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EDITORIAL

Child is the father of man

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William Wordsworth in his Poem, "My Heart Leaps Up", also known as Rainbow, in 1802 nostalgically expressed "the Child is Father of the Man." We are still alive to this jarring thought. Lord Alfred Tennyson, in Memoriam talks of "an infant crying in the night, an infant crying for the light, and with no language but a cry."Is poetry law. Child custody and the vexed question of cross border inter parental child removal not finding any legislative definition, they remain a subject of varying judicial interpretation of the Supreme Court from time to time. India is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction, 1980, acceded to by 100 other countries.Thus wrongful removal and retention of a child by a parent defies recognition and acceptance under codified Indian law, even though it is an offence internationally. A corpus of 30 million non-resident Indians living globally in 200 countries with multifarious relationships,creates an immense potential for unresolved child custody disputes upon a parent relocating to India by violating the other parent's rights in a foreign jurisdiction. The hapless child tossed over continents suffers in silence for no fault of his.

Access, visitation, interim-custody or even e-contact is proving difficult in the current lockdown scenario. On April 24, the Delhi High Court in a children custody matter, provided a mother uninterrupted contact on regular basis through video conference with her three daughters, without any interference from or supervision of the father. Justice Nazmi Waziri held that the father shall ensure that a computer in constant working condition with regular internet connectivity, shall be kept in a room free for the three children to speak to their mother, whilst their legal custody is presently with the father, to enable unrestricted and unhindered conversation with the mother. Justice Roshan Dalvi of the Bombay High Court in a workshop on child custody "rhetorically but aptly coined the word FAMILY as Father And Mother I Love You", as is quoted by Justice Mridula Bhatkar in a Bombay Judgment rendered in 2016.

The Hindu Minority and Guardianship Act, 1956 (HMGA), declares that the natural guardian of a Hindu minor boy or an unmarried girl shall be the father, and after him, the mother, provided that the custody of a minor who has not completed 5 years of age, shall ordinarily be with the mother. The HMGA does not contain any independent, statutory or procedural mechanism for adjudicating custody rights or declaring Court appointed guardians. The reference to the word "Court" in the HMGA relegates a parent or any other person seeking appointment as a "guardian"to invoke the provisions of a 130year old colonial law i.e. the Guardian and Wards Act, 1890 (GWA),and wherein the parent is constrained to seek exclusive temporary custody of his biological offspring during the pendency of such hearing.Sad, but true, child custody issues between parents are thus to be determined under the GWA,upon a natural parent wanting to be declared as an exclusive guardian to his own natural born child.

India is a signatory to the United Nations Convention on the Right of the Child (UNCRC). Consequently, the definition of the "best interest of the child" has been implanted from the UNCRC in the Juvenile Justice (Care and Protection of Children) Act, 2015 to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social wellbeing and physical, emotional and intellectual development". Axiomatically, Courts in India, are now duty bound to ensure the true import of this meaning to full expression. The Law Commission of India in Report number 257, rendered in 2015, titled, Reforms in Guardianship and Custody Laws in India, recommended joint custody and shared parenting, whilst disagreeing with single custody parents. Exhaustive recommendations were made to suggest amendments in the HMGA and GWA for joint custody and guidelines for custody, child support and visitation arrangements. Report number 263 of the Law Commission of India titled ,The Protection of Children (Inter-Country Removal and Attention) Bill, 2016, recommended a draft Bill for protecting the best interest of children relating to custody as per the UNCRC. The report of Justice Rajesh Bindal Committee given to the Government in 2018 also suggested that the best interest of the children is of paramount importance in matter relating to their custody in view of the UNCRC. However, till date no significant progress in forthcoming with any proposed legislation being finalised on the subject.

In a verdict of 2017, the Supreme Court in the case of NithyaAnand Raghavan,has enunciated new directions in matters relating to custody in inter country parental child removal cases by departing from the principles of comity of courts and first strike jurisdiction, which had earlier been laid down in the verdict of Surya Vadanan in 2015.Whilst now holding that the jurisdiction of the writ of Habeas Corpus cannot be used and converted for executing the directions of a foreign court, the Supreme Court has ruled that the High Court may examine the return of a child to a foreign jurisdiction, if it would be in the interests and welfare of the minor child. This would be done in exercise of parens patriae jurisdiction of the High Court, without being "fixated" with the foreign court order directing return of the child within a stipulated time, which would however be only a factor to be taken into consideration.

To be entitled to maintain a petition for Guardianship under GWA, the Guardian Judge will have jurisdiction only if the "minor ordinarily resides" within the territorial limits of the authority of the District or Family Court. In the celebrated judgment of RuchiMajoo in 2011, the Supreme Court has been pleased to hold that in exercising powers under the GWA, the Guardian Judge is competent to entertain a petition only if the "minor ordinarily resides" in its jurisdiction as "a Court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a Court in that country. The party aggrieved of such removal, may seek any other legal remedy open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings."The phrase "minor ordinarily resides" in GWA has been construed by some High Courts in different decisions as not being identical to mean "residence at the time of the application" or "residence by compulsion at a place however long, cannot be treated as the place of ordinary residence", the purpose being to avoid mischief that a minor may be stealthily removed to a distant place and forcibly kept there to gain jurisdiction. Thus, the "minor ordinarily resides" has been interpreted to mean a "place from where he had been removed or in other words, the place where the minor would have continued to remain but for his removal." In such a situation, a Guardian Judge may thus decline to exercise jurisdiction if the minor child resident abroad, does not "ordinarily reside" within his territorial limits, but is simply present there on the date of the filing of the guardianship petition.

The writ of Habeas Corpus for seeking implementation of child rights where the parents are fighting for the custody of their offspring was settled by the Supreme Court in Gohar Begum in 1960 by following principles applicable to such writs in England to deliver custody of infants. In Nil Ratan Kundu in 2009, following English and American Law, the Supreme Court held that "the basis for issuance of a writ of Habeas Corpus in a child custody case is not an illegal detention", but "the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate". Hence, invoking of the writ of Habeas Corpus by a non-resident parent for child custody on the strength of a foreign court custody order is the only efficacious, speedy and effective remedy, since the minor "ordinarily resides" abroad and there is a bar of jurisdiction under GWA for a guardianship petition before a Guardian Judge.

In 2019 the Supreme Court in Lahari Sakhamuri, took note of the expression "best interest of the child" given in the JJ Act, and in a child centric jurisprudence held that "it cannot remain the love and care of the primary care giver, i.e. mother". Thereby,the Court in its wisdom, shattered the glass ceiling of gender preference and provided neutrality to parents', on the welfare of the child principle. Earlier, in 2017, Justice A.K. Sikri in Vivek Singh Vs. Romani Singh discussed the concept of Parental Alienation Syndrome, and held that "a child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation."

The law declared by the Supreme Court shall be binding on all courts. In the absence of a clear codified law on cross border inter-parental child removal issues, the much needed clearer path of judicial precedent will continue to guide litigants and courts.The prophecy of Wordsworth resounds, reverberates and echoes, resonating that the child is the father of man.

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