WELFARE OF THE CHILD IN FAMILY LAWS — INDIA AND AUSTRALIA

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Introduction

The concept of the welfare of the child is an integral part of law in all modern legal systems. Indian law also uses the concept extensively. In the present context when child's rights are widely recognised, it is imperative to examine the mutual compatibility of the rights discourse with that of the welfare of the child discourse. This discussion will help in exploring the relative merits of the two concepts and determining how best to safeguard the interests of the child.

The concept of the welfare of the child / best interests of the child is most often deployed in the area of family laws[1]. Parallel to this there is a common assertion of the rights of the child. International conventions are the main driving force behind the presence of the child's rights discourse in various domestic legal systems. Even if it is accepted that the rights discourse is a surer safeguard for the interests of the child the welfare principle is not likely to become obsolete in a hurry. Childhood as the time of vulnerability has a firm hold on our imagination. Therefore, parallel to the rights discourse, it is imperative to examine and develop the welfare of the child principle in a systematic manner.

This article is divided into four main parts and it begins with a brief historical overview of the development of the discourse of the welfare or best interests of the child in the common law context. The social and historical specificity of the concept is however, not acknowledged when it is deployed by the Indian legal system. In the second part an analysis of the Indian Supreme Court judgements is carried out to demonstrate that judges' personal preferences form the content of the welfare/best interests of the child principle. This is a highly unsatisfactory state of affairs and needs to be rectified by legislative change. In the third part an analysis of the recent amendments in the *Juvenile Justice Act, 1986* provides a possible model for legislative reform.

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1 Child welfare laws are the other major jurisdiction where the principle of the welfare of the child is used but I will primarily confine the discussion to child custody issues in family laws.

The last part develops a model of an ideal or at least a desirable child custody law.

I

Historical Development of the Concept of the Welfare of the Child in Common Law

The concept of the welfare of the child owes its existence to the dual developments of the demands made by or on behalf of married women and the rise of the discourse of childhood as a period of vulnerability.

Traditionally common law recognised the father as the sole legal guardian of a child. Mothers had no legal rights with regard to their children. This was perhaps in keeping with a host of other legal disabilities that attached to married women and therefore it is not surprising that the mother was the legal guardian of illegitimate children[2]. Blackstone is quoted by Dickey as having said that, "A mother ... is entitled to no power, but only reverence and respect"; Dickey also describes the early common law position with regard to illegitimate children[3] as covered by the doctrine of "filius nullius", that is an illegitimate child was considered to be the child of no one and therefore deemed to be under the legal guardianship of no one. It was only in *Barnardo* v. *Mc Hugh*, that the House of Lords recognised that a mother did have a right of custody of her illegitimate child. This right was seen as a corollary to her obligation under the *Poor Law Amendment Act 1834* (Eng) to maintain such a child up until the age of sixteen years.

The idea that on marriage the legal personality of the wife merged into that of the husband came under steady if not slow challenge from early nineteenth century. This was manifested most obviously in the demands of married women to the right to hold property and the possibility of divorce. As long as married women had no separate legal identity the issue of mothers' rights with regard to their children was not controversial. If however, it became possible that married women could live separately from their husbands or former husbands it also became imperative to specify the rights of respective parents with regard to their children. It is thus sometimes that the mothers gained their rights at the expense of fathers' absolute rights over children.

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2 A. Dickey, *Family Law*, pp. 356-358, Lawbook Company, Sydney, 4th edn, 2002. He also cites for the above quote: W. Blackstone, *Commentaries on the Laws of England*, Vol. 1 (1765), p. 441.

3 [1891] A.C. 388.

The concept of welfare of the child came to be used in this tussle between the parents and this struggle demonstrates the less than noble origins of the concept.

The interdependence of women's claims and the rise of the welfare principle however, should not obscure the fact that the wider recognition of the child and childhood as a distinct phase of life was taking place in many fields[4]. Interest in the welfare of the child was evident in the increasing concern with the education and for hygiene and health of children[5]. In the eighteenth century, concern for the emotional well being of the children became evident. It was however, the harsh conditions of child labour in the early nineteenth century that brought the welfare of the child into prominence. Child labour laws were paralleled by state laws interfering with the family for the protection of delinquent children. For example, the *Infant Felons Act, 1840* enabled the Chancery Court to grant 'care and custody' of an infant convicted of felony to a person other than the father or guardian.

The judicial and legislative developments of the concept of the welfare of the child are somewhat different from each other. According to Susan Maidment[6] the common law courts were reluctant to override the absolute rights of the father and the greatest conceptual contribution came from Equity with the Court of Chancery interfering with the father's rights in the name of the interests of the child. The court's jurisdiction was originally intended to protect the property of the ward but the court had very early on started to protect the child for the child's sake. But even the Court of Chancery was reluctant to interfere with the absolute rights of the father and only gradually came to acknowledge that the father might have forfeited his rights by his behaviour.

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4 See Philipe Aries, *Centuries of Childhood*, Harmondsworth, Penguin, (1962). Even though aspects of Aries argument are disputed the central thesis that the concept of child emerged at a specific historical moment is widely accepted.

5 Aries as quoted by Susan Maidment, *Child Custody and Divorce: The Law in Social Context*, p. 92, Croom Helm, London and Sydney, 1984. The following discussion primarily relies on her book and unless otherwise stated the information is derived from her book.
She also cites the following: Lloyd de Mause, *The History of Childhood*, Psychohistory Press, New York, (1974); E. Shorter, *Childhood: A Sociological Perspective*, Slough, NFER, (1972); W. Kessen, *The Child*, Wiley, New York, (1965); J. Walvin, *A Child's World: A Social History of English Childhood 1800-1914*, Harmondsworth: Penguin, (1982); I. Pinchbeck and M. Hewitt, *Children In English Society*, Vol. II, (1973), London, Routledge and Kegan Paul.

