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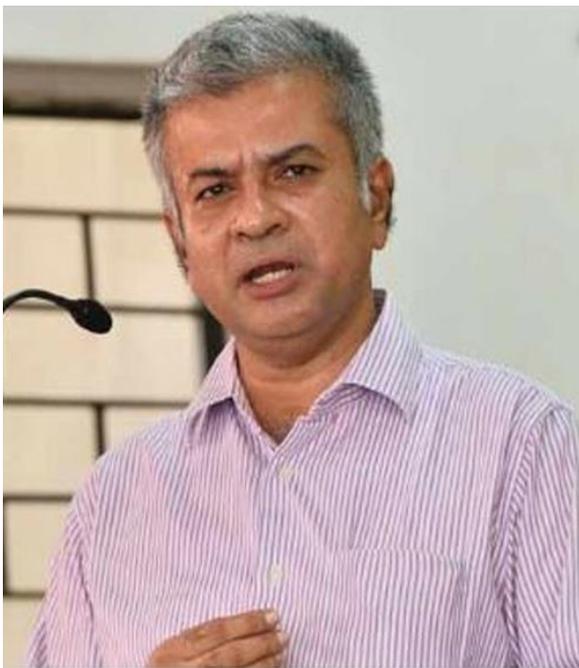
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Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

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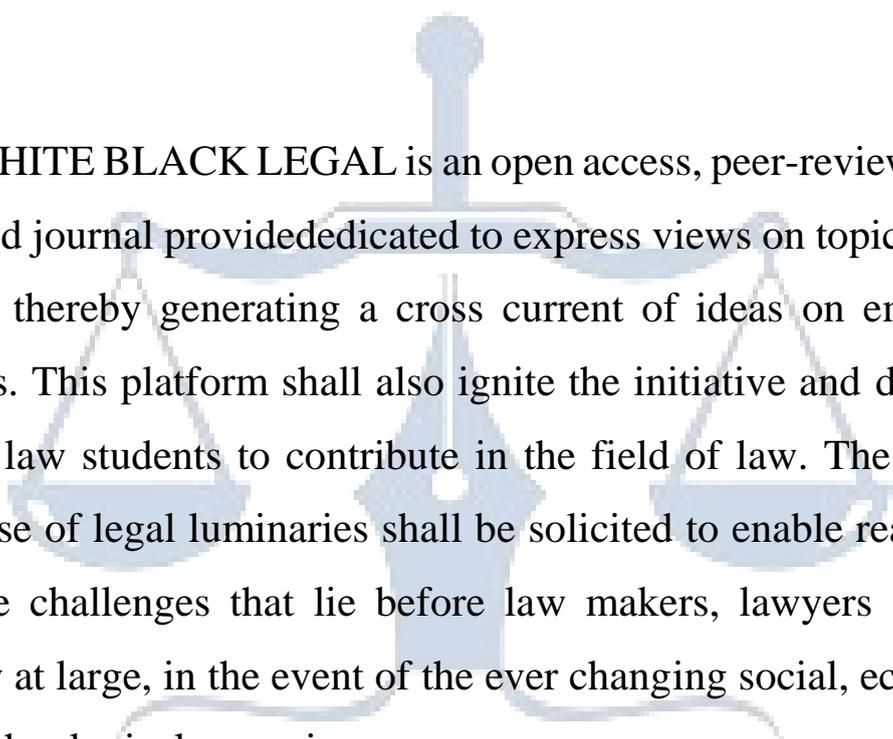


Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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With this thought, we hereby present to you

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THE WELFARE PRINCIPLE: AN INTERNATIONAL PERSPECTIVE

AUTHORED BY - SHRISHTI VERMA

Abstract

The welfare principle is perceived as a strikingly substantial stride toward the course of child jurisprudence. As, in numerous cases, the several lives depend on the just implementation of this precept. It is an unavoidable vital right which can only be accomplished through the precise stability “between the rights of the parents and the child not only in cases of custody” but also in discrete other instances of adoption, neglect, death of the parents, abuse, etc. This research paper undertakes to yield insight into the welfare principle, notably in cases of custody. It commences by expounding about the diverse conventions such as “the United Nations Convention on the Rights of the Child” which inaugurated this principle internationally and formerly also emphasized the other two principle namely “The European convention on Human rights” and “the Hague Convention” which alleviated this doctrine to enlarge its purview and also added crucial elements to it. This research concentrates on the distinctive types of welfare principle models reflected in different countries following the peculiar legal systems such as the UK following the common law system, Germany which adheres to the civil law system and lastly comparing those countries with India to get a general perspective. It will not only stimulate us to perceive how distinct countries implemented these principles domestically and till which extent. Conclusively, this research paper discloses about the general challenges the principle is combating and recommendations to shape it.

