

**DIVORCED PARENTS AND BEST INTEREST OF THE  
CHILD: SOCIO-LEGAL ISSUES IN INDIA**

A Thesis Submitted

To

**Sikkim University**



In Partial Fulfilment of the Requirement for the  
**Degree of Doctor of Philosophy**

By

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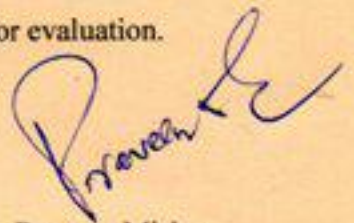
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I, **Alisha Pradhan**, hereby declare that the subject matter of this thesis entitled "**DIVORCED PARENTS AND BEST INTEREST OF THE CHILD: SOCIO-LEGAL ISSUES IN INDIA**" is the record of work done by me, that the contents of the thesis did not form the basis of award of any previous degree to me, or to the best of my knowledge, to anybody else. The thesis has not been submitted by me for any research degree in any other university/institute. This has been submitted in partial fulfilment of the requirement of the **Degree of Doctor of Philosophy in Law**, School of Social Sciences, Sikkim University, Gangtok, India.



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Alisha Pradhan

**Dedicated to my beloved  
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(Late Mr. D. K. Pradhan)**

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## **LIST OF ABBREVIATIONS**

AIR	All Indian Reporter
ALL	Allahabad
BIC	Best Interest of Child
BOM	Bombay
CAL	Calcutta
CNLUJ	Chanakya National Law University Journal
FLQ	Family Law Quarterly
GWA	Guardian and Wards Act
GUJ	Gujarat
HC	High Court
HP	Himachal Pradesh
HMGA	Hindu Minority and Guardianship Act
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
ILR	Indian Law Report
IBR	Indian Bar Review
ILI	Indian Law Institute
IPC	Indian Penal Code
JMF	Journal of Marriage and Family
JCIL	Journal on Contemporary Issues of Law
JHSS	Journal of Humanities and Social Science
JFP	Journal of Family Psychology
JILI	Journal of the Indian Law Institute
KAR	Karnataka

KEL	Kerela
MAD	Madras
MP	Madhya Pradesh
MLJ	Madras Law Journal
NALSAR	National Academy of Legal Studies and Research
NRI	Non Residential Indians
POCSO	Protection of Children Against Sexual Offences
P&H	Punjab and Haryana
SC	Supreme Court
SCC	Supreme Court Cases
UNCRC	United Nation Convention on the Rights of the Children
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund



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# CHAPTER 1

## INTRODUCTION

### 1.1.STATEMENT OF PROBLEM

“A child cannot be tossed like a shuttlecock between the parents” (R.M Lodha and Rohinton Nariman JJ)<sup>1</sup>

Marriage is an institution which provides legal bedrock and social legitimacy to cohabitation of a man and women and procreation of children. It is ordained for promoting normal human life and happiness. A marriage starts, with hope and contentment, when a couple are first married everything appears to be perfect and no couple wants to think it will not last forever. But every marriage does not always succeed because of human nature, every single person has their individual perspective, the way of looking at things, as their perspectives do not match, conflict between the two arises in course of time. Due to this conflict relationship is filled with struggle and misery, distance between the spouses starts to grow and they tend to believe that divorce is a good solution to the problem they cannot solve. But it turns out that divorce is a permanent solution to a temporary problem with no relief, no hope and no success in their relationship. They want to end their connection, and they are in the point of no return bog. They see divorce as a light of hope and visualize that everything will be fine after divorce. Therefore, dissolution of marriage has been a major sensation in the 21<sup>st</sup> Century with an increasing rate of divorce, particularly in the last decade where the growth rate of divorce has increased exponentially. Dissolution of marriage is the process where the relationship between the husband

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<sup>1</sup>J Venkatesan, Supreme Court: The child cannot be tossed like a shuttle cock between the parents, The Hindu, January 30, 2009.

and wife ceases to exist and the marriage gets annulled. Divorce is an unpleasant act which gives rise to many social and legal issues like maintenance, guardianship and custody. Here we will focus on child custody and guardianship issues. The act of divorce can be a right choice for the spouses, but no choice for their children, who are the ultimate victims of divorce between the parents because family plays an important role in child development and can determine who the child is going to be. If a family is obnoxious it can psychologically scar an individual. Divorce is almost permanently traumatic for children. It increases the peril of psychological and behavioural problem of children. Although the child is young and cannot express verbally what is happening in a child's life, the child will still be feeling the impact. First of all, it is hard for the children to acknowledge the situation that their parents no longer stay together. As a result of divorce a child may have to shift to a different home and at times different school. To adapt to this new situation, it will take time. Their mind is tender and can slip into a state of shock on seeing parents split forever. Normally children of a broken family will have more emotional disturbances than children of other families. As India is a country having deep rooted cultural and religious beliefs and notorious social taboos, divorce is still considered to be a taboo. The children of divorced parents are looked differently; same extent of respect is not given to the children of divorced parents as compared to other children who belong to a flawless family. So this leads to overall personality disorder of the child, which may lead to many problems in future. A child of a fragmented family is subjected to countless interrogations in our society. Children of a broken family usually face problems in getting admission in school. Even if they get admission in school, friends and teachers tend to ask them about their parents. It is an arduous task for the child to convey each and every one that they belong to a broken family. Often in school parents teacher

meeting takes place and both the parents are supposed to attend it. The child of a broken family will have either his mother or father to attend the meeting. Seeing others with both the parents, the child will rip apart. The children of a divorced parents are normally inclined towards termination of their education and they drop out from school. Whenever a child visits his relative with one of his parents, the relative chats about divorce. Gradually the child discontinues attending family functions. They try to keep themselves aloof as far as possible. Separation devastates the family and it is often noticed that such act can cause serious trauma to the children and the child might be experiencing emotional and distressing mental breakdown which often results in alienating them from the social process.

This is not the only problem that the child faces. The custody of a child is allowed to one of the parents and other may or may not be given visitation right. The parent who is given custody of the child, will often talk ill about the other parent. Each will try to fill hatred towards the other parent in the mind of the child. As such the child will start building up hatred towards the other parent. The disturbed children are predominantly prone to develop complications with anger, rebellion, deviance and rule violations. Since they get attention, guidance, care of one of the parent which is not adequate for them as such, they are prone to drug addiction. The child's sense of security is lost. The child's life will not be exactly as it was and will not continue to feel the same love for both the parents. When parents fight or put the child in middle of the quarrel, the parents are sending a message that winning over each other is more important than the child's life.

Along with the social, psychological and mental problems as discussed above, there exist legal issues as well. The term "custody" is not defined in any of the legislations

dealing with child custody issues. According to Black's law dictionary (8<sup>th</sup> edition), child custody means "The care, control, and maintenance of a child awarded by a court to a responsible adult". Custody involves legal custody (decision-making authority) and physical custody (care giving authority), and an award of custody usually grants both rights. In a divorce or separation proceeding between the parents, the court usually awards custody to one of them, unless both are found to be unfit, in which case the court may award custody to a third party, typically a relative. In a case involving parental dereliction, such as abuse or neglect, the court may award custody to the state for placing the child in foster care if no responsible relative or family friend is willing and able to care for the child.

In ancient period, as the society was usually run by the paternalistic values as such child custody and guardianship was given to the father only. But from the dawn of the 18th Century, the issue of their political rights and the equivocation of equality changed the socio-economic environment giving them the new domain of women empowerment which can be seen in the present context where the mother is given the responsibility of child custody and guardianship. Child custody laws are different in different countries, and in a country like India which is known as a land of diversified culture, religion, race etc. family matters like marriage, divorce, custody and guardianship are governed by the personal laws of the party.

Custody cases in Hindu law are governed by Hindu Marriage Act, 1955. Under the provisions of the Act, 'interim order' may be passed, altered, suspended by the court from time to time, and make provision in the decree as it may be just and proper with respect to custody, maintenance and education of minor children.



The Hindu Minority and Guardianship Act, 1956 lays down the provision for “Natural Guardians of a Hindu Minor”. Under the provisions of the Act, when a child has not completed the age of five years, the mother will be given custody of a minor child, the father will be granted custody of boys and unmarried daughters, and custody of an illegitimate child will remain with mother and later transferred to the father. Along with Section 6, Section 13 lays down a provision that the “Welfare of the minor shall be of paramount consideration”. This section states that guardian of a minor will be appointed by the court, taking welfare of the child as paramount consideration. The term paramount consideration is needed to disclose the gravity of the situation and is to be determined for the welfare of a minor.

According to Muslim law, after the dissolution of the marriage, the custody of infant child rests with the mother. Child custody cases under Muslim law vary according to the different schools of Muslim law. Under Hanafi school, custody of a male child remains with the mother till he attains the age of 7 years and female child till she attains the age of puberty. Under Ithna Ashari school, custody of the male child is given to the mother till he attains the age of 2 years, and female child till she attains the age of 7 years.

Along with the personal law of the party, Guardians and Wards Act 1890, is a secular law which governs matters like guardianship and custody. Section 17 of the said Act states that the court will appoint or declare a guardian for the “welfare of the minor”. It further states that the court will take into consideration “age, sex and religion of the minor, guardian’s character and his closeness with the minor”.

Studies reveal that child custody matter is subjective which means that it is in the discretion of the court. The court can decide on what ground child custody can be

given. While deciding child custody cases predetermined opinion is taken by the court. Here, the psychological impact on the child is not taken into consideration. Suppose the mother is not in a position to give proper care to the child due to lack of income, child custody can be given to the father. Likewise, if the child is too small custody is given to the mother, even though the mother will also have a husband who will be the stepfather of the child, who will not have interest in the welfare of the child, only because of the age of the child, custody is given to the mother. So emotional disturbances of the child, with whom the child wants to go, is not taken into consideration. It is the judges who determine the welfare of the child, this is one of the problems because the judges often lack the knowledge and expertise of what is best for a particular child.

There are a number of legislations which look into the matter of child custody like Guardians and Wards Act 1890, Hindu Minority and Guardianship Act 1956 and personal laws of the party. In these Laws, there exist numerous lacunae. We need a precise definition of Child custody otherwise the judiciary can interpret according to its wishes and scale of values. There is no provision relating to joint custody in India, even though joint custody has been awarded by the courts in some cases. The Legal framework is silent on how custody issues need to be handled, what factors should be relevant in decision making, what should be the process of dispute resolution between parties over children. Above all, there is no proper legislation (like in the United Kingdom, Custody of Infants Act 1839) exclusively dealing with child custody issues.

## **1.2.REVIEW OF LITERATURE**

### **LEGAL, SOCIAL AND PSYCHOLOGICAL ISSUES**

- J. D. M. Derret, Introduction to Modern Hindu law, 1<sup>st</sup> edition, Oxford University Press (1963): the author in this book dedicated a separate chapter on Hindu Minority and Guardianship. He elucidates that guardianship of minor is conventionally regarded as a right, and rarely as a right which can be profitable. The law regards guardianship as a responsibility, which may be used only for the advantage of the minor. The author has said that a child tender years was generally entrusted to the custody of the mother.
- C. Rama Rao, “Trends in international child custody orders”, 10CULR, 377(1986): Parens Patriae Doctrine is discussed in this article. According to this doctrine a power is granted to the court to take absolute decisions for the welfare of the child. It is also stated that a writ of Habeas Corpus may be applied in child custody cases. The author also states that when a child is in unsuitable situation due to which the child’s health is affected, then the court needs to free the child from such a situation. As time passes by and nothing remains stagnant, everything keeps on changing. Custody orders are also not of a permanent character and therefore in order to meet the changing circumstances, custody orders also have to change. He also points out that the relationship between husband and wife does not remain same after divorce, gradually the relationship between the husband and wife gets faded, but they continue to share a bond with their children. Hence both the parents want the custody of their children. In Indian court, while dealing with custody orders, the welfare of the children is given prime importance. But foreign courts have

taken a broader view in dealing child custody orders keeping in mind the welfare of the child.

- Nadir Modi, “Child custody: Mother or father”, 81AIR, 40(1994): In this article, it is stated that for child custody, the struggle between husband and wife continues to follow up right after the divorce. In this article, it has been pointed out that a mother has the right of custody over her children up to seven years of age but this is not an absolute right as the welfare of the child is given utmost importance in child custody orders by the court. Father is also given the right of custody of his child for the welfare of the child.
- Baidyanth Choudhury, “Custody of children mother’s role over father’s monopoly in Indian family laws and trend of judicial attitude”, 12CILQ, 111(1999): Even after the divorce, both the parents continue to have love and affection towards their child and a problem arises when both the parents want custody of their child. The author states that one should not be confused between guardianship and custody as they are not the same. Guardianship is a broader term than custody. But despite the difference between guardianship and custody, both aim at securing the interest of the child.
- Aqil Ahmed, *Mohammadan Law* (edited by Prof. I.A. Khan), 23<sup>rd</sup> edition, Central Law Agency (2008): In chapter 11 of this book which is titled as ‘Guardianship’, the author states that the term ‘guardian’ is defined in the Guardians and Wards Act as “a person having the care of the person of a minor or of his property, or of both his person and his property”. Meaning, appointment, kinds, and cessation of guardianship is discussed. He gives a list of persons who are entitled to the custody and guardianship of a minor child.

A comparison of Sunni and Shia Law relating to guardianship is also laid down. Therefore, it can be said that the author has clearly differentiated between guardianship and custody as they are not the same. In chapter 12 of this book which is titled as 'Maintenance', the author states a father is bound to maintain his 'sons until they attain puberty, and his daughters until they are married'. It makes an important point that the father's responsibility to maintain his child is not narrowed by the fact that child is in custody of the mother.

- Asaf A.A. Fyze, *Outlines of Muhammadan Law*, 5<sup>th</sup> edition, Oxford University Press (2008): In chapter 6 of this book which is titled as 'Guardianship', the author states that the term 'guardian' the author states that guardianship may be of a person, of property and in marriage. It states that the mother has the custody of a child of tender age. It also states that the rights of the mother do not indicate that the father has no rights. It also points out that when the mother is absent or prohibited to act as the custodian of the minor child, then the female relations are entitled to the custody of the minor child. When both the mother and the female relations fails to act as the custodian, then the male relations like the father, paternal grandfather, full brother are entitled to the custody of the minor child. Further, it states that the father is the guardian of the minor.
- Paras Diwan, *Modern Hindu Law*, 19<sup>th</sup> edition, Allahabad Law Agency (2009): in this book the author emphasis about the custody of the person that a person having the care of the person of the minor or of his property or both person or property, it may be emphasised that guardians exist essentially for



the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the minor is of paramount consideration. Welfare includes both physical and moral wellbeing.

- Pratim Sarkar, “Custody and welfare of children: A study on the Indian Judicial trend where father’s right to custody preferred”, 12IBR, 105(2014): the main sufferer of divorce happens to be the child. The child through social stigma carries a mark of a broken family. Custody and maintenance of minor children are some of the problems that arise due to divorce. In legal custody, mothers are naturally favoured but the court looks at the welfare of the child. The author points out that the “welfare of the child” includes the all-round development of the child. In child custody matters, a court has a wide discretion. Only when it is for the welfare of the child that the custody is given to a person.
- Caesar Roy, “Shared parenting system vis-à-vis custody of child- in India in need of legislation for caring children”, 6CNLUJ, 65(2016): The loser is always a child in custody battle, therefore a new concept in child custody has emerged as ‘shared parenting’, where both the parents have right in nurturing of the child. In India the concept of shared parenting is new and it is progressively growing. For the full development of the child, the guidance and care of both the parents is necessary. The author also discusses the ‘International Council on Shared Parenting’. The main aim of this association is to find out the requirements of children whose parents are apart and to formulate evidence-based recommendations about shared parenting. The author further states that the Indian laws i.e., The Guardians and Wards Act

1890 and The Hindu Minority and Guardianship Act 1956, do not talk about shared parenting.

- Kusum, “Cases and materials on family law”, 4<sup>th</sup> edition, Universal law publication: Several points have been discussed where the court has granted custody for the welfare of the child. The court has given custody of the child to a parent who is living outside court’s jurisdiction for the welfare of the child. Ill-health of a parent is not a ground to deny custody of the child. The personal laws are overridden by the welfare of the child in custody decisions. The author further points out that the visitation rights of a parent may be denied for the welfare of the child.
- Janak Raj Jai, “Handbook on divorce law and procedures”, 5<sup>th</sup> edition, Universal law publication: In chapter 15 of this book which is titled as ‘Custody of children’, the author states that the welfare of the child should be the prime law in granting child custody orders and not the religion. In custody orders, religion should not be taken into account. Fundamental rights of the child should be the guarding principle in custody cases.
- Mary Ann Mason, “The roller coaster of child custody law over the last half century”, 24AALM, 451(2012): According to Mary Ann Mason, Child custody had a “roller coaster” past. She states that there has been a paradigm shift in child custody cases, earlier father was given sole custody rights of the child, later mother was also preferred for child custody and the doctrine of best interest of the child came into the picture in the early 1960s. During 1980s joint custody was introduced. She states that the Best interest of the child was in joint custody. She also mentions about “unwed fathers, step-

fathers, gay and lesbian parents, grandparents”, and their position in child custody cases. She also states that the United States has not ratified the United Nations Convention on the Rights of the Child. So she points out that nationwide harmony on the “Best interest of the child” cannot take place excluding the principles of the United Nations Convention on the Rights of the Child.

- Sonali Abhang, “Guardianship and custody laws in India-suggested reforms from Global angle” 20 ISOR-JHSS, 39(2015): In this article, it is stated that laws governing custody are closely linked with that of guardianship. The author of this article states that guardianship is a “bundle of rights”. In guardianship both property as well as minor’s right is administered through an adult and custody is a narrow concept because it is related to the upbringing of the child. The author further points out that Best Interest of the Child guideline is applied by many nations.
- Nuzhat Parveen Khan, Child Rights and the Law, 2<sup>nd</sup> edition, Universal Law publication (2016): the author of this book discusses child rights and the laws enacted for their enforcement. Different issues relating to children, especially from the marginalised sections of society, the rights available to them under the Constitution and the various laws enacted to implement the same is discussed. The concept of child rights and child abuse is also discussed. She has also referred to the various government policies, plans and programmes for child welfare, along with the legislative measures taken by the government for protection of the rights of the child. Judicial approach towards

the protection of child rights in the form of judicial pronouncements is also analysed.

- Asha Bajpai, *Child Rights in India Law, Policy, and Practice*, 3<sup>rd</sup> edition, Oxford University Press (2017): the author of this book exhaustively analyses the rights of the child. Policy initiatives taken in India is analysed and the court judgement is also analysed. The book deals with a variety of aspects governing the life of a child. It discusses the health, education, growth and development of a child. besides, it discusses features of the juvenile justice system, protection of children under different laws. This book is divided into nine chapters. Chapter one deals with the rights of the child. Chapter two deals with right to family environment. Chapter three deals with right to parental care. Chapter four deals with right against economic exploitation. Chapter five deals with right to protection against sexual abuse and exploitation. Chapter six deals with Juvenile Justice. Chapter seven deals with right to development. Chapter eight deals with right to survival and chapter nine deals with making child rights a reality.
- Dinshaw Fardunji Mulla, *Mulla Principles of Mahomedan Law*, 22<sup>nd</sup> edition, Lexis Nexis (2017): In chapter 18 of this book which is titled as ‘Guardianship of Person and Property’, the author deals in detail the appointment of guardians under Islamic Law. Right of mother to custody of infant children is discussed. It states that under Shia law, “the mother is entitled to the custody of the male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the above mentioned age, the custody belongs to the father”.

Under Shafei Law, “the mother is entitled to the custody of her daughter even after she has attained puberty and until she is married”. It also states that welfare of the minor must be a paramount consideration. It further states that when the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act, the latter will prevail. In chapter 19 of this book which is titled as ‘Maintenance of Relatives’, points out that a father is obliged to maintain his ‘sons until they have attained the age of puberty’ and his ‘daughters until they are married’. “The fact that the children are in custody of their mother does not relieve the father from the obligation of maintaining them.”

- Dinshaw Fardunji Mulla, Hindu Law, 23<sup>rd</sup> edition, Lexis Nexis (2018): in this book the author has emphasised on section 6 of Hindu Minority and Guardianship Act. Clause (a) of the above Act declares that father is the natural guardian of the person as well as property of minor unmarried daughter, and next to him the mother is the natural guardian of the minor. This clause rules defines that though the father is the natural guardian of the minor’s person and property, the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. Unless there are some special facts and circumstances indicating that it is not in the interest and well-being of the minor to be with the mother. The right provided in favours of the mother under this clause is as to the custody of the infant. It is not necessary that any such case the father should be removed from guardianship. The author regarding the preference in matters of custody has explained that there can be no general principle that the mother has to be preferred to the father. The question of custody of the child would have to be determining on

consideration of the facts and surrounding circumstances including the age, sex, and requirement of the child.

Therefore, it is clear from the above-mentioned literature review that none of the research work has properly covered the problem which needs to be identified. There is a research gap. Therefore, a research is important in the matter and the researcher proposes to undertake it.

### **1.3. RATIONALE AND SCOPE OF THE STUDY**

Children are vulnerable section of the society. Divorce, in any circumstances, rips the childhood apart, emotionally and mentally. The behaviour of the child changes as divorce is extremely disturbing. The rationale behind selecting child custody and guardianship of divorced parents, in particular, is to identify what exactly constitutes the welfare of the child. Custody and guardianship issues under Hindu law, Muslim law, Christian law and the Parsi law will be examined. The scope of the study is limited to India although a brief comparison will be made with present English Law on the subject.

### **1.4. RESEARCH OBJECTIVES**

2. To analyse and understand the various issues regarding child custody and guardianship of divorced parents in India.
3. To highlight the changes in the law that are required to ensure proper protection of child custody and guardianship in the modern era.

4. To analyse various schemes for the protection of the “welfare of the child” in child custody and guardianship cases and also to put forward possible suggestions.

### **1.5. RESEARCH QUESTIONS**

- What are the various issues of child custody and guardianship of divorced parents in India?
- Whether the existing laws are adequate to protect the issues of child custody and guardianship cases?
- Whether the existing judicial decisions and the policies for the protection of the “welfare of the child” in child custody and guardianship cases are adequate to address the grievances of child custody and guardianship in India?

### **1.6. HYPOTHESIS**

- The existing laws in India are inadequate for securing and protecting the “welfare of the child” in child custody and guardianship cases.
- The accepted mores of Indian society are not consistent with the best interest of children of divorced parents.

### **1.7. RESEARCH METHODOLOGY**

The entire research will be based on the doctrinal method of research. Sources are both primary and secondary. The data will be collected and analysed from primary source based on cases, statutes and International conventions. Secondary sources like books, journals, reports etc. will also be relied upon.

## **1.8. CHAPTERISATION**

### **CHAPTER 1: INTRODUCTION**

The first chapter will be an introduction to the thesis which includes the statement of problem, literature review, research objectives, research questions, hypothesis and the research methodology.

### **CHAPTER 2: RIGHTS OF CHILDREN UNDER BASIC NATIONAL AND INTERNATIONAL INSTRUMENTS**

This chapter will have two parts. In Part A, the special provisions relating to children contained in the Constitution of India and the rights created therein will be discussed. In Part B, the rights of children under the international instruments will be examined.

### **CHAPTER 3: CHILD CUSTODY AND GUARDIANSHIP OF DIVORCED PARENTS: THE CONCEPT, DEFINITION, ISSUES AND CHALLENGES**

This chapter will examine the concept of child custody and guardianship in detail. This chapter will discuss various issues which are being faced by the children, parents and the judiciary in child custody and guardianship cases.

### **CHAPTER 4: COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING CHILD CUSTODY AND GUARDIANSHIP IN INDIA AND THE UNITED KINGDOM**

This chapter will analyse the various laws which are for the child custody and guardianship cases. A comparative analysis of the various legislations of the United Kingdom and India will be made in this chapter.



## **CHAPTER 5: THE ROLE OF INDIAN JUDICIARY IN PROTECTING THE “WELFARE OF THE CHILD”**

This chapter will analyse the contribution made by the judiciary in India for the protection of the welfare of the child.

## **CHAPTER 6: CONCLUSION AND SUGGESTIONS**

In the light of the analysis made in the above mentioned chapters, concluding chapter will examine the efficiency of existing laws in protecting the child’s welfare and suggest some measures to be taken for safeguarding the child’s welfare in child custody and guardianship cases.

## CHAPTER 2

### RIGHTS OF CHILDREN UNDER BASIC NATIONAL AND INTERNATIONAL INSTRUMENTS

*“If we don’t stand for children, we don’t stand for much”* - Marion Wright Edelman.

#### 2.1. INTRODUCTION

Child population is larger in India in comparison with other countries of the world. In the year 2001, there were 428 million children under the age of 18 years. In 2006, the number of children under 18 years was 430 million.<sup>1</sup> India has 158.7 million children in the age group of 0-6 years, comprising about 16 percent of the total Indian population as per the 2011 census.<sup>2</sup>

In India, the legal obligation of child custody and security lies with the parents. In a patriarchal society, children were the beneficiary of welfare measures. While looking after children, there was no understanding that children are also individuals having individual rights.

In India, on several occasions, children are not consulted in matters and decisions affecting their lives. Because of the social and cultural setup of our country, in most of the places like family, neighbourhood, school, etc. children’s views are not given much importance. Even if the children speak out, they are usually not heard.<sup>3</sup>

When human beings are physically and psychologically not able to defend for themselves, the vulnerability of that human being is more. It can be pointed out that,

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<sup>1</sup>Ministry of Women and Child Development, Third and Fourth Combined Periodic Report on the Convention of the Rights of the Child (Government of India, 2011).

<sup>2</sup>Law Commission of India, 259<sup>th</sup> Report on Early Childhood Development and Legal Entitlement, 2015 (August 2015).

<sup>3</sup>Nuzhat Parveen Khan, Child Rights and The Law (Universal Law Publishing, 2<sup>nd</sup> edn., 2016) p.3.

in all societies, the younger the children the more vulnerable they are. Age limits are a formal reflection of society's judgement about the evolution of children's capacity and responsibilities.

In every sphere of our society, age limits formally regulate children's activities, such as age for marriage, age for casting vote, age when they can work, etc.<sup>4</sup> Mostly age limits differ from activity to activity and from country to country. The legal formation of a child has tended to vary depending upon the purpose.

- According to P.V. Kane, "Nar declared that a person was a minor till the sixteenth year".<sup>5</sup>
- The Indian Majority Act, 1875 was enacted essentially to bring about uniformity in the applicability of laws to persons of different religions.<sup>6</sup> Section 3 of the Act, lays down that every person domiciled in India is deemed to have attained majority at the age of eighteen years, unless a particular personal law specifies the age of majority. But in case of a minor for whose person or property or for both, a guardian has been appointed or declared by any court of justice, then the age of attaining majority is twenty one years.<sup>7</sup>
- The Protection of Women from Domestic Violence Act, 2005 defines child as a person who is below eighteen years of age.<sup>8</sup>

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<sup>4</sup>Asha Bajpai, Child Rights in India Law, Policy, and Practice (Oxford University Press, 3<sup>rd</sup> edn., 2017) p.2.

<sup>5</sup>Pandurang Vaman Kane, History of Dharmasastra Vol III (Bhandarkar Oriental Research Institute, 1941) p. 166.

<sup>6</sup>Indian Majority Act, 1875 (Act 9 of 1875).

<sup>7</sup>Ibid.

<sup>8</sup>Protection of Women from Domestic Violence Act, 2005, Section 2(b) "child means any person below the age of 18 years and includes any adopted, step, or foster child".

- The Hindu Minority and Guardianship Act, 1956 (HMGA) defines a minor as a person who has not completed the age of eighteen years.<sup>9</sup>
- According to Christian law<sup>10</sup> and Parsi law<sup>11</sup> the age of majority is attained at the age of 18 years. However the age of marriage is twenty one years for males and eighteen years for females.<sup>12</sup>
- The Mines (Amendment) Act, 1952, states the age at which a person can enter in employment. It lays down that “no person below eighteen years of age shall be allowed to work in any mine or any part thereof”.<sup>13</sup>
- The Factories Act, 1948 lays down that a child below fourteen years of age is not allowed to work in factories.<sup>14</sup>
- Under the Child Labour (Prohibition and Regulation) Act, 1986, any person who has not completed the age of fourteen years is a child.<sup>15</sup>
- Under the Child Labour (Prohibition and Regulation) Amendment Act, 2016, any person who has not completed the age of fourteen years is a child.<sup>16</sup> The Act also defined adolescent as a person who is above fourteen years of age but under eighteen years.<sup>17</sup>
- The age limit for different purposes has been laid down under the Indian Penal Code, 1860. For criminal liability “nothing is an offence which is done by a

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<sup>9</sup>The Hindu Minority and Guardianship Act, 1956, Section 4(a).

<sup>10</sup>The Christian Marriage Act, 1872, Section 3.

<sup>11</sup>The Parsi Marriage and Divorce Act, 1936, Section 2.

<sup>12</sup>The Prohibition of Child Marriage Act, 2006, Section 2(a).

<sup>13</sup>The Mines (Amendment) Act, 1952, Section 2(b).

<sup>14</sup>The Factories Act, 1948, Section 2(c).

<sup>15</sup>The Child Labour (Prohibition and Regulation) Act, 1986, Section 2(ii).

<sup>16</sup>The Child Labour (Prohibition and Regulation) Amendment Act, 2016, Section 4(ii).

<sup>17</sup>Ibid, Section 4(i).

child under the age of seven years”<sup>18</sup> and in certain circumstances it is twelve years.<sup>19</sup> For purposes of protecting a child from kidnapping, abduction and related offences, the age of the child is sixteen years in case of boys and eighteen years in case of girls.<sup>20</sup>

- The word child has not been defined anywhere under the Commission for Protection of Child Rights Act, 2005, but from the objective of the Act, it appears that the Commission for Protection of Child Right has adopted the definition provided under the Convention on the Rights of the Child, i.e. children up to the age of eighteen years.<sup>21</sup>
- Under the Prohibition of Child Marriage Act, 2006, defines child as a person who is a male below twenty-one and a female below eighteen.<sup>22</sup>
- Under the Rights of Children to Free and Compulsory Education Act, 2009, defines child to mean a male or female child of the age of six to fourteen years.<sup>23</sup>
- Under the Protection of Children against Sexual Offences Act, 2012, a person below the age of eighteen years is termed as a child.<sup>24</sup>

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<sup>18</sup>The Indian Penal Code, 1860, Section 82.

<sup>19</sup>Ibid, Section 83 “Nothing is an offence which is done by a child above seven years of age and under twelve who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion”.

<sup>20</sup>Ibid, Section 361 “whoever, takes or entices any minor under sixteen years of age if a male and under eighteen years of age if a female or any person of unsound mind out of the keeping of lawful guardian, is said to kidnap such minor or person from lawful guardianship”.

<sup>21</sup>The Commission for the Protection of Child Rights Act, 2005.

<sup>22</sup>Supra note 12, Section 2(a).

<sup>23</sup>The Rights of Children to Free and Compulsory Education Act, 2009, Section 2(c).

<sup>24</sup>The Protection of Children against Sexual Offences Act, 2012, Section 2(d).

- Under the Juvenile Justice (Care and Protection of Children) Act, 2015, the age of majority is eighteen years for both boys and girls.<sup>25</sup>
- According to Article 1 of the United Nation Convention on the Rights of the Children, 1989 (UNCRC) “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

From the above discussed Acts it can be clearly seen that there is no uniform definition of the term, “child”. The innumerable definitions of the term “child” covered under the various Indian laws is not uniform and adequate. Different statutes prescribe different maximum age limits, but no legislation gives the minimum age when the child may be called as a person as it is not clear whether an unborn child can be treated as a victim of child abuse.

Even though the children constitute a significant section of every society the society has time and again exploited and abused children. Like all other countries, India too faces the problem of child abuse and child right violation. There is a serious prerequisite to recognize the scopes and difficulties of child abuse and child right violation. There are countless reasons why child right violation is taking place. These are due to of lack of education, poverty, divorced parents, unemployment, etc.<sup>26</sup>

In psychological reasoning children are in a position of learning and understanding the world that they perceive and experience. So it’s a very fragile state where one can implant an idea or show functions of society. It becomes crucial that they should be

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<sup>25</sup>The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 2(12).

<sup>26</sup>Supra note 3, p.6.

alienated from social stigma and nurtured to a better environment. So that they can contribute something greater, something good that benefits the whole.

## **2.2. CHILD RIGHTS**

At the time of Industrial Revolution, large numbers of children were employed in industries, agricultural sector and in domestic services. These children were misused and abused by the employer and other workers.<sup>27</sup> Moreover, after the two world wars, large numbers of people were displaced, children were abandoned. Due to the aftermath of the world wars, the world began to recognise the need for child rights.

During the nineteenth century, an effort to save the child began. Legislations for the protection of child rights was passed, homes for the orphans was made, schools were opened for the children, separate juvenile courts were formed.<sup>28</sup>

V.R. Krishna Iyer has rightly stated that “so long as children suffer, are victimised or are not nourished, there is no true humanism or love in the world and the guilty nations decline and fall sooner or later.”<sup>29</sup>

In order to combat child right violation and child abuses there is a need for child rights. There are special provisions relating to children contained in the Constitution of India and the rights created therein. The rights of children are also laid under the international instruments. It was during the twentieth century that the concept of children’s rights emerged due to which there was a shift in the focus from welfare to the rights based approach. This shift in approach is primarily concerned with issues of

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<sup>27</sup>Savita Bhakhry, Children in India and their Rights (National Human Rights Commission, 1<sup>st</sup> revised edn., 2016) p. 8.

<sup>28</sup>Ibid.

<sup>29</sup>V. R. Krishna Iyer, Jurisprudence of Juvenile Justice: A Preambular Perspective (Indian Law Institute, 1994) p. 1.

social justice, non-discrimination, equity and empowerment.<sup>30</sup> All human rights that are available to human beings are also available to Children. However, along with those human rights children have been given special rights as they constitute the vulnerable section of the society.

The United Nation declared the year 1979 as the “International Year of the Child”.

## **2.3. PART A: CHILD RIGHTS UNDER THE NATIONAL LAW**

### **2.3.1. THE CONSTITUTION OF INDIA**

Under the constitution of India, even though the definition of the child has not been specifically mentioned, the drafting committee of the constitution considered the sensitive issue regarding child protection due to their physical and mental immaturity.<sup>31</sup> Special rights are guaranteed under the Constitution of India for the protection and upliftment of the children.

Article 15 of the Constitution lays down provision for anti-discrimination.<sup>32</sup> However, for the upliftment of the vulnerable section of the society, special provision is made

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<sup>30</sup>Supra note 4, p.1.

<sup>31</sup> Supra note 3, p.189.

<sup>32</sup>Constitution of India, Article 15 “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1)The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2)No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3)Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of the article 19 shall prevent the State from making any special provisios, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as special provisions



for women and children.<sup>33</sup> Along with the special rights guaranteed to the children, the children are also provided with all other rights under the constitution of India that are provided to the adult citizens of India,<sup>34</sup> like equality before law,<sup>35</sup> right to freedom of speech and expression,<sup>36</sup> right to life,<sup>37</sup> and right against exploitation.<sup>38</sup>

### **2.3.2. Rights to Education:**

*“Children deprived of words become school dropouts; dropouts deprived of hope behave delinquently. Amateur censors blame delinquency on reading immoral books and magazines, when in fact, the inability to read anything is the basic trouble”*-Peter S. Jennison.

Right to education of every child is clearly a human right with enormous power to change. Education empowers the child to “develop and realise his full potential as a human being; develop the ability to think, question, and judge independently; develop a sense of self-respect, dignity, and self-confidence; develop and internalise a sense of moral values and critical judgement; learn to love and respect fellow human beings and nature; develop civic sense, citizenship, and value of participatory democracy and

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relate to their admission to educational institutions including private educational institutions, whether aided by the State, other than the minority educational institutions referred to in clause (1) of article 30.”

<sup>33</sup>Ibid, Article 15(3) “Nothing in this Article shall prevent the state from making any special provision for women and children”.

<sup>34</sup>Supra note 4, p.8.

<sup>35</sup>Supra note 32, Article 14: “Equality before law: The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

<sup>36</sup> Constitution of India, Article 19(1)(a) “Protection of certain rights regarding freedom of speech, etc. (1) all citizens shall have the right- (a) to freedom of speech and expression.”

<sup>37</sup>Ibid, Article 21 “Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to the procedure established by law”.

<sup>38</sup>Ibid, Article 23 “Prohibition of traffic in human being and forced labour-

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the state from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.”

enable decision making”.<sup>39</sup> Therefore, education is important. Education opens up vast opportunities to the educated person. The main purpose of education is the overall development of a human being and to safeguard human rights. Education is the main tool to fight child labour and other injustices. The United Nation has recognised the right to education as a human right.<sup>40</sup>

In 1882, the Indian Education Commission, contained the proposal for adopting a law for universal compulsory education or at least for children employed in factories who mooted. This was rejected due to financial and administrative difficulties. The first experiment of making primary education compulsory took place in 1893 when the ruler of the state of Baroda, Maharaj Sayajirao Gaekwad, introduced compulsory education in the Amreli division of his state; since the result were promising, he extended it to the entire state in 1906. Gopal Krishna Gokhale made the first definite demand for the official introduction of primary education in March 1910 when he moved a resolution in the Imperial Legislative Council, which was later withdrawn. Even in 1913, the British government was not prepared to accept the principle of compulsion, but wished to expand primary education as a ‘voluntary basis’. However, in 1918, with the efforts of Vithalbhai Patel, Bombay passed a Primary Education Act permitting municipalities to introduce compulsory education in their areas. Within few years, other provinces also passed laws aimed at compulsory education. By the early 1930s, the principle of compulsory education was written into state law. But these laws, however, were not executed satisfactorily due to many reasons, such as

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<sup>39</sup>Supra note 4, p. 605-606.

<sup>40</sup>Vijay M. Gawas, “Right to education under constitution of India and development among the scheduled tribe: A socio-legal study” 4LJL (2018), p. 63.

technical flaws, lack of experience, and unwillingness to make use of the power of prosecution under the acts.<sup>41</sup>

Knowing the importance of education, initially the framers of the Indian Constitution imposed a duty on the state to provide free and compulsory education to all children below the age of fourteen years of age. Article 45 of the Constitution levied a time-limit of ten years to implement the right to free and compulsory primary education. Amongst all the articles contained in Part IV of the constitution, Article 45 the only article which lays down time limit in which the right to free and compulsory education should be made justifiable.<sup>42</sup> The main aim of Article 45 of the Constitution was to eliminate illiteracy from India. It was expected that the elected government of the country would implement this directive.<sup>43</sup> On the basis of Article 45 of the Constitution, only a few states (i.e., Assam, Andhra Pradesh, Andaman and Nicobar Island, Bihar, Chhattisgarh, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Uttar Pradesh, West Bengal) took an effort to formulate and pass laws.<sup>44</sup> Apart from Article 45 of the Constitution Article 41<sup>45</sup> and Article 46<sup>46</sup> of the Constitution refers to right to education.

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<sup>41</sup>Supra note 4, p. 617-618.

<sup>42</sup>Supra note 40, p. 67.

<sup>43</sup>Supra note 3, p.190.

<sup>44</sup>MP Jain, Indian Constitutional Law (Lexis Nexis, 7<sup>th</sup> edn., 2014) p.1228.

<sup>45</sup>Supra note 32, Article 41: "Right to work, to education and to public assistance in certain cases – The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want."

<sup>46</sup>Ibid, Article 46: "Promotion of education and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections – The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

When the Constitution of India was drafted, the right to education was provided under the directive principle of state policy only.<sup>47</sup> The right to education was kept under the purview of Part IV of the Indian Constitution due to the financial condition of the country. The framers of the Indian Constitution while drafting the Constitution did not consider reasonable to make education a fundamental right.<sup>48</sup>

The Supreme Court at this stage implemented the “right to education” from other Articles of the Constitution such as Article 21<sup>49</sup>, 24<sup>50</sup>, 30(1)<sup>51</sup>, 39(e)<sup>52</sup> and 39(f)<sup>53, 54</sup>.

In *Kharak Singh v. State of Uttar Pradesh and others*,<sup>55</sup> the Honourable Court held that educating a child demands more than a teacher and a blackboard, or a classroom and a book. The Right to Education is a comprehensive model that requires a child to study in a quality school, and a quality certainly should pose no threat to a child’s safety.

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<sup>47</sup>Supra note 44, p.1227.

<sup>48</sup>Supra note 3, p.190.

<sup>49</sup>Supra note 32, Article 21: “Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.”

<sup>50</sup>Ibid, Article 24: “Protection of employment of children in factories, etc. – No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

<sup>51</sup>Ibid, Article 30(1): “Right of minorities to establish and administer educational institutions – All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.”

<sup>52</sup>Ibid, Article 39(e): “Certain principles of policy to be followed by the State – The state shall, in particular, direct its policy towards securing – that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.”

<sup>53</sup>Ibid, Article 39(f): “Certain principles of policy to be followed by the State – The state shall, in particular, direct its policy towards securing – that children are given opportunities and facilities to develop in a healthy manner and in a conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”

<sup>54</sup>Supra note 44, p.1227.

<sup>55</sup>AIR 1963SC 1295.

In *Bandhua Mukti Morcha v. Union of India*<sup>56</sup> and *Mohini Jain v. State of Karnataka*,<sup>57</sup> it was held that right to education is a fundamental right guaranteed under Article 21.

In *Mohini Jain v. State of Karnataka*,<sup>58</sup> with a view of eliminating the practice of collecting fee for admitting students in educational institutions, the Karnataka Legislature passed an Act purporting to regulate tuition fee in private medical colleges in the State. By issuing a notification under the Act, the Government fixed Rs. 2000 per year as tuition fee payable by candidates admitted against 'government seats', but other students from the State were to pay Rs. 25,000 per year. The Indian students from outside the State were to pay Rs. 60,000 per year. On a writ petition filed by an out of the State student, the Supreme Court quashed the notification under Article 14. In justification of the notification, the private medical colleges had argued that they did not receive any financial aid from the Government and so they must charge much higher fees from private students to make good the loss incurred on government students. The court accepted that the Constitution does not expressly guarantee the right to education, as such, as a Fundamental Right. But reading cumulatively Article 21 along with the Directive Principles contained in Articles 38, 39(a), 41 and 45, the Court opined that "it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens." The Court argued that without making the right to education under Article 41 a reality, the Fundamental Rights would remain beyond the reach of a large majority which is illiterate; the Fundamental Rights including the freedom of speech and expression and other rights guaranteed under Article 19, cannot be fully appreciated and fully

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<sup>56</sup>AIR 1984 SC 802.

<sup>57</sup>AIR 1992 SC 1858.

<sup>58</sup>Ibid.

enjoyed unless a citizen is educated and is conscious of his individualistic dignity. Further 'life' in Article 21 means right to live with human dignity. "Right to life" is the compendious expression for all those rights which are basic of the dignified enjoyment of life. Thus, ruled the Court, "the right to education flows directly from the right to life," and that the "right to education" being concomitant to the fundamental rights, "the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens." The main question before the Bench was whether it would be permissible for private but government recognised educational institutions to charge capitation fee for the admission of the students. The Bench characterised capitation fee as 'teaching shops'. "The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly adhorrent to the Indian culture and heritage." The Bench declared that charging capitation fee amounts to discrimination on a class basis and is thus denial of Article 14 because a poor meritorious student is denied admission to these institutions because he has no money whereas the rich can purchase education. Such a treatment is patently unreasonable, unfair and unjust. The Court further observed in this connection: "Restricting admission to non- meritorious candidates belonging to the richer section of society and denying the same to poor meritorious is wholly arbitrary against the constitutional scheme and as such cannot be legally permitted. Capitation fee in any form cannot be sustained in the eye of law. The only method of admission to the medical colleges in consonance with fair play and equity is by way of merit and merit alone." The Bench thus declared charging of capitation fee by the State recognised educational institutions as "wholly arbitrary and as such violative of Article 14 of the Constitution." Referring to the fixing of Rs. 60,000 as tuition fee from outside State students in the impugned notification, the Court observed: "Whatever name one may

give to this extraction of money in the name of medical education it is nothing but the capitation fee and as such cannot be sustained and is liable to be struck down.” Taking an absolute view of the state obligation to provide education at all levels, the Bench observed: “We hold that every citizen has a ‘right to education’ under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State recognised educational institutions.... Charging capitation fee on consideration of admission to educational institutions, is a patent denial of a citizen’s right to education under the Constitution.” In *Mohini Jain*, the Court took an extremely expansive view of State obligation to provide education to everyone at all levels.

In *Unnikrishnan J.P. v State of Andhra Pradesh*,<sup>59</sup> the Supreme Court held that “right to education to children of the age of six to fourteen years”<sup>60</sup> is a fundamental right. The duty to provide free education up to the age of fourteen years of age can be liquidated by the “state either through government schools, or private schools run by non-governmental bodies, aided and recognised by the state”.<sup>61</sup> The Supreme Court has held that right to education is a part and parcel of Article 21 of the Constitution.<sup>62</sup> Education is an important tool to regulate a dignified life of every human beings.<sup>63</sup>

Subsequent to the decision of *Unnikrishnan*, in the year 2002 through the Constitutional Eighty-sixth Amendment Act 2002, inserted three amendments to provide for the education and welfare of children. Through this amendment, Article

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<sup>59</sup>AIR 1993 SC 2178.

<sup>60</sup>Supra note 32, Article 21A “Right to education - The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine”.

<sup>61</sup>Supra note 44, p.1227.

<sup>62</sup>Supra note 32, Article 21 “Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to the procedure established by law”.

<sup>63</sup>Ibid, p.1228.

21A<sup>64</sup> was introduced which makes the right to education a fundamental right. In order to achieve free and compulsory education to all children below the age of fourteen years at a faster speed, the right was made a fundamental right. Article 45 was substituted by the Eighty-sixth Amendment Act, 2002. Article 45 now provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Article 51A(k)<sup>65</sup> of the Indian Constitution was added through the Eighty-sixth Amendment Act, 2002. State has a duty and an obligation to provide education to Children under Article 45 and Article 21A of the Constitution respectively. However, under Article 51A (k) the obligation to provide education is under a “parent or guardian”. The Government passed the Eighty Sixth Amendment Act 2002. However, the main task that lay ahead is the enforcement of the right guaranteed by the said amendment act.<sup>66</sup> Article 21A read with Article 19(1)(a) has been interpreted as providing all children the right to have primary education in a standard of instruction of their choice. Article 21A has also been interpreted as the fundamental right of each and every child to receive education free from fear of security and safety so that children have a right to receive education in a sound and safe building.<sup>67</sup>

Notwithstanding Article 21A, which guarantees free and compulsory education for children from six to fourteen years of age, there are approximately 35 million children who are out of school. Those children who are in school are also deprived of quality

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<sup>64</sup>Supra note 32, Article 21A “Right to education - The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine”.

<sup>65</sup>Ibid, Article 51A(k) “It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years”.

<sup>66</sup>Supra note 3, p.191.

<sup>67</sup>Supra note 44, p.1232.



education. This means that children are deprived of quantitative as well as qualitative education.<sup>68</sup>

The main purpose of imparting compulsory education will be achieved when there are enough schools built for the children. In India, the Government does not invest much in education of the children. As a result, education is getting privatized. The main aim of private school is only profit making. Education is very expensive in the private schools. Huge number of children from low economic background cannot avail the facilities of private schooling.<sup>69</sup>

The first draft of the Right of Children to Free and Compulsory education Bill was proposed in the Parliament in 2008 with the belief that values of equality, social justice and democracy and the creation of a just and humane society is possible only through provision of inclusive elementary education extending to children belonging to all sections of the society.<sup>70</sup> Along with the constitutional right to education, a separate statute i.e. The Right of Children to Free and Compulsory education, 2009 has also been passed. For the first time in India's history, children have been guaranteed their right to quality elementary education by the state with the help of families and communities.<sup>71</sup>

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<sup>68</sup>Supra note 3, p.10.

<sup>69</sup>Ibid, p.191.

<sup>70</sup>Supra note 4, p. 626.

<sup>71</sup>Ibid, 627.

The underlining features of the Act are: -

- It provides free and compulsory education to all the children from six to fourteen years of age until the child completes his elementary education.<sup>72</sup>  
‘Free’ means that no child shall be liable to pay any kind of fee or charges or expenses, which may prevent him or her from pursuing and completing elementary education.
- If a child is not enrolled in a school even after attaining six years of age or if a child was unable to complete his elementary education, the child shall be admitted in a class suitable to his age. Once a child is enrolled in a class suitable to his age, the child is bound to receive special training so as to be at par with the other children.<sup>73</sup>
- When the school doesn’t have the facility for a child to complete his elementary education, then the child may be transferred to another school for completing his elementary education. When a child needs to transfer to any other school, transfer certificate should be provided to the child at the earliest

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<sup>72</sup>Supra note 23, Section 3: “Right of child to free and compulsory education – (1) Every child of the age of six to fourteen years, including a child referred to in clause (d) and clause (e) of Section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education.”

<sup>73</sup>Ibid, Section 4: “Special provisions for children not admitted to, or who have not completed, elementary education – Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he shall be admitted in a class appropriate to his or her age:

Provided that where a child is directly admitted in a class appropriate to his or her age, then, he or she shall, in order to be at par with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed:

Provided further that a child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years.”

in order to avoid delay. If the transfer certificate is not provided to the child on time, then the child cannot be denied admission in school.<sup>74</sup>

- Capitation fee shall not be charged by any school while admitting a child. No child, parent or guardian shall undergo screening procedure for admission in school.<sup>75</sup>
- Section 16 of the Act states that no child till he completes his elementary education shall be failed in any class or expelled from school.<sup>76</sup>
- Further Section 17(1) of the Act forbids physical punishment and mental harassment of the children.<sup>77</sup>
- A person to be appointed as a teacher must have a minimum qualification prescribed by the academic authority.<sup>78</sup> However, the minimum qualification requirement for a teacher can be relaxed for a maximum period of five years

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<sup>74</sup>Ibid, Section 5: “(1) Where in a school, there is no provision for completing of elementary education, a child shall have a right to seek to transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of section 2, for completing his or her elementary education.

(2) Where a child is required to move from one school to another, either within a State or outside, for any reason whatsoever, such child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of section 2, for completing his or her elementary education.

(3) For seeking admission in any other school, the Head-teacher or in-charge of the school where such child was last admitted, shall immediately transfer the issue certificate:

Provided that delay in producing transfer certificate shall not be a ground for either delaying or denying admission in such other school;

Provided further that the Head-teacher or in-charge of the school delaying issuance of transfer certificate shall be liable for disciplinary action under the service rule applicable to him or her.”

<sup>75</sup>Ibid, Section 13: “(1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardians to any screening procedure.”

<sup>76</sup>Ibid, Section 16: “Prohibition of holding back and expulsion – No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.”

<sup>77</sup>Ibid, Section 17(1): “No Child shall be subjected to physical punishment or mental harassment.”

<sup>78</sup>Ibid, Section 23(1): “Any person possessing such minimum qualification, as laid down by the academic authority, authorized by the Central Government, by notification shall be eligible for appointment as a teacher.”

by the Central Government when the State doesn't have institution offering 'courses and training in teacher education'.<sup>79</sup>

- A teacher is under an obligation to attend the school regularly, complete the syllabus within the stipulated time and parent teacher meeting should be conducted.<sup>80</sup>

In *Lalima Gupta and others v. State of Himachal Pradesh and another*,<sup>81</sup> it has been held that when the environment of the school is like that of a home, then it can be the best method to educate a minor child, so that the all-round development of the child can take place in a natural way. The best person to provide the hands-on environment for the child is a teacher who knows the culture and language of the child. A teacher should have a child friendly attitude, and should welcome the child with warm manner particularly when the child is a first generation learner.

For the improvement of a nation, education of juvenile's is one of the most important elements. To end poverty, unawareness and fallacy, a resilient base of education is a

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<sup>79</sup>Ibid., Section 23(2): "When the State does not have adequate institution offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification: Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years."

<sup>80</sup>Ibid., Section 24(1): "A teacher appointed under sub-section (1) of section 23 shall perform the following duties, namely: -

- (a) maintain regularity and punctuality in attending school;
- (b) conduct and complete the curriculum in accordance with the provision of sub-section (2) of section 29;
- (c) complete entire curriculum within the specified time;
- (d) assess the learning ability of each child and accordingly supplement additional instructions, if any, as required;
- (e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and
- (f) perform such other duties as may be prescribed."

