

**Reconciling 'Best Interests of the Child' with the
Traditional Muslim Law Rules on Child Custody: Trends in
the Judicial Decisions of Bangladesh**

A Thesis Submitted for the Doctor of Philosophy

By

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Abstract

In Bangladesh respective religion-based personal laws generally govern the family matters of individual religious communities. In respect of the rules of Muslim personal laws, there had been significant efforts on the part of the higher judiciary in Bangladesh to progressively interpret these rules according to the needs of the changing social realities. This progressive judicial approach can be traced back to the post-colonial period when the courts in the Indian subcontinent had given a number of liberal interpretations in awarding custody of children. However, such departure from traditional rules to ensure child's welfare had instigated a persistent judicial debate between the two considerations and the debate still continues in Bangladesh as well as in India and Pakistan.

The liberal interpretations in the custody decisions are consistent with the best interests principle as encompassed in Article 3(1) of the Convention on the Rights of the Child, which is ratified by Bangladesh. However, Bangladesh's commitment towards ensuring best interests particularly in matters of child custody, which has a direct impact on child rights, does not always get reflected in the judicial decisions. Particularly, the decisions of the family courts in Bangladesh are still largely influenced by the traditional rules of child custody.

The thesis thus examines the trends in the judicial decisions in Bangladesh in applying Muslim law principles of child custody weighing their considerations against the principle of best interests of the child. Considering the common legislative history, the thesis also gives an overview of the judicial trends on custody, in India and Pakistan. Upon evaluation of the decisions, the thesis draws an analysis of how far the courts in Bangladesh – both the Supreme Court and the family courts, are reconciling their efforts to uphold 'best interests of the child' with the traditional Muslim law rules on child custody.

Dedication

To my parents, my husband and my child, for their constant support throughout the journey.

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List of Acronyms and Abbreviations

ACII	Advisory Council of Islamic Ideology
ACRWC	African Charter on the Rights and Welfare of the Child
AD	Appellate Division
AIR	All India Reporter
All.	Allahabad
APWA	All Pakistan Women's Association
BLC	Bangladesh Law Chronicle
BLD	Bangladesh Legal Decisions
Bom.	Bombay
Cal.	Calcutta
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CLC	Civil Law Cases
CLR	Commonwealth Law Reports
CRC	United Nations Convention on the Rights of the Child
CrPC	Criminal Procedure Code 1898
Dac.	Dacca
Del.	Delhi
DLR	Dhaka Law Reports
E R	English Reports
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
FCO	The Family Court Ordinance of 1985
FLR	Family Law Reports

Gau.	Gauhati
Guj.	Gujarat
GWA	Guardians and Wards Act 1890
HCA	High Court of Australia
HCD	High Court Division of Supreme Court of Bangladesh
HGMA	Hindu Majority and Guardianship Act 1956
I.A.	Indian Appeals
ICCPR	International Covenant on Civil and Political Rights
ILR	Indian Law Reports
Kar.	Karachi
Ker	Kerala
Lah.	Lahore
LEX	BDLex Database
MANU	Manupatra
Mad.	Madras
MFLO	Muslim Family Law Reform Ordinance 1961
MIA	Moore's Indian Appeals
MLD	Monthly Law Digest
MLJ	Madras Law Journal
MLR	Mainstream Law Reports
Oudh	Oudh Sector
PC	Privy Council
Pesh.	Peshawar
PLD	Pakistan Legal Decisions
Que.	Quetta
SC	Supreme Court
SCC	Supreme Court Cases

SCMR	Supreme Court Monthly Review West Pakistan
UCC	Uniform Civil Code
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
USA	United States of America
W.P	West Pakistan
W.R.	The Weekly Reporter
WHO	World Health Organisation

