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# Welfare of the Child: A Comparative Study of the Legislative Frameworks of Japan and the UK\*

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## Abstract

This paper compares the legislative frameworks on the welfare of the child principle in Japan and the UK. The paper examines selected laws and regulations in (a) custody and visitation disputes (b) adoption cases and (c) alternative placement for children in need of State protection. It finds that the UK has consistently incorporated the welfare principle as the paramount consideration in all issues concerning children whereas Japan lacks a substantive legal framework on the child's welfare. The ratification of the United Nations Convention on the Rights of the Child contributed positively to legal and policy changes in the UK but Japan appears to have ratified it as a diplomatic gesture.

**Keywords:** welfare of the child, children in need, alternative placement, state protection, child guidance center

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## I Introduction

Children are the most vulnerable group of human beings who do not themselves possess autonomous rights of a legal standing. They can neither demand for parental care, family care or State care nor are they entitled to initiate legal actions for their parents', family's or the State's failure to provide them with a good family environment. The actions or for the matter non-actions of the parents, extended families and State with respect to children are usually justified in reliance of the "welfare of the child"<sup>1)</sup> principle. Children generally live with their parents at their family residence, but when the parents are unable to care for them due to financial constraints, parental illness, imprisonment or death, extended families, such as grandparents or siblings have looked after and cared for them. Thus, children have been made to rely on adults for their development and well-being.

Basically, children live in a family environment as a family member in the company of adults because it was regarded to serve their welfare. But, over the years parental abuse in the form of physical, psychological and sexual abuse, neglect and abandonment have emerged causing States to take measures to rescue the children from their abusive parents. A child who is removed from his/her parental care and custody by the State is placed in an institution on a temporary basis. When the child is unable to be reunited with his/her parents, the State assumes the responsibility of making a decision on the appropriate placement for the particular child. Whether the State gives paramount consideration to the particular child's welfare in an alternative placement decision-making is the concern of this paper.

This paper considered how the child's welfare principle is reflected in a State's legislation? And, for that purpose the laws and regulations in Japan and the UK have been compared. Both the UK and Japan have ratified the Convention on the Rights of the Child (CRC) in 1991 and 1994 respectively. It is a well known fact that the welfare of the child principle as it is understood in the UK has been advanced by the courts and eventually legislated, long before the CRC was drafted. In Japan too the courts appears to have been conveniently developing the principle although the legislature has not given heed to it. It will be interesting to study whether the ratification of the CRC has induced legislative changes and alignment of existing legislations in the UK and Japan with regard to the application of the welfare of the child principle.

## II Welfare of the Child in General

The welfare of the child is a legally well-known but poorly defined principle. Geraldine describes welfare of the child as "a principle of compassion" because it appears to be "self-imposed limitation of adult power which stemmed from the recognition that only an adult is in a position to take a decision on behalf of a child because of the child's lack of experience and judgement. It grants broad discretion to the decision maker thus leading to a lack of uniformity on a domestic level. There is a lack of agreement over what constitutes children's interests, let alone their best interests".<sup>2)</sup>

Legislative debates and scholastic arguments have been ongoing worldwide, for decades to describe the real meaning of this term. No specific definition of the term is available and efforts to define remain futile due to the changing needs of children. A common definition of international stand-

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1) The welfare of the child principle is known as the 'best interests of the child' in some States. In Japan, the equivalent term are '*kodomo no saizen no riekī*' or '*kodomo no fukushi*'.

2) Geraldine Van Bueren, *The International Law on the Rights of the Child*, Kluwer Academic Publisher (1995) at p. 45.

ard is unaffordable or rather impractical bearing in mind the diverse nature of children's background, circumstances and characteristics. Nonetheless, the term, "welfare of the child" is 'meant to describe factors that guide a court's deliberation on how best to meet a child's needs'.<sup>3)</sup> This term is used differently in each State and each State usually has its own criteria or factors that guide a court's deliberating process. It is a very subjective question and usually assessed on a case by case basis. Among the factors considered by the courts are the wishes of the child, the impact of any decision on his/her development and future and the importance of familial relationship.

Many international instruments have adopted the child's welfare principle but the most comprehensive instrument specifically advocating the rights of children is the United Nations Convention on the Rights of the Child 1989 (CRC). The child's welfare principle is enshrined under its Article 3(1) which reads "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child** shall be a **primary consideration**". The CRC is said to have established a general principle on children's welfare. It also provides children with a minimum standard of protection.

Alston observed that "there is no single version of the best interest principle being reflected on other international instruments".<sup>4)</sup> Indeed, there is none. The choice of words in Article 3(1) reflects its objective to accord special protection to children's rights. This article has a wide scope in the sense that it applies to 'all actions concerning children'. A list of actions is not provided by the CRC considering the changing nature of children's needs which determine the actions to be taken. Nonetheless, it is not restricted to the upbringing of children. Geraldine argues that 'all actions' is "sufficiently broad to encompass all state agencies and includes both action and inaction".<sup>5)</sup> Thus, it appears to vest responsibilities on all decision making entities namely the judicial, legislative and administrative authorities of a State and private institutions and individuals. On the face of it, it appears to have left the parents out of its ambit because a balancing of parents' and children's interests requires interference by a third party. Nevertheless, Article 18 (1) adopts it as a guiding principle for parents.