<sup>81</sup>AIR 1993 HP 11.

necessity.<sup>82</sup>

After the completion of elementary education, most students are not in a financial position to complete their schooling. They are forced to drop out after class 8. As a result, they cannot compete with the rest of the world. These dropouts have lesser opportunities in terms of employment. They are forced to work as labourers.

### **2.3.3. Child Labour**

*“Child labour perpetuates poverty, unemployment, illiteracy, population growth, and other social problems”- Kailash Satyarthi*

Child labour is one of the major issues which debar child from receiving the basic human rights. It is the foulest method of encroachment of human rights. The problem of child labour is universally known. Child labour is prevalent in the entire world. A child is exploited physically, ethically, economically and their right to education is infringed. “Any non-school-going child is a child labourer”.<sup>83</sup> It also hinders the child’s ability to think normally. Child labour includes children prematurely leading adult lives, working long hours for low wages, under conditions damaging to their health and to their physical and mental development, sometimes separate from their families, frequently deprived of meaningful education and training opportunities that could open up a better future for them.<sup>84</sup>

International Labour Organisation (ILO) report on child labour used the term ‘child labour’ to cover all economic activities carried out by persons less than 15 years of age, regardless of their occupational status (wage earners, own-account workers,

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<sup>82</sup>Leila Seth “The Rights of the Child” 20IICQ (1993), p.87.

<sup>83</sup>Supra note 4, p. 272.

<sup>84</sup>Ibid, p.271.

unpaid family workers, and so on), but not household work performed by them in their parents' home, except where such work can be assimilated to an economic activity.<sup>85</sup> The International Labour Organisation (ILO) as work that deprives children of their childhood, their potential, and their dignity, and is harmful to physical and mental development.<sup>86</sup> It refers to work that:

- Is mentally, physically, socially, or morally dangerous and harmful to children; and
- Interferes with their schooling which deprives them of the opportunity to attend school; obliges them to leave school prematurely; or requires them to attempt to combine school attendance with excessively long and heavy work.<sup>87</sup>

Most of India's child employment is concentrated in agriculture and allied activities. Accounting for over two-thirds of child employment, agriculture is the single largest sector of the concentration of child labour in India. This is followed by manufacturing, wherein 16.55 percent are found to be engaged in manufacturing commodities. Trade, hotels, and restaurants account for the next significant share of child workers, with 8.45 percent. Most of the children engaged in agriculture work as part of the farm household unit. However, a significant proportion of them also work as paid casual labour at a wage rate mostly half that of adults.<sup>88</sup>

Agricultural work is hazardous. With the increasing use of fertilizers and pesticides in agriculture, the nature of work is increasingly becoming more hazardous. Similarly, in the manufacturing sector, the second largest sector of child employment, most of the

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<sup>85</sup>Ibid, p.272.

<sup>86</sup>Ibid.

<sup>87</sup>ILO, 'What is Child Labour?', International Programme on the Elimination of Child Labour (IPEC). Available at <http://www.ilo.org/ipecc/facts/lang--en/index.htm> (accessed on 12 Dec 2018).

<sup>88</sup>Supra note 4, p.276.

children are engaged in the informal sector with near absence of any provisions related to work hours, overtime, basic social security, and representation of voice.<sup>89</sup>

Children in urban areas are employed as domestic helpers in shops, hotels, stalls, etc. The children even work as rag pickers, coolies, casual labourers. These children work not because they wish to, but they are forced to work due to their social and economic conditions. As children are under compulsion to work they are often exploited by the employer. It is often assumed that the nature and extend of poverty in a country determines the number of its child labour. Studies have been undertaken in various countries around the world, particularly those that are relatively underdeveloped economically, do show that child labour and poverty are intimately linked.<sup>90</sup> However, it is also clear that the specific circumstances of child labour are influenced by many other factors. No single cause can be isolated for the prevalence of child labour. It is a combination of several factors. It is inherent in the cycle of poverty, unemployment, underemployment, and low wages caused by inequitable distribution of resources and economic policies. However no cause can justify the existence of child labour.<sup>91</sup> Child labourer receive low negligible income and often no wages at all. They have no rights as workers and cannot join trade unions. Child labour also depresses adult labour and keeps adults unemployed.<sup>92</sup>

Through Article 24<sup>93</sup> of the Indian Constitution, a limited restriction is laid down for child labour. As per Article 24, a child below the age of fourteen years shall not be

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<sup>89</sup>Ibid.

<sup>90</sup>Ibid, p.277

<sup>91</sup>Ibid, p.277-278.

<sup>92</sup>Ibid, p.278.

<sup>93</sup>Supra note 32, Article 24 “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any hazardous employment”.

employed to work in any factory or mine or engaged in any other hazardous employment.

In *People's Union of Democratic Rights v. Union of India*,<sup>94</sup> the Supreme Court has laid down that Article 24 expresses a Fundamental Right “which is plainly and indubitably enforceable against everyone”.<sup>95</sup> Article 24 lays down a mandatory rule that an employer cannot employ a child below the age of 14 years employed in any hazardous employment.<sup>96</sup> The duty not to employ a child in perilous construction works also rests with the Central Government, State Government and other government authorities to safeguard that the contractor to whom they have assigned construction work does not employ a child below fourteen years of age.<sup>97</sup>

In *Labourers Working on Salal Hydro Project v. State of Jammu and Kashmir*,<sup>98</sup> as per the constitutional mandate contained under Article 24 of the Indian Constitution, it has been held that children below the age of 14 years cannot be employed in any construction work. The court has directed the Central Government, to prohibit the employing of children in hazardous working condition. The court has articulated the Government to encourage the employer to send children to school and provide free education as per Article 21A of the Constitution. Due to the social and economic condition of our society, the Court apprehended that child labour cannot be quashed completely as it would not be accepted by large number of people because of their economic condition.<sup>99</sup>

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<sup>94</sup>AIR 1982 SC 1473.

<sup>95</sup>Supra note 44, p.1242.

<sup>96</sup>Ibid.

<sup>97</sup>Ibid.

<sup>98</sup>AIR 1984 SC 177.

<sup>99</sup>Supra note 44, p.1242.



In *M.C. Mehta v. State of Tamil Nadu*,<sup>100</sup> the Supreme Court in this landmark judgement held that children below the age of fourteen years cannot be employed in any hazardous industry, mines, etc. The Supreme Court has laid down rules for the State Government to safeguard the “economic, social and humanitarian rights” of the children working unlawfully.

Article 39(e)<sup>101</sup> prohibits the children of tender age from being abused. Article 39(f)<sup>102</sup> ensures that the children grow in a healthy manner and are protected from exploitation. One of the main intentions of Article 39(e) and Article 39(f) of the Indian Constitution is to lay down a directive principle of state policy to safeguard the children from exploitation and to protect the interest and welfare of the children.<sup>103</sup> In acquiring the directives contained in Article 39(e) and Article 39(f) of the constitution, a national policy for the welfare of the children has been formulated by the Government of India. The policy proclaims “The Nation’s children are a supremely important asset”.<sup>104</sup>

In *Sheela Barse v. Union of India*,<sup>105</sup> the Supreme Court in pursuance of Article 39(f) has laid down that all children below the age of sixteen years of age should be released from jail. In its place, the Supreme Court has urged the state to set up remand home and juvenile Courts.<sup>106</sup> A child is a national asset and therefore, “it is the duty

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<sup>100</sup>AIR 1997 SC 699.

<sup>101</sup>Supra note 32, Article 39(e) “The state shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength”.

<sup>102</sup>Ibid, Article 39(f) “That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment”.

<sup>103</sup>Supra note 44, p.1423.

<sup>104</sup>Ibid.

<sup>105</sup>AIR 1986 SC 1773.

<sup>106</sup>Supra note 44, p.1423.

of the state to look after the child with a view to ensuring full development of its personality”.<sup>107</sup>

Notwithstanding Article 24, 39(e) and 39(f) of the Indian Constitution, children are employed in numerous works. Child labour comprises approximately 26% of the labour force in organized sectors.<sup>108</sup> The working condition for the children is unhygienic and unsafe. These children are often misused and abused by the employers.

The Constitution of India has imposed a basic duty on the government to raise the level of nutrition, standard of living, improvement of public health and to prohibit consumption of intoxicating drinks and drugs which are injurious to health.<sup>109</sup>

The above Articles, unquestionably reflects the concern towards the health and safety of the children.

#### **2.3.4. FACTORIES ACT, 1948**

In order to combat child labour which is a universal phenomenon, certain laws have been passed to control child labour in India. The Factories Act is one of the legislations which regulates child labour. The first Factories Act was enacted in 1881. According to the Act of 1881, a child below 7 years of age is prohibited from working in factories. Employment in two factories on the same day is prohibited. A child is entitled to at least four holidays in a month.<sup>110</sup> Since 1881, the Act has been amended on numerous occasions. In the Factories Act, 1948, the minimum age for employment of children in factories is fourteen years of age.<sup>111</sup> The daily admissible working hour

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<sup>107</sup>AIR 1986 SC 1773.

<sup>108</sup>Supra note 3, p.89.

<sup>109</sup>Supra note 32, Article 47.

<sup>110</sup>Supra note 4, p.292.

<sup>111</sup>Supra note 14, Section 67: “Prohibition of employment of young children – No child who has not completed his fourteenth year shall be required or allowed to work in any factory.”

of the children under the Factories Act 1948, is four and a half hours.<sup>112</sup> The manager in every factory must keep a register of child workers bearing the name of the child, nature of work etc. to be available to the Inspector at all times.<sup>113</sup>

### **2.3.5. THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986**

The Child Labour (Prohibition and Regulation) Act, 1986, prohibited employment of a child as a labour in certain occupations. It also standardises the working condition for children in certain employment where the children have the right to work.

The purposes of this Act are: banning the employment of children, that is, those who have not completed their 14<sup>th</sup> year, in specified occupations and processes; laying down procedures to decide modifications to the schedule of banned occupations or processes; and regulating the conditions of work of children in employment where they are not prohibited from working.

Children below the age of fourteen years are prohibited from being employed in certain specified occupations. Part A of the Schedule lays down a list of occupations and Part B of the Schedule lays down a list of processes in which a child is not permitted to work.<sup>114</sup> Part A includes employment associated with cinder picking, working in railway station, construction of railway station, cracker and firework shops,

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<sup>112</sup>Ibid, 1948, Section 71(1): “Working hours for children – No child shall be employed or permitted to work, in any factory –

- (a) for more than four and a half hours in any day;
- (b) during the night.

<sup>113</sup>Ibid, Section 73(1): “The manager of every factory in which children are employed shall maintain a register of child workers, to be available to the Inspector at all times during working hours or when any work is being carried on in a factory, showing –

- (a) the name of each child worker in the factory,
- (b) the nature of his work,
- (c) the group, if any, in which he is included,
- (d) where his group works on shift, the relay to which he is allowed, and
- (e) the number of his certificate of fitness granted under section 69.

<sup>114</sup>Supra note 15, Section 3.

slaughter houses, as a domestic helper, employment of children in restaurants, hotels, motels, and shops.<sup>115</sup> Part B includes, bidi making, carpet weaving, cement manufacturing, wool cleaning, manufacturing of slate pencils, mica cutting, painting, soap manufacturing, tanning, etc.<sup>116</sup> A child is permitted to work for a maximum of six hours in a day which includes one hour of rest.<sup>117</sup> A child cannot be employed in any work between 7 p.m. to 8 a.m. and a child shall not be permitted to work overtime.<sup>118</sup> All the children who are employed are entitled to a weekly holiday.<sup>119</sup> The appropriate government is authorised to make rules for the health and safety of the children who is employed in any establishment.<sup>120</sup> These rules may provide for “cleanliness in the place of work and freedom from nuisance; disposal of waste and effluents; ventilation and temperature; dust and fume; artificial humidification; lighting; drinking water; latrine and urinals; spittoons; fencing of machinery; work at or near machinery in motion; employment of children on dangerous machines; instructions, training and supervision in relation to employment of children on dangerous machines; device for cutting of power; self-acting machine; easing of new machinery; floor, stairs and means of access; pits, slums, opening in floor, etc.; excessive weights; protection of eyes; explosive or inflammable dust, gas, etc.; precaution in case of fire; maintenance of building; and safety of building and machinery”.<sup>121</sup>

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<sup>115</sup>Gautam Banerjee, *Child and the Law* (Notion Press, 1<sup>st</sup> edn., 2017) p.58.

<sup>116</sup>*Ibid.*

<sup>117</sup>Supra note 15, Section 7.

<sup>118</sup>*Ibid.*

<sup>119</sup>*Ibid.*, Section 8.

<sup>120</sup>*Ibid.*, Section 13(1).

<sup>121</sup>*Ibid.*, Section 13(2).

In *M.C. Mehta v. State of Tamil Nadu*,<sup>122</sup> the Honourable Supreme Court held that the employment of children in the manufacturing process in match factories is unauthorised, but they can be hired in the process of packing, but directed it be done in an area away from the place of manufacture to avoid exposure to accidents.

The procedure laid down in the Act relating to the prosecution of offences is as follows:

- Any person, police officer, or inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction.
- Every certificate as to the age of the child which has been granted by the prescribed medical authority shall, for the purposes of this act, be conclusive evidence as to the age of the child to whom it relates.
- No court inferior to that of a metropolitan magistrate or a magistrate of the first class shall try any offence under this Act.

Penalties under the Act:

- Whoever employs any child or permits any child to work in any hazardous employment shall be punished with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both.<sup>123</sup> For a repeat offence, the punishment

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<sup>122</sup>AIR 1991 SC 417.

<sup>123</sup>Supra note 15, Section 14(1)

is imprisonment for a term which shall not be less than six months but which may extend to two years.<sup>124</sup>

- For failing to give notice to the inspector as required by Section 9, or failing to maintain a register as required by Section 11, or making any false entry in the register, or failing to display an abstract of Section 3, or failing to comply with any other provisions of this act or rules, the punishment is imprisonment which may extend to one month, or with fine which may extend to Rs. 10,000 or both.<sup>125</sup>

On 2016, The Child Labour (Prohibition and Regulation) Amendment Act came into force. The Act provides for ban of employment of children below fourteen years of age in all occupations and enterprises. But the child can help in his family or family enterprise, which is other than any hazardous occupations, after his school hours or during vacations.

It defines that children between fourteen and eighteen years of age as adolescents and bars their employment in any hazardous occupations. It makes child labour a cognizable offence. Punishment up to 2 years of imprisonment and penalty up to Rs 50, 000. Section 2 of the Act states that “An Act to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes and the matters connected therewith or incidental there to.”<sup>126</sup>

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<sup>124</sup>Ibid, Section 14(2).

<sup>125</sup>Ibid, Section 14(3)

<sup>126</sup>Supra note 16, Section 2.

Child labour denies children of educational opportunities, it hinders their development both physically and mentally and constrains them to proceed with a life of drudgery and deprivation in shabby places.<sup>127</sup>

### **2.3.6. INDIAN PENAL CODE, 1860**

A child is guaranteed with certain privileges under the Indian Penal Code. Section 82 of the Indian Penal Code lays down that an act done by a child below seven years of age is not an offence.<sup>128</sup> An act done by a child above 7 years of age and less than 12 years of age, who has not attained adequate maturity, is not an offence.<sup>129</sup> In *Hiralal Mallick v. State of Bihar*,<sup>130</sup> in this case the Supreme Court held that a child below 7 years of age is absolutely free from criminal charges. If the child is above 7 years but below 12 years of age, and if it is proved that the child has not attained sufficient maturity to judge the nature and consequence of the act. Then a defence of *doli incapax* can be availed.

An act done in good faith for the benefit of a person not planning to cause death of the said person is not an offence under Section 88 of the Indian Penal Code.<sup>131</sup> Section 89 of the Indian Penal Code lays down that an act done in good faith for the benefit of the child who is below 12 years of age is not an offence.<sup>132</sup> The law itself through

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<sup>127</sup>Supra note 82, p88.

<sup>128</sup>Supra note 18, Section 82: "Act of a child under seven years of age – Nothing is an offence which is done by a child under seven years of age."

<sup>129</sup>Ibid, Section 83: "Act of a child above seven and under twelve of immature understanding – Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."

<sup>130</sup>AIR 1977 SC 2236.

<sup>131</sup>Ibid, Section 88: "Act not intended to cause death, done by consent in good faith for person's benefit – Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm."

<sup>132</sup>Ibid, Section 89: "Act done in good faith for benefit of child or insane person, by or by consent of guardian – Nothing which is done in good faith for the benefit of a person under twelve years of age, or

Section 88 and 89 of the Indian Penal Code grants a special privilege to a person imposing corporal punishment on a child if it is done in good faith for the benefit of the child. The protection of a person inflicting corporal punishment on a child by Section 88 and 89 is in conflict with the rights guaranteed under the Constitution of India and the duties under the United Nation Convention on the Rights of the Child.<sup>133</sup>

In *Hasmukhbhai Gokaldas Shah v. State of Gujarat*,<sup>134</sup> the Gujarat High Court held that ‘corporal punishment to child in present days is not recognised by law’. This judgement of the Gujarat High Court is contrary to Sections 88 and 89 of the Indian Penal Code.

Section 305 of the Indian Penal Code lays down that whoever abets the commission of suicide of a person below the age of eighteen shall be punished with “death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine”.<sup>135</sup> Section 317 of the Indian Penal Code, lays down a provision to safeguard that children are not left at the peril of their parents i.e. they are not deserted. The father or mother of a child under the age of twelve years, must not leave a child in any place with the purpose of deserting a child. A person who deserts a

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of unsound mind, by or by consent, either express or implied, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person, provided-

First – That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly – That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly – That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly – That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.”

<sup>133</sup>Supra note 4, p. 672.

<sup>134</sup>2009 CriLJ 2919.

<sup>135</sup>Supra note 18, Section 305: “Abetment of suicide of child or insane- If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine”.



child shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.<sup>136</sup>

Section 361 of the Indian Penal Code lays down that whoever takes or attracts any minor (under sixteen years of age if a male, or under eighteen years of age if a female), or any person of unsound mind, without the permission of a guardian, retains the child out from the lawful guardian is said to kidnap such minor or person of unsound mind from lawful guardianship.<sup>137</sup> Whoever kidnaps any person from India or from lawful guardianship shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.<sup>138</sup>

In *Taj Mohammad v. State of Madhya Pradesh*,<sup>139</sup> a minor girl named Ivy became intimate with the accused. One day she left her house and proceeded to a railway station along with the accused. This happened just after the accused had visited her father's house. In the meanwhile, a search for her was made and she was found sitting with the accused on a bench on the platform of the station. It was held that the accused was guilty for the commission of kidnapping.

Section 363A of the Indian Penal Code proclaims that kidnapping or maiming a minor for purposes of begging is a criminal offence under IPC i.e. whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor,

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<sup>136</sup>Ibid, Section 317: "Exposure and abandonment of child under twelve years, by parent or person having care of it – Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

<sup>137</sup>Ibid, Section 361: "Kidnapping from lawful guardianship – Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

<sup>138</sup>Ibid, Section 363: "Punishment for kidnapping – Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

<sup>139</sup>(1961) Cr.LJ 513.

in order that such minor may be employed or used for the purpose of begging shall be punished with imprisonment for a term which may extend to ten years, and shall be liable to fine. Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punished with imprisonment for life, and shall also be liable to fine, where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.<sup>140</sup>

Section 366A of the India Penal Code, safeguards the girl child from sexual offences. Any person who induces any minor girl under the age of eighteen years to go form any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be

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<sup>140</sup>Supra note 18, Section 363A: “Kidnapping or maiming a minor for purposes of begging –

- (1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
- (2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life, and shall also be liable to fine.
- (3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.
- (4) In this section –
  - (a) ‘begging’ means-
    - (i) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;
    - (ii) entering on any private premises for the purpose of soliciting or receiving alms;
    - (iii) exposing or exhibiting, with the object of obtaining or extorting alms, any alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;
    - (iv) using a minor as an exhibit for purpose of soliciting or receiving alms;
  - (b) ‘minor’ means-
    - (i) in the case of a male, a person under sixteen years of age; and
    - (ii) in the case of a female, a person under eighteen years of age.”

punishable with imprisonment which may extend to ten years, and shall also be liable to fine.<sup>141</sup>

Section 369 of the Indian Penal Code states that whoever kidnaps a child below 10 years of age with an aim of taking fraudulently any movable property from the child, will be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.<sup>142</sup>

Section 372 of IPC, states that whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment for a term which may extend to ten years, and shall be liable to fine.<sup>143</sup>

Section 373 states that whoever buys, hires or otherwise obtains possession of any person below eighteen years of age with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person

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<sup>141</sup>Ibid, Section 366A: “Procuration of minor girl – Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.”

<sup>142</sup>Ibid, Section 369: “Kidnapping or abducting child under ten years with intent to steal from its person – Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any movable property from person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

<sup>143</sup>Ibid, Section 372: “Selling minor for purposes of prostitution, etc. – Whoever sells, lets to hire, or otherwise dispose of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.”

will at any age be employed or used for any purpose, shall be punished with imprisonment which may extend to ten years, and shall also be liable to fine.<sup>144</sup>

### **2.3.7. THE PROHIBITION OF CHILD MARRIAGE ACT, 2006**

When the bride or the bridegroom is a child then the marriage solemnised between them is termed as child marriage.<sup>145</sup> When a marriage is solemnised and the party to that marriage is a minor, the marriage shall be voidable at the option of the minor. In *Court on its Own Motion (Lajja Devi) v. State*,<sup>146</sup> the Delhi High Court stated that under the Prohibition of Child Marriage Act, the child marriage is voidable and not void. Child marriage is an offence which is punishable under law, but it still considers child marriage as valid. That is voidable until it is proclaimed void. This traces an inconsistent position in the Act.

For terminating a child marriage a petition may be filed in the district court.<sup>147</sup> If the petitioner is a minor at the time of filing a petition, the petition can be filed by the minor's guardian or 'next friend along with the Child Marriage Prohibition Officer'.<sup>148</sup> Once the child attains the age of majority, then the limitation period for filing a petition for nullifying a child marriage is two years.<sup>149</sup>

A child marriage becomes null and void under the following circumstances<sup>150</sup>:

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<sup>144</sup> Ibid, Section 373: "Buying minor for purposes of prostitution, etc.- Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

<sup>145</sup> Supra note 12, Section 2(b).

<sup>146</sup> W.P. (CrI.) No. 338/2008, CrI. M.C. No. 1001/2011, CrI. M.A. No. 3737/2011. W.P. (CrI.) No. 821/2008, CrI. M.A. No. 8765/2008 and W.P. (CrI.) No. 566/2010.

<sup>147</sup> Supra note 12, Section 3(1).

<sup>148</sup> Ibid, Section 3(2).

<sup>149</sup> Ibid, Section 3(3).

<sup>150</sup> Ibid, Section 12.

- Where a child is bribed, tempted, seduced and unlawfully taken away from the lawful guardian;<sup>151</sup>
- Where a child is fraudulently made to leave a place;<sup>152</sup>
- Where a child is sold for the purpose of marriage, and made to go through a form of marriage. If the minor is married, after which the minor is sold or trafficked or used for immoral purpose.<sup>153</sup>

When a child marriage is annulled, the wife has the right to maintenance until she remarries.<sup>154</sup> In case a child is born out of the wedlock, the child is a legitimate child.<sup>155</sup> The district court shall make suitable order for the child taking into consideration the ‘welfare and best interest of the child’ for custody of the child.<sup>156</sup>

Section 9, 10 and 11 of the Act lays down the punishment for child marriage:

- When a marriage is contracted by an adult male with a minor female, he shall be punished with imprisonment which may extend to two years and a fine which may extend to one lakh rupees or both.<sup>157</sup>
- When a person executes a child marriage or assists to execute a child marriage, he shall be punished with imprisonment which may extend to two years and a fine which may extend to one lakh rupees or both.<sup>158</sup>

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<sup>151</sup>Ibid, Section 12(a).

<sup>152</sup>Ibid, Section 12(b).

<sup>153</sup>Ibid, Section 12(c).

<sup>154</sup>Ibid, Section 4(1).

<sup>155</sup>Ibid, Section 6.

<sup>156</sup>Ibid, Section 5.

<sup>157</sup>Ibid, Section 9.

<sup>158</sup>Ibid, Section 10.

- When a person having charge of the child allows or supports for the solemnisation of the marriage. Carelessly fails to stop the marriage from being solemnised and the child marriage is contracted, he shall be punished with imprisonment which may extend to two years and a fine which may extend to one lakh rupees.<sup>159</sup>

A Child Marriage Prohibition Officer shall be appointed by the State Government for the entire state or for an area listed in the notification, to carry out the function prescribed under Section 16(3) of the Act. The duty of the Child Marriage Prohibition Officers is to prevent child marriage; to generate awareness among the people of the problems that result from child marriage; to provide periodical returns and statistics to the State Government; to gather evidence for the prosecution of persons infringing the provisions of the Act.<sup>160</sup>

On an application of the Child Marriage Prohibition Officer or through a complaint by any person to the Judicial Magistrate of the first class or a Metropolitan Magistrate. When the Magistrate is contented that the child marriage has been arranged or solemnised in violation of this Act, an injunction order shall be issued.<sup>161</sup> When a child marriage takes place infringing the injunction order that marriage shall be void ab initio.<sup>162</sup>

Section 13(4) of the Act, lays down provision to curb mass child marriages that take place on occasions like Akshay Tritiya. The District Magistrate will function as the Child Marriage Prohibition Officer to stop the solemnisation of mass child

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<sup>159</sup>Ibid, Section 11.

<sup>160</sup>Ibid, Section 16(3).

<sup>161</sup>Ibid, Section 13(1).

<sup>162</sup>Ibid, Section 14.

marriage.<sup>163</sup> On the day of Akshay Tritiya, in Rajasthan child marriages are openly performed. Akshay Tritiya is observed as the best, positive and a lucky day for solemnising marriage.<sup>164</sup> Child marriage is still taking place notwithstanding the provisions of the Act.

In *Smt. Sushila Gothala v. State of Rajasthan and Others*,<sup>165</sup> the petitioner had approached the court under Article 226 of the Indian Constitution for issuance of direction to the respondents to immediately stop the menace of child marriage in Rajasthan in an effective manner, and further for a direction to punish the officer who was responsible for not prohibiting the child marriages, as per the provisions of the Child Marriage Regulation Act. On the occasion of Akshay Tritiya every year, child marriages are performed in contravention of the act as it is considered an auspicious day for performing marriages. The writ petition was disposed of with the observation that this social evil can be eradicated only if the people of Rajasthan themselves revolt against this age-old custom, which is primitive in nature and cannot be justified by any civilized society. The court further held that as per Section 13 of the Act, if the child marriage prevention officers have not been appointed, the government should consider the feasibility of making the provisions of the Act more stringent and punishment for contravention of the Act should be severe.

In *William Rebello v. Agnelo Vaz and Another*,<sup>166</sup> an application was filed for dispensing with the age limit of the marriage and to give necessary directions to the civil registration authority to register the marriage of the applicants. As Applicant No. 1 was not 21 years of age and could not marry, the court was requested to remove the

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<sup>163</sup>Ibid, Section 13(4)

<sup>164</sup>Supra note 4, p. 386.

<sup>165</sup>AIR 1995 Raj 90.

<sup>166</sup>AIR 1996 Bom 204.

impediment as both the parents had given consent for such marriage. In the application, it was also contended that as a result of friendship between Applicants No. 1 and 2, Applicant No. 2 had become pregnant and the pregnancy was 20 weeks old. The application for the removal of the impediment was entertained under the provisions of Article 5 of the Portuguese Civil Code and the trial judge, on the basis of the submission made, considered the application and thought it fit to remove the impediment, and accordingly allowed the application.

In *Jitender Kumar Sharma v. State and Another*,<sup>167</sup> both the boy and the girl who were minors had fallen in love, eloped and had gotten married as per Hindu rites and ceremonies. The Division Bench of the Delhi High Court considered the issue of validity of such a marriage. The Court opined that a Hindu marriage which is not void under the Hindu Marriage Act would continue to be valid, provided the provision of Section 12 of the Prohibition of Child Marriage Act, 2006, are not attracted. A marriage in contravention of Clause (3) of Section 5 of the Hindu Marriage Act was neither void nor voidable. However, Section 3 of the Prohibition of Child Marriage Act, had introduced the concept of voidable marriage. Since this was a secular law, it would override the provision of the Hindu Marriage Act. In view of Section 3 thereof, which made child marriage voidable at the option of the contracting party being a child, the Court observed that the position contained in Clause (3) of Section 5 of the Hindu Marriage Act, holding that such a marriage was neither void nor voidable, was the legal position prior to the enactment and enforcement of the Prohibition of Child Marriage Act, and after this enactment the marriage in contravention of Clause (3) of Section 5 of the Hindu Marriage Act would not be ipso facto void but could be void if any of the circumstances enumerated in Section 12 of the Prohibition of Child

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<sup>167</sup>171 (2010) DTL 543.



Marriage Act was triggered. The legislature made a specific provision for void marriage under certain circumstances but did not render all child marriage void. It also introduced the concept of a voidable child marriage, clearly indicating that all child marriage is not void.

In *Court on its Own Motion (Lajja Devi) v. State*,<sup>168</sup> the Delhi High Court laid down some of the evils associated with child marriage as health risk due to early sexual intercourse and pregnancy; girls are often subjected to domestic violence and sexual abuse; Infringing their educational right; high rate of maternal and child death; higher rate of divorce and separation.

### **2.3.8. THE PROTECTION OF CHILDREN AGAINST SEXUAL OFFENCES ACT, 2012**

Children are vulnerable and people tend to take their advantage. As a result, the children are subjected to sexual abuse. The child who is sexually abused undergoes a lot of pain, suffering and disturbance hampering the child physically and psychologically. In order to combat child sexual abuse, the Government has passed a law to protect the children from sexual abuse.

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<sup>168</sup>W.P. (CrI.) No. 338/2008, CrI. M.C. No. 1001/2011, CrI. M.A. No. 3737/2011. W.P. (CrI.) No. 821/2008, CrI. M.A. No. 8765/2008 and W.P. (CrI.) No. 566/2010.

On 14<sup>th</sup> November 2012, the Protection of Children against Sexual Offences Act, 2012, came into force. The Act protects children below the age of 18 years<sup>169</sup> from “sexual assault<sup>170</sup>, sexual harassment<sup>171</sup> and pornography<sup>172</sup>”. With an aim to provide speedy trial, in every district “a Court of Session to be a Special Court is formed to try an offence under the Act”.<sup>173</sup> The Special Court conducts the trial in a child-friendly method<sup>174</sup> and the identity of the child is not disclosed.<sup>175</sup> A child is not to be called frequently to testify in court.<sup>176</sup> During the trial, the dignity of the child needs to be

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<sup>169</sup>Supra note 24, Section 2(d).

<sup>170</sup>Ibid, Section 7: “Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault”.

<sup>171</sup>Ibid, Section 11: A person is said to commit sexual harassment upon a child when such person with sexual intent –

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefore”.

<sup>172</sup> Ibid, Section 13 “Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes –

(a) representation of the sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);

(c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes”.

<sup>173</sup>Ibid, Section 28.

<sup>174</sup>Ibid, Section 33(4): The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court”.

<sup>175</sup>Ibid, Section 33(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the court of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child”.

<sup>176</sup>Ibid, Section 33(5): The Special Court shall ensure that the child is not called repeatedly to testify in the court”.

retained and the child should not be asked aggressive questions.<sup>177</sup> An effort has been made by this Act to safeguard the interest of the child.

In *Govind Shripat v. The State of Maharashtra*,<sup>178</sup> a complaint was registered by the complainant of kidnapping his minor daughter. The minor girl was found and her statement was recorded in the police station. While recording her statement it was found that the accused had a sexual relation with her. The accused contended that he had a love affair with the minor girl and she had consented to the relationship. The Bombay High Court held that the girl was below 16 years at the time of occurrence of the offence. The accused cannot take advantage of her consent. The consent of a minor below 16 years is irrelevant. The Court noted that, 'Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It should, therefore be considered a crime against humanity.'

A person who commits an offence prescribed under this Act is subjected to stringent punishment:

- When a person commits a 'penetrative sexual assault', he will be imprisoned for not less than seven years which may extend to life imprisonment and a fine.<sup>179</sup>
- When a person commits an 'aggravated penetrative sexual assault', he will be imprisoned for not less than ten years which may extend to life imprisonment and a fine.<sup>180</sup>

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<sup>177</sup> Ibid, Section 33(6): The Special Court shall not permit aggressive questioning or character assassination of the child and ensure the dignity of the child is maintained at all times during the trial".

<sup>178</sup> (2010) ALL MR (Cri) 907.

<sup>179</sup> Supra note 24, Section 4.

<sup>180</sup> Ibid, Section 6.

- When a person commits a ‘sexual assault’, he will be imprisoned for not less than three years which may extend to five years and a fine.<sup>181</sup>
- When a person commits an ‘aggravated sexual assault’, he will be imprisoned for not less than five years which may extend to seven years and a fine.<sup>182</sup>
- When a person commits ‘sexual harassment’ to the child, he will be imprisoned for three years and a fine.<sup>183</sup>
- When a person commits an offence of using a child for pornographic purposes, he will be imprisoned for five years and a fine and in the event of subsequent conviction, he will be imprisoned for seven years and a fine.<sup>184</sup>

Any person who has an apprehension that an offence under the POCSO Act is likely to be committed, or has knowledge that an offence has been committed, has a mandatory obligation to report the matter.<sup>185</sup> An express obligation has also been vested upon media personnel, and the staff of hotels, lodges, hospitals, clubs, studios, or photographic facilities, to report a case if they come across material or object that are sexually exploitative of children.<sup>186</sup> Failure to report the offence under the POCSO Act is punishable with imprisonment of up to six months or fine or both. This penalty is, however, not applicable to a child. The Act also makes it an offence to report false information, when such report is made other than in good faith.<sup>187</sup>

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<sup>181</sup>Ibid, Section 8.

<sup>182</sup>Ibid, Section 10.

<sup>183</sup>Ibid, Section 12.

<sup>184</sup>Ibid, Section 14(1).

<sup>185</sup>Ibid, Section 19.

<sup>186</sup>Ibid, Section 20.

<sup>187</sup>Ibid, Section 21.

In *Gorakh Daji Ghadge v. The State of Maharashtra*,<sup>188</sup> the father had raped his 13 year old daughter in their home. The Mumbai High Court held that seminal emission is not necessary to establish rape. What is necessary to establish rape is that there must be penetration. The High Court has also dealt with the father daughter relationship and stated that ‘crimes in which women are victims need to be severely dealt with and in extreme cases such as this when the accused, who is the father of the victim girl, had thought it fit to “deflower” his own daughter of tender years to gratify his lust, then only a deterrent sentence can meet the ends of justice.’

In *Narayanamma (Kum) v. State of Karnataka and Others*,<sup>189</sup> the Court held that fact of admission of two fingers and hymen rupture does not give a clear indication that the prosecutrix is habitual to sexual intercourse. The doctor has to opine as to whether the hymen stood ruptured much earlier or carried an old tear. The factum of admission of two fingers could not be held averse to the prosecutrix, as it would also depend upon the size of the fingers inserted. The doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such conditions obviously relate to the hymen.

In *Reference v. Firoz Khan*,<sup>190</sup> a 4 years old child was brutally raped and was left in the field unconscious. The child was taken to the hospital but she died on her way without giving any evidence. The case was registered and the accused was arrested. On the basis of the evidence produced by the parties the Session Judge imposed death sentence to the accused. A reference of the judgement of the trial court was made to the Madhya Pradesh High Court. The High Court upheld the judgement of the trial court as the crime committed by the accused fulfilled the test of ‘rare of the rarest

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<sup>188</sup>1980 Cr LJ 1380.

<sup>189</sup>(1994) 5SCC 728.

<sup>190</sup>Criminal Reference No. 9/2013.

case'. A complete effort has been made for safeguarding child rights in the judgement of the High Court. It has directed to ensure State Commission for Protection of Children in the states of Punjab, Haryana and the Union Territory of Chandigarh; compulsory registration of children's homes; establishment of children's courts; appointment of special public prosecutors; the national commission and the state commission shall discharge their function under the Protection of Children against Sexual Offences Act. The State Government has to apply the direction laid down by the High Court. The State Government must efficiently work to check odious sexual abuse against children by sensitizing the people about it.<sup>191</sup>

In *Dhananjaya Chatterjee v. State of West Bengal*,<sup>192</sup> an 8 year old child was raped and murdered by her school's security guard. The trial court imposed death sentence to the accused. The high court upheld the judgement of the trial court. It was held that the crime of rape and murder was brutal and an outrage to human dignity.

In *State of Punjab v. Gurmit Singh*,<sup>193</sup> a girl under 16 years of age was gang raped. The Supreme Court, in this case, settled several important points of law. First, it stated that the courts cannot overlook the fact that in case of sexual offences, the delay in lodging an FIR can be due to a variety of reasons, partly because of the reluctance of the prosecutrix and her family members to go to the police and complain about an incident which concerns the reputation of the prosecutrix and the honour of her family. Secondly, it also held that there is no requirement of law to insist upon corroboration of the statement of the prosecutrix for conviction of an accused and that corroborative evidence is not an imperative component of judicial credence in every case of rape. While dealing with the importance of in-camera trial in rape cases, the

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<sup>191</sup>Supra note 4, p. 418-419.

<sup>192</sup>1994 (2) SCC 220.

<sup>193</sup>AIR 1996 SC 1393

Supreme Court observed that a trial in camera would not only be in keeping with the self-respect of the victim of the crime and in tune with the legislative intent, but it is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court under the gaze of the public.

In *State v. Aas Mohammad*,<sup>194</sup> a minor aged 14 was in a sexual relationship with her landlord. On discovery of the minor's pregnancy a complaint was filed by the minor's mother. The minor girl stated that the complaint was filed because the landlord refused to marry her. During the court proceedings, the landlord offered to marry the minor girl. When the landlord was released on bail he married the minor girl. The judge ensured compliance with the undertaking and released the accused. This judgement is in inconsistency with the crux of the Protection of Children against Sexual Offences Act. The Act is to safeguard children from 'sexual assault, sexual harassment and child pornography' and not to give legitimacy to child marriage.<sup>195</sup>

The Act has consolidated the various Supreme Court and High Court guidelines and directions relating to child victims and witnesses and strengthened the legal provisions for the protection of children from sexual abuse and exploitation. It incorporates child-friendly mechanism and procedures for reporting, medical examination, recording of child statement, investigation, maintaining respect and dignity of child victims during trial in courts, and ensuring care and protection to the child at every stage of the legal process.<sup>196</sup>

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<sup>194</sup>SC No. 78/2013, decided on 13<sup>th</sup> August 2013.

<sup>195</sup>Supra note 4, p. 417.

<sup>196</sup>Ibid, p.374.

### **2.3.9. THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015**

Since the mid nineteenth century, the law relating to Juvenile Justice gradually evolved in India. The Juvenile Justice (Care and Protection of Children) Act, has been amended time and again in order to meet the changing circumstances and to protect the children who are in ‘conflict with law’ and who are in ‘need of care’. The amendment of the Act is done taking into consideration the standards prescribed in the United Nations Convention on the Rights of the Child, 1989.

The Juvenile Justice Act, 2000 has been amended twice in 2006 and 2011 to make it more child-friendly. A 23-year-old Nirbhaya, a paramedical student, was gang raped by six persons on a moving bus in Delhi and one of them was found to be a minor, just few months short of turning 18. The teenager was found guilty of taking part in the gang rape. In fact, during the pendency of the trial, the juvenile accused attained majority. Yet, he was tried as a juvenile as the law treats a person as a juvenile if at the time of the commission of offence he was below 18 years of age. He was sent to a correctional home for 3 years as per the Juvenile Justice Act 2000. The case against the juvenile offender had sparked a lot of public outrage with demands being raised to bring down the age to be declared juvenile from 18 to 16 years. After this, the juvenile justice legislation after that had been subject to intense debate among scholars, professionals, civil society, people’s organisations, and the state.<sup>197</sup>

The Ministry of Women and Child Development had introduced the Juvenile Justice Bill, 2014 in the Lok Sabha on 12<sup>th</sup> August 2014. This draft bill provisions responded to the perceptions, articulated by a wide cross-section of society for the need to have

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<sup>197</sup>Ibid, p. 576-577.



an effective and strengthened system of administration of juvenile justice care and protection. The proposed legislation, which would replace the existing Juvenile Justice Act, 2000, clearly defined and classified offences as petty, serious and heinous, and defined differentiated processes for each category. Recognizing the rights of the victims as being equally important as the right of juveniles, special provisions were proposed to tackle heinous offences committed by individuals in this age group. Further, a Parliamentary Standing Committee on Human Resource Development was set up for examination of the bill.<sup>198</sup> The passing of the act was promoted by a public outcry on the release of the minor involved in the gruesome Nirbhaya gang rape incident on completion of his 3 year term in a juvenile home.<sup>199</sup>

On 1<sup>st</sup> January 2016, the Juvenile Justice (Care and Protection of Children) Act, 2015 came into force. The Act was formulated in order to provide children with their basic needs who are in ‘conflict with law’ and ‘children in need of care and protection’. “To dispose of matters in the best interest of children”.<sup>200</sup> The Act was formulated because it was realized that the justice system that existed for adults is inappropriate for being applied to children.

There are three categories of offences under the Act:

- Petty Offences<sup>201</sup> - offences for which the maximum punishment under the Indian Penal Code or other law for the time being in force is imprisonment up to 3 years.

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<sup>198</sup>Ibid, p.577.

<sup>199</sup>Ibid, p. 581

<sup>200</sup>Supra note 25.

<sup>201</sup>Ibid, Section 2(45): “Petty offences includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to 3 years”.

- Serious Offences<sup>202</sup> - offences for which the punishment under the Indian Penal Code or other law for the time being in force is imprisonment between 3 to 7 years.
- Heinous Offences<sup>203</sup> - offences for which the maximum punishment under the Indian Penal Code or other law for the time being in force is imprisonment for 7 years or more.

The word juvenile has been replaced by the word child in the Act.<sup>204</sup> This Act prescribes certain rights to the children, like right to be presumed innocent,<sup>205</sup> right to dignity,<sup>206</sup> right to be heard,<sup>207</sup> right to safety,<sup>208</sup> right to equality and non-discrimination,<sup>209</sup> right to privacy,<sup>210</sup> “right to be re-united with his family”,<sup>211</sup> right to a fair hearing and right to review.<sup>212</sup> In order to protect these rights, the ‘central

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<sup>202</sup>Ibid, Section 2(54): “Serious offences includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force is imprisonment between 3 and 7 years.”

<sup>203</sup>Ibid, Section 2(33): “Heinous offences includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for 7 years or more.”

<sup>204</sup>Ibid, Section 2(13): ‘Child in conflict with law’ means a child who is alleged or found to have committed an offence and who has not completed 18 years of age on the date of commission of such offence.

<sup>205</sup>Ibid, Section 3(i): “Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

<sup>206</sup>Ibid, Section 3(ii): “Principle of dignity and worth: All human beings shall be treated with equal dignity and rights”.

<sup>207</sup>Ibid, Section 3(iii): “Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s view shall be taken into consideration with due regard to the age and maturity of the child”.

<sup>208</sup>Ibid, Section 3(vi) “Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreated while in contact with the care and protection system, and thereafter”.

<sup>209</sup>Ibid, Section 3(x): “Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability or offences committed, and equality of access, opportunity and treatment shall be provided to every child”.

<sup>210</sup>Ibid, Section 3(xi): “Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process”.

<sup>211</sup>Ibid, Section 3(xiii): “Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest”.

<sup>212</sup>Ibid, Section 3(xvi): “Principle of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act”.

government, state governments, the board and other agencies' must be guided by the above mentioned rights while applying the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.

When the police arrest a child who is alleged to be in conflict with the law, the child must be produced before the Board within twenty-four hours of his arrest. Under no circumstances a child who is in conflict with law will be placed in a police prison or in a lockup.<sup>213</sup> When a child commits an offence and is arrested by the police or produced before the Board, the child ought to be released on bail. The bail of the alleged child can be rejected if there is an apprehension that the child upon his release will ally with a criminal or exhibit a child to the perils.<sup>214</sup> When the bail of the alleged child is rejected, the child must be 'kept only in an observation home'.<sup>215</sup> Once the responsibility of the child is assigned to a person by the Board, the said person ought to care, safeguard, protect the child as his own child.<sup>216</sup>

As soon as the child is arrested, the 'Child Welfare Police Officer' or the 'Special Juvenile Police Unit' must inform the child's parents or the guardian about the arrest and ask them to come at the Board where the child is to be produced. The 'Child Welfare Police Officer' or the 'Special Juvenile Police Unit' must also inform the 'Probation Officer' and in his absence to the 'Child Welfare Office' about the arrest. They need to prepare a 'social investigation report' and must be presented before the Board within two weeks. The Board must inform the 'Probation Officer' and in his absence the 'Child Welfare Office' once the child is realised on bail.<sup>217</sup>

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<sup>213</sup>Ibid, Section 10.

<sup>214</sup>Ibid, Section 12(1).

<sup>215</sup>Ibid, Section 12(2).

<sup>216</sup>Ibid, Section 11.

<sup>217</sup>Ibid, Section 13.

When a child (who is above sixteen years of age) is alleged to have committed a 'heinous offence', the mental and physical ability of a child, his capability to understand the nature and the consequences of the offence is examined.<sup>218</sup> When the lawsuit of the alleged child is unsettled, the 'Chief Judicial Magistrate' or the 'Chief Metropolitan Magistrate' directs the Board for speedy settlement of the case.<sup>219</sup>

When a child brought before the Board is not found to be in 'conflict with law', the Board will 'pass order to that effect'.<sup>220</sup> If the Board feels that there is prerequisite of 'care and protection' to the child, the child may be referred to the 'Committee' with proper instructions.<sup>221</sup> When a child brought before the Board is found to be in 'conflict with law', the Board may:

- Give counselling to the child and his parents and the guardian and permit the child to go home;<sup>222</sup>
- Order the child to join group counselling;<sup>223</sup>
- Order the child to participate in social services;<sup>224</sup>
- Order to pay fine;<sup>225</sup>

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<sup>218</sup>Ibid, Section 15(1).

<sup>219</sup>Ibid, Section 16: "Review of pendency of inquiry:

(1)The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board once in every three months, and shall direct the Board to increase the frequency of its sittings or may recommend the constitution of additional Boards.

(2)The number of cases pending before the Board, duration of such pendency, nature of pendency and reasons thereof shall be reviewed in every six months by a high level committee consisting of the Executive Chairperson of the State Legal Services Authority, who shall be the Chairperson, the Home Secretary, the Secretary responsible for the implementation of this Act in the State and a representative from a voluntary or non-governmental organisation to be nominated by the Chairperson.

(3) The information of such pendency shall also be furnished by the Board to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate and the District Magistrate on quarterly basis in such form as may be prescribed by the State Government"

<sup>220</sup>Ibid, Section 17(1).

<sup>221</sup>Ibid, Section 17(2).

<sup>222</sup>Ibid, Section 18(1)(a).

<sup>223</sup>Ibid, Section 18(1)(b).

<sup>224</sup>Ibid, Section 18(1)(c).

<sup>225</sup>Ibid, Section 18(1)(d).

- Release the child on ‘probation of good conduct’;<sup>226</sup>
- Direct the child to a ‘special home’;<sup>227</sup>
- Order the child to attend school;<sup>228</sup>
- Join a vocational training course;<sup>229</sup>
- Join a therapeutic centre;<sup>230</sup>
- Restrict the child from going to specified places;<sup>231</sup>
- Start de-addiction course.<sup>232</sup>

In every district, a ‘Child Welfare Committee’ must be established by the State Government. The ‘Child Welfare Committee’ has a duty to protect the children who is in ‘need of care’ under the Act.<sup>233</sup> A member of the ‘Committee’ can be appointed only when he is actively working for minimum of seven years, for the betterment of the children’s health, education and welfare; has a degree in child psychology or psychiatry or law or he is a social worker.<sup>234</sup> A child himself or the police officer, government worker, child line service, non-governmental organisation, child welfare officer, probation officer, social worker, nurse, doctor may produce the child who is in ‘need of care and protection’ before the ‘Committee’.<sup>235</sup> Any person who finds a deserted or lost child, a child without family support, a child who is an orphan must inform the ‘Child line services’ or the police station or a ‘Child Welfare Committee’ or the ‘District Child Protection Unit’ or the child must be entrusted to child care

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<sup>226</sup>Ibid, Section 18(1)(e).

<sup>227</sup>Ibid, Section 18(1)(g).

<sup>228</sup>Ibid, Section 18(2)(i).

<sup>229</sup>Ibid, Section 18(2)(ii).

<sup>230</sup>Ibid, Section 18(2)(iii).

<sup>231</sup>Ibid, Section 18(2)(iv).

<sup>232</sup>Ibid, Section 18(2)(v).

<sup>233</sup>Ibid, Section 27(1).

<sup>234</sup>Ibid, Section 27(4).

<sup>235</sup>Ibid, Section 31.

institution.<sup>236</sup> The committee takes all possible measures to find the child's parents or guardian if the child is deserted or lost. If it is found that the child is an orphan without any support, the committee will proclaim the 'child legally free for adoption'.<sup>237</sup> The committee by an order, may place the child in foster care when there is a necessity of care, maintenance and security.<sup>238</sup> A foster family shall be selected on the basis of the family's capability, skill, competence, experience in child care.<sup>239</sup> Every possible effort shall be made not to split siblings while assigning a foster family.<sup>240</sup> It is the duty of the foster family to look after the child's health, nourishment, education, and overall development.<sup>241</sup>

Every child has a right to family. In order to protect this right Section 56 of the Act lays down the provision for 'adoption'. According to Section 56(1) "adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children. As per the provisions of this Act, the rules made there under and the adoption regulations framed by the Authority."<sup>242</sup>

Children in India are born into unfortunate conditions that drives them towards exploitation and violence. Showing the correlation between poverty and juvenile crime, Justice Chandrachud quoted the National Crime Records Bureau statistics which shows that in 2015, approximately 42% of the child offenders come from families whose annual income was below rupees 25,000 and about 28% from families having an income ranging between rupees 25,000 to 50,000 while a minuscule 2%

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<sup>236</sup>Ibid, Section 32(1).

<sup>237</sup>Ibid, Section 38

<sup>238</sup>Ibid, Section 44(1).

<sup>239</sup>Ibid, Section 44(2).

<sup>240</sup>Ibid, Section 44(3).

<sup>241</sup>Ibid, Section 44(6).

<sup>242</sup>Ibid, Section 56(1).

hailed from families within a higher income bracket.<sup>243</sup> Therefore, he was of the view that children in India often “inherit crime”, because they are born into unfortunate circumstances that pushes them towards substance abuse and violence.<sup>244</sup> Justice Chandrachud stated that “Given the deplorable conditions most children live in, these children in conflict with the law are not just offenders but in many cases they are children in need of care of protection.”<sup>245</sup> He further added that “a more holistic approach focused on aspects of deprivation and poverty is needed... we need to examine the role played by the various stakeholders in the juvenile justice system, from the government to the civil society to the private sector, in providing infrastructural support as well as human intervention.”<sup>246</sup> Accepting that “we have some reason to be sanguine about the implementation of the juvenile justice system.” He pointed out a pilot project started in Jabalpur concerning the economic independence and skill improvement of children in observation homes, where these are tendered vocational training and the money earned through their participation in horticulture, music, culture and handicrafts is deposited in their joint accounts. He also mentioned the initiative taken by the State of Gujarat to employ the “Public-Private Partnership” model in streamlining funds contributed towards the corporate social responsibility and using its improvement in conditions of life of the children in child care institutions. Lastly, he emphasised that dealing with the lives of some of the most vulnerable children in the Indian society, the Juvenile Justice system cannot

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<sup>243</sup> Justice Chandrachud while delivering the keynote address at the National Juvenile Justice Consultation organized by the Supreme Court on Juvenile Justice and UNICEF.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

operate as an “impersonal” system and urged that all functionaries adopt a compassionate method in catering to the children under their care.<sup>247</sup>

#### **2.4. PART B: CHILD RIGHTS UNDER THE INTERNATIONAL INSTRUMENTS**

Since the beginning of the twentieth century, the International Law on the rights of the child has developed. Three steps were involved in the process of developing the international law on the rights of the child. The first step involved in recognition by the international community that all individuals including children were the objects of international law, requiring legal protection. The second step is giving the required basic rights to individuals including children. The third step is that, in order to ensure that the individuals are able to enjoy the exercise of their fundamental rights, they must be acknowledged to possess the necessary procedural capacity to exercise and claim these rights and freedom.<sup>248</sup>

Commitments for the safeguard of children coexisted in different international treaties and resolutions since the League of Nations days.<sup>249</sup> Declaration of the Rights of Child also known as the ‘Geneva Declaration’ was adopted on 26<sup>th</sup> September 1924. It stated that suitable means should be offered for the child’s ‘physical and spiritual development’ and, in particular, provide for the education and safeguard of a child from abuse.<sup>250</sup> The 1948 Universal Declaration on Human Rights stated that children are authorised to special care and support. The United Nation General Assembly on 20<sup>th</sup> November 1959, adopted the United Nation Declaration on the Rights of the child. Immediately after 30 years, the General Assembly adopted the Convention on

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<sup>247</sup>Ibid.