1) Introduction

“It is well understood that in custody battles passions become inflamed and children often become victims of their parents' irrational, selfish behavior. Within the court system, various concepts have been developed in an attempt to combat this and to achieve custody arrangements that are in the best interests of the children.”¹

¹Karen M. Munro, *the Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making*, 30 ALTA. L. REV. 852, 852-898 (1992).

Welfare's principle calls for a determination carried out with respect to the child, considering the child's interest over other interests.² The requiring of this welfare principle generally appears when the matrimonial ties are ruptured and the question of custody of the child turns up, where the obligation of maintaining the child mainly physical control over the life of the child are driven out either by one parent solely or proportioned by both parents or a third party can also be nominated for that purpose.³ These parenting arrangements are legally construed as guardianship and custody which is the responsibility of making decisions about the children, but the guardianship comprises the major decisions about the child's life including property, religion, education and custody just carries the physical control of the child which is given to a parent before or after divorce. Here the determining basis of these custody battles is "the welfare principle", which can be unfolded into three ways: firstly considering the paramount and exclusive concern of the child, secondly the harmonizing the child's and parent's welfare, thirdly giving higher emphasis to the parental rights more than the child's interest. Most of the countries around the world acknowledge the first interpretation of the welfare principle with their own evolved variations.⁴

"Further, the extensive period for these laws had its roots in the late eighteenth century which got strengthened more during the nineteenth century and reached till its zenith point in the third quarter of the last century."⁵ At the international level, they advanced human right laws to embrace the family relationship. Therefore, various conventions and treaties became the nucleus part of this law, for instance, "the United Nations Convention on the Rights of the Child⁶. In expansion, the Hague Children's Conventions include procedures for furthering the scope of the subject matter and including some new aspect to it."⁷⁸ These conventions developed into the spirit guidelines for various countries, and they have developed their own versions of laws referring to it. Versions and its evolution in some countries will be determined in the following research study. The outlook of this research is limited toward understanding the notion of welfare principle with the cooperation of the international conventions and treaties

² John Eekelaar, *Beyond the Welfare Principle*, 14 CHILD & FAM. L. Q. 237, 237-250 (2002).

³ Suparva N. & Neha Purohit, *Guardianship and Custody in India, England and under the International Regime of the Hague Conference*, 5 NUALS L.J. 34, 34-44 (2011).

⁴ *Id.* at 3.

⁵ *Supra* note 2

⁶ CONVENTION ON THE RIGHTS OF THE CHILD, G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/49, at 166 (Nov. 20, 1989), reprinted at 28 I.L.M. 1456 (1989).

⁷ Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47 (2010).

⁸ *Supra* note 2

as the guiding source and further, the legislative, legal and executive settlements about the conception, which is to be interpreted firstly in: common law country like UK and Civil law country like Germany and to focus on Indian laws and judgments and to get a comparative view about the countries and to find out the challenges and resolve them.

1.1) The following research paper will focus on the following objectives:

- To ascertain the relevance of various International Convention and treaties regarding the welfare principles in order to historical and Jurisprudential perspective of welfare principle.
- To study the interpretation of versions of laws and conventions adhered by the Common law countries (United Kingdom) in respect of welfare principles.
- To understand the version of laws and convention pursued by the civil laws countries (such as, Germany) in conduct to evaluate the welfare principle followed there.
- To understand the Comparison of above discussed countries with Indian laws.
- In conclusion, to examine the challenges faced by Child welfare principles respecting the different versions of welfare principles laws reflected in aforementioned countries, in order to obtain the more distinguished view of welfare principles.

1.2) Beside this, there some questions which will be dealt in this research are:

- How are international conventions and treaties dealing with welfare concepts in order to under its historical and jurisprudential perspective?
- To review how the common law country's version of welfare concept accords with the subject matter and how effective it is?
- How does the interpretation of welfare principle exist in civil law countries and again how effective it is in dealing with the concept?
- What are the laws in India regarding this discussed principle and how it differs from the above two mentioned countries?
- What are challenges faced by the child welfare principles respecting the different versions of welfare principles laws reflected in aforementioned countries?

2) The conventions following the Child's Best Interest Principles

The doctrine of welfare principle directly affects future of the child whose interest has been considered, his placement, propensity not only in cases of custody, divorce, visitation but also in cases of adoption, death of parents, proceeding of abuse and neglect, crime, illegitimacy

proceeding and alternative forms of protective services accessible for children. Further in the modern era we have the prudent judge who can absolutely observe the underlying issues and can resolve it after acknowledging the best interest of the child.⁹ But preceding to the twentieth century, the procedure and laws concerning the subject matter were not well delineated or were not even present in few rigid countries. Mainly it was governed through the male superiority where the custody of the children were considered as their father's property and to an extent the custody of the children of tender age were given to their mother as the younger child needed more support from the mother. But with the advanced state of psychological science over the twentieth century, so-called tender year theory was reinstated by the initial developed best interest theory where the circumstances and interest of the child was welcomed into paramount consideration.¹⁰ Typically, one of the models of this theory was more intensified on the primary caregiver to the child who was getting custody after divorce. Even one of the models favored the non parents the visitation rights to ensure the child's interest.¹¹

