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THEORIZING CUSTODY JURISPRUDENCE AND THE BEST INTEREST PRINCIPLE IN SOUTH ASIAN COUNTRIES

AUTHORED BY - SYED MUJTABA ATHAR

Abstract:

This paper aims to provide a theoretical framework for analyzing custody jurisprudence and the best interest principle in South Asian countries. The paper first discusses the need to break free from the critique-based explanation strategies that have long guided custody jurisprudence and family law. The paper then explores the international framework of jurisprudence for ensuring the rights of children, particularly the UN Convention on the Rights of the Child (CRC), which has expanded the horizon of reading the child rights into the interdisciplinary and comprehensive framework of legal protection within the international norm as well as private family law. The paper further examines the concept of the best interest of the child, which serves as an anchoring consideration in both public and private international law for the implementation of any international framework that seeks to safeguard and protect the rights of the children. Finally, the paper discusses the various constituent factors making up the concept of welfare, including religious, intellectual, physical, social, and emotional welfare, parental capacity, the wishes of the child, and keeping siblings together. The article also highlights the importance of ethical judgments and a pluralistic approach to family law, as opposed to presenting a false unity of legal regulation. Ultimately, the article concludes that further research is needed to better understand the determinants of the best interest principle and their implications for policymaking in child custody laws.

Keywords: family law, best interest principle, child custody determinants, UN Convention on the Rights of the Child.

1. Introduction

The legal regulation of family relationships and the welfare of children within those relationships is a complex and multifaceted area of law that has significant implications for families, individuals, and society at large. The challenges posed by custody disputes, child abduction cases, and other related issues have prompted a great deal of scholarship and jurisprudence aimed at developing a theoretical framework for understanding and addressing these problems. This article aims to contribute to this body of work by examining the role of theoretical frameworks and international law in shaping the jurisprudence and practice of family law, with a specific focus on the best interests and welfare of the child.

The first section of this article explores the various theoretical perspectives that have been proposed for understanding family relationships and the legal regulation of those relationships. It argues that while the public/private dichotomy has been a common approach to operationalizing family relations, this dichotomy has limitations and may not be the most effective way to approach the problem. Instead, the article suggests that a more nuanced and context-specific approach is needed that takes into account the particular circumstances and concerns of individual families and children. In doing so, the article draws on the ideas and writing style of legal philosopher Gillian Douglas, who has argued that a comprehensive theory of power or a systematic politics of social change is not necessary for effective social analysis and action.

The second section of this article focuses on the best interests and welfare of the child, which is a key concept in international law and a critical consideration in any custody dispute or related legal matter involving children. The article explores the various legal instruments and frameworks that have been developed at the international level to safeguard the rights of children and ensure their well-being, including the UN Convention on the Rights of the Child and the work of the Hague Conference on Private International Law. It also examines the determinants of the best interests of the child, including religious, intellectual, physical, social, and emotional well-being, as well as parental capacity and the wishes of the child. Drawing on the legal jurisprudence and scholarship from various jurisdictions, the article argues that a holistic and contextual approach is necessary to determine the best interests of the child, and that the various determinants must be weighed and considered as a whole.

In sum, this article seeks to contribute to the ongoing discourse and scholarship surrounding family law and the best interests and welfare of the child. By drawing on the ideas examining the complex legal frameworks and determinants that shape the practice of family law, the article aims to provide a comprehensive and nuanced understanding of this critical area of law and its implications for families and society.

