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INTERNATIONAL STATUTES AND CONVENTIONS RELATINGTO CHILD CUSTODY AND GUARDIANSHIP: COMPARATIVE STUDY

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Abstract:

This comparative study explores international statutes and conventions pertaining to child custody and guardianship, emphasizing the evolving recognition of the social interest in safeguarding childhood. Across various jurisdictions, there is a growing acknowledgment of the imperative to ensure that every child develops into adulthood without hindrance. This shift entails prioritizing the welfare of children over parental rights in legal adjudications. The English legal framework for custody and guardianship, while not consolidated into a single enactment, reflects this trend through a mix of statutory and non-statutory provisions. Over the past century, legislation in this area has increasingly delegated regulatory authority to the state, with parental rights taking a backseat to the paramount concern for the child's welfare. Additionally, this study briefly explores notable features of Roman law before delving into English legislation on the subject.

Keywords: child custody, guardianship, welfare of the child, parental rights, international statutes, comparative study, legal framework, legislation, state regulation, Roman law.

1. Introduction:

The modern law all over the world is now veering around the proposition that there is a social interest in the protection of childhood; a child is to be accorded protection just because it is a child and “its birth within or without the lawful wedlock is hardly a factorto be taken into consideration.” The modern world is also accepting, now more readily,that there is a social responsibility to see that every child grows into adulthood as a normal human being without any drawbacks or inhibitions. Guardianship laws of most countries now accept that in all adjudication in respect of children, the uppermost consideration is the welfare of children so

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much so that even parental rights are subordinated to it.[1]

The English law of custody and guardianship of children introduced not found or codified in one single enactment. So much of it is statutory is scattered in several enactments. Partof it is still non-statutory.

Legislation on the subject, particularly the statutes passed during the last and half a century or so, shows that much of the field has come to be regulated by the State. The rights of the parents have receded into the background, while the welfare of the child has come into the foreground. Before we deal with the legislation in England it would be appropriate to refer certain interesting features of the Roman law.

2. Position of minor in earlier Roman law

In the early days, no other nation dealt with the subject of minors and their guardians so distinctly and elaborately as the Romans. In their early concept, they realized the necessity of guardians for the orphans predominantly. The right and duty bearing unitwas the family (familia) with its eldest member (pater familias) as its head and not any individual. While the children were under the father's power (potestas), their care and protection were not the concern of Roman Public Law. In early Roman thinking, attainment of puberty simply was not tantamount to sufficient maturity to look after one's own affairs. The age of puberty was "14 years for males and 12 years for females."

The two distinct classes of guardians in vogue for all orphans, males and females, were known as- (i) tutors (tutela impuberum) and (ii) curators (curaminorum). They were only in vogue respectively till the attainment of puberty and for person sui juris, i.e. tillthe period below the age of 25 years.

Originally the nearest male agnate (tutela agitima) and in the absence of an agnate the nearest cognate and, according to Justinian, the nearest capable ascendant was eligible to be "tutor" or a statutory guardian. Testamentary guardians had preference over such"tutors". In case of non-availability of such persons, Roman Magistrates used to appoint tutors dative after having them

[1] "Guardianship of Minors Act 1971" § 1, "Hindu Guardianship Act 1956" § 13,Kvartshav v. Redkova no. 36/677, (1946) 9 Sud. Park, USSR 4.

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satisfied about such appointee's fitness, either with or without security. The mother of the infant had no power whatsoever to appoint a regular testamentary guardian. With the confirmation of the court, she could, however, appoint a guardian for the property she was leaving for a minor child.

Tutors auctoritus was a legal necessity to bind down the minor sufficiently. During Justinian time, the appointment of a curator was obligatory when the minor wanted to (i) engage in a law suit; (ii) receive payment of debts, and (iii) have accounts of administration from the former tutor. The functions of tutor and curator were practically confined to administration of the minor's estate. The person of minor, so to say, was no concern of them.

3. Statutes relating to minor under English law

3.1. Position prior to 1989

English law in the early days recognized various kinds of guardianship, which are nolonger in existence. Guardianship was more a right than an obligation. Guardianship was rooted in the feudal system: guardians were largely concerned with the property of the child heir. "The Court of Chancery developed the concept of the Crown as parens patriae for infants who needed protection. Guardianship became the instrument for maintaining the father's authority over the children."[2]