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Mehmood Akhtar v District Judge and 2 others [2004] LEX/SCPK/0297/2004
Mehmood Ayyaz v Additional District Judge, Chakwal and other [1992] PLD Lahore 441
Mirza Qamar Raza v Tahira Begum [1988] PLD Karachi 169
Miss Hina Jilani, Director of A.G.H.S. Legal Aid Cell v Sohail Butt [1995] PLD Lahore 151
Mrs. Khurshid Begum v Additional District Judge, Rawalpindi and 2 others [2004] Lahore 395
Mrs. Shaukat Khalid v Additional District Judge [1990] LEX/SCPK/0168/1990
Mst. Rashida Begum v Shahab Din and others [1960] PLD Lahore 1142
Mst. Aisha Bibi v Naeem Umar Qadri [2000] YLR 1171
Mst. Amina Bi v Muhammad Abbas Butt and another [1988] SCMR 1794
Mst. Aziz Khatoon and Others v Mst. Zubaida Khanum [1988] SCMR 832
Mst. Balquis Fatima v Najm-ul-Ikram Qureshi [1959] PLD Lahore 566
Mst. Basant Kaur v Gian Singh and others [1939] AIR Lah 359
Mst. Fahmida Begum v Habib Ahmed [1968] 20 DLR (WP) 254
Mst. Farah Iqbal v Muhammad Anwar and 2 others [2003] PLD Que 131
Mst. Feroze Begum v Lt. Col. Muhammad Hussain [1978] SCMR 299
Mst. Hifsa Naseer v ADJ Gujar Khan [2017] PLD Lahore 153
Mst. Imtiaz Begum v Tariq Mehmood [1995] CLC 800
Mst. Iram Shahzad and 2 Others v Additional District Judge [2011] PLD Lahore 362
Mst. Jamila Bano v Mirza Muhammad [2003] YLR 1337
Mst. Kaneez Fatima v Wali Muhammad [1993] PLD SC 901
Mst. Kaneez Sughra v Syed Mushtaq Hussain Shah and others [1989] LEX/SCPK/0138/1989
Mst. Nazir v Hafiz Ghulam Mustafa [1981] SCMR 200
Mst. Rabia Bibi v Abdul Qadir and others [2016] CLC 1460
Mst. Rashida Begum v Shahab Din [1960] PLD (W.P.) Lah 1142
Mst. Rashida Bibi v Muhammad Ismail [1980] LEX/SCPK/0213/1980

Mst. Razia Bibi v Riaz Ahmad [2004] SCMR 821
Mst. Rubia Jilani v Zahoor Akhtar Raja and 2 others [1998] LEX/SCPK/0562/1998
Mst. Sughra Begum v Ashfaq Ahmad Butt [1981] PLD Lahore 393
Mst. Sundri V Respondent: Mohamad Fafoo and another [1971] AIR J&K 43
Mst. Tahira v Additional District Judge, Rawalpindi and others [1990] SCMR 852
Mst. Taj Bibi v Khuda Bakhsh [1988] PLD Peshwar 57
Mst. Yasmin Bibi v Mehmood Akhter [2004] YLR 641
Mst. Zohra Begum v Latif Ahmad Munawwar [1965] PLD (WP) Lah 695
Muhammad Bashir v Ghulam Fatima [1953] PLD Lah 73
Muhammad Iqbal v Mst. Irshad Begum and 2 Others [1984] SCMR 1034
Muhammad Zaman v Ameer Hamza [2009] CLC 230 [Shariat Court (AJ&K)]
Nazeer Begum v Abdul Sattar [1963] PLD (WP) Karachi 465
Peggy Collin v Muhammad Ishfaq Malik [2010] PLD Lah. 48
Riasat Mehmood v. Mst. Nadia Parveen [2014] MLD 374
Riyaz v Noorjan A [2022] (MANU/KA/3631/2022)
Roshni Desai v Jahanzeb Niazi [2011] PLD Lahore 423
Rukhsana Malik and 2 others v Abdul Aziz and 2 others [2004] PLD Lahore 801
Saji Muhammad Shafi and another v Mst. Maqbool Afza and others [1986] LEX/SCPK/0536/1986
Sardar Hussain v Mst. Parveen Umar [2003] YLR 3054
Sardar Muhammad v Nasima Bibi [1966] PLD (W.P.) Lah. 703
Sayeeda Khanam v Muhammad Sami [1952] PLD Lahore 113
Shaukat Pervez Butt v Mst. Nargis Sultana and another [1988] PLD Lahore 290
Sultan Mirza v Mst. Shahnaz Akhtar [1975] PLD Lahore 194
Syed Tahseen Razi v Dr. Farhana Shaheen and another [2003] YLR 1067
Zareena Bibi v Muhammad Ashraf [2015] PLD Lahore 253
Zebu v Miraj Gul [1952] PLD 23