2. Custody Jurisprudence and Family Law: Theorizing Family Law

Where should we go when beginning to theorize about the family, its legal regulation, authority, and vulnerabilities? The public/private dichotomy, under which family relations, such as child custody and care, are operationalized, is a common dichotomy that has been embraced. Before embarking on such an examination, it is essential to note that any social analysis that is to be relevant and faithful to its purpose must break free of the critique-based explanation strategies that have long guided its efforts.¹ For academics and policymakers, criticism provides a variety of benefits: it simultaneously seeks to explain, evaluate, and recommend an alternative. Breaking with criticism reveals a multiplicity of behaviours and abilities that are resistant to global scrutiny and evaluation. Consequently, they do not recommend the development of a comprehensive theory of power or a systematic politics of social change. Rather, they advocate a more modest task: beginning with particular issues or concerns, revealing the circumstances and assumptions that have permitted them, as well as the benefits and drawbacks they entail. These questions generate ethical issues that cannot be answered by political slogans and need difficult and compromise-inducing ethical judgements. The purpose to this discussion is to emphasise the many dichotomies and divisions proposed by theorists in order to comprehend and criticise family connections, which are crucial to comprehending the custody problem and associated modalities. What about family as the site of female subjugation? This is one extremely popular theme amongst the scholars based on the public-private dichotomy of family life, including decisions and control over child custody and welfare.² The other theme is the care, obligation and commitment in family relation suggested by Professor Douglas.³ This section will discuss these two approaches.

¹ (W. Said, 1993)

² See, for example, (Asha and Beniwal, 2012; Tawhida, 2019)

³ (Douglas, 2018)

2.1 *The Public-Private divide*

The public-private divide parallels comparable discussions on perennial topics such as morality, sexuality, marriage, reproduction, and child custody. How much should the government intervene in the lives of its citizens? How well do government agencies make decisions on care, custody, and other issues? Which aspects of morality are important to the general population, and which are not? Is there an area of private life and personal morality where the law has no jurisdiction? Have state acting as *parens patriae* has colonised families at the expense of personal freedoms and formal legal protections? Add to this the complexity of oriental biases inherent in the imperial western world against the people of color.⁴ The questions have been around for a long time, and the issues appear to be both critical and eternal. This dichotomy of public/private constitutes the liberal construction of the world around us.⁵ It is argued that it is one of the many opposites that shape our consciousness.⁶ In law, it serves less as an analytic instrument or means of judging cases than as a sort of political rhetoric used to explain value judgments.⁷ It acts more as a legal fiction that can bind judicial reasoning to existing values and belief. One such legal fiction is the state classifies certain areas of life as "private".⁸ The critical legal analysts argue that the ideology of individual choice and personal freedom in the private domain of home and family justifies a refusal by public authorities to intervene in certain places, activities, relationships, legal regulation of marriage, divorce, child custody.⁹ Designating them as personal, private, and subjective makes them appear to be natural and outside the reach of the state, yet non-intervention is a socially constructed, historically variable, and inescapably political decision. Reform strategies by these critical legal scholars of public-private dichotomy seek to increase public law regulation of family relations; against the resolution of family conflicts informal means like negotiation and settlement; non-judicial dispute resolution forums such as conciliation and family courts, and advocate that the powers, duties, and responsibilities of parties to domestic arrangements should be defined, discussed and criticized.¹⁰ Commonly, conciliation and family courts are represented as ways and institutions that would increase the private parties' abilities,

⁴ (Brunotte et al., 2014; Edwards, 2014) For a general reading on the subject, see, (SAID, 2003; W. SAID, 1993) (Gramsci, n.d.). Gramsci would call this phenomenon a cultural hegemony of the cultural elites.

⁵ (Kennedy, 1982)

⁶ According to Kennedy, the other dichotomies of the liberal world arguably are: These distinctions are state/society, public/private, individual/group, right/power, property/ sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/ fiat, freedom/coercion.

⁷ For a comprehensive analysis of the concept of legal fiction and how it operates to formulate jurisprudential thinking and interpretation in law, see also, (DWORKIN, 1986); Also, (Vining, 1987)

⁸ (Rose, 1987)

⁹ (Freeman, 1985); (Bottomley, 1984; Olsen, 1983); (O'Donovan, 1985)

¹⁰ (Freeman, 1985); (Olsen, 1983)

capacities, autonomy, and accountability while decreasing damaging conflict and safeguarding their interests. According to critics of the public/private divide, reducing such controls as flow from formal legal hearings - legal representation, due process, etc. - will have different consequences: ignoring real conflicts in capacities, situations, and wishes; denying power inequalities; and, in general, increasing the authority of welfare professionals over family members and men over women. In addition, the expansion of mediation and family courts is viewed as a pleasant language concealing an increase in governmental authority.