2.1) "The United Nations Committee on the Rights of the Child (UNCRC)"

International conventions are the considerable source to underlying study of the concept of Welfare principle. "The United Nations Committee on the Rights of the Child" has mainly highlighted the state's obligation in securing the child's interest through decided principle.¹² It is considered as the 'Magna Carta' of the rights of the child as it combines a full catalogue of the rights of the child from birth to maturity.¹³

It was also stated that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, incorporating appropriate legal protection, before as well as after birth." Thus it clarifies that the best interest of the child should be considered as they are in need of assistance even after birth. Beside this, it is not only their parents' responsibility but the responsibility of the whole community which culminates in escalation of purview of convention.

⁹ Martin Guggenheim, *What's Wrong with Children's Rights* 173, 173-250 (2005)

¹⁰ M Henaghan, *'Above And Beyond The Best Interests Of The Child'* 13, 14-20 (2008)

¹¹ *Supra* note 9

¹² Atangcho Nji Akonumbo, *Excursion into the Best Interests of the Child Principle in Family Law and Child-Related Laws and Policies in Cameroon*, 63 63-100 FAM. L. (2010).

¹³ *Id.* at 12

Subsequently article 3 para 1 represents it clear that the conventions make welfare of the child the apex consideration in all the concerns regarding them. Further the article 12 of this convention also upholds the child rights to be considered during decision making and also encourages the child to participate in the process of decision making.¹⁴ This article in section is the unification of the child right and welfare, the child herself has the right to say that she wants it to happen. This significant convention constructs the trail on children's rights and interest blended with jurisprudential concepts in a malleable way.¹⁵

2.2) "The European convention on Human rights"

"The European convention on Human rights"¹⁶ is not principally fixated on the welfare of children but address it skillfully to secure the children's interest. The following is reinforced through "Human right act 1998". The convention secures the child's interest in two ways. Firstly, it is enforceable against public authorities¹⁷ and they all must act in a way that is observed in this convention unless some other contradictory legislature appears.¹⁸ "Secondly, under section 3 of the Human Rights Act 1998 it concentrates on the condition when the interpretation of the legislature of the state parties should align with the fundamentals inscribed in convention and if they are not interpreted in accordance with convention, then legislature should stand out with the incompatibility issued by amending the legislature."¹⁹

In order to enhance the scope of this convention, the decisions of European court also form part of this convention.²⁰ The two most quoted articles which expressly protect the rights of the children are article 8 and article 2,²¹ under which it preserves the child's interest from the adults rights and establishes a distinction between them which balances enforceability of both rights at the same time. The following convention manuscripted various provisions which strengthen the child's welfare. Firstly, the children are entitled to the same right as adults as article 1 says that the state party should secure the right and the freedom of everyone within their jurisdiction. Further, the right guaranteed heedless to any form of discrimination in the form of religion,

¹⁴ P. Alldred, *'Ethnography and discourse analysis: dilemmas in representing the voices of children' in Feminist Dilemmas in Qualitative Research: Public Voices, Private Lives*, SAGE, 7 (1998).

¹⁵ *Supra* note 12.

¹⁶ E. Verhellen, *'Children's Rights in Europe'* IJCH. R. 357 (1993).

¹⁷ M. Hunt, *'The Horizontal Effect' of the Human Rights Act'* PL 423 (1998).

¹⁸ COUNCIL OF EUROPE, *The Protection of Minors under the European Convention on Human Rights* (Council of Europe, 1993).

¹⁹ G. Kingscote, *Incorporation of the European Convention on Human Rights*, FAM L. 195 (1998).

²⁰ Human Rights Act 1988, § 2.

²¹ J. Liddy, *'The Concept of Family Law under the European Convention of Human Rights'* EHRL 23 (1998).

nation, colour, although the age is not specifically mentioned but 'such as' words used in the principle, formulates that the list is not specifically exhaustive.²²²³ This convention balances the rights of both the groups of people but it can interfere with the interest as in accordance with the law, therefore it should be exercised proportionately and in limited manner so that interest of both the rights could be preserved.²⁴ "In X v Switzerland the Commission extended a slight better - 'special attention should be paid to the children's interests'."²⁵ It can also interrupt in the cases where the child's interest is not paramountly considered, and it should be significantly weighted in the condition where adults are in breach of their right. In "Hendriks v Netherlands" the question aroused before the commission that the right to access to the child should be provided to a non-custodial parent or not. Where the commission found out that such access is in acquaintance with "article 8 of the convention" where the interest of the child should be paramountly considered.²⁶²⁷ Moreover in the case of "Olsson v Sweden (No 2)" the court specifically recognized the welfare of the child's interest and that the court should always first look at the child's interest and then try to create a fair balance between both forms of rights.²⁸ In "BR and J v Federal Republic of Germany" where the court seeks to find the limitation of the paramount of child's interest theory and to also identify the significance of striking the balance between child's interest and parents too.²⁹