Article 3 (1) provides that the welfare of the child is 'a primary consideration' and not 'the paramount consideration', as reflected other international instruments as well as in many Western legal systems (the UK). One example is the Convention on the Elimination of All Forms of Discrimination against Women which has 'the primordial consideration' (Article 5) and 'paramount' (Article 16). Parker points out that the choice of 'a' is weaker than 'the' and arguably 'primary' is weaker the 'paramount'.<sup>6)</sup> Geraldine explains that at the initial stage of drafting in 1980 'the paramount' was chosen but after revision 'a primary' was adopted because it applies as a general principle and not to a specific single situation.<sup>7)</sup>

Another article which has a general principle and relevant to this study is Article 12 of the CRC which stipulates children's right to have his or her views respected and to be heard in any judicial

3) Carrie Craft, What Does the Term Best Interests of the Child Mean?

<http://adoption.about.com/od/lawsandlegalresources/f/bestinterestsofchild.htm>

4) Philip Alston, The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights, pp. 1-25, UNICEF, 1994.

5) Geraldine Van Bueren, The International Law On The Rights Of The Child, Kluwer Academic Publisher (1995) at p. 46. He explained that during the drafting of the convention the word "official" was deleted from Article 3 thereby implying that Article 3 was intended to include private social welfare agencies and individuals.

6) Stephen Parker, The Best Interests Principle: Principles and Problem, pp. 26-41, UNICEF, 1994.

7) Refer to note 5, p. 48.

or administrative proceedings affecting them.<sup>8)</sup> This article is broad because it gives a right to a child to state his/her 'views' and not merely 'wishes'. Depending on the child's age and maturity, the courts and administrative authorities have to consider the child's view. But, it does not require the consent of a child to be obtained in matters affecting him/her, for example in adoption or foster care arrangements.

Potter asserts that "the provisions of Art 3(1) and Art 12 are not framed so as to confer autonomous rights upon children in respect of the matters covered; they are a directive to States to secure for the child the right to express the child's views in matters which affect it and in particular the opportunity to be heard in judicial proceedings".<sup>9)</sup> Geraldine argues that "Article 3(1) does not create rights or duties; it is only a principle of interpretation which has to be considered in all actions concerning children."<sup>10)</sup> Parker suggests that "in all matters not governed by positive rights in the Convention, Article 3(1) will be the basis for evaluating the laws and practices of the State Parties".<sup>11)</sup> Relying on this principle, I shall now evaluate the laws and practices relating to alternative placement of children in Japan and the UK.

In the UK, what is the legal definition of the "welfare of the child"? Historically, children were regarded as the property of their father. The father had inherent powers over his children without the need to consider their welfare. The mothers were, as in most other States, not given equal rights in the upbringing of the children. The courts appear to have been the real guardian of the child's welfare. In the landmark case of *I v C*,<sup>12)</sup> Lord MacDermott had pronounced a clear rule which was adopted by the courts in the UK and other commonwealth countries and was later reflected in the Children Act 1989 (1989 Act). The Lordship has stated the principle as 'A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is *most* in the interests of the child's welfare'. Since this case, the courts have been treating the welfare of the child as the paramount consideration in all cases involving children, for example in custody and contact disputes. The paramountcy principle was given legislative recognition when the Children Act was passed in 1989. This leading statute on children, laid in its Section 1(1) the paramountcy of the child's welfare as the governing principle in most court applications involving children. It states that "when a court determines any question with respect to the **upbringing of a child**; or the administration of the child's property or the application of any income arising from it, the child's welfare shall be the **court's paramount consideration**".

The child's welfare is made the paramount consideration in both private law proceedings (e.g. residence and contact orders) and in public law proceedings (e.g. care and supervision orders). The 1989 Act does not offer a specific definition of the term 'welfare of the child', but it provides in Sec-

8) Article 12 (1) of the CRC provides "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

9) Sir Mark Potter (President of the Family Division, England and Wales), *The Voices of The Child: Children's Rights in Family Proceedings* [2008] IFL 140.

10) Refer to note 5, p. 46.

11) See note 6.

12) [1970] AC 668

tion 1(3) a list of factors to be considered by the courts in the assessment of the welfare principle. This 'welfare checklist' is not exclusive as other factors may be taken into account by the courts depending on the circumstances of the case, and most importantly, the factors are not listed in a hierarchy of importance. Nevertheless, the courts must consider the welfare checklist before making a decision in all application matters pertaining to the upbringing of children.<sup>13)</sup> The welfare checklist appears to have established a minimum safeguard for children as they are the most vulnerable minority in judicial proceedings.

Furthermore, Section 1(3) (a) of the 1989 Act requires the courts to consider "the ascertainable **wishes and feelings** of the child concerned, considered in the light of his age and understanding". The wishes and feelings of a child may not be the determining factor but only a factor to be considered by the court after having heard the child. Interestingly, the courts need not consider the 'views' of older children but only their 'wishes and feeling'. The courts can override the wishes of the child, for example when there is evidence of brainwashing by a parent in residence or contact disputes. The 1989 Act allows children for the first time to apply in their own right for certain orders with the leave of the court. The UK Private Law Programme<sup>14)</sup> which contains the framework for the proper conduct of private law cases concerning children provides that 9 is a suitable age for a child to attend court and state their wishes.