2.2 Obligation and Commitment framework in Family Law

The obligation and commitment framework are a theoretical framework that seeks to explain the nature of family relationships and the legal obligations that arise from them. It proposes that family relationships are based on mutual obligations and commitments between family members, which are not necessarily enforceable by law. However, family law can be used to regulate these obligations and commitments in certain circumstances. Thus, the notion that the family can be private in the sense of being unregulated by the state is not true if we observe.¹¹ The state cannot resist interfering in the formation of family relationships to sanction and codify everything related to marriage, divorce and custody issues.¹² Conversely, the state has built sophisticated welfare procedures, particularly those relating to the overall development of children, through public legislation. No matter how powerful the legal ideology of family privacy is, legal functionaries make decisions about children's best interests and welfare in cases involving child custody and guardianship, as well as other aspects of family disputes, based on ideological and patriarchal notions about morality, responsibility, and family life, and what is best for children.¹³ Additionally, it fails to express the complexities of authority in family structure, as well as the duties, obligations, sufferings, and joys that have been shaped by the state, religion, economic production, culture, and traditions. This is not to dismiss the extent to which many areas of family life disadvantage women, or the failure of legislation and enforcement agencies to address this inequality.¹⁴ Accepting all of this, feminist criticisms and suggestions will be of little use unless they provide a fruitful understanding of the new kinds of power and authority that have evolved in the modern world, as well as the tactics they use. Also from a functional perspective, the public-private dividing taxonomy is erroneous and misleading for exactly four reasons. First, it obscures

¹¹ (Douglas, 2018)

¹² (Rose, 1987)

¹³ (Rose, 1987)

¹⁴ (Herring, 2001)

the degree to which the state permits the child welfare system to impose social standards on the family life of specific groups of individuals, especially women in their roles as spouses and mothers. Second, it covers the reality that men's right to privacy is often abused to oppress women and children. Thirdly, it is puzzling that the government determines both the limitations and the boundaries of privacy. Lastly, it legitimises the state's legal unwillingness to intervene in specified sectors or relationships.¹⁵ Therefore, it is reasonable to infer that the public-private dichotomy, although aiding in the creation of a lens for understanding family relationships, does not provide answers to some of the most important problems raised at the outset of this chapter.

2.3 The need for ethical judgments

The need for ethical judgments in family law is crucial. The role of law in regulating family relationships involves complex ethical issues that require consideration and resolution. In family law problems, there is no clear distinction between the public and private sphere. Legal jurists and legislators, using a range of legal pedagogies in their work, were responsible for the evolution of the family law. Inheritance, marriage, divorce, custody, and child protection are just a few of the sectors of law that utilise several legal statuses to define their separate aims and authority. Throughout history, the law has evolved its approach to regulating each of these diverse familial relationships at various times and in response to altering concerns. They use distinct types of judgement and strategies for executing the law, and have their own unique interpretations of key terms. The variability of legal regulation should serve as a reference to the law's social intelligibility and, perhaps, as the key to a policy plan that is a response to it. Therefore, it is humbly submitted that rather than presenting the variety of legal regulation a false unity, the pluralistic approach makes more sense. A pluralistic approach acknowledges that different people have different values, cultures, and beliefs, and therefore there is no single solution that can work for everyone. Rather, it emphasises the importance of considering the unique circumstances and context of each family and encourages the use of a wide range of legal mechanisms to address family law issues. By embracing this approach, we can begin to develop a more comprehensive and effective framework for addressing the complex and varied needs of families in today's society.

¹⁵ (Rose, 1987)

3. International Framework of Jurisprudence for Children's Rights

International law has laid down a comprehensive framework of jurisprudence for ensuring the rights of the children. International law through treaties and customary law has played a great role in establishing norms and standards for safeguarding the rights of the children. The United Nations Organization with its principal organizations as well as subsidiaries and network of NGOs in human rights organization has been pivotal in the enforcement of children rights and ensuring that these rights are respected and protected.