UK

de Manneville v. de Manneville [1804] 32 E.R. 762
J v C [1970] AC 668
Queen v. Gyngall 1893] 2 QBD 232
Re R (A Minor) (Wardship: Consent to Medical Treatment) [1991] 4 All ER 177

Re W (A Minor) (Medical Treatment) [1992] All ER 4

Others

Secretary, Department of Health and Community Services v. J.W.B. and S.M.B. High Court Of Australia [1992] HCA 15

Secretary, Dept. of Health and Community Services, v JWB and SMB [1992] 175 CLR 21

Hokkanen v Finland [1996] 1 FLR 289

Re E (A Minor) (Wardship: Medical Treatment) [1993] 1 FLR 386

YC v United Kingdom [2012] 55 EHRR 33

Yousef v Netherlands [2003] 36 EHRR 20

List of Statutes and Treaties

NAME AND YEAR OF THE STATUTE	JURISDICTION
The Caste Disabilities Removal Act, 1850	Passed in British India (repealed in 2018)
The Children Act, 1989	United Kingdom
The Children Act, 2013	Bangladesh
The Civil Code of the Islamic Republic of Iran, 1928	Iran
The Code of Criminal Procedure, 1973	India
The Constitution (Eighth Amendment) Act, 1985	Pakistan
The Constitution of India	India
The Constitution of the Islamic Republic of Pakistan, 1956	Pakistan
The Constitution of the People's Republic of Bangladesh	Bangladesh
The Custody of Infants Act, 1839	United Kingdom
The Family Court Ordinance, 1985	Bangladesh
The Guardians and Wards Act 1890	Bangladesh
The Guardianship of Infants Act 1886	United Kingdom
The Guardianship of Infants Act, 1925	United Kingdom
The Hindu Minority and Guardianship Act, 1956	India
The Indian Contract Act, 1872	India
The Indian Evidence Act, 1872	India
The Indian Majority Act, 1875	India
The Indian Penal Code in 1860	India
The Indian Succession Act, 1925	India
The Judicature Act, 1873	United Kingdom
The Muslim Family Law Reform Ordinance, 1961	Bangladesh

The Muslim Personal Law (Shariat) Application Act, 1937	Bangladesh
The National Children Policy, 2011	Bangladesh
The National Plan of Action to Eliminate Child Labour (2020-2025)	Bangladesh
The National Women Development Policy, 2011	Bangladesh
The Offences of Zina (Enforcement of Hadood) Ordinance, 1979	Pakistan
The Personal Laws (Amendment) Act, 2010	India
The Personal Status Law of Kuwait, 1959	Kuwait
The Prevention and Suppression of Human Trafficking Act, 2012	Bangladesh
The Prevention of Anti-Women Practices Act, 2011	Pakistan
The Transfer of Property Act, 1882	India

List of International and Regional Treaties and Declarations

- The African Charter on the Rights and Welfare of the Child 1990
- The Convention on the Elimination of all Forms of Discrimination Against Women (Adopted 18 December 1979).
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Adopted 4 November 1950)
- The Geneva Declaration of the Rights of the Child, 1924
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)
- The International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966)
- The UN Declaration on the Rights of the Child (Adopted 20 November 1959)
- The Convention on the Rights of the Child (Adopted 20 November 1989),