6 Supra n. 5 at pp. 89-106, esp. 95-96.

i. Legislative Development of the Welfare Principle

On the legislative front, there were about 90 Acts passed between 1780 and 1914 dealing with employment conditions for children, education, protective legislation for orphaned, deserted, neglected or destitute children[7]. In 1839 first inroad on behalf of the mother was made into the absolute common law rights of the father over his children when the *Custody of Infants Act, 1839* was enacted. The *Guardianship of Infants Act, 1886* provided that where the marriage was not working the mother could apply for the custody of children even during the lifetime of the father. In 1869 for the first time it was legislatively recognised that the principle of 'welfare of the child' might be used in deciding a custody issue. Under the *Custody of Children Act, 1891* the courts could deny *habeas corpus* petitions of parents if they were deemed to have forfeited their right to custody. The *Guardianship of Infants Act, 1925* allowed the claims of mother and father to be treated on par in a custody dispute and the welfare of the child was the first and paramount consideration. However, if the dispute did not come to the court the common law rule of absolute rights of the father was still intact. It was in the *Guardianship Act, 1973* that legislation eventually recognised that the mother and father had equal rights of parenthood.

ii. Judicial Developments of the Welfare Principle

Prior to 1875 (when the common law and equity jurisdictions were merged) disputes over the custody of children were resolved either in the Court of Chancery or by a writ of *habeas corpus* in the King's Courts. The King's Bench applied the common law principle of absolute rights of the father while the Chancery Court developed the principle of the welfare of the child. In 1857 the *Matrimonial Causes Act* created the new 'divorce court' which could decide custody disputes as it thought fit. However, in practice the absolute rights of the father over 'his' children were not challenged.

In 1878, the Court of Appeal in a divorce case[8] first mentioned the interests of the children as being paramount. But even in 1883[9] the Court of

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7 Some of the other relevant legislation in this period was as follows: *Infant Life Preservation Act, 1872* was enacted in response to the scandal erupting of poor mothers leaving their children in baby farms. This Act required foster mothers to register. The *Poor Law Amendment Act, 1889* permitted the Poor Law Guardians to assume parental rights. *Prevention of Cruelty to Children Act, 1889* was enacted as a manifestation of the state's concern for the welfare of the children.

8 *D'Alton v. D'Alton*, [1878] 4 PD 87.

9 *Re Agar Ellis* [1883] 24 Ch D 317.

Appeal upheld the sacred rights of the father in regard to the religious upbringing of the child. Despite the welfare principle guilty spouses were unlikely to get custody of the child until after the Second World War. In 1893[10] the Court of Appeal spelt out the content of the welfare principle. The Court included in its list the 'ties of affection' in addition to the concerns about physical care, moral and religious welfare.

According to Maidment[11] the source of this new understanding of the attachment of children to their caretakers is not entirely obvious. Previously the practices of wet nursing, apprenticeship at others' houses or sending away children for domestic service or to the schools were the norm. Even when in the twentieth century the mother's roles as the child carer and homemaker were extolled the upper and middle class women relied on governess and nannies while the lower class women relied on child minders. Judges in 1893 were relying on commonsense, popular or intuitive understanding. Their child-centred approach however, did not move beyond interpreting the welfare of the child in accordance with social and cultural values about the family and marriage. The legislative elevation of the welfare principle to the paramount consideration happened in the *Guardianship of Infants Act, 1925.* However, this Act was a specific response of the government to the demands of women's organisations for joint rights of guardianship.

The Guardianship Bill in 1925 subjected the claims of a mother to guardianship of her child to a judicial protection of the welfare of the child. Even though the government did not believe that it was changing the law but enacting the prevailing judicial practice it was a convenient principle as it allowed social and cultural values and beliefs about family and marriage to inform the judicial interpretation.

The welfare principle has continuously enjoyed high social approval as a child- centred concept. Its 'indeterminate' nature has allowed the judiciary to incorporate in the law changing ideologies of the family and marriage. So too the welfare principle has always been used to arrive at custody decisions made for and by adults. The origin of the concept itself shows that women demanded recognition of their parental rights and were primarily concerned with their own rights. It is true that they believed that their enhanced rights would better serve the interests of the child. Similarly the Chancery Court in exercising its jurisdiction was imposing its own views of what was best for the child.

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10 *Re McGrath* [1893] 1 Ch 143.

11 Supra n. 5 at p.103 and pp. 107-148.

Paternalism is inherent in the welfare concept and its indeterminacy has long been recognised. The judges have always interpreted the concept in the light of contemporary societal values. However, their knowledge of such contemporary realities is more a common sense knowledge rather than informed social sciences knowledge. Maidment argues that as professionals whose decisions affect crucial aspects of children and parents' lives it is at least incumbent upon the judges to inform themselves with systematic social science knowledge.

The same criticism can be levelled at the Indian Courts. The Indian legal system has utilised the welfare principle since the early days of the introduction of English colonial rule. In the next section I wish to explore whether any of the developments discussed above have been reflected in the Indian legal system's response to custody disputes and the consequential development of the welfare principle. The respective religious personal laws of various communities and the *Guardian and Wards Act of 1890* govern Child custody disputes. The Supreme Court plays an important role in interpreting these laws. Therefore, I will examine the views about the welfare of the child expressed by various Supreme Court Judges.

II

Supreme Court's Views on Child Custody and Maintenance

Guardianship and custody matters are governed by a curious combination of legislative and uncodified rules of religious personal laws. There is very little and certainly non-systematic effort at legislation. The *Guardian and Wards Act, 1890* acknowledges the father as the natural guardian and after him the mother. However, the father could appoint a testamentary guardian and deprive the mother of any claim to guardianship rights with respect to her own children. The reformed Hindu law in the *Hindu Minority and Guardianship Act, 1956*, Section 6 specifies the father as the natural guardian and only after him can the mother be the natural guardian. The Act however, does confer on the mother the right to appoint a guardian by will ignoring the testamentary guardian appointed by the father. It also specifies that the custody of a child up to the age of five years shall ordinarily remain with the mother.