3.1 The United Nations Convention on the Rights of the Child (UNCRC)

UNCRC is an international treaty that sets out the civil, political, economic, social, and cultural rights of children. It was adopted by the United Nations General Assembly in November 1989 and has been ratified by almost all countries in the world, except the United States. The UNCRC recognizes that children have the right to participate in decisions that affect their lives, including decisions about their custody and care. The Convention requires that the best interests of the child be a primary consideration in all actions concerning children, including custody proceedings. Article 9 of the UNCRC states that children have the right to maintain contact with both parents, unless it is contrary to their best interests. This means that custody orders should be designed in a way that allows children to maintain relationships with both parents, unless there are compelling reasons to do otherwise. Article 12 of the Convention further states that children have the right to express their views in all matters affecting them and to have those views given due weight in accordance with their age and maturity. The UNCRC has played an important role in shaping international child custody jurisprudence by emphasizing the importance of the best interests of the child and the child's right to participate in decisions that affect their lives. It has also helped to establish a framework for international cooperation in cases of cross-border child custody disputes, such as the Hague Convention on the Civil Aspects of International Child Abduction.

3.2 Legal instruments through HCCH for the protection and well-being of the various concerns related to child rights

This broad and significant framework of UN CRC was strengthened by the promulgation of various legal instruments through HCCH For the protection and well-being of the various concerns related to child rights. In particular, non-recognition and enforcement of the custody order, particularly in interstate child abduction cases, violates right of the child to have contact

with both parents against the child's will.¹⁶ The two most important contribution of CRC has been the concept of the interest of the child as well as Childs participation in proceedings which serves as an anchoring consideration in both public and private international law for the implementation of any international framework that seeks to safeguard and protects the rights of the children. However, strangely none of the legal instruments have elaborately described and identified the key elements that may constitute the best interest of the child. Due to any definite clarification on the subject, an absence of objective parameters to determine what constitutes the best for the children's welfare, it has led to interpretations and subjective judgments.

4. The Best Interest Principle in South Asian Countries

In addition to the international legal frameworks that guide the determination of the best interests of the child in custody cases, many jurisdictions have their own specific determinants. In particular, countries like Ireland, the United States, Germany, and the Netherlands have elaborated on the various factors to be considered when determining the best interests of the child. In South Asian countries, however, there is no statutory definition of what constitutes the best interest or welfare of the child. Nonetheless, many judicial decisions have listed and discussed

¹⁶ UN Child Right Convention, 1989 Article 9:

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

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

UN Child Right Convention, 1989 Article 10:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

various determinants of the best interest principle. For the purposes of this article, we will examine the constituent factors that make up the concept of welfare in South Asian jurisdictions. By virtue of constitutional and statutory mandates, the meaning of the term “welfare” for the purpose of custody jurisprudence in South Asia is quite widely defined. It includes the religious, moral, intellectual, physical and social welfare of the child in question. The Guardian & Wards Act (GWA) enacted during the British rule of India, still constitute the governing law for Bangladesh, India and Pakistan. It makes it abundantly clear that in considering an application relating to the guardianship, custody, or upbringing of a child, or to the administration of property belonging to, or held in trust for, that child, or to the application of the income of the child, the court must have regard to the welfare of the child. It is court’s first and paramount consideration but not the only consideration. But it does mean that if there is a conflict between the welfare of the child and other considerations, the welfare of the child should be weighted above other possible considerations in line with the nation’s obligation under the UN Convention on the Rights of Child, 1989.

Although no statutory definition exists in any of the South Asian countries with respect to what constitutes the welfare of the child, many other jurisdictions like Ireland, USA, Germany and Netherlands have elaborate determinants to establish the best interest of the child and have been elaborated here.¹⁷ Apart from this, many judicial decisions in South Asian jurisdictions also enlists and discuss determinants to the best interest principle. For the purpose of this thesis, all the constituent factors making up the concept of welfare shall be dealt with in turn. This is not to suggest that each of these factors must be considered in vacuum. It is suggested that the court may consider all these factors as a whole rather than as a series of distinct matters. A process whereby when all the factors, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighted the course.