In fact, the 1989 Act recognises that any delay in decision making is harmful to a child and thereby stipulates in its Section 1(2)<sup>15)</sup> the 'non-delay' principle. Delay is considered to be detrimental to children's well-being especially in child protection cases. Hence, the courts give directions and even draw up a timetable where necessary, to expedite proceedings. Some scholars argue that a pressured or hurried decision making is prejudicial and may fail to reflect a best option for a child. It is submitted that a timely and well considered decision making serves the welfare of a child. The application of the welfare principle is not limited to the 1989 Act proceedings but applies whenever the court is called upon to determine any questions about the upbringing of a child. The principle is a theme which runs through the regulations made under the 1989 Act, and the accompanying guidance.<sup>16)</sup>

It is conclusive that the domestic law of the UK sets a higher standard than Article 3(1) of the CRC. Section 1(1) of the 1989 Act recognises the welfare of the child as the 'paramount consideration' whereas the Article 3(1) CRC only requires 'a primary consideration'. Where the UK domestic law sets a higher standard than the convention it must not be diluted, but must be retained. Article 3(1) has a wider application as it applies to administrative authorities and legislative bodies whereas the application of Section 1(1) of the 1989 Act is restricted to court proceedings (litigation). Section 1(1) only applies when the 'upbringing of children' is directly in issue but Article 3 (1) applies to 'all matter concerning children'. The application of Section 1(1) can be excluded by other statutory

13) *B v B* [1997] 2 FLR 602 it was held that, "although it is not necessary or appropriate for a judge to go through the checklist item by item, it does represent an extremely useful and important discipline for judges to ensure that all the relevant factors and circumstances are considered and balanced. A failure to consider one or more of the factors may, however provide a ground for an appeal".

14) It is referred to as the President's Guidance, 9 November 2004 (DCA, 2005).

15) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

16) The same welfare criteria have to be applied in making an Emergency Protection Order or a Child Assessment Order; two orders introduced under the 1989 Act aimed at safeguarding children's welfare.

provision<sup>17)</sup> whereas Article 3(1) only applies when it is provided under the domestic law of a State or applied by the courts. Article 12 of the CRC requires the ‘views’ of the child to be considered prior to a decision making. No doubt it has a wider scope but not every child is able to form his/her view on matters affecting him/her so considering the child’s ‘wishes and feelings’ under Section 1(2) is presumably a better approach in promoting the child’s welfare.

In Japan, paternal preference was practiced for centuries by Japanese male dominant society. In the past children were considered as chattels and were subjected to the control of the father and his family. The mother who has no rights over children was forced to leave them behind upon divorce, which occurs usually without her consent. The eldest son was valued and groomed as the leader and heir of the family. The mother’s social status was lower than her eldest son. Other children in the family were cared for by their paternal grandparents. Not until the Japanese Civil Code (JCC) was enacted did the position of mothers changed. Article 818 of the JCC provides for the joint exercise of parental rights by the father and mother. Thus, in principle parents have joint responsibility for raising and educating their child. But, upon divorce only one parent has parental authority. Matrimonial disputes between parents are resolved within the family or at the family court mediation. Almost 90% of divorce is consent divorce between the parties. Only one parent will be vested with parental authority<sup>18)</sup> and no arrangements need to be made for the children who will automatically reside with the parent having parental authority. The other parent seldom has visitation opportunity. When a divorce petition is contested family courts make decisions in respect of children.

How is the welfare of the child principle understood and interpreted in Japan? The principle of the welfare of the child is neither defined nor specifically provided for in the legislation. The JCC provides that the ‘interests of the child’ may be considered in certain cases by the family court for example in Article 819 (6).<sup>19)</sup> It states that “the **family court** may, on the application of any relative of the child, rule that the other parent shall have parental authority in relation to the child if it finds it necessary for the **interests of the child**”.<sup>20)</sup> The meaning of ‘interests of the child’ is not provided. There is neither a ‘welfare checklist’ nor legislative guideline on the factors to be considered by family courts in assessing a child’s welfare. The views of the judges on the child’s welfare is thus influential. The family court judges are known to place much reliance on factors such as the wishes of the parents and societal norms in deciding what is best for a child, especially in custody and visitation disputes. It is not very clear from the judicial precedents on what amounts to the “welfare of the child” but apparently many criteria have been established by the family courts. Importance given to parental rights appears to negate a fair determination of a child’s welfare in judicial proceedings.<sup>21)</sup>

The Child Welfare Act 1947 (1947 Act) is the first legislation established purportedly to promote child welfare. Its Article 1 provides that “all citizens shall endeavor to ensure that children are

17) For example, Human Fertilisation and Embryology Act 1990 provides ‘first’ instead of ‘paramount’ consideration.

18) Joint custody is not recognized in Japan so only one parent is vested with parental authority (*shinaken*).

19) Article 819 (6) provides for person who has parental authority in the case of a divorce or recognition.

20) 子の利益のため必要があると認めるときは、家庭裁判所は、子の親族の請求によって、親権者を他の一方に変更することができる（民法819条6項）。Paramount consideration is known as最高の関心事。

21) In 2010, the Law Committee reported to the Ministry of Justice that the parental authority should be suspended at least partially in child abuse cases.

born and brought up in good mental and physical health.' Article 2 explicitly provides that 'The national and local governments shall be responsible for bringing up children in good mental and physical health, along with their guardians'. In addition, Article 3 stipulates that "the provisions of the preceding two Articles constitute the basic philosophy to guarantee children's welfare and this philosophy shall be consistently respected in enforcing all laws and regulations on children".