<sup>248</sup>Supra note 4, p.22.

<sup>249</sup>Supra note 82, p. 79

<sup>250</sup>Ibid.



the Rights of the Child. The Convention has been articulated as the most comprehensive statement of children's right with force of International Law.<sup>251</sup>

#### **2.4.1. INTERNATIONAL BILL OF RIGHTS**

The International Bill of Human Rights consists of the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights and its two Optional Protocols.

- Universal Declaration of Human Rights, 1948 (hereafter UDHR) is a document containing general human rights including that of children. The Preamble of the UDHR states that 'freedom, justice and peace in the world' can be achieved by respecting the fundamental rights of all human being.<sup>252</sup> The UDHR comprises of 30 Articles. It lays down the fundamental principles of human rights. Every human being has an inalienable right to be born free and equal and in dignity,<sup>253</sup> right to freedoms contained in the declaration and right to non-discrimination,<sup>254</sup> right to life, liberty and security,<sup>255</sup> right against

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<sup>251</sup>Ibid.

<sup>252</sup>Universal Declaration of Human Rights 1948, "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

<sup>253</sup>Ibid, Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

<sup>254</sup>Ibid, Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

<sup>255</sup>Ibid, Article 3: "Everyone has the right to life, liberty and the security of person."

torture, inhuman or degrading treatment or punishment;<sup>256</sup> right to equality;<sup>257</sup> right to free and fair public hearing;<sup>258</sup> right to privacy, family, home and correspondence;<sup>259</sup> right to movement and to reside within the borders of a state;<sup>260</sup> right to seek asylum;<sup>261</sup> right to nationality;<sup>262</sup> right to marry and to found a family;<sup>263</sup> right to own property;<sup>264</sup> right to freedom of thought, conscience and religion;<sup>265</sup> freedom of expression;<sup>266</sup> freedom of peaceful

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<sup>256</sup>Ibid, Article 4: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”

<sup>257</sup>Ibid, Article 7: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>258</sup>Ibid, Article 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

<sup>259</sup>Ibid, Article 12: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attack.”

<sup>260</sup>Ibid, Article 13:

“1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.”

<sup>261</sup>Ibid, Article 14:

“1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. The right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

<sup>262</sup>Ibid, Article 15:

“1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

<sup>263</sup>Ibid, Article 16:

“1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to form a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

<sup>264</sup>Ibid, Article 17:

“1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.”

<sup>265</sup>Ibid, Article 18: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

<sup>266</sup>Ibid, Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

assembly and association;<sup>267</sup> right to social security;<sup>268</sup> right to work;<sup>269</sup> right to rest and leisure;<sup>270</sup> right to health.<sup>271</sup> Two Articles of UDHR specially and expressly deal with child rights. Article 25(2) of the UDHR emphasises upon the rights of children to special care and assistance through direct child rights protection and through motherhood protection.<sup>272</sup> Article 26 of UDHR emphasizes on access and aim to education.<sup>273</sup> This is not a binding resolution but has helped in laying down certain common standards for children worldwide.

The UDHR was adopted in 1948 just a year before the Indian Constitution was adopted in 1949. The Constitution of India is greatly inclined towards the rights prescribed in the UDHR. There is a close resemblance between the

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<sup>267</sup>Ibid, Article 20:

“1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.”

<sup>268</sup>Ibid, Article 22: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

<sup>269</sup>Ibid, Article 23:

“1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.”

<sup>270</sup>Ibid, Article 24: “Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”

<sup>271</sup>Ibid, Article 25(1): “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

<sup>272</sup>Ibid, Article 25(2) “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”.

<sup>273</sup>Ibid, Article 26 “(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.”

rights contained in the UDHR and the Indian Constitution in Part III and Part IV.<sup>274</sup> In *Keshwanand Bharati v. State of Kerala*,<sup>275</sup> the Supreme Court observed that the UDHR created a path for India while adopting the Constitution, to understand the nature of Human Rights. Even though the UDHR is not a legally binding instrument in India.

- International Covenant on Civil and Political Rights, 1966 (hereafter ICCPR) emphasizes that children deserve special measures of protection and assistance. Special provision for the rights of the children is guaranteed under Article 14(1) of the Covenant.<sup>276</sup> This Article of the covenant provides an express exception to the rights to a hearing in public, when it is in the interest of the juveniles or where it concerns the guardianship of children. Article 14(3) states that in criminal proceedings the age of the child and the desirability of promoting their rehabilitation must be considered. Article 10(3) of the covenant obliges states to separate accused juveniles from accused adults and bring them as speedily as possible for adjudication and accord them treatment to their age and legal status.<sup>277</sup> Article 18(4) of the covenant, the states are obliged to respect the liberty of parents to ensure the religious and moral

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<sup>274</sup>H.O. Agarwal, *International Law and Human Rights* (Central Law Publication, 20<sup>th</sup> edn., 2014) p.790.

<sup>275</sup>AIR 1973 SC 1461, 1510.

<sup>276</sup>International Covenant on Civil and Political Rights (ICCPR) 1966, Article 14(1) “All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him or of his rights and obligations in a suit at law everyone shall be entitled to fair and public hearing by a competent independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morality, public order [ordre public] or national security in a democratic society, or when the interest of the private lives of the parties so required, or to the extent strictly necessary in the opinion of the court in special circumstances, where publicity would prejudice the interest of justice, but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”.

<sup>277</sup>Ibid, Article 10(3) “The penitentiary system shall comprise treatment of prisoners for essential aim of which shall be their reformation and social rehabilitation, Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

education of the children.<sup>278</sup> Article 23(4) of the covenant lays down the states parties must take proper steps when a marriage is terminated, and a provision shall be made to safeguard the children born out of the wedlock.<sup>279</sup> Article 24<sup>280</sup> of the Covenant specifically deals with children. It states that a child shall not be discriminated on the basis of religion, race, sex, or any other factor. From the birth of a child, he shall be entitled to a name and a nationality.

- International Covenant on Economic, Social, and Cultural Rights, 1966 is applicable to all human beings. Therefore, all the rights contained in the covenant are also applicable to children as well. Article 2(2) of the Covenant lays down that the rights documented in the Covenant will be applied without any discrimination on the basis of religion, race, sex, or any other factor by the State Parties.<sup>281</sup> Article 13<sup>282</sup> and 14<sup>283</sup> of the Covenant includes right to

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<sup>278</sup>Ibid, Article 18(4) “The state parties to the present covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”.

<sup>279</sup>Ibid, Article 23(4): “States Parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for necessary protection of any children”.

<sup>280</sup>Ibid, Article 24 “(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

(2) Every child shall be registered immediately after birth and shall have a name.

(3) Every child has the right to acquire a nationality”.

<sup>281</sup>International Covenant on Economic, Social, and Cultural Rights, 1966, Article 2(2): “The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>282</sup>Ibid, Article 13:

“1. The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.

2. The State Parties to the present Covenant recognize that with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

education. It states that primary education must be compulsory and free. Secondary education and higher education shall be made available to all. Article 10 and 12 of the covenant specifically mentions about children. Article 10<sup>284</sup> of the Covenant lays down that possible safeguard and support to be rendered to family especially for child care and child education. It also points out that children should be given special protection without any kind of discrimination. The children should not be exploited and child labour should

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(b) Secondary education in its different forms, including technical and vocational secondary education shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The State Parties to the present Covenant undertake to have respect for the liberty of parents and when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral educations, of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that education given in such institution shall conform to such minimum standards as may be laid down by the state.

<sup>283</sup>Ibid, Article 14: “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years to be fixed in the plan of the principle of compulsory education free of charge for all.”

<sup>284</sup>Ibid, Article 10, “The state parties to the present covenant recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after child birth. During such period working mothers should be accorded paid leave or leave with adequate security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punished by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law”.

be prohibited. Article 12<sup>285</sup> of the Covenant includes right to everyone to have supreme possible standard of ‘physical and mental health’.

#### **2.4.2. DECLARATION OF THE RIGHTS OF CHILD, 1924**

The League of Nation’s General Assembly on 26<sup>th</sup> September 1924 adopted a Declaration of the Rights of Child also known as the ‘Geneva Declaration’. The first International Instrument dealing with Children’s Right is the Declaration of 1924. This declaration holds a significant position in human rights as it referred to the rights of children for the first time. This declaration is established on the belief that children are the vulnerable section of the society. Therefore, children need special supervision, help and security.<sup>286</sup> The preamble of the Declaration declares that “the mankind owes to the child the best it has to give”.<sup>287</sup>

The five main principles of the Declaration are<sup>288</sup>: -

- The basic requirements for the development of the child psychologically, spiritually and emotionally must be provided to the child.
- The child who is hungry must be fed, the sick must be nursed, the backward must be helped, the delinquent must be reclaimed, and the orphan and the waif must be sheltered and scoured.

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<sup>285</sup>Ibid, Article 12 “1. The state parties to the present covenant recognise the right to everyone to the enjoyment of the highest attainable standards of physical and mental health.  
2. The steps to be taken by the State parties to the present covenant to achieve the full realization of this right shall include those necessary for  
(a) the provision for the reduction of the still birth rate and of infant mortality and for healthy development of the child.  
(b) the improvement of all aspects of environment and industrial hygiene.  
(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases.  
(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness”.

<sup>286</sup>Katharina Stornig, ‘Geneva, 1924: The Geneva Declaration of the Rights of the Child’, Online Atlas on the History of Humanitarianism and Human Rights, accessed on 3<sup>rd</sup> July 2019.

<sup>287</sup>Declaration of the rights of child, 1924.

<sup>288</sup>Supra note3, p.328.

- In times of distress the child must be the first one to receive relief.
- The child must be brought up in such a condition that he can earn livelihood. The child should be safeguarded from exploitation.
- The child must be brought up in the consciousness that its talent must be developed to the service of its fellow men.

The base of child rights was recognised by the above five main principles of the Declaration.<sup>289</sup> The Declaration pointed out that the ‘welfare of the child’ is the concern of the world at large rather than one society or one nation.<sup>290</sup> The whole world should strive to protect the rights of the child.

The League of Nations was not able to stop another World War. World War two engulfed and it affected thousands of children. The United Nation’s General Assembly on 11<sup>th</sup> December 1946, stated new principles to safeguard, maintain and care for the children. Therefore, it established the ‘United Nations International Children Emergency Fund’ (hereafter UNICEF) to help the displaced and refugee children who are deprived of food and shelter. The words ‘International’ and ‘Emergency’ is removed from the official name. Now it is known as ‘United Nations Children Fund’. UNICEF is working in India since 1949.

### **2.4.3. UNITED NATIONS DECLARATION ON THE RIGHTS OF CHILD, 1959**

The Declaration of the Rights of Child, 1959 makes reference in its preamble of both United Nations Charter and the Universal declaration of the Human Rights. The

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<sup>289</sup>Supra note 27, p. 10.

<sup>290</sup>Ibid.



preamble mentions about the special protection and care including proper legal protection required by children. The Declaration of 1959 restates the pledge of declaration of the Rights of Child 1924, “that the mankind owes to the child the best it has to give”.

Principle 1 of the declaration states that “the child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.”<sup>291</sup> The declaration also states that “the child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity”.<sup>292</sup> From the birth of a child, he shall be entitled to a “name and to a nationality”.<sup>293</sup> “The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.”<sup>294</sup> The Declaration also lays down that special care shall be provided to ‘physically, mentally or socially handicapped’ children.<sup>295</sup> “The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material

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<sup>291</sup>Supra 287, Principle 1.

<sup>292</sup>Ibid, Principle 2.

<sup>293</sup>Ibid, Principle 3.

<sup>294</sup>Ibid, Principle 4.

<sup>295</sup>Ibid, Principle 5.

security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Societies and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.”<sup>296</sup> The Declaration also provides a principle which lays down free and compulsory education to children. To improve his capabilities, to have a distinct judgement. To be trustworthy. The onus to provide education to a child lies with the parents. It also upholds that children are authorised to be safeguarded and that such safeguard ought to be instigated by reference to the “best interest of the child” as the utmost consideration.<sup>297</sup> A child in any situation shall be “the first to receive protection and relief”.<sup>298</sup> He shall be safeguarded against all forms of mistreatment, brutality and abuse and shall not be employed.<sup>299</sup> A child shall not be differentiated on the basis of his religion, race or any other factor.<sup>300</sup>

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<sup>296</sup>Ibid, Principle 6.

<sup>297</sup>Ibid, Principle 7: “The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.”

<sup>298</sup>Ibid, Principle 8.

<sup>299</sup>Ibid, Principle 9: “The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.”

<sup>300</sup>Ibid, Principle 10: “The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.”

#### **2.4.4. UNITED NATION CONVENTION ON THE RIGHTS OF THE CHILD, 1989**

On 20<sup>th</sup> November 1989, the Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly Resolution. The former United Nation Declaration on the Rights of the Child, 1959 although an international instrument, did not carry any compulsory legal responsibilities, while the Convention on the Rights of the Child, 1989 obliges the signatory states for an active ratification of the rights laid down in the Convention. The Convention acknowledges children's specific vulnerability and discusses not only civil and political rights, but also social, cultural and humanitarian rights which are commonly dependent.<sup>301</sup> United Nations Convention on the Rights of the Child is a landmark in the international movement for the protection of Child Rights. The Convention sets a universal legal principle for the safeguard and well-being of children. The children are to be protected from exploitation, abuse and torture. The United Nations have maintained their faith in fundamental human rights and in dignity and worth of the human beings and have determined to promote social progress and better standards of life in larger freedom. Keeping this in mind the Convention on the rights of the child was adopted.

The Preamble of the Convention on the Rights of the Child states, "the states parties to the present convention, considering that, in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".<sup>302</sup> The Convention on the

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<sup>301</sup>Supra note 82, p. 79-80

<sup>302</sup>Convention on the Rights of the Child,1989.

Rights of the Child is formulated in accordance with the Charter of United Nation. It states that all human beings have right to freedom and a right to better standard of life. Children are to be provided with special care and support. A healthy family environment should be provided to a child where the child gets love, happiness and understanding.

In the Convention on the Rights of the Child, the main responsibility is kept on the parents and then on the State parties to take all proper methods to guarantee that the child is safeguarded against all forms of discrimination due to the status of parents or family.<sup>303</sup> Article 2 of the Convention on the Rights of the Child, lays down that “the State Parties shall respect and ensure the rights laid down in the Convention to each child”.<sup>304</sup> There shall be no discrimination on the basis of race, language, religion, sex, etc. If there is any kind of discrimination, the state parties shall take proper measures to safeguard the child from discrimination. The best interest of the child shall be the paramount consideration in actions regarding children.<sup>305</sup> Right to life is granted to each child.<sup>306</sup> Every child has the right to name, nationality, right to know and right to be cared by his parents.<sup>307</sup> The child should not be separated from his or her parents, except in cases where separation is necessary for the best interest of the child.<sup>308</sup>

When a child can form his or her own view, the child has a right to express his or her

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<sup>303</sup>Vijender Kumar, “Impact of Divorce on Children: A socio-economic and legal study”, 16NALSAR Law Review (2011), p. 127.

<sup>304</sup>Supra 302, Article 2.

<sup>305</sup>Ibid, Article 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.”

<sup>306</sup>Ibid, Article 6(1): “States Parties recognise that every child has inherent right to life.”

<sup>307</sup>Ibid, Article 7(1): “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared by his or her parents.”

<sup>308</sup>Ibid, Article 9(1): “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as the one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

views freely,<sup>309</sup> right to freedom of expression,<sup>310</sup> right to freedom of thought, conscience and religion,<sup>311</sup> freedom of association, freedom of peaceful assembly,<sup>312</sup> right to protection from unlawful interference and attack,<sup>313</sup> right to health,<sup>314</sup> right to standard of living which is required for child development,<sup>315</sup> right to education,<sup>316</sup> right to recreation and to participate in cultural life and art,<sup>317</sup> right against exploitation<sup>318</sup> is to be ensured by the States Parties and it should be guaranteed to the child. A disabled child has a right to special care.<sup>319</sup>

The countries that have ratified the convention shall take suitable measures to safeguard the child from:

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<sup>309</sup>Ibid, Article 12(1): "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

<sup>310</sup>Ibid, Article 13(1): "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."

<sup>311</sup>Ibid, Article 14(1): "States Parties shall respect the right of the child to freedom of thought, conscience and religion."

<sup>312</sup>Ibid, Article 15(1): "States Parties recognise the rights of the child freedom of association and to freedom of peaceful assembly."

<sup>313</sup>Ibid, Article 16(2): "The child has the right to the protection of law against such interference or attacks."

<sup>314</sup>Ibid, Article 24(1): "States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."

<sup>315</sup>Ibid, Article 27(1): "State Parties recognise the right of every child to a standard of living, adequate for the child's physical, mental, spiritual, moral and social development."

<sup>316</sup>Ibid, Article 28(1): "State Parties recognise the right of the child to education, and with a view to achieve this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education free and compulsory and available to all children;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make education and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at school and the reduction of drop-out rates."

<sup>317</sup>Ibid, Article 31(1): "States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts."

<sup>318</sup>Ibid, Article 36: "States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."

<sup>319</sup>Ibid, Article 23(2): "States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or other caring for the child."

- Illegal use, making and trading of ‘narcotic drugs and psychotropic substances’.<sup>320</sup>
- Sexual abuse and exploitation.<sup>321</sup>
- Abduction, sale or trafficking.<sup>322</sup>

Article 45 of the Convention on the Rights of the Child, states that specialized agencies, the United Nations Children’s Fund (UNICEF) and other United Nations Organs are entitled to be present at meetings of the Committee on the Rights of the Child that fall within the scope of their mandates. The Committee can solicit expert advice, ask for reports to be submitted, transmit requests for assistance from states parties to various agencies or NGOs, and request that the United Nations Secretary-General conduct studies.<sup>323</sup>

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<sup>320</sup>Ibid, Article 33: “States Parties shall take appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant International Treaties, and to prevent the use of children in illicit production and trafficking of such substances.”

<sup>321</sup>Ibid, Article 34: “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

<sup>322</sup>Ibid, Article 35: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

<sup>323</sup>Ibid, Article 45: “In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children’s Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children’s Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children’s Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children’s Fund and other competent bodies, any reports from State Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee’s observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on the behalf studies on specific issues relating to the rights of the child;

What separates the Convention on the Rights of the Child from other human rights treaties is the provision laid down in Article 45 of the Convention. Other human rights treaties have not managed to establish ad hoc, informal information gathering techniques, but in the Convention on the Rights of the Child, these measures were written into the formal processes. This Article gives the members of the committee on the Rights of the Child a number of different powers which they have taken upon themselves to enlarge and interpret in a way that is very constructive.<sup>324</sup>

On 2<sup>nd</sup> September 1990, India became signatory to Convention on the Rights of the Child and ratified it in the year 1992. It is mandatory for the Government of India to implement the rights contained in the Convention. Therefore, taking into consideration the standards prescribed in the United Nations Convention on the Rights of the Child, 1989, India has enacted the following Acts to safeguard the children:

- Protection of Children against Sexual Offences Act, 2012 was enacted in order to prevent child sexual abuse.
- The Juvenile Justice (Care and Protection of Children) Act.
- Right to Education Act, 2009.

## **2.5. CONCLUSION**

The national and the international law have laid down the basic standards for the children. Even though there are surplus legislations at both national and international

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(d)The Committee may make suggestions and general recommendations based on information received pursuant to Article 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and report to the General Assembly, together with comments, if any, from States Parties.

<sup>324</sup>Cynthia Price Cohen, Rebeca Rios-Kohn, et.al., “The United Nation Convention on the Rights of the Child”, 91ASIL (1997), p.74.

levels dealing with the rights of the child. The rights of the child are not guaranteed properly. Child Rights are infringed. Many children in India are deprived from the basic standards fixed by law. Reports from all over the world shows how children are misused, abandoned, exploited and abused in society.

As India is one of the signatories of the United Nations Convention on the Rights of the Child, 1989, and has ratified the convention, an agreement deciding a uniform upper age limit of children could have been made and thereafter an amendment could have been made in the laws. Nevertheless, till date no effort has been made to standardise the upper age limit of children.<sup>325</sup> Still in India, different legislations have different upper age limits for childhood. Until and unless there is uniformity in the age limit for childhood, it is very difficult to make a strong legislation to protect the child rights. There has to be a harmonization of the upper age limit for childhood in order to protect the rights of the child.

In India, different legislations specify different age limits for determining a human being as a child. Whether a person will fall under the category of a child will depend upon the law that is being invoked in a given case. This difference creates unfairness and inequality.<sup>326</sup> For example, a person is considered a child till fourteen years of age under the 'Right to Education Act' and 'Child Labour (Prohibition and Regulation) Amendment Act'. However, the same person is considered a child till eighteen years of age under the 'Protection of Children against Sexual Offences Act' and 'Juvenile Justice (Care and Protection of Children) Act'. Children don't just rely on school for education, they are relying on school for nutritious meals, a safe shelter from violence, and access to clean water and sanitation.

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<sup>325</sup> Ambarish Rai, Sneha Patil, et.at. (eds.), "Child Rights in India: Contemporary Challenges", 13JNHRC (2014), p.133.

<sup>326</sup>Supra note 27, p. 53.



When we talk or think of child labour, one pictures a child working in factories or in a tea stall. However, in some families, whole family is involved in the business for example ironing clothes, and often the children work as carriers, fetching the clothes and returning the ironed ones. Often a maid brings along her girl child to work and the girl ends up working. Most of them do not go to a school or, do not finish primary school. Many are married off at a young age.

The root cause to deprive a child his right to education and force the child to work is largely due to the existence of poverty in India. Once a child starts to work, his happiness is lost, he grows much faster without enjoying his childhood. Overall his childhood is endangered. There is a high risk for a child to be exposed to sexual abuse by his employer and co-workers. Moreover, if the child is not educated he is forced to do labour-intensive work, his opportunities will be limited which will surely damage his future. Children are seen selling balloons, flags, toys and books at railway stations and traffic signals. We see a large number of children begging, working in hotels. We witness children begging for food. So in order to eradicate child rights violation and child abuse, first we need to eradicate poverty. A large number of parents feel that learning to become a carpenter, cobbler or graze cattle and to look after the siblings rather than going to school will benefit their children. The income that is earned by the children is useful in most of the families but the parents need to be mindful that investing in the child's education is more important than the extra money that can be added for family expenditure.<sup>327</sup>

The practice of child marriage still prevails in India. Child marriage is a violation of the child rights and at large human rights. The ill effects of child marriage are severe

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<sup>327</sup>Supra note 82, p.84.

especially upon the girls. Most of the child marriage ends with divorce. As a result, the child born out of the marriage also suffers custody and guardianship issues. Child trafficking for immoral purpose is also rampant in India. The children who is in 'conflict with law' needs to be handled diligently. The reason for committing an offence must be understood. The rights of the children that are guaranteed under the Constitution of India and other legislations needs to be implemented properly. In order to combat child right violation, the basic rights fixed by the law needs to be implemented strictly. The legal system has to progress with the changing time to meet the needs of the child.

The children need to be aware of their rights. In every school, self-awareness programmes should be conducted. Child Rights should be incorporated in school syllabus. Where child rights in simple language can be taught to students so that they can be aware of their rights.

Society must not look down/differently upon a child who has been sexually abused. They need to be treated equally as they have done no wrong. Child abuse not only scars the child but also the family members.

We must endeavour to achieve the promise of the Convention and our Constitution to become a "living reality" for every child.<sup>328</sup> A child should be helped so that they realise their rights, the right to good nutrition and spread awareness about the need to free them from the burden of malnutrition. Every child has the right to a world that is healthy and sustainable.

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<sup>328</sup>Ibid, p. 88.

**CHAPTER 3**

**CHILD CUSTODY AND GUARDIANSHIP OF DIVORCED  
PARENTS: THE CONCEPT, DEFINITION, ISSUES AND  
CHALLENGES**

**3.1. INTRODUCTION**

During the ancient period, the king was under an obligation to help vulnerable people like senior citizens, children, orphans and widows, and provide them with food, accommodation and medicine.<sup>1</sup> According to P.V. Kane “as in Western Jurisprudence, so in India the king was looked upon as ‘parens patriae’<sup>2</sup>, the protector or guardian of all minors. Gaut X 48-49 and Manu VIII 27 prescribe that the king shall protect the property of a minor until he attains majority or until he returns from his teacher’s home”.<sup>3</sup> A person related with a minor can contend them as a guardian of minor’s property but ultimately it is the king who is to see that the minor’s property is protected.<sup>4</sup>

In India, marriage is considered very holy. In recent times, increasing number of married couples is undergoing distress and incompatibilities. Due to various socio-economic factors, there is a rapid rise in discontent marriages in India as a result of which, the rate of divorces and separations have gone up. By this unpredictable social disaster, the family courts and other courts are feeling helpless due to the rise in matrimonial problems related cases such as custody of children. “The family is the

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<sup>1</sup>Pandurang Vaman Kane, History of Dharmasastra Vol III (Bhandarkar Oriental Research Institute, 1941) p. 59.

<sup>2</sup>Parens Patriae is a Latin term meaning ‘parent of his or her country’. Parens Patriae is a doctrine that permits the state power and authority to protect individuals who are deemed legally unable to act on their own behalf.

<sup>3</sup>Supra note 1, p. 165.

<sup>4</sup>Ibid, p. 165-166.

building block of the society and marriage is its foundation.”<sup>5</sup> This foundation of society is shaken by the act of divorce. Divorce is almost permanently traumatic. It gives rise to certain issues like guardianship and custody of the children. In divorce proceedings the matter of custody is the most complicated issue which generates social, spiritual, financial, educational and legal problems in the society.

According to P.V. Kane, a guardian of the minor’s property must care for the property as it belonged to him and for any damage in the minor’s property, the guardian is accountable as a “depositee” for the damage.<sup>6</sup>

The law pertaining to guardianship and custody is connected. However, it is important to understand that guardianship and custody are two separate concepts. The concepts of guardianship and custody are misinterpreted and they are understood as the same concept. The custody of the minor cannot be interpreted to mean the duty of a guardian to look after the minor. Guardianship means looking after the minor’s person and property. The term ‘guardian’ is defined by the Guardians and Wards Act, 1890 as a “person having the care of the person of a minor or of his property or of both his person and property.”<sup>7</sup> The term “custody” is not defined in any of the legislations dealing with child custody issues. The legal position of all guardians being fiduciary, the guardians of all types are responsible personally for breach of trust.<sup>8</sup>

As India is a land of diversified culture, religion, race, etc. family matters like marriage, divorce, maintenance, custody and guardianship are governed by the personal laws of the party. India being a secular state, there exists a secular legislation

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<sup>5</sup>Patrick F. Fagan and Aaron Churchill, *The Effects of Divorce on Children* (Marriage research council, 2012) p.47.

<sup>6</sup>Supra note 1, p. 460-461.

<sup>7</sup>The Guardians and Wards Act, 1890, Section 4(2).

<sup>8</sup>Paras Diwan, *Modern Hindu Law*, (Allahabad Law Agency, 17<sup>th</sup> edn., 2006), p.261

(i.e. Guardians and the Wards Act, 1890) dealing with guardianship and custody of the minor. This law is applicable to all irrespective of religion. While assigning a guardian for the minor, the fundamental aim should be for the welfare of the minor. In case of a disagreement between the personal law of the minor and welfare of the child, the welfare of the child will always predominate.<sup>9</sup>

### **3.2. CHILD CUSTODY AND GUARDIANSHIP UNDER DIFFERENT RELIGIOUS LAWS**

In India there are four main religious laws i.e. Hindu law, Muslim law, Christian law, and Parsi law. The law governing child custody and guardianship under different religious laws is analysed.

#### **3.2.1. HINDU LAW**

Manu clearly proclaims “Custody of children vested of all children within the realm in the king as *parens patrie*”.<sup>10</sup> During the ancient period, people mostly lived in a joint Hindu family. The members of the joint Hindu family were protected by the Karta. The minor child was safeguarded by the Karta even after the death of the minor’s father. Mother had no status during the lifetime and after the death of her husband regarding the children matter. The minor children were safeguarded by the Guru in the Gurukula.

According to Hindu law, the sovereign of the state is the lawful guardian of all minors. As the sovereign of the state was unable to take proper care and protection of the minor children, the law of guardianship (Guardians and Wards Act, 1890) evolved in

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<sup>9</sup>Dinshaw Fardunji Mulla, *Mulla Principle of Mohammedan Law*, (Lexis Nexis, 22<sup>nd</sup> edn., 2019) p. 446.

<sup>10</sup>Hindu code (VIII), 27.

order to provide welfare to the minor children.<sup>11</sup> Under the Hindu law, the law of guardianship and custody is codified under the Hindu Minority and Guardianship Act, 1956 and the Hindu Marriage Act, 1955.

In *Mohini v. Virendra Kumar*,<sup>12</sup> the Hon'ble Supreme Court held that the mother is entitled to guardianship and custody of a minor of 11 years old in the interest of the welfare of the minor.

- **Guardianship:**

The Hindu Minority and Guardianship Act, 1956, has codified the law of guardianship of minor Hindu children. The term guardian under the Hindu Minority and Guardianship Act is defined as “a person having the care of the person of a minor or of his property or of both his person and property”.<sup>13</sup>

The Act has classified guardians as:

- Natural guardian;
- Testamentary guardian;
- Guardian appointed or declared by the court; and
- De facto guardian.

Natural Guardian: Father is the natural guardian and after him the mother is the natural guardian of his son and unmarried daughter.<sup>14</sup> Mother is the natural guardian and after her the father is the natural guardian of the illegitimate boy and an

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<sup>11</sup>Jyashree V. Doddawadmath, *Personal Law Relating to Women*, (Allahabad Law Agency, 1<sup>st</sup> edn., 2011) p. 140.

<sup>12</sup>AIR 1932 Oudh 182

<sup>13</sup>The Hindu Minority and Guardianship Act, 1956, Section 4(b).

<sup>14</sup>Ibid, Section 6(a): “The natural guardian of the Hindu minor; in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are – (a) in the case of a boy or an unmarried girl – the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.”

illegitimate unmarried daughter.<sup>15</sup> For the benefit of the minor child and his/her property, the natural guardian has the power to do all acts which is necessary or reasonable.<sup>16</sup>

In *Jijabai v. Pathan Khan*,<sup>17</sup> the Supreme Court recognised the mother's right of guardianship of her minor daughter even though father was alive taking into consideration the interest of the minor.

In *Sheela v. Soli*,<sup>18</sup> it had been held that conversion to another religion is not a ground to remove the mother's right of guardianship as long as she is able to provide a congenial, comfortable and happy home.

In *Surinder Koner v. Harbans Singh*,<sup>19</sup> the Hon'ble Supreme Court emphasising that though section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father's property of right of guardianship subject to the paramount consideration of the welfare of the minor.

In *Kumarsu Manikayala Rao v. Kumarsu Nagabhusanam*,<sup>20</sup> it has been held that once child goes in adoption, natural parents cease to be natural guardians of the child. Natural parents could be guardians of the child only if so appointed by the adoptive parents or by the court.

#### Testamentary Guardian: Section 9 of the Hindu Minority and Guardianship Act, 1956

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<sup>15</sup>Ibid, Section 6(b): "The natural guardian of the Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are – (b) in the case of an illegitimate boy or an illegitimate unmarried girl – the mother, and after her, the father".

<sup>16</sup>Ibid, Section 8(1): "The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant."

<sup>17</sup>AIR 1971 Sc 315.

<sup>18</sup>1981 Bom. 175.

<sup>19</sup>1984 II D.M.C. 136 (SC).

<sup>20</sup>2001 AP 531.

lays down provision of testamentary guardians. The father can appoint a guardian of his minor children by 'will'.<sup>21</sup> However, if the father dies when the mother is alive, the guardian appointed by the father through his 'will' be ineffective till the mother is alive.<sup>22</sup> For the illegitimate minor children, the mother can appoint a guardian by 'will'.<sup>23</sup> After the death of the natural guardian, the guardian appointed by 'will' acts as the guardian of the minor child.<sup>24</sup>

Guardian appointed by the court: Section 12 of the Hindu Minority and Guardianship Act, lays down that the High Court has the jurisdiction to appoint a guardian of a minor child and his/her property. The welfare of the minor shall be the paramount consideration while appointing a guardian by a court.<sup>25</sup>

Defacto guardian: Anyone without lawful authority, takes constant interest in the welfare of the minor child and his/her property is said to be a de facto guardian.<sup>26</sup> Section 11 of the Hindu Minority and Guardianship Act, 1956, lays down provision to

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<sup>21</sup>Supra note 13, Section 9(1): "A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both."

<sup>22</sup>Ibid, Section 9(2): "An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian."

<sup>23</sup>Ibid, Section 9(4): "A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may; by will, appoint a guardian for any of them in respect of the minor's person or in the minor's property or in respect of both."

<sup>24</sup>Ibid, Section 9(5): "The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will."

<sup>25</sup>Ibid, Section 13: "Welfare of minor to be paramount consideration – (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. (2) No person shall be entitled to the guardianship by virtue of the provisions of the Act of any law relating to guardianship in marriage among the Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

<sup>26</sup>Supra note 8, p.263



abolish de facto guardian.<sup>27</sup>

- **Custody:**

The Hindu Minority and Guardianship Act, 1956, does not define the term custody. Under the provisions of the Act, when a child has not completed the age of five years, the mother will be given custody of a minor child.<sup>28</sup>

The Hindu Marriage Act, 1955 deals with custody of a Hindu minor child. Under the provisions of the Act, 'interim order' may be passed, altered, suspended by the court from time to time, and make provision in the decree as it may be just and proper with respect to custody, maintenance and education of minor children.<sup>29</sup> The court exercises a discretionary power while making an interim order for custody of minor children.<sup>30</sup> Welfare of a child shall be the prime consideration while making custody order. In *Poonam v. Krishanlal*,<sup>31</sup> the Hon'ble Supreme Court granted custody of the minor child to the mother and grandfather. It has been held that for the welfare of the child, custody may be given to a third person.

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<sup>27</sup>Supra note 13, Section 11: "After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor."

<sup>28</sup>Ibid, Section 6(a): "The natural guardian of the Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are – (a) in the case of a boy or an unmarried girl – the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."

<sup>29</sup>The Hindu Marriage Act, 1955, Section 26: "Custody of children – In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible and may, after the decree upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made :

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent."

<sup>30</sup>H.K. Saharay, *Laws of Marriage and Divorce*, (Eastern Law House, 5<sup>th</sup> edn., 2007) p.269

<sup>31</sup>1989 S.C 401.

In *Mayamma v. Chikkanna*,<sup>32</sup> it was observed that the father and mother were separated for a long time, and the children were residing with the mother, the father was neglecting the children and was not even paying maintenance. The court held that the mother was entitled to the custody of the minor children even though they were aged 10 and 7.

### 3.2.2. MUSLIM LAW

Under the Muslim Law, guardianship is termed 'Wilayat' and Custody is termed 'Hizanat'. Guardianship is the right of the father and custody is the right of both parents.<sup>33</sup> Under the Muslim Law, a complete difference is made between Guardianship and Custody. Muslim law insures a special right to women for keeping the custody of their children (in case of boy, upto 7 years and for girl, till puberty or marriage) while guardianship will remain intact with father who is liable to pay the maintenance of his minor children when they are under the custody of mother. Some of the verses of the Koran<sup>34</sup> and ahadis<sup>35</sup> are the sources of law of guardianship and

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<sup>32</sup>(1986) 1 HLR 384 (Kant)

<sup>33</sup>Kamran Hashemi, "Religious Legal Traditions, Muslim States and the convention on the Rights of the Child: An Essay on the Relevant United Nation Documentation" 29HRQ (2007), p.212-213.

<sup>34</sup>The Koran, iv, 2, 5, 6 - "Given unto orphans their substance; and give them not the bad in exchange for the good; and devour not their substance by adding it to your own substance. Verily that would be a great sin. Give not unto the weak of understanding the substance which God has appointed you to preserve for them, but provide them therewith and clothe them and speak to them with kindly speech. Provide orphans until they attain the age of marriage; then if he perceive that they are able to manage their affairs well, then deliver unto them their substance, and devour it not wastefully or hastily for they are growing up. Let him that is rich abstain generously (entirely from taking the property of orphans); and that who is poor let him take thereof in reason. And when ye deliver up their substance unto orphans, have (the transaction) witnessed in their presence".

The Koran, xvii, 34; iv, 153 - "Come not near the wealth of the orphan save with that which is better, till he comes to strength".

<sup>35</sup>Misccat-ul-Messabib, Book XIII Chapter XVII part 3: "when these revelations came down, viz., meddle not with the substance of the orphan, otherwise than for improving thereof "and" surely they who devour the possessions of the orphans unjustly, shall swallow down nothing but fire into their bellies and shall broil in ragging flames'- all those who have orphans in their care went home, and they separated their own food from orphans, and also their water, fearful lest they might be mixed. Then when the orphans left any of their meat or drink, it was taken care of for them to eat afterwards. Then this method was unpleasant to the orphans, and they mentioned it to the Prophet, then the God sent down his revelation, O! Mohammed, they will ask the concerning orphans, answer to deal righteously

custody.

In *Imambandi v. Mutsaddi*,<sup>36</sup> the Privy Council stated “It is perfectly clear that under Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone or, if he be dead, his executor (under the Sunni law) is the legal guardian.”

In *Rahima Khatoon v. Saburjanessa*,<sup>37</sup> the court held that the mother loses guardianship of the minor daughter in case she remarries with another person not related to the child within prohibited degree of relationship.

In *Gohar Begam v. Suggi alias Nazma Begam*,<sup>38</sup> Gohar Begam was a singing woman in the keeping of one Trivedi, a Hindu. She was unmarried Muslim mother of a natural daughter, Anjum, acknowledged by Trivedi as his daughter. Anjum was sent to stay with a friend of her mother, Nazma Begam, who later refused to part with her claiming that she had great affection for the child and she had sufficient means to look after her. The Hon’ble Supreme Court held that the mother of an illegitimate daughter is in Muslim Law entitled to its custody. Refusal to restore the child to its mother was illegal detention. Anjum was handed over to her mother Gohar Begam.

- **Guardianship:**

Under the Muslim Law, guardianship is divided into:

- guardianship of a minor person; and

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with them is best and if ye mix your things with theirs, verily they are your brother. Then they mixed their meat and drink together.

<sup>36</sup>(1918) 45 IA 73.

<sup>37</sup>AIR 1996 Gau 33.

<sup>38</sup>(1960) 1 SCR 597.

- guardianship of the property of a minor.

Rules for guardianship of minor's property is discussed in detail. However, only few rules have been laid down for guardianship of a minor person. Like the Hindu Law, guardianship under the Muslim Law is also classified as:

- i. Natural Guardian
- ii. Testamentary Guardian
- iii. Guardians appointed by the Court

Natural Guardian: Under the Muslim law, a natural guardian is the father of the minor child. Under Shia law, in the absence of the father, the paternal grandfather is the natural guardian of the minor child. Under Sunni Law, no other person is recognised as a natural guardian even in the absence of the father.<sup>39</sup> Both the Shia and Sunni laws, do not accept the mother as a natural guardian of her minor children even if the father is not alive.

In *Imambandi v. Mustsaddi*,<sup>40</sup> it has been stated that till the father is alive, he is the only guardian of his minor children.

In *Fateh Chand v. Balkrishan Dass*,<sup>41</sup> it has been held that the mother has right to be the legal guardian of minor's property and cannot enter into any agreement to alienate it.

Testamentary Guardian: A testamentary guardian is a guardian appointed by a 'will'. The two schools of the Muslim Law i.e. the Sunni school and the Shia school have

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<sup>39</sup>Paras Diwan, *Law of Adoption Minority Guardianship & Custody*, (Universal Law Publishing Co., 4<sup>th</sup> edn., 2010) p. 728.

<sup>40</sup>(1918) 45 IA 73.

<sup>41</sup>AIR 1963 S.C. 1405.

different laws for assigning a testamentary guardian. According to the Sunni school, the authority to appoint a testamentary guardian is with the father of the minor child. The grandfather has the power to appoint a testamentary guardian only when the father and the executor are absent. According to the Shia school, only in the absence of the grandfather, the father has the right to appoint a testamentary guardian.<sup>42</sup> The mother is abridged from appointing a testamentary guardian for her minor child. However, the mother has the power to appoint a testamentary guardian for her minor child under these circumstances: -

- When the father of the child appoints the mother of the child as the general executrix by the will.
- When the property of the mother will transfer to her children after her death.

A different perspective among the two schools of Muslim law arises in the matter of appointment of a non-Muslim mother as a testamentary guardian. The appointment of a non-Muslim mother as a testamentary guardian is valid among the Sunnis. However, the appointment of a non-Muslim mother as a testamentary guardian is not valid among the Shias.<sup>43</sup>

Guardian appointed by the Court: A guardian of a Muslim minor can be appointed by the court in the absence of the natural guardian and the testamentary guardian.<sup>44</sup>

De facto guardian: A person who assigns himself as the guardian of a minor person and property is termed as de facto guardian. Any relative of the minor child other than

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<sup>42</sup>Mst. Atkia Begum v. Muhammad Ibrahim, AIR 1916 PC 250.

<sup>43</sup>Supra note 39, p. 729.

<sup>44</sup>Aqil Ahmad, Mohammedan Law, (Central Law Agency, 23<sup>rd</sup> edn., 2011) p. 225.

the natural guardian, testamentary guardian and guardian appointed by the court can be a de facto guardian.<sup>45</sup> A de facto guardian is the custodian of a minor person and his property. They have no rights but only duties.<sup>46</sup>

In *Noor Mohammad v. Mohd Ziauddin*,<sup>47</sup> it has been stated that in Muslim Law, “guardianship is indeed an obligation, not a right”.

- **Custody:**

Under the Muslim Law, custody (Hizanat) of a male child below seven years of age and female child till she attains puberty is authorised to the mother.<sup>48</sup>

Under Hanafi School, custody of a male child till seven years of age and female child till puberty remains with the mother.<sup>49</sup>

Under Ithna Ashari school, custody of the male child is given to the mother till he attains the age of two years, and female child till she attains the age of seven years.<sup>50</sup>

In *Salamat Ali v. Majjo Begum*,<sup>51</sup> the principle of 7 years was diluted. The District Court in the case considered the age of the child as the criterion of guardianship but the Allahabad High Court opined that the welfare of the child shall be determined the basis of evidence and not on the basis of 7 years of age.

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<sup>45</sup>Supra note 9, p. 458.

<sup>46</sup>Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, (Oxford University Press, 5<sup>th</sup> edn., 2008) p. 164.

<sup>47</sup>AIR 1992 MP 244.

<sup>48</sup>Supra note 9, p. 446.

<sup>49</sup>Supra note 46, p. 161.

<sup>50</sup>Ibid.

<sup>51</sup>AIR 1985 All 29.

In *Enamul Haque v. Bibi Taimunissa*,<sup>52</sup> in this case it has been held that the mother is entitled to the custody of the female child until she has attained puberty.

The custody of the minor child vest with the mother. However, the mother's right to custody of the minor child is not absolute. The mother's right to custody may be taken away. When the evidence on record shows that the minor's custody of the mother infringes the welfare of the child.<sup>53</sup> When marriage breaks down and the spouses separate, the mother's right to custody of the infant child doesn't terminate on the ground that she ceases to be the wife of her former husband. But on her second marriage, custody of infant child belongs to her former husband.<sup>54</sup> In the absence of the mother, the custody of a Muslim child is entitled to maternal grandmother, paternal grandmother, full sister and other female relatives. However, in the absence of mother and female relatives, the custody of a Muslim child is entitled to the father, nearest paternal grandfather, full bother, consanguine brother and other paternal relatives.<sup>55</sup> Under the Muslim Law, after the son reaches seven years of age, and the daughter attains puberty, the father is entitled to their custody.

In *Mohammed Shafi v. Shamin Banoo*,<sup>56</sup> it has been held that even during the marriage, the custody of the minor children in case of a boy until he attains the age of 7 years, and in the case of a female until she attains puberty is with the mother. The right of the father to the custody of the child is deferred, and the primary right is in the mother, and in the absence of the mother, in mother's female heirs. As long as the right to custody is with the mother, the mother is deemed to be also having the custody and care of the minor. If that is so, it is obvious that the mother during the

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<sup>52</sup>AIR 1967 Pat 344.

<sup>53</sup>Supra note 9, p. 449.

<sup>54</sup>Supra note 46, p. 162.

<sup>55</sup>Supra note 46, p. 162.

<sup>56</sup>AIR 1979 Bom. 156.

period laid down by the Muslim Law has both the custody and the care of the minor as long as she is not disqualified from retaining the custody of the minor.

In *Farzanabi v. S.K. Ayub Dadamiya*,<sup>57</sup> the Bombay High Court held that there is no doubt that under Muslim Law the father is entitled to the custody of a son over 7 years of age. The Court observed that as far as possible the ordinary rule of Muslim Law should be adhered to. The children were above 7 years of age. The court also found that the welfare of the minors did not lie in favour of residing with their mother. The children also expressed the desire to live with their mother. But the court observed they were not of an age when they could make an intelligent preference. The court therefore awarded the custody of the child to the father.

### **3.2.3. PARSILAW**

Custody of Parsi children is mentioned under Section 49 of the Parsi Marriage and Divorce Act, 1936.<sup>58</sup> In matters relating to custody, maintenance and education of children below the age of eighteen years, the court has the power to pass an order in suit brought before it.<sup>59</sup>

A child needs to be interviewed by the court before passing any order. In the matter of custody, maintenance and education of the minor has not been mentioned in Section 49 of the Parsi Marriage and Divorce Act, 1936. In *Thrity Hoshie Dolikuka v.*

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<sup>57</sup>AIR 1989 Bom 357.

<sup>58</sup>The Parsi Marriage and Divorce Act, 1936, Section 49 “In any suit under this Act, the court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of eighteen years, the marriage of whose parents is the subject of such suit, and may, after the final decree upon application, by petition for this purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such final decree or by interim orders in case the suit for obtaining such decree were still pending”.

<sup>59</sup>Kumud Desai, *Kumud Desai’s Indian Law of Marriage and Divorce*, (Lexis Nexis, 10<sup>th</sup> edn., 2017) p.492.



Hoshian Shavaksha Dolikuka,<sup>60</sup> it was held that the court is under no obligation to meet the minor child who is in question in custody disputes and to know the wishes of the minor.

#### **3.2.4. CHRISTIAN LAW**

Like the Parsi, the Christians do not have a separate law governing guardianship and custody of the children. The Indian Divorce Act, 1869 contains provision governing custody of children. Section 41 of the Indian Divorce Act, 1869 states that while a suit for 'judicial separation' is in the court an 'interim order' for 'custody, maintenance and education of the minor children' may be passed by the court.<sup>61</sup> Section 42 lays down that once the court grants a decree absolute for 'judicial separation', the court can make an order for 'custody, maintenance and education of the minor children' once a petition for the same has been made to the court.<sup>62</sup>

#### **3.3. THE GUARDIANS AND WARDS ACT, 1890**

Along with the personal law of the party, the Guardians and Wards Act 1890, is a secular law which governs matters like guardianship and custody. The Guardians and Wards Act, 1890 applies to all minor children irrespective of their religion. The Guardians and Wards Act, 1890 contains 53 sections, divided into four chapters. Chapter two of the Act lays down provisions for "appointment and declaration of

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<sup>60</sup>AIR 1982 SC 1276.

<sup>61</sup>The Indian Divorce Act, 1869, Section 41: "Power to make orders as to custody of children in suit for separation- In any suit for obtaining a judicial separation the Court may, from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject to such suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the said court."

<sup>62</sup>Ibid, Section 41: "Power to make such orders after decree – The Court after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending".

guardians”. Chapter three lays down provisions for “duties, rights and liabilities of guardians”. Chapter four lays down “supplementary provisions”.

While appointing a guardian of a minor, the personal law of the minor child is taken into consideration by the court.<sup>63</sup> The procedural law is laid down in the Guardians and Wards Act, 1890.<sup>64</sup> The personal law of the minor will govern guardianship until the court appoints a guardian for the minor. Once the guardian is appointed by the court, then only the provisions of the Guardians and Wards Act, 1890 applies to the guardian.<sup>65</sup> Since the substantive law is still the personal law. The Act of 1890, was passed in supplementary to the personal law of the children governing guardianship and not contrary to the personal law.<sup>66</sup> The rights, duties and liabilities of the guardian under the personal law is not affected by the Act of 1890.<sup>67</sup>

The Guardians and Wards Act, lays down that where the court is contended that an order for appointment of a guardian of a minor person or property or both for the welfare of the minor, the court may pass an order.<sup>68</sup> The court has the power to appoint or declare a guardian and may also remove a guardian appointed by the court or a guardian acting under a will.<sup>69</sup> Once an application is made by a person claiming to be a guardian of the minor, relative or friend of the minor and the collector of the district before the court for appointment of a guardian. Then the court makes an order

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<sup>63</sup>Supra note 7, Section 19.

<sup>64</sup> Supra note 39, p. 424.

<sup>65</sup>Ibid.

<sup>66</sup>S.N. Jain, Child and the Law, (N.M. Tripathi Pvt. Ltd., 1979) p.141.

<sup>67</sup>Supra note 7, Section 6 “Saving of power to appoint in other cases - In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.”

<sup>68</sup>Ibid, Section 7 “Power of the Court to make order as to guardianship – (1) Where the court is satisfied that it is for the welfare of a minor that an order should be made – (a) appointing a guardian of his person or property or both, or (b) declaring a person to be such a guardian, the court may make an order accordingly.”

<sup>69</sup>Ibid, Section 7(2) “An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.”

appointing or declaring a guardian.<sup>70</sup> The application should mention the particulars stated in the Act like age, sex, religion, location and value of the property etc. for an order to be passed by the court.<sup>71</sup>

Section 12 of the Act, states that the court has the power to make an interlocutory order for the production of a minor and interim protection of minor's person and property.<sup>72</sup>

Section 17 of the said Act states that the court will appoint or declare a guardian for the "welfare of the minor". It further states that the court will take into consideration "age, sex and religion of the minor, guardian's character and his closeness with the minor."<sup>73</sup> The welfare of the minor is determined by these factors as laid down by the Act. The personal law of the minor is a significant consideration to determine guardianship. The appointment and declaration of a guardian by the court should not be against his will.<sup>74</sup> The will of a person to be appointed as a guardian of a minor is more important than the welfare of the child. The court cannot force a person to be a guardian of the minor when he doesn't accept the appointment. If a person is apt to be appointed as a guardian for the welfare of the child, but if he doesn't accept his

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<sup>70</sup>Ibid, Section 8 "Persons entitled to apply for order – An order shall not be made under the last foregoing section except on the application of – (a) the person desirous of being, or claiming to be, the guardian of the minor; or (b) any relative or friend of the minor; or (c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property; or (d) the Collector having authority with respect to the class to which the minor belongs."

<sup>71</sup>Ibid, Section 10.

<sup>72</sup>Ibid, Section 12 "Power to make interlocutory order for production of minor and interim protection of person and property – (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper. (2) If the minor is female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country".

<sup>73</sup>Ibid, Section 17(2) "In consideration what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property."

<sup>74</sup>Ibid, Section 17(5) "The court shall not appoint or declare any person to be a guardian against his will."

appointment as a guardian, he cannot be appointed. In *K.K. Mahashankar Joshi v. Pradip Kumar Joshi*,<sup>75</sup> the custody of the child was handed to the maternal uncle as the welfare of the child was better looked after by him. The child's father was refused custody of the child.

Section 20 of the Guardians and Wards Act, lays down that the guardian has a fiduciary relation with the ward. Which means that a guardian is under an obligation not to make or derive any profit being a guardian of the ward.<sup>76</sup>

Section 22 of the Guardians and Wards Act, lays down provision for the guardian's salary. If a guardian is appointed or declared by the court, the guardian is entitled to certain allowance for the execution of his duties. When a guardian appointed or declared is a government officer, then the fee shall be paid to the Government from the property of the ward.<sup>77</sup>

Section 24 of the Guardians and Wards Act, lays down that if a guardian of a ward is charged with the custody of the ward must look after the ward's health, upkeep and education.<sup>78</sup>

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<sup>75</sup>(1992) 3 SCC 573.