The Muslim law declares the father to be the natural guardian but the custody of children of tender years is given to the mother. The Hanafi law as practised in India recognises the mother's custody until the son reaches seven

years of age or a daughter reaches puberty when the custody is transferred to the father[12].

The *Parsi Marriage and Divorce Act, 1936* provides that in a suit under this Act, the court can make orders for custody, education and maintenance for a child less than eighteen years of age. In the *Indian Divorce Act, 1869* (now the *Divorce Act, 1869*) the court can make orders as to custody, education and maintenance of minor children[13]. It is important to note that the welfare principle is not mentioned in either legislation. The *Guardian and Wards Act, 1890* is relevant as it applies to Christians and Parsis as well. Father as the natural guardian is therefore imported through this legislation.

In interpreting these very varied rules the Supreme Court has consistently held that the guiding principle is the welfare of the child. The Supreme Court pronouncements in custody cases from 1959 to 2000 are analysed below to give some indication of how the Indian Supreme Court has conceptualised the welfare of the child.

Gohar Begum v. Suggi Alias Nazma Begam and others[14] was a dispute about custody of an illegitimate Muslim girl. The Supreme Court held that under Mohammedan law, the mother of an illegitimate child was entitled to the custody of the female child, no matter who the father was. But the guiding principle is the welfare of the child. Years later in *Noor Saba Khatoon v. Mohammad Qasim*[15] the issue was whether children of Muslim parents were entitled to claim maintenance under Section 125 of the *Criminal Procedure Code, 1973*, (hereinafter referred to as *CrPC*), or was their right restricted to the grant of maintenance only for a period of two years prescribed under Section 3(1) (b) of the *Muslim Women (Protection of Rights on Divorce) Act, 1986* (hereinafter referred to as *MWA*). The Supreme Court most emphatically said that the issue of children's maintenance was not involved in the controversy resulting in the enactment of the *MWA*. Section 3(1) (b) of this Act refers to the right of the divorced mother on her own behalf for maintaining the infants and it has nothing to do with the right of the child/children. Supreme Court held that it would be "unreasonable, unfair, inequitable and even preposterous to deny the benefit of Section 125 *CrPC* to the children only on the ground that they are born of Muslim parents".

12 Baidyanath Choudhury, "Custody of Children - Mother's Role Over Fathers Monopoly in Indian Family Laws And Trend Of Judicial Attitude", Vol. XII, 111-116 at p. 112,, *Central Indian Law Quarterly*, (1999).

13 However see infra n. 40.

14 *AIR* 1960 SC 93.

15 (1997) 6 *SCC* 233.

It bears emphasising that all the reasons for the *CrPC* provisions governing children's maintenance have to do with the justice of the situation and there is no possibility of entertaining the claim in the name of the *MWA*, which specifically deals with the issue.

Rosy Jacob v. Jacob A Chakramakkak[16] was a dispute between a Christian mother and father. The father relied on the provisions of the *Guardians and Wards Act, 1890* (hereinafter referred to as *GWA*), as under the *Indian Divorce Act, 1869*, the sons and daughters of Indian Christian fathers cease to be minors at 16 and 13 years of age respectively. The Supreme Court rejected the father's contention that under the *GWA* Section 25, if the father is not unfit to be a guardian, then no question arises of examining the welfare of the children and appointing another guardian. The mother was given custody of the two youngest children on the basis that she was materially well off and a girl reaching puberty, as well as a boy of tender years needs to be with their mother.

The mother is time and again expected to act reasonably and not expect her rights or interests to be recognised. The following two cases illustrate this statement. In *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*[17] the High Court had given the custody of a young girl to the father on the ground that the mother was in full time employment and thus would not be available for the child. This was a protracted dispute from 1979 to 1982 where the father had repeatedly denied access to the mother and used court proceedings in effect to harass her. Eventually the Supreme Court gave custody to the mother but ordered that the child go to a boarding school. In subsequent proceedings against the husband for contempt of court the Supreme Court declined to impose any punishment on the husband as the girl was very fond of the father and any punishment imposed on him would distress the child. No costs were awarded to the wife also for the reason that such an award would definitely result in further court proceedings and thus cause anguish to the child.

Elizabeth Dinshaw v. Arvind Dinshaw[18] involved the abduction of the child by the father from the USA. Mother filed a *habeas corpus* writ petition in the Supreme Court and it gave her the custody of the child on the basis that she was full of genuine love for the child and 'she can be safely trusted to look after him, educate him and attend in every possible way to his proper

16 *AIR* 1973 SC 2090.
17 AIR *1982 SC 1457.*
18 *AIR* 1987 SC 3.

upbringing'[19]. But in addition the Supreme Court expects the mother to not take a vindictive attitude to the father and in effect asks that she should forget and forgive the father. Moreover, she should also help in the withdrawal of arrest warrants against the husband outstanding in Michigan State.

By the same token the mother who is full of compassion and forgiveness cannot be vindictive. In *Satish Mehra v. Delhi Administration*[20] the issue before the Supreme Court was whether to quash the proceedings and charges framed by the sessions judge in regard to sexual molestation of the child by the father. The Supreme Court observed that 'some eerie accusations have been made by a wife against her husband. Incestuous sexual abuse, incredulous ex facie, is being attributed to the husband'[21]. The Supreme Court quashed the proceedings because among other things the effect of such a trial would be damaging for the child.

The young child is supposed to be better off with the mother as evidenced in many pronouncements: In *Pushpa Singh v. Inderjit Singh*[22] the Supreme Court held that a child of less than five years age undoubtedly needed the affection of his mother for which there was no adequate substitute. Therefore, the paramount interest of the child lay in giving his custody to his mother. Similarly in *Sarita Sharma v. Sushil Sharma*[23] the Supreme Court held that ordinarily a female child should be allowed to remain with the mother so that she could be properly looked after. There was no effort at explaining from where these ideas were derived. Construction of motherhood thus draws upon common sense ideas of the judges. The judges are however, not expected to substantiate their beliefs. Women who may not conform to the judges' expectations of ideal maternal and/or feminine behaviour have no way of challenging these notions. The 'welfare of the child' being a child-centred principle is not supposed to be subject to other considerations like the interests of the mother. It thus deflects attention from this construction of reality by the Supreme Court Judges.