Part – I: Introduction

In Bangladesh respective religious laws generally govern the family matters of individual religious communities, although there has been a significant influence over time, of new principles through legislations and judicial precedents.¹ Muslim family law discourse in Bangladesh is again characterized by the significant efforts made by the courts (in particular, by the higher judiciaries) to apply traditional rules to modern circumstances. Through these efforts, courts had occasionally overridden traditional interpretations of Muslim law principles and based their decisions on equity, justice and good conscience. This ‘activist’² role of the Bangladeshi courts is even more manifest in the interpretation of the law relating to custody of the children.³ This is an area, which had remained almost outside of the substantial Muslim law reforms that took place through codifications and reform legislations during the colonial and post-colonial period in the Indian subcontinent.⁴ However, in the post-colonial period, a number of liberal interpretations have been given by the courts in the Indian subcontinent in awarding custody of children, instigating thereby a persistent debate between traditional Muslim law rules and the principle of welfare or best interests of the child. The present thesis aims to evaluate this debate, which is still continued in the Judiciary in Bangladesh, through liberal interpretation of the laws to suit the needs of changed social realities. This liberal interpretation in the modern custody decisions are consistent with the best interests principle as encompassed in Article 3(1) of the Convention on the Rights of the Child (CRC)⁵ which says that ‘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’.

¹ Taslima Yasmin, ‘Judicial Trends in Child Custody Cases in Bangladesh: Traditional Islamic Law

² See Ridwanul Hoque and Morshed Mahmud Khan, ‘Judicial Activism and Islamic Family Law: a Socio-Legal Evaluation of Recent Trends in Bangladesh’ (2007) 14 (2) *Islamic Law and Society* 204; also see Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (OUP 2011).

³ Serajuddin, *Muslim Family Law* (n 2) 97.

⁴ The term ‘Indian subcontinent’ or ‘subcontinent’ has been widely used to refer to the British colonial empire in the region. The New Oxford Dictionary of English defines the region as ‘historically forming the whole territory of greater India ... [and presently] divided between India, Pakistan, and Bangladesh’. *New Oxford Dictionary of English* (OUP 2001) 929.

⁵ Convention on the Rights of the Child (entered into force 20 November 1989) 1577 UNTS 3(CRC).

It is worth mentioning that the principle of welfare is generally considered as the domestic law equivalent of the 'best interests principle' as embodied in the CRC. Writing on the context of Pakistan, Davis noted that 'Pakistan's "welfare" test is virtually identical to the "best interests of the child" standard'.⁶ Other South Asian scholars have also generally referred to the term 'best interests principle' as an alternative to 'welfare' of the child principle⁷. The judicial decisions in South Asia as will be discussed in the later chapters of the thesis, also follow a similar pattern where both terms have been used synonymously by the courts.

Bangladesh is one of the first few countries to have ratified the CRC⁸ and is committed as such to ensure 'best interests of the child' particularly in matters of child custody, which has a direct impact on the rights of the children. Such commitment towards best interests principle does get reflected in the judicial decisions especially in the recent decisions of the higher judiciary in Bangladesh.⁹ However, the family matters being governed principally by religious personal laws, the best interests of the child standard had not always been applied in its true sense in the judicial decisions. Religious principles had often induced the judicial decisions to overlook the best interests of the child involved in the dispute. On occasions, court's apparent reliance on welfare or best interests standard was also not free from its bias towards the religious and cultural traditions.

The thesis thus proposes to identify the trends in the judicial decisions in Bangladesh in applying (or overriding) Muslim law principles of child custody weighing their

⁶ Martha F. Davis, 'Child Custody in Pakistan: The Role of Ijtihad' (1985) 5(2) Boston College Third World Law Journal 119, 126.

⁷ See Savitri Goonesekere, 'The Best Interests of the Child: A South Asian Perspective' (1994) 8 International Journal of Law and the Family 117, 145; Ayesha Shahid and Isfandiyar Ali Khan, 'Pakistan', in Nadjma Yassari Lena and others (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (Springer 2017); Shabnam Ishaque and Muhammad Mustafa Khan, 'The Best Interests of the Child: A Prevailing Consideration within Islamic Principles and a Governing Principle in Child Custody Cases in Pakistan' (2015) 29 International Journal of Law, Policy and The Family 78; Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.

⁸ Bangladesh ratified the CRC on 03 August 1990
<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=en>
accessed 03 March 2023.