Article 3 clarifies that the principle of child welfare as provided for in Articles 1 and 2 must be respected in the execution of 'all laws or ordinances' relating to children and not limited to the Child Welfare Law. It appears to place collective responsibilities on the parents, relatives, society and State to support the sound development of children. What does the term 'guarantee children's welfare' mean? No definition, explanation or illustration has been provided in the 1947 Act and neither are there any rules or guidelines available. Literally, it can be understood as giving an 'assurance' that the welfare of children must be considered in applying laws and rules in the upbringing of children. The standard for applying the children's welfare principle, whether it is 'a primary', 'the first' or 'the paramount' has not been prescribed. The decision making standard may differ according to the knowledge, qualification and capabilities of a particular decision-maker. Simply put, a welfare decision for a child is disposed at the discretion of the decision making agency, namely the local authority social welfare service known as the Child Guidance Center (CGC).

Moreover, the welfare of 'children' instead of the 'child' has been used implying the approach is collective rather than individualistic. It is argued that the 'welfare of children' in a Japanese context refers to creating a social welfare system for all children and is not centered on protecting the welfare of an individual child. Children are considered not to have rights of their own and parents are their saviors and therefore, parents and children cannot have conflicting interests. In a custody dispute for example, the conflicting interests of the parents and not the child's welfare is given priority. It is simply because the principle of a child's welfare is not fully understood by the parents or other decision-makers. Furthermore, there is no requirement for the child's welfare to be considered in each individual case involving children.

Japan ratified the Convention on the Rights of the Child in 1994 and claims that to conform to the spirit of the Convention it has been developing various measures relating to welfare and education of children. Law Concerning the Prevention Child Abuse was enacted in 2000 but to the dismay of the legal fraternity, the principle of the child's welfare was not codified. In its Initial Report to the Committee on the Rights of the Child, the Japanese Government claims that "Article 1, 2 and 3 of the Child Welfare Law, Article 1 of the Juvenile Law, and Article 3 of the Maternal and Child Health Law, assume that a child's best interest is to be considered in each individual case".<sup>22)</sup> However, with regard to this, the Committee pointed out that: "the best interests of the child and respect for the views of the child are not being fully integrated into the legislative policies and programs relevant to children".<sup>23)</sup> The Japanese Federal Bar Association (JFBA) which submitted a

22) Para 54 of the Initial Report Initial Reports of State Parties due in 1996: Japan. 05/08/96 CRC/C/41Add.1, Consideration of Reports Submitted by States Parties under Article 44 of the Convention.

23) The Committee recommended that: "further efforts must be undertaken to ensure that the best interests of the child are appropriately reflected in any legal revision, judicial and administrative decisions, as well as the development and implementation of all projects and programs which have an impact on children." JFBA observes at Para 45 (1) "The principle of the best interest of the child and the necessity of giving top priority in all measures concerning children, are not sufficiently understood by the courts, administrative authorities or legislative organs, and preparation for and pursuit of the realization are not followed sufficiently, and in reality, the situation has slipped backwards".



counter report to the Committee highlighted that, “in view of the Japanese legal structure, there is nothing written in the legislation that clearly states all measures should be taken in accordance with the principle of the best interest of child.”<sup>24)</sup>

It is crystal clear that there is no legislative framework in Japan relating to the principle of the welfare of the child. A child's welfare is not the paramount consideration in matters involving children. The interests of the child must be considered in certain cases but it not the overriding factor. Despite, the ratification of the CRC, the vagueness in legal principles remain causing uncertainties as to the appropriate decision-making standard in matters involving children. It is submitted that in the absence of a clear statutory provision on the welfare of the child principle, ambiguity and vagueness will prevail in judicial proceedings making it difficult for lawyers to adequately represent their clients. Until and unless the legislature decides to enact a clear and unambiguous provision on the child's welfare the uncertainty will remain.

### III Welfare of the Child & Adoption

Although, Article 3(1) of the CRC provides a child's welfare as a primary consideration in all matters affecting children, its Article 21 establishes a higher standard in adoption cases. Article 21 contains the principle of the paramount consideration that is “State Parties that recognise and/or permit the system of *adoption* shall ensure that the best interests of the child shall be **the paramount consideration**”. Article 21 recognises that adoption must serve the child's welfare and must be dealt with diligently because it extinguishes the child's legal relationship with his/her birth parents and creates a new legal relationship with the adoptive parents. It specifically requires the establishment of competent authorities to handle domestic and international adoption. Besides the courts, the accredited agencies must consider the child's welfare as paramount in their decision making. Article 12 must also be applied in relation to a child for whom adoption is determined to be the best possible option. The child's view and not consent is relevant to the determining authorities.

In the UK, the public authorities namely courts and adoption agencies are required to exercise their powers and duties in compliance with Adoption and Children Act 2002<sup>25)</sup> which lays down a new law on adoption.<sup>26)</sup> It provides the paramountcy of the child's welfare principle at Section 1(2)<sup>27)</sup> which says “the *paramount* consideration of the **court or adoption agency** must be the *child's welfare, throughout his life*”. The law prior to the coming into force of the Adoption and Children Act 2002, laid child's welfare as the ‘first consideration’ and not ‘paramount consideration’. With this change, the welfare principle in adoption law has been aligned with the 1989 Act and Article 21 of the CRC both of which stipulate a child's welfare as paramount in adoption cases. Under the first consideration welfare test, courts and agencies had to take into account the interests of all parties concerned, namely the child, the birth family and the adoptive family. Although, the child's

24) At Para 187 JFBA concludes that “it will be necessary to expressly specify the best interests of the child, the child's right to express his/her views and participate in the Civil Code”.