In *Rajiv Bhatia v. Government of NCT of Delhi*[24] the mother disputed the claim of her husband's brother that he had adopted the child. Mother was given custody of the child and the Supreme Court approved the observation of the High Court that prima facie it was not acceptable that the young mother would give her three-year-old daughter in adoption. While it is true that

19 Id. at p. 8.
20 (1996) 9 *SCC* 766.
21 Id. at p. 767.
22 (1990) Supp *SCC* 53.
23 (2000) 3 *SCC* 14.
24 (1999) 8 *SCC* 525.

sometimes women stand to benefit by such constructions of motherhood, it nevertheless is a risky basis of claiming any maternal rights as it can easily work to their disadvantage.

The idea that it is not normal for a young mother to give up her child also informs the response of the Supreme Court in *Jai Prakash Khadria v. Shyam Sunder Aggarwalla*[25]. This case involved a dispute between two sets of grandparents for the custody of the child. The father had died of a sudden heart attack and the mother had since remarried a man who had two children. The mother claimed that she had given the child in adoption to her father. The mother's special leave petition to be appointed guardian of the child was not entertained by the Supreme Court on the reasoning that she had already consented to the child's adoption. It is with complete lack of irony that the Supreme Court goes on to entertain the application of the paternal grandfather for custody despite the adoption of the child by the maternal grandfather.

Githa Hariharan v. Reserve Bank of India & Dr. Vandana Shiva v. V. Jayanta Bandhopadhyaya[26] is a widely discussed recent decision of the Supreme Court. The petition was to quash the provisions of the *Hindu Minority and Guardianship Act, 1956* (hereinafter referred to as *HMGA*) and the *GWA* that made the father the natural guardian of any child, and the mother "after" the father, as unconstitutional. The Supreme Court went to great lengths to avoid declaring the provision (Section 6(a) *HMGA*) unconstitutional and gave the provision a 'progressive' interpretation that the phrase "mother is the guardian "after" the father" does not mean after the father has died but it means "in the absence of" the father. The father could be absent from the care of the minor's property or person for any reason whatsoever and would include a situation when the father is deemed absent.

The facts of the *Githa Hariharan* petition related to the authority of the Reserve Bank of India to insist that only the father as the guardian of the minor could authorise opening an account in the name of the minor. The Supreme Court made it amply clear that the banks would need to modify their rules in view of the Supreme Court's decision. However, the Supreme Court ruling did not yield clear principles for the particular facts of the *Dr. Vandana Shiva* petition. In that petition the marriage had not been dissolved yet and the father of the child was asserting his right to be consulted as the only legal guardian. How would the mother in this case assert her right to be treated as the lawful guardian? Would the father be deemed absent when the parents are living

25 *AIR* 2000 SC 2172.
26 (1999) 2 SCC 228.

apart? Does the father cease being the legal guardian if the mother is given custody? Is there a distinction between guardian and custodian? All these issues and many more cannot be satisfactorily resolved unless there is legislative recognition of the principle that the mother along with the father is a natural guardian of her child.

The reluctance of the Supreme Court to strike down the guardianship provisions as contravening the fundamental right of sex equality is disappointing. But what is even more troubling is that in different circumstances the same Supreme Court feels justified in using the concept of radical equality between the mother and father. In *Padmja Sharma v. Ratan Lal Sharma*[27] the Supreme Court held the mother was equally responsible for the maintenance of the children. While mothers may not aspire to be recognised as natural guardians they can rest assured that they have the equal responsibility of maintenance. In this case the Supreme Court held that the divorced parents were bound to contribute towards the maintenance of their children in proportion to their salaries. The Supreme Court seems totally unconcerned about the 'true' costs of child rearing. It used no sociological or economic literature to assess the costs - financial and non financial - of bringing up a child. Nor is the Supreme Court in the least perturbed or even aware of the glaring anomaly that the very same woman is not entitled to a legal share of the matrimonial property. There is of course no effort to bring into the family law discourse any realisation that women, whether they earn an income or not, still contribute to the accumulation of matrimonial property.

The above analysis makes it amply clear that in disputes relating to the custody or maintenance of children the so called religious rules do not have much of a hold on the imagination of the Supreme Court. The judiciary and to a lesser extent the legislation are uncompromisingly committed to the welfare of the child. If religious rules are mentioned it is only to support the interpretation of the welfare principle. That is as it should be but it needs to be asked why is it such a difficult step to take when the Supreme Court is interpreting concepts with regard to women's rights? Thus it is not enough to say that an enlightened judiciary can be relied upon to protect the interests of the children (and occasionally of women too).

The issue is wider than just a matter of judicial interpretation as it also relates to the legislative competence of the Indian state in respect of the so-called religious personal laws. Any meaningful change in Indian laws relating to family issues will have to start with legislative reform. And I wish to

27 *AIR* 2000 SC 1398.

argue that child custody laws cannot be reformed in isolation. The reforms in this area will have to be a part of an overall reform of family laws. At the very minimum family law must articulate a vision of just laws for all members of the family. Judicial interpretation will continue to be important but it should happen within the background of adequate legislative provisions. The Indian state does not have a commendable record in the area of family law reforms and is mired in futile debates about the sacrosanct nature of religious personal laws, claims of minority communities and powers of a secular state. As a result we live with anachronistic and unsuitable laws. To argue for legislative reform in this context may seem like a pointless exercise but I wish to rely on the recent changes to the *Juvenile Justice Act, 1986*. This reformed enactment provides a relevant model for legislative change in the contentious area of family laws including the child custody laws. A brief analysis of these reforms is provided in the following section.