<sup>76</sup>Supra note 7, Section 20 "Fiduciary relation of guardian to ward – (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instruments, if any, by which he was appointed, or by this Act, he must not make any profit out of his office. (2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent".

<sup>77</sup>Ibid, Section 22 "Remuneration of guardian – (1) A guardian appointed or declared by the court shall be entitled to such allowance, if any, as the court thinks fit for his care and pains in the execution of his duties. (2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fee shall be paid to the Government out of the property of the ward as the State Government, by general or special order, directs".

<sup>78</sup>Ibid, Section 24 "Duties of guardian of the person – A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires".

Section 25 of the Guardians and Wards Act, states that a person requesting for custody must be a guardian.<sup>79</sup> The issue that arises is that a person who is interested in custody only and not guardianship cannot apply for custody under Section 25 of the Guardians and Wards Act.<sup>80</sup> In *Rosy Jacob v. Jacob A.*,<sup>81</sup> the Hon'ble Supreme Court considered a Christian father's application to obtain custody of his children under section 25 of the Guardians and Wards Act. The court held that section 25 of the said Act is attracted only if a ward leaves or is removed from custody of a guardian of his person and the court is empowered to make an order for the return of the ward to his guardian if it is of the opinion that it will be for the welfare of the ward to return to the custody of the guardian. The court held that section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian, which includes all categories of guardians. It was further held that section 25 demands reasonable and liberal interpretation. The court also held that the discretion under section 25 is to be exercised judiciously.

Section 27 of the Guardians and Wards Act, states that a guardian of the ward's property ought to deal with the ward's property as a man of ordinary prudence and deal with the property as he would have dealt with as his own property.<sup>82</sup>

Section 28 of the Guardians and Wards Act, states the powers of a testamentary guardian. It lays down that when a will or other instrument appoints a guardian, his

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<sup>79</sup>Ibid, Section 25 "Title of guardian to custody of ward – (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

<sup>80</sup>Supra note 39, p. 577.

<sup>81</sup>AIR 1973 SC 2090

<sup>82</sup>Supra note 7, Section 27 "Duties of guardian of property – A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property."

power in the ward's immovable property is subject to certain restriction imposed by the instrument in matters like mortgage or charge, or transfer by sale, gift, exchange of the immovable property. However, if the guardian is permitted by an order of the court in writing, despite the restraint to dispose of any immovable property stipulated in a way allowed by the court.<sup>83</sup>

Section 29 of the Guardians and Wards Act, states the limitation of powers of guardian of property appointed or declared by the court. When a guardian is appointed or declared by the court to be a guardian of the ward's property, he shall not, mortgage or charge, or transfer by sale, gift, exchange or lease the ward's immovable property without the previous permission of the court.<sup>84</sup>

Section 31 of the Guardians and Wards Act, states the circumstances under which permission is granted to the guardian to do acts mentioned under Section 29 of the Act. It lays down that in the case of necessity and for the advantage of the ward, permission to do an acts mentioned under section 29 is permitted.<sup>85</sup>

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<sup>83</sup>Ibid, Section 28 "Powers of testamentary guardian – Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the court which made the declaration permit him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order."

<sup>84</sup>Ibid, Section 29 "Limitation of powers of guardian of property appointed or declared by the Court – Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the court to be guardian of the property of a ward, he shall not, without the previous permission of the court: (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or (b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor."

<sup>85</sup>Ibid, Section 31 "Practice with respect to permitting transfers under Section 29 – (1) Permission to the guardian to do any of the acts mentioned in Section 29 shall not be granted by the court except in case of necessity or for an evident advantage of the ward. (2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the court may see fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation and be dated and signed by him. (3) The court may in its discretion attach to the permission the following among other conditions , namely: (a) that a sale shall not be completed

Section 32 of the Guardians and Wards Act, states that when a guardian of the ward's property is appointed or declared by the court, the court has the power to define, restrict or extend the power of the guardian in respect of the ward's property for the advantage of the ward.<sup>86</sup>

Section 33 of the Guardians and Wards Act, states that a guardian may apply by petition to the court which appointed or declared the guardian for its opinion, advice or direction with respect to the management and administration of the ward's property.<sup>87</sup>

Section 34 of the Guardians and Wards Act, lays down the obligations on a guardian of property appointed or declared by the court. For the benefit of the child, the guardian shall if so required by the court, give a bond to the judge. The bond may be with or without sureties, to account for what he may receive in respect of the ward's property. A statement of the immovable property belonging to the ward shall be

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without the sanction of the court; (b) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the court for that purpose, at a time and place to be specified by the court, after such proclamation of the intended sale as the court, subject to any rule made under this Act by the High Court, directs; (c) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants of the court directs; (d) that the whole or any part of the proceeds of the act permitted shall be paid into the proceeds of the act permitted shall be paid into the court by the guardian, to be disbursed therefrom or to be invested by the court on prescribed securities or to be otherwise disposed of as the court directs. (4) Before granting permission to a guardian to do an act mentioned in Section 29, the court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.”

<sup>86</sup>Ibid, Section 32 “Variation of powers of guardian of property appointed or declared by the Court- Where a guardian of the property of a ward has been appointed or declared by the court and such guardian is not the Collector, the court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject.”

<sup>87</sup>Ibid, Section 33 “Rights of guardian so appointed or declared to apply to the Court for opinion in management of property of ward- (1) A guardian appointed or declared by the court may apply by petition to the court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward. (2) If the court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit. (3) The guardian stating in good faith the facts in the petition and acting upon the opinion, advice or direction given by the court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.”

provided to the court within six months from the date of his appointment or declaration. The guardian shall show his accounts in the court as and when the court directs. The guardian shall pay the due balance from him on those accounts. The guardian needs to pay for the ward's maintenance, education and development.

Section 39 of the Guardians and Wards Act, lays down the provision for removal of guardian. A guardian may be removed by the court on an application of any person interested or on its own motion on certain grounds like abuse of his trust; failure to execute and inability to execute his duties; unable to take proper care of the ward; when a guardian is convicted of any offence which weakness his character and is unfit to be a guardian; when a guardian doesn't dwell within the local limits of the jurisdiction of the court; bankruptcy and insolvency.

In *Dhaninder Kumar v. Deep Chand*,<sup>88</sup> it was held that the power to remove a guardian by the court is not a discretionary power of the court but a mandatory power.

Section 40 of the Guardians and Wards Act, lays down that a guardian appointed or declared by the court can resign from guardianship, he can apply to the court for discharge.<sup>89</sup>

Section 41 of the Guardians and Wards Act, lays down provision for the cessation of authority of guardian. The power of guardians of minor ceases by his death, removal or discharge; by the court of Wards assuming superintendence of the person of the ward; when the ward ceases to be a minor; marriage in the case of female ward whose husband is unfit to be a guardian; when a ward's father is unfit to be a guardian. The

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<sup>88</sup>1991 (I) Civ LJ 8(All.).

<sup>89</sup>Supra note 7, Section 40 "Discharge of guardian – (1) If a guardian appointed or declared by the court desires to resign his office, he may apply to the Court to be discharged. (2) If the court finds that there is sufficient reason for the application, it shall discharge him, and if the guardian making the application is the Collector and the State Government approves of his applying to be discharged, the court shall in any case discharge him."



power of a guardian of minor's property ceases by his death, removal or discharge; by the court of Wards assuming superintendence of the property of the ward; when a ward ceases to be a minor.

### **3.4. ISSUES OF CHILD CUSTODY AND GUARDIANSHIP OF DIVORCED PARENTS**

“A husband will find a new wife and a wife will find a new husband but the child will lose the parents and will never find a new parents.”<sup>90</sup>

Family plays an important role in nurturing a child with love and care. A child's emotional and physical security is protected by the family. A healthy childhood can be safeguarded by a healthy family. It is the duty of the parents to nurture a child with proper care and protection. When a child is born he is vulnerable. Therefore, a child needs to be nurtured and protected by his family. Parents possess certain parental rights over their children as the parents are the natural guardian of the child. These rights include child's proper upbringing, sound health and proper education. There are children living without the support of one or both the parents. The children undergo a traumatic childhood witnessing the fights between the mother and the father at the time of divorce. The enmity between the parents makes an unhealthy atmosphere for child development.<sup>91</sup> The children who witness the constant fights of the parents feel that their parents are discarding them.<sup>92</sup> As they do not get proper attention and love

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<sup>90</sup>Asha Bajpai, *Child Rights in India Law, Policy, and Practice* (Oxford University Press, 3<sup>rd</sup> edn., 2017) p.196.

<sup>91</sup>Paul R. Amato and Bruce Keith, “Parental Divorce and the well-being of Children: A Meta Analysis” 110(*Psychological Bulletin*, 1991) p.27.

<sup>92</sup>Daniel J. Hynan, *Child Custody Evaluation: A New Theoretical Applications and Research Account* (Charles C. Thomas publisher ltd., 2014) p.8.

from the parents. At times, family can hurt its members in such a way that it never cures.<sup>93</sup>

When a marriage is dissolved, unpleasant fights for the custody of the minor children take place.<sup>94</sup> The divorce proceedings are frequently twisted into a battlefield by parents to win against each other and the children are often turned into means to score.

The act of divorce can be the right choice for the spouses, but no choice for their children, who are the ultimate victims of divorce between the parents because family plays an important role in shaping the life of child and determines who the child is going to be. Usually, when the mother and the father is living together under the same roof without any discord, that environment is considered to be a healthier atmosphere for children's growth than living with a single parent.<sup>95</sup>

When the spouses separate, they need to act maturely. The spouses need to love and care their children more. They need to speak aptly in front of the children when they are upset. The parents need to act maturely because the impact on the children is adverse when the parents act immaturely.<sup>96</sup> When a child is exposed to the conflict of the parents, the child is emotionally and mentally damaged. The child faces depression and instability. Parents must have the sensibleness not to fight with each other in front of the child in order to protect their child.<sup>97</sup> In order to get the custody of the child or to retain the custody of the child. The parents start to play with the emotions of the child. The parents buy new toys, gadgets and give plenty of money to the child. The child misuses the money and sometimes they are addicted to drugs.

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<sup>93</sup>Mahendra Tiwari, Family Law and Child Law (Random Publication, 1<sup>st</sup> edn., 2013) p.1.

<sup>94</sup>Nadir Modi, "Child Custody: Mother or Father" 81AIR (1994), p.40.

<sup>95</sup>Supra note 91, p.27.

<sup>96</sup>Harvey Brownstone, Tug of war: A Judge's verdict on separation, custody battles and the bitter realities of family court (ECW Press, 1<sup>st</sup> edn., 2009) p.5.

<sup>97</sup>Ibid, p.74.

Divorce is an act which gives rise to many issues relating to child rearing. In most of the areas like behaviour, emotional comfort, education, self-confidence, self-respect and bond with the parents of the child from a broken family is comparatively lesser than the children who belong from unbroken families.<sup>98</sup> The children from a broken families receive less care, support and assistance from the parents.<sup>99</sup> Divorce of parents causes numerous mental and emotional effects on the children which weakens the child.<sup>100</sup> Hence, the social and mental difficulties in the children increases.

As India is a country having deep rooted cultural and religious beliefs and notorious social taboos, divorce is still considered to be a taboo. Divorce is accompanied by certain social stigma in India.<sup>101</sup> A child of a divorced parents struggle to be accepted by a conservative society, due to the stigmatisation attached to divorce.<sup>102</sup> The children of divorced parents are looked differently. Same extent of respect is not given to the children of divorced parents as compared to other children who belong to an intact family. The children of a broken family often face humiliation in the society because of their family background.<sup>103</sup> So this leads to overall personality disorder of the child, which may lead to many problems in future. A child of a fragmented family is subjected to countless interrogations in our society. Sometimes, the relatives and neighbours tend to blame the child for their parents' divorce.

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<sup>98</sup>Supra note 91, p.26

<sup>99</sup>Supra 5, p.3

<sup>100</sup>Ibid, p.12.

<sup>101</sup>Paul R. Amato, "The Impact of Divorce on Men and Women in India and the United States", 25JCFS (1994), p. 212.

<sup>102</sup>Vijendra Kumar, "Impact of divorce on children: A socio-economic and legal study", 6NALSAR Law Review (2011), p.124-125.

<sup>103</sup>Paul R. Amato and Ross A. Thompson, *The Post divorce Family: Children, Parenting and Society* (Sage Publication, 1999) p.16.

The resentment and anger among parents in custody disputes is so poisonous. The parents are usually in battle for supremacy and power. They are on a pursuit for revenge with each other.<sup>104</sup>

The parents at times prolong the litigating that the child reaches the age of majority.<sup>105</sup> The parents tries to prolong the litigation in order to torture each other. There are times when the parent doesn't even meet the child nor contribute towards the child's upbringing for years. However, once the child is stable in the new environment, the parent may approach to proclaim possession over the child. The parents ought to understand that the child is not their 'property' for exercising their ownership rights.<sup>106</sup> It is crucial for the parents to understand that a child cannot be owned by a parent.<sup>107</sup>

The custody of a child is allowed to one of the parents and other may or may not be given visitation right. The spouses often fill bitterness on the brains of their children about the other parent. The parents play upon the child's consciousness and pass on their own preconception about their spouses to the child. Filling bitterness in the minds of the child, creates a huge impact on the child's personality. The parent who is given custody of the child, will often talk ill about the other parent. Each will try to fill hatred towards the other parent in the mind of the child. As such the child will start building up hatred towards the other parent. Usually the parents relinquish their duty and accuse the other parent for divorce. Not one person puts an effort to cure the wounds of the child ragged between the fighting parents. The parents are busy taking care of their own interest and therefore the trauma that a child faces is never taken

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<sup>104</sup>Supra note 96, p.2.

<sup>105</sup>Ibid, p.14

<sup>106</sup>Supra 90, p.197.

<sup>107</sup>Supra 103, p.52.

into consideration. Sometimes, the parents try to provoke each other by accusing for several reasons like: not delivering the child for access visit on time, clothes were not sent correctly after access visit etc. As the minds of the child is very tender, they start believing what the parent said. They start abusing the other parent. As a result of wish the child becomes prone to abuse.

Children who sees parents quarrelling time and again, they start developing a guilty consciousness and starts blaming themselves for their parent's separation.<sup>108</sup> It is hard for the children to acknowledge the situation that their parents no longer stay together. A children of a broken family have a hope and wishes for their family to reunite.<sup>109</sup>

As a result of divorce a child may have to shift to a different home and at times different school. To adapt to this new situation, it will take time. The children of a broken family faces adjustment difficulties.<sup>110</sup> Their mind is tender and can slip into a state of shock on seeing parents split forever. When there are more than one children the parents with divide children among themselves.

Illustration: The spouses has two children A and B. When the spouses separate, the mother gets the custody of A and the father gets the custody of B. This is called split custody. When the child has to adjust in a new environment with one parent. It is disheartening that the child has to cope with the separation from their siblings as well.

In a divorce or separation proceeding between the parents, the court usually awards custody to one of them, unless the mother and the father is found to be unfit, in such a case the court may award custody to a third party, typically a relative. When a child is abused or neglected by the parents, the court may award custody of the child to the

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<sup>108</sup>Supra note 102, p. 125.

<sup>109</sup>Supra note 103, p.16.

<sup>110</sup>Ibid, p.4.

state for placing the child in foster care if no responsible relative or family friend is willing and able to care for the child. The trauma in such a situation is even more as the child receives no love from the parents. The relatives and foster homes usually do not take proper care of the child. The child is usually bullied by the relatives. They are usually forced to do most of the household work. They do not receive proper guidance as needed in their studies. The child lacks the sense of belongingness.

Children of a broken family usually face problems in getting admission in school. There are number of factors which most of the school now a days take into consideration. They interview the parents; they look into the family background before giving admission. Even if they get admission in school, friends and teachers tend to ask them about their parents. It is an arduous task for the child to convey each and every one that they belong to a broken family. Often in school parent's teacher meeting, annual programs takes place and both the parents are supposed to attend it. The child of a broken family will have either his mother or father to attend the meeting. Seeing others with both the parents, the child will rip apart. The children of a divorced parents are normally inclined towards termination of their education and they drop out from school. Children from a broken family are likely to be involved in robbery at school.<sup>111</sup>

When a single parent is the mother, mostly the living condition decreases. It is challenging for a female to find a job. Even if she gets a job, the wage she gets is not adequate as compared to the work done by her. Therefore, a single mother usually has a poor living condition. The peril of developmental difficulties in children rises because of the lack of financial assets. Adequate facilities that are necessary for a

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<sup>111</sup>Supra note 5, p.13.

child's proper growth and education cannot be provided by a single mother. Due to the lack of resources, the single parent along with the child lives in shantytowns where proper school facility is lacking.<sup>112</sup> Due to the burden of work and family that she has to manage it is difficult for a mother to raise a child single handedly.<sup>113</sup>

Whenever a child visits his relative with one of his parents, the relative talks about their parents' divorce. Gradually the child discontinues attending family functions because they are continuously interrogated. Deep rooted culture prevails in India, where ever a person goes he is asked about his parent's name, caste and occupation. It is difficult for a child to convey to each and every one that he belongs to a broken family. As our society still considers divorce a taboo, the child starts to lie. He tries to keep himself aloof as far as possible in order to avoid societal questions. Separation devastates the family and it is often noticed that such an act can cause serious trauma to the children and the child might experience emotional and distressing mental breakdown which often results in alienation from the social process. Sometimes, the child does not want to reveal that he belongs to a broken family.

The disturbed children are predominantly prone to develop complications such as anger, rebellion, defiance and rule violations. Since they get attention, guidance, and care of only one of the parents which is not adequate for them they are prone to drug addiction. The child's sense of security is lost. The child's life will not be exactly as it was and he will not continue to feel the same love for both the parents. When parents fight or put the child in the middle of the quarrel, the parents are sending a message that winning over each other is more important than the child's life. Usually, a single parent is compelled to work in order to earn a living. The parent gives less time to his

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<sup>112</sup>Supra note 91, p.27.

<sup>113</sup>Supra note 101, p.215.

children. As a result, the children get less support and guidance from the parent. As the children do not get enough guidance and support from the parent, the children undergo several difficulties in education, self-confidence, conduct and cooperation, etc.<sup>114</sup> The child starts comparing his life with other children. He starts to imagine ‘how’ his life would have been if he had the opportunity to live with both the parents. The child starts over-thinking as a result of which the child suffers from anxiety and depression.

As the child of a broken family witnesses the breakdown of his parent’s relationship, the constant fights between the parents, the hatred between the parents, a child of a broken family has trust issues.<sup>115</sup> The child has no hope in love, marriage and family. He lacks trust in all relationships. He starts believing that all relationships need to end dramatically so he starts keeping himself detached. He does not believe in relationships or any emotional bonds. He faces utmost struggle in his love life as he lacks trust. The absence of trust and the fright of being rejected often hampers a relationship.<sup>116</sup> As he lacks trust he starts disbelieving in God. He is liable to desert his faith in God.<sup>117</sup> As he is going through a rough phase in life, he sees nothing but darkness. Therefore, the tendency to commit suicide is much higher amongst children who belong to a broken family.<sup>118</sup> The optimistic outlook to marriage is negative and the optimistic outlook to divorce is positive for children who belong to a broken family. They do not look into marriage as being stable and everlasting.<sup>119</sup>

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<sup>114</sup>Supra note 91, p.27.

<sup>115</sup>Supra 5, p.20.

<sup>116</sup>Ibid.

<sup>117</sup>Ibid, p.26.

<sup>118</sup>Ibid, p.45.

<sup>119</sup>Ibid, p.21-22.



Large numbers of children from broken families leave their parents' home and live alone or marry.<sup>120</sup> This is mainly because the children want to free themselves from the unhealthy environment where there is unhappiness and discomfort. They want to escape from the continuous interrogation done by the relatives and neighbours. They want to escape to a new environment.

Along with the social, psychological and mental problems, there exist legal issues as well. The term "custody" is not defined in any of the legislations dealing with child custody issues. Guardianship and custody are two different concepts which are at times misinterpreted and are taken to be the same.

The family court deals with matters relating to guardianship and custody of a minor child. If there is no family court, then the district court deals with the proceedings. During the custody proceedings, the child is also interviewed in the family courts. The environment in the family court is not child friendly. The child is often confused in such an environment. The family court is so overburdened with the work that it is not feasible to resolve the child's requirements. A child's suffering and social conduct rises due to marital conflict.<sup>121</sup> The way of looking into things by a child is quite different from that of an adult.

Once the spouses separate, the custody of the child is given to one parent and access to other parent. After the divorce of the parents, the non-custodial parent gets lesser amount of time with the child<sup>122</sup> for overall development of a child, love and care of both the parents is of utmost necessity. The court needs to consider numerous factors like relationship between the child and parents, education facility, wishes of parents,

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<sup>120</sup>Ibid, p.15.

<sup>121</sup>Supra note 90, p.194.

<sup>122</sup>Supra note 91, p.27.

wishes of children, age of the child, etc. while granting custody of the child. The orders of the family court clearly shows that the best interest of the child is not stated in any decision.<sup>123</sup> The court does not give any information regarding the factors taken into account by the court while awarding custody. The courts do not provide any explanation about the factors or reasons they have considered for granting custody. The orders simply state to whom the custody is awarded. Custody is awarded on the basis of the negotiation done by the parties. The party which negotiates well will get the custody of the child. This is one of the biggest issues. What constitutes the welfare of the child is mostly over looked. Judges often decide the cases on the basis of the facts of the family relationship and children's wishes presented before it by the advocates. Moreover, the judges are not appropriately skilled to be aware of the psychological difficulties hidden in making children want. Due to heavy litigations in the family court, the Judges have to award several child custodies, access decisions on the base of inadequate, biased and extremely emotional written evidence.<sup>124</sup> As the court is over burdened by the cases, the court does not have the time and resources to evaluate factors which constitute the welfare of the child. A child is already disturbed on seeing their parents separate. On top of that it is traumatic for a child to give judicial interviews. The interviews that the child gives can also be influenced by one of the parents. As a result, it is difficult to prove what the child actually wants. The parents permit an outsider to make essential decisions concerning their child's activities like education, health, how the child is going to live, etc.<sup>125</sup>

### **3.5. BEST INTERESTS OF THE CHILD**

Since the pre-nineteenth century, the origin of the Best Interest of the Child took place.

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<sup>123</sup>Supra note 90, p.195.

<sup>124</sup>Supra note 96, p.1.

<sup>125</sup>Ibid.

Historically, the family's breadwinner has mostly been the father. Children were deemed their father's property and the courts granted it accordingly as it was pondered that the fathers were better capable to look after their children and provide all the necessities. During the early twentieth century, under the "tender years' doctrine" the mother was given the custody of the minor child. Through this doctrine it was conferred that children are emotionally attached with their mothers compared to the father. The twentieth century saw more gender neutral decision making and placements, as more mothers entered the workforce, which made them independent financially and consequently they were progressively capable to support their children financially.<sup>126</sup>

The United Nations Convention on the Rights of the Child states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>127</sup> Further Article 18(1) of the United Nations Convention on the Rights of the Child makes it clear that the "best interests of the child" will be the main concern.<sup>128</sup>

"The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests. In order to effectively guarantee the rights of indigenous children such measures would include training and awareness raising among relevant professional categories of the importance of considering

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<sup>126</sup>Elizabeth Grim, Best Interest of the Child supplemental to the report child welfare system (Office of Performance Evaluations Idaho Legislature, 2017), p. 2-3.

<sup>127</sup>The United Nations Convention on the Rights of the Child, 1989, Article 3(1).

<sup>128</sup>Ibid, Article 18(1).

collective cultural rights in conjunction with the determination of the best interests of the child.”<sup>129</sup>

The future of our society is in the hands of the children. However, the children who represent the future need guidance as they belong to the vulnerable section of our society.<sup>130</sup> Although the child is young and cannot express verbally what is happening in his life, the child will still be feeling the impact. Once the parents separate, the court decides with which parent the child is going to stay and the visitation rights of the other parent.

The damages caused on children by divorce cannot be totally prevented by the law. As it cannot coerce harmonious relationship between humans. Nonetheless, it can provide a means to lower the injury by safeguarding the interest of children is not disregarded during the custody proceedings.<sup>131</sup>

In most of the Jurisdictions the “best interest” principle regulates the child custody disputes while making custody orders.<sup>132</sup> While judging any family issues the utmost consideration should always be the ‘best interest of the child’.<sup>133</sup> The welfare of the child includes the a better health of the child, best educational attainment, proper mental and emotional behaviour, bond with the family and financial status.<sup>134</sup> It means complete security, comfort, happiness and safety of the child. It refers to the

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<sup>129</sup>General Comment No. 11, Indigenous Children and their Rights under the Convention, (2009) para. 33.

<sup>130</sup>Kerin S. Bischoff, “The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes when Sexual Abuses is Alleged”, 138 *University of Pennsylvania Law Review* (1990) p. 1383.

<sup>131</sup>Supra note 102, p. 131.

<sup>132</sup>Supra note 130, p. 1384.

<sup>133</sup>Paul Millar, *The Best Interests of Children: An Evidence-based Approach* (University of Toronto press, 2009) p.3.

<sup>134</sup>Supra note 103, p.3.

growth of a child's physical, psychological, emotional and social abilities.<sup>135</sup> The 'best interest of the child' should be the foundation for determining custody orders rather than the parent's ego and their rights. It is in the 'best interest of the child' to keep an intimate bond with both the mother and the father.<sup>136</sup> Certain fundamental things need to be deliberated while determining the best interest of the child. These are "the wishes of the parents; the wishes of the child; the interactions of the child with the parents, siblings and other relevant individuals; the mental and physical health of all relevant individuals".<sup>137</sup>

Custody and visitation order lays down with which parent the child is going to live with and how often the child is going to be with the other parent. The Judges need to consider the love, affection and emotional relation between the child and each parent while making custody and visitation orders. While granting custody, the court must consider the parent's plan for child's care and rearing. Children needs stability in order to grown adequately. The court needs to scrutinise the constancy of the family in which the child is going to live. Child-care abilities of the parents must be considered while granting custody. A parent must have the ability to nurture a child properly. The parent must be able to feed the child, provide the child with adequate amount of sleep, to take the child to school, to provide proper health care, etc. After divorce the parental decisions for the child to cope up with the changes with proper care is important for the 'best interest of the child'.<sup>138</sup>

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<sup>135</sup>Supra note 66, p. 41.

<sup>136</sup>Supra note 103, p.52.

<sup>137</sup>Daniel J. Hynan, *Child Custody Evaluation: A New Theoretical Applications and Research Account* (Charles C. Thomas publisher Ltd., 2014) p.8.

<sup>138</sup>Supra note 103, p. 218.

If the child is capable of forming an independent opinion, the child's wishes needs to be taken into consideration by the court.<sup>139</sup> However, the wishes of the child must be reasonable. The court will not ponder upon an unreasonable wishes of the child.<sup>140</sup>

Illustration: The court interviewed two minor children A and B before granting custody orders. Child A desired to stay with the father as he provided him with expensive gadgets. Child B desired to stay with the mother as his father drank alcohol and hit him. The court will take into consideration only the wish of Child B as the wish of Child A is unreasonable.

The environment in which the child lives should be healthy for his normal and healthy growth. An unhealthy environment where there are constant fights between the parents causes stress in the tender minds of the children. In the interest of the child, the child needs to be removed from unhealthy environment because it hampers the children.<sup>141</sup>

#### In India:

In India the Doctrine of Best Interest Theory developed through the legislation. All the personal law relating to matrimonial statutes make provisions for dealing with the issue of child custody. The provisions in the matrimonial Acts can however be invoked only when there are some proceedings under the Act. Hindus have an additional Act viz. the Hindu Minority and Guardianship Act, 1956. A part from this there is the Guardian and Wards Act, 1890. This is a secular law for appointment and declaration of guardian and allied matters, irrespective of caste, community or

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<sup>139</sup>Supra note 7, Section 17(3): "If the minor is old enough to form an intelligent preference, the Court may consider that preference".

<sup>140</sup>Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May 2015, available at: <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf> (Visited on June 8, 2019) p.42.

<sup>141</sup>Thirty Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, AIR 1982 SC 1276.

religion; through in certain matters the court will give consideration to the personal law of the parties. The provisions of the personal laws and secular law are complementary and not interrogation to each other and courts are obliged to read them together in a harmonious way. These acts include the word welfare, the word welfare has to be taken in the widest sense and must include the child's moral as well as physical wellbeing and also have regard to the ties of affection.

Under the Hindu Minority and Guardianship Act, 1956, Section 13(1) states that when the court appoints or declares a guardian the supreme factor shall be the "welfare of the child".<sup>142</sup> Section 13(2) states that guardian will not be appointed by the court if it's for the "welfare of the child".<sup>143</sup> Section 7(1) of the Guardian and Wards Act, lays down that for the "welfare of a minor" the court can make an order for the appointment of a guardian.<sup>144</sup> Section 17(1) states that the court while appointing a guardians needs to be guided by the personal laws of the minor for the "welfare of the minor".<sup>145</sup> Section 17(2) of the Act lays down the factors (i.e., "age, sex and religion of the minor, the character and capacity of the purposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the purposed guardian with the minor or his property") which needs to be considered by the court while determining the "welfare of the

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<sup>142</sup>Supra note 13, Section 13(1): "In the appointment or declaration of any person as a guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration".

<sup>143</sup>Supra note 13, Section 13(1): "No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor".

<sup>144</sup>Supra note 7, Section 7(1): "Where the Court is satisfied that it is for the welfare of a minor that an order should be made: (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the court may make an order accordingly".

<sup>145</sup>Ibid, Section 17(1): "In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions 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".

minor”.<sup>146</sup> Section 17(5) of the Act clearly states the welfare of the child as a paramount consideration. As the Act lays down that the welfare of the minor should conform to the personal law of the minor and the willingness of the guardian.<sup>147</sup>

Therefore, Section 7(1) and Section 17 of the Guardians and Wards Act, makes it clear that the welfare of the child is of paramount consideration has not been precisely stated. The principle of the best interest of the child has not been actually laid down.

However, the judiciary has tried to safeguard the principle of ‘welfare of the child’. In *Irfan Ahmad Shaikh v. Mumtaz*,<sup>148</sup> the Bombay High Court, upheld the principle of ‘welfare of the child’ and granted custody of a minor girl child to the mother even though the mother was remarried, as the child desired to live with the mother.

In *Rosy Jacob v. Jacob Charmakkal*,<sup>149</sup> the Supreme Court stated that “the children are not mere play things for their parents. Absolute rights of parents over the destinies and lives of their children has, in the modern changed conditions, yielded to the consideration of their welfare as human beings.”

In *Reddy v. Reddy*,<sup>150</sup> the Kerala High Court has clarified welfare as not merely material but also moral welfare.

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<sup>146</sup>Ibid, Section 17(2): “In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the purposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the purposed guardian with the minor or his property”

<sup>147</sup>Ibid, Section 17(5): “The Court shall not appoint or declare any person to be a guardian against his will”.

<sup>148</sup>AIR 1999 Bom 25.

<sup>149</sup>AIR 1973 SC 2090.

<sup>150</sup>AIR 1975 Ker 134.



In *Shoib alias Shobu v. Sabir Ali*,<sup>151</sup> the Allahabad High Court held that “In spite of the fact that the mother is entitled to the custody of her male child until he has completed the age of seven years, still the welfare of the child will be kept in view before deciding the custody.”

In *Wan Abdul Aziz v. Siti Aishah*,<sup>152</sup> it was held that “the basis and aim of custody is the welfare of the child who is to be looked after and this is the basis on right of the child. This right must paramount to the right of the person who claims the custody”.

In *M.D. Khalid v. Zeenat Perveen*,<sup>153</sup> the court observed that “the children can not be treated as chattle or property. Their welfare has to be considered more on humanitarian ground and looking into overall welfare of the child. The custody of child is merely in the nature of the trust for his welfare and benefit. Therefore, merely because the father is the natural guardian under the personal law applicable to him, the minor cannot be entrusted to his custody.”

In *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashankar Joshi*,<sup>154</sup> after the unnatural death of their mother, the children were living with their maternal uncle. The father was facing charge under Section 498 of the Indian Penal Code. Before the Supreme Court, the children expressed their willingness to remain with their maternal uncle, who, according to them, was looking after them very well. In the interest and welfare of the children, custody was handed over to the maternal uncle instead of the father. In the welfare of the child, the legal rights were superseded.

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<sup>151</sup>1987 All L.J. 414.

<sup>152</sup>(1975), JH(1) 47.

<sup>153</sup>AIR 1988 All 252.

<sup>154</sup>(1992) 3 scc 573.

In *Sarabati v. Phoolbati*,<sup>155</sup> the Punjab and Haryana High Court held that while determining the custody of a child, welfare of the child should be paramount consideration rather than the custody rights of guardian or of natural parents. In this case, the child was living with his grandparents who named a piece of land in his favour. However, the natural parents were demanding the custody of the child. Keeping in mind the welfare of the children the Court decided the case of the custody of the child in favour of grandparents.

In *Sajjan Sharma v. Deen Dayal Sharma*,<sup>156</sup> the Calcutta High Court held that with regard to custody, the welfare of the child is the paramount consideration irrespective of the relations.

In *Tabassum Bano v. State of Madhya Pradesh*,<sup>157</sup> the Madhya Pradesh High Court held that while determining the custody of the child, welfare of the child should be paramount consideration.

In *Mausami Moitra Ganguli v. Jayant Ganguli*,<sup>158</sup> the Hon'ble Supreme Court of India held that the welfare of the child should be paramount consideration, while determining the custody of the child.

From the above discussed cases it is clear that the Hon'ble Supreme Court and the High Courts have held that, in custody disputes, the concern for the welfare of the child supersedes even the statutory provisions.<sup>159</sup> As the child is vulnerable, law has acquired precise care to safeguard their interest.<sup>160</sup> The paramount consideration

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<sup>155</sup>AIR 2008 (NOC) 1984 (P&H).

<sup>156</sup>AIR 2008 Cal 224.

<sup>157</sup>AIR 2009 (NOC) 2041 (MP).

<sup>158</sup>AIR 2008 SC 2262.

<sup>159</sup>Nuzhat Parveen Khan, *Child Rights and The Law* (Universal Law Publishing, 2<sup>nd</sup>edn., 2016), p. 498.

<sup>160</sup>Beauty Bandy, "The Doctrine of Best Interest and Custody of Child: A Legal Perspective", XIII KULR (2006), p.176.

should always be the ‘best interest of the child’ while deciding custody disputes rather than the rights of the parents.<sup>161</sup> The doctrine appears to be the principal factor in determining the interest of a child in the arena of present welfare society.<sup>162</sup> While determining custody disputes, the “positive test” that is the factor which constitutes the ‘child’s best interest’ needs to be determined rather than the “negative test” that focuses on the incompetence of the applicant.<sup>163</sup>

When a child is competent to express his opinion, the child’s opinion should be taken into consideration while granting custody orders. The court while making custody orders needs to consider the wish of the child, favourable environment for upbringing of the child and not better legal rights of either parent.<sup>164</sup>

As can be seen from the family law analysis of Best Interest of the Child, it is clear that there is no standardized operational definition for Best Interest of the Child. Alternatively, it is up to each state to decide the guiding principles, variables, laws, procedures and facts that are used to identify and evaluate what is in the Best Interest of the Child.<sup>165</sup>

Even though the judiciary has in a number of cases safeguarded the “best interests of the child”, the judiciary lacks precision as to what precisely comprises the “best interests of the child”. Therefore, in custody disputes there are no ways to safeguard the ‘interests of the child’.<sup>166</sup> This is mainly because the provisions dealing with the “best interests of the child” are vague. The theory of best interest must be well-defined, so as to

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<sup>161</sup>Kusum, Cases and Materials on Family Law (Universal Law Publishing Co. Pvt. Ltd., 4<sup>th</sup> edn., 2015) p. 316.

<sup>162</sup>Supra note 160, p.176.

<sup>163</sup>Ibid.

<sup>164</sup>Supra note 161, p. 326.

<sup>165</sup>Elizabeth Grim, Best Interest of the Child supplemental to the report child welfare system (Office of Performance Evaluations Idaho Legislature, 2017), p. 7.

<sup>166</sup> Supra 40, p.2.

guide the courts for proper execution. The principal welfare of children must to be strengthened through legislative mechanism.

### **3.6. JOINT CUSTODY**

Legal custody gives a parent right to make medical, educational, and religious decisions for their children. Joint legal custody means that both parents share these decisions. Parents who agree to joint custody generally continue to play a full and active role in providing a sound social, economic, educational, and moral environment for their children. Joint legal custody means that both parents have the responsibility for raising the children and carrying out the tasks of guiding, disciplining, supporting, and caring for the children. Joint custody can allow parents to provide individual guidance to their children while collaborating on child rearing skills. Both parents will care for their children at separate times. Joint custody can allow parents to provide individual guidance to their children while collaborating on child rearing skills.

Joint custody of the child can help to combat the above discussed issues and strive towards the principle of ‘best interests of the child’. As both the parents have a vital role in the upbringing of the child. One of the best ways of childrearing is that all parents must try if practicable for joint custody. Parents functioning jointly are most competent to make choices which are best for the children.<sup>167</sup> Even after divorce it is expected that parents take the liability of their children mutually<sup>168</sup> for the betterment of the child. Joint custody permits same power to the parents while formulating decisions concerning their children. On all the subjects concerning children like

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<sup>167</sup>Supra note 96, p.95.

<sup>168</sup>Supra note 103, p.52.

education, religion, health will be made jointly by the parents. Joint custody means that the children will get a considerable quantity of time to spend with each parent.<sup>169</sup>

Both the parents play a major role in the upbringing of the child. The child does not feel the absence of the either parent. Moreover, the child will get attention of both the parents and will be nurtured properly. However, it is to be noted that the orders of joint custody must be made only when the parents are cordial, and act in a matured and civilized way. It should not be permitted where the parents are incompatible to each other and show an incompetence to unite.

Article 18(1) of the Convention on the Rights of the Child, 1989, states that the “state parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interest of the child will be the basic concern.”<sup>170</sup>

With regard to children of divorced parents, worldwide many countries have favored ‘shared parenting’<sup>171</sup> method than sole custody.

In India, child custody is governed by the personal laws of the party and the Guardians and Wards Act, 1890. Joint custody for children is not mentioned in both the personal laws and the Guardians and Wards Act, 1890. While deciding custody and guardianship disputes, utmost importance is given to the “welfare of the child”. The Law Commission of India, decided to study the issue of “adopting a shared

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<sup>169</sup>Ibid, p.52.

<sup>170</sup>Convention on the Rights of the Child, 1989, 18(1).

<sup>171</sup>Countries like Netherlands, United Kingdom, Australia, United States.

parenting system in India”.<sup>172</sup> On November 2014, the Law Commission of India issued a consultation paper on “adopting a shared parenting system in India”. Investigation of shared parenting throughout the world and a review of existing law in India was made in the consultation paper. A set of questions related with shared parenting was also posed and comments were invited from the public. After several rounds of discussions and deliberations, the views of the Commission centered around:

- i. Strengthening the welfare principle in the Guardians and Wards Act, 1890 and emphasizing its relevance in each aspect of guardianship and custody related decision-making;
- ii. Providing for equal legal status of both parents with respect to guardianship and custody;
- iii. Providing detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations; and
- iv. Providing for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.<sup>173</sup>

These recommendations are laid down in Report No. 257 of the Law Commission of India titled “Reforms in Guardianship and Custody Laws in India”. However, even after the recommendation of the Law commission in 2015, there has been no amendments in the legislations governing guardianship and Custody in India. Still the legislations in India are silent on joint custody for children. However, the Judiciary knowing the importance and the need for joint custody has granted joint custody of a

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<sup>172</sup>Supra note 40, p. ii.

<sup>173</sup>Ibid.

minor child. In a 2011 judgement of the Karnataka High Court, which used the concept to resolve a custody dispute involving a 12-year-old boy. In *K.M. Vinaya v. B. Srinivas*,<sup>174</sup> both parents are permitted custody “for the sustainable growth of the minor child”.

In *Eugenia Archetti Abdullah v. State of Kerela*,<sup>175</sup> the petitioner (wife), the respondent (husband), and the children were all US citizens in this case. The petitioner had approached the court with a habeas corpus petition seeking a direction or commanding respondents numbers 2 to 4 to produce two infants named Roshan and Nishant before the Hon’ble Court and to handover their custody, with their passports, to the petitioner, their mother. The two infant twins were less than 3 years old. The petitioner and the respondent got married while in the United States, after which they moved to Bahrain where the petitioner gave birth to the said two children. Because of the shift of employment, they went back to the state of Taxis in the USA and settled there. According to the petitioner, their married life was not happy, which led to domestic violence from part of the second respondent. This resulted in a criminal case. Finally, the matter was settled. The respondent lost his employment in Texas and both of them with their children visited India and came to Kozhikode in the state of Kerala, where the second respondent had his roots. While there, according to the petitioner, there was again ill-treatment on part of the second respondent and she was thrown out of the residential house, and finally she had to fly back to United States without the children. According to her, the custody of the children with the respondent was an act of illegal custody, and hence they were illegally detained. The petitioner wife had already moved a petition for custody of the children as well as for

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<sup>174</sup>MFA No. 1729/2011, Karnataka High Court, judgement dated 13<sup>th</sup> September 2013.

<sup>175</sup>(2005) 1 HLR Ker 34.

the dissolution of the marriage with the second respondent, in accordance of the family law applicable in the State of Texas in United States. In light of the facts and circumstances of the case, the court, while granting custody of the children to the petitioner wife, laid down rigorous conditions, one of them being shared custody/visitation rights for a period of seven days from the time of the court order to the time of the petitioner left India. Further, it allowed continued access/visitation right to the respondent spouse to meet up with his minor children for three hours every day, although quite limited and laying down contingency measures in the event of violation of the said conditions by the petitioner wife.

In *Mausami Ganguli v. Jayant Ganguli*,<sup>176</sup> Hon'ble Supreme Court held in the instant case that the idea of shared parenting is still new to Indian custody jurisprudence. While the old principle of the father as the natural guardian has been laid to rest, in its place the best interest of the child principle is applied to custody disputes. It was further held by the court that the custody orders can be applied under Section 21 of the Protection of Women from Domestic Violence Act only in addition to applications for protection or other orders. This means that where there is domestic violence and a woman wants a protection or other similar orders, she can also apply for temporary custody. The magistrate can give orders of temporary custody of children only. This will not prevent the other party from going to an appropriate forum and seeking permanent custody or joint custody of the children. If a matter with regard to custody of children is pending in a court, an application under the Protection of Women from Domestic Violence Act for temporary custody of children can be made in the same court.

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<sup>176</sup>(2008) 7SCC 673.



Joint custody was made in the following manner:

- i. The child was to be with the father for the first six months of the English calendar and thereafter with the mother for six months every year.
- ii. The expenditure incurred by the child and educational expenses was to be shared by both the parents.
- iii. On the weekends the parent was allowed visitation rights when the child was living with the other parent.
- iv. The child was permitted to use telephone or video conference with each parent while living with the other.

Every child has the right to have full access to both parents. It is not about dividing the child's time among the parents. It is about dividing the parents' time to ensure that a child has 100 percent access to both parents all the time, regardless of logistics, schedules, finances, differences and all other challenges parents might face.

### **3.7. CONCLUSION**

Divorce can be the best tool to flee from family disputes for parents but they do not realise that life after divorce is unclear for them and as well as their children.<sup>177</sup> If a family is obnoxious it can mentally and emotionally wound the members of the family. Divorce is almost permanently traumatic for children. It increases the peril of psychological and behavioural problems of children. The overall growth of the child of divorced parents is hampered. The effects of divorce are much greater on the child as the child never gets a new parent. Separation of parents is not the only cause that

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<sup>177</sup>Supra note 103, p.192.

can lead to complications in the children. It is the separation allied to inter parental battle, a lack of co-parenting and an unsteady family environment, poor co-parenting, alterations in the child's everyday routine or emotional and mental problems of the parents themselves.<sup>178</sup> Both the parents are precious to every child, both the parents play an important role in a child's life. Taking them away from any one of the parents can damage them psychologically and emotionally. Therefore, in divorce proceedings child custody is a critical matter and it ought to be dealt with utmost carefulness to guarantee a bright future for the child.<sup>179</sup>

The term 'custody' is not mentioned under the personal laws and the Guardians and Wards Act. The term custody needs to be clearly defined so that it does not create vagueness while dealing with custody disputes. Guardianship and custody are two different notions which are, at times, misinterpreted and are taken to be the same.

In India, the laws dealing with guardianship and custody are mentioned under the personal laws and also under the Guardians and Wards Act which is a secular law. However, even under the secular law it is specifically mentioned that the provisions of the personal law are to be applied consistently with the provision of the Guardians and Wards Act.<sup>180</sup> It is clear that the personal law of the minor predominates the decision making process while awarding guardianship and custody by the Court. In custody disputes, the religion of the parents ought to be an immaterial consideration in a secular state like India. Under the personal laws, once a petition for divorce, judicial separation is filed in the court then only 'custody, maintenance and education

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<sup>178</sup>Aruna G. Faraswani, "Child Custody and effect of noncompliance of orders of access", *Bharati Law Review*, (2013), p.78.

<sup>179</sup>*Ibid.*

<sup>180</sup>*Supra* note 9, p. 449.

of minor children' can be raised but this is not the case under the secular law i.e. Guardians and Wards Act, 1980.

There are numerous issues associated with divorce. The major impact of divorce is always caused to the children. Even though the child suffers a major loss after their parents' divorce, the opinion of the child is never taken into consideration by the parents. The voices of the children are always neglected and superseded by the voices of the parents. The children of divorced parents lose the support of one parent. The children of a divorced family undergo several social, emotional and mental problems due to their parents' divorce. When the child is overburdened with stress, emotional breakdown at that very moment the suit for custody of the child is filed. The child is interviewed in the court which adds more stress. "Litigation is not good for children"<sup>181</sup> as it traumatises the child. A humanitarian approach is very essential to resolve child custody disputes.<sup>182</sup> While dealing with custody disputes, the judges and the parents should always strive for the "best interests of the child". What exactly constitutes the "best interests of the child" is extremely vague which needs to be cleared. It is the judges who determine the welfare of the child. This is one of the disadvantages because the judges lack the knowledge of what is best for a particular child. The aim of the judges and the parents should always be for the prosperity of the child. As the support system of the children of a broken family is shaken, the children undergo several problems. The problems which arise due to divorce of the parents can be combatted by allowing the parents joint custody of the child. "If parents are important resources of children's development, then all things being equal, two parents should be better than one".<sup>183</sup> India has no legislation dealing with custody

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<sup>181</sup>Supra note 96, p.3.

<sup>182</sup>Supra note 59, p.492.

<sup>183</sup>Supra note 91, p.27.

and guardianship and joint custody. India should reform its custody and guardianship laws and incorporate a provision dealing with joint custody. The children are the future of our society. They need to be protected. They cannot be tossed between the parents. The studies show that majority of the children of divorced parents show deviant behaviour, prone to abuse due to lack of emotional support that needs to be given in the particular age group. It could also be noted that proper legislative measures are also absent to curb the menace.

Family court should spend more time finding out what the child wants and what they are going through. Rather than what the parents want.

**CHAPTER 4**

**COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK**

**GOVERNING CHILD CUSTODY AND GUARDIANSHIP IN**

**INDIA AND THE UNITED KINGDOM**

**4.1. INTRODUCTION**

In chapter 3, the legal framework governing Child Custody and Guardianship in India is analysed. In this chapter the legal framework governing children in the United Kingdom is analysed. “Since law is also a cultural phenomenon and manifestation of tradition, true understanding of the historical, social and cultural background of the different systems is essential for evaluation of their comparative merits and demerits.”<sup>1</sup> A comparative study of the legal framework governing child custody and guardianship in India and the United Kingdom is made. As “Comparative legal research flourishes with diversity of legal systems and patterns. Looking to the distinct principles, procedures, approaches and institutions, legal system can be grouped into four major legal families in the world: common law, civil law, socialist law and religion based law.”<sup>2</sup>

In Roman law, children were regarded as the property of their father, who had the right to trade and enter the child into forced labour. On the other hand, mothers had no legal rights with respect to their children, even as guardian in the event of father’s death. Later in English Common law, father continued to have near absolute powers, and the legal obligation to safeguard, maintain and educate their children. Thus till the mid-nineteenth century, fathers had custody rights, irrespective of the circumstances

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<sup>1</sup>Ishwara Bhat, “Comparative Method of Legal Research: Nature, Process and Potentiality” 57JILI (2015) p.151.

<sup>2</sup>Ibid, p.150.

after divorce. Mothers had very limited access to their children after divorce. The absence of maternal custody rights was highlighted by Caroline Norton in England.<sup>3</sup> When Norton separated from her husband, she was denied access of her three children. The legal advisor stated that she had no legal remedy. Norton, read through the law books. She realised that mothers in her situation had been frequently turned away by the courts. Norton decided to appeal directly to Parliament, and drafted the bill that finally became the Custody of Infants Act, rather than attempt to struggle against years of anti-maternal precedent.<sup>4</sup> The Custody of Infants Act of 1839, brought a landmark change which directed the courts to award custody of children under the age of seven to a mother, and to award visitation rights to a mother for children above seven years.

The Convention on the Rights of the Child was ratified by the United Kingdom in 1992. However, it is not a part of domestic law in England. It ensures that while the United Kingdom Government will try to comply with the rules laid down in the Convention. The Convention cannot be explicitly relied on in any court proceedings in England and Wales. Through their interpretation of domestic law, the court may take it into account and will try to ensure, where possible that such law is consistent with the terms of the Convention. Nevertheless, in the case of a clear conflict between the provisions of the Convention and English law, the court shall take force in the latter and not the former.<sup>5</sup>

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<sup>3</sup>Sarah Abramowicz, "English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody", 99(1999) p. 1359.

<sup>4</sup>Ibid, p. 1359-1360.

<sup>5</sup>Ian Butler, Lesley Scanlan, et.al., *Divorcing children: Children's experience of their parents' divorce*, (Jessica Kingbley, London and New York, 1<sup>st</sup> edn., 2003), p. 24.

Child custody law is a survivor of equity system of jurisprudence, which first started in the Chancellor's court in England and developed over the centuries alongside the courts of law in England.

## **4.2. LEGAL FRAMEWORK GOVERNING CHILD CUSTODY AND GUARDIANSHIP IN THE UNITED KINGDOM**

### **4.2.1. CUSTODY OF INFANTS ACT 1839**

In the United Kingdom, the Custody of Infants Act was the starting point of women's legal rights. The Custody of Infants Act 1839 included the ideas of English social reformer Caroline Norton. After her divorce, she was incapable to take custody of her children. The 1839 Act gave the mother a way to petition the courts for child custody up to seven years of age and visitation rights for older children, provided that the mother had not committed adultery.<sup>6</sup> The 1839 Act therefore was the basis of the so called "tender years doctrine" in law – the legal presumption was that a child's 'tender' years should be with the mother.

### **4.2.2. CHILDREN AND YOUNG PERSONS ACT 1933**

The Children and Young Persons Act, 1933 imposes "criminal liability" to any person above the age of 16 years for "assaults, ill-treats, neglects, abandons, or exposes" any minor child under 16 years of age, causing the minor child harm to his health.<sup>7</sup> It is

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<sup>6</sup>The Custody and Infants Acts, 1839.

<sup>7</sup>The Children and Young Persons Act, 1933, Section 1(1): "If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, and shall be liable-

- (a) On conviction on indictment, to a fine...or alternatively, ... or in addition thereto, to imprisonment for any term not exceeding ten years;
- (b) On summary conviction, to a fine not exceeding 400 pounds, or alternatively, ....., or in addition thereto, to imprisonment for any term not exceeding six months."

the duty of the parent or the legal guardian to provide adequate “food, clothing, medical and lodging” to the minor child. If the parent or the legal guardian is unable to perform their basic duties, then the parents and the guardian is responsible of neglecting the minor child.<sup>8</sup>

Section 4 of the Act states that no child under the age of 16 shall be in “street, premises, or place for the purpose of begging”. Any person who instigates, permits or uses a minor child for begging then the person will be imprisoned for maximum of three months.<sup>9</sup>

Part II of the Act lays down the ‘general provisions as to employment’. Employment of any child below the age of fourteen years shall be prohibited.<sup>10</sup> However, the child is permitted to do light work<sup>11</sup> after the school hours and during school holidays.<sup>12</sup> The working hours of the child ought to be between 7 a.m. to 7 p.m.<sup>13</sup> On the days the child attends school, he is allowed to work for a maximum period of 2 hours in a

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<sup>8</sup>Ibid, Section 1(2)(a): “a parent or other person legally liable to maintain a child or young person or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;”

<sup>9</sup>Ibid, Section 4(1): “If any person causes or procures any child or young person under the age of sixteen years or, having responsibility for such a child or young person, allows him to be in any street, premises, or place for the purpose of begging or receiving alms, or of inducing the giving of alms (whether or not there is any pretence of singing, playing, performing, offering anything for sale, or otherwise) he shall, on summary conviction, be liable to a fine not exceeding [level 2 on the standard scale], or alternatively, ... or in addition thereto, to imprisonment for any term not exceeding three months.”