25) Replaces Adoption Act 1976 and came into force on 30<sup>th</sup> December 2005. It is important to mention at this juncture that Prime Minister, Tony Blair has initiated the reform in adoption law to increase the adoption of children looked after by public agency, namely the local authorities.

26) The Children Act 1989 provides other alternatives to adoption such as residence order and special guardianship order.

27) The former adoption law, Adoption Act 1976 provided at Section 6 that ‘a court or adoption agency must have regard to all the circumstances, first consideration being given to safeguard and promote the welfare of the child throughout his *childhood*’.

welfare is the first consideration, it was not the overriding principle. The new paramountcy principle makes a child's welfare the pre-eminent consideration outweighing all others in decisions relating to adoption.<sup>28)</sup>

It is also interesting to note that the paramountcy of the child's welfare applies not just to judicial decision making, as under Section 1(1) of the 1989 Act but also to the decision making of adoption agencies; local authorities and registered private adoption agencies.<sup>29)</sup> Thus, when applying the paramountcy principle, courts or adoption agencies must ask what is best for the particular child in light of the range of placement options available.<sup>30)</sup> Moreover, the old welfare principle applied to the child only throughout his 'childhood'. But, now the courts and adoption agencies have to also consider it throughout the child's 'life'. Section 1(3) of the Adoption and Children Act 2002 also has a "non-delay" provision which states that 'the court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare'.

Section 1(4) of the Adoption and Children Act 2002 contains a welfare checklist; list of factors, which are similar to Section 1(3) of the 1989 Act. This section which has also omitted a definition of the 'child's welfare', provides a welfare checklist that must be applied by courts and adoption agencies in deciding what is best for the child in matters related to adoption. Section 1(4) provides that 'the court and adoption agency *must* have regard to the following matters (among others) (a) the child's ascertainable wishes and feelings regarding the decision considered in the light of the child's age and understanding; (b) the child's particular needs;<sup>31)</sup> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person; (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant; (e) any harm (within the meaning of Children Act 1989) which the child has suffered or is at the risk of suffering; (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including- (i) the likelihood of any such relationship continuing and the value to the child of its doing so; (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs; (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

Similar to the 1989 Act, the welfare checklist is not exhaustive, but is a general guide to the courts and adoption agencies. The welfare checklist shows that "Parliament had laid down a careful process for the making of placement and adoption orders, to be respected and scrupulously implemented; the framework could not be bypassed or short-circuited. The Act and the Regulations were to be honoured and obeyed in their entirety."<sup>32)</sup> First, it had to be considered whether adoption was

28) *Re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602

29) Private Adoption Agencies are bound by the Adoption and Children Act 2002 and regulated by Adoption Agencies Regulations 2005.

30) The Adoption and Children Act 2002, LexisNexis Butterworths, 2007 at p. 22.

31) Section 1(4) (b) refers to the 'needs' of the child but ought to be considered by the court or agency. Reference should be made to Section 1(3)(b) of the 1989 Act which provides that 'physical, emotional and educational needs' shall be regarded by the courts in a child's welfare determination. The term 'needs' in the Adoption and Children Act 2002, shall therefore include 'physical, emotional and educational needs'. But, it is not limited to Section 1(3)(b), so social, moral, psychological and health needs may also be taken into account in adoption related decision making. (A Quick Guide to the Adoption and Children Act (2002), Her Majesty's Courts Service, Version 2, January 2006.)

32) *Re B (Placement Order)* [2008] 2 FLR 1404

in the welfare of the child and if that was answered in the affirmative the local authority had to apply for a placement order.<sup>33)</sup> The court will then assess the welfare of the child by taking into consideration the likely impact of the decision on a particular child. This will require an application of the welfare checklist to every individual case.

A child's wishes and feelings under Section 1(4) (a) are significant to the court or agency when they accord with his/her welfare. Recognition of the child's wishes and welfare depends largely on the child's age and understanding of the circumstances. However, there is no requirement that the courts and the adoption agencies must obtain the consent of the children to adoption. It is obvious that the domestic law in the UK which had a lower standard (first consideration) under the previous adoption law has been reformed to reflect the paramountcy of the child's welfare in adoption cases to align it with the 1989 Act and in light of the international obligation under Article 21 of the CRC.

In Japan, adoption is not a widely recognised system for children. Adoption of unrelated persons was unacceptable under the traditional Japanese culture due to the importance given to blood ties. A child is not adopted because adoption serves the children's welfare. Rather, on the need of a family to have an heir. Adult adoption was very common in those days and to a certain extent still is. Social welfare system was not developed until a few decades ago and adoption remains the last choice for children requiring State protection. Babies of unmarried mothers were adopted in secret through doctors or nurses because if the truth is known, the adoptive parents will be out-casted by the society. There are various private adoption agencies besides the local authority public care. Each having its own rules, policies and practices because standardised regulations on adoption is yet to be introduced.