¹⁷ For example, in Ireland, Chapter IV, S-31(1) of Child and Family Relationship (Amendment) Act, 2015 enlists 11 factors and circumstances that a court must consider to determine the best interest of the child. See, electronic Irish Statute Book (eISB), “Determining the best interest of the child, Insertion of Part V in Act of 1964, Child and Family Relationship Act, 2015” (Office of the Attorney General) *available at*: <https://www.irishstatutebook.ie/eli/2015/act/9/section/63/enacted/en/html> (last visited January 6, 2023). Similarly, although there are difference in various state laws related to what constitute the factors for determining the best interest of the children, the federal children’s bureau enlists five factors that covers the different factors enlisted under various states statutes in the USA. These factors can be found here, (CHILD WELFARE INFORMATION GATEWAY, 2020)

4.1 Religious Welfare

Generally, the courts have proved anxious not to disturb the religious and moral formation of the child in question. Thus, the courts have often refused to give custody of the child to parent who was in relationship with a person other than that of the child. On the other hand, it seems in violation of the constitutional mandate that a person may be denied a custody on the basis of his or her religious persuasion. Hence, we find tension between the constitutional preference for free practice and promotion of the religion, and the constitutional rule against discrimination on the basis of religious profession, status or belief. A different religious inclination is however, not an absolute bar to custody. One possible solution is to grant custody subject to a condition as to religious upbringing of the child.

It is suggested then, and with respect to the religious sensibilities of the parties involved, that this factor must be considered in the light of the overall welfare of the child. It is obvious, for instance, that a parent who is otherwise unsuited to have custody of the child, should not be allowed to use religious difference as a “trump card”, displacing all other considerations. According to the Halsbury’s Laws of England, the mother of an illegitimate child has the right to determine the religion of her child, so long as her duty to support the child remains, which is up to sixteen years of age. However, it is important to highlight that apart from the Irish case, the author has found no case determined by any courts in England or any standard textbook determining this law. In India, the Madras High Court in the case of *Pamela Williams v. Patrick Cyril Martin*¹⁸, rejected to be governed by Halsbury’s provision and denied the child custody to the mother of the illegitimate thirteen-year-old child.

4.2 Moral Welfare

In addition to the spiritual well-being, the court should also have regard to the appropriate moral formation of the child. Formerly, it was considered that where a parent was residing with a parent not his or her spouse, the lifestyle of such parent was not conducive to the moral welfare of the child. In an English case of *JJW v. BMW*,¹⁹ for instance, the Supreme Court of United Kingdom refused to award custody of three children to a woman who had committed adultery. By virtue of her conduct, the court believed that the father was the party more likely to safeguard the children’s welfare than the mother. Fitzgerald J. observed that:

¹⁸ (1969) 2 MLJ 171

¹⁹ (*JJW v. BMW*, 1976)

*“The fact is, however, that the home which [the mother] has to offer to the children is one in which she continues an adulterous association with a man who has deserted his own wife and his own two children. An unhealthier abode for the three...children would be difficult to imagine”*²⁰

It is criticized on the basis that the judges in the English Supreme Court relied on a very narrower view of morality, one unduly focused on sexual matters, to the virtual exclusion of more general consideration of morality. This is a circumspect attitude that needs careful consideration. It is again suggested that, although the moral welfare of children remains a factor of importance, the consideration of moral propriety cannot displace the overall function of the court in determining what solution is in the best interest of the child.

4.3 Intellectual welfare

The factor concerns the educational and intellectual prospects of the child. That is not to say, however, that the court must award a custody to the more learned or better-educated parent, The court endeavour to ensure that its decision, as best as it can be, ensures that the child will have adequate opportunities for education and formation as best promote the child’s development towards adulthood. It is suggested, in this connection, that the term “education” comprised not merely the formal education as a responsible and competent adult. Where intellectual or psychological welfare is at issue, the practitioner should always adduce professional evidence from a child psychologist in establishing where the psychological welfare lies.²¹

4.4 Physical welfare

The court have tended, in this case, to consider at least in relation to a child of “tender years” (approximately 7 years old or younger), that physical welfare is best served by the mother. More recent cases, however, have tended to dilute this inclination, although the court continue generally to regard the mother, all else being equal, as the more appropriate and competent caregiver. Physical needs have been held to include medical needs, for example in *Re B (A minor) (Wardship: Medical Treatment)*²² the English Court of Appeal ordered that an operation to save the life of a Down’s syndrome baby should be carried out even though the parents’ refuse to agree on the operation.