⁹ The Supreme Court of Bangladesh consists of the High Court Division (HCD) and the Appellate Division (AD).

considerations against the principle of best interests of the child. Upon such evaluation, the thesis attempts to draw an analysis of how far the current judicial practices are applying the principle of best interests of the child in deciding custody disputes.¹⁰

¹⁰ The thesis is focused on the matters relating to 'custody' as a form of guardianship and does not include the broader category of 'guardianship' within its scope as perceived by the traditional Muslim law rules (the rules are discussed in the later chapters). As such issues like guardianship of marriage and guardianship of property and the judicial decisions and rules under these categories are excluded from the analysis. However, due to overlapping duties and capacities of a 'guardian' and 'custodian' - both under the Muslim law rules and the statutory laws, discussions on guardianship and use of the terms in conjunction with 'custody' occasionally appeared in the overall content of the thesis.

Chapter 1: Outline, Research Question and Methodology

1.1. Research Outline

The research is broadly divided into four parts. Part - I of the research gives a brief background of the custody disputes in Bangladesh and broadly introduces the key premise of the thesis with the primary focus on the concept of best interests of the child as articulated in Article 3 of the CRC. Part - I consists of three chapters. Chapter one introduces the research outline and the key research questions. This chapter then describes the research methodologies that the thesis has followed. The methodology section contains a separate discussion with regard to the family court cases, as the process of collection and analysis of the judgments was different from the Supreme Court (SC). The first chapter then discusses the limitations of the research as well as its potential contribution to the existing academic knowledge.

As the thesis is premised on the best interests principle as embodied in the CRC, chapter two gives an overview of what the best interests principle in the Convention entails, including how the principle is embodied in other international and regional instruments. The chapter also significantly focuses on the academic scholarship surrounding the debate over indeterminacy of the principle. In the third chapter, the research addresses the debate surrounding primacy of the best interests principle and discusses the concerns regarding paternalism and cultural and religious considerations that may influence the determination of the best interests of the child. The chapter further includes a section on the limits of cultural considerations when they contradict human rights norms. The third chapter subsequently discusses how the Committee on the Rights of the Child had responded to the implementation efforts of different countries; in particular of Muslim majority countries, in terms of the interplay of traditional rules governing custody laws with the determination of best interests of the child.

Part-II of the thesis focuses on South Asian jurisprudence on the subject and contains chapters four, five, six and seven. Chapter four analyses the common legislative history of child custody laws shared by the three countries in the sub-

continent- Bangladesh, India and Pakistan and discusses the traditional Islamic law concept of child custody as understood and applied in the South Asian context. The chapter then examines the premise of the Guardians and Wards Act 1890 (GWA), which is the key governing statute in custody cases in all the three jurisdictions of South Asia.

Chapter five gives an overview of the judicial discourse in India with regard to applying the best interests standard in child custody disputes. Chapter six and seven focuses on the judicial trends in Pakistan on the subject. In light of the fact that Bangladesh was a part of Pakistan (as East Pakistan) in the post-colonial period till its independence in 1971, the sixth chapter focuses particularly on the cases of the superior judiciary of Pakistan reported prior to 1971, as the body of jurisprudence during that period forms a substantive part of the judicial discourse in Bangladesh. The seventh chapter then gives an overview of the current judicial trend in Pakistan by analysing a number of decisions of the Pakistan's superior judiciary on custody.

Part III of the research focuses exclusively on the judicial trends in Bangladesh with regard to custody disputes between Muslim parties. The part gives a brief overview of the Bangladeshi legal framework on child custody drawing from the discussion in Part II. Part III consists of four chapters – Chapter eight, nine, ten, and eleven. In Chapter eight, the research examines the judicial decisions of the SC since 1971 and highlights the shift in the judicial approach towards welfare or best interests principle. The chapter also scrutinises a parallel judicial trend during this period that was influenced by the traditional rigid interpretations of the Muslim law rules of custody. The ninth chapter focuses on the modern approach of the judicial discourse in the SC that embraces the best interests principle and includes analysis of cases from 2012 till 2023.

Chapters ten and eleven of Part III analyse the judicial trends in the family courts' decisions in Bangladesh and examine how far the best practices of the higher courts have influenced the trends in the lower courts in applying best interests principle in child custody cases. Chapter ten examines those family courts' decisions that adhered to the best interests standard embraced by the higher judiciary and chapter

eleven scrutinises the decisions of the family courts that were influenced mainly by the traditional rules to the contrary.