The law of adoption is provided for in the JCC. It does not require the relationship between the child and birth parents to be relinquished. The child, birth parents and adoptive parents had remained in a legal familial relationship. The child's welfare was not given any significance by the parties and under this 'regular adoption system' judicial recognition was not required. In 1988 after decades of pressure from scholars, provisions on a system of special adoption which extinguishes permanently the legal relationship between a child and birth parent was introduced as a protection for children aged six (6) and below. The family courts were given powers to determine if a special adoption is necessary for the interests of the child under certain provisions of the JCC. For instance, Article 817-7 provides that "a ruling of special adoption shall only be made if both parents of a person to be adopted are incapable or unfit to care for the child or there are any other special circumstances, and it is found that the special adoption is especially necessary for the **interests of the child.**"

The JCC appears to have made a random reference to the term 'interests of the child' in relation to adoption. There are no definitions, illustrations or examples of the term. The criteria or factors to be considered are not available. Whether this term has a similar meaning to the UK's child's welfare principle is unclear. By the time amendments were made to the JCC in 1988, Japanese lawmakers must have been aware of the importance given to the welfare of the child in other jurisdiction like the USA and the UK but the above amendments do not reflect even a resemblance of the

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33) Re S [2008] All ER

principle. At least Japan could have adhered to its obligation under the CRC which it ratified in 1994, to incorporate the paramountcy of the welfare of the child principle during the revision of the JCC in 1988, but it did not. As such, the Japanese laws lack the most important legal tool; well established criteria to determine a child's welfare.

The other peculiar feature of Japanese adoption system is that public and private adoption agencies are not strictly regulated. There are no strict rules or regulations governing adoption practices of the public or private agencies. Any person or organisation may arrange adoption for children in Japan if the Prefectural Government's formalities are fulfilled. There is no inspection conducted on the activities or performance of these agencies. It is said that doctors' associations and lawyers arrange children's adoption privately based on their own standards and policies. A Management Guidelines for Child Guidance Centers has been introduced as a guide for the public agencies but regrettably it revolves on administrative related issues and does not expressly incorporate the child's welfare principle. Article 19(2) of the Special Regulations on Adjudgement of Domestic Relations provides that the statement by the child aged 15 years old or above, must also be heard in family court proceedings. Special adoption concerns children 6 and below so there is no necessity to apply this provision. In a regular adoption, the wishes of children 15 and above must be regarded, but their consent is not required even though they are made a party to the adoption application. The decision-makers such as the CGC or a private adoption agency, birth and adoptive parents and the family courts can override the child's wishes in adoption arrangements if it is deemed to serve the child's welfare.

#### IV Welfare of the Child & Alternative Placement

Some children are deprived of family environment due to poverty, parental illness, parental death and so on. Some, on the other hand are taken into care by the State when it is determined to be in the child's welfare to do so, for example when children are neglected, abandoned or abused by their parents. When children are deprived of family environment temporarily or permanently the State has to decide on an alternative placement for each child. When the subject of alternative placement arises, adoption seems to be the best choice because of the permanency and stability it provides to a child. But, there are other types of alternative placements such as relatives care,<sup>34)</sup> foster care,<sup>35)</sup> group care<sup>36)</sup> and institutional care<sup>37)</sup> to safeguard the interests of children. In deciding an appropriate alternative placement, the child's welfare must be taken into account. The issue is whether the child's welfare is the paramount consideration in an alternative placement decision making.

Article 20<sup>38)</sup> of the CRC stipulates that children deprived of family environment must be cared for

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34) Relatives care means members of the extended family for example grandparents, aunts, uncles or even older siblings help to look after children with or without financial assistance from the State.

35) Foster care is where strangers are chosen to look after children requiring protection, with financial and other service support from the States.

36) Group care is where older children live in small groups with the supervision of social welfare officers.

37) Institutional care is where children are placed in children protection homes and looked after by public authority or private organizations.

38) Article 20 of the CRC provides as follows (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. (2) States Parties shall in accordance with their national laws ensure alternative care for such a child. (3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be

and placed in a suitable alternative placement by the State.<sup>39)</sup> The standard of decision making in respect of children deprived of family environment is not specified under Article 20. This is one circumstance where Article 3(1) must be resorted to. In deciding which alternative placement is best for a child, the child's welfare becomes 'a primary consideration'. On the face of it, it appears that the administrative bodies of the State must adhere to the principle of the child's welfare as a primary consideration when making an alternative placement choice for a particular child. Nonetheless, a distinction has to be made between adoption and non-adoption alternative placements. The reason is because adoption cases are decided on a higher standard, 'the paramount consideration' than that established by Article 3(1) whereas, non-adoption cases are deemed to be decided on 'a primary consideration' standard. Article 12 applies to all alternative placement decisions and the authorities concerned must have regard to the wishes of the particular child.

In respect of children deprived of family environment the following measures are listed as a preferential measure, firstly, restoration to their birth family; secondly, placement with other family members or relatives; thirdly, placement with adoptive parents pursuant to adoption order; fourthly placement with foster parents; fifthly, placement in institutional care. Some scholars suggest that child should be placed for international placement only when these options have been exhausted. I beg to defer because once children are institutionalized, their welfare is nobody's concern. They stay in isolation at the institutions as an invisible minority. Therefore, the decision-makers for children must also consider whether international adoption would be the best placement choice for a child even before finalising an institutional placement.