III

Adoption as a Rehabilitative Measure: A Model for Legislative Reform of Family Laws

Traditionally adoption has been treated as a personal law issue and until recently with the exception of Hindu law no other religious personal law permitted adoption[28]. Even Hindu law provisions are a curious amalgam of religious ideas and progressive ideas for children[29]. Although Maharashtra has enacted a secular adoption law in 1995[30], it is not a widely known development and has not been emulated by any other state legislature. The only real option for anyone wanting to adopt children until recently has been to foster them. Previous efforts by the Central legislature to introduce a uniform adoption law were frustrated by demands made in the name of the inviolability of religious personal laws[31].

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28 Recently the Kerala High Court has accepted the possibility of Indian Christians adopting a child because the cannon law recognizes it. See *Philips Alfred Malvin v. Y. J. Gonsalvis, AIR* 1999 Kerala 187.

29 The *Hindu Adoption and Maintenance Act, 1956* permits a Hindu man to adopt one son and one daughter. The traditional Hindu law is modified in that a daughter can also be adopted. An unmarried Hindu woman is allowed to adopt but a married Hindu woman cannot adopt in her own right. She however, must consent to any adoption by her husband.

30 The *Maharashtra Adoption Act, 1995*. See Anju Jain, "Maharashtra ushers in a Uniform Adoption Law", pp. 11-12, (Sep) 10 *Lawyer's Collective,* (1995).

31 See debates about adoption law reform in Archana Parashar, *Women and Family Law Reform in India*, pp. 168-173, Sage Publications, (1992).

The Juvenile Justice law is a specialist law used for dealing with children who commit certain crimes but are too young to be dealt with under the standard Criminal law and procedures. The Juvenile Justice law used to be known as the Juvenile Delinquency Law and the change in nomenclature in 1986, suggests a change in the philosophy of the legislation. *The Juvenile Justice Act, 1986* has recently been re-enacted as the *Juvenile Justice (Care and Protection of Children) Act, 2000.* The statute in separate parts deals with children in conflict with the law and children in need of care and protection[32]. The statute thus also includes children who have not committed any offence. Such children are not the usual subjects of juvenile justice system. The statute not only brings such children in its purview but uses adoption as a child protection measure. The Rajya Sabha debates[33] on this reform bill demonstrate the possibility of introducing progressive changes and bypassing the religious personal law versus secular state moribund debates.

In the Rajya Sabha the Bill was introduced as a legislative attempt to make the judicial system more child friendly as well as accessible and for the rehabilitation of the destitute child. Adoption of such a child (that is, a child orphaned, abandoned, neglected) is one of the rehabilitative measures[34]. The adoption provision was explained as based upon Article 21 of the *Convention on the Rights of the Child* (hereinafter referred to as *CRC*) and in no way undermining the personal law of any community. This is indeed a breakthrough in the adoption discourse as previous legislative reform measures have failed on the ground that even a merely enabling law of adoption will have the effect of modifying the religious personal laws, especially of Muslims and Parsis.

The sanctity of religious personal laws argument was also used in the Rajya Sabha debates, perhaps not surprisingly, by a former Judge of the Supreme Court. Justice Ranganath Misra argued that the adoption provision should be subject to a rider that "such adoption shall be subject to personal

32 The *Juvenile Justice (Care and Protection of Children) Bill, 2000* was introduced in the Lok Sabha on 15 December 2000 and adopted. The Rajya Sabha then discussed the Bill on 19 and 20 December, 2000. See for details of discussion in the Lok Sabha: XII (20) *LSD*, 15.12.2000., cols 328-333 and XIII (21) *LSD* 18.12.2000., cols 356-400.

33 The following account is taken from the *Rajya Sabha Debates*, 19.12.2000. pp 292-297; and *Rajya Sabha Debates*, 20.12.2000. pp. 305-333.

34 Various other alternatives for rehabilitation and social reintegration are foster care, sponsorship, aftercare of abandoned, destitute, neglected and delinquent juveniles.

law of the adoptive parents"[35]. His main rationale for demanding such a change was that the *Hindu Adoption and Maintenance Act, 1956* (hereinafter referred to as *HAMA*), bars a Hindu from adopting more than one son and one daughter. The Juvenile Justice Bill should not remove that bar placed on a Hindu by Hindu law. Another reason for not permitting unrestricted adoption was that the 1956 Act recognised a social reality that if there was already a son or adopted son, to adopt another stranger would create disharmony in the family and disrupt the family.

The Law Minister responded by dismissing these claims on the basis that the present proposal had nothing to do with religion or religious personal laws. He asserted that this legislation is a social legislation, with a special purpose, and its primary emphasis is not on adoption. This law, according to the Minister, has a social purpose that millions of abandoned, orphaned or neglected children should be looked after in the homes of the relatively affluent people. Such people may have a house, they may have children and yet they may say that they are willing to sponsor a child or take a child in adoption as a member of the family. This law takes care of these children who have a special need. Religion is immaterial in this context, as most of these children would not even be aware of their religion. Parents' religion will also not be a bar. This is a special law for the specific category of children who are neglected, abused or orphaned. For all other children the general law (*HAMA*) will apply but when the special law is applicable it will defy the religion of the child as well as of the parents.

Fali Nariman[36] repeated the argument of Justice Ranganath Misra in a modified form that the bill should include a guideline that this Act is a rehabilitative measure not meant to override any personal laws. He was adverting to the related issue whether the adopted child would inherit property in accordance with the religious personal laws. Jethmalani[37] gently reprimanded those wanting that the adoption should be subject to personal laws. In his opinion such a move would only retard the process of rehabilitation. The endless disputes and complications that will arise because of religious personal laws will lead the child to courts rather than to a family that could rehabilitate such a child. According to Jethmalani the original purpose of the Hindu law of adoption was entirely spiritual while the purpose of adoption under this law is the physical, economic and social rehabilitation of the unfortunate child. Admittedly this proposed law is ambiguous about

35 *Rajya Sabha Debates*, 20.12.2000. pp. 306-309.
36 Id. at pp. 314-316.
37 Id. at pp. 328-330.

the law of succession applicable to a child adopted under this Act but it is more than probable that those who want to adopt a child as social service will also ensure that the child has a share in the inheritance. Moreover, the courts could construe that an adopted child under the statute would be an adopted child for the purposes of inheritance. In his view this was an enlightened, secular legislation, which should not be dragged to middle ages by subjecting it to personal laws.