<sup>10</sup>Ibid, Section 18(1)(a): “Subject to the provisions of this section and of any byelaws made there under no child shall be employed-

(a) So long as he is under the age of fourteen years;”

<sup>11</sup>Ibid, Section 18(1)(aa): “Subject to the provisions of this section and of any byelaws made there under no child shall be employed-

(aa) To do any work other than light work;”

<sup>12</sup>Ibid, Section 18(1)(b): “Subject to the provisions of this section and of any byelaws made there under no child shall be employed-

(b) Before the close of school hours on any day on which he is required to attend school;”

<sup>13</sup>Ibid, Section 18(1)(c): “Subject to the provisions of this section and of any byelaws made there under no child shall be employed-

(c) Before seven o’clock in the morning or after seven o’clock in the evening or any day;”



day<sup>14</sup> and 12 hours in a week.<sup>15</sup> The age and gender of the child must be taken into consideration while making laws for the employment of children by a ‘local authority’.<sup>16</sup> Section 20 of the Act deals with ‘street trading’. It lays down that “no child shall engage or be employed in street trading”.<sup>17</sup> However, children who has reached the age of fourteen can be engaged in street trading by their parents, to an extent stipulated by the byelaws.<sup>18</sup> Section 21 of the Act lays down the ‘penalties and legal proceedings’ with regard to the employment of children. The person who infringes the employment provisions laid down in this Act, shall be fined a maximum of twenty pounds for his first offence and thereafter fifty pounds.<sup>19</sup> Any person who

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<sup>14</sup>Ibid, Section 18(1)(d): “Subject to the provisions of this section and of any byelaws made there under no child shall be employed-

(d) For more than two hours on any day on which he is required to attend school;

<sup>15</sup>Ibid, Section 18(1)(da): “Subject to the provisions of this section and of any byelaws made there under no child shall be employed-

(da) For more than twelve hours in any week in which he is required to attend school;

<sup>16</sup>Ibid, Section 18(2): “A local authority may make byelaws with respect to the employment of children, and any such byelaws may distinguish between children of different ages and sexes and between different localities, trades, occupations and circumstances, and may contain provisions.”

<sup>17</sup>Ibid, Section 20(1): “Subject to sub section (2) of this section, no child shall engage or be employed in street trading.”

<sup>18</sup>Ibid, Section 20(2): “A local authority may make byelaws authorizing children who have attained the age of fourteen years to be employed by their parents in street trading to such extent as may be specified in the byelaws, and for regulating street trading under the byelaws by persons who are so authorized to be employed in such trading; and byelaws so made may distinguish between persons of different ages and sexes and between different localities, and may contain provisions-

(a) Forbidding any such person to engage or be employed in street trading unless he holds a licence granted by the authority, and regulating the conditions on which such licences may be granted, suspended, and revoked;

(b) .....

(c) requiring such persons so engaged or employed to wear badges;

(d) regulating in any other respect the conduct of such persons while so engaged or employed.

<sup>19</sup>Ibid, Section 21(1): “If a person is employed in contravention of any of the foregoing provisions of this Part of this Act, or of the provisions of this Part of this Act, or of the Provisions of any byelaw or regulation made there under, the employer and any person (other than the person employed) to whose act or default the contravention is attributable shall be liable on summary conviction to a fine not exceeding twenty pounds or, in the case of a second or subsequent offence, not exceeding fifty pounds: Provided that, if proceedings are brought against the employer, the employer, upon information duly laid by him and on giving to the prosecution not less than three days’ notice of his intention, shall be entitled to have any person (other than the person employed) to whose act or default he alleges that the contravention was due, brought before the court as a party to the proceedings, and if, after the contravention has been proved, the employer proves to the satisfaction of the court that the contravention was due to the act or default of the said other person, that person may be convicted of the offence; and if the employer further proves to the satisfaction of the court that he has used all due diligence to secure that the provisions in question should be complied with, he shall be acquitted of the offence.”

jeopardise a child's 'life or limb' shall be liable to a fine of maximum of fifty pounds for his first offence and thereafter one hundred pounds.<sup>20</sup>

A child below twelve years of age will not be skilled to take part in a perilous act and a person who teaches a child to take part in a perilous act and shall be liable to a fine of maximum of twenty pounds for his first offence and thereafter fifty pounds.<sup>21</sup> Once a licence is permitted by a 'local authority' and the child attains 12 years of age, then the child can be trained to take part in a perilous act.<sup>22</sup>

A child shall not be permitted by a person having his/her accountability to go overseas for making profit by "singing, playing or being exhibited". When a child is paid for taking part in "sport, or working as a model" a licence should be granted.<sup>23</sup>

When a child attains 14 years of age, a licence can be permitted for a child to go overseas for "singing, playing or being exhibited".<sup>24</sup>

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<sup>20</sup>Ibid., Section 23: "No person under the age of sixteen years, and no child aged sixteen years, shall take part in any performance to which section 37(2) of the Children and Young Persons Act 1963 applies and in which his life or limb are endangered and every person who causes or procures such a person or child, or being his parent or guardian allows him, to take part in such a performance, shall be liable on summary convictions to of fine exceeding \$50; or in the case of a second or subsequent offence, exceeding \$100."

<sup>21</sup>Ibid., Section 24(1): "No child under the age of twelve years shall be trained to take part in performance of a dangerous nature, and no child who has attained that age shall be trained to take part in such performances except under and in accordance with the terms of a licence granted and in force under this section; and every person who causes or procures a person, or being his parent or guardian allows him, to be trained to take part in performances of a dangerous nature in contravention of this section, shall be liable on summary conviction to a fine not exceeding \$20 or, in the case of a second or subsequent offence, not exceeding \$50."

<sup>22</sup>Ibid., Section 24(2): "A local authority may grant a licence for a child who has attained the age of twelve to be trained to take part in performance of a dangerous nature."

<sup>23</sup>Ibid., Section 25(1): "No person having responsibility for any child shall allow him, nor shall any person cause or procure any child to go abroad

- (a) for the purpose of singing, playing, or being exhibited, for profit, or
- (b) for the purpose of taking part in a sport, or working as a model, when payment in respect of his doing so, other than for defraying expenses, is made to him or to another person, unless... a licence has been granted in respect of him under this section:

Provided that this subsection shall not apply in any case where it is proved that the child was only temporarily resident within the United Kingdom."

<sup>24</sup>Ibid., Section 25(2): "A justice of the peace may grant a licence in such form as the Secretary of State may prescribe, and subject to such restrictions and conditions as the justices of the peace thinks fit, for any child who has attained the age of fourteen years to go abroad for any purpose referred to in

When a child is held in a police station or while taken to or from any criminal court or while anticipating previously or after participation in any criminal court from partner with an adult who is accused of any offense other than an offense with which the kid or youngster is mutually charged, and for guaranteeing that a girl while detained be in the care of a woman, measures shall be prepared for forestalling a child.<sup>25</sup> Where a child is in police confinement, such steps as reasonable will be acquired to determine the character of an individual liable for his well-being.<sup>26</sup> For the welfare of the child, his parent, guardian or any person accountable for the child's well-being is liable.<sup>27</sup> When a child is alleged of any crime and is produced before the court, his parent or guardian must be present at the court throughout the trial of the court.<sup>28</sup> During the court proceeding of any person no child will be allowed to be in court. However, when the child is a witness of the offence he can be present in court.<sup>29</sup> When a child

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subsection (1) of this section, but no such licence shall be granted in respect of any person unless the justice of the peace is satisfied –

- (a) that the application for the licence is made by or with the consent of his parent or guardian;
- (b) that he is going to fulfil a particular engagement;
- (c) that he is fit for the purpose, and that proper provision has been made to secure his health, kind treatment, and adequate supervision while abroad, and his return from abroad at the expiration or revocation of the licence:

that there has been furnished to him a copy of the contract of employment or other document showing the terms and conditions of employment drawn up in a language understood by him.”

<sup>25</sup>Ibid., Section 31: “Arrangements shall be made for preventing a child or young person while detained in a police station, or while being conveyed to or from any criminal court, or while awaiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child or young person is jointly charged, and for ensuring that a girl (being a child or young person) shall while so detained, being conveyed, or waiting, be under the care of a woman.”

<sup>26</sup>Ibid., Section 34(2): “Where a child or young person is in police detention, such steps as are practicable shall be taken to ascertain the identity of a person responsible for his welfare.”

<sup>27</sup>Ibid., Section 34(5): “For the purposes of this section the persons who may be responsible for the welfare of a child or young person are –

- (a) his parent or guardian; or
- (b) any other person who has for the time being assumed responsibility for his welfare.”

<sup>28</sup>Ibid., Section 34A (1): “Where a child or young person is charged with an offence or is for any other reason brought before a court, the court –

- (a) May in any case; and
- (b) Shall in the case of a child or a young person who is under the age of sixteen years,

Require a person who is a parent or guardian of his to attend at the court during all the stages of the proceedings, unless and to the extent that the court is satisfied that it would be unreasonable to require such attendance, having regard to the circumstances of the case.”

<sup>29</sup>Ibid., Section 36: “No child (other than an infant in arms) shall be permitted to be present in court during the trial of any other person charged with an offence, or during any proceedings preliminary

as a witness is giving the evidence, all persons present in the court must be removed from the court.<sup>30</sup> When a child gives his false evidence without oath, he shall be guilty of lying and shall be punished.<sup>31</sup> The court can give order to keep the identity of the child undisclosed in relation to any proceedings in any court.<sup>32</sup> If the identity of the child is disclosed by any person, he shall be liable to a fine.<sup>33</sup>

Youth Courts: When the Magistrates' Courts hears any accusation against a child are known as youth courts.<sup>34</sup> A Magistrates' court which is not a youth court shall have no charge against a child. However, when a charge is against a minor child and an individual who have attained 18 years of age; when a child is alleged of an offence and an individual above 18 years of age is charged for abetting, supporting, agreeing

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thereto, except during such time as his presence is required as a witness or otherwise for the purposes of justice or while the court consents to his presence: and any child present in court when under this section he is not to be permitted to be so shall be ordered to be removed."

<sup>30</sup>Ibid., Section 37(1): "When, in any proceedings in relation to an offence against or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a child or young person is called as a witness, the court may direct that all or any persons, not being members or officers of the court or parties to the case, their legal representatives, or person otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of that witness: Provided that nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency."

<sup>31</sup>Ibid., Section 38(2): "If any child whose evidence is received unsworn in any proceedings for an offence by virtue of section 52 of the Criminal Justice Act 1991 wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be liable on summary conviction to be dealt with as if he had been summarily convicted of an indictable offence punishable in the case of an adult with imprisonment."

<sup>32</sup>Ibid., Section 39(1): "In relation to any proceedings in any court, the court may direct that –

- (a) No newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or agent or in respect of whom the proceedings are taken, or as being a witness therein;
- (b) No picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;

Except in so far (if at all) as may be permitted by the direction of the court."

<sup>33</sup>Ibid., Section 39(2): "Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale."

<sup>34</sup>Ibid., Section 45(1): "Magistrates' courts –

- (a) Constituted in accordance with this section or section 66 of the Courts Act 2003 (judges having powers of District Judges (Magistrates' Courts)). And
- (b) Sitting for the purpose of –
  - (i) Hearing any charge against a child or young person, or
  - (ii) Exercising any other jurisdiction conferred on youth courts by or under this or any other Act,

Are to be known as youth courts."

for instigating such offence will be heard by a Magistrates' court other than a youth court.<sup>35</sup> For using the power conferred on the youth courts, the court will meet as often as required.<sup>36</sup> When the youth court meets, no one will be in the court room<sup>37</sup> (except 'the members and official of the court'; 'legal representatives'; 'parties to the case'; 'news agencies'). When a charge is against a child, a youth court can proceed with the trial.<sup>38</sup> A child can be kept in remand by the youth court in order to acquire evidence. In the jurisdiction of the youth court the remand period can be prolonged in his nonappearance so that the child shows once in twenty-one days before a 'court or a justice of the peace'.<sup>39</sup>

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<sup>35</sup>Ibid., Section 46(1): "Subject as hereinafter provided, no charge against a child or young person, and no application whereof the hearing is by rules made under this section assigned to youth courts, shall be heard by a magistrates' court which is not a youth court:

Provided that –

- (a) a charge made jointly against a child or young person and a person who has attained the age of eighteen years shall be heard by a magistrates' courts other than a youth court; and
- (b) where a child or young person is charged with an offence, the charge may be heard by a magistrates' court which is not a youth court if a person who has attained the age of eighteen years is charged at the same time with aiding, abetting, causing, procuring, allowing or permitting that offence; and
- (c) where, in the course of any proceedings before any magistrates' court other than the youth court, it appears that the person to whom the proceedings relate is a child or young person, nothing in this subsection shall be constituted as preventing the court, if it thinks fit so to do, from proceeding with the hearing and determination of those proceedings."

<sup>36</sup>Ibid., Section 47(1): "Youth Courts shall sit as often as may be necessary for the purpose of exercising any jurisdiction conferred on them by or under this or any other Act."

<sup>37</sup>Ibid., Section 47(2): "No person shall be present at any sitting of a youth court except –

- (a) members and officers of the court;
- (b) parties to the case before the court, their legal representatives, and witnesses and other persons directly concerned in that case;
- (c) bona fide representatives of newspapers or news agencies;
- (d) such other persons as the court may specially authorize to be present."

<sup>38</sup>Ibid., Section 48(1): "A youth court sitting for the purpose of hearing a charge against, a person who is believed to be a child or young person may, if it thinks fit to do so, proceed with the hearing and determination of the charge.... notwithstanding that it is discovered that the person in question is not a child or young person."

<sup>39</sup>Ibid., Section 48(3): "When a youth court has remanded a child or young person for information to be obtained with respect to him, any youth court acting in the same local justice area –

- (a) May in his absence extend the period for which he is remanded, so, however, that he appears before a court or a justice of the peace at least once in every twenty-one days;
- (b) When the required information has been obtained, may deal with him finally."

Juvenile delinquents: A child below the age of ten years shall not be guilty of any crime.<sup>40</sup> The Secretary of State can mandate the transfer of a detainee (under the age of eighteen years) to an approved school for detention.<sup>41</sup> An institution maintained by a public fund can be prescribed to be used as a remand home.<sup>42</sup>

An authorisation from the Secretary of State is required if the managers of any school premeditated for the 'education and training of persons' to be sent in the institution.<sup>43</sup>

With the authorisation of the Secretary of State, a local authority can commence with any other local authority to fund the money for the establishing, constructing or running of an approved school.<sup>44</sup> The school can be arranged by the Secretary of State

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<sup>40</sup>Ibid., Section 50: "It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence."

<sup>41</sup>Ibid., Section 58: "The Secretary of State may by order direct that –

- (a) a person who is under the age of eighteen years and is undergoing detention in a Borstal institution; or
- (b) a child or young person sentenced to be detained under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 with respect to whom he is authorised to give directions under section 92 of that Act; or
- (c) a young person who has ordered to be imprisoned and has been pardoned by His Majesty on condition of his agreeing to undergo training in a school,

shall be transferred or sent to and detained in an approved school specified in the order; and any such order shall be an authority for his detention in that approved school or in such other approved school as the Secretary of State may from time to time determine until such date as may be specified in the order. Provided that the date to be so specified shall be not later than that on which he will in the opinion of the Secretary of State attain the age of nineteen years nor later –

- (a) in the case of a person who was sentenced to detention under the said section 91, than the date on which his detention would have expired;
- (b) in the case of a young person who has been sentenced to imprisonment and pardoned as aforesaid, than three years from the date as from which his sentence began to run;
- (c) in the case of a person who was undergoing detention in a Bostal institution, than the end of the period for which he would have been liable to be detained therein."

<sup>42</sup>Ibid., Section 77(2): "The authority or persons responsible for the management of any institution other than a person may, subject in the case of an institution supported wholly or partly out of public funds to the consent of the Government department concerned, arrange with the council of a country brought for the use of the institution, or any part thereof, as a remand home upon such terms as may be agreed."

<sup>43</sup>Ibid., Section 79(1): "The managers of any school intended for the education and training of persons to be sent there in pursuance of this Act may apply in the Secretary of State to approve the school for the purpose, and the Secretary of State may, after making such inquiries as he thinks fit, approve the school for that purpose and issue a certificate of approval to the managers."

<sup>44</sup>Ibid., Section 80(1): "A local authority may, with the approval of the Secretary of State, undertake, or combine with any other local authority in undertaking, or contribute such sums of money upon such conditions as they may think fit towards, the purchase, establishment, building, alteration, enlargement, rebuilding or management of an approved school:

with regard to the age and creed of a person for whom it is made and environmental.<sup>45</sup>

### 4.2.3. GUARDIANSHIP OF MINORS ACT 1971

The purpose of the 1971 Act is to “consolidate certain enactments relating to the guardianship and custody of minors”. With regard to the ‘custody of a minor’ and ‘administration of the property’ of a minor, the utmost attention must be given to the welfare of the child by the court rather than the rights of the parents.<sup>46</sup> The Act also gives equal right to the mother as that of the father to “apply to the court” with regard to the minor.<sup>47</sup>

After the death of the father, the mother shall be appointed as the guardian of the minor along with the “guardian is appointed by the father”<sup>48</sup> and vice versa.<sup>49</sup> A

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Provided that, before giving his approval, the Secretary of State shall satisfy himself that the proposed expenditure is reasonable and, where it is proposed to purchase, build or establish a new school, that there is a deficiency of approved school accommodation which cannot properly be remedied in any other way.”

<sup>45</sup>Ibid 81(1): “The Secretary of State may classify approved schools according to the age of the persons for whom they are intended, the religious persuasion of such persons, the character of the education and training given therein, their geographical position, and otherwise as he thinks best calculated to secure that a person sent to an approved school is sent to a school appropriate to his case, or as may be necessary or the purposes of this Act.”

<sup>46</sup>Guardianship of Minors Act, 1971, Section 1: “Where in any proceedings before any court (whether or not a court as defined in section 15 of this Act) –

- (a) the custody or upbringing of a minor; or
- (b) the administration of any property belonging to or held on trust for a minor, or the application of the income there of, is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”

<sup>47</sup>Ibid., Section 2: “The mother of a minor shall have the like powers to apply to the court in respect of any matter affecting the minor as are possessed by the father.”

<sup>48</sup>Ibid., Section 3(1): “On the death of the father of a minor, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the minor either alone or jointly with any guardian appointed by the father; and –

- (a) where no guardian has been appointed by the father; or
- (b) in the event of the death or refusal to act of the guardian or guardians appointed by the father, the court may, if it thinks fit, appoint a guardian to act jointly with the mother.”

<sup>49</sup>Ibid., Section 3(2): “On the death of the mother of a minor, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the minor either alone or jointly with any guardian appointed by the mother; and –

- (a) where no guardian has been appointed by the mother; or

‘testamentary guardian’ for a minor can be assigned by ‘deed or will’ by the father<sup>50</sup> and the mother.<sup>51</sup> The court can assign a guardian for a minor who has no ‘parent’, ‘guardian’ or ‘any person having parental rights’.<sup>52</sup> For the welfare of the minor, the testamentary guardian and guardian appointed by the court can be removed and a new guardian can be assigned.<sup>53</sup>

Custody: For the ‘welfare of the minor’ the court can make an order vis-à-vis the ‘custody of the minor’ and ‘access to the minor’.<sup>54</sup> Once the mother is given the right to custody, the court can make an order to give certain sum to the mother for the ‘maintenance of the minor’.<sup>55</sup> Section 10(1)<sup>56</sup> and 11<sup>57</sup> lays down that certain sum of

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(b) in the event of the death or refusal to act of the guardian or guardians appointed by the mother, the court may, if it thinks fit, appoint a guardian to act jointly with the father.”

<sup>50</sup>Ibid., Section 4(1): “The father of a minor may by deed or will appoint any person to be guardian of the minor after his death.”

<sup>51</sup>Ibid., Section 4(2): “The mother of a minor may by deed or will appoint any person to be guardian of the minor after the death.”

<sup>52</sup>ibid., Section 5(1): “Where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the application to be guardian of the minor.”

<sup>53</sup>Ibid., Section 6: “The High Court may, in its discretion, on being satisfied that it is for the welfare of the minor, remove from his office any testamentary guardian or any guardian appointed or acting by virtue of this Act, and may also, if it deems it to be for the welfare of the minor, appoint another guardian in place of the guardian so removed.”

<sup>54</sup>Ibid., Section 9(1): “The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding –

- (a) the custody of the minor; and
- (b) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.”

<sup>55</sup>Ibid., Section 9(2): “Where the court makes an order under subsection (1) of this section giving the custody of the minor to the mother, the court may make a further order requiring the father to pay to the mother such weekly or other periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the father.”

<sup>56</sup>Ibid., Section 10(1): “Where the court makes an order under section 4(4) of this Act that a person shall be the sole guardian of a minor to the exclusion of his mother or father, the court may –

- (a) make such order regarding –
  - (1) the custody of the minor; and
  - (2) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor; and
- (b) make a further order requiring the mother or father to pay to the guardian such weekly or other periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the mother and father.

<sup>57</sup>Ibid., Section 11: “The powers of the court under section 7 of this Act shall, where one of the joint guardians is the mother or father of the minor, include power –

- (a) to make such order regarding –
  - (i) the custody of the minor; and



money to be paid to the guardian for the ‘maintenance of the minor’. The sum paid for the maintenance of a minor as per section 9, 10 and 11 of the Act, can be extended till he reaches twenty-one years of age.<sup>58</sup>

#### **4.2.4. CHILDREN ACT 1975**

The court can make “custodianship order” on an application of applicant<sup>59</sup> i.e., a relative, step-parent or any authorised person with the permission from the custodian of the child.<sup>60</sup> The court by order provide the applicant access of the child on the submission made by parent or grandparent of the child.<sup>61</sup> The parent of the child is required to pay certain sum to the applicant for the maintenance of the child

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(ii) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor;

(b) to make an order requiring the mother or father to pay such weekly or other periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the mother or father;

(c) to vary or discharge any order previously made under that section.”

<sup>58</sup>Ibid., Section 12(1): “An order under section 9, 10 or 11 of this Act for the payment of sums towards the maintenance of a minor may require such sums to continue to be paid in respect of any period after the date on which he ceases to be a minor but not extending beyond the date on which he attains the age of twenty-one; and any order which is made as aforesaid may provide that any sum which is payable there under for the benefit of a person who has ceased to be a minor shall be paid to that person himself.”

<sup>59</sup>Children Act, 1975, Section 33(1): “An authorized court may on the application of one or more persons qualified under subsection (3) make an order vesting the legal custody of a child in the applicant or, as the case may be, in one or more of the applicants.”

<sup>60</sup>Ibid., Section 33(3): “The person qualified to apply for custodianship order are –

(a) a relative or step-parent of the child –

(i) who applies with the consent of a person having legal custody of the child, and

(ii) with whom the child has had his home for the three months preceding the making of the applicant;

(b) any person –

(i) who applies with the consent of a person having legal custody of the child, and

(ii) with whom the child has had his home for a period or periods before the making of the application with amount to at least twelve months and include the three months preceding the making of the application;

(c) any person with whom the child has had his home for a period or periods before the making of the application with amount to at least three years and include the three months preceding the making of the application.”

<sup>61</sup>Ibid., Section 34(1)(a): “An authorised court may, on making a custodianship order or while a custodianship order is in force, by order –

(a) on the application of the mother, the father or a grandparent of the child, make such provision as it thinks fit requiring access to the child to be given to the applicant.”

periodically<sup>62</sup> or at once.<sup>63</sup> The child rights of the custodian to legal custody of the child shall only be in force while the custodianship order has effect.<sup>64</sup>

The magistrates' court can exercise its power despite the fact that the proceedings are brought 'by or against a person' living outside England and Wales.<sup>65</sup> An application for an order by a magistrates' court may be proceeded recommending the matters to which the court needs to fulfil before proceeding in such a case.<sup>66</sup>

#### **4.2.5. CHILDREN ACT 1989**

Before the Children Act, 1989 the main responsibility of the child was assigned to the mother. Visitation rights during holidays and weekends was given to the fathers. With this practice, it was portrayed that the mother was winning the custody of the child. This practice ensured that the fathers had a duty towards child rearing and therefore they had to become more involved in it and not simply provide economic assistance and depart from his duty. The Children Act 1989 intended to tackle this grievance.<sup>67</sup>

The Children Act, 1989 was enacted 'to reform the law relating to children. To provide for local authority services for children in need and others. To amend the law

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<sup>62</sup>Ibid., Section 34(1)(b): "An authorised court may, on making a custodianship order or while a custodianship order is in force, by order –

(b) on the application of the custodian, require the child's mother or father (or both) to make to the applicant for the benefit of the child or to the child such periodical payments, and for such term, as may be specified in the order."

<sup>63</sup>Ibid., Section 34(1)(c): "An authorised court may, on making a custodianship order or while a custodianship order is in force, by order –

(c) on the application of the custodian, require the child's mother or father (or both) to pay to the applicant for the benefit of the child or to the child such lump sum as may be so specified."

<sup>64</sup>Ibid., Section 44(1): "While a custodianship order has effect in relation to a child the right of any person other than the custodian to legal custody of the child is suspended, but, subject to any further order made by any court, revives on the revocation of the custodianship order."

<sup>65</sup>Ibid., Section 46(1): "It is hereby declared that any jurisdiction conferred in a magistrates' court by virtue of this Part is exercisable notwithstanding that the proceedings are brought by or against a person residing outside England and Wales."

<sup>66</sup>Ibid., Section 46(2): "A magistrates' court may, subject to subsection (3), proceed on an application for an order under this Part notwithstanding that the defendant has not been served with the summons, the rules may prescribe matters as to which the court is to be satisfied before proceeding in such a case."

<sup>67</sup>Supra note 5, p. 21.

with respect to children's homes, community homes, voluntary homes and voluntary organisations. To make provision with respect to fostering, child minding and day care for young children and adoption.'

Any issues pertaining to child rearing and management of his property, the court while determining such issues the 'welfare of the child' shall be paramount consideration.<sup>68</sup> The court should bear in mind that delay in the proceedings concerning child's upbringing will prejudice the 'welfare of the child'.<sup>69</sup>

When the court is considering to 'make, vary or discharge' Section 8<sup>70</sup> order and a special guardianship order,<sup>71</sup> the court will take into consideration the wishes of the child; the child's physical, psychological and educational prerequisites; the capacity of the child to adapt to the changing environment; age; sex of the child; any harm the child had undergone or is likely to undergo; ability of his parents.<sup>72</sup>

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<sup>68</sup>The Children Act, 1989, Section 1(1): "When a court determines any question with respect to –  
(a) the upbringing of a child; or  
(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."

<sup>69</sup>Ibid, Section 1(2): "In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

<sup>70</sup>Ibid, Section 8: "Residence, contact and other orders with respect to children."

<sup>71</sup>Ibid, Section 1(4): "The circumstances are that –  
(a) that court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or  
(b) the court is considering whether to make, vary discharge a special guardianship order or an order under Part IV."

<sup>72</sup>Ibid, Section 1(3): "In the circumstances mentioned in subsection (4), a court shall have regard in particular to –  
(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);  
(b) his physical, emotional and educational needs;  
(c) the likely effect on him of any change in his circumstances;  
(d) his age, sex, background and any characteristics of his which the court considers relevant;  
(e) any harm which he has suffered or is at risk of suffering;  
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;  
(g) the range of powers available to the court under this Act in the proceedings in question."

Section 2, 3 and 4 of the Children Act deals with 'Parental Responsibility'. Both the parents shall have parental responsibility of a legitimate child.<sup>73</sup> The mother shall have parental responsibility of an illegitimate child and if the father has acquired it and has not ceased to have it the parental responsibility of an illegitimate child vest with the father.<sup>74</sup> The father shall acquire the parental responsibility of an illegitimate child if he registers himself as the child's father; if there is an agreement between him and the child's mother for the child's parental responsibility; and the court on his application orders the parental responsibility to him.<sup>75</sup>

The rule of law that the father is the natural guardian of a legitimate child is abolished.<sup>76</sup>

Parental responsibility according to this Act means all the 'rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.<sup>77</sup> It also comprises the 'rights, powers and duties which a guardian of a child's estate would have had in relation to the child and his property'.<sup>78</sup>

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<sup>73</sup>Ibid, Section 2(1): "Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child."

<sup>74</sup>Ibid, Section 2(2): "Where a child's father and mother were not married to each other at the time of his birth –

- (a) the mother shall have parental responsibility for the child;
- (b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Act."

<sup>75</sup>Ibid, Section 4(1): "Where a child's father and mother were not married to each other at the time of his birth, the father shall acquire parental responsibility for the child if –

- (a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);
- (b) he and the child's mother make an arrangement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or
- (c) the court, on his application, order that he shall have parental responsibility for the child."

<sup>76</sup>Ibid, Section 2(4): "The rule of law that a father is the natural guardian of his legitimate child is abolished."

<sup>77</sup>Ibid, Section 3(1): "In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

<sup>78</sup>Ibid, Section 3(2): "It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property."

Until the child reaches majority or is adopted, the parental responsibility is conferred with both the parents. Even after divorce, when the custody of the child is assigned to one parent, the other parent holds his parental responsibility. Main decisions concerning child's rearing is taken by both the parents.<sup>79</sup> When both the parents can take major decision concerning their child's future, this lessens the "win/lose" aspect to the aftermath of court cases as this notion deliberated to "lower the stakes" in parental disputes over their children.<sup>80</sup>

Appointment and revocation of guardians: Section 5 deals with appointment of guardians. When any individual makes an application with respect to the child in the court. The court may by order appoint that individual to be the child's guardian if the child has no parent with parental responsibility; and a residence order has been made with respect to the child in favour of a parent, guardian and special guardian of his who had died while the order in force.<sup>81</sup> A parent having responsibility of the child can appoint a guardian for his child after his death.<sup>82</sup> In a same way a guardian having responsibility of a child can appoint a guardian for the child after his death.<sup>83</sup> A person so assigned as a guardian will acquire the parental responsibility for the child.<sup>84</sup> All the former appointment of guardians will be annulled by the appointment

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<sup>79</sup>Supra note 5, p. 22.

<sup>80</sup>Ibid.

<sup>81</sup>The Children Act, 1989, Section 5(1): "Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if –

(a) the child has no parent with parental responsibility for him; or

(b) a parent, guardian or special guardian of the child was named in a child arrangements order as a person with whom the child was to live and has died while the order was in force; or

(c) paragraph (b) does not apply, and the child's only or last surviving special guardian dies."

<sup>82</sup>Ibid., Section 5(3): "A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death."

<sup>83</sup>Ibid., Section 5(4): "A guardian of a child may appoint another individual to take his place as a child's guardian in the event of his death, and a special guardian of a child may appoint another individual to be his child's guardian in the event of his death."

<sup>84</sup>Ibid., Section 5(6): "A person appointed as a child's guardian under this section shall have parental responsibility for the child concerned."

of guardians under section 5(3) and (4).<sup>85</sup> An individual who selected the guardian can be annulled by him.<sup>86</sup>

Child arrangements orders: Agreements controlling the child's life (i.e. child's cohabitation, association with other person) is termed as "child arrangements order".<sup>87</sup> For a child who is in the care of a local authority, no court shall make any order with regard to section 8, except "child arrangements order".<sup>88</sup> The local authority shall make no submission and no court will make an order for a "child arrangements order".<sup>89</sup> However, for the welfare of a child, the court has the right to make an order under section 8 of the Act.<sup>90</sup> A parent or a guardian of a child, a person having

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<sup>85</sup>Ibid., Section 6(1): "An appointment under section 5(3) or (4) revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian."

<sup>86</sup>Ibid., Section 6(2): "An appointment under section 5(3) or 5(4) (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by a written and dated instrument which is signed –

- (a) by him; or
- (b) at his direction, in his presence and in the presence of two witnesses who each attest the signature."

<sup>87</sup>Ibid., Section 8(1): "In this Act –

"child arrangements order" means an order regulating arrangements relating to any of the following –

- (a) with whom a child is to live, spend time or otherwise have contact, and
- (b) when a child is to live, spend time or otherwise have contact with any person;

"a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;

"a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child."

<sup>88</sup>Ibid., Section 9(1): "No court shall make any section 8 order other than a child arrangements order to which subsection (6B) applies, with respect to a child who is in the care of a local authority."

<sup>89</sup>Ibid., Section 9(2): "No application may be made by a local authority for a child arrangements order and no court shall make such an order in favour of a local authority."

<sup>90</sup>Ibid., Section 10(1): "In any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if –

- (a) an application for the order has been made by a person who –
  - (i) is entitled to apply for a section 8 order with respect to the child; or
  - (ii) has obtained the leave of the court to make the application; or
- (b) the court considers that the order should be made even though no such application has been made."

parental responsibility of the child and a person who is named in a child arrangements order can apply to the court for order under section 8.<sup>91</sup>

When a person is assigned as a “child’s special guardian” is said to be a “special guardianship order”.<sup>92</sup> For this purpose, a “special guardian” must be eighteen years of age and should not be a parent of the same child.<sup>93</sup> The court has the authority to make an order in any family proceedings with regard to any child to advice, aid and support any person named in the order.<sup>94</sup>

For all those children who is in need, the local authority will protect and uphold the welfare of children.<sup>95</sup> The assistances delivered by an authority with the view of upholding the welfare of the child, may be for the family of a particular child in

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<sup>91</sup>Ibid., Section 10(4): “The following persons are entitled to apply to the court for any section 8 order with respect to a child –

- (a) any parent, guardian or special guardian of the child;
- (b) any person who by virtue of section 4A has parental responsibility for the child;
- (c) any person who is named, in a child arrangements order that is in force with respect to the child, as a person with whom the child is to live.”

<sup>92</sup>Ibid., Section 14A(1): “A “special guardianship order” is an order appointing one or more individuals to be a child’s “special guardian” (or special guardians).”

<sup>93</sup>Ibid., Section 14A(2): “A special guardian –

- (a) must be aged eighteen or over; and
- (b) must not be a parent of the child in question, and subsection (3) to (6) are to be read in that light.”

<sup>94</sup>Ibid., Section 16(1): “Where, in any family proceedings, the court has power to make an order under this Part with respect to any child, it may (whether or not it makes such an order) make an order requiring –

- (a) an officer of the services or a Welsh family proceedings officer to be made available; or
- (b) local authority to make an officer of the authority available, to advice, assist and (where appropriate) befriend any person named in the order.”

<sup>95</sup>Ibid., Section 17(1): “It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) –

- (a) to safeguard and promote the welfare of children within their area who are in need; and
- (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children’s needs.”

need.<sup>96</sup> For determining the welfare of the child the local authority may consider the ‘wishes and feelings’ of the child.<sup>97</sup>

Within the jurisdiction of a local authority, a day care for children in need who is five years of age or below and is not attending school will be provided.<sup>98</sup> For the people who is caring for children in day care or who at any time escort such children while they are in day care may offer certain services by the local authority.<sup>99</sup>

For the child who is in need within the jurisdiction of the local authority, will provide accommodation.<sup>100</sup> The same can be provided for a child at the age of 16 when the prosperity and safety is prone to be discriminated if the accommodation is not offered.<sup>101</sup> For safeguarding the welfare of the child, accommodation may be provided

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<sup>96</sup>Ibid., Section 17(3): “Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of this family, if it is provided with a view to safeguarding or promoting the child’s welfare.”

<sup>97</sup>Ibid., Section 17(4A): “Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by this section, a local authority shall, so far as is reasonably practicable and consistent with the child’s welfare –

- (a) ascertain the child’s wishes and feelings regarding the provision of those services; and
- (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.”

<sup>98</sup>Ibid., Section 18(1): “Every local authority shall provide such day care for children in need within their area who are –

- (a) aged five or under; and
- (b) not yet attending schools, as is appropriate.”

<sup>99</sup>Ibid., Section 18(3): “A local authority may provide facilities (including training, advice, guidance and counselling) for those –

- (a) caring for children in day care; or
- (b) who at any time accompany such children while they are in day care.”

<sup>100</sup>Ibid., Section 20(1): “Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –

- (a) there being no person who has parental responsibility for him;
- (b) his being lost or having been abandoned; or
- (c) the person who has been caring for him being prevented from providing him with suitable accommodation or care.”

<sup>101</sup>Ibid., Section 20(3): “Every local authority shall provide accommodation for any child in need within their area who reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.”



by a local authority in their jurisdiction for a child in need even through parental responsibility is afforded.<sup>102</sup>

An order can be made for assigning the child in the maintenance and guidance of a ‘designated local authority’ by the court.<sup>103</sup> The ‘care order’ or ‘supervision order’ can be made by the court once it is contented that the child is in pain or is likely to cause injury.<sup>104</sup> Once the child attains seventeen years of age, no ‘care order’ or ‘supervision order’ may be made.<sup>105</sup>

Once the care order with regard to a child is made, the local authority must take and retain the child into their care till the order is in force.<sup>106</sup> By the proposed care order, the local authority shall have ‘parental responsibility’ with regard to the child.<sup>107</sup>

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<sup>102</sup>Ibid., Section 20(4): “A local authority may provide accommodation for any child in need within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child’s welfare.”

<sup>103</sup>Ibid., Section 31(1): “On the application of any local authority or authorised person, the court may make an order –

- (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
- (b) putting him under the supervision of a designated local authority.”

<sup>104</sup>Ibid., Section 31(2): “A court may only make a care order or supervision order if it is satisfied –

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to –
  - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
  - (ii) the child’s being beyond parental control.”

<sup>105</sup>Ibid., Section 31(3): “No care order or supervision order may be made with respect to a child who has reached the age of seventeen (or sixteen, in the case of a child who is married).”

<sup>106</sup>Ibid., Section 33(1): “When a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.”

<sup>107</sup>Ibid., Section 33(3): “While a care order is in force with respect to a child, the local authority designed by the order shall –

- (a) have parental responsibility for the child; and
- (b) have the power (subject to the following provisions of this section) to determine the extent to which –
  - (i) a parent, guardian or special guardian of the child; or
  - (ii) a person who by virtue of section 4A has parental responsibility for the child, may meet his parental responsibility for him.”

Once a ‘supervision order’ is in force, the supervisor must guide, help and support the child to take steps as per the order.<sup>108</sup>

An interim order for care and supervision with regard to the child in question can be made by the court.<sup>109</sup> The court will make an ‘interim supervision order’ for a child if it is contented that the welfare of the child will be reasonably protected without an interim order being made.<sup>110</sup> An officer shall be appointed by the court for a child in question except if it is not essential to protect the child’s welfare.<sup>111</sup>

The court can make the order on a submission made by a local authority, once it is contented that the child is suffering.<sup>112</sup> The submission for child assessment ought to be handled as an ‘emergency protection order’ by the court.<sup>113</sup> Once it is contented that an ‘emergency protection order’ can be formulated with regard to the child then

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<sup>108</sup>Ibid., Section 35(1): “When a supervision order is in force it shall be the duty of the supervisor –  
(a) to advise, assist and befriend the supervised child;  
(b) to take such steps as are reasonably necessary to give effect to the order; and  
(c) where –  
(i) the order is not wholly complied with; or  
(ii) the supervisor considers that the order may no longer be necessary, to consider whether or not to apply to the court for its variation or discharge.”

<sup>109</sup> Ibid., Section 38(1): “Where –  
(a) in any proceedings on an application for a care order or supervision order, the proceedings are adjourned; or  
(b) the court gives a direction under section 37(1), the court may make an interim care order or an interim supervision order with respect to the child concerned.”

<sup>110</sup>Ibid., Section 38(3): “Where, in any proceedings on an application for a care order or supervision order, a court makes a [child arrangements order with respect to the living arrangements of] the child concerned, it shall also make an interim supervision order with respect to him unless satisfied that his welfare will be satisfactorily safeguarded without an interim order being made.”

<sup>111</sup>Ibid., Section 41(1): “For the purpose of any specified proceedings, the court shall appoint [an officer of Service] [or a Welsh family proceedings officer] for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.”

<sup>112</sup>Ibid., Section 43: “On the application of a local authority or authorised person for an order to be made under this section with respect to a child, the court may make the order if, but only if, it is satisfied that –

- (a) the application has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm;
- (b) an assessment of the state of the child’s health or development, or of the way in which he has been treated, is required to enable the application to determine whether or not the child is suffering, or is likely to suffer, significant harm; and
- (c) it is unlikely that such an assessment will be made, or be satisfactory, in the absence of an order under this section.”

<sup>113</sup>Ibid., Section 43(3): “A court may treat an application under this section as an application for an emergency protection order.”

the court will not create a ‘child assessment order’.<sup>114</sup> The date from which the ‘child assessment order’ will come into force will be stated in the order and the order will be in force for minimum of 7 days starting from the date mentioned in the order.<sup>115</sup> Only when the order states that the child should be retained away from home then the child can be kept away from his home.<sup>116</sup>

For the welfare of children, all local authority will make provisions as they think suitable for safeguarding “community homes”.<sup>117</sup> A ‘local authority’ or a ‘voluntary organisation’ may provide for a community home and run and the preserve it.<sup>118</sup>

A child below sixteen years of age who is accommodated in their own home and cared by any other person than his parent, relative and a person having parental responsibility then it can be stated as “a privately fostered child’ and to look after the

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<sup>114</sup>Ibid., Section 43(4): “No court shall make a child assessment order if it is satisfied –  
(a) that there are grounds for making an emergency protection order with respect to the child; and  
(b) that it ought to make such an order rather than a child assessment order.”

<sup>115</sup>Ibid., Section 43(5): “A child assessment order shall –  
(a) specify the date by which the assessment is to begin; and  
(b) have effect for such period, not exceeding 7 days beginning with the date, as may be specified in the order.”

<sup>116</sup>Ibid., Section 43(9): “The child may only be kept away from home –  
(a) in accordance with directions specified in the order;  
(b) if it is necessary for the purposes of the assessment; and  
(c) for such period or periods as may be specified in the order.”

<sup>117</sup>Ibid., Section 53(1): “Every local authority shall make such arrangements as they consider appropriate for securing that homes (“community homes”) are available –  
(a) for the care and accommodations of children looked after by them; and  
(b) for purposes connected with the welfare of children (whether or not looked after by them), and may do so jointly with one or more other local authorities.”

<sup>118</sup>Ibid., Section 53(3): “A community home may be a home –  
(a) provided, by a local authority; or  
(b) provided by a voluntary organisation but in respect of which a local authority and the organisation –  
(i) propose that, in accordance with an instrument of management, the equipment, maintenance and (subject to subsection (3B)) management of the home shall be the responsibility of the local authority; or  
(ii) so propose that the management, equipment and maintenance of the home shall be the responsibility of the voluntary organisation.”

child in all situations is called “to foster a child privately”.<sup>119</sup> The welfare of children who are “privately fostered” within the jurisdiction of the local authority must be pondered and protected by the authority.<sup>120</sup> Rules can be set by the Secretary of State to visit the child who is privately fostered by an officer in the jurisdiction of the local authority.<sup>121</sup>

#### **4.2.6. CHILDREN ACT 2004**

The Act enacted for the foundation of a ‘Children’s commissioner’. To make arrangement about administrations to children by nearby specialists and different people. To make provision in relation to Wales about advisory and help offerings relating to family proceedings.

Children’s Commissioner: An office of children’s commissioner is to be established.<sup>122</sup> The Children’s Commissioner in England has the role of merchandising consciousness of the view and welfare of children.<sup>123</sup> The Children’s Commissioner may additionally in precise under section 2 of the Act can ask any

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<sup>119</sup>Ibid., Section 66(1): “In this Part –

- (a) “a privately fostered child” means a child who is under the age of sixteen and who is cared for, and provided with accommodation in their own home by, someone other than –
  - (i) a parent of his;
  - (ii) a person who is not a parent of his but who has parental responsibility for him; or
  - (iii) a relative of his; and
- (b) “to foster a child privately” means to look after the child in circumstances in which he is a privately fostered child as defined by this section.”

<sup>120</sup>Ibid., Section 67(1): “It shall be the duty of every local authority to satisfy themselves that the welfare of children who are or are proposed to be privately fostered within their area is being or will be satisfactorily safeguarded and promoted and to secure that such advice is given to those concerned with them as appears to the authority to be needed.”

<sup>121</sup>Ibid., Section 67(2): “The Secretary of State may make regulations –

- (a) requiring every child who is privately fostered within a local authority’s area to be visited by an officer of the authority –
  - (i) in prescribed circumstances; and
  - (ii) on specified occasions or within specified periods; and
- (b) imposing requirements which are to be met by any local authority, or officer of a local authority, in carrying out functions under this section.”

<sup>122</sup> Children Act 2004, Section 1(1): “There is to be an office of Children’s Commissioner.”

<sup>123</sup>Ibid., Section 2(1): “The Children’s Commissioner has the function of promoting awareness of the views and interests of children in England.”

individual take account of their interest for the interest of the children. Instruct the Secretary of State on the perspectives and interests of children. Consider the issues relating to the interests of children. The Children’s Commissioner should publish a report on any issue considered or researched by him.<sup>124</sup> The Children’s Commissioner must consider the interests of children. The following aspects of their welfare is to be considered i.e. “physical, mental and emotional well-being, protection from harm and neglect, educational, training and recreation, the contribution made by them to society and social and economic well-being”.<sup>125</sup> The Children’s Commissioner must take a reasonable steps to make the children conscious of his functions and to communicate with the Commissioner.<sup>126</sup> In England, when a child raises a problem of public policy of relevance to other children, the Commissioner can investigate into that case and can make suggestions about the problem involved.<sup>127</sup> The Secretary of State must be consulted by the Children’s Commissioner before holding an investigation under section 3 of the Act.<sup>128</sup> Once the investigation is finished a report

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<sup>124</sup>Ibid., Section 2(2): “The Children’s Commissioner may in particular under this section –  
 (a) encourage persons exercising functions or engaged in activities affecting children to take account of their views and interests;  
 (b) advise the Secretary of State on the views and interests of children;  
 (c) consider or research the operation of complaints procedures so far as relating to children;  
 (d) consider or research any other matter relating to the interests of children;  
 (e) publish a report on any matter considered or researched by him under this section.”

<sup>125</sup>Ibid., Section 2(3): “The Children’s Commissioner is to be concerned in particular under this section with the views and interests of children so far as relating to the following aspects of their well-being –  
 (a) physical and mental health and emotional well-being;  
 (b) protection from harm and neglect;  
 (c) educational, training and recreation;  
 (d) the contribution made by them to society;  
 (e) social and economic well-being.”

<sup>126</sup>Ibid., Section 2(4): “The Children’s Commissioner must take reasonable steps to involve children in the discharge of his function under this section, and in particular to –  
 (a) ensure that children are made aware of his function and how they may communicate with him; and  
 (b) consult children, and organization working with children, on the matters he proposes to consider or research under subsection (2)(c) or (d).”

<sup>127</sup>Ibid., Section 3(1): “Where the Children’s Commissioner considers that the case of an individual child in England raises issues of public policy of relevance to other children, he may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues”.

<sup>128</sup>Ibid., Section 3(3): “Before holding an inquiry under this section the Children’s Commissioner must consult the Secretary of State.”

must be published by the Children's Commissioner encompassing his suggestions and a copy of the report must be sent to the Secretary of State.<sup>129</sup>

Function of the Commissioner: The Children's Commissioner has the role of promoting consciousness of the opinions and securities, welfare of children in Wales<sup>130</sup>, Scotland<sup>131</sup> and Northern Ireland<sup>132</sup>. A report must be prepared by the Children's Commissioner after the end of every financial year mentioning the method he used to carry out his purpose, the outcome of the functions and the issues he proposes to ponder in the subsequent financial years.<sup>133</sup> A copy of the report should be sent to the Secretary of State and the Secretary of State should place a copy of the report before each house of Parliament.<sup>134</sup>

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<sup>129</sup>Ibid., Section 3(5): "As soon as possible after completing an inquiry under this section the Children's Commissioner must –

- (a) publish a report containing his recommendations; and
- (b) send a copy to the Secretary of State."

<sup>130</sup>Ibid., Section 5(1): "The Children's Commissioner has the function of promoting awareness of the views and interests of children in Wales, except in so far as relating to any matter falling within the remit of the Children's Commissioner for Wales under section 72B, 73 or 74 of the Care Standards Act 2000 (c.14).

<sup>131</sup>Ibid., Section 6(1): "The Children's Commissioner has the function of promoting awareness of the views and interests of children in Scotland in relation to reserved matters."

<sup>132</sup>Ibid., 7(1): "The Children's Commissioner has the function of promoting awareness of the views and interests of children in Northern Ireland in relation to expected matters."

<sup>133</sup>Ibid., Section 8(1): "As soon as possible after the end of each financial year the Children's Commissioner must make a report on –

- (a) the way in which he has discharged his function under this Part, other than the functions of holding inquiries;
- (b) what he has found in the course of exercising those functions during the year; and
- (c) the matters he intends to consider or research in the next financial year."

<sup>134</sup>Ibid., Section 8(3): "Where the Children's Commissioner makes a report under this section –

- (a) he must send a copy to the Secretary of State; and
- (b) the Secretary of State must as soon as possible lay a copy before each House of Parliament."

Children's services: Every children's service authority should make a preparation to help co-operation among the authority in England<sup>135</sup> and in Wales<sup>136</sup>. Keeping in mind the welfare of the children (i.e. physical, psychological and emotional welfare; safeguarding from injury and abandonment; providing educational training) the preparation must be made in the authority's area in England<sup>137</sup> and in Wales<sup>138</sup>. The concern of parents and other persons for the welfare of the children must be taken into account by the authority in England<sup>139</sup> and in Wales<sup>140</sup>. All the duties are carried out of 'each person and body' respecting and protection the welfare of children.<sup>141</sup>

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<sup>135</sup>Ibid., Section 10(1): "Each children's services authority in England must make arrangements to promote co-operation between –

- (a) the authority;
- (b) each of the authority's relevant partners; and
- (c) such other persons or bodies as the authority consider appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area."

<sup>136</sup>Ibid., Section 25(1): "Each children's services authority in Wales must make arrangements to promote co-operation between –

- (a) the authority;
- (b) each of the authority's relevant partners; and
- (c) such other persons or bodies as the authority consider appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area."

<sup>137</sup>Ibid., Section 10(2): "The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to –

- (a) physical and mental health and emotional well-being;
- (b) protecting from harm and neglect;
- (c) education, training and recreation;
- (d) the contribution made by them to society;
- (e) social and economic well-being."

<sup>138</sup>Ibid., Section 25(2): "The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to –

- (a) physical and mental health and emotional well-being;
- (b) protecting from harm and neglect;
- (c) education, training and recreation;
- (d) the contribution made by them to society;
- (e) social and economic well-being."

<sup>139</sup>Ibid., Section 10(3): "In making arrangements under this section a children's services authority in England must have regard to the importance of parents and other persons caring for children in improving the well-being of children."

<sup>140</sup>Ibid., Section 25(3): "In making arrangements under this section a children's services authority in England must have regard to the importance of parents and other persons caring for children in improving the well-being of children."

<sup>141</sup>Ibid., Section 11(2): "Each person and body to whom this section applies must make arrangements for ensuring that –

- (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and

A “Local Safeguarding Children Board” should be created by “each children’s services authority” for their region in England<sup>142</sup> and in Wales<sup>143</sup>. For the welfare of the children, the “Local Safeguarding Children Board” must organize what is done by each person or body represented on the Board in the jurisdiction of the authority and must safeguard the efficiency of what is done for the welfare of the children “by each person or body” in England<sup>144</sup> and in Wales<sup>145</sup>.

Fostering of children: The Secretary of the State by rules can compel an individual who ‘fosters a child’ privately in the jurisdiction of a ‘children’s services authority in England’ to be listed for private fostering by the authority in harmony with the rules.<sup>146</sup>

In Wales, the Assembly can by rules compel an individual who ‘fosters a child’ privately in the jurisdiction of a ‘children’s services authority in Wales’ to be listed for private fostering by the authority in harmony with the rules.<sup>147</sup>

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(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to the need.”