Part IV consists of the concluding chapter of the thesis. Chapter twelve thus integrates the different parts of the analysis and reflects on the key question of the research: to what extent the best interests principle is applied in child custody disputes in Bangladesh and how do the Bangladeshi courts reconcile the principle with the traditional Muslim law rules of child custody.

1.2 Literature Review

The existing body of literature on child custody laws in Bangladesh is very limited and the influence of either the best interests principle or the traditional rules of Muslim law in custody cases has remained largely unexplored. A study report published in 2011 by the South Asian Institute of Advanced Legal and Human Rights Studies (SAILS) focused on child custody and guardianship cases exclusively to examine the applicable laws, as well as the procedural aspects in child custody and guardianship cases.¹¹ The study in the process reviewed most-cited reported cases of the preceding 10 years period in which the SC had critically engaged with the orthodox age-sex rule and departed from those rules in order to prioritize welfare of children. The study report, although noted that besides those progressive decisions, that it termed as 'best practices', the court would otherwise rely upon traditional rules in custody cases¹²; it did not analyse those traditional rules-based decisions to better understand and compare the paradox between welfare and religious considerations.

Again, the subject related to custody issues are generally discussed as part of broader studies on Muslim women's rights, mostly viewing custody from the

¹¹ Nowrin Tamanna and others, *Muslim Women's Rights under Bangladesh Law: Provisions, Policies and Practices Related to Custody and Guardianship* (The South Asian Institute of Advanced Legal and Human Rights Studies 2011) 22; the study was updated and re-published as a book chapter in 2019, see Nowrin Tamanna and others 'Muslim Women's Rights under Bangladesh Law: Provisions, Policies and Practices Related to Custody and Guardianship' in Faustina Pereira and others (eds) *Revisiting Personal Laws in Bangladesh: Proposals for Reform Muslim Women's Rights under Bangladesh Law* (Brill Nijhoff 2019)145

¹² *ibid.*

perspective of mothers' 'entitlement/right', with less focus on child-rights. Alamgir Serajuddin for instance, in his book discussed the welfare-based decisions of the SC and considered those as 'shining examples of judicial activism' because they were favourable towards mothers' right to custody.¹³ He explained this position further, maintaining that 'in the unequal fight for custody between the sexes, it is often the women who lose because of their social disabilities and financial constraints.'¹⁴ Commenting on the judicial activism in the leading child custody cases, Hoque and Khan also lauded the efforts of the SC for demonstrating sensitivity to the plight of Muslim women and 'improving justice' for them.¹⁵

Tamanna examined the welfare-standard advanced by the progressive decisions of the SC from a feminist perspective.¹⁶ She argues that even when mother's custody rights prevail on the ground of welfare, such decisions are not always based on equal status of women and rather the premise remains a discriminatory one 'as it is often based on stereotypical assumptions regarding women's role in the family and in society'.¹⁷

Thus, the existing limited literature on child custody in Bangladesh mostly discusses the progressive welfare-based decisions of child custody from the perspectives of women's rights. Although such analysis is crucial from a gender-equality perspective, it overshadows, to some extent, the scope of examining the custody decisions and practices from a child-rights-centric approach. Especially, discussion around relevance of the principle of best interests of the child in custody decisions is almost absent in the existing academic scholarship.

Also, the available scholarship largely overlooked the courts' underlying biases towards religious rules reflected even in some of the leading decisions that are often cited as 'progressive' or 'best practices'. Another crucial gap in literature is the lack of analysis on the modern judicial approach in custody cases, as there has not been

¹³ Serajuddin, Muslim Family Law (n 2) 239.

¹⁴ *ibid.*

¹⁵ Hoque and Khan (n 2) 223.

¹⁶ Nowrin Tamanna, 'The "welfare of the child" in Sharia law: an analysis of child custody law and practices in Bangladesh from a feminist perspective' (2014) 26(3) Child and Family Law Quarterly 283.