Maneka Gandhi,[38] the Minister responsible for the Bill, supported the Bill as a measure for dealing with the consequences of destitution rather than the causes themselves. She explained the primary objective behind allowing adoption as to ensure the right of a child without a family, who may be abandoned, orphaned or destitute, to grow up in a congenial atmosphere. In doing so she explained that she neither wanted to incur the liabilities of personal law nor confer the privileges of personal law.

Thus a fairly major inroad was made into the domain of religious personal laws but the government was able to avoid the usual opposition to reform the so-called religious laws. The obvious lesson that can be learnt from the enactment of the *Juvenile Justice Act, 2002* (hereinafter referred to as *JJA*) is that particular attention must be paid to the formulation of issues. By projecting adoption as a social reform issue the tenor of debate changed and the main focus of attention became the need for rehabilitation of neglected children. No doubt objections relating to the religious personal law aspects were raised but the supporters of the Bill could successfully construct the alternative discourse about the special needs of certain children. In doing so the government used the legitimising force of International Conventions, i.e., the *CRC*. It also described this law as a special law for the specific category of children who were neglected, abused or orphaned. It is interesting that the Law Minister went so far as to misrepresent the general law when he said that for all other children the general law, i.e., the *HAMA* will apply. Surely the Law Minister knew that the *HAMA* is not a general law in any sense of the term. It makes adoption available to very specific Hindu persons and then with a range of restrictions. To describe it as the general law is obviously incorrect. So too when Jethmalani supported the legislation as pursuing a social purpose he described the purpose of Hindu law of adoption as entirely spiritual. This is once again incorrect as the *HAMA* for the first time allowed the adoption of a daughter and adoption by a single woman. In both cases no spiritual purpose can be cited from within Hindu thought. It is perhaps not

38 Id. at pp. 331-332.

surprising that the *JJA* does not address the legal consequences of adoption. Generally the law of adoption operates on certain assumptions and is inextricably linked with rules of succession. The supporters of the *JJA* however, chose to deflect the concerns with regard to succession rules applicable to the adopted child by suggesting that those choosing to adopt can be expected to look after the interests of the adopted child as well. Thus rather than the law providing the relevant succession rules it became the moral responsibility of the adopters to do the right thing by the adopted child. This course of action is only explainable as the government's effort to avoid engaging with succession and therefore religious personal law rules.

Reformers similarly used the social welfare discourse in a particular manner. It is highly unusual for social welfare provisions to be a part of the Juvenile Justice law. Generally the Juvenile Justice laws govern juveniles who have come in conflict with the criminal law system. Social Welfare laws, on the other hand are usually enacted for the protection of vulnerable sections of society. These include children who are in need of care and protection for various reasons. By portraying adoption as a social welfare measure the government could at once take credit for protecting the interests of vulnerable children and yet not incur the cost of doing so. Even though the contemporary adoption laws in most common law jurisdictions are supposed to operate for the welfare of the child, adoption is not generally an area covered in social welfare legislation. More commonly it forms a part of the law broadly defined as family law. Thus it is a highly unusual step for the government to allow adoption under the *JJA*.

Realistically all that the reformed law is doing is making it possible for neglected children to be given a chance at a decent upbringing. It is nowhere near an acknowledgement of the responsibility of the state to provide for the basic social needs of homeless and abandoned destitute children. Yet the government is able to portray itself as enacting a socially progressive legislation and silence the critics. The successful deployment of the imagery of socially progressive and caring laws is something worth thinking about. I suggest that those interested in changing the family laws and making them equitable and just need to adopt a similar stance. Rather than going around in circles about the relationship between a secular state and inviolable religious personal laws it is time to change the terms of the discourse. Therefore, with regard to the concept of the welfare of the child the focus of attention must be on articulating in legislation what might constitute the welfare/best interests of the child in disputed cases of custody.

IV

A Desirable Child Custody Law

Usually disputes about child custody are a late manifestation of breakdown in the marriage relationship. During the ongoing marriage childcare largely remains the responsibility and concern of the parents. Unless there is gross abuse of the child the law enforcement authorities do not intervene and therefore, what constitutes adequate or ideal child rearing practices remains unarticulated at least in the legal discourse. However when the parents separate and disagree, the needs of the child become the responsibility of the legal system in the name of the welfare/best interests of the child principle.

Courts more than any other branch of the legal system is called upon to interpret the concept of the welfare of the child. As demonstrated above, in the second part of this article, the Supreme Court judges struggle in the task without much assistance from the legislature or the legal scholars. It is no surprise that the judges bring in their common sense understanding of what is best for the child. It is inevitable that the gendered nature of childcare gets naturalised and in the process women get identified with motherhood. The present social arrangements thus become leagitimised as the ideal arrangements for childcare. As Maidment has argued above, there is not much point in criticising the judges for introducing their common sense notions of what is best for the child. The indeterminate nature of the welfare principle is well recognised. The solution to this problem does not lie either in prescriptive legislation. What we need is a co-ordinated effort at reforming the legislation so that more meaningful guidance is provided to the judges. But more importantly, the judges ought to be trained in social sciences. With the best legislative guidance judges will still be the ones interpreting the welfare principle. In doing so judges ought to be well informed about child psychology, gendered roles of childcare and the consequences for women of taking on childcare as a primary role. The point I wish to make here is that the best interests or welfare of the child can not be adjudged in isolation from other members of the family.