<sup>142</sup>Ibid., Section 13(1): “Each children’s services authority in England must establish a Local Safeguarding Children Board for their area.”

<sup>143</sup>Ibid., Section 32(1): “Each children’s services authority in Wales must establish a Local Safeguarding Children Board for their area.”

<sup>144</sup>Ibid., Section 14(1): “The objective of a Local Safeguarding Children Board established under section 13 is –

(a) to co-ordinate what is done by each person or body represented on the Board for the purposes of safeguarding and promoting the welfare of children in the area of the authority by which it is established; and

(b) to ensure the effectiveness of what is done by each such person or body for those purposes.”

<sup>145</sup>Ibid., Section 14(1): “The objective of a Local Safeguarding Children Board established under section 31 is –

(a) to co-ordinate what is done by each person or body represented on the Board for the purposes of safeguarding and promoting the welfare of children in the area of the authority by which it is established; and

(b) to ensure the effectiveness of what is done by each such person or body for those purposes.”

<sup>146</sup>Ibid., Section 45(1): “The Secretary of State may by regulations require any person who fosters a child privately in the area of a children’s services authority in England to be registered for private fostering by that authority in accordance with the regulations.”

<sup>147</sup>Ibid., Section 46(1): “The Assembly may by regulations require any person who fosters a child privately in the area of a children’s services authority in Wales to be registered for private fostering by that authority in accordance with the regulations.”



The Secretary of the State in England, and the Assembly in Wales can make arrangement for the payments for a foster parent to be made by a ‘children’s services authority in England or Wales’.<sup>148</sup>

#### **4.2.7. CHILDCARE ACT 2006**

The main aim of the Act is to lay down the powers and duties of “local authorities and other bodies in England” to increase the welfare of minor children and to amend Part 10A of the Children Act 1989. The welfare of the minor children ought to be improved by the “local authority” in England and they are required to minimise disparities in relation to the physical, psychological and emotional welfare; safeguard from injury and abandonment; education, training and recreation; the contribution made by them to society; social and economic welfare. A target is set by the Secretary of State for development of welfare of minor children and lessening of inequalities among minor children in “the area of an English local authority”.<sup>149</sup>

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<sup>148</sup>Ibid., Section 49(1): “The appropriate person may by order make provision as to the payments to be made –

- (a) by a children’s services authority in England or Wales or a person exercising functions on its behalf to a local authority foster parent with whom any child is placed by that authority or person under section 23(2)(a) of the Children Act 1989;
- (b) by a voluntary organization to any person with whom any child is placed by that organization under section 59(1)(a) of that Act.”

<sup>149</sup>Childcare Act 2006, Section 1: “General duties of local authority in relation to well-being of young children

- (1) An English local authority must -
  - (a) improve the well- being of young children in their area, and
  - (b) reduce inequalities between young children in their area in relation to the matters mentioned in subsection (2).
- (2) In this Act “well-being”, in relation to children, means their well-being so far as relating to –
  - (a) physical and mental health and emotional well-being;
  - (b) protection from harm and neglect;
  - (c) educational, training and recreation;
  - (d) the contribution made by them to society;
  - (e) social and economic well-being.
- (3) The Secretary of State may, in accordance with regulations, set targets for -
  - (a) the improvement of the well-being of young children in the area of an English local authority;
  - (b) the reduction of inequalities between young children in the area of an English local authority in relation to the matters mentioned in subsection (2).

A parent of a minor child having parental responsibility and care of the child is termed as “parent” under Section 2(2) of the Act and it also states that a woman who is planning to become a parent or a pregnant women is termed as “prospective parent”.<sup>150</sup>

“An English local authority” should protect the provision of childcare to address the issues of parents in their general vicinity who need childcare so as to approve them to take up or keep o in work or to embrace instruction or preparing which could sensibly be required to help them to acquire work.<sup>151</sup> In deciding if the arrangement of childcare is adequate to meet the prerequisites of Section 6(1), a local authority must have respect to the requirements of parents in their general vicinity for the arrangement of childcare in regard of which the childcare component of working assessment credit is payable and the arrangement of childcare which is appropriate for disabled children and may have respect to any children which they hope to be accessible outside their territory.<sup>152</sup> An English local authority must make sure about

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(4) In exercising their functions, the English local authority must act in the manner that is best calculated to secure that any targets set under subsection (3) (so far as relating to the area of the local authority) are met.

(5) In performing their duties under this section, an English local authority must have regard to any guidance given from time to time by the Secretary of State.”

<sup>150</sup>Ibid., Section 2(2): “In this section – “parent” means a parent of a young child, and includes any individual who –

(a) has parental responsibility for a young child, or

(b) has care of a young child;

“prospective parent” means a pregnant woman or any other person who is likely to become, or is planning to become, a parent;

“social services functions”, in relation to a local authority, has the same meaning as in the Local Authority Social Services Act 1970 (c.42).”

<sup>151</sup>Ibid., Section 6(1): “An English local authority must secure, so far as is reasonably practicable, that the provision of childcare (whether or not by them) is sufficient to meet the requirements of parents in their area who require childcare in order to enable them –

(a) to take up, or remain in, work, or

(b) to undertake education or training which could reasonably be expected to assist them to obtain work.”

<sup>152</sup>Ibid., Section 6(2): “In determining for the purposes of subsection (1) whether the provision of childcare is sufficient to meet those requirements, a local authority –

(a) must have regard to the needs of parents in their area for-

(i) the provision of childcare in respect of which the child care element of working tax credit is payable, and

that early years arrangement of an endorsed depiction is accessible freely for such periods as might be recommended for ever small child in their general vicinity who has accomplished such age as might be recommended but is under obligatory ‘school age’.<sup>153</sup> The local authority in England, may provide financial assistance to any person who provides childcare.<sup>154</sup> The local authority may go into an understanding under which instalments are made to the expert for the arrangement by the authority of childcare for a youngster. However, this doesn't have any significant bearing to childcare gave in compatibility of the obligation forced by segment 7 or to childcare gave under segment 18(1) or (5) of the Children Act 1989.<sup>155</sup>

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(ii) the provision of childcare which is suitable for disabled children, and (b) may have regard to any children which they expect to be available outside their area.”

<sup>153</sup>Ibid., Section 7(1): “An English local authority must secure that early years provision of a prescribed description is available free of charge for such periods as may be prescribed for each young child in their area who –

- (a) has attained such age as may be prescribed, but
- (b) is under compulsory school age.”

<sup>154</sup> Ibid., Section 8: “Power of local authority in relation to the provision of childcare

- (1) An English local authority may-
  - (a) assist any person who provides or proposes to provide childcare;
  - (b) make arrangements with any other person for the provision of childcare;
  - (c) subject to subsection (3), provide childcare.
- (2) The assistance which a local authority may give under subsection (1)(a) includes financial assistance; and the arrangements which a local authority may make under subsection (1)(b) include arrangements involving the provision of financial assistance by the authority.
- (3) An English local authority may not provide childcare for a particular child or group of children unless the local authority are satisfied-
  - (a) that no other person is willing to provide the childcare (whether in pursuance of arrangements made with the authority or otherwise), or
  - (b) if another person is willing to do so, that in the circumstances it is appropriate for the local authority to provide the childcare.
- (4) Subsection (3) does not affect the provision of childcare by the governing body of a maintained school.
- (5) Subsection (3) does not apply in relation to the provision of childcare under section 18(1) or (5) of the Children Act 1989 (c.41) (day care for children in need).
- (6) In exercising their functions under this section, an English local authority must have regard to any guidance given from time to time by the Secretary of State.”

<sup>155</sup> Ibid., Section 10: “Charges where local authority provide childcare

- (1) An English local authority may enter into an agreement under which payments are made to the authority for the provision by the authority of childcare for a child.
- (2) Subsection (1) does not apply –
  - (a) to childcare provided in pursuance of the duty imposed by section 7, or
  - (b) to childcare provided under section 18(1) or (5) of the Children Act 1989 (c. 41) (day care for children in need), provision as to charges for such care being made by section 29 of that Act.”

An English local authority in their general vicinity must plan appraisals of the adequacy of the arrangement of childcare. The childcare evaluation must be set up before the end of the time of one year starting with the initiation of this area. Resulting childcare appraisals must be set up at interims not surpassing three years. The authority must keep a childcare evaluation arranged by them under audit until the childcare appraisal is supplanted by a further childcare evaluation. Guidelines may make arrangement requiring a childcare appraisal to manage recommended matters. In setting up a childcare appraisal and holding it under survey, an English local authority must consult such people and have respect to any direction given every once in a while by the Secretary of State.<sup>156</sup>

Wales: “An Welsh local authority” should protect the provision of childcare to address the issues of parents in their general vicinity who need childcare so as to approve them to take up or keep o in work or to embrace instruction or preparing which could sensibly be required to help them to acquire work.<sup>157</sup> In deciding for the

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<sup>156</sup>Ibid., Section 11: “Duty to assess childcare provision

- (1) An English local authority must prepare assessments of the sufficiency of the provision of childcare (whether or not by them) in their area (“childcare assessments”).
- (2) The first childcare assessment must be prepared before the end of the period of one year beginning with the commencement of this section.
- (3) Subsequent childcare assessments must be prepared at intervals not exceeding three years.
- (4) The authority must keep a childcare assessment prepared by them under review until the childcare assessment is superseded by a future childcare assessment.
- (5) Regulations may make provision requiring a childcare assessment –
  - (a) to deal with prescribed matters or be prepared according to prescribed criteria;
  - (b) to be in the prescribed form;
  - (c) to be published in the prescribed manner.
- (6) In preparing a childcare assessment and keeping it under review, an English local authority must –
  - (a) consult such persons, or persons of a description, as may be prescribed, and
  - (b) have regard to any guidance given from time to time by the Secretary of State.

(7) Subsection (5) of section 6 applies for the purposes of this section as it applies for the purposes of that section.”

<sup>157</sup>Ibid., Section 22(1): “A Welsh local authority must secure, so far as is reasonably practicable, that the provision of childcare (whether or not by them) is sufficient to meet the requirements of parents in their area who require childcare in order to enable them –

- (a) to take up, or remain in work, or
- (b) to undertake education or training which could reasonably be expected to assist them to obtain work.”

motivations behind subsection (1) regardless of whether the arrangement of childcare is adequate to meet those prerequisites, a nearby position must have respect to the requirements of parents in their general vicinity for the arrangement of childcare in regard of which the childcare component of working expense credit is payable, the arrangement of childcare which is appropriate for incapacitated children, and the arrangement of childcare comprising the utilization of the Welsh language and may have regard to any childcare which they hope to be accessible outside their jurisdiction.<sup>158</sup> The local authority in Wales, may provide financial assistance to any person who provides childcare.<sup>159</sup>

In England, the Chief Inspector has the onus of keeping the Secretary of State informed about the contribution of structured early years provision to the welfare of children for whom it is provided. The early years provision the equality and standards of regulated.<sup>160</sup>

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<sup>158</sup>Ibid., Section 22(2): “In determining for the purposes of subsection (1) whether the provision of childcare is sufficient to meet those requirements, a local authority –

- (a) must have regard to the needs of parents in their area for –
  - (i) the provision of childcare in respect of which the child care element of working tax credit is payable,
  - (ii) the provision of childcare which is suitable for disabled children, and
  - (iii) the provision of childcare involving the use of the Welsh language, and
- (b) may have regard to any childcare which they expect to be available outside their area.”

<sup>159</sup>Ibid., Section 23(1): “A Welsh local authority may –

- (a) assist any person who provides or proposes to provide childcare;
- (b) make arrangements with any other person for the provision of childcare;
- (c) provide childcare.”

<sup>160</sup>Ibid., Section 31(1): “The Chief Inspector has the general duty of keeping the Secretary of State informed about –

- (a) the contribution of regulated early years provision in England to the well-being of children for whom it is provided;
- (b) the quality and standards of regulated early years provision in England;
- (c) how far regulated early years provision in England meets the needs of the range of children for whom it is provided;
- (d) the quality of leadership and management in connection with regulated early years provision in England.

Two registers must be maintained by the Chief Inspector. The first register should contain every person who are registered as early years' childminders or other early years providers under Chapter 2 of the Act. The second register is divided into two parts (Part A and Part B). Part A contains all persons who are registered as later years childminders or other later years providers under Chapter 3 and Part B contains all persons who are registered as childminders or other childcare providers under chapter 4.<sup>161</sup> A person who is registered as early years childminders is only offered "early years childminding in England".<sup>162</sup> To advance the prosperity of minor children for whom early years arrangement is given by early years suppliers to whom section 40 applies, the Secretary of State should by request determine as per section 41 such prerequisites as he considers suitable identifying with learning by, and the improvement of, such children, and by guidelines indicate as per section 43 such necessities as he considers fitting administering the exercises of early years suppliers to whom section 40 applies.<sup>163</sup> An early years supplier to whom section 40 applies must make sure about that the early years arrangement meets the learning and

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<sup>161</sup>Ibid., Section 32: "Maintenance of the two childcare registers –

- (1) The Chief Inspector must maintain two registers.
- (2) The first register ("the early years register") is to be a register of all persons who are registered as early years childminders or other early years providers under Chapter 2 (which provides for the compulsory registration of persons providing early years provision).
- (3) The second register ("the general childcare register") is to be divided into two Parts.
- (4) The first Part ("Part A") is to be register of all persons who are registered as later years childminders or other later years providers under Chapter 3 (which provides for the compulsory registration of persons providing later years provision for children under the age of eight).
- (5) The second Part ("Part B") is to be a register of all persons who are registered as childminders or other childcare providers under Chapter 4 (which provides for the voluntary registration of persons providing early years provision or later years provision in respect of which they are not required to be registered under Chapter 2 or 3)".

<sup>162</sup>Ibid., Section 33(1): "A person may not provide early years childminding in England unless he is registered in the early years register as an early years childminder."

<sup>163</sup>Ibid., Section 39(1): "For the purpose of promoting the well-being of children for whom early years provision is provided by early years providers to whom section 40 applies, the Secretary of State must–

- (a) by order specify in accordance with section 41 such requirements as he considers appropriate relating to learning by, and the development of, such children ("learning and development requirements"), and
- (b) by regulations specify in accordance with section 43 such requirements as he considers appropriate governing the activities of early years providers to whom section 40 applies ("welfare requirement")."

advancement necessities, and the welfare prerequisites must be agreed upon.<sup>164</sup> The learning and advancement necessities may indicate comparable to every one of the regions of learning and improvement. The information, aptitudes and understanding which small kids of various capacities and developments are relied upon to have before the first September next after the day on which they accomplish the age of five. The issues, aptitudes and procedures which are required to be instructed to minor children of various capacities and developments, and the courses of action which are required for evaluating kids to find out what they have accomplished according to the early learning objectives.<sup>165</sup> The regions of learning and advancement are as per the following –

- individual, social and enthusiastic improvement; correspondence, language and education, critical thinking, thinking and numeracy, information and comprehension of the world, physical improvement, and imaginative improvement.<sup>166</sup>

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<sup>164</sup>Ibid., Section 40(2): “An early years provider to whom this section applies –

(a) must secure that the early years provision meets the learning and development requirements, and

(b) must comply with the welfare requirements.”

<sup>165</sup>Ibid., 41(2): “The learning and development requirements may specify in relation to each of the areas of learning and development –

(a) the knowledge, skill and understanding which young children of different abilities and maturities are expected to have before the 1<sup>st</sup> September next following the day on which they attain the age of five (“early learning goals”).

(b) the matters, skills and processes which are required to be taught to young children of different abilities and maturities (“educational programmes”), and

(c) the arrangements which are required for assessing children for the purpose of ascertaining what they have achieved in relation to the early learning goals (“assessment arrangements”).

<sup>166</sup>Ibid., Section 41(3): “The areas of learning and development are as follows –

(a) personal, social and emotional development,

(b) communication, language and literacy,

(c) problem solving, reasoning and numeracy,

(d) knowledge and understanding of the world,

(e) physical development, and

(f) creative development.”

A learning and improvement request may not require the designation of a specific period of timeframes to the instructing of any instructive program or any issue, aptitude or procedure shaping piece of it, or the creation in the timetables of any early years supplier of arrangement of a specific kind for the periods to be allotted to such instructing.<sup>167</sup>

Welfare requests: The issues that might be managed by welfare guidelines incorporate the welfare of the children; the measures for protecting the children; reasonableness of people to think about, or be in normal contact with, the kids concerned; capabilities and preparing; the appropriateness of premises and equipment; the way in which the early years arrangement is sorted out; methods for managing grumblings; the keeping of records; the arrangement of data. The Secretary of State must refer the Chief Inspector and some other people before making welfare regulations. The welfare guidelines may give that an individual who without sensible reason neglects to agree to any necessity of the guidelines is blameworthy of an offense, and that an individual liable of the offense is at risk on rundown conviction to a fine not surpassing level 5 on the standard scale.<sup>168</sup>

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<sup>167</sup>Ibid., Section 41(5): “A learning and development order may not require –  
(a) the allocation of any particular period or periods of time to the teaching of any educational programme or any matter, skill or process forming part of it, or  
(b) the making in the timetables of any early years provider or provision of any particular kind for the periods to be allocated to such teaching.”

<sup>168</sup> Ibid., Section 43: “Welfare requirements:  
(1) The matters that may be dealt with by welfare regulations include –  
(a) the welfare of the children concerned;  
(b) the arrangements for safeguarding the children concerned;  
(c) suitability of persons to care for, or be in regular contact with, the children concerned;  
(d) qualifications and training;  
(e) the suitability of premises and equipment;  
(f) the manner in which the early years provision is organized;  
(g) procedures for dealing with complaints;  
(h) the keeping of records;  
(i) the provision of information.  
(2) Before making welfare regulations, the Secretary of State must consult the Chief Inspector and any other persons he considers appropriate.



Later years childminders for children: An individual may not give later years childminding in England for a child who has not achieved the age of eight except if he is enrolled in Part A of the general childcare register as a childminder.<sup>169</sup> However, this rule does not apply in the following circumstances:-

- the individual giving the later years childminding; the kid or youngsters for whom it is given; the idea of the later years childminding; the premises on which it is given; the occasions during which it is given; the courses of action under which it is given.<sup>170</sup>

A child below the age of eight years, shall not be accommodated by an individual. In England, later years arrangement on premises which are not household premises, or which would be later years childminding under section 96(9), except if he is enrolled in Part A of the general childcare register in regard of the premises.<sup>171</sup> However, this rule does not work corresponding to later years arrangement for a child if the arrangement is made at any of the accompanying schools as a component of the school's exercises “a maintained school, a school approved by the Secretary of State

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- (3) Welfare regulations may provide –
- (a) that a person who without reasonable excuse fails to comply with any requirements of the regulations is guilty of an offence, and
  - (b) that a person guilty of the offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) In this section “welfare regulations” means regulations under section 39(1)(b).”

<sup>169</sup>Ibid., Section 52(1): “A person may not provide later years childminding in England for a child who has not attained the age of eight unless he is registered in Part A of the general childcare register as a childminder.”

<sup>170</sup>Ibid., Section 52(3): “The circumstances specified in an order under subsection (2) may relate to one or more of the following matters (among others) –

- (a) the person providing the later years childminding;
- (b) the child or children for whom it is provided;
- (c) the nature of the later years childminding;
- (d) the premises on which it is provided;
- (e) the times during which it is provided;
- (f) the arrangements under which it is provided.”

<sup>171</sup>Ibid., Section 53(1): “A person may not provide for a child who has not attained the age of eight –

- (a) later years provision on premises in England which are not domestic premises, or
- (b) later years provision on domestic premises in England which would be later years childminding but for section 96(9), unless he is registered in Part A of the general childcare register in respect of the premises.”

under section 342 of the Education Act 1996 (c.56), or an independent school”. The arrangement is made by the owner of the school or an individual utilized to work at the school, and the child is an enlisted understudy at the school or, if the arrangement is made for more than one youngster who has not achieved the age of eight, at any rate one of the kids is an enrolled student at the school.<sup>172</sup> As a prerequisites of section 52(1), an individual who intends to give later years childminding must be enrolled and can purpose to the Chief Inspector for enlistment as a later years childminder.<sup>173</sup> A claim under subsection (1) must give a recommended data about endorsed matters. Offer all other data which the Chief Inspector sensibly requires the candidate to give and be joined by any recommended charge.<sup>174</sup> The Chief Inspector must allow an application under subsection (1) if the candidate isn't precluded from enlistment by guidelines under section 75, and it appears to the Chief Inspector that any prerequisites endorsed for subsection (3) of section 54 are fulfilled and are probably going to keep on being fulfilled.<sup>175</sup> The necessities for enlistment may contain prerequisites identifying with the applicant, the premises on which the later years

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<sup>172</sup>Ibid., Section 53(2): “Subsection (1) does not apply in relation to later years provision for a child if—  
 (a) the provision is made at any of the following schools as part of the school’s activities –  
     (j) a maintained school,  
     (ii) a school approved by the Secretary of State under section 342 of the Education Act 1996 (c,56) (approval of non-maintained special schools), or  
     (iii) an independent school,  
 (b) the provision is made by the proprietor of the school or a person employed to work at the school, and  
 (c) the child is a registered pupil at the school or, if the provision is made for more than one child who has not attained the age of eight, at least one of the children is a registered pupil at the school.”

<sup>173</sup>Ibid., Section 54(1): “A person who proposes to provide later years childminding in respect of which he is required by section 52(1) to be registered may make an application to the Chief Inspector for registration as a later year childminder.”

<sup>174</sup>Ibid., Section 54(2): “An application under subsection (1) must –  
 (a) give any prescribed information about prescribed matters,  
 (b) give any other information which the Chief Inspector reasonably requires the applicant to give, and  
 (c) be accompanied by any prescribed fee.”

<sup>175</sup>Ibid., Section 54(3): “The Chief Inspector must grant an application under subsection (1) if –  
 (a) the application is not disqualified from registration by regulations under section 75, and  
 (b) it appears to the Chief Inspector that any requirements prescribed for the purposes of this subsection (“the prescribed requirements for registration”) are satisfied and are likely to continue to be satisfied.”

childminding is to be given; the measures for later years childminding on those principles; any individual who might be caring about children and whatever other individual who might be on those premises.<sup>176</sup> Individual who proposes to give on any premises later years arrangement in regard of which he is required by section 53(1) to be enrolled may make an application to the Chief Inspector for enlistment as a later years supplier in regard of the premises.<sup>177</sup> An application must contain any endorsed data about recommended matters, give all other data which the Chief Inspector sensibly requires the candidate, and be joined by any endorsed expense.<sup>178</sup> The Chief Inspector must allow an application under subsection (1) of section 55 if the candidate isn't excluded from enrolment by guidelines under section 75, and it appears to the Chief Inspector that any prerequisites endorsed for the reasons for subsection(1) are fulfilled and are probably going to keep on being fulfilled.<sup>179</sup> The recommended necessities for enlistment may incorporate prerequisites identifying with the candidate; the premises on which the later years arrangement is to be given; the courses of action

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<sup>176</sup>Ibid., Section 54(5): "The prescribed requirements for registration may include requirements relating to -

- (a) the applicant;
- (b) the premises on which the later years childminding is to be provided;
- (c) the arrangements for later years childminding on those premises;
- (d) any person who may be caring for children on those premises;
- (e) any other person who may be on those premises."

<sup>177</sup>Ibid., Section 55(1): "A person who proposes to provide on any premises later years provision in respect of which he is required by section 53(1) to be registered may make an application to the Chief Inspector for registration as a later years provider in respect of the premises."

<sup>178</sup>Ibid., Section 55(2): "An application under subsection (1) must –

- (a) give any prescribed information about prescribed matters,
- (b) give any other information which the Chief Inspector reasonably requires the applicant to give, and
- (c) be accompanied by any prescribed fee."

<sup>179</sup>Ibid., Section 55(3): "The Chief Inspector must grant an application under subsection (1) if –

- (a) the applicant is not disqualified from registration by regulations under section 75, and
- (b) it appears to the Chief Inspector that any requirements prescribed for the purposes of this subsection ("the prescribed requirements for registration") are satisfied and are likely to continue to be satisfied."

for later years arrangement on those premises; any individual who might be thinking about kids on those premises; other individual who might be on those premises.<sup>180</sup>

In England, an application by an individual for the purpose of “childminding” (i.e. later years childminding for a child above eight years of age or early years childminding) can be made to the Chief Inspector for registration in “Part B of the general childcare register as a childminder”.<sup>181</sup> An application should contain prearranged data about prearranged substances, provide every data which the Chief Inspector rationally needs the request to provide and an approved fee is taken.<sup>182</sup>

### **4.3. BEST INTEREST THEORY IN THE UNITED KINGDOM**

The development of “Best Interest Theory” has been emerged through various Acts and enactments. The custody of Infant Act, 1839 give the custody rights to mother of infant child up to the age of 16 years. If the mother is guilty of adultery, she will be excluded from custody rights. The Matrimonial Causes Act of 1857 allowed the court to make decision regarding custody and maintenance. This Act overwrites the right of the father over their children. The powers of court to award custody to mothers increased gradually. In 1886, the Doctrine of Best Interest Theory was introduced.

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<sup>180</sup>Ibid., Section 55(5): “The prescribed requirements for registration may include requirements relating to –

- (a) the applicant;
- (b) the premises on which the later years provision is to be provided;
- (c) the arrangements for later years provision on those premises;
- (d) any person who may be caring for children on those premises;
- (e) any other person who may be on those premises.”

<sup>181</sup>Ibid., Section 62(1): “A person who provides or proposes to provide in England –

- (a) later years childminding for a child who has attained the age of eight, or
- (b) early years childminding or later years child minding for a child who has not attained that age but in respect of which the person is not required to be registered under Chapter 2 or 3, may make an application to the Chief Inspector for registration in Part B of the general childcare registered as a childminder.”

<sup>182</sup>Ibid., Section 62(1): “An application under subsection (1) must –

- (a) give any prescribed information about prescribed matters,
- (b) give any other information which the Chief Inspector reasonably requires the applicant to give, and
- (c) be accompanied by any prescribed fee.”

Section 5 of the Guardianship of Infants Act, 1886 provide that “the court may, upon the application of the mother in any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access there to either parent, having regard to the welfare of the infant, and to the conduct of the parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father and may alter, vary or to discharge such order on the application of either parent, or after the death of either parent, of any Guardian under this act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just.”<sup>183</sup>

In determining the best interests of the child in the context of a separation of the parents, the court may determine the living conditions of the child and his custodial and non-custodial parents. Such issues as the stability of the child’s life, links with the community, and stability of the home environment provided by each parent may be considered by a court in deciding the child’s residency in custody and visitation proceedings. In English law, Section 1(1) of the Children Act 1989, makes the interests of the child the paramount concern of the court in all proceedings and having indicated in Section 1(2), that delay is likely to prejudice the interests of the child, it requires the court to consider the ‘welfare checklist’, i.e. the court must consider. The ascertainable wishes and feelings of each child is considered. The welfare checklist considers the needs, wishes and feelings of the child and young person. The welfare checklist provides a comprehensive list of issues that need to be considered to ensure that young people who come into court proceedings are safeguarded fully and their rights as citizens are promoted.

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<sup>183</sup>Guardianship and Infants Act, 1886, Section 5.

#### 4.4. CHILD CUSTODY CASES IN THE UNITED KINGDOM

In *Powel v. Cleaver*,<sup>184</sup> a testator was appointed by the father to look after his son. The father returned to claim guardianship and inheritance of the son left to him by the testator. The drawback that pertained in the father's claim of guardianship was that it would deprive the child from inheritance. The court after going through the facts and circumstances of the case, the court precisely ruled in favour of the child in order to evade disadvantages of any kind to the child. The Chancellor stated that the parental autonomy should not damage the child. In this case the "best interest of the child" predominated over "parental autonomy".

In *De Manneville v. De Manneville*,<sup>185</sup> the mother filed a writ of habeas corpus for the delivery of the infant child from the father. The mother stated that the child was taken away from her by force. The court examined the child. After examining the child, the court was of a view that child was safe with the father. The custody of an eleven months' minor child was given to the father notwithstanding the fact that mother may be pre-eminent for nurturing infant child. It was held that the father had legal right to the custody of the child. It was held that "The law is clear, that the custody of the child, of whatever age, belongs to the father, if he chooses."

In *Re Halliday's estate*,<sup>186</sup> once the parents separated, the minor child stayed with the mother. Clandestinely the father separated the minor child from the mother. The mother applied to the court for the custody of the child. The court granted the custody of the child to the father and the access was given to the mother. The statutory right of the mother can be continued steadily with the father's common law right of custody.

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<sup>184</sup>(1789) 29 Eng. Rep. 274 (Ch.)

<sup>185</sup>(1804) 32 Eng. Rep. 762 (Ch.)

<sup>186</sup>(1852) Ch. 17 jurist 56-95 R.R.847.

In *Goldsmith*,<sup>187</sup> the father of the child was a habitual drunkard and in the state of intoxication consistently indulged in violence. On this basis of gross misconduct, the court denied custody to the father.

In *Re Agarallis*,<sup>188</sup> Bowen, L.J. held that “to neglect the natural jurisdiction of the father over children until the age of 21 would really be set aside the whole course an order of the nature”. Only when it becomes that the right of the family is abused to the detriment of the children, the father no longer remains a natural guardian he becomes an un natural guardian, but until that happens mere disagreement with the views taken by the father of his right an interest of his children could not justify court’s interference. If it were not so, the learned Judge held, that the court might be interfering all day and with every family.

In *R v. Gyngall*,<sup>189</sup> Justice Esher, M.R held that “the court must exercise the jurisdiction with great care, and can only act when it is shown that either the control of the parent or the description of person he is, or the position in which he is placed is such as to render not merely better but, - I will not say essential – clearly right for the welfare of the child in some very important respect that the parent right should be suspended.” Therefore, in Habeas Corpus proceedings the procedures predominated at equity can also be associated.

In *W v. W*,<sup>190</sup> an order of restitution of conjugal right was attained by the wife, when the husband failed to obey the order, the wife applied for custody of the minor child aged 5 years. At that time, the child was living with paternal grandparents. The wife claimed that the husband and his parents was not authorized to custody, the court held

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<sup>187</sup>(1876) 2 Q.B.D.75

<sup>188</sup>(1883) 24 Ch. 317.

<sup>189</sup>(1893) 2. Q.B.232

<sup>190</sup>(1926) P 111

that “the matter of immediate consideration is the comfort, health, moral, intellectual and spiritual benefit of the child.” The court held that the child should remain with the grandparents and access was granted to the mother.

In *Re B's settlement*,<sup>191</sup> a marriage took place between a Belgian national (husband) and a British national (wife). On marriage, the wife/mother took Belgian nationality. A child was born out of the wedlock in Belgium. The Court in Belgium granted divorce. By the common law of Belgium, the father was granted the custody of the minor child. The mother, started living in England. On her visit to Belgium, she was granted custody of the child for some days. However, she did not return the child and brought him to England. The child had been living with mother in England for nearly two years. The father began divorce proceedings in Belgium, and the Court appointed him guardian. Pending the proceedings, the Court gave him the Custody and ordered the mother to return the infant within twenty-four hours of service of the order on her. However, she did not return the child. The Correctional Court in Brussels fined her for disobedience and sentenced her to imprisonment should the fine be not paid. The Correctional Court also confirmed the custody order. in the backdrop of these facts, the summons taken out by the father that custody of the infant be given to him came up before Morton, J. who after hearing the parties and in view of the provisions of the Guardianship and Infants Act, 1925 observed that “At the moment my feeling is very strong that, even assuming in the father’s favours that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England for the time being in the present case the position is that nearly two years ago, when the child was already in England, an interlocutory order was made by

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<sup>191</sup>(1940) Ch. 54



the Divorce Court in Belgium giving the custody of the child to the father I do not know how far, if at all, the matter was considered on the footing of what was best for the child at that time, or whether it was regarded as a matter of course that the father, being the guardian by the common law of Belgium and the application in the divorce proceedings and the only parent in Belgium, should be given the custody. I cannot regard that order as rendering it in any way improper or contrary to the comity of nations if I now consider, when the boy has been in this country for nearly two years, what is in the best interest of the boy. I do not think it would be right for the Court, exercising its jurisdiction over a ward that is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937". The judge further observed that "I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country."

In *M. v. M. (Child: Access)*,<sup>192</sup> Latey J. observed that "where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. These upsets are usually minor and superficial. They are heavily outweighed by the long-term advantages to the child of keeping in touch with the parent concerned, so that they do not become strangers, so that the child later in life does not resent the deprivation and turn against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the

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<sup>192</sup>[1973] 2All E. R. 81, 88.

child's development which that parent by its companionship and otherwise would make.”

In *Re L. (minors)*,<sup>193</sup> a German national man married a British national woman. Two children were born out of the wedlock in German. Dispute arose between the spouse and the wife was unhappy and left the matrimonial home along with her children in August 1972 and came to England. She started working in the school and her children were admitted at the school. As the children was not returned to German, the father came to England in search of the children. The mother issued an originating summons making them wards of court on 25<sup>th</sup> October 1972. The Trial judge held that the children should be brought up by their mother and the life of the children should continue in what were their natural surroundings, unless it appeared to the court that it would be harmful to the children if they were returned. He concluded that in view of the arrangements which their father could make for them, the children would not be harmed by being returned. He, accordingly, ordered that they be returned to Germany and that they remain in their father's custody until further order. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. Buckley, LJ in his detailed consideration of the matter, wherein he referred to the afore noticed decisions and few other decisions as well, held as follows “where the court has embarked on a full-scale investigation of those facts, the applicable principles, in my view, do not differ from those which apply to any other warship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, and may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstances of the

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<sup>193</sup>(1974) 1 All ER 913

particular case. The court may conclude that notwithstanding the conduct of the ‘kidnapper’ the child should remain in his or her care or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed. Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgement apply, but the decision must be justified on somewhat different grounds. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child’s own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.”

In *Gillick v. West Norfolk Area Health Authority*,<sup>194</sup> Mrs Gillick had five daughters below 16 years of age. From the Department of Health and Social Security circular issued to health authorities Mrs Gillick took an exemption which advised general medical practitioners that they would not be acting unlawfully if they prescribed contraceptives to girls under 16 providing the doctor was acting in good faith and seeking to protect the girl against the harmful effects of sexual intercourse. The Department of Health and Social Security advice urged doctors to seek to persuade the patient to involve her parents, but nevertheless, if she would not, and if, in the

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<sup>194</sup>(1985)

doctor's opinion, exercising clinical judgement, the patient required contraceptives, they should be prescribed. The advice was based upon a recognition of the confidentiality principle between doctors and patients. Mrs Gillick sought an assurance from her health authority that her daughters would not be given advice or treatment without her prior knowledge and consent while they were under the age of 16. The authority refused, and Mrs Gillick approached the court seeking a declaration that the advice contained in the circular was unlawful. She was particularly concerned that it was encouraging doctors to commit a criminal offence under Section 28(1) or Section 6(1) of the Sexual Offences Act 1956. Section 28(1) makes it an offence for a person to cause or encourage... the commission of unlawful sexual intercourse with ... a girl under 16 for whom he is responsible. Section 6(1) makes it an offence for a man to have unlawful sexual intercourse with a girl under the age of 16, and Mrs Gillick's contention was that a doctor would place himself in the position of being an accessory to the crime were he to prescribe contraceptives knowing that the girl intended to engage in sexual intercourse.

The House of Lords held by a four to one majority that the law did not recognise any rule of absolute parental authority until a fixed age. It was determined that the law would recognise parental rights only as long as they were needed for the protection of the child. Parental rights 'yielded' to the child's right to make decisions based upon proof that he or she had sufficient understanding and intelligence to be capable of making up his or her own mind. In respect of the facts of Gillick, Lord Fraser thought that a doctor would not breach the law by failing to inform parents that their daughter was to be prescribed contraceptives if the following are satisfied:

- That the girl, although under 16, will understand his advice;

- That she cannot be persuaded to inform her parents or give permission for the doctor to inform them;
- That she is likely to begin or continue having sexual intercourse with or without contraceptive treatment;
- That her physical or mental health will suffer if she does not receive contraceptives; and
- That her best interests require her to be given contraceptive advice, treatment, or both, without parental consent.

In Re: M and another (children abduction),<sup>195</sup> after the wedlock of the Zimbabwean couple, two children were born in Zimbabwe. The parents separated in 2001 and the children started living with their father in Zimbabwe. The mother unlawfully removed the children to the United Kingdom in 2005. Then the children began to live in the United Kingdom. Two years later, the father applied for their return to Zimbabwe under The Hague Convention on the Civil Aspects of International Child Abduction 1980, given effect in domestic law by the Child Abduction and Custody Act, 1985. However, the children did not want to be returned to Zimbabwe and hence they opposed. The Judge found that the mother and the children had no legal right to stay in the United Kingdom. This decision was upheld by the court of appeal. The mother appealed in the House of Lords.

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<sup>195</sup>(2007) UKHL 51.

The following issues appeared in this case:

- Once the children were settled, there was discretion nevertheless to return them under the convention, or whether their return had to be sought and ordered under some jurisdiction.
- If there was such discretion, the principles which would apply to the court's power to return them under some other jurisdiction.

Article 12 of The Hague Convention on the Civil Aspects of International Child Abduction<sup>196</sup> lays down the basic obligation to return the child. The court stated that “On its true construction, Article 12 of The Hague Convention envisaged that a settled child might be returned within the convention procedures. The words ‘shall unless left the matter open’. That construction would be consistent with all the other exceptions of the rule of return. When a court came to exercise its discretion, it was entitled to take into account the various aspects of the convention policy, alongside the circumstances which gave the court a discretion in the first place and wider considerations of the child's right and welfare” in the second place.

Furthermore, where the child's objection was raised, only two conditions needed to be met for such an exception to be brought into play. First, that the child herself objected to being returned and second, that she/he had attained an age and degree of maturity at which it was appropriate to take account of her/his views. The mother appealed against the decision of the court of appeal, which was dismissed on the application of

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<sup>196</sup>The Hague Convention on the Civil Aspects of International Child Abduction 1980, Article 12: “Where a child has been wrongfully removed or retained in terms of Article 3 and at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The Judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”

the father, that their two children should be returned to Zimbabwe, where the father was resident and from where the mother has removed them.

In England, Habeas Corpus has also long been used to gain the custody of infant. The writ is issued on the application of the party seeking custody and is directed against whoever has the control of the infant. Though, in theory, it still rests on the idea of relieving an illegal restraint, the ordinary rules of family law apply in custody cases and the matter is heard in the family division. An application for custody is a proceeding which involves “not a question of liberty, but of nature, control and education”. The court has an extensive and special jurisdiction over wards of the courts in respect of both their person and their property and exercising their jurisdiction it acts in a parental and administrative manner. Therefore, the court will decide who is to have the custody, care and control of the ward and who is to have access is to be allowed. It will control where the ward is to live and will not permit him to be removed from the jurisdiction of the court without leave. It follows that it can make orders for his maintenance and supervision his education and religious upbringing and investigates proposal as to marriage. In the exercise of this jurisdiction also, the welfare of the minor is the paramount consideration.

In *T v. S (Wardship)*,<sup>197</sup> the husband and wife after separation disagreed over contract arrangements and the child had been made a ward of the court. Though there had been substantial compliance with court orders throughout proceedings and by this stage the father was having staying contract. The mother continued to make unsubstantiated assertions and the father showed no insight into the problems caused by his behaviour. The child had a potentially serious physical condition, the resultant medical advice

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<sup>197</sup>(2011) EWHC 1608 (Fam), (2012) 1 FLR 230.

being to circumcise the mother while spending significantly increased time with the father alongside a family assistance order. The judge reserved all applications for the next 16 months to himself to be listed *ex parte* in order to establish whether judicial enquiry was merited.

The case is useful in that it was made clear that wardship remains permissible where the needs of the child required it within a private law context. In these specific circumstances wardship was deemed appropriate to continue as the exercise of parental responsibility had been effectively abrogated by incessant parental conflict, a residence order had assumed totemic status in the parents' mind and would be unhelpful to the child's future care, and there was an unusual need for the court to exercise control through detailed provisions. In emergency situations due to the immediate effect of wardship, the jurisdiction remains particularly useful in emergency situation such as where medical treatment is required, forced marriage is anticipated, or there has been threatened child abduction. The child becomes the ward of the court immediately upon the originating summons being issued thereby providing immediate protection. Furthermore, on application to the High Court may also be taken more seriously and have greater weight. Of course, when the matter is brought before the court for consideration it may well be that the court is not satisfied, upon consideration, that wardship is the appropriate recourse. However, at least the position will have been frozen up to the point. Due to the immediate nature of wardship it remains particularly effective in threatened child abduction cases. A child who is a ward of court may not be removed from England and Wales without the court's permission and where such permission has not been given, police assistance to prevent removal may be obtained. Such proceedings are, however, limited to children



who are habitually resident in the United Kingdom and thus are subject to the jurisdiction.

#### **4.5. COMPARISONS BETWEEN INDIAN AND ENGLISH LAW**

“Comparison is a logical and inductive method of reasoning that enables objective identification of merits and demerits of any norm, practice, system, procedure or institution as compared to that of others.”<sup>198</sup>

The rate of divorce in the west is more as compared to India. In the west, divorce is not considered a taboo and hence the families are not stigmatised. In India, the society still stigmatises divorce. It is still considered a taboo.<sup>199</sup> Different states have different judicial and social practices, therefore it is difficult to apprehend in what way custody is determined. Therefore, custody laws vary from one state to the other. Matters regarding rights of the child in divorce proceedings is dealt by the Children Act 1989 in England. However, in India there is no complete legislation with respect to this right.<sup>200</sup> We have inherited our legal laws from the Common law system. Therefore, comparing the laws of UK and India we can know what exactly are the lacuna present in our legal system.

##### Interim order:

- United Kingdom: Under the Matrimonial Causes Act 1973, there is no explicit provision for making an interim order, nonetheless an interim order can be made under the powers conferred by section 42 of the Act. The 1978 Act gives a domestic court power to make an interim order at any time before finally

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<sup>198</sup>Supra note 1, p.147.

<sup>199</sup>Vijendra Kumar“Impact of Divorce on children: A socio-economic and legal study”, 6NALSAR Law Review, (2011), p.136.

<sup>200</sup>Ibid.

deposing of the case, but only if there are “special circumstances” making this desirable. There is no limit in the 1973 Act upon the number or duration of interim orders. The other Acts contain uniform provisions whereby the court cannot make more than one interim order in relation to each original application and an interim order ordinarily ceases to have effect not later than three months after it is made<sup>201</sup> but may be continued by order for a further period of not more than three months.<sup>202</sup> The provisions relating to custody give ancillary power to make interim orders to resolve questions between people holding parental right in the United Kingdom.

- India: In India, an interim order can be made as per the Hindu Marriage Act, 1955; Parsi Marriage and Divorce Act 1936 and Indian Divorce Act 1869 relating to custody. Time limit upon interim orders is not specified under the Indian laws.

#### Custody:

- United Kingdom: The term ‘custody’ in English law, has been used in a broader sense so as to incorporate almost all the rights of guardianship, as well as in a narrow sense, so as to include only ‘care and control’ of the child.<sup>203</sup> The term “legal custody” is defined under section 86 of the Children Act 1975. A custody order proceedings under the 1973 Act must, “unless otherwise directed” provide that no step (other than the institution of proceedings in a court) may be taken by the parent which would result in the child being known

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<sup>201</sup>G.A. 1973, Section 2(5E); D.P.M.C.A. 1978, Section 19(7); C.A. 1975, Section 34(5).

<sup>202</sup>Ibid.

<sup>203</sup>Asha Bajpai, *Child Rights in India Law, Policy, and Practice* (Oxford University Press, 3<sup>rd</sup> edn 2017), p. 234-235.

by a new surname except with the leaves of the judge or the consent in writing of the other parent.<sup>204</sup>

In most proceedings in which a custody order may be made, the court may call for a welfare report, in proceedings under the 1973 Act from the Court Welfare Officer and in other cases from a Probation Officer or the local social services authority.<sup>205</sup> The principle for ordering a welfare report is not same in all cases.<sup>206</sup> It differs from one statute to the other. For instance, under the 1973 Act the court “may at any time refer to a court welfare officer for investigation and report any matter arising in matrimonial proceedings which concerns the welfare of a child”.<sup>207</sup> Under the 1971 and 1975 Acts the court may order a report “with respect to any specified matter... appearing relevant to the application”.<sup>208</sup> Under the 1978 Act, a similar standard pertains, but the power is only exercisable “when the court ..... is of the opinion that it has not sufficient information” to exercise its powers.<sup>209</sup>

- India: The term ‘custody’ has not been defined in any of the legislations dealing with child custody issues. Provision relating to change of surname is not laid down in India when there is change in custody.

Since, 1839 a complete code for child custody matters was prevalent in the United Kingdom. However, in India till date a legislation dealing with child custody is not prevalent.

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<sup>204</sup>The Law Commission of London, 96<sup>th</sup> Report on Family Law Review of Child Law: Custody (December, 1986) p.47.

<sup>205</sup>D.P.M.C.A. 1978, sections 12(3), (4), (5), (6), (7), 13(3), 14(4), and 21(5); Matrimonial Causes Rules 1977, rule 95; C.A. 1975, section 39; G.A. 1973, section 6; G.M.A. 1971, section 14A(7).

<sup>206</sup>Supra note 204, p.73.

<sup>207</sup>Matrimonial Causes Rules, rule 95(1).

<sup>208</sup>G.A. 1973, Section 6(1); C.A. 1975, Section 39(1).

<sup>209</sup>D.P.M.C.A. 1978, Section 12(3)

## Welfare:

- United Kingdom: The origins of the “welfare principle” lie in the unbiased jurisdiction of the Court of Chancery, where the judges tentatively began to develop it during the late 18<sup>th</sup> and 19<sup>th</sup> centuries, for example, in relation to the appointment and removal of guardians<sup>210</sup> and the denial of custody to a father on grounds of unfitness or inability.<sup>211</sup> This trend coincided with the development of remedies whereby the mother of a legitimate child could claim custody or access from the father. The welfare of the child was first prescribed by statute as a relevant consideration, along with the conduct and wishes of the parents, in the Guardianship of Infants Act 1886. The welfare principle or variations of it as widely adopted in other common law jurisdictions.<sup>212</sup>

The idea that the child’s welfare could override parental claims was at once the cause and effect of two other developments. One was equality between the parents. When mothers were first permitted to seek custody or access from fathers, it was the welfare of the child rather than the claims of the mother which became the justification for interfering with his rights.<sup>213</sup> Twentieth century recognised that priority should be given to the children’s interests over those of the adults.

Section 1 of the Guardianship of Minors Act 1971 lays down that the “welfare of the minor” is the “first and paramount consideration”.<sup>214</sup> This lays down the fundamental regulation that courts are under a obligation to promote the “best

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<sup>210</sup>Johnstone v. Beattie (1843) 10 Cl. & Fin. 42, 142.

<sup>211</sup>Powel v. Cleaver (1798) 2 Bro C.C. 499.

<sup>212</sup>Supra note 204, p.181.

<sup>213</sup>Re Flynn (1848) 2 De G. and Sm. 457, 474 per Lord Knight Bruce.

<sup>214</sup>Guardianship of Minors Act 1971, Section 1.

interests” of child.<sup>215</sup> Section 1 of the Act lays down the duty that assigned in the court. Nonetheless, recent dicta have advocated that first and paramount consideration must also be given to the child’s welfare by parents, irrespective of court proceedings.<sup>216</sup> In *Gillick v. West Nortfolk and Wisbech Health Authority*, laid down that “parental right must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not”.<sup>217</sup>

In *Richards v. Richards*,<sup>218</sup> it was held that the paramountcy rule will only apply where the child’s welfare is “directly in question”.

In *J. v. C.*,<sup>219</sup> Lord MacDermott held that “the child’s welfare is to be treated as the top item in a list of items relevant to the matters 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 has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules or determines the course to be followed”.

In *Re McGrath*,<sup>220</sup> Lindley L.J. held that “the welfare of the child is not to be measured by money alone nor by physical comfort only ... The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded”.

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<sup>215</sup>Supra note 204, p.179.

<sup>216</sup>Ibid., p.184.

<sup>217</sup>[1986] A.C. 112.

<sup>218</sup>[1984] A.C. 174.

<sup>219</sup>[1970] A.C. 668.

<sup>220</sup>[1893] 1Ch. 143.

Welfare includes not only custody and education, but also financial provision.<sup>221</sup> The Act of 1989 states that the court shall take into consideration several factors like the wishes of the child; the child's physical, psychological and educational prerequisites; the capacity of the child to adapt to the changing environment; age, sex of the child; any harm the child had undergone or is likely to undergo; ability of his parents<sup>222</sup> while making custody and guardianship orders.

- India: In India, under the personal laws<sup>223</sup> as well as the secular law<sup>224</sup>, the “welfare of the child” is taken into consideration while appointing or declaring a guardian. “Welfare of the child” in relation to custody of the child is not mentioned. The Guardians and Wards Act, lays down several factors which need to be taken into account by the court while determining the “welfare of the child” (i.e., “age, sex and religion of the minor, the character and capacity of the purposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the

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<sup>221</sup>M.C.A. 1973, Section 41(6).

<sup>222</sup>The Children Act, 1989, Section 1(3): “In the circumstances mentioned in subsection (4), a court shall have regard in particular to –

- (h) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (i) his physical, emotional and educational needs;
- (j) the likely effect on him of any change in his circumstances;
- (k) his age, sex, background and any characteristics of his which the court considers relevant;
- (l) any harm which he has suffered or is at risk of suffering;
- (m) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (n) the range of powers available to the court under this Act in the proceedings in question.”

<sup>223</sup>The Hindu Minority and Guardianship Act, 1956, Section 13(1): “In the appointment or declaration of any person as a guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration”.

<sup>224</sup>The Guardians and Wards Act, 1890, Section 17(1): “In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions 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”.

purposed guardian with the minor or his property”).<sup>225</sup> In *Sunil Kumar Chowdhary v. Smt. Sati Rani*,<sup>226</sup> held that welfare of the minor is the main consideration.

In *Tarun Ranjum Majumdar v. Sidhartha Datta*,<sup>227</sup> the court stated that the welfare of the child is supreme and not the legal rights of the parties.

In *Prakash Chandra Jain v. Smt. Chandrawati Jain*,<sup>228</sup> in this case the court observed that the controlling consideration, therefore, for governing the custody of the child is the welfare of the child and not the right and sentiments of the parties. In deciding any question as to the custody and upbringing of the minor the court must regard the minor’s welfare as the first and paramount consideration.

Joint Custody: Joint custody systems vary widely across the globe. A comparative review of different countries reveals a vast diversity of approaches. The term “joint custody” can refer to several different things: joint legal custody, joint physical custody, or a combination of both.<sup>229</sup> For the future of the child concern of both parents is utmost important, therefore, joint custody orders are becoming increasingly common.<sup>230</sup> There has been an increasing recognition that the charge of raising up children is not the sole duty of one parent but a shared duty of both parents.<sup>231</sup> When

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<sup>225</sup>Ibid, Section 17(2): “In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the purposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the purposed guardian with the minor or his property”

<sup>226</sup>AIR 1969 Cal 573

<sup>227</sup>AIR 1991 Cal 76.

<sup>228</sup>1996(2) RLR 691.

<sup>229</sup>Supra not 203, p. 239

<sup>230</sup>Supra note 204, p.41.

<sup>231</sup>Supra note 204, p.125.

the child under the supervision of both parents, then it regarded as the best way of promoting the welfare of the child.<sup>232</sup>

- United Kingdom: In England and Wales joint custody ordinarily means that legal responsibility for taking “strategic” decisions as to the child’ rearing is joint, while one parent has day-to-day care and control and the other has access.<sup>233</sup>
- India: In India, Joint custody for children is not mentioned in both the personal laws and the Guardians and Wards Act, 1890. The Law Commission of India issued a consultation paper on “adopting a shared parenting system in India” on November 2014. However, the legislations in India are silent on joint custody for children. Nevertheless, the Judiciary knowing the prominence and the requirement for joint custody has approved joint custody of a minor child.

#### **4.6. CONCLUSION**

Until the 18<sup>th</sup> century, the welfare of the children as the paramount consideration was not followed by the court. The history of legislative development relating to custody of children in India reflects that till the 1890, position of father was dominant in all matters mother had no right to involve in Childs matter but after passing the Hindu Minority and Guardianship Act 1956, the position of mother has changed Section 6(a) provides that Natural guardian of Hindu minor in respect of minor person as well as in respect of minor’s property the father and after him the mother. This Act retains the superiority of the father. Inspite of this 83<sup>rd</sup> Law Commission Report on Guardian and Wards Act 1890 has made various recommendations to remove gender discrimination

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<sup>232</sup>Ibid.