In the UK, children who are deprived of family environment are referred to as 'looked after children.' There were 69,000 children in the care of local authorities in 2009. 57% (34,600) of these children were boys and 43% (26,300) were girls. 5% (3,200) of children looked after were under 1 year old, 16% (9,500) were aged between 1 and 4 years old, 17% (10,500) were aged between 5 and 9 years old, 41% (24,800) were aged between 10 and 15 years old and 21% (12,900) were aged 16 and over. The following placements were made in respect of the children deprived of family environment by local authorities: 73% (44,200) of were living with foster parents, 10% (6,200) were living in children's homes (includes secure units, children's homes and hostels), 7% (4,100) were living with their parents, 4% (2,500) were placed for adoption and 3% (1,720) were placed in residential schools or other residential settings.<sup>40)</sup>

The local authorities are the administrative bodies vested with the duties of caring and deciding on an alternative placement for children deprived of family environment. They are not bound by the child's welfare principle under Section 1(1) in the discharge of these duties because the 1989 Act only applies to the courts. Therefore, when local authorities are making decisions about the alternative placement of children they only have a duty to safeguard and promote the child's welfare.<sup>41)</sup> It simply means that the child's welfare need not be the paramount consideration of the lo-

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paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

39) A Commentary by the UNICEF dated 22 June 2009. Article 20 "concerns children who are temporarily or permanently unable to live with their families, either because of circumstances such as death, abandonment or displacement, or because the State has determined that they must be removed for their best interests. Such children are entitled to 'special protection and assistance'. <http://unicef.typepad.com/main/2009/06/article-20.html>

40) Statistics provided by British Association for Adoption & Fostering <http://www.baaf.org.uk/info/stats/england.shtml>

41) Section 22 (3) (a) of the Children Act 1989.

cal authorities. Although alternative placement relates directly to the 'upbringing' of a child, the local authorities are not vested with the responsibilities to regard welfare of the child as paramount. The application of Section 1(1) of the 1989 Act does not extend local authorities. It suffices if a local authority proves that an arrangement plan made for a particular child is intended to promote the child's welfare.

By virtue of Section 22(4) of the 1989 Act before making any decision with respect to a child deprived of family environment, a local authority shall ascertain the wishes and feelings of the child, his/her parents and others relevant parties and the child's age and understanding and his/her religious persuasion, racial origin and cultural and linguistic background. Local authorities are required to work in partnership with parents. The first option must be to work with the parents by voluntary arrangement unless to do so would be placing the child at risk of significant harm.<sup>42)</sup> They are required under regulations to tell children what plans they have made about their placement but children's consent is not relevant.

The local authority will seek a court order when compulsory action is in the child's welfare. Prior to making an application to the court, local authorities are required to make care plans. Care plans include placement with relatives, foster parents and children's institution. Section 31 the 1989 Act empowers the court to make a care order when alternative placement is considered to serve the child's welfare. When deciding whether to make a care order, the welfare of the child must be the court's paramount consideration and the court must have regard to the welfare checklist. The welfare of the child is given paramount consideration at the stage when the matter is brought for the court's deliberation. The courts can decline to make a care plan proposed by the local authority if the plan does not meet the child's welfare requirement. But, the local authorities are not bound to apply the paramountcy principle to arrive at a suitable care plan for a child. This appears to be a problem and a standardised procedure is warranted to serve the child's welfare.

In Japan, the number of children requiring protection as of 2008 was 45,658. These children were placed by the local authority known as the Child Guidance Centers (CGC) at the following children care institutions; 31,593 children were placed in children's institutions, 3,611 children were living with foster parents, 1,104 children were placed at institutions for disabled children, 1,995 children were living at independent facility for children, 3,299 children were placed at infants home and 4,056 children were living at mother and child homes. Pursuant to the 1947 Act, every prefectural government in Japan is obligated to establish CGCs which offer advisory services to families on various problems concerning children. The 1947 Act provides that a child without a guardian or a child whose guardian is regarded as inappropriate to care for him/her is subject to a maximum of 2 months temporary custody by the CGC. If necessary the time frame is extended, otherwise the child is transferred to an infant home or a protective institution as determined by the child welfare officers (CWO) of the CGC. A foster family system is also established under the 1947 Act but still infamous under the Japanese society because of the importance given to 'blood ties'.

The CWO shall evaluate the child's condition by having an interview with the child or his/her parents, and give sufficient consideration to the child or the parents' opinion when determining the action to be taken as provided for in the Management Guidelines for Child Guidance Centers. The

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42) The precise rules on placement decisions are contained in Arrangements for Placement of Children (General) Regulations 1991.

CGC must obtain permission from a family court to place a child in the custody of foster parents or to send him/her to Child Welfare Facilities against the will of the birth parents.<sup>43)</sup> The procedures are to be conducted by a family court according to the Law for Adjudgement of Domestic Relations and the Special Regulations on Adjudgement of Domestic Relations. In cases where parental consent is not required for example when parents are death or missing family courts interference is not necessary and as such, the welfare assessment is conducted solely by the CWOs.