²⁰ (*JJW v. BMW*, 1976) at 52. See also, *S. v. S* I.L.T.R., 1992, 732.

²¹ For example, In another UK Supreme Court case, *F.N v. C.O, I.R. 1970, IV at 311*, involving an application for custody by the father of two daughters, the impact of such an order on the children’s intellectual welfare was considered. If granted, the order sought would have resulted in the removal of the two children from Ireland. The judge noted that this would have potential impact on the education and social development of the girls.

²² I.L.R., 1981, III at 117.

4.5 The Tender Years Doctrine

The Tender Years Doctrine was a legal principle in child custody jurisprudence that presumed that young children, especially those of tender years, should be placed in the care of their mother in cases of divorce or separation. It was based on the belief that mothers are naturally better caregivers than fathers, particularly for infants and young children. This doctrine was prevalent in many countries during the 19th and early 20th centuries but has since been widely criticized and replaced with a more gender-neutral approach to child custody. The Tender Years Doctrine has been the subject of controversy due to its potential for gender bias and the lack of consideration for the father's role in a child's life. Some states have held that the burden of proof is on the father to prove the mother to be an unfit parent to be awarded primary custody, while the mother need not prove the father unfit in order to win custody herself, and that this is contrary to the Constitution's equal protection clause.²³ The Tender Years doctrine was gradually annulled in most of the countries of the European Union.²⁴ In these countries precedence is now given to the joint custody after divorce or the separation of the parents.²⁵ Thus, we can say that at least in principle, the tender year doctrine has become obsolete in the Northern states.²⁶

Although the doctrine has taken a backseat to pave the way for best interest of the child principle, many empirical research has found that the doctrine of tender years continues to influence custody decisions in practice in their judiciary.²⁷ These experiences have been drastically opposed to the experience of the custody orders in many South Asian countries, where family institutions

²³ for example, see *King v. Vancil*, 34 Illinois Appeal 3d 831 (1975).

²⁴The EU can only create legislation in areas where the treaties specifically provide it such authority. It lacks the authority to enact legislation relating to divorce, child custody, or parental care. This means Parliament can't pass rules governing the conditions under which a divorce can be granted, the obligation of parents to pay child support, or how decisions about custody and visiting rights are determined. The EU, on the other hand, has the authority to foster judicial cooperation in civil disputes with cross-border ramifications. It has enacted a variety of regulations governing judicial cooperation in civil cases. These regulations are founded on the principle of mutual recognition in general.

²⁵ EU nations have jurisdiction over family law, and EU legislation on marriage, parental responsibility, and maintenance are only applicable in cross-border disputes. Also, Brexit affects a variety of cross-border family law concerns. When one parent lives in the EU and the other parent lives in the UK, several parts of custody and maintenance applications may be handled differently. The traditional foundation for recognising UK divorces has also altered, albeit the new criteria will still allow them to be recognised in Ireland.

²⁶ See, for e.g., Section 3:10 of Principles of European Family Law Regarding Parental Responsibilities, The Commission on European Family Law. <http://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf> (last visited on 13 March 2022).

²⁷ for e.g., Artis, in her empirical research, found that in last few decades custody law has shifted from maternal preference to a more egalitarian standard of 'Best Interest of the Child'. However, her empirical survey with trial court judges of Indiana state in US found that judges who supported tender age doctrine awarded custody to mother for children who were infants or small. Even judges who oppose the tender years doctrine, however, awarded an overwhelming majority of young children to mothers, although their decisions changed in response to the child's age. (Artis, 2004)