<sup>233</sup>Ibid., p.127.



in this respect, and has also laid down guidelines for the courts. It recommended equal rights of guardianship and custody of the mother and gave some suggestions regarding the custody of children in persuasion of the above, recommendation in 2010 the Personal Law (amendment) Bill has been passed with some modification of Guardian and Wards Act 1890 according to which section 19(b) include mother along with the father for the purpose of removing gender inequality. Similarly, 133<sup>rd</sup> Law Commission report upon “Removal of Discrimination Against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaborating of the Welfare Principle.” According to this mother should have same and equal rights in respects of the custody of minor persons as well as property?

Similarly, the history of English law relating to custody of a child shows two important trends. The first is the gradual equalization of the parental status of the mother and father of a child born in wed lock. In the second development, the parental rights of the both mother and father have become less important as the welfare of the minor has reason to be the first and paramount in any litigated as the welfare of the minor has reason to be the first and paramount in any litigated issue relating to the custody and upbringing and administration of the property of the child. It is thus concluded from the above discussion that legislative norms are made for the protection of child interest and gave to some extent equal rights to mother legislative norms are not bound to follow the religious norms. Therefore, all religious norms are subordinate to the legislative norms. The legislative norms in India and in England try to follow or adopt to give importance to the child’s social, moral, ethical, economic, educational problem. Under English Law and Indian law both have given importance to the child welfare.

After going through the laws of the United Kingdom and India, it can be stated that the laws of the United Kingdom can be adopted in India with certain modification.

## CHAPTER 5

# THE ROLE OF INDIAN JUDICIARY IN PROTECTING THE “WELFARE OF THE CHILD”

### 5.1. INTRODUCTION

The onus lays in the legal system to safeguard the welfare of the child once the parents separate.<sup>1</sup> The consequence of divorce is the litigation on the issue of guardianship and custody of a minor child.<sup>2</sup> Indian judicial trend highlights that the children of tender year should be committed to the custody of the mother. Older boys should be in the custody of the father. Older girls in the custody of the mother. However, this is not always true. The court may sometimes while considering the welfare of the minor award custody to the mother or the father or the third party. Judicial trend reflects that the court only sees the welfare of the child as a paramount consideration.

As it is evident from the previous chapters that there are no proper legislations dealing with child custody issues. The Judges often struggle determining the welfare of the child as there is no much aid from the legislature.<sup>3</sup> The courts often interpret the concept of the welfare of the child. Judges often use their common sense understanding what is best for the child.<sup>4</sup>

As we have discussed the welfare of the child in chapter 3, and it is understood that ‘welfare of the child’ should be a paramount consideration while deciding child

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<sup>1</sup>Archana Parashar, “Welfare of the Child in Family Laws – India and Australia” 1NALSAR (2003) p. 65.

<sup>2</sup>Arun Kumar, “Guardianship and custody of the person of a minor child – conflicting claims” 17JILI, (1975) p.299

<sup>3</sup>Supra note 1.

<sup>4</sup>Ibid.

custody and guardianship cases. In this chapter we will analyse the contribution made by the judiciary in India for the protection of the welfare of the child. Even though the concept of welfare of the child is vague the judiciary have time and again set a precedent as to what constitute the welfare of the child. The judiciary has tried to safeguard the principle of ‘welfare of the child’.

In matters relating to guardianship and custody, the judiciary has replaced the rule of parental rights and has decided the case on the basis of ‘welfare of the child’. The personal law and the secular law mostly emphasised on the parental rights. For example, the mother is entitled custody till the child completes his tender age and thereafter the custody is transferred to the father.<sup>5</sup> In such matters, legislation lacks behind the judicial law.<sup>6</sup>

## **5.2. ROLE AND CONTRIBUTION OF THE JUDICIARY**

Some of the landmark judgement is analysed. The role of judiciary in protecting the welfare of the child is analysed. The progression in child custody laws is analysed. The courts are vested with a very broad discretion and broad powers in matters of custody of children.<sup>7</sup>

- In *Gohar Begam v. Suggi alias Nazma Begum*,<sup>8</sup> Gohar Begam was a singing woman in the keeping of one Trivedi, a Hindu. She was unmarried Muslim mother of a natural daughter, Anjum, acknowledged by Trivedi as his daughter. Anjum was sent to stay with a friend of her mother, Nazma Begam, who later refused to part with her claiming that she had great affection for the

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<sup>5</sup>K.S. Sharma, *Inadequacies legislation on child care in India*, (Indian Law Institute, 1994), p.58

<sup>6</sup>*Ibid.*

<sup>7</sup>Pratim Sarkar, “Custody and Welfare of Children: A study of the Indian Judicial Trend where Father’s Right to Custody Preferred”, *XLI(4) IBR* (2014) p.108.

<sup>8</sup> AIR 1960 SC 93.

child and she had sufficient means to look after her. The Hon'ble Supreme Court held that the mother of an illegitimate daughter is in Muslim Law entitled to its custody. Refusal to restore the child to its mother was illegal detention. Anjum was handed over to her mother Gohar Begam.

- In *Ratan Amol Singh v. Kamal Jeet Kaur*,<sup>9</sup> a petition was filed by the mother for the custody of three daughters who were living with the father. The mother had the custody of the son. The Punjab High Court observed that the provisions of Guardian and Wards Act 1890 and Hindu Minority and Guardianship Act 1956 should be read together. The welfare of the minor must be the major and paramount consideration. Certain limitations are imposed in the father's right to custody and hence it is not absolute. The court further observed that the father's right is restricted for the benefit and welfare of the minor.
- In *Chanandra Prabha v. Premnath*,<sup>10</sup> when the Subordinate Judge dismissed the application of the mother under section 26 of the Hindu Marriage Act for the custody of the male child below five years of age, an appeal was filed against the order. In the order, the court witnessed that the child was well maintained by the father. When the child was produced before the court and asked if he was happy with his father, the child answered that he was happy with the father and from his face the court got an impression that he was happy with the father. For the sake of the child, the Court even requested the wife to go back to her husband. Thereafter, if she felt it's not safe for her, then she could continue with the proceedings. However, the wife did not agree to

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<sup>9</sup>1961 Punj. 51

<sup>10</sup>AIR 1969 DEL 283

the proposals and induced the Court to give a decision against her. The custody of the child was given to the father. On appeal, the High Court held that a child below five years of age, needs the care of his 'natural mother'. The court held that "the father nor his female relations, however close, well-meaning and affectionate towards the minor, can appropriately serve as a proper substitute for the minor's natural mother." The court further held that parental care is vital and in the case of fight between the father and the mother, when the child is under five years of age, the mother has been rightly endowed with a preferential claim in regard to the child's custody. The Delhi High Court granted the custody of the minor child to the mother.

- In *Marggarate Maria Pulparampil Nee Feldman v. Chacko Pulparampil and others*,<sup>11</sup> a petition was filed by the mother under Article 226 of the Indian Constitution. It was prayed that the father to produce his two minor children before the Court. The two minor children were produced before the court. On 18<sup>th</sup> January 1968, a joint petition was filed in the Court by both the parents. A collective decision was taken by them that the children be assigned to the 'St. Theresa's Convent, Ernakulam', until the former petition of the mother is disposed. The children were under the protection and control of the Mother Superior of the Convent. The parents were granted the right to access the children. The wife claimed that the husband left the matrimonial home. In defence, the husband stated that he had to leave the matrimonial home because of the behaviour of his mother-in-law and brother-in-law. Both the husband and wife approached the German Courts. The husband requested for access to the children. There was an agreement about the access to the children by the

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<sup>11</sup>AIR 1970 Ker 1.

father. However, the father was dissatisfied with the agreement. So, there was some alteration in the agreement by consent. It was agreed that the father may have access to his daughter once in a week on Thursday for three hours. He was also authorised to meet his son every fourth Thursday of the month. On 27<sup>th</sup> December 1966, the father took the children out and agreed to return them before 6 p.m. to the mother. However, the father brought the children to India without informing the mother about their departure. On 28<sup>th</sup> December 1966, the mother moved a petition before the Appellate Court for an order to handover the children to the mother. Nothing happened pursuant to this order. In December 1967, she came to India and made several attempt to see the children. She was not allowed to meet them. She therefore moved to Kerala High Court. The Court exercising jurisdiction regarding custody of the children ordered that the custody of the children to be given to the mother. The decision of the German Court was respected. The Court also pointed out that the father is the legal and natural guardian of his children. The father has the legal custody of the children and he has the right to take the children from the custody of the mother. But this law does not apply in all events. The removal of the children by the father against the terms of 'Ext. P14' and that in a dishonest way was unlawful. This proves that he has no respect for the orders of the Court. He was unsympathetic for the feelings of the mother and the health of his children.

After considering all the facts and circumstances of this case the custody was given to the mother. Access to the children was given to the father when the children are brought to India after every three years and when he visits Germany. The court also pointed out that when the children are taken out of

India, the court will not have jurisdiction. The writ will not function outside India. The court stated that the direction given by the court will be valued and executed to full extent by the German Court in the same way as the orders of the German Court was respected and honoured by the Indian Court.

- In *Rosy Jacob v. Jacob A. Chakramakkal*,<sup>12</sup> the appellant (wife/mother) and respondent (husband/father) was married and out of their wedlock three children was born. Conflict and differences aroused between the parties. In the proceedings of judicial separation, the custody of two minor children i.e. Mary alias Maya and Thomas alias Mahesh was given to the mother and custody of Ajit alias Andrew was given to the father. The custody of Ajit was applied by his mother. As it was alleged that the father had beaten Ajit as he had accepted a birthday gift from his mother. The father denied the allegation. However, after investigation found out that the he had beaten Ajit. Therefore, Ajit was directed to be handed over to his mother subject to certain conditions. The father appealed against the order. The appellate bench directed that the custody of Ajit remains with the father, the custody of Mahesh remains with the mother at her expense, Maya was directed to send to a boarding school at the expense of both the parties. Later both the parties presented a series of application in the appellate court seeking amendments of its directions. The court finally made an order amending its former directions. It directed Maya to be in the custody of the mother. The Supreme Court stated that “the children are not mere play things for their parents. Absolute rights of parents over the destinies and lives of their children has, in the modern changed conditions, yield to the consideration of their welfare as human beings.”

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<sup>12</sup>AIR 1973 SC 2090.



- In *Elizabeth Dinshaw v. Arvand M. Dinshaw*,<sup>13</sup> marriage took place between the petitioner (a citizen of the United States of America) and the first respondent (a citizen of India). They settled down in United States after the marriage. A son was born out of the wedlock in America. The couple started facing differences and the petitioner along with her son left the respondent. She filed a petition for divorce and the same was granted by the court. The decree also directed the petitioner (mother) “the care, custody and control of the minor child until he reaches the age of eighteen years”. The father was given visitation rights. Regarding the travel of the minor child outside the United States, it was guided that only on a petition the court shall make determination as to whether such travel is in the best interest of the child. On 11<sup>th</sup> January 1986, the father brought the child to India without the knowledge of the petitioner and the court. When the child was not returned by the father, the mother moved to the Circuit Court against the violation by the father. A warrant of arrest was issued by the court against the father for “unlawfully taking and retaining the child outside the State”. The warrant could not be executed as the father was in India.

The Consular Officer, American Consulate General, Bombay, visited the residence of the first respondent’s (the father) parents in Pune. However, the minor child was not present there and the grandparents reported that the child and his father had gone to North India. The mother filed a Habeas Corpus petition directing the respondents to produce in Court her minor child and to hand over custody to her as the person entitled to it under the order of a competent foreign Court. The father produced the child before the Court. A

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<sup>13</sup>(1987) 1 SCC 42.

counter-affidavit was filed by the father explaining that the grandfather of the minor child was seriously ill and he wanted to see the child. He even stated that the child desires to stay in Pune so he was admitted in a School. It was further stated that it is in the best interest of the child that he should be allowed to stay in India along with him.

It was held that “it is the duty of all Courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The Courts in all countries ought to be careful not to do anything to encourage the tendency of sudden and unauthorised removal of children from one country to another. This substitution of self-help for due process of law in this field can only harm the interests of the wards generally, and a judge should pay due regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child”. The father was liable for the contempt of the order of the court for taking away the child from the custody of the mother. The father is guilty of abduction of the minor child. Therefore, he cannot claim benefit by declaring that the child is admitted in a school. It was further held that in the best interest of the child, the minor should be in the custody of the mother and continue his education in the United States.

- In *Farjanabai v. S.K. Ayub Dadamiya*,<sup>14</sup> the respondent (father) filed an application under the Guardians and Wards Act, 1890 to be appointed as the guardian of the two minor sons. According to the Muslim Law, the mother is entitled to custody of a minor child till seven years. The minor child desired to

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<sup>14</sup> AIR 1989 Bom 357

stay with the mother. However, the Honourable Judge found that the welfare of the minor child did not lie in favour of their living with their mother. The mother's evidence did not support her case that the father of the child had remarried. The mother's appeal was dismissed.

- In *Raj Kumar Gupta v. Barbora Gupta*,<sup>15</sup> a husband lodged an application pursuant to Section 25 of the Guardians and Wards Act, 1890 against his spouse for an order to return his minor daughter, to his custody. The minor daughter was then two and a half years old. The ground specified for the return of the minor daughter was that the wife had taken the child from his legal custody. The application lodged by the husband was dismissed, therefore the husband appealed. "Religion" plays a pivotal part in India in matters like marriage, divorce, guardianship, succession. Firstly, in this case the religion of the child is determined. The husband belongs to Hindu religion and the wife belongs to Christian religion. The marriage between them was solemnized under the Special Marriage Act, 1954. The child born out of this wedlock is said to belong to a Hindu religion with respect to the Explanation (ii) to Section 3(1) of the Hindu Minority and Guardianship Act where under "any child, legitimate or illegitimate, one of whose parents is a Hindu... and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belong" is a Hindu. The child in this case is a Hindu, hence any question relating to guardianship and custody would be governed by the Hindu Minority and Guardianship Act, 1956 super added to the provision of Guardians and Wards Act, 1890. Secondly, it was pointed out that since the birth of the child in 1983, the child was with the mother and the

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<sup>15</sup>AIR 1989 Cal 165

father remains undisputed until the mother left her husband's home in 1986. The child was with her mother alone since 1986.

The paramount consideration while determining guardianship and custody cases is the welfare of the minor. The welfare of the minor supersedes the lawful rights of the parents. The learned council for the wife contented that the shift in the custody should be done only if it is in the paramount importance of the welfare of the minor. The learned council for the husband advocated that once it is shown that the father is the lawful guardian and custodian and the child has been removed from his custody, an order under Section 25 for the return of the child to the lawful guardian and custodian should be made. Unless the individual objecting to the order may positively convince the court that such return would not be for the benefit of the minor.

The father has not pleaded that child has not been well looked after and brought up and the mother has failed to offer the child with anything that may be rationally essential for its proper rearing. The child was present before the court as well as in Hon'ble Judges chamber along with her parents and their learned council. It had been found out that the child to be well nurtured, lively, active and energetic. The child expressed the feeling to stay with her mother only. However, as the child had not attained sufficient maturity, her view is not taken into consideration. It has been argued that the mother is suffering from diabetic, smokes cigarette and drinks wine. The court held that anybody can be subject to an illness like diabetics. The fact that the mother is suffering from diabetic does not disabled her from discharging her parental duties and

responsibilities. Smoking cigarette and drinking wine is not a ground to deny custody of the minor.

Bearing in mind the facts and circumstances of the case, the judgement of the trial court was upheld and the custody of the child was given to the mother.

- In *Poonam Datta v. Krishnlal Datta*,<sup>16</sup> on the death of the minor's father, the mother was living separately from her in-laws. Money received from the employer of the deceased father was kept in a fixed deposit in a bank. The minor was studying in a school in which his mother was teaching. The grandfather wanted custody of the child. The court directed that the child be kept in custody of her mother and continue to study in the same school. But the grandfather was permitted to take the child and keep him in the company of his family every weekend. Money was remain in deposit and the interest thereof payable to the mother and the grandfather in equal share. This arrangement was to continue until either of the parties moved for the appropriate guardianship proceedings and got a declaration. The case was under Section 6 of the Hindu Minority and Guardianship Act and Sections 12 and 17 of the Guardians and Wards Act. The court directed the parties to consider the interest of the child as paramount consideration.
- In *Kirtikumar Maheshanker Joshi v. Pradipkumar Karunashankar Joshi*,<sup>17</sup> the Hon'ble Supreme Court has observed that "In our judgement, the law relating to custody of a child is fairly well settled and it is this: In deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statues and the rights flowing interpreting legal provisions.

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<sup>16</sup>(1989) Supp. (1) SCC 587.

<sup>17</sup>1992(3) SCC 573

It is a human problem and is required to be solved with human touch. A court while dealing with custody cases is neither bound by statutes nor by strict rules of evidence or procedure, nor by precedents. In selecting proper guardian, the court is exercising *parens patriae* jurisdiction, ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comfort, moral and ethical values cannot be ignored. They are equally, or we may say even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgement, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.”

- In *Chandrakala Menon (Mrs.) v. Vipin Menon*,<sup>18</sup> the Hon’ble Supreme Court held that the question regarding the custody of a minor child cannot be decided on the basis of legal rights of the parties. The custody of a child has to be decided on the sole and predominant criterion of what would be best serve the interest and welfare of the minor. In that case also the girl Sumaya appeared in the chambers and her wishes and sentiments were gathered by Hon’ble Supreme Court. She liked her maternal grandparents and the court came to the conclusion that it would be in the interest and welfare of the minor that she would be permitted to be in the custody of her mother Chandrakala. The custody of the father was refused.

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<sup>18</sup>(1993) 2SCC 6.

- In *Githa Hariharan and another v. Reserve Bank of India and another*,<sup>19</sup> in 1982, Githa Hariharan (first petitioner) and Mohan Ram (second petitioner) married in Bangalore. In July 1984, a son was born out of the wedlock. On 10<sup>th</sup> December 1984, Githa Hariharan and Mohan Ram applied to the Reserve Bank of India (first respondent) for 9 percent Relief Bond to be held in the name of the son and for the purposes of investments. The parents agreed that the mother would act as a natural guardian of her son. The application of Githa Hariharan was returned back to her stating to produce an application duly signed by the ‘father or a certificate of guardianship from a competent authority in favour of the mother’. The petitioners filed a writ petition in order to strike down Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 as it violated Article 14 and 15 of the Indian Constitution and to quash and set aside the decision of the first respondent refusing to accept the deposit from the petitioners and to issue a writ of mandamus directing the acceptance of the deposit after declaring the mother as the Natural Guardian of the minor son.

The first respondent stated in reply that the mother is not the natural guardian of the minor son therefore the application was not accepted by the bank. Father is the only natural guardian as per Section 6(a) of the Hindu Minority and Guardianship Act, 1956.

In the District Court of Delhi, a divorce petition was filed by the husband/father against the first petitioner (wife/mother) and custody of the minor son. The wife stated that the husband has been proclaiming that he was

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<sup>19</sup>AIR 1999 SC 1149.

the only natural guardian of the minor son and all the decisions should be taken with his permission.

After considering the facts and circumstances of the case, the definition of guardian in Section 4(b) and natural guardian in Section 4(c) of the Hindu Minority and Guardianship Act, 1956 do not make any discrimination against mother and she being one of the guardians stated in Section 6 would unquestionably be a natural guardian as stated in Section 4(c). As per Section 6(a) of Hindu Minority and Guardianship Act, 1956 “the father, and after him, the mother” give an impression that mother can be considered to be the natural guardian of the minor only after the lifetime of the father. Even during the life time of the father, if it is necessary for the welfare of the minor, the mother can replace the father by the order of the court. Under Section 6(a) of Hindu Minority and Guardianship Act, when the mother acts as the guardian of the minor during the life time of the father without the order of the court is not considered her as a legal guardian. The mother can act as a guardian only after the life time of the father. This interpretation creates gender inequality. The court observed that the word “after” must not broadly mean “after the life time”. “In the absence of” as per Section 6(a) the word “absence” means the father’s absence from the care of the minor child and the minor’s property. When the father is unconcerned in the matters of the minor even if he is living with the mother or with both the father and the mother. The charge of the minor is given solely to the mother. When the father is physically incompetent to look after the minor, the father can be considered to be absent and mother can be recognized as the natural guardian. Such interpretation will be natural outcome of a harmonious construction of Section 4 and 6 of the Hindu



Minority and Guardianship Act, without causing any harm to the language of Section 6(a). The court further observed that "while both the parents are duty bound to take care of the person and property of their minor child and act in the best interest of his welfare, in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and for mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be absent for the purpose of Section 6(a) of the Hindu Minority and Guardianship Act 1956 and Section 19(b) of the Guardian and Wards Act 1890."

The Supreme court held that "the Reserve Bank of India was not right in insisting upon an applications signed by the father or an order of the Court in order to open a deposit account in the name of the minor particularly when there was already a letter jointly written by both the petitioners evidencing their mutual agreement. The Reserve Bank of India must accept the application filed by the mother. The Reserve Bank of India and other organizations may formulate appropriate methodology in the light of the observations made above to meet the situations arising in the contextual facts of a given case."

Justice Anand also observe that "the message of international instruments—the convention on the elimination of all form of discrimination against women

(CEDAW), 1979 and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discriminations of all form against women is quite clear. Indian is a signatory to convention on the elimination of all form of discrimination against women (CEDAW) having accepted and ratified it in June 1993. The interpretation that we have placed on section 6(a) gives effect to the principles contained in these instrument. The domestic Courts are under an obligation to give due regard to international convention and norms for construing domestic laws when there is no inconsistency between them". Justice Banerjee, observed that "though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure, the same is however, no longer dormant but, presently quite loud. This cry is not restrictive to any particular country but, world over with variation in degree only. Article 2 of Universal Declaration of Human Rights provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever, such as race, sex or religion and the ratification of the convention for elimination for all form of discrimination against the women by the United Nation and Organization in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same". However, this judgment of Supreme Court will solve problems of many mothers who are practically in charge of the affairs of the minor children, who face harassment from various authorities, who insists on father signature. But a question will still remain open is, what if the father and mother, along with the child, are living together and the father is not "absent" within the meaning of the term as

defined by the court. Did the court intent to give complete equality to both the parent in the matter of guardianship in which it would mean either mother /father? However, since the court in the present case, has based only on the interpretation of the word "after" the primary clause under which the mother would be the guardian only "after" the father, still stands. The only change the judgement has made is that it has given an extended meaning to word "after" to include several situations, it has not given equal rights of guardianship on the mother.

- In *Irfan Ahmad Shaikh v. Mumtaz and another*,<sup>20</sup> in this case the petitioner's custody petition was dismissed on the ground that the petitioner's advocate failed to appear before the court twice when the matter was on board and was called out for hearing. Thereafter, the petitioner filed a review petition. The minor child was present in the Court with her maternal grandparents. The minor child was crying when the proceedings was taking place. The minor child refused to go with the father, when she was asked by the Honourable Judge. Therefore, the Review Petition was dismissed on 21<sup>st</sup> May 1998 as the Honourable Judge felt that it was not suitable to give the child to the father against her wishes. The petitioner filed a Notice of Motion on 5<sup>th</sup> June 1998. The learned Counsel for the petitioner, stated that the the natural father of the minor child has not remarried. The natural mother of the minor child got remarried. Therefore, the atmosphere is not suitable for a child to live with her mother and step-father. He even stated that the child was taught by her mother to go against her father. The minor child refused to go with the father and wanted to stay with her mother and her step-father. She stated that her step

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<sup>20</sup>AIR 1999 Bom 25.

father has provided her all the facilities. Furthermore, she even stated that her father used to leave her with her Aunt's children and he was never there for her and used to beat her. Therefore, after considering the matter carefully Honourable Judge R.J. Kochar, J. rejected the petition and granted custody of the minor child to the mother.

Therefore, in this case the 'welfare of the child' was upheld by the Honourable Judge. The wishes of the child were given utmost importance as the minor child was capable of understanding. It also held that remarriage of the parent is not a ground for not granting custody of the child. The Bombay High Court, upheld the principle of 'welfare of the child' and granted custody of a minor girl child to the mother even though the mother was remarried.

- In *Jai Prakash Khadria v Shyam Sunder Agarwalla*,<sup>21</sup> after the death of the minor's father, the minor child's paternal grandfather filed a case under Section 7 of the Guardians and Wards Act, 1890 for appointing him as guardian and custody of the minor child and an ex parte injunction against the mother, restraining her from giving the child in adoption to her father. Subsequently after the petition, the mother gave the child in adoption to her father. The family court granted guardianship and custody rights to the paternal grandfather. The family court and the Division Bench of the High Court have widely observed the matter and give due weight the welfare of the minor. The Supreme Court also granted the guardianship and custody rights to the paternal grandfather. The Court seems to be impressed by some considerations, which, inter alia were: "the child was over-fondled when he

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<sup>21</sup> AIR 2000 SC 2172

was with the paternal grandfather whereas when with the maternal grandfather, he used to be left alone with the servants. Also, the paternal grandfather had revoked his Will executed earlier in favour of the daughters and made a fresh Will in favour of the child. The Will was, however, subject to the condition that the child comes and lives with them. Another factor which weighed with the courts was the fact of the mother's re-marriage and the second husband having two children from his previous marriage".

The custody orders are not final but are interlocutory in nature. It is subjected to alteration at any time upon the transformation of circumstances demanding alteration of custody orders. The change in custody must be proved to be in the interest of the child. In this case, notwithstanding the child was adopted by the maternal grandfather, the guardianship and custody right was granted to the paternal grandfather.

- In *Sarita Sharma v Sushil Sharma*,<sup>22</sup> a writ of Habeas Corpus was filed by the father in respect of two minor children. It was contended that the child was in illegal custody of the mother. The petition was approved by the High Court and directed the mother to return the two minor children to the father along with the children's passport. The court even asserted that the father has the right to take the children to the United States of America without any limitation. Hence the mother of the two minor children appealed. An interim order with respect to the care and custody of the children and visitation rights was passed from time to time by the District Court of Tarrant Country Texas, U.S.A. When the parties got separated, the wife along with the two minor

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<sup>22</sup> AIR 2000 SC 1019

children moved away. On this base, the Associate Judge passed an order giving custody of the children to the father and the visitation right to the mother. One day, the mother exercising her visitation right picked up the children from their father's house and drop the children to school the next day. The father was informed that the children were not dropped to school. The mother along with the two minor children came to India. The mother argued that she had brought the children to India with full knowledge of the father. The father was alcoholic and violent person therefore he is not a fit person to raise the children. After considering the facts and circumstances of the case, the High Court rejected the argument put forward by the mother and stated that if the decree of divorce and custody of the children was obtained by fraud, she should approach the American Court for revocation of such order. The writ petition was allowed by the High Court. The appellant (wife) submitted that in Habeas Corpus proceeding the "court should consider is whether the person, in respect of whom a writ of Habeas Corpus is sought, is kept in illegal custody or is detained against his wish." It was also contended that for acquiring custody of minor children living with the mother, the Habeas Corpus petition is not a suitable proceeding. After considering the facts and circumstances of the case, the Court held that the father is an alcoholic person and it would not be proper to place the children in his custody. Out of the two minor children, one is a female child. therefore, it is suitable to place the custody of the female child to the mother. It is not in the best interest of the child to be separated from his/her siblings. Both the children wished to stay with the mother. Therefore, the custody of both the children was handed to the mother.

- In *Akash v. State of Andhra Pradesh*,<sup>23</sup> custody of minor male child was awarded to the mother. Under the order, the mother was required to take the child to the father during holidays, vacations and other festivals failing which the custody order in her favour was liable to be modified. On the mother's failure to comply with these directions, the father filed a petition for modification of the order and arrest of the wife for contempt of court order. The mother appeared before the court and tendered an unconditional apology, she explained the circumstances which prevented her from taking the child to the father. Her father was ill and was hospitalised and the child who was just nine years old could not be sent alone to the father's place. The mother's apology was accepted with directions that the orders should be complied with in future. The maternal grandfather filed a writ petition in the High Court praying that the child was not comfortable in the company of the father and that he was of an age where his wishes should be given due weight and accordingly he should not be forced to go to meet the father. It was further contended that the distance between the place of residence of the father and the mother was about 1400 kilometres and it was very inconvenient for the mother to take the child to the father.

The court held that the maternal grandfather had no locus standi to file the petition since both the natural guardians of the child were alive. They alone can raise objections, if any. In this case, the mother never raised the question of inconvenience in the court, rather she had given an undertaking to the court that she would take the child to the father as per the directions. The mother

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<sup>23</sup>AIR 2000 AP 261.

could not be allowed to flout the Family Court orders and deny to the father the visitation rights.

- In *Syed Saleemuddin v. Dr. Rukhsana*,<sup>24</sup> the appellant was the husband of respondent 1. On 7<sup>th</sup> December 1993, they were married. Out of the wedlock, they had two children, a daughter named Ayesha Fathima aged six years and a son named Zaiduddin aged five years. The appellant was a businessman and the Respondent 1 was a doctor practicing Ayurvedic medicine. On 26<sup>th</sup> March 2000, respondent 1 sustained burn injuries when she was in her house. On the next day, she was admitted to Princess Duru Shehvar Children's and General Hospital, Hyderabad and it was alleged that it was a case of dowry harassment as the appellant attempted to kill her by setting her on fire. The Court ordered that the custody of the two children will remain with the mother, till the Family Court disposes off the petition filed by the appellant for their custody. It was further ordered that the appellant will pay the amount spent for treatment of respondent 1. If any amount is yet to be paid, the appellant will pay the amount within one month. In the circumstances of the case, there will be no order for costs.
- In *Kumar V. Jahgirdar v. Chetana K. Ramatheertha*,<sup>25</sup> in this appeal, the subject matter of disposal between the married couple, now separated by decree of divorce obtained on mutual consent under the provisions of the Hindu Marriage Act, is their rival claim to the exclusive custody of their daughter Aaruni, who is now a litter over 9 years old and is pursuing her education in a well-known school in Bangalore, where the parties reside. After

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<sup>24</sup>(2001) 5 SCC 247.

<sup>25</sup>(2001) 4 SCC 682.



obtaining divorce on mutual consent, the wife, was re-married to Anil Kumble, a cricketer. The family court of Bangalore, by its judgement dated 20<sup>th</sup> April 2002, after considering the evidence led by the parents of the child, came to the conclusion that as the wife is re-married to a famous cricketer and is leading a different style of life involving frequent tours with her second husband for attending cricket events, there is likelihood of the child developing distance and dislike for her natural father. The exclusive custody of the child was directed to be given to the natural father with only right of visitations to the mother on every week, on Sundays between 10 a.m. and 8 p.m., and to keep the child with her overnight on two Sundays in a month, with prior intimation to her former husband.

The high court, in appeal, by its impugned judgement dated 27<sup>th</sup> January 2003, however, took a different view and reversed the judgement of the family court. On the basis of evidence on record, the division bench of the high court formed an opinion that in the absence of compelling reasons and circumstances, the mother cannot be deprived of the company of the child to the detriment of the interest of the child. The high court, therefore, set aside the judgement of the family court and directed that the mother should continue to retain exclusive custody of the child, with visitation rights to her former husband. The former husband was allowed to keep the child on weekends, either on Saturday or Sunday, from morning till evening, and he could also be with the child during half the period of school vacations. The stay of the child with each of them during half of the vacations was to be shared by the two parents under mutual agreement. The father was allowed to visit the child as and when he liked, with prior intimation and mutual arrangements with the

mother. The parties were also given liberty to seek necessary modifications in the arrangement evolved by the high court.

Without going into the allegations, counter-allegations, and misapprehensions expressed against each other, on the paramount consideration of best safeguarding the interest of the child, the judgement of the high court giving exclusive custody of the child to the mother and visitation rights to the natural father was maintained with little modification for the following reasons. The child was 9 years of age and on advent of puberty. This is the age in which she requires more care and attention of the mother. The mother, at this age of the child, deserves to continue to keep the custody of the female child. She is reported to have given up her service and leading the life of a house-wife. The progress report of Aaruni from Sophia High School, Bangalore, indicated that she is very good at studies and has a bright educational career.

The prospect of arrival of the second child in the family of the wife was another circumstance which would be in favour of the present child. The petitioner lived alone with his father. There were no female members living jointly with him, although he may have female relations in the city, but that would not ensure constant company, care, and attention to the female child. The petitioner (natural father) was a busy stock broker reportedly carrying on his business with the aid of online computer, but it could not be said that in the course of his business, he would not have to remain out of residence for attending his office and other business engagements.

The apprehension expressed against the second husband, that he might poison the mind of the child and create ill-will towards the natural-father, was not

borne out from the evidence on record. On the contrary, the second husband, in his deposition, had made statements evincing a very cooperative and humane attitude on his part towards the problem of the estranged couple and the child. The court found that the apprehension expressed against the second husband was without foundation. The parents of the child had separated by mutual consent without making any vicious allegations against each other. They also agreed under the express terms of the consent decree of divorce to take responsibility of bringing up their child as her joint guardians. The gesture of decency and cooperation in jointly looking after the child had to continue. In this mutual agreement of the separated couple, on behalf of the second husband, it was assured that he would continue to give his unreserved cooperation and help and would do nothing to spoil the relationship of the child with the natural father.

The visitation rights given to the natural father, in the present circumstances, also did not require any modification because with the passage of time, the growing child should eagerly wait for the company of his father as a happy and enjoyable moment rather than treat it as a part of empty ritual or duty. To make visitation rights of the natural father effective and meaningful for proper growth of the child, active cooperation of both the parents and her step-father was expected and it was hoped that none would fail in this regard.

Since the mother of the child was married to a famous cricketer, as and when she left the country on tour with her husband during school days or vacation period of the child without taking the child with her, the custody of the child during her absence from her home was to be given to the natural father instead

of leaving the child to the care and custody of some other member of the family. With this observations and modifications, the Supreme Court maintained the judgement of the high court. The appeal was thus disposed of.

- In *Radha @ Parimala v. N. Rangappa*,<sup>26</sup> the mother filed a petition for custody of the child. The respondent who is the father of the minor under section 25 of the Guardian and Wards Act, alleging that he married the appellant at Kengapur village prevailing in the community from out of the wedlock the minor was born. The appellant (mother) left the matrimonial home without any justification and consent of the respondent and in his absence and without informing anyone else. Surprised by the sudden disappearance of the appellant and well-wisher of the respondent went in search of the appellant. They found the appellant in the company of her paramour named P. Ismail, who is an assistant master at Honganur in Channapatna Taluk living in adultery with him. Under the circumstances the respondent filed a case against his wife under section 13 (i) of the Hindu Marriage Act for divorce. The appellant despite service of notice on her did not appear before the Court. In the circumstances the court granted decree of divorce on the basis of the evidence adduced by the respondent. However, after the disposal of respondent petition, the appellant has filed an application for setting aside the ex party decree. The Court below has given the custody of the minor to the father. Aggrieved by this order the mother appealed before the High Court. The Karnataka High Court after hearing both parties councils and evidence on record observed that “it is the prime duty of the Court to do all the acts and things necessary for the protection/welfare of minors for they cannot take care of themselves. The

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<sup>26</sup>2004 (2) HLR 416 Kar.

expression 'welfare' in this context is to be understood in its widest sense and embraces not merely the martial and physical well-being and happiness of the minor but every circumstance and every factor bearing upon the moral and religious welfare and the education and upbringing of the minor. In all matters relating to the custody and upbringing of the minor the primary and paramount consideration of the court must be the welfare of the minor. The word welfare of the child admits of no straight-jacket yard tick. It has many facets such as financial, educational, physical, moral and religious welfare. The question where the welfare of the minor lies should be answered after weighing and balancing all factors germane to the decision making, such as relationships, claims and wishes of parents, risk, choices and all other relevant circumstances. The answer lies in the balancing of these factors circumstances and determining what is best for the minor total well-being." The court further observed that the natural guardian is entitled to have the custody of the minor children though, in the case of girl, less than 5 years the mother has the right to custody of the minor by a reason of the proviso. Subject to the exception made in the proviso to clause (a) of section 6 the father has the preferential right of guardianship and custody of the minor children. But, it should be remembered that even the preferential right of the father as natural guardian should be subordinated to and even overridden by the sole consideration that the welfare of the minor is to be determinative, factor in all these matters of guardianship and custody. However, the controlling consideration governing the custody of minor children is the welfare of the children and not the right of the parties. The father's right to the custody of the minor children is neither an absolute nor an indefeasible one. The mother can also be given custody of the

minors, if their welfare requires it, even if the father is otherwise fit to act as guardian. In entrusting the custody of the child to one of the parents, the Court should take into account relevant circumstances including social and religious environment of the family, the quality of immediate neighbourhood and locality in which a particular parent resides, the financial position of the parents, educational facilities for the minor concerned and all other circumstances and factors which are germane to the decision making. The Court is no so much concerned with the feeling of a particular parent as with the welfare of the minor.

- In *Rajesh K. Gupta v. Ram Gopal Agarwala*,<sup>27</sup> the appellant (father of the child) was an Advocate-on-record in the Supreme Court of India. He was married and out of the wedlock a daughter was born. Difference arose between husband and wife. Thereafter, the wife along with the minor daughter went and stayed with her parents. The appellant filed a Habeas Corpus petition in the Delhi High Court seeking the custody of his minor daughter. The petition was filed on the ground that his daughter had been abducted by his wife's parents, and his wife was suffering from mental illness. Therefore, the custody of the child should be given to him. Bearing in mind the evidences and the context of the case, the High Court disposed of the petition and held that mother could continue with the custody of the child. Therefore, the father appealed to the order. The appellant argued that the mother was suffering from mental illness of paranoid schizophrenia for almost two decades and she was receiving medical treatment in United States of America and thereafter in All India Institute of Medical Sciences. It was further argued that the life and

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<sup>27</sup>AIR 2005 SC 2426

health of the minor child could not be safe with the mother. The respondent argued that the mother is not suffering from any mental illness. The court, on the basis of medical record found out that the mother was not suffering from any mental illness. It also pointed out that the father by profession was a lawyer, which is a very time consuming profession. The mother of the child is living with her parents, her father is well educated and financially sound and could cater the needs of his daughter and granddaughter. The maternal grandmother is also there to look after her granddaughter. The Honourable Judge of the High Court before whom the mother and the child had appeared has recorded that the child was in good and perfect condition. The Supreme Court after considering to the submission of both the parties, the custody of the child was retained to the mother and henceforth appeal was dismissed.

The court while determining child custody cases, the paramount consideration should be the 'welfare of the child' and not the legal rights of the parties.

- In *Poolakkal Ayisakutty v. Parat Abdul Samad*,<sup>28</sup> mother of the minor child committed suicide. Thereafter, the minor child was brought up by the maternal grandparents. The father of the minor child filed an application for the custody of the child. The Family Court granted custody of the child to the father. The maternal grandparents filed an appeal against the order. The Court modified the order and the father was granted only visitation rights. While holding so, the Court stated that "the child is, since the death of its mother, living with the maternal grandparents. If a transplantation is made at this age of the child, it will badly affect the child especially when the father has remarried and a child

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<sup>28</sup>AIR 2005 Ker 68

is born to him in the new marriage. He had already been allowed, as per the interim order, to have visits at his choice, at the house of the appellant. That is being continued. In such circumstances, he can surely win over the affection of the child in due course and the child will also be aware in due course of the fact that its betterment will always be in the hands of the respondent.” Once the grandfather expired, the father again filed for the custody of the child. It was argued that after the death of the grandfather, the grandmother only would not be able to look after the child. For the welfare of the child, the father should be given the custody of the child. The Family Court after considering the facts and circumstances of the case, established that for the welfare of the child, the father should be given the custody of the child. The petition was allowed and custody of the child was given to the father. So the appeal by the grandmother. The Principles of Mohammedan Law were referred as laid down under Section 352 and 353 of Mulla’s Principle of Mohammedan Law. Argument on the basis of the provisions of the Muslim Law was raised that the maternal grandmother is entitled to have custody of the minor son. The Court held that when the issue of the custody of the child is involved, the paramount consideration should be the welfare of the child. The maternal grandmother was a diabetic patient and was reliant on her other daughter so the welfare of the child lies in giving custody of the child to the father. Remarriage is not a ground to reject custody of the child. Therefore, the appeal was dismissed.



- In *Wazid Ali v. Rehana Anjum*,<sup>29</sup> as per the appellant (the father), once the dispute arose between the husband and the wife, the wife left him and started living in Raisen along with her minor child. On 18<sup>th</sup> December 2001 (approximately after six months) his brother-in-law brought the minor child to the father house and left the child with the father saying that “he should take care of his daughter”. The child was seven months and fifteen days old when she was handed over to her father. He apprehended some mischief, lodged a report in police station and also filed an application under Section 7 of the Guardians and Wards Act, 1890. That he being the natural guardian of his minor child be declared as a guardian. The wife filed a reply alleging that her husband had left her in her parent’s home. On the day of Eid, her husband under a false pretext took away the child and since then the child is living with him. The wife filed an application under Section 97 of the Criminal Procedure Code. Subsequently, the husband also filed an application under Section 97 of the Criminal Procedure Code. The wife prayed that the husband’s application be dismissed and the custody of the child to be given to her. The trial court dismissed the application of the husband. The wife had not filed a separate application under the Guardians and Wards Act, 1890, therefore the minor child was not directed to be delivered to her. Thus the husband appealed. The father raised an argument that the minor child was residing with the father. The mother did not bother to get the custody the child until the father filed an application under Section 7 of the Guardians and Wards Act, 1890. The child would be better looked after by the father as he was working as a teacher while the mother was doing nothing and her father had also retired. The

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<sup>29</sup>AIR 2005 MP 141

mother argued that, the minor child was only four years and hence she is entitled to custody of the minor child as per Section 352 of the Mohammedan Law. The court held that the “custody of minor is a sensitive issue. It is also a matter involving the sentiment attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiment of the parties towards the minor child and the welfare of minor which is a paramount importance.” The minors are not able to maintain themselves. Therefore, the State as ‘pater patrice’ has the authority take any necessary action for their security. The welfare of the child includes “the material and physical well-being; the education and upbringing; happiness and moral welfare.” The court taking into consideration the welfare of the child and the personal laws of the parties. The court stated that the welfare of the “minor must be far as possible consistent with the personal law relating to the parties. The preferential right of any person to the guardianship under the personal law cannot be ignored unless he/she is totally unfair to be appointed as guardian and court must necessarily consider his/her claims in preference to any other.” Custody of the minor child given to the mother and visitation rights to the father.

- In *Surabhai Ravi Kumar Minawala v. State of Gujarat*,<sup>30</sup> a petition was filed by the mother under Article 226 of the Constitution, praying the court for issuance of writ of habeas corpus against the father of the child aged nine months, to produce the child in the court and direct him to handover its custody to her. The main objection to this petition was that it was not maintainable since an alternate efficacious remedy was available to the

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<sup>30</sup>AIR 2005 Guj. 149.

petitioner and further that there was no need to issue writ of habeas corpus since the child was not in illegal custody of the father and the welfare of the child would be maintained in the best possible manner if the child remained with the father and his family. It was further averred that it was the petitioner who had left the family with her father and brother and she was not prepared to come back, and therefore, her petition should be dismissed. The petitioner's contention was that she was thrown out of the house when the child was just two months old. The court made all efforts to bring about settlement between the parties but that did not work. In these efforts, the court specifically stated that the petitioner was not at fault, rather it was the father who made things difficult. The argument that father's custody not being illegal, a writ of habeas corpus would not lie was also rejected. The main focus however, was on the child's welfare. Under section 6 of the Hindu Minority and Guardianship Act the mother is the natural guardian of a minor and the custody of a child below age five would ordinarily be with the mother. The father's superior financial position was of no relevance as according to the court, "no amount of wealth and 'mother-like-love' can take place of mother's care and love for the child". Further, according to the court, "if the claim of the respondent (father) is to be weighed vis-à-vis the claim of the petitioner regarding safeguarding the interests of the child, it is very clear that petitioner can provide all the basic, necessary facilities and amenities to the child. Beside, from the father's affidavit it transpired that the child is likely to be with its grandmother and paternal aunts; and between the mother on the one side and grandmother and the paternal aunts on the other, undoubtedly, the scale would tilt heavily in favour of the mother", the court remarked. The suggestion that the child be

allowed to stay 15 days in a month with father was rejected as it would unnecessarily toss the child like shuttlecock between the two families. This would adversely affect the child's health and make adjustment difficult for him. Custody was accordingly given to the mother.

- In *Sarabjit v. Piara Lal*,<sup>31</sup> a suit was filed for custody of a minor child by the widowed mother. The parties were married at H and stayed at A after marriage, where the son was born. The father of the child died when the child was just a year old. The petitioner (mother) stated that after her husband's death, she was turned out of the house at A by her in-laws and her child was forcibly and illegally snatched by them. Despite intervention of relatives and neighbours, neither she was allowed to stay at A nor was she allowed to take the child. She then went to H, her parental place. She filed a petition for custody of the child under section 7 and 25 of the Guardians and Wards Act, 1890, read with section 6 of the Hindu Minority and Guardianship Act, 1956 at H. The Guardian Judge, on the basis of objection raised by the respondent, held that such petition could be filed within the jurisdiction of District Courts where the minor "ordinary resides" as provided by section 9 of the Guardians and Wards Act viz., A, the petitioner was, accordingly returned for presentation in the competent court. Hence, the present petition.

The mother had, during the pendency of this petition also filed application for grant of interim custody of the child, asserting that the custody petition was returned to her by the Guardian Judge after keeping it pending for two years. This, according to her counsel was a calculated attempt to ensure that the child

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<sup>31</sup>AIR 2005 P&H 237.

attains the age of 5 so that they are out of the ambit of section 6(a) of the Hindu Minority and Guardianship Act under which the custody of a minor who has not completed the age of 5 shall, ordinarily be with the mother. On the main issue of jurisdiction, the court held that the expression “minor ordinarily resides” in section 9 of the Guardians and Wards Act has to be interpreted to mean the residence of the mother. Once, under section 6(1) of the Hindu Minority and Guardianship Act it is mandatory that the child below the age of 5 years has to reside ordinarily with the mother, it is implied that the residence of the mother would be the residence of the child. Thus, the court, where the mother resides, would have jurisdiction to entertain the custody application and not the court where the child is actually residing. As to the claim of the mother on merits, the court held that the tender age of the child below 5 years would necessarily require the natural love and affection which the child is likely to get in the lap of his mother rather than that of grandparents. Another aspect which the court considered was that it would be highly inconvenient for the mother to prosecute proceedings for the custody of her minor son at A. The court accordingly set aside the order rejecting her application for custody of the child on the ground that court at place a alone would have jurisdiction to decide the application, and directed that custody be given to the mother.

- In *Sheila B. Das v. P.R. Sugasree*,<sup>32</sup> this appeal was filed by the mother (appellant) against the judgement and order of Kerela High Court. Here the appellant was a doctor by profession and respondent was a lawyer by profession. They got married and a child was born to the couple on 20<sup>th</sup> June

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<sup>32</sup>AIR 2006 SC 1343.

1993. Differences arose between the couple and the appellant left her matrimonial home along with her child. This application is filed under Section 7 and 25 of the Guardian and Wards Act, 1890 and under Section 6 of the Hindu Minority and Guardianship Act, 1956. The High Court allowed the applications of the respondent and gave the custody of the child to the father (respondent). Being dissatisfied with the order of the family court, the mother filed an appeal in the High Court of Kerala wherein an order of the family court was stayed. The father thereupon filed an application before the High Court for review of the said order and in the pending proceedings a direction was given by the High Court to the family court to interview the minor child. The report of the family court shows that the minor child preferred to stay with her father and ultimately High Court vacated the stay granted by it on 21<sup>st</sup> May 2001. The High Court confirmed the order of the family court and gave the custody to the father. High Court, however, permitted the mother to visit the child at the house of the father once in a month and with the direction that she will not be removed from the father's house. The Supreme Court dissented from all the above judgement and the court held that in the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the courts, keeping in view the fact that paramount consideration in such cases was the interest and welfare of the minor. In this case the Supreme Court observed that "there is no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs the child appears to be happy in the respondents company and has also

been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child". No allegations other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such allegations are not borne out from the materials before the court and are not sufficient to make the respondent ineligible to act as the guardian of the minor. Therefore, custody of the child given to the father and visitation rights given to the mother and the appeal dispose of by retaining the order passed by the learned judge of the family court at the issue on the application of respondent under Sections 7 and 25 of the Guardians and Wards Act, 1956.

- In *Mandy Jane Collins v. James Michael Collins*,<sup>33</sup> a 8 year old minor daughter said to be illegally detained in Goa by the father. The court declining the issuance of a writ of habeas corpus, held that the parties could pursue their remedies in normal civil proceedings in Goa. The court, dismissing the mother's plea for custody, concluded that the question of permitting the child to be taken to Ireland (where the father and the mother were residing) without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible, and directed that status quo be observed. This, in effect, meant that the 8-year-old minor girl continue to live in Goa without her mother or any other female family member in the father's house. In a challenge to this decision by the mother before the Supreme Court of India, the appeal was dismissed on 21<sup>st</sup> August 2006, leaving it open to the parties to move the appropriate forum for the custody of the child, which, if

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<sup>33</sup>(2006) 2 Hindu Law Reporter Bombay 446.

done, was directed by the Supreme Court to be decided within a period of three months with earlier visitation rights continuing to the mother.

- In *Lekha v. P. Anil Kumar*,<sup>34</sup> after two and a half months of the marriage, the parties got separated. Thereafter, the wife gave birth to a baby boy. She filed a suit for divorce on ground of cruelty by husband. Which was granted by the Trial Court. Custody of the child was also obtained by her. The husband filed an appeal before the Kerala High Court seeking custody of his son. During pendency of this appeal the wife remarried. The High Court reversed the Trial Court order on the ground of the mother's remarriage and directed that the child's custody be handed over to the father even without interviewing the child. Against this order, the wife filed an appeal. The High Court order was set aside. Admitting the wife's appeal, the Hon'ble Supreme Court held that custody would be with the mother notwithstanding her remarriage. The court held that even though under the Hindu Law, the father is the natural guardian after the age of five, the predominant consideration is the welfare of the child. It remarked "the fact that the mother had married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcoming but that does not imply that she is not deserving of the solace and custody of her child. If the court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of her mind, then the custody of the minor child should not be refused to her or else we would be really assenting to the proposition that a second marriage involving a

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<sup>34</sup>(2006) 12 SCALE 163.



mother per se will operate adversely to a claim of a mother for the custody of her minor child”.

It has been held that remarriage of the minor’s father cannot be a ground for prohibiting him the custody rights of the minor. Custody of the child was granted to the mother with arrangements for father’s visitation.

- In *Mausami Moitra Ganguli v. Jayant Ganguli*,<sup>35</sup> on 18<sup>th</sup> April 1996, Mausami (appellant) and Jayant (respondent) got married. On 28<sup>th</sup> May 1998, a child was born to the couple. Differences arose between the couple. The appellant and she stated that the respondent had lied to her regarding his occupation. He had no income to maintain the family and was habituated to alcohol and smoking. The appellant who worked as a teacher had to maintain the appellant and his family. However, she was imperilled to physical violence. On 16<sup>th</sup> August 2001, the appellant left her husband's home at Allahabad. She filed a suit for divorce. On 12<sup>th</sup> September 2002, an ex-parte decree was made. There was no appeal on the ex-parte decree so the decree was final. On 5<sup>th</sup> April 2003, the appellant filed a petition under Section 10 and 25 of the Guardians and Wards Act, 1890 for declaring her as the lawful guardian of her minor son and to hand over the custody of the child to her. The respondent contented that the appellant had deserted the child when he was not even three years of age. She had no emotional attachment with the child.

After going through the facts and circumstances of the case, the Family Court found that the father (respondent) is incompetent to act as a guardian. The respondent appealed to the High Court against the order of the Family Court.

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<sup>35</sup>(2008) 7 SCC 673.

The High Court set aside the order of the Family Court and allowed permanent custody of the minor son to the father. The mother (appellant) filed an Appeal against the order of the High Court.

For the development of the child, safety and permanency of the child is also a vital component. After examining the case the court was convinced that the child's interest and welfare will be best served if the child stays with the father. The order of the High Court giving custody to the father and visitation right to the mother is upheld. As a result, the appeal got dismissed.