3.1.1 Talford's Act 1839:

It is the Talford's Act 1839,[3] since when right gradually developed into an obligation. Paternal control which was wide and sweeping over the infant's person was least concerned with its property. Along with the principle of "welfare of the child," there commenced gradual burdening of paternal control with obligations. Father's absolute right over his children appears clearly from Lomlly, in re,[4] where Vice-Chancellor Bacon observed that the Court of Chancery had "no right to interfere with the sacred right of the father over his children." The same view was taken in *King v. De Mannerville*[5] and *R. v. Henrietta.*[6] It was indicated by Lord Chancellor

[2] STEPHEN M CRETREY, JUDITH M. MASCON AND REBECCA BAILY-HARRIS, PRINCIPLES OF FAMILYLAW, 7th Ed.
[3] FLAVIA AGNES, FAMILY LAW: Vol. 2: MARRIAGE, DIVORCE, AND MATRIMONIAL LITIGATION, Oxford University Press.
[4] 47 LT (NS) 284.
[5] (1804)1 KB 5 East 221.
[6] (1836) 4 A& E 624.

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Elden that the Court of Chancery could, by way of superintendence, exercise the jurisdiction in case of father's unwillingness or inability to discharge his duties or when he was actively proceeding against normal paternal rights. In his view, the superintending power over such children, who could not take care of themselves and had not the benefit of that care, should restwith the Court of Chancery.

In *Wellensley v. Wellensley,*[7] Lord Redsdale opined that where father had abused his right by himself living in adultery and encouraging his children in swearing and in keeping low company, the court had the power to intercede. They were all cases before the Talford Act, when in British Common Law mother had absolutely no right whatsoever even with respect to the custody of or access to her children. But even thenthe Chancery Court, in Takbat and Earl of Shrewsbury, intervened in the matter and gave the custody to the mother in preference to that of testamentary guardian, but made it sufficiently clear that the mother had under the law on right whatsoever to intervene with a testamentary guardian. In *Ball v Ball,* whatsoever, the court refused the mother not only the custody but access too. It is, however, awfully clear that the Chancery Court refused to interfere with the father's right over his children except under very exceptional circumstances of gross misconduct or serious unfitness.

By the Talford's Act 1839, "in the interest of the child,""the mother's right to havecustody up to the age of the seventh year of the child" and also her "right of access" was recognized, where the mother was not guilty of adultery. Thus, the idea of welfare of the child came in prevalence. But this did not prove adequate against the absolute domineering right of the father over his child, which was unfeasible to interfere under the Common Law unless gross misconduct on the part of the father was established.

Where marriage of parents of the infant was the subject matter of the proceeding under either Matrimonial Causes Act 1857, or Matrimonial Causes Act 1859, the Courts were vested with wide jurisdiction in "matters relating to custody, education and maintenanceof the child." But even then the position of either of the parents remaining practically the same as before s. 25 (10) of the Judicature Act 1873, first provided for the prevalence of "rules of equity in matters relating to custody and education of infants."

a. Custody of Infants Act, 1873

In the same year, repealing the Talford's Act 1839, the Custody of Infants Act 1873 was passed

[7] De Mannerville v. Mannerville (1804)10 Ves 52; 56 RR 348.

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raising the age of the child to 16 years for the purpose of custody with the mother and introducing the corresponding right of the father's and the guardian's access. But even this Act not having proved sufficient to impinge the father's right, the passing of the Guardianship of Infants Act 1886, and the Prevention of Cruelty to and Protection of Children Act 1889, was necessary. The former Act recognized the mother as a guardian for her children on the father's demise and empowered her to appoint a testamentary guardian. She was also given equal right with the father regarding custody of and accessto children.

b. Guardianship of Infants Act, 1886[561]

This further extended the provision of the earlier Acts by empowering the court to givethe mother custody until of her children till they reached the age of 21. Furthermore, the father was now stopped from defeating the mother's rights after his death by appointing a testamentary guardian, for it was enacted that the mother was to act jointly with guardianso appointed, and for the first time she herself was given limited powers to appoint a testamentary guardian.

c. Custody of Children Act, 1891

Then the Custody of Children Act 1891 was introduced for empowering the court to refuse custody to the parents in case of desertion or abandonment of the child. It provides that if a parent has abandoned or deserted his or her child , the burden shall shifts on them to prove that they are proper and suitable for custody claimed and that the court may refiise to give him possession of the child altogether (Section 1). Moreover, "if at thetime of parent's application for custody the child is being brought up by another person,the court may now, upon awarding custody to the parent, order him to pay the whole or part of the costs incurred in bringing it up."

d. Guardianship of Infants Act 1925[8]

It may be noted that the Act of 1925 gave the statutory effect of the rule that in any custody dispute, the court must consider its "welfare as the first and paramount consideration." It also completed the process of assimilation of the parent's rights by enacting that neither the father nor the mother should from any other point of view of superiority to the other and by giving to the mother the same right to appoint testamentary guardians as the father.