2.3) The Hague Child Protection Convention

"Another convention acknowledged as The Hague Child Protection Convention was negotiated and consistently endorsed by the members of the 18th Hague Commission on International Private Law in 1996.³⁰ Its drafting falls within a general international endeavor to reinforce the protection of childhoods in danger. "The Hague Child Protection Convention has been signed and ratified by 49 states which include both members and non-members of the Hague Conference."³¹ This issue was raised at the very beginning of the "Hague Conference in 1893" and led to the "Convention of 1902 on the Guardianship of Minors".³² The third amendment

²² Nielsen v Denmark (1989) 11 EHRR 175, at p 191.

²³ A. Bainham, 'Contact as a Fundamental Right' 54 CLJ 255 (1995).

²⁴ Application 11526/85 50 D&R 219.

²⁵ X v Switzerland 8257/78 13 D&R 248.

²⁶ Hendriks v Netherlands 18 D&R 225

²⁷ Hendriks v Netherlands Comm No 201/1985 GAOR (A 143/40).

²⁸ Olsson v Sweden (No 2) (1994) 17 EHRR 134.

²⁹ BR and J v Federal Republic of Germany 9639/82 36 D&R 130.

³⁰ E.D.M, *The German National Child Welfare Law*, 4 SOCIAL SERVICE REV. 605, 608-628 (1930).

³¹ *Id.* at 30.

³² Peter Nygh, *The New Hague Child Protection Convention*, 11 INT'L J.L. POL'Y & FAM. 344 (1997).

to the convention was specifically emphasizing the child's interest. Beside this, gives the "habitual residence of the child" as the central place, which helps in determining the jurisdiction and implementation of law by the authorities. This convention is formed for the protection of all the children, regardless of the nation they belong to.

The extents of the subsequent elements are exemplified in chapter 1, which can be further partitioned into sections such as "parental responsibility" and "the protection of the children." Article 1 (2) defines the term parental responsibility which encompasses "parental authority or any relationship which determines the rights, power and responsibilities of the parent or legal guardian or other person acting as in the form of legal representative."³³ This is not only limited to these bodies but is also extended to all persons or bodies invested with parental authorities. It portrays that the responsibility begins with the birth of the child or can also be arised by the operation of law in the form of agreement or administrative action. Further in this convention the measures for protection of child which reflects the welfare of child principle. Particularly article 3 (a), 3 (b) and 3 (c) are mainly concerned with the issues pertained to guardianship, custody and right of accession. Where, it generates a contrast between the "parental responsibility between parents and kin."³⁴ However, the access right channels the right to take the child for a limited period of time; it can also be even from one place to another. This convention arranges the procedure and principle even to safeguard for international child contracts. According to this article, convention includes the child of age until it turns 18s but rejects the unborn child.³⁵ Article 7 implies towards 'habitual residence' that directly deals with the wrongful expulsion. The factor of Habitual residence is the contemplated principle rule in this convention for recognizing the jurisdiction also helps in determining parental responsibility.³⁶ Mainly it seeks to deal with the aspects where according to child's habitual residents the purpose of illegal activity can be identified. So that, if there is any transgression of the child's interest, then it can conveniently be analyzed.

³³ *Id.* at 32.

³⁴ *Supra* note 32.

³⁵ *Supra* note 9.

³⁶ *Re J.* [1990] 2 AC 562, 578-9.

3) Perspectives of countries regarding the Welfare Principle

Now, after knowing about diverse prospects of welfare in specific conventions, we have to understand the welfare in various facets of the peculiar legal systems adopted by different countries.

3.1) “The doctrine of best interest theory in common law country (England)”

Development of numerous acts and enactments give rise to the best interest theory in England. Firstly, the implementation of “The Custody of Infant Act, 1839 gives the custody of the infant up to 16 years to mother.”³⁷ Any matrimonial default like adultery can exclude her from this right. This was reinforced by another act called matrimonial cause act of 1857, which legislate regarding the significance of “custody and maintenance”. This act replaces the right of the father over their children. Later in 1860, the doctrine of best interest was introduced through the introduction of “Guardianship of infant’s act 1886”. “Mainly it accorded with four concerning issues, firstly granting the mother’s right to custody of the infant child.”³⁸ Secondly, accession rights to either parent for the welfare of the infant, thirdly the wishes of the parties and fourthly concentrated on liabilities of the parents.³⁹ Section 1 gave the authority to the court to decide the question regarding the custody of the infant irrespective of the father’s superior right over it. Section 2 reflects the initial reflection of best interest policy, which gave the right to the mother as the father to approach for the child’s custody. Further to trail towards the equality based approach, the parliament of the UK enacted “Guardian and infant’s act 1925”.