¹⁷ *ibid* 284.

any significant academic scholarship discussing SC's (or the family courts') decisions of the past 10 years or so.¹⁸

The literature with regard to the judicial trend of the family courts in Bangladesh is even more scant, perhaps due to the difficulty in accessing the unreported decisions of the lower courts. Professor Monsoor in her book included a chapter on unreported decisions of the family courts in custody cases, which had included brief summary of only 4 unreported decisions of 1990's.¹⁹ The SAILS study however, asserts to have examined 40 case-records of the lower courts; but other than a general observation that the lower courts in most cases do not follow the best practices advanced by the higher judiciary - it did not offer any further critical analysis of those lower court orders. Also, no specification or category of the nature of the orders collected is mentioned in the methodology. As such, it is unclear whether the orders are *ex parte* decrees, *solenama*, orders for guardianship of property; or orders for custody between two contesting parties. A bulk of these case records would not perhaps be able to provide broader perspectives on the judicial approach of the family courts, considering that other than judgments in contesting cases of custody, welfare or best interests of the child is almost never discussed in such court orders. There is as such, a clear gap in the existing literature on the judicial approach of the family courts; which is crucial, as such analysis is necessary to understand how the lower judiciary is responding to the progressive trend of the higher judiciary.

1.3. Research Question

¹⁸ The SAILS study, which was revised and published in 2019, had included analysis of cases only up-to the *Anika Ali* Judgment of 2012 (*Anika Ali v Rezwanul Ahsan* 17 MLR [2012] [AD] 49); See Nowrin Tamanna and others 'Muslim Women's Rights under Bangladesh Law: Provisions, Policies and Practices Related to Custody and Guardianship' in Faustina Pereira and others (eds) *Revisiting Personal Laws in Bangladesh: Proposals for Reform Muslim Women's Rights under Bangladesh Law* (Brill Nijhoff 2019) 145.

¹⁹ Taslima Monsoor, *Judiciary and Gender on Trial: Reported and Unreported Decisions of Family Courts* (Dhaka 2007) 89; see also, 'Women's Rights under Muslim Family Law with Particular Reference to Custody and Guardianship' (1997) The Dhaka University Studies Part-F 8 49.

The key hypothesis of the study is that although over the time, the courts have given priority to the best interests principle over traditional Muslim law rules in deciding custody disputes between Muslim parties, it cannot still be said to be the sole or dominant consideration and the traditional rules continue to influence the judicial decisions. The key statute governing custody matters is an old colonial time law which does not clearly endorse welfare to be the primary consideration and as such, courts sometime hesitate to rely on the best interests principle when there is apparent contradiction with the traditional interpretations of custody rules. Despite having several decisions from the apex court declaring welfare or best interests of the child to be the paramount consideration in custody cases, the same has not yet become a standard rule to be followed in all cases of custody in all courts.

Based on the above hypothesis, the research aims to answer the following questions:

- a. Has there been a consistent transition in the judicial trends in Bangladesh from the traditional rules of the Muslim personal laws towards welfare or best interests of the child in custody cases between Muslim parties?;
- b. How far the courts in Bangladesh have addressed and applied best interests principle as enunciated in Article 3 of the CRC in awarding custody?

1.4. Research Methodology

The thesis primarily uses doctrinal research methodology with library-based research, which is a textual analysis of all relevant cases and secondary literature.²⁰ For the case analysis of the SC decisions, the thesis had reviewed published judgments on custody disputes from 1 January 1972 till 1 July 2023. Judgments were collected using multiple case digests including Dhaka Law Reports (DLR) and Bangladesh Legal Decisions (BLD). For SC cases all yearly volumes of DLR and BLDs were reviewed, and judgments which had included substantive discussions regarding principles related to child custody, were considered for the analysis. Some

²⁰ Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and Socio-legal Methods of Research: Merits and Demerits' (2012) 2 Educational Research Journal 252, 252.

of the judgments were also collected using BDLEX,²¹ which is an online legal database. Case laws of India and Pakistan for the relevant comparative discussions were extracted using Library of the Supreme Court of Bangladesh as well as online databases such as Manupatra.²² In case of the analysis of the higher judiciary of India and Pakistan, the research approach was similar to that of Bangladesh where cases mainly from the end of the colonial rule in 1947 till the year 2023 have been reviewed. Decisions, which had signified a particular trend in the judicial approach in child custody cases in India and Pakistan, had been then included in the analysis. For the purpose of the research, the judgments have been qualitatively analysed with a view to identify whether the courts are applying best interests standards in awarding child custody.