Some amendments were made to the 1947 Act in 1997 to reinforce the consideration of a child's welfare principle; (a) when a CGC takes an action such as placing a child in an institution, it is explicitly stipulated that it shall hear the child's opinion; (b) when the will of the child or the parents does not coincide with the policy of the CGC, or when the CGC deems it necessary, it seeks the opinion of a council of medical and legal experts. Yet, from the interviews that I have conducted at CGCs in Osaka, I observed that the CGC staffs lack basic understanding of the child's welfare principle and usually place children in institution than with extended family or foster parents. I have spoken to Directors of private adoption agencies and realized that they too operate in a similar manner though their welfare assessments are based on different policies.<sup>44)</sup>

## V Conclusion

A comparative study of the legislative frameworks of welfare of the child principle of the UK and Japan shows 5 main distinctions. The first point is the incorporation of the child welfare principle as a statutory provision. The UK has clear statutory provisions on the principle of the welfare of the child coupled with a welfare checklist to guide the courts in matter concerning children in its major statutes such as the 1989 Act. Almost all the statutes relating to children have child welfare provisions. Japan on the other hand does not have a specific statutory provision in the laws governing children suggesting that the legislators have not recognised the child welfare principle as legally significant. This however, does not mean that the child welfare principle is utterly absent from the Japanese jurisprudence. The principle is applied by judges in the family courts but due to lack of uniformity, uncertainty is prevalent.<sup>45)</sup> Statutory incorporation of the principle will comprehend vagueness in law.

The second point is the decision making standard in a child welfare assessment. There is a well established decision making standard on the principle of the welfare of the child in the UK, namely the child's welfare is "the paramount consideration" of the courts. But, such a standard is absent under Japanese laws. In the UK, welfare of the child is the paramount consideration in cases involving the 'upbringing of children' and binds the courts. In adoption cases it is also the paramount principle and applies to courts and has been extended to adoption authorities. A child's welfare is not the paramount consideration in alternative placement decision making by a public or private authority but when a court is called upon to approve a placement decision, it becomes the court's paramount consideration. Judicial recognition which functions as a check and balance in the UK may minimises abuse of authority or inaction by child welfare officers. In Japan, the underlying

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43) Article 27(4) of the Child Welfare Law, 1947.

44) I am currently conducting interviews with public and private adoption agencies in Osaka and England to study their policies on child placement.

45) The study of case law is dealt with in a forth coming paper.



principle is the welfare of the child but it is not paramount in every case. The family courts have a duty to promote general welfare of children based on the societal norms than to protect the concerned child's welfare. Wide discretionary power is vested on the child placement decision-makers who are inclined to work for the interests of their agencies and whose exercise of authority is beyond court's scrutiny.

The third point is that permanent alternative placement requires judicial recognition in the UK but not in Japan. In the UK, without a care order children cannot be placed permanently at any alternative placement including children's institutions. In contrast, in Japan a court order is only essential for special adoption cases but not to place a child in the children institution or foster care. Institutional placement is preferred and has become the most common alternative placement because there is no paper work and no tedious court procedures. After a child is placed in institution, no initiative is taken to make a foster care or adoption placement on the ground of parental objection. In general, the family courts are not called upon at the initiative of the Head of CGC when parents strenuously object to a placement. A requirement to obtain a court order for permanent alternative placement will see a reduction of children placed at the institution in Japan.

The fourth issue is the protection system for children. Legal safeguard appears to be better for children who live in family setting than children who are deprived of family environment in both the UK and Japan. In the UK, for all the cases relating to the 'upbringing of children' the decision making standard is paramount consideration of the child's welfare. But, for children looked after by the local authority, with an exception of adoption, the rest of the arrangements on alternative placement are not subjected to the paramount consideration standard. In Japan too the children who live with parents have more safeguards than children requiring protection cared for by the State. In matrimonial disputes involving children, family courts must consider a child's welfare. For children requiring protection, administrative bodies or private agencies designate alternative placement arrangements including adoption without the need to adhere to the child's welfare principle. It appears that in cases where parental consent needs dispensation the family courts rarely come to the aid of these children.

The fifth point is legal reform. One particular reason cannot be offered for the reformation of child laws, especially adoption law in the UK. It could be an indirect influence of its ratification of the CRC whereby many statutes were aligned to reflect the objective of the CRC.<sup>46)</sup> Another reason, could be the Prime Minister, Tony Blair's political initiative<sup>47)</sup> to increase adoption of institutionalised children despite some researches showing that adoption is not the best solution for all children deprived of family environment. Whatever, the reason is, laws have been standardised to reflect the welfare of the child as a paramount principle in almost all matters involving children. In Japan, legal changes have been extremely slow if not rare. The principle of welfare of the child is understood as creating mechanisms to advance the social welfare of children as a whole. Therefore, welfare of the child is not the paramount consideration in all matters involving children. Although the Japanese Government claims that the welfare of the child is placed at the center of the 1947 Act, neither a definition nor a checklist is available as a guide to the courts, administrative authori-

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46) It is essential to highlight at this juncture that the CRC has not been incorporated into the domestic law of the UK. As such, the court are not bound to apply it but based on the principle of international obligation, the UK courts applies it.

47) White Paper on Adoption: A New Approach, 2002.



ties or child welfare agencies. It has yet to amend the provisions of the JCC, especially on adoption to reflect its compliance of the CRC. Ratification of the CRC appears to be a diplomatic token.

In conclusion, it is submitted that a comprehensive legislative framework is necessary to make the principle of the welfare of the child the paramount consideration in child related matters in Japan. The UK's welfare checklist would be an excellent guide for the Japanese law-makers to contemplate. Although the age requirement to regard the wishes of children is not legally determined in the UK, Japanese legislature should incorporate a minimum age requirement in its welfare checklist. A specific guideline for child welfare officials will assure uniformity in best option decisions.

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