In [1893] 1 ch786, Lord Justice Lindley In re, McGrath for the first time laid down categorically

[8] R. W. VICK, C. F. SHOOLBRED, ELSEVIER, THE ADMINISTRATION OF CIVIL JUSTICE IN ENGLAND AND WALES: p. 84, 18-May-2014

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that, “the moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”He indicated that the supreme consideration should be "the welfare of the child”as incorporated in the Guardianship of Infants Act 1925.

In the matters of guardianship and custody of children like powers to apply were recognized under this Act for each of the parents, the paramount consideration being welfare of the infantas a ipso facto principle took its evolutionary wings for the first time vide this Act and the aspects of pernicious dominance of gender disparity was on verge of dissolving.

e. Children Act of 1953

The position in 1953 was as follows: "Subject to this fundamental principle (welfare ofthe child) an infant's father still remains his sole legal guardian during his (the father's) life time, but this fact, of 67 Chapter-II courses, adds little, if anything, to the father's primary position as a parent. On the father's deed, the infant's mother becomes, either sole guardian or guardian jointly with a guardian appointed by the deed or will of the father,or, in default, by the court. And even during the father's life time, the mother has thesame right to apply to the court in respect of any matter affecting the infant as the father has, and an equal right to appoint by deed or will a guardian to act after her death as co- guardian with her surviving husband, or if he is dead, the Guardian appointed by him. In the event of differences of opinion between the surviving parent and the guardian appointed by the deceased parent, the court may award sole custody of the infant to either, as it may consider best for the welfare of the infant"

f. Guardianship of Minors Act 1971[9]

The Guardianship of Minors Act 1971 was passed consolidating provisions of “guardianship and custody of minors” by repealing the Acts of 1886, 1925 and 1951. Sections 1 to 6 of that Act provided that, the court shall consider the welfare of minor in custody or the administration of any property belonging to minor.

“The provisions relating to custody, upbringing of minors are to be decided” is thus laid down in the Act of 1971. “Where in any proceedings before any court (Whether or not a court as defined in section 15 of this Act): The custody or upbringing of a minor; The administration of any property belonging to or held on trust for a minor, or the application of the income thereof

[9] The National Archives, *available at:* https://www.legislation.gov.uk/ukpga/1971/3/contents.

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is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take in to consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, up-bringing, administration or application is superior to that of the mother or the claim of the mother is superior to that of the father".

g. Children Act of 1973

It provides "the equality of parental rights" in these terms: "1 (i) in relation to the custody on upbringing of a minor, and in relation to the administration of any property belongingto or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows a father and the rights and authority of mother and father shall be equal and be exercisable be either without the other."There is inherent and discretionary jurisdiction with the high Court relating to wardship.

Finally, the law relating to Habeas corpus, in so far as it deals with the recovery of minors below the age of discretion is also relevant side by side with this legislative developments as to guardianship and custody, legislative measures for the welfare of the children have come in quick succession with the passage of latest Act on the subject Children Act 1975. This branch of the law has become a fairly complex one in England. The object of legislation relating to children is "to provide for the care, protection, maintenance welfare, training, education and rehabilitation of neglected and delinquent children and for the trial of the later."

3.2 POSITION AFTER CHILDREN ACT 1989

3.2.1. Children Act 1989

Numerous pieces of previous legislation have now been repealed and replaced by the Children Act 1989[10] and it inducted fundamental changes at least in three basic concepts namely 1.

a. Parenthood replacing guardianship.

b. Parental responsibility replacing the concept of parental rights and duties.

c. Introducing new powers to make residence orders rather than custody orders.

"In order to safeguard and to promote welfare," the Act of 1989 allotted duties to authorities, courts, families and agencies. The prime concern of the Act is best cared within their own

[10] British Medical Journal, *Children Act 1989,* BMJ, Vol. 299, No. 6714 (Dec. 16, 1989), pp. 1482- 1483 (2 pages)

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homes. It also provides provisions for statutory bodies' n case when parents and families do not cooperate.

3.2.1.1. Welfare of the child

"The welfare of the child is the prime concern of the courts." It also notified that in caseof delay in adjudication of child's cases will have an impact on a child's welfare. The court while deciding the particular case should take into account "age, sex, background, child wishes, emotional and educational needs which likely effect of the change on the child, parent's capacity to meet child needs and powers of the courts."