The status of the mother was improved which further strengthened the best interest principle because it is directly raising the status of the women in every aspect which even encourages the court to give custody to the mother as they can be in many cases serves to the mark for the child’s supreme interest. Further, “Section 1 of the Guardianship Act of 1973”, dealt in the matter of guardianship of the minor to follow the equality based approach. Furthermore, in the cases of divorce, the courts were directed to ascertain the child’s best interest in cases.⁴⁰ “Section 1 (1) of the Children’s act 1989 expressly makes the interest of the child as paramount concern”, Even in Section 1 (2) even the delay in the proceeding was considered against the interest of the child. Mainly in determining the foremost interest of the child, the court

³⁷ *Id* at 36.

³⁸ *Supra* note 35.

³⁹ Guardianship & Infants Act, 1886, 49 & 50 Viet, c. 27, § 5 (Eng.)

⁴⁰ *Id.* at 39.

considers the number of things, such as the feeling and wishes of each child concerned “the physical, emotional and educational in present and in the future”, it also significantly consider the position of the parents, their capability, their relationship with other person and also to evaluate about the relevant harm or risk of suffering now. The Children’s act 1989 gave an ample range of power to the court.⁴¹

3.1.1) England has documented the several cases which contributed towards the development of the child’s jurisprudence, mainly dealing with the matters that questioned regarding the principles, rules and procedures regarding the worth and value of the children. One of such questions was dealing with absolute parental authority, which is directly channeled to the effects on the child’s welfare. “In *Rex v. Devall* 1763 where it was observed by the king’s bench that the children who were the subjects of the habeas writ to be delivered to the father but any decision regarding the custody of the children was left to the discretion of the judges which will be done after considering every essential circumstance.”⁴² “In *Bisset’s* case, the custody of the child was given to the mother by the court so that the educational needs of the child can be fulfilled and the overall interest of the child can be determined.”⁴³

At the end of the 1700s the children were noticed as more different and valuable as compared to the chattel. This change in perspective prompted the change in the interpretation and standard of children’s welfare principle reached new heights. “But again in 1804, these standards were quickly doused as the judicial reinforcement of the parental preference was considered regardless of the child interest as the eleven months child was given in father’s custody ignoring the child’s interest of staying with the mother.” It was said that “The law is clear, that the custody of a child, of whatever age, belongs to the father, if he chooses.”⁴⁴

“In 1815, a Pennsylvania father sought custody of his two daughters, nine and twelve, in *Commonwealth vs Addicks* but the court granted the custody to the mother after considering the tender ages of the children.⁴⁵ Later after three years the father demanded back the custody of his daughter based on the argument that children’s best interest and their future moral core can only be served when they will be aware of their mother’s corrupt practices of adultery,

⁴¹ *Supra* note 12

⁴² *Rex v. devall* (1763) 97 Eng.Rep. 913 (Eng.).

⁴³ *Bisset* (1774) 98 Eng. Rep. 899 (K.B.) (Eng.)

⁴⁴ *Supra* note 12.

⁴⁵ John Eekelaar, *Beyond the Welfare Principle*, 14 CHILD & FAM. L. Q. 237 (2002).

whereas mother argued that despite of her fault she served as the good mother” but court was more persuaded by the father’s argument of a moral understanding of marriage vows. Finally, the custody was given to the father.” This case introduced the aspect of tender years to the child’s interest principle.

However, the English courts were strictly holding the parental preference rule again 1824. Simultaneously, across the Atlantic the principle was challenged by emerging standards of welfare principles which were recognized in the case of United States vs. Green where it was observed that “the rights of the parents existed for the benefit of the child and were always subordinate to the child’s welfare when it was in violation.” “In Re. L. (minors)⁴⁶ the Court of Appeal has made a distinction between cases, where the court considers the facts and fully investigates the merits of a dispute, in a wardship matter in which the welfare of the child concerned is not the only consideration but is the first and paramount consideration, and cases where the court do not embark on a full-scale investigation of the facts and make a summary order for the return of a child to a foreign country without investigating the merits.” In order to look at the determination of a child’s best interest, various aspects need to be considered. Mostly the conflict revolved around mother and father at or after the time of the divorce. Court also presumes that the parents are the best people to know about the welfare of the child. This presumption can be overcome if the parent is not fit to take care of the child.

3.1.2) Critics about English version of welfare Interest: “The best interest standard has received criticism by various groups for the infringement of privacy rights and family law reform, particularly about how it unlawfully marginalizes children from their one parent and fulfilling government’s interest and often cultivates protracted litigation.” It was also argued that higher evidentiary standards are also not maintained and further the best interest principle should be only applied to the cases where the parenting responsibilities are breached and rights are violated.