All too often the judges in custody disputes interpret the welfare of the child without acknowledging that the interests of the mother, usually the primary care taker, are relevant as well. The common judicial response to any claim as interest of the mother is that the court is bound to uphold the welfare of the child as the paramount consideration. This means that the interests of the mother are declared irrelevant at the very moment when she needs them most. For a woman who has been the primary care taker or a full

time mother the end of marriage can also mean that she is denied custody of her children, if the court decides that the welfare of the child requires so. There are two separate issues here. First, the welfare of the child ought to be protected and this is uncontroversial. Second, the way in which the welfare of the child is determined is far from perfect and judicial discretion can become a mechanism of normalising present childcare arrangements as inevitable or even ideal. This is unnecessary and less than just for most women who find themselves in a custody dispute. The law can be a mechanism for achieving justice for all members of the family rather than making the child's welfare a fetish.

The shortcomings of the law in this area are indirectly those of the entire legal system. The legislative provisions are anachronistic manifestations of our colonial past. To compound the difficulties the contemporary legal scholarship is as if caught in a time warp. There is a great paucity of scholarly writing on child custody laws and the available analyses are predominantly doctrinal analyses with very little effort at inter-disciplinary research. The law scholars, when they do write, generally do not move beyond analysing the technicalities of the legislation or the judgements[39]. The non-lawyer commentators have an extremely superficial understanding of the nature of law. If meaningful law reform is to take place the responsibility of articulating what is desirable law in the area rests with the legal scholars. Therefore, my main argument here is that we need adequate inter-disciplinary legal analysis. More specifically in the present context, legal analysts should take into account the interdependence of law with other social institutions. It is this kind of legal analysis that is a bare minimum that must inform proposals for legislative reform.

Any effort to formulate new legislative proposals must explicitly take into account the links between law and other societal institutions. Thus an ideal or desirable child custody law incorporating the principle of the 'welfare of the child' would presumably have to rely on the contemporary knowledge about child development, nature of marriage, patterns of child rearing and the gendered nature of childcare. The judges have to interpret the legislation in the light of all these factors but the legislators bear a prior responsibility of articulating the concept and its components. Judicial discretion can and ought to be guided by a carefully designed list of factors that would be relevant in assessing the welfare of the child.

39 A cursory survey of the legal literature indexed in the Indian Law Institute's *Index to Legal Periodicals*, over the past fifteen years yielded a meager list of eight short articles. None of these articles went beyond discussing the legislation or the relevant judicial pronouncements.

This is where the role of legal scholars becomes crucial as they have the expertise and the institutional independence to formulate legislative reform proposals taking into account the current social sciences knowledge about children. A sad lack in Indian legal scholarship is that most of the time the law on any given topic is taken as a given. Therefore, the proposed changes are also imagined within the parameters set by the present laws. There seems to be no desire or possibility of changing the terms of legal discourse. This is a particular shortcoming of most of the legal academic writing and analysis. No other branch of legal system can fill this gap as the scholars are the most suited to the task of theoretically analysing the law. They must bear the responsibility of re-conceptualising the terms of the debate and draw upon history, sociology, economics and politics to articulate the links between law and other societal institutions. Unless such a shift in emphasis in legal analysis is reached we will continue to live with anachronistic laws that are a sad and inefficient legacy of our colonial past[40].

Thus in the context of child custody what would constitute an ideal or even desirable law needs to be articulated and discussed by the legal scholars. Only then can the legislators and judicial authorities make meaningful changes. As a starting point we need to ask who needs the child custody law in contemporary society and what aims should such a law have, i.e., best interests/welfare of the child? How are such interests to be conceptualised? Maybe judicial discretion guided by a legislative list of relevant factors should be taken into account. Custody disputes are a late manifestation of the breakdown in a marriage relationship. And the arrangements of child rearing

40 A recent example of the hold of this colonial legacy is evident in the reformed *Indian Divorce Act, now called the Divorce Act, 1869.* This Act deals with dissolution of Christian marriages and since its original enactment the current amendments in 2001 are the first major revision of the substantive provisions of the law. Admittedly some changes in the grounds of divorce have now put men and women on the same level and for the first time the law makes divorce by mutual consent available to Christians. Yet it makes for depressing reading to see that the so called progressive reforms basically replicate the law of divorce in the 1950s and 1960s in England (incidentally also the so called Hindu law of divorce in the *Hindu Marriage Act, 1955).* Even the definitions of the Act hark back to a colonial past. For example, the definition of minor, in Section 3(5), still makes a distinction between the son and daughter of a 'native' Christian father and other Christians. It is shocking to realize that in 2001 the Indian Parliament could reform this legislation and still uphold the anachronistic idea that the son of a native Christian father is a minor up to 16 years of age and the daughter of a native Christian father is a minor only up to 13 years of age. For all other unmarried children the age of minority is eighteen years! So too the legislation talks about the married woman's right to enter into a contract and hold property – matters which hark back to the concerns of English laws in the early nineteenth century.

after the marriage has ended inevitably relate to what would be an ideal situation in an ongoing marriage. Thus the concept of marriage, availability of divorce and its repercussions on minor children are some of the issues that need explicit discussion. An adequate custody law can hardly ignore the maintenance issues. Hence the law would have to articulate a conception of an ideal or at least desirable life for the child.

V

Australian Family Law and Child's Welfare[41]

I will briefly discuss the Australian family laws to demonstrate that a child-centred approach nevertheless requires an articulation of the ideal family and the responsibilities of both parents. There are major difficulties in this regard in the Australian family laws yet it is a much better model than the contemporary Indian laws of child custody. I wish to argue that we need to provide a similar legislative guide to the judiciary in its task of interpreting the welfare of the child.