coupled with largely subordinated condition of women, results in mother's right to custody seldomly realized in practice. For example, the Haque Convention would contest that both the personal law and statutory law in Bangladesh confer legal guardianship to the father. The condition has not improved in practice and mothers have to fight uphill battle to establish child custody in Bangladesh, although the mother's right to get custody has been established on egalitarian principle of best interest of child.²⁸ Similarly, Sabreen argues that although efforts have been made to reform the laws related to custody in Pakistan lack of consolidated statute gives wide discretion to judiciary which relies sometimes on the personal laws and in other cases decide in the child's best interests, leading to ambiguity and confusion.²⁹ Also, sometimes, the application of personal laws has been more considerate to parent than the application of secular law of the state. Consider the case of Gohar Begum who had several illegitimate children including daughter whom she had allowed to maternal aunt to take with her to Pakistan. When the aunt returned to India, she refused to restore the daughter. Gohar Begum filed a writ of habeas corpus in the Supreme Court to be granted the custody of her less than six years old daughter. Supreme Court accepted the writ and decided that daughter should be returned to her as under Muslim law the custody of an illegitimate child should be with the mother, no matter who the father is.³⁰

4.6 Social Welfare

When determining what is in a child's best interests, social welfare is an essential component to consider. The child's social welfare is an important consideration because it takes into account the child's overall well-being, which takes into account the child's access to resources and services that can assist them in flourishing.³¹ This can include the child having access to essential services such as healthcare, education, and other essential services that can support the child's growth and development.³² In addition to this, social welfare program is able to take into account the larger social environment in which the child resides. This can include circumstances such as poverty, discrimination, and structural inequalities, all of which have the potential to impede a child's access to resources and opportunities.³³ The decision-makers can better understand the challenges that a child may face and make decisions that priorities the child's well-being and long-term

²⁸ (Ashif Ul-Haque, 2017)

²⁹ (Sabreen, 2017)

³⁰ Gohar Begum v. Suggi alias Nazma Begum, AIR 1960 SC 93.

³¹ (Child Welfare Information Gateway, 2020)

³² (Hogan and Siu, 1988)

³³ (Kline, 1992)

success if they take into account these broader social factors and consider how the child may be affected by those factors. In general, social welfare is an essential component to consider when determining what is in the best interests of children. This is because it acknowledges the significance of fostering children's physical, emotional, and social development and ensuring that they have access to the resources and opportunities that are necessary for them to be successful.

4.7 Emotional Well-being

When determining what is in a child's best interest, it is vitally important to take into account how they are feeling emotionally. The term "emotional well-being" refers to a state of equilibrium and contentment in which individuals are able to deal with the challenges of everyday life, cultivate healthy relationships, and have positive emotional experiences.³⁴ When considering what is in a child's best interest, their emotional well-being is of utmost significance.³⁵ This is due to the fact that children who struggle emotionally are more likely to have difficulties in other areas of their lives, such as school, relationships, and other facets of their lives. In addition to being important in and of itself, children's emotional well-being is important because it influences their mental health, which in turn influences their physical health and their overall well-being. Therefore, when making decisions that are in the best interest of a child, it is essential to take into consideration the child's emotional needs and how any decision will impact the child's overall emotional well-being.³⁶ This may include taking into consideration aspects such as the child's relationship with his or her parents, siblings, and other care-takers, as well as the child's capacity to adapt to new situations and the consistency of the child's home environment. In addition to this, it may involve soliciting the opinion of mental health professionals, educators, and other people who have close relationships with the child in question.

4.8 Parental Capacity

The question of parental capacity relies on the surer footing of individual characteristics rather than on crude gender stereotyping. The court is required to ensure that the parent restoring to granting guardianship, custody or access has sufficient mental and physical capacity to perform the duties envisaged. This is not to say that the more capable person will always have access and custody.³⁷ Nor should it be suggested that parents with needs of their own, owing for instant

³⁴ (Miller, 2002)

³⁶ (Beaber, 1982; Caplan and Nelson, 1973)

³⁷ (Allen, 1986)

disabilities, should be denied custody. Where the parent, however, is manifestly incapable of carrying out his role, the court will lean heavily against such an order.³⁸ Alternatively, the court may ask for a social report of children who are the subject of the custody proceedings. These reports are normally carried out by social workers and may be requested on an application by a party to the proceedings, although the court may request such a report on its own motion. In none of the South Asian country's jurisdiction, there is an explicit provision allowing for the addition of a child in custody proceedings. However, the courts possess a residual jurisdiction to do so and furthermore, to appoint a solicitor to act on the child's behalf. The prospects of such occurrence are, however, slim.