3.2) Best Interest principle in civil law country (Germany)

“Approximately 170,000 minors’ are affected by their parents’ divorce proceedings every year in Germany.”⁴⁷ The focal point of the laws and procedure dealing with the child’s right having

⁴⁶ Re. L. (1974) IW.L.R 250 (Eng.)

⁴⁷E.D.M, *The German National Child Welfare Law*, 4 SOCIAL SERVICE REV. 610, 608-628 (1930).

their welfare as their focal point. Parental responsibility comprises care of the child and its property,⁴⁸ it means to fulfil all his basic requirements like education, food and to also determine all the important decisions in his life, etc.⁴⁹

Divorce results in the change of the structure of joint parental responsibility; child can usually live with the mother or the father as they are separated. At the vital stages of the child, parents make important decisions which affect the child's development.⁵⁰ If the parents have already entered into an agreement regarding the custody of the child, then the court has no authority to deal with it. The principle of child's best interest can be decided by the parents through agreement.⁵¹ Only exception to this rule is that who is of fourteen years of age or more, if involved in the agreement then the objection raised by him or his wishes will be taken into consideration.⁵²

In the case of disputed transfer of custody, the court has the authority to interfere and to grant custody to the parent who is closest to the child's best interest.⁵³ The child's welfare is the foremost consideration to make decisions regarding parental responsibility for any court.⁵⁴ It also instructs the two stages test, firstly regarding the custody that weather the joint custody or sole custody of the parental responsibility for the child after considering the beat interest for the child.⁵⁵ The element in Joint responsibility is the parent's ability to cooperate. Serious conflict between the parents can result in the dissolution of joint responsibility if these conflicts result in non performance of the parental responsibility.⁵⁶ However, it was observed in German judicial interpretation that the violence within the relationship of parents plays a fairly minor role in regard to the decision regarding parental responsibility.⁵⁷

If the joint custody is not in the favor of child's foremost interest, then the option of sole custody is considered. The evaluation criterion for granting sole custody of child to parents depends on the various factors of security of child's development and continuity of the same. This principle

⁴⁸ GERMAN CIVIL CODE § 1626 (1). (Ger.).

⁴⁹ *Id.* at 44 § 1631 (2).

⁵⁰ GERMAN CIVIL CODE § 1671 (1). (Ger.).

⁵¹ *Supra* note 54.

⁵² *Supra* note 54.

⁵³ GERMAN CIVIL CODE, § 1671 (2) 2 (Ger.).

⁵⁴ *Id.* at 53, § 1697a. (Ger.).

⁵⁵ FamRZ 1999, 38, 39 (Ger.).

⁵⁶ FamRZ 2004, 354, 255(Ger.).

⁵⁷ JAmt 2003, 217, 219 (Ger.).

of the child's development considers the essential element of priority of parental care. They also evaluate how the parental care of the particular parent can contribute to the development of the child's personality.⁵⁸ Beside the court also tries to observe the ties of the parent with the child together with their living condition and financial situation.⁵⁹ The preferred custody of the child is not given to their parents. As there are a number of conditions which are responsible before giving the child for custody such as the actual circumstances, the risk of harm to the child, education, practicing religious activity. Similarly, it also questions the rearing skill of the parents; it also considers the parents' effort to maintain the communication between the child and the separated partner who is merely having the visitation right.⁶⁰

Dispute concerning the custody question initiates by the family court and it has the duty to investigate through the issue and ascertain the stated facts.⁶¹ Moreover, the court will try to study the cases in every single aspect and generally, will also consider hearing the child's wishes, its inclinations, ties which can help the court to form the decision regarding the child and its property. But when the child is above fourteen of age, then they can be involved in the court proceedings.⁶² The implementation of the court decision takes some time for the fulfillment of the statutory requirements.⁶³ There are the cases where the court intervenes with its emotion and regulates parental responsibility in order to serve the child's welfare interest. "It is itself encompassed in the German Civil Code of section 1666 that the court takes all the significant measures to emphasize on to prevent any physical, mental, or moral well being of the child who has the background of abusive parents, who neglected their child, or failed in fulfilling their parental responsibility."⁶⁴ The court tries to make sure that the child is in the best hand.

Court order can be amended in the restrictive conditions, as where the parental responsibility previously made by the court is permanently affecting the child's welfare. It can even have the authority to cancel the implementation under section 1666 of the German Civil code when it is imminent danger to the child and its welfare is completely ceasing.⁶⁵ But the main element on

⁵⁸FamRZ 1981, 124, 126 (Ger.).

⁵⁹ 63FamRZ 1981, 429, 434(Ger.).

⁶⁰ *Id.* at 59.

⁶¹ *Supra* note 45.

⁶²*Supra* note 54

⁶³ *Supra* note 45.

⁶⁴ *Supra* note 54.

⁶⁵ *Id.* at 64.

which the whole German modal of welfare depends on is the just enforcement and interpretation of laws by the authorities.