Family laws use a number of concepts but they are not often defined sufficiently, precisely. The concept of guardianship is the oldest but has been supplemented by those of custody, care and control and access over time. The exact scope of these respective concepts has continued to be a matter of discussion. Originally at common law, in the nineteenth century and the beginning of the twentieth century, the principal legal notion concerning the rights and powers of an adult over a child was that of guardianship. It included all the rights and powers that could be exercised by an adult for the welfare and upbringing of a child. Even though the courts in the nineteenth century were beginning to refer to custody it was only in the twentieth century that custody was used as a separate concept in the legislation. A loose distinction between the two terms that could be described as guardianship encompasses the general rights of a parent to guard the interests of the child against the outside world. Custody is a narrower concept and usually deals with rights in respect of the welfare and upbringing of a child as well as the day to day care and control over the child. However, the few cases that have considered the distinction between the two concepts make it clear that in contradistinction to custody there are not too many rights and powers distinctive to guardianship. Gradually the courts started distinguishing between custody and care and control so that the latter evolved into a separate legal notion.

41 The following account is based upon Anthony Dickey, *Family Law*, Lawbook Company, Sydney, 4th edn, (2002). Unless otherwise stated all information is taken from this book, Part V, chapters 16, 17 & 21, pp. 327-360 & pp. 398-413.

The *Family Law Act, 1975* is the relevant legislation in operation in Australia. It is a Commonwealth enactment that replaced the earlier state and territory laws dealing with 'matrimonial causes'. From the commencement of the *Family Law Act, 1975* it was enacted that each of the parties to a marriage was the guardian of a child of the marriage who had not attained the age of eighteen years, and each parent had the joint custody of the child. The Act was amended in 1988 and included in its ambit ex-nuptial children as well and thus each parent (rather than parties to a marriage) of a child who had not attained the age of eighteen years was a guardian of the child and each had joint custody of the child. The result of this legislation was that each parent could exercise the rights of guardianship independently of the other as each was separately a guardian of the child. However, each of the parents had to exercise the rights of custody jointly with the other parent as they were both joint custodians. At the dissolution of a marriage if parents could not agree upon child related matters the courts could award custody of the child to one parent and the other parent would usually be awarded access rights.

The Act was further amended in 1996 and the concepts of guardianship and custody have been repealed[42]. The Act now speaks about parental responsibilities. The main rationale for the change was claimed to be to replace the ideas of parents' proprietor rights in their children with ideas about the responsibilities of parents. There is no such thing as parental rights and only the child has rights, which ought to be protected by everyone including the parents. Interestingly, the Act for the first time expressly recognises two positive rights of the child. Every child has the right to know and be cared for by both its parents and every child has the right to contact with both its parents on a regular basis.

Each parent of a child who has not attained the age of eighteen years ordinarily has parental responsibilities for the child. It may be implicit in the legislation that each parent should exercise parental responsibilities jointly with the other parent but it is not explicitly stated. At the end of a marriage both parties as parents have the same rights and responsibilities and are encouraged to enter into voluntary parenting plans and which can be registered with the Family court. Once registered such parenting plans operate as court orders. If however, the parents fail to do so the court can make parenting orders or welfare orders with regard to the child. There are four species of

42 See Part VII entitled "Children" of the *Family Law Act, 1975*. I have refrained from giving the exact numbers of sections as my purpose here is simply to introduce the concepts used in this enactment.

parenting orders. These are residence orders, contact orders, child maintenance orders and specific issues orders. Very loosely the former custody and access orders are now replaced with residence and contact orders.

The *Family Law Act, 1975* from its inception has included the principle of the welfare or best interests of the child. The finer details of the legislation have changed over time but broadly speaking the family court is charged with the responsibility of deciding child related disputes by pursuing welfare of the child as a paramount consideration. More importantly the legislation provides a list of factors to be considered in deciding what may constitute the welfare or best interests of the child. At the present time the Act contains this list in Section 68F.

This section sets out twelve considerations the court must take into account in determining the best interests of the child. The considerations in Section 68F(2) of the *Family Law Act, 1975* are:

"(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behavior; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behavior that is directed towards, or may affect another person;

(h) the attitude to the child, and the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant."

Although the twelve considerations must be taken into account in determining the best interests of the child the relevance of each consideration is dependant on the particular issues involved in a dispute. No one consideration has any greater significance than any other consideration. Ultimately it still remains for the court to decide what constitutes best interests of the child in any particular case.

There are many criticisms of these provisions of the *Family Law Act, 1975* but it must be acknowledged that they are a vast improvement on the conditions under which the Indian Supreme Court is called upon to interpret the best interest/welfare of the child. Therefore, the immediate task for legal analysts and scholars in India is to start articulating what considerations must be taken into account in interpreting the best interests of the child.

Conclusions and Suggestions

Traditionally child maintenance has been treated as a separate issue by the English and Australian legal systems. But in India because of the paucity of maintenance legislation the two issues of custody and maintenance are very often clubbed together. This in turn means that the welfare principle gets intertwined with the wider issue of the nature of marriage. For example,

in Indian legal scholarship there is no effort to examine, analyse or critique the conception of marriage upheld by the legal system either in the legislature or the judiciary. When divorce is permitted it is usually on the basis of antiquated 'fault' grounds of divorce. If the parties to a marriage are only able to dissolve a marriage because the other spouse has committed a fault or have serious illness or incapacity how may anyone then articulate what is best for the child of such a marriage? Would the child be better off with the non-guilty spouse or the non-disabled parent? If not, why not and by reference to what values will the welfare of the child be determined? Originally Common Law Courts were reluctant to give custody of a child to the 'guilty' spouse but gradually abandoned this principle. For Indian courts where would appropriate guidance come from?

As detailed above, the Supreme Court has felt free to interpret the welfare of the child without the constraints of the religious personal laws. However, when maintenance for wives is not conceptualised as entitlement how may the children invoke and enforce such a right for themselves? Supreme Court judges make valiant efforts but essentially they operate with practically no legislative guidance as to the factors that may or ought to be taken into account in determining the welfare of the child. It is therefore, imperative for the legal scholars to commence the task of articulating how the welfare of the child ought to be conceptualised. In doing so, I suggest we will necessarily have to articulate the wider conception of a just family law. Such a conception would uphold the right to justice of all family members.

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