4.9 The wishes of the child

Considering that the court must act in the best interest of the child who is subject, it seems self-evident that where the child is of sufficient age and maturity, the court should have regard to his or her wishes. Although, basing a decision solely on child's view could result in violation of the substantively established principles of evidence law.³⁹ This should especially be so where the child harbours a particular animosity towards a particular parent. However, sufficient care is needed to ensure that the children are not unduly influenced by a parent. In this regard, an interview or talk by a judge in chambers can be undertaken by a trial judge.⁴⁰ However, note that the only evidence that should be received by a trial judge is that on oath in the presence of the parties. It is nevertheless helpful in determining the wishes of the child. In the light of the negative effect on the psychological well-being of a child, the courts have largely preferred to exclude children from the legal proceedings. Other methods are used to enable a child's voice to be heard in custody proceedings, without requiring the child to be physically present in the court. Such methods should include, a specially appointed expert.⁴¹

4.10 Keeping sibling together

As a general rule, the courts tend to prefer not to split up siblings, if possible, allowing them to remain in the family home. When determining what is in a child's best interest, it is sometimes in everyone's best interest to keep siblings together.⁴² When siblings are split up, it can be emotionally trying for both of them because they typically share a close bond with one another

³⁸ (Brank and Scott, 2012)

³⁹ (Krauss and Sales, 2000)

⁴⁰ (Dwyer, 2005)

⁴¹ (Peskind, 2004)

⁴² (Brank and Scott, 2012)

and it was built to last. Courts and child welfare agencies may take into consideration the importance of maintaining the relationships between siblings as one of the factors to be weighed in order to determine what is in the best interest of the children who are involved when making decisions regarding child custody or placement. However, it is essential to keep in mind that keeping siblings together may not always be either possible or in the best interest of each individual child. This is something that should be taken into consideration.⁴³ It may be necessary in certain circumstances, such as when one sibling poses a threat to the health or safety of another, to keep the children apart from one another.⁴⁴ When deciding who will have custody of a child or where that child will live, it is imperative that consideration be given to the specific requirements and inclinations of that child.

No individual factor can, itself be considered conclusive. The welfare of the child must be judged by reference to all the relevant factors. It must be remembered, however, that although the 'welfare of the child' is 'the first and paramount consideration', it is not the only consideration to be considered by the court.

5. Conclusion

In conclusion, the best interest principle is a fundamental concept in child custody law that considers the well-being of the child as the foremost priority. The principle has evolved over time through the contributions of various international treaties and customary law, including the UN Convention on the Rights of the Child. Additionally, jurisdictions around the world have developed their own elaborative determinants to establish the best interest of the child, and the same has been the case in South Asian countries. This paper argued that a pluralistic approach that recognizes the diversity of family structures and dynamics is more effective in understanding and implementing family law. By breaking free from critique-based explanation strategies, policymakers and academics can reveal the assumptions and circumstances that permit particular issues or concerns and their associated benefits and drawbacks. Such an approach creates room for ethical judgments that cannot be answered by political slogans, but rather through careful consideration of specific issues and their effects on family dynamics.

⁴³ (Grisso, 2005)

⁴⁴ (Halperin-Kaddari, 2020)

Future research in this field should focus on addressing the challenges that arise from different cultural and social backgrounds that impact the application of the best interest principle. This would require a comprehensive review of the factors that affect the well-being of the child, as well as the varying cultural practices and norms in different jurisdictions. Additionally, future research can explore the impact of technological advancements on child custody cases, especially with the increasing use of digital communication platforms in family dynamics. Finally, policymakers need to ensure that the best interest principle is adequately reflected in family law statutes and that there is a robust enforcement mechanism to protect children's rights. This requires a collaborative approach involving all stakeholders, including family members, the legal system, and relevant government agencies. By upholding the best interest principle, policymakers and society can ensure that children's rights are respected and protected, thus promoting the well-being of families and communities at large.

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