3.3) The Welfare doctrine from India's perspective

In India there are various legislatures where the best interest principle of the child is reflected mainly the personal laws of diverse religions covers the subject matter but in supreme court in diverse aspects tries to determine the issue and also to secure the welfare of the child. There are numerous statutes such as “Guardians and wards Act 1890⁶⁶” which is general in nature and legislate in providing the bundles of rights and power under guardianship and also helps in the matters of custody.⁶⁷ Then for Hindus separately there are a number of acts like “Hindu minority and guardianship act 1956” containing principles dealing with the “guardianship and custody” rights of minor Hindu children. Also, the “Hindu marriage act 1955” provides in the form of section 26⁶⁸ the court gets an authority to take decisions to pass interim orders regarding the custody, maintenance and education of the child.⁶⁹ Under Islamic law” the father is the natural guardian of the child, but an exception to this rule is tender year principles where the son remains under the custody of mother till seven years of age and girls till their puberty.⁷⁰ The mothers have the unconditional rights over the tender years of their child unless they are not disqualified because of misconduct, adultery, and are not following under the interest of the child.⁷¹ Furthermore, for Parsi and christen law “section 49 of Parsi and divorce act 1936⁷²” for christen “section 41 of the Divorce act 1869⁷³” same as Hindu marriage act authorizes the court to give paramount consideration in the subject matter of interest of the child. Also, authorizes to pass the interim court order in favor of minors in the matters of Custody maintenance. Another legislation “Special marriage act 1954⁷⁴” furnishes a special form of secular marriage, the couple resorting under this act can also act for the purpose of custody of the child under section 38 which again vests the court to pass the interim order regarding custody of the child and for many more issues pertained to its interests.

⁶⁵ Bundesgerichtshof [BGH][Federal Court of Justice] July 14, 1956, Bayerisches Oberstes Landgericht (BayObLG) 350, 1956 (Ger.).

⁶⁶ Guardians and wards Act, No 8 of 1890, INDIA CODE (1993). (India)

⁶⁷ REFORMS IN GUARDIANSHIP & CUSTODY LAWS IN INDIA, Report No. 257 of the Law Commission of India, (2015).

⁶⁸ Hindu marriage Act, No 25 of 1955, INDIA CODE (1993) § 26. (India)

⁶⁹ *Supra* note 66

⁷⁰ *Supra* note 65

⁷¹ B.M. GANDHI, FAMILY LAW 200 (Eastern Book Company eds., 2nd ed. 2019)

⁷² Parsi and divorce Act, No 3 of 1936, INDIA CODE (1993) § 49. (India)

⁷³ Divorce Act, No. 6 of 1869, INDIA CODE (1993) § 41. (India)

⁷⁴ Special marriage Act, No. 43 of 1945, INDIA CODE (1993) § 38. (India)

3.3.1) Under various high court and supreme court judgments' considered the paramount interest of the childlike in "Sheoli Hati v. Somnath Das"⁷⁵ and also in "Saraswatibai Shripad Vad v. Shripad VasANJI Vad,"⁷⁶ where the welfare of the child was even considered higher than his parent's welfare.

Further there various cases laws in which this principle was more evolved and also acknowledged the conditioned elements of the adhering principles. In "Rosy Jacob v. Jacob A. Chakramakkal",⁷⁷ where the SC discussed that the purpose of these above mentioned legislature does not only mean physical custody but means custody and parental care in every aspect such as health maintenance, financial needs and morally they can grow to be a better person, which enlarges the scope of the welfare principle for children. In "Gaurav Nagpal v. Sumedha Nagpal,"⁷⁸ SC tries to widen the scope of welfare to include "moral and ethical welfare of the child". Though it also stated that the other rights in parallel to the child's interest as the "paren patriae jurisdiction cannot be ignored." Further in "Nil Ratan Kundu v. Abhijit Kundu",⁷⁹ SC observed that welfare principle is considered to be the positive test where it is not judging the parents that they are unqualified to get the "custody of the child" but only tries to secure the child interest in every aspect possible. Further, in "Roxann Sharma v. Arun Sharma,"⁸⁰ the SC in order to balance the right between the parents and the children the visitation rights are also granted depending on the different circumstances and facts.