3.2.1.2. Parental responsibility

Section 3 of the Act has defined the word parental responsibility.[574] It is the responsibility of parent towards the child and his property. Section 4 talks on the responsibility of both when both have legally married to each other, if they are unmarried at the time of birth of the child, the father of the child may apply for parental responsibility to court or by mutual agreement. It can be decided between the mother or child and father. Section 5 of the Act provides that "guardian may be appointed if there is no one to take care with parental responsibility." Section 6 of the Act provides that an appointment of guardian can be changed vide the application of the parent. The court can order to submit reports to courts on the welfare of the child.

3.2.1.3 Different Orders in the family proceeding

Besides two new orders have been introduced by the Act, one is the 'prohibited steps orders' and the other is 'Specific issue orders'.

a. **Contact order:** it is an order which requires the person to allow (with whom child resides) to contact with another person.
b. **Prohibited steps orders:** it prohibits a parent from exercising full parental responsibility without the cogent approval of the court.
c. **Residence order**: (child arrangement order) arrangement for which a child should live with. The person who wins the order has parental authority over achild.
d. **Specific issue order:** order relating to parental responsibility for a child.
e. **Family assistance order**: probation officer or any officer is directed to advice, assist the family.

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All these orders are passed under s. 8 of the Act. Again s. 44 of the Matrimonial CausesAct 1973 has been amended so as to direct the courts while dealing with divorce, nullity or judicial separation proceedings to consider "whether there are any children of the family to whom this section applies and where there are any such children, whetherThe court should exercise any of its powers under the Children Act 1989 with respect to any of them."

Section 41 would apply to "children under the age of 16 years and they must be of the family," i.e. in relation to the parties to the marriage which would cover adopted childand child privately fostered and treated the member of the family. Section 8 of the Children Act 1989 is an important feature of the statute and emphasizes the well-being of the child, which should be a pre-eminent or imperative consideration with the court, being the pivotal principle of any court determines any matter in reference to "(a) the upbringing of the child; or (b) the administration of the child's property or income, the welfare of the child is the fundamental consideration of the court."

Section 10 of the Act formulates provisions concerning who is competent enough to apply for the order. Any party to a marriage in relation to whom the child is a child of the family besides parents and guardian are naturally competent to apply. Even the child himself and anybody, authority or organization professionally concerned with children who are not otherwise entitled To apply, to ask for "leave of the court to apply for section8 orders." So under the present law even the child may apply for leave without a next friend and while granting the leave the court must be satisfied that the child has sufficient understanding in making the proposed.

Again under the Children Act 1989 guardianship is distinguished from parenthood and soa guardian from a foster parent. The children Act made parenthood not guardianship the primary concept, parental responsibility replaced parent's rights and duties and the courts now make decisions about the child's residence and not custody. "The concept of parental responsibility means the power of the parent in term of responsibility not rights and locates the objection to come for children with the parents not with the state. Modern concept is based on "custody" was used to describe "the primary responsibility for the up- bringing of children" rest on their parents. the term custody was used to describe a factthe child being under the adult's physical control, a child custody and a state of law the rights, control the child physically, that is, legal custody.

The law of guardianship is now exclusively controlled by the 1989 Act. Parents are no longer regarded as guardians and generally, no guardians will be parents. Any parent or any guardian may appoint a guardian for the minor if the minor is under 18 yrs of age. "Such appointment is

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made in writing and signed by the persons who made it." The court may on its own appointed guardian or any interested person or the child himself may seek leave to appoint any person as guardian.

The adoption law has also been substantially amended and proceedings under the Adoption Act 1976 have been designated by s. 8 (4) of the Children Act 1989 as family proceedings'. The courts are now to make s. 8 orders in this field as well as of making an adoption order keeping in mind the child's welfare of paramount consideration. The Adoption and Children Act 2002 have made significant amendments to the provisions of the Children Act 1989. "The Welfare Reform and Provisions Act 1999, the Child Support, Pensions and Social Security Act 2000 and Human Rights Act 1998 have a great impact on the status of the children."[11]

CONCLUSION

In India Guardians and Wards Act was passed by Britishers with the legacy of common law and keeping the supremacy of parental rights in custody and guardianship. Still section 7 and Section 17 of the Act were available for courts to act in "welfare of the child." Section 19 and Section 25 of the Act of 1890 subordinate to the supremacy of the father. The concept of "welfare of the child" has been mentioned in the Act of 1890.[624] However it is a thread that is visible at some place but gets blurred elsewhere by being entangled with others. It needs now to be painted in glowing colours.

The laws of guardianship and custody has come a long way from absolute power over children to evolution of principle of "welfare of the child to be the sole and paramount consideration" in deciding guardianship and especially custody. This evolution happened has been extensively been discussed in the present research.

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