- In Mohan Kumar Rayana v. Komal Mohan Rayana,<sup>36</sup> the appeals arise out of the circumstance wherein owing to disputes and differences between married couples, the child born of the wedlock has become the object of a tussle for custody between two parents. The appellant, who is the husband of the respondent, married the respondent on 2<sup>nd</sup> March 2002. A daughter was born to them and she was named Anisha. Initially there were no disputes as such between the parties but after the daughter's birth the atmosphere in the marital home began to change. The mother (respondent) moved to the family court seeking custody of her minor daughter under Section 6 of the Hindu Minority and Guardianship Act 1956. The father (appellant) herein also filed a custody petition, and both the applications were taken up for hearing together by the learned family court. By its judgement dated 2<sup>nd</sup> February 2007 the family court dismissed the father's application for custody and allowed the application filed by the mother. The father is directed to hand over the custody of the minor daughter to the mother. Aggrieved by the said judgement and

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<sup>36</sup>AIR 2008 SC 471.

order of the family court the appellant filed an appeal before the Bombay High Court. The High Court directing that the minor child would be available to the appellant. It was also stipulated that whenever the appellant was not available in Bombay the child should remain with the respondent. The Supreme Court observed that since these appeals have been preferred against the interim orders passed by the Bombay High Court in the two pending family court appeals, learned counsel for the appellant, submitted that in these appeals the only grievance of the appellant was with regard to denial of complete access to his child. He prayed that the visitation rights which had been granted by the family court be restored during the pendency of the two appeals in the Bombay High Court. The Supreme Court further observed that after having looked through the materials on record and after considering the views of the parties and the minor girl, the Supreme Court observed “that the appellant should not be denied complete access to his minor child, even if there has been a default in complying with the directions of the High Court and pending the disposal of the appeals, he should be allowed to have access to his minor child at least to some extent”.

The paramount consideration while deciding custody disputes should always be the ‘best interest of the child’ rather than the rights of the parents.<sup>37</sup> While determining custody disputes, the “positive test” that is the factors which constitute the ‘child’s best interest’ needs to be determined rather than the “negative test” that is focusing on the incompetence of the applicant.<sup>38</sup>

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<sup>37</sup>Kusum, Cases and Materials on Family Law (Universal Law Publishing Co. Pvt. Ltd., 4<sup>th</sup> edn., 2015) p. 316.

<sup>38</sup>Ibid.

- In *Nil Ratan Kundu v. Abhijit Kundu*,<sup>39</sup> the custody of a minor child was given to the maternal grandparents. The father of the minor child tortured his wife for not bringing enough dowry. She was physically and mentally harassed. This incident was a shock to the minor child. The father was arrested as the mother of the child ‘alleged torture to death by the father’ and therefore he was accused under section 498A and 304 of the Indian Penal Code, 1860. The grandparents nurtured the child. Once the father was granted bail, he failed an application requesting for the custody of the child under the Guardians and Wards Act. The Trial Court, approved the father’s application and an order was subsequently made to handover the child to the father ‘immediately’. The grandparents appealed against the order of the Trial court. It was argued that the trial court did not take into consideration the wishes of the minor child while implementing the power laid down under the Guardians and Wards Act, 1890. The Divisional Bench of the High Court upheld the decision of the Trial court. The appeal made by the grandparents was approved by the Supreme Court and the father’s application for the custody of the child was dismissed. It was observed that the ‘first and the paramount consideration is the welfare of the minor and not the right of the parents under a statute’. While deciding complex child custody cases, the Court must take cognizance of the appropriate statutes and the rights contained therein. Child custody cases in a social problem and it needs to be resolved with human touch rather than by merely interpreting the legal provisions. The child in question was called upon by the court to find out his wishes. On this account the court found out that the child was happy with the grandparents. The minor

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<sup>39</sup>AIR 2009 SC (Supp) 732.

child refused to go with his father. The Supreme Court held that the “negative test” whether the father is incompetent, unfit or prohibited to have custody of the child is not significant. It is the “positive test” whether such custody would be in the interest of the child is significant.

When a child is competent to express his opinion, the child’s opinion should be taken into consideration while granting custody orders. The court while making custody orders need to consider the wish of the child, favourable environment for upbringing of the child and not better legal rights of either parent.<sup>40</sup>

- In *Gaurav Nagpal v. Sumedha Nagpal*,<sup>41</sup> on 14<sup>th</sup> October 1996, Gaurav and Sumedha got married. On 15<sup>th</sup> November 1997, a child was born. On 8<sup>th</sup> August 1999, the child was deserted by the mother (respondent). On 25<sup>th</sup> August 1999, a Habeas Corpus petition was filed by her. The Delhi High Court rejected the petition on the ground of territorial jurisdiction. She filed a Special Leave Petition against the order dated 14<sup>th</sup> January 2000 and also files a Writ Petition under Article 32 of the Constitution of India. An interim custody was allowed to the father (appellant). A maintenance petition was filed by the respondent before the Delhi High Court and a petition for guardianship was filed in the District Court, Gurgaon. By order dated 2<sup>nd</sup> May 2002, learned Civil judge dismissed the application for interim custody on the ground that the change in custody would go against the ‘welfare of the child’ as it would traumatise the child if separated from the father.

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<sup>40</sup>Kusum, Cases and Materials on Family Law (Universal Law Publishing Co. Pvt. Ltd., 4<sup>th</sup> edn., 2015) p. 326.

<sup>41</sup>(2009) 1SCC 42.

The respondent filed a Revision Petition before the High Court. By the order dated 30<sup>th</sup> September 2002, visitation right was granted to the respondent. A contempt petition was filed for violation of the terms of the appellant. Custody of the child was granted to the respondent by the District Judge, Gurgaon.

An appeal was made against the order dated 6<sup>th</sup> January 2007. High Court passed an interim order staying the order of custody to the respondent but continued the order with respect to visitation rights.

The appellant stated that he is the legal guardian of the child. As the appellant lives in a joint family, the child will be better taken care of by the family. The child has been living with him for the past 7 years. The respondent stated that the appellant had moved to Bahadurgarh by dishonesty. An interim order was passed by the court. However, the appellant failed to obey the orders. As a result, he was punished with one month's imprisonment. The respondent further stated that wealth and the luxury cannot decide the 'welfare of the child'.

The court stated that the "children are not mere chattels nor are they toys of their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

With certain modification of the order passes by the District Judge and the High Court, visitation rights were passed. The child shall be with the father for seven days during the holidays. The child shall be allowed to visit the father twice in a month from morning to evening. After going through the facts and circumstances of the case, the appeal was terminated with some alteration.

- In *V. Ravi Chandran v. Union of India and Others*,<sup>42</sup> in December 200, V. Ravi, an American citizen, married Vijayashree in Tirupati, India according to Hindu rites. In July 2002, their son Adithya was born in the US. In July 2003, Vijayashree approached the New York State Supreme Court for a divorce. On 18<sup>th</sup> April 2005, the court passed a consent order granting joint custody to the parent. The marriage was dissolved in September 2005, incorporating the 18<sup>th</sup> April 2005 order. On 18<sup>th</sup> June 2007, a consent order with regard to the joint custody awarded, specifying details of residence, time sharing, and holidays, was made by the family court of the state of New York.

On 28<sup>th</sup> June 2007, Vijayashree brought Adithya to India, telling his father that she would henceforth be living with her parents in Chennai. The father moved the family court in New York and was granted temporary sole legal and physical custody of the minor child. Vijayashree was directed to turn over the child and his passport to the father. Further, the New York court suspended custodial time granted to the mother and issued non-bailable child abuse warrants against her.

Adithya's father filed a petition in the Supreme Court of India for his son to be produced. But both mother and child could not be traced for over 2 years, until

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<sup>42</sup>(2009) 14 Scale 27.

the Central Bureau of Investigation finally located them and produced them in court in October 2009.

The Supreme Court declared that while dealing with the custody case of a child removed by a parent from one country to another, in contravention of the orders of the court where the parties had set up their matrimonial home, the court in India had to consider whether to conduct a summary inquiry or an elaborate inquiry into the question of child custody.

In the case of a summary inquiry, the court would return custody to the country from which the child had been removed, unless such return is shown to be harmful to the child. In case of order of summary return, all aspects of the child's welfare would be investigated by the court where the matrimonial home was situated.

In the event of an elaborate inquiry, the court could ignore the order of the foreign court, go into the merits, and decide the issue of custody from the standpoint of the child's permanent welfare. If the court took the view that an elaborate inquiry was necessary, the court was bound to consider child's welfare, including stability and security, a loving and understanding environment, and full development of the child's character, personality, and talents.

The issue of a summary or elaborate inquiry is to be decided from the standpoint of the best interests of the minor. The summary jurisdiction to return the child is exercised if, for example, the child is removed to another country where his native language is not spoken, or the child is divorced from the social customs and contacts to which he is accustomed, or education in the



native land is interrupted and the child is subjected to a foreign system of education that could psychologically disturb him. Summary jurisdiction is to exercised only if the court is moved quickly and promptly, that is, before the child develops roots in the country to which he has been removed.

Alternatively, the court can think about conducting an elaborate inquiry taking into account other facts such as the time that has lapsed after the removal, and it could be considered that it would be in the best interests of the child for him not to be sent back to the country from which he was removed. In that case, the unauthorised removal of the child from his native country would not come in the way; the court can ignore the removal and independently consider whether sending the child back is in his best interests.

The court observed that the matter of custody of a minor child was not to be decided on considerations of the legal rights of the parties but on the sole and predominant criterion of the best interests of a minor.

The Supreme Court applied this declared law and examined whether, in the facts of the present case, an elaborate inquiry or a summary inquiry should be conducted by the court in India. It observed that the minor child Adithya was an American citizen, born and brought up in the USA, and that Adithya's natural environment was America. Keeping in view the best interests and welfare of the child, the mother and father had obtained a series of consent orders regarding custody rights and maintenance from the courts in America. That, in June 2007, both parties had agreed to a comprehensive arrangement with respect to shared joint legal and physical custody of Adithya.

Vijayashree alleged before the Supreme Court of India past denial of basic rights to the child by the father. She said the father failed to give the child medication, denied him education, did not provide a stable environment, and abused the child. The court observed that in view of the fact that all orders with regard to custody of Adithya had been passed by courts in America, with the consent of both parties, the mother's present allegations had no substance.

The submission that the American courts had no jurisdiction, and that the orders passed were inconsistent with Indian laws and could not be executed, was rejected. The court observed that the mother had been staying in India for 2 years and had not pursued any legal proceedings for sole custody of the child or for a declaration that the orders passed by the American courts were null, void, and without jurisdiction. In fact, she did initiate proceedings under the Guardian and Wards Act but later withdrew the case. The judgement noted that there is nothing to even remotely suggest that it would be harmful for the child or return to his native country.

The court examined the issue of the child developing roots in the country to which he had been removed, and prompt application for custody of the child. The court observed that Adithya was not receiving an education in any one place in India. He had moved from one school to another. Indeed, both mother and son could not be traced for two years after the court issued a notice because they were moving from one state to another. Vijayashree's parents denied any knowledge of their daughter's whereabouts since September 2007. The court held that under these circumstances, there had been no occasion for the child to develop roots in India. It also noted that the father had moved for

custody without delay, and that the child could not be produced for 2 years as the mother was constantly on the move.

The court added that the father was prepared to pay all the travel expenses and make living arrangements for the mother in the USA till courts in America passed the necessary orders. Also, that he would comply with the earlier joint custody order passed by the American courts with the consent of both parties. He would request the American courts to drop all warrants issued against the mother and would not pursue criminal charges against her. The fact of confirmation of admission for Adithya in a school in the USA was also noted by the court.

The Supreme Court concluded that it would be in Adithya's best interest to return to the USA. Vijayashree was ordered to return to the USA with Adithya within 15 days.

- In *Athar Hussain v. Syed Siraj Ahmad and Others*,<sup>43</sup> here the appellant is the father of the minor children in whose respect interim custody and guardianship have been sought for. Respondent 1 is the maternal grandfather of the two minor children of the appellant and Respondents 2, 3 and 4 are their maternal aunt and uncles. The appellant married one Umme Asma, daughter of Respondent 1, in accordance with Islamic rites and customs. Two children were born from the wedlock, Athiya Ali, aged about 13 years and Aayn Ali, aged about 5 years. Their mother Umme Asma died. Subsequent to the death of Umme Asma, the mother of two minor children, the appellant again married Jawahar Sultana on 25<sup>th</sup> March 2007 who in the pending proceeding

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<sup>43</sup>(2010) 2 SCC 654.

had filed an application before the Family Court for her implement in the same. The Family Court disposed of the application under Section 12 read with Order 39 Rule 1 and passed an ex parte interim order restraining the appellant from interfering with the custody of the two children of the appellant. Therefore, the appellant filed an application against the order of the Family Court under Order 39 Rule 4 of the Code praying for vacation of interim order of injunction passed against him. The Family Court by its order vacated the interim order of injunction. The Family Court found the balance of convenience also leaning in favour of the appellant, who is admittedly the natural guardian of the children. The photographs produced by both the parties were considered as indicating that the children shared with both. It was found that they were also happy in the company of their stepmother. Though Athiya had stated that she was not willing to go with her father. The Family Court observed that it could be of no consequence as she was not old enough to form a mature opinion and was susceptible to tutoring. The fact that the son went to the appellant when he saw him in the court premises indicated that the children were close to the appellant. Accordingly, balance of convenience was found tilting in favour of the appellant. Aggrieved by this order, the respondent filed a writ petition before the High Court of Karnataka at Bangalore. The High Court by its order had set aside the order of the Family Court by which it had vacated the interim order of injunction. The High Court observed that merely because the father has love and affection for his children and is not otherwise shown unfit to take care of the children, it cannot be necessarily concluded that the welfare of the children will be taken care of once their custody is given to him. The girl had expressed a marked reluctance

to stay with her father. The High Court was of the opinion that the children had developed long standing affection towards their maternal grandfather, aunt and uncles. The sex of the minor girl who would soon face the difficulties of attaining adolescence is an important consideration, though not a conclusive one. She will benefit from the guidance of her maternal aunt, if custody is given to the respondents, which the appellant will be in no position to provide. Further, there is a special bonding between the children and it is desirable that they stay together with their maternal grandfather, aunt and uncles.

In case of custody of the minor children, the family law i.e. the Mohammedan Law would apply in place of the Act. The High Court had held that the preferential rights regarding the custody of the minor children rest with the maternal grandparents. After making a doubtful proposition that in case of a conflict between personal law and the welfare of the children, the former shall prevail, the High Court held that in this case there is no such conflict. For the reasons aforementioned, the High Court by its impugned order set aside the order of the Family Court, which vacated the interim order of injunction issued against the appellant. It is this order of the High Court, which is challenged before the Supreme Court by way of a special leave petition which on grant of leave have been heard by Supreme Court in the presence of the learned counsel appearing on behalf of the parties. In this case Supreme Court followed the judgement of *Siddiquunnisa Bibi v. Nizamuddin Khan*,<sup>44</sup> this was a case concerning the right to custody under the Mohammedan Law. A question has been raised before the Supreme Court whether the right under the Mohammedan Law of the female relation of a minor girl under the age of

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<sup>44</sup> AIR 1932 All 215

puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct? The right to the custody of such a minor vested in her female relations is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child should be continue by the father in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father.

The Supreme Court held that the question of guardianship can be independent of and distinct from that of custody in the facts and circumstances of each case. Keeping in mind the paramount consideration of the welfare of the children, apex court gave preference to the maternal relations notwithstanding the fact that the father is the natural guardian of his children.

- In *Vikram Vir Vohra v. Shalini Bhalla*,<sup>45</sup> on 10<sup>th</sup> December 2000, Vikram (appellant) and Shalini (respondent) got married according to the Hindu rites. On 5<sup>th</sup> August 2002, a child was born to the couple. Differences arose between the couple and they agreed for a divorce by mutual consent and filed a petition for the same. On 5<sup>th</sup> September 2006, the Additional District Judge, Delhi passed a decree of divorce. Settlement between the parties had taken place with regard to the custody of the child. "The parties have agreed that the custody of the minor son Master Shivam shall remain with the mother, petitioner No.1 who being the natural mother is also the guardian of the son

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<sup>45</sup>(2010) 4 SCC 409.

Master Shivam as per law laid down by the Supreme Court of India. It is, however, agreed that the father petitioner shall have right of visitation only to the extent that the child Master Shivam shall be with the father, petitioner No.2, once in a fortnight from 10 AM to 6.30 PM on a Saturday. Petitioner No.2 shall collect the child Master Shivam from WZ-64, 2nd Floor Shiv Nagar Lane No.4, New Delhi-58 at 10 AM on a Saturday where the child is with his mother. And on the same day at by 6.30 PM, the petitioner No.2 would leave the child back at the same place with the mother i.e. petitioner No.1 and in case he does not do so petitioner No.1 the mother shall collect the child from petitioner No.2 on the same day. Both parties undertake before this Hon'ble Court that they would not create any obstruction in implementation of this arrangement. The petitioner No.1 shall take adequate care of the child in respect of health, education etc., at her own cost. In case the petitioner No.1 changes her address or takes the child outside Delhi, she shall keep petitioner No.2 informed one week in advance about the address and telephone nos. and the place where the child would be staying with the mother, to enable the petitioner No.2 to remain in touch with the child. The petitioner No.1 has received all her Stridhan and other valuables, articles and other possessions, and nothing remains due to her from the petitioner No.2. The petitioner No.1 and the child Shivam has no claim to any property or financial commitment from petitioner No.2 and all her claims are settled fully and finally". Both the appellant and the respondent independently filed an application requesting for change in terms and conditions for custody of the child. The respondent working in Australia wanted to take the child along with her. The appellant opposed for a child to leave India permanently would not be for the welfare of

the child. The terms and conditions for the custody of the child was altered by the Trial Court's order dated 6<sup>th</sup> April 2009. The respondent was allowed to take the child to Australia. However, the child was to be brought back to India twice in a year (i.e. 18<sup>th</sup> December to 26<sup>th</sup> January and 26<sup>th</sup> June to 11<sup>th</sup> July) for allowing the visitation rights of the father. The order of the Trial Court was appealed to the High Court. The appellant argued that the application of Section 26 of the Hindu Marriage Act, 1955 does not lie. The Trial Court has no jurisdiction to entertain the new petition once a decree is passed. Taking into consideration the provision of Section 26 of the Act, the High Court regarded that provision is intended to enable the Court to pass suitable orders from time to time to protect the interest of the minor children. The High Court held that once a final order is passed, the party cannot file any number of fresh petition ignoring the earlier order passed by the Court. The Court took into consideration that even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, they do form part of the petition seeking divorce by mutual consent. It was of the view that absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant. The child was interviewed by the learned Judge of the High Court to find the wishes of the child. The child expressed his desire to stay with the mother (respondent). The child refused to stay with the father (appellant). Special Leave Petition was filed by the appellant. The child was also interviewed in the Supreme Court. The child expressed his feeling to stay with the mother. After analysing the facts and circumstances of the case, the court pointed out that parting a child from his



mother will be devastating for both. The father for all these years lived without the child and got used to it. Therefore, the appeal was dismissed.

- In *Shilpa Aggarwal (Ms.) v. Aviral Mittal & Anr.*,<sup>46</sup> this case arose out of a habeas corpus petition before the High Court of Delhi, filed by the father of the child. The high court had directed the return of the child to England to join the proceedings before the courts of England and Wales, failing which the child had to be handed over to the petitioner, the father, to be taken to England as a measure of interim custody, leaving it for the court in that country to determine which parent would be best suited to have the custody of the child. That direction was upheld by this Court which the observation that since the question as to what is in the interest of the minor had to be considered by the court in the United Kingdom in terms of the order passed by the high court directing return of the child to the jurisdiction of the said court did not call for any interference.
- In *Dinesh Alias Shed Mohamed Sheik Sikandar and others v. Jareena Begum*,<sup>47</sup> Dinesh was married to Sainammal. On 10<sup>th</sup> November 2005, a daughter was born out of the wedlock. On 28<sup>th</sup> July 2007, Sainammal committed suicide. Criminal case was registered against Dinesh and his father and mother. The custody of the minor daughter was under her father and paternal grandparent. Sainammal's mother filed a petition under Section 7(1)(b), 8 and 25 of the Guardians and Wards Act, 1890, requesting to assign her as the "legal guardian of the minor child and for a consequential direction to hand over the minor to her". Dinesh and his parent was alleged that they

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<sup>46</sup>(2010) 1 SCC 591.

<sup>47</sup>II (2011) DMC 550

asked for dowry. The Trial Court stated that Dinesh and his parent was not in a favourable position to have the custody of the minor child. Hence, the custody was granted to the maternal grandmother. Dinesh and his parent filed an appeal under Section 47 of the Guardians and Wards Act, 1890. It was submitted by them that the welfare of the child rest with the father. The maternal grandmother never met the minor child. The minor child was produced in the Judge's chamber along with her father and maternal grandmother. On enquiry, the child was not capable of giving an intelligent preference as she had just completed 5 years of age. The child was going to a school and was in good health. The child was unable to recognise her maternal grandmother. Thus, the court granted custody of the minor child to the father.

- In *Gayatri Bajaj v. Jiten Bhalla*,<sup>48</sup> the appellant (wife) and the respondent (husband) were married and out of the wedlock two daughters were born. The relationship between the couple got strained therefore the couple filed a joint petition to obtain divorce by mutual consent under Section 13B of the Hindu Marriage Act. The terms of the agreement were, that the custody of the two minor daughters to be given to the father along with the visitation right to the mother. Three years later from the decree of divorce was passed, the wife instituted a suit seeking a declaration that the decree of divorce was null and void as her consent for mutual divorce was obtained by fraud. Regarding the custody of the child, the parties contended that the custody of the two minor daughters to be given to the father along with the visitation right to the mother. The two daughters did not want to go with their mother. The father was asked to bring both the daughters to the Supreme Court Mediation Centre on every

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<sup>48</sup> AIR 2013 SC 102

Saturday and hand over the minor daughters to their mother till Sunday 10 a.m. However, the two daughters declined to go with the mother and the mediation centre. They began to act abnormally and even declined to take food. Therefore, the father filed an application before the court seeking ‘vacation/modification’ of the previous order. After considering the facts and circumstances of the case, the court was of the view that “both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court.” Hence the court revoked the visitation right of the mother.

- In *Murari Lal Sidana v. Anita*,<sup>49</sup> after the parents separation, the children were being taken care of by the grandparents. They were all through with the grandparents and happy and emotionally bonded with them. The father committed suicide after some years and the mother did not even come on this occasion. Thereafter, the mother filed an application for custody under section 25 of the Guardians and Wards Act, 1890 and section 6 of the Hindu Minority and Guardianship Act, 1956. The trial court, on the assumption that a mother is always the well-wisher of the children granted custody to her. It is against

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<sup>49</sup>AIR 2013 Raj 100

this order the grandparents appealed. The court went through the law and the facts and circumstances of the case, after analysing the same, it allowed the appeal of the grandparents. The children were with the grandparents even since birth. Over the period they had developed emotional bonding with the grandparents, they had settled in their school. They had never had any interaction with the mother. The court also interacted with the children to ascertain their wishes which left no iota of doubt that children did not want to leave the grandparents and other family members at all. In this backdrop, it observed that the trial court's appreciation of evidence is coloured by the presumption that the mother always has the interests of her children. Such presumption is however, "neither legal nor warranted by the evidence on record", the court remarked. Even visitation rights were not given to the mother as this could cause emotional and psychological trauma to the children who would have to comply with an order that they are absolutely uncomfortable with. The court ruled that "since children should be permitted to develop their personality without too much of emotional and psychological disturbance, it would be in the interest of welfare of the children to deny the visitation rights to the mother".

- In *Rajan Chawla v. Lisbon John Miranda*,<sup>50</sup> a petition for grant of guardianship of a three and a half year old female child. The parties were married under the Special Marriage Act as the father was a Roman Catholic and the mother a Hindu. The mother died an unnatural death and the father, as accused of her death, was in jail. The contest was between the maternal grandfather who took charge of the child immediately after the death of the

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<sup>50</sup>AIR 2013 Bom 29.

mother, and the father's sister. Various aspects were raised, discussed and considered by the court. In the light of the welfare of the child, the factor of age was considered. The child being less than four years of age, the court held that she must be left to grow where she is accustomed and not uprooted. The aunt's contention that the child being a female her guardianship should be given to her was rejected as being absurd. The court observed that "the first legal and natural guardian of any female child is the father and he is not of the same sex". Factors like character and capacity of the guardian, nearness of kinship and wishes of the deceased mother were also considered and the court felt that the grandfather had a better claim. Religion was another significant issue raised. It was argued on behalf of the aunt that since the father was a Roman Catholic, the child should be brought up as a Catholic. Rituals must be performed and she must attend a convent school where ideals of Christianity would be taught. The judge retorted that "the concept of religion in section 17(2) of the Guardians and Wards Act, 1890 [which enjoins upon the court to consider inter alia the aspect of religion of the minor]... does not contemplate... that in our patriarchal society, only the religion of the husband must prevail. The argument and such interpretation is directly contrary to the freedom of religion under the Constitution of India and will be gender discriminatory ... There is no greater religion amongst the great religions .... It would be in the interest of the child that the child is kept away from any religious dogmas to which she has not been exposed in her infancy so as to leave her children care free and stress free". The following remarks are pertinent too "it would be insulting to Christianity to see the father of the child who is a Christian being convicted of murder of his wife. The child would not

get the idealism of Christianity from a father who has been imprisoned during her minority having been charged with murder of her mother and cruelty towards her”. Infact the circumstances of the case clearly indicated that the aunt had neither any interest nor experience of living with the child. She had filed the petition only on the instruction of the jailed father. consequently, the petition of the grandfather was granted and he was appointed guardian in respect of the person and property of the minor child.

- In *Nirali Mehta v. Surendrakumar Surana*,<sup>51</sup> the parents had obtained a divorce by mutual consent and in lieu of the wife not claiming anything by way of maintenance or child support, the father gave up all rights over the child. He even filed an affidavit in the Family Court to this effect. The mother thus was a single parent and the only guardian. The father’s parents filed an application for access and custody of the child. The family court gave access to the child on certain holidays. It is against this order that the mother filed a writ petition. After analysing the statutory provisions on the subject, sections 7 and 8 of the Guardians and Wards Act, 1890 and sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956 and also the cardinal principle of welfare of the child, the court held that the grandparents cannot claim custody or access over the child. The mother alone is the guardian in this case. Custody and access are ancillary reliefs in a guardianship petition. The court observed that “only a legal guardian validly appointed as such guardian of a minor child can claim custody or access to the child”. The father who neglects or evades his own parental duties and responsibilities cannot, from the backdoor, gain entry and access to the child through his parents agitating on his behalf in another grab.

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<sup>51</sup>AIR 2013 Bom 123.

In any case according to the court, there was nothing to indicate that it would be in the welfare of the child “to be tossed from one place to another to be given ‘custody’ or ‘access’ to the grandparents of the child who are not and cannot claim to be the guardians of the child whilst the mother is alive and present”.

- In *Vivek Singh v. Romani Singh*,<sup>52</sup> in 2007, Vivek and Romani got married, and out of their wedlock a daughter was born. After three years of their marriage, the couple separated. The wife stated her husband abused her removed her from the house. When she was about to leave along with her daughter, her husband took the minor daughter from her and he locked himself inside the house. Thinking that he might harm the child, the police suggested not to take any step and the police ensured her that by morning they would return the child to her. Next morning, both the husband and wife along with the minor daughter were ordered to come to the police station. The husband failed to bring the child to the police station and he stated that he would never give the child to the wife. The wife contended that her daughter was looked after by a male servant, as the husband lived alone and he was an army officer and she would look after the child properly as she was a teacher. Challenging the wife’s application, stated that he was rearing the child properly. The family court, allowed the custody of the child to remain with the father.

The wife appealed to the High Court against the order passed by the family court. The High Court, granted the custody of the child to the mother on the ground of ‘tender age’. The husband appealed to the Supreme Court against

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<sup>52</sup>AIR 2017 SC 929

the order passed by the High Court. The husband stated that since the child's birth he is rearing the child properly. For the best interest of the child, she should not be tossed between one residence to another. The custody of the child was granted to the mother so that the child grows up in the best environment. As the child has only lived with the father, and is unaware of the experience living with the mother. Once the child lives with the mother, then only she will be in a better position to choose where her welfare lies.

- In *Nagesh Kumar Pathak v. Krishna Pathak*,<sup>53</sup> the couple got married in 2011 and out of their wedlock a son was born. The marriage between the couple got strained. The son started staying with the mother after the dispute. The mother and the maternal grandmother nurtured the child, and the child was studying in a good school in Class 4. The father of the child alleged that the mother was suffering from mental illness. The minor child contented that his father used to beat him and showed no desire to stay with him and desired to live with the mother. On the basis of best interest of the child, the custody of the minor son was granted to the mother.
- In *Somnath Das v. State of Jharkhand*,<sup>54</sup> the mother was granted the custody rights and the father was granted the visitation rights of the minor daughter. The father had to bear all the necessary expenditures and educational expenditures. The father desired the child to go to a good school in Bangalore. The court permitted the father to take the minor daughter to Bangalore for her education. The mother disobeying the order of the court refused to take her daughter to Bangalore by the father alone. The court stated that as the mother

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<sup>53</sup>AIR 2017 Jhar 120.

<sup>54</sup>AIR 2017 Jhar 99



deliberately violated the orders of the court, so the court was to take action against her as it was a contempt of court. Along with the role of the mother, the father's role cannot be ignored. The love and care of the father cannot be taken away from the child. The court stated that if the mother violates the court order again. To ensure the custody of the child to the father, the court permitted the father to take the help of the superintendent of Police. The mother was allowed to accompany the daughter to Bangalore at the expenditure of the father.

- In *Haroon Khan v. Nazreen Khatoun*,<sup>55</sup> the wife was accused in the murder of her husband. The wife was denied the custody of the minor child as she was accused for murder and therefore the habeas corpus petition was dismissed. A special appeal was filed after the writ of habeas corpus petition was dismissed. However, the special appeal was also dismissed and the appellant had the liberty to invoke the provision under section 25 of the Guardianship and Wards Act, 1890 for custody of the minor. An application under section 12 of the Guardians and Wards Act for interim custody of the child was moved. Against the application under section 12, the petitioners have filed an objection. The Family Court decided the application for interim custody of the child. The paternal grandmother was given the custody of the child. This interim custody order has been challenged by the mother through the writ of habeas corpus. The Allahabad High Court stated that matters relating to custody of the minor child should be settled at the earliest. Within two months the proceedings may be finalized and the mother may be given the custody of the child. The writ petition is disposed of.

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<sup>55</sup>MANU/UP/2736/2017.

- In *Fakharuddin Ali Ahmad v. Tabassum Fatma Fakharuddin Ali Ahmad*,<sup>56</sup> the appellant (husband/father) and the responded (wife/mother) married and out of their wedlock a son and a daughter were born. Disputes arose between the husband and the wife and for almost four years they started living separately. The wife has filed a case against her husband under section 498-A of Indian Penal Code and also under Dowry Prohibition Act and a maintenance case. Both the children are living with their mother at Patna. The father contended that the mother is denying him to meet his children. The father being the natural guardian filed the case for custody of his children under the principles of Mohammedan personal law. The case was dismissed. The father stated that due to the financial situation of the wife, the children were not given suitable care. The wife stated that the appeal was filed with wrong objective and she is qualified and capable to maintain her children. The Patna High Court held that the father being a natural guardian does not ispo facto entitle him the custody of the child. Based on the rights of the parents, the custody of minor children cannot be decided. The paramount consideration should always be the welfare of the minor. The children when interviewed by the court, stated that they wanted to stay with their mother. The court gave the custody rights to the mother. The father was given the visitation rights.
- In *Lahari Sakhamuri v. Sobhan Kodali*,<sup>57</sup> a marriage was solemnised according to Hindu rites between Lahari Sakhamuri (appellant) and Sobhan Kodali (respondent) in Hyderabad. Both the parties to the marriage was working in the United States. Out of the wedlock, a son and a daughter was

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<sup>56</sup>AIR 2018 Pat 84.

<sup>57</sup>(2019) 7 SCC 311

born in the United States. Over the period of time, differences appeared between the couple. On 21<sup>st</sup> December 2016, the wife filed a petition for divorce and custody of the minor children on the basis that there was a complete irretrievable breakdown of marriage under the Divorce Code, 1980 prevalent in the United States. Regarding the custody of the child, the parties could not arrive to any consensus. On 23<sup>rd</sup> March 2017, the appellant along with both the children travelled to India as her maternal grandmother passes away. On 12<sup>th</sup> April, 2017 she files a petition in the Family Court, Hyderabad seeking custody of minor children and injunction against the respondent under the Guardians and Wards Act, 1890. An ex-parte injunction was granted. She also filed a FIR under Section 498A IPC against the respondent and his family. The respondent and his counsel in the United States were orally informed of the ex-parte order which was received by respondent through e-mail from the counsel of the appellant in India. On receiving the oral information, the respondent files an emergency petition for interim orders in petition for divorce and custody filed at the instance of the appellant. In defence, the appellant stated that she had only temporarily relocated to India for attending her grandmother's funeral. Hearing both the parties, on 22<sup>nd</sup> May 2017, the United State Court passes order for continuing the jurisdiction over the custody matter and granted temporary physical custody of the children to respondent with further direction that children be returned to the jurisdiction of the Court in the United States by 2<sup>nd</sup> June, 2017.

The respondent moved an application under Order 7 Rule 11 of Civil Procedure Code in the proceedings instituted in the Family Court, Hyderabad asserting that the Family Court, Hyderabad has no jurisdiction to decide the

application for the custody of minor children as they are not the ordinary resident of Hyderabad. Vide the order dated 15<sup>th</sup> September, 2017 the claim was rejected holding that the Family Court, Hyderabad is competent to exercise jurisdiction to examine the application filed at the instance of the applicant. Respondent preferred appeal to the High Court against the order dated 15<sup>th</sup> September 2017. Simultaneously, the respondent also files a writ petition seeking Writ of Habeas Corpus for producing the minor children in the custody of the United States Court. The appeal and the writ petition were clubbed but were decided by the High Court by separate orders. Order dated 8<sup>th</sup> February, 2018 stated that the Family Court, Hyderabad has no jurisdiction. Therefore, application filed by the applicant stood rejected. The appellant filed an appeal against the said orders.

The parties were sent for mediation and the Court appointed a Mediator so that the parties could reach an amicable solution. However, the parties could not settle down amicably.

For the appellant, the Learned Counsel submitted that the return of the children to the United States would go against the 'best interest of the children' and the 'tender years' doctrine'. For the respondent, the learned senior counsel stated that both the minor children were born in the United States and were going school in the United States. Therefore, the removal of children from the United States despite the Order of the United States Court affects their future and it is not in the 'best interest' of the children. The court after hearing both the parties directed the appellant to return both the children to the United States. The respondent was directed to make all arrangements of stay and

travel of the appellant and both the minor children. A sum of 15 lakhs shall be deposited in the bank of the appellant.

- In *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*,<sup>58</sup> on 28<sup>th</sup> May 2006, Shekhar (respondent No. 1) and Zalem got married. While Zalem was pregnant she was detected with breast cancer. A girl child (Shikha) was born on 14<sup>th</sup> August 2017. Zalem was undergoing treatment and during that period the minor child was with her father (respondent No. 1). On 29<sup>th</sup> November 2017, respondent No. 1 was diagnosed with tuberculosis and was hospitalised. Zalem along with the minor child was taken by the Tejaswini Gaud (appellant No.1) and Dr. Pradeep Gaud (appellant No. 4) at their residence in Mumbai. Zalem moved to her paternal home i.e. the residence of Samir (appellant No. 3) along with her child in June 2018. They again shifted to Mumbai with appellant No. 1 in July 2018. Zalem died because of her illness. Till 17<sup>th</sup> November 2018, the minor child stayed in the residence of appellant No. 3. The custody of the child was denied to the father (respondent No. 1). A writ petition was filed by the respondent No. 1 for seeking custody of the child. The High Court held that the respondent No. 1 is entitled to the custody of the child. As the child needs love, attention and affection of the father. The custody of the child was handed to the father (respondent No. 1) and appellant No. 2 and 3 were given access to the child. The writ of habeas corpus used by the respondent was challenged by the appellant. The appellant argued that the child was not illegally detained by them but the mother of the child had given the child to the appellants. The legal rights of the parties, cannot be the sole criteria for determining the custody of the child. The welfare of the child

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<sup>58</sup>(2019) 7 SCC 42.

should be the main principle while determining the custody of the child. The respondent contended that the father has the paramount right to the custody of the children and he cannot be deprived of the custody of the minor child unless it is shown that he is unfit to be her guardian. Considering the welfare of the child, the child had to be handed over to the first respondent. As per Section 6 of the Hindu Minority and Guardianship Act, 1956, the father being the natural guardian the appellant has no legal right for the custody of the infant. After analysing the facts and circumstances of the case, it was held that “taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralized with the passage of time.” Till the child is settled down in the atmosphere of the first respondent No. 1., the appellants No. 2 and 3 shall have access to the child initially for a period of three months for the entire day at the residence of the respondent No. 1. After the child completes four years, the appellant No. 2 and 3 are permitted to take the child on every weekends from the residence of the father. The appellant shall hand over the custody of the child to the father (respondent No.1) on 10<sup>th</sup> May 2019.

### **5.3. CONCLUSION**

It is thus evident from the analysis of the above case laws that the welfare principle has quite often not been properly appreciated or has been overlooked by the trial court, and the mother had to approach the higher court at considerable cost of time and money. Many cases do not reach the higher courts for lack of resources and in these cases the interest of the child suffers. Due to long legal battles, the custody of the

child remains with a person with whom it should perhaps not remain. The right of the child to speedy trial is also violated. The trial courts have to be sensitised to the rights of the child and to be more child-friendly.

After the landmark Githa Hariharan Case, the mother has been given the status of natural guardian in the Hindu Minority and Guardianship Act, but in all other laws, the father still has the superior position as a natural guardian. Child custody and guardianship cases has undergone changes due to the change in the Judicial attitude even when there is no change in the legislations. It is the need of an hour to make an effort to reform the legislation in order to provide assistance to the judges.<sup>59</sup> It is clear that judgement granting custody are affected by issues like poverty, character, adultery, immorality, religion, sex, age, abandonment, remarriage, wishes of parents and children, and nearness of kin. These are the factors that are taken into account by the courts while determining the best interests of the child.<sup>60</sup> Courts are more inclined towards the 'welfare of the child'. As it is evident from the above discussed case laws that keeping in mind the welfare of child sometime court awards the custody to their parents and some time to the grandparents and the third party. The court while determining the custody cases needs to determine several factors. The financial stability of the parents is taken into account by the court while granting custody rights. However, better financial resource is not the only measure regulating custody rights. The welfare of the child needs to be given due importance. Physical securities and moral values need to be provided. The court must take into consideration the wishes of the child with whom the child wishes to stay. Re-marriage of the parents must be considered by the court while granting custody rights, however, re-marriage should

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<sup>59</sup>Supra note 1.

<sup>60</sup>Asha Bajpai, *Child Rights in India Law, Policy, and Practice* (Oxford University Press, 3<sup>rd</sup> edn., 2017) p. 252.

not be the sole criteria to disentitle the parent from having the custody rights of the child.<sup>61</sup> Each case has to be decided on its own facts. The writ of habeas corpus in child custody matters is maintainable where it is proved that the detention of the minor child by the parent or others was illegal and without any authority of law.<sup>62</sup>

The legislations dealing with child custody and guardianship being very vague. The Judiciary has played a major role in protecting the 'welfare of the child'. However, even though the judiciary has in number cases safeguarded the "welfare of the child" but the judiciary lacks precision as what precisely comprises the "welfare of the child". Therefore, in custody disputes there are no ways to safeguard the 'welfare of the child'.<sup>63</sup> This is mainly because the provisions dealing with the "welfare of the child" is vague. The Judiciary over the period of time has made a tremendous modification and alteration in child custody laws.

The judges must be trained in social science because even with the best statutory provisions, judges will still be the ones interpreting the welfare principle. In doing so judges ought to be well informed about child psychology. The child is not represented in the courts through counsel, it is upto the judges to ensure that the child's interests are not ignored or damaged.

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<sup>61</sup>Athar Hussain v. Shed Siraj Ahmed (2010) 2 SCC 654.

<sup>62</sup>Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari (2019) 7 SCC 42.

<sup>63</sup>Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May 2015, available at: <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf> (Visited on June 8, 2019) p.2.



## CHAPTER 6

### CONCLUSION AND SUGGESTIONS

A large number of children in India still live much below the standards set by the Indian Constitution, national and international law. They undergo a range of threats to their development, well-being, and survival. They suffer from poverty, diseases, famine, and war. They also suffer from acts and omissions by their own caretakers, guardians, and parents. Child labour still prevails in India. Child labour denies a child the 'right to childhood'. Any work done by children that harms them, exploits them either physically, mentally, or morally, or blocks their access to education can be termed as child labour. Along with child labour, there are still thousands of child marriages reported throughout the country. Early child marriage violates the child's freedom. Child abuses and child neglect are offences not only against the child but also against the whole society. Every day, we come across various cases of cruelty against children in our homes, surrounding neighbourhood, on the road and at places of employment. Children are beaten up and are imperilled to difficulties. Even parents and guardians indulge in child right violation, when they physically assault a child. Child neglect which seldom draws attention is a very complicated phenomenon and affects the whole life of the child. Very few parents realise that providing proper care and basic facilities of life are obligatory for the complete growth of the child. Half of the success of a child depends on how he is psychologically treated. Emotionally disturbed child is incompetent to become a good citizen. A large number of children are exposed to sexual assault in juvenile institutions. A sexually assaulted child can never lead a dignified and self-respecting life.

The rights based approach reflects a growing awareness of the need to listen to children's view and to facilitate their participation in decisions which affect them. Children, who participate effectively, will be aware of societal processes, their rights and responsibilities, will be sensitive towards rights violation of others in the society, they will also develop capacity to think, question and judge and will accordingly be prepared to take actions for bringing about progressive changes in the society.

Every child has an absolute right to a relationship with both parents, assuming the relationship does not put the child at risk of harm. Even after divorce the parents will still have love and affection for their child. Hence, both the parents want the custody of the child. A tug of war takes place between the parents to gain custody rights of the child. Children who are deprived of emotional or physical safety respond by disliking their caregivers. They respond by disliking themselves. This is why self-love can feel so impossible in adulthood. The trauma that the child undergoes will be engraved in the mind of the child and it will haunt him throughout his life and it is very difficult for the child to forget the trauma. The parents do not realise the effect of it. As a result the child becomes an introvert. The trauma handled by the child has to be taken into consideration in custody battles between parents. It is absolutely necessary that experienced and able judges preside over custody and guardianship disputes. They should be trained in handling such sensitive matters and be child friendly. Beside the judges, the other staff and personnel of the courts should also be sensitised to be child friendly. Child friendly courtrooms hardly exist in some cities. There is a need for a child friendly courtrooms.

Under Hindu Law, child custody is regulated by the Guardian and Wards Act and Hindu Minority and Guardianship Act. The superiority of the father is mentioned in

the Hindu Minority and Guardianship Act. In *Ram Chandra K. v. Annapurnu Ammal*,<sup>1</sup> the Kerala High Court established that under section 6 of the Hindu Minority and Guardianship Act the father is the natural guardian and it is only after him the mother can be the natural guardian. For the first time, the Hindu Minority and Guardianship Act confers the mother the right to appoint a guardian by will ignoring the testamentary guardian appointed by the father. The Act also lays down that the custody of the child up to the age of five years will be with the mother. The right to custody has been qualified by the word, 'ordinarily', which has raised the dilemma in the judiciary.

Under Muslim law, the concept of guardianship is separate from the concept of custody. The mother is granted custody and the father is granted guardianship of the child during the tender age of the child. The father is the sole guardian of the minor child. The misconduct of the mother is the only reason that can deprive the mother from the custody of the child. The custody right belongs to the mother. However, this right is not an absolute right, the custody rights can be taken away from the mother for the welfare of the child. Muslim law is the only law that lays down the superior rights of the mother with regard to the custody of the child.

Under the Indian Divorce Act, the court has an unrestricted discretion in making interim orders for the custody, maintenance and education of the child. The Indian Divorce Act underlines the father's right.

The Guardians and Wards Act which is a secular Act, applies to all communities. The Guardians and Wards Act identifies the superior right of the father in respect of the guardianship.

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<sup>1</sup>AIR 1964 Ker 271.

The law relating to guardianship and custody are two separate concepts. Custody can be defined as the immediate control of the child. Guardianship can be defined as the overall responsibility of the child. The custody of the child during the tender years of the child can be given to the mother, however the guardianship of the child remains with the father. The father is liable to maintain his child. The father will always remain the father of the child even after his divorce with his wife. Custody and guardianship rights should never coincide, if it does coincide, then it is very dangerous as the father is free from all his liabilities and the mother will be having all the burden to raise the child. Both the mother and the child will ultimately suffer as in India, women are mostly unemployed. Even if they are employed, they work in small scale industries, they are not given proper wages. So it is difficult for her to maintain the child, to provide proper education, give a healthy environment. Therefore, it is a tormenting experience for the child. It is the responsibility of both the parents to look after the child. Once the mother remarries, the step-father is not liable to maintain the child under the law. The liability to maintain the child remains with the father.<sup>2</sup> “The fact that the children are in custody of their mother during infancy does not relieve the father from the obligation of maintaining them.”<sup>3</sup>

In *Siddiq Ahmad Sanji v. Smt. Parveen*,<sup>4</sup> the plea of the father that while he is entitled to guardianship of his children, when in fact they are living with their mother will not disentitle them from claiming maintenance.

In *Siraj Sahebji Mujawar v. Roshan Siraj Mujawar*,<sup>5</sup> the Bombay High Court has held that under the Muslim Law so far as the children out of the dissolved wedlock are

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<sup>2</sup>Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, (Oxford University Press, 5<sup>th</sup> edn., 2008) p. 175.

<sup>3</sup>Dinshaw Fardunji Mulla, *Mulla Principle of Mahomedan Law*, (Lexis Nexis, 22<sup>nd</sup> edn., 2019) p. 467.

<sup>4</sup>1984 Cri. L.J. 341.

<sup>5</sup>AIR 1990 Bom. 344.

concerned, the father's obligation to maintain them is absolute in terms of section 370 of the Code of Criminal Procedure, 1973, so long as he is in a position to do so and the children have no independent income of their own.

India has made some significant commitments towards ensuring the basic rights of children. But the issue of Child Rights in India is still caught between legal and policy commitments towards children on the one hand, and the fallouts of the process of globalisation on the other.

The origin of the English law shows that the legislative norms are created to safeguard the child's interest and to give some rights to the mothers. The legislative norms in India and in the United Kingdom try to follow or adopt to give importance to the child's social, moral, ethical, economic, educational problems. Legislative norms are not bound to follow the religious norms. Therefore, all religious norms are subordinate to the legislative norms.

After analysing statutory provisions and judicial attitude regarding the custody and guardianship of minor child, it is also important to note here that parliament should take note on the question of custody of the minor child and make comprehensive law relating to the minors.

The welfare of the entire community depends on the health and welfare of the child. The betterment of the child is the betterment of the community because child is the future leader. A neglected and abused child will never become a good and responsible citizen. "The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests. In order to effectively

guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child.”<sup>6</sup> The Welfare of the child has indeed dramatically influenced family law jurisprudence worldwide, and that has had a dramatic effect on the family. However, still it does not presume to know what the welfare of the child really are, but rather has illuminated the foundations of a doctrine rooted in parental protection and manifested in the legal standard regarding children to assist judicial decision-making for what is “best for a child”.

Custody of child has been a concern of society from the very beginning. It involves a delicate fabric of legal and socio dynamics. Given the vulnerability of child, law should take particular care to propel and protect their interest.

A plethora of decisions of the Supreme Court endorse the proposition that in matter of the custody of children, their welfare shall be the focal point. The trend of judiciary relating to custody of child and its best interest reflects that welfare of children is a paramount consideration in a decision for custody between father and mother, though section 13(1) of the Hindu Minority and Guardianship Act. It has been recognised that in case of declaration of any person a guardian of Hindu minor by court, the welfare of the children shall be the paramount consideration. In the same way when in matrimonial proceeding under the Hindu Marriage Act spouses demand the custody of the children under section 26 of the Act through court, the court should not adhere to the rule of priority of the father’s claim of custody over mother’s claims. The court

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<sup>6</sup>General Comment No. 11 (2009), Indigenous Children and their Rights under the Convention, Para. 33.

should consider not only the economic position of the parent but the interest and welfare of the child should be taken into account.

Prior to the twentieth century, in common law jurisdictions children were treated as the property of the father. So after divorce the custody of the child was given to the father. With the passing of time, the custody rights of the father were changed by most of the jurisdiction and “tender years” doctrine was imposed. Absolute right of custody is not granted to the mother or the father by any legislation, even though the mother is in a better position to look after the child and father is in a better position to provide financial assistance. As the legislations are vague, the burden lies upon the judiciary to act rationally while awarding custody of the child. The best interest principle is adopted by the court while awarding child custody. However, the concept of best interest is vague and subjective, hence it leaves a scope for misuse. The interest of the child cannot be crystallised in concrete terms, so the welfare of the child gets glossed over which needs to be arrested in order to achieve the welfare of child in letter and spirit. While examining the issues regarding child custody, it is understood that the Tender Years principle and the Best Interest legal test are all inconsistent. Shared parenting approach must be adopted.

After analysing various religious laws relating to the custody of a child and other laws in India as well as in England, Law Commission Report, and case laws, it is obvious that all laws are made for the welfare and protection of child’s interest. Although there is urgent need that court must make some guidelines to implement the concept of the best interest of the child. It is also necessary that the interest of children must not be limited to their material need but has to be quite comprehensive. Indian courts have made the principle of best interest as the rule of court and tried to follow it as

efficiently as possible, but the concept itself being a relative one, it leaves a lot of scope for its misuse.

## **SUGGESTIONS**

- There has to be a harmonisation of the upper age limit for childhood in order to protect the rights of the child.
- Divorce should not be considered as a taboo and the children of a broken family should not be stigmatised in our society.
- The term custody needs to be clearly defined so that it does not create vagueness while dealing with custody disputes.
- A separate statute on child custody needs to be passed by the Parliament as the existing laws are inadequate to protect the issues of child custody.
- Judicial decisions should be based on the welfare of the child.
- As the Family Court is overburdened by cases, a special court needs to be set up for child custody cases, so that spousal conflicts do not interfere in child matters.
- In custody disputes, the religion of the parents ought to be an immaterial consideration in a secular state like India.
- The judges and the parents should always strive for the “best interests of the child”. What exactly constitutes the “best interests of the child” is extremely vague which needs to be clarified.



- Orientation programmes for judges of family court to be conducted by psychologist to sensitise them to child related issues.
- India should reform its custody and guardianship laws and incorporate a provision dealing with joint custody.
- Guardianship and custody laws should be understood properly as they are two separate concepts.
- There is a need for a separate child welfare ministry separating it from the current women and child development ministry. It will be able to focus better on child development and child welfare.

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# **ANNEXURE**

## **Convention on the Rights of the Child**

**Adopted and opened for signature, ratification and accession by General Assembly  
resolution 44/25 of 20 November 1989**

**entry into force 2 September 1990, in accordance with article 49**

### **Preamble**

The State Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the

International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration, Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co- operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

## **PART I**

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her,

and, to this end, shall take all appropriate legislative and administrative measures.

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

#### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

#### **Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

#### **Article 6**

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

#### **Article 7**

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

#### **Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

#### **Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be

necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### **Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### **Article 11**

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own

views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

#### **Article 13**

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **Article 14**

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

#### **Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

### **Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

### **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

### **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

#### **Article 20**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

#### **Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

#### **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable

international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

### **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

### **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.



2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

#### **Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

#### **Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

#### **Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

#### **Article 28**

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - (d) Make educational and vocational information and guidance available and accessible to all children;
  - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

#### **Article 29**

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
  - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
  - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
  - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
  - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### **Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

**Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

**Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

**Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

**Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**Article 37**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty

shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

### **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

### **Article 40**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
  - (i) To be presumed innocent until proven guilty according to law;
  - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
  - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
  - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
  - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
  - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
  - (vii) To have his or her privacy fully respected at all stages of the proceedings.
- 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
  - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
  - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

**Article 41**

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.

## PART II

### Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

### Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

#### **Article 44**

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights
  - (a) Within two years of the entry into force of the Convention for the State Party concerned;
  - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

#### **Article 45**

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:



- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

### **PART III**

#### **Article 46**

The present Convention shall be open for signature by all States.

#### **Article 47**

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 48**

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### **Article 49**

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of

ratification or accession.

#### **Article 50**

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

#### **Article 51**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

#### **Article 52**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

#### **Article 53**

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

#### **Article 54**

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.