3.4) Differences of perspective in numerous models

India's welfare principle is referred from the international conventions laws, but its implementation and enforceability is totally different from it because of its various subdivisions in the categories of various personal laws. But unlike English laws, India's gives consideration to the rights of both sides but is more inclined toward children's welfare, as it wants the ultimate benefit of all the parents and follows the golden rule of interpretation. But the English law is more inclined towards the parents' rights and refers to the stricter implementation of law as in the case of Ex parte Skinner case where the father had the custody of the child although the

⁷⁵Sheoli Hati v. Somnath Parsi and divorce Act, No 3 of 1936, INDIA CODE (1993) § 49. (India)

⁷⁵Sheoli Hati v. Somnath Das⁷⁵, (2019) 7 SCC 490 (India)

⁷⁶ Saraswatibai Shripad Vad v. Shripad VasANJI Vad, 1940 SCC Bom 77 (India)

⁷⁷ Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840 (India)

⁷⁸ Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42 (India)

⁷⁹ Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413. (India)

⁸⁰ Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318 (India)

interest of the child was lying with the mother.⁸¹ Further in the case of the civil law system the welfare principle is generally clearly defined under one code which describes all the rights generally and its implementation and provisions are different too. But In India it is defined under personal law which is different from every set of persons following the religion division. UK laws and Germany laws also differ so much with each other in provision, in representation and the ways they are opting for approaches and the judicial interpretation as the former differ more on child interest unlike the former.⁸² All of them are derived from the international convention but their enforcement, nature, manners of the application of law and the interpretation is different.

4) Conclusion and recommendation

The best interest principle developed initially as an international private law dealing with the critical subject matter, but domestically and timely it contrasts from place to place. Different conventions added different perspectives to this concept. “UNCRC” firstly initiated this principle internationally and other principles like “Hague convention and Convention by European Union” widened the scope of welfare concept and to add more aspects like visitation rights, habitual residence and parental responsibility. Further, after deliberating the legislature case laws of three countries, the differences which lie in them are of the representation, applicability, nature, procedure, enforceability and interpretation of the subject matter. Every country has its distinct set of experience, set of population structure and care which advanced the shape of welfare principle developing there. But all three have emanated from the same international private law but different domestically.

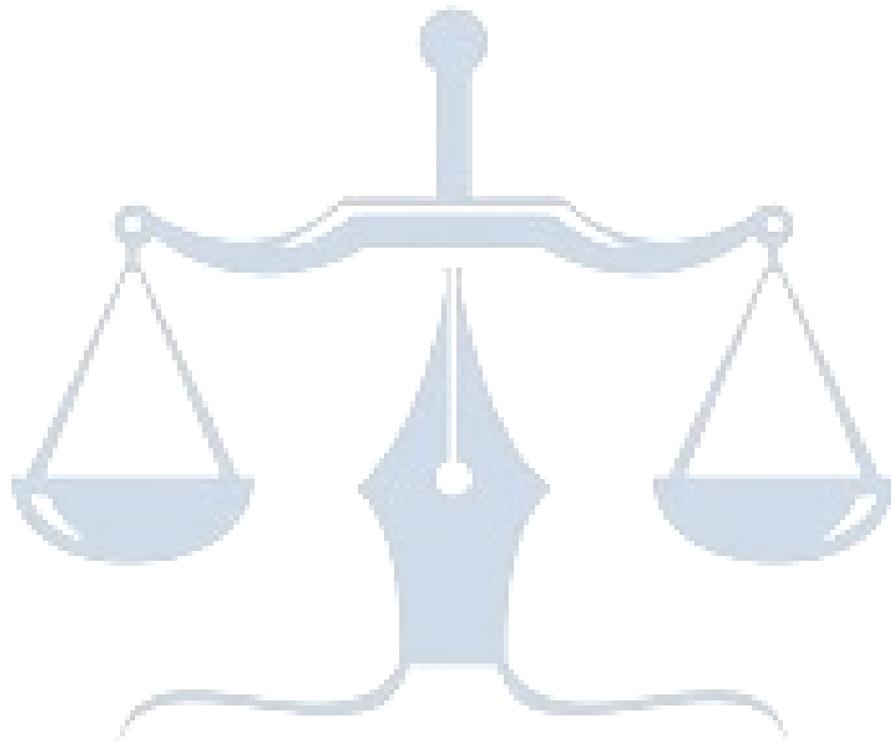
But there are many challenges which were observed in almost every welfare principle model; it might fail to achieve its purpose of securing the best interest of the child. Because it in some aspects tries to conceal the fact about the untested assumption in order to decide what is truly good for children. Happened in the case *Re M (Child’s Upbringing)*⁸³ where the children were removed from their family and sent into some place, in the name of applying welfare principles. Further, there are also some cases where other interests were paid no heed, which also raised the issue of “lack of fairness” and infringement of the right of adults because the parents are best to decide child’s welfare. There can also be the case where the parents are taking an

⁸¹ *Ex parte skinner* (1824) 9 Moore 278 (KB), (Eng.).

⁸² *Re Agar-Ellis* (1883) 24 Ch D 317. (Eng.)

⁸³ *Re M* (1996) 12 FLR 441. (Eng.)

unwanted advantage of the children, and then the law, judges, welfare services and other experts should step in. These problems need to be addressed to advance the welfare principle. For that we need to create the system where lack of transparency and fairness can be reverted back. It can be done only when the different principles and laws are interpreted wisely by considering everybody's interest and rights, towards the legal aim of securing a child's interest in every aspect.



WHITE BLACK
LEGAL