In terms of other sources of the documentary analysis, secondary materials including books, journals and other scholarly contribution were collected using mainly the library of the Brunel University of London and of the University of Dhaka. Additionally, the thesis had also reviewed other relevant resources including, statutes, international treaties and other legal documents, organizational reports, online news portals and online resources from government and other organizational websites.

1.4 (a) Methodology for Case Analysis of the Family Courts of Bangladesh

Decisions of the lower courts in general are not reported in Bangladesh and as such the cases collected of the family courts for the research could not follow any systematic review. Only those family court cases were reviewed which could be collected accessing the physical case depository of district level courts through help of the individual judges of the concerned courts. However, the thesis attempted to cover a substantial number of cases spreading across several years, in order to reach an understanding of how the lower courts have approached the custody questions throughout different time periods.

²¹ Online Legal Research Database Bangladesh (BDLEX) < <https://www.bdllex.com> > accessed 04 March 2023.

²² Online Legal Database for Research (Manupatra) < <https://www.manupatrafast.com/?t=desktop> > accessed 04 March 2023.

A total of 172 case records had been collected from various Family Courts amongst which a total of 64 cases were contested judgments filed in between 1 January 2007 to 1 July 2023. Among these contested judgments, 38 cases were collected from the special Family Courts of Dhaka and the rest of the judgments were collected from districts outside the capital.²³

Although the research was initially aimed at collecting case records from specific districts, it appeared through the process of data collection, that the number of child custody cases in the family courts is significantly less compared to other family matters and some districts have no recorded contested judgments in the past ten to twelve years on the matter.²⁴ In addition to that, the process of collecting cases as noted above was significantly difficult, as typically there was no specific case list available to the courts where all the family cases were recorded under separate categories. It was only through personal communication with the judges that the researcher was allowed to visit record rooms of the courts to find out the relevant judgments manually from all the case records preserved according to the year of issuance of order. Hence all available sources and links were utilized in order to ensure that the maximum number of case records (in particular, contested judgments) could be gathered, without limiting the data collection to any specific district or districts. As such for the purpose of the research, case records from the family courts of altogether 15 districts were collected and examined. The districts were randomly selected as per availability and accessibility of the data.

Because there is no available statistics as to the total number of custody decisions filed in the family courts²⁵ and also since only limited number of districts have been covered; it cannot be conclusively assumed that the total number of cases collected

²³This indicates that litigating a case for physical custody of a child perhaps is not very common especially in areas outside the capital. Lack of access to justice especially for women, limited legal aid, expensive and cumbersome litigation process may have contributed to the significantly small number of cases on child custody. However, exploring the causes of such limited use of the formal legal system for a dispute regarding child custody is beyond the scope of the present thesis.

²⁴ For example when the researcher contacted the Family Court judge of Rajbari and Brahmanbaria, the court officers informed that in the past 10 to 12 years there had not been a single contested case on custody although there were few guardianship applications which had been disposed of as per 'no objection' given from the opposite parties.

²⁵ According to the present method of preserving the records, collecting such statistics also seems impracticable

and analysed for the purpose of the thesis is representing the overall custody applications filed before the family courts in various districts. However, in view of the fact that the logistical difficulties make the analysis of lower courts judgments almost impractical without having personal linkages with the concerned judges, the number of cases collected for the research can perhaps be considered relatively significant.²⁶ Indeed the cases helped to guide the research towards identifying patterns in awarding custody and drawing a comparative view with the custody decisions of the SC.

1.5. Limitation and Scope for Further Research

Although the study has reviewed all yearly volumes of the leading case digests, not all cases of the SC get reported in the published digests. As such the scope of the study is limited to only the judgments, which are published in the digests. With regard to the family courts' judgments, collecting case records was difficult as there is practically no means available for the researchers to collect subject wise case records from the family courts, as only when the case number is known an application for a certified copy of it can be made. As such, cases were collected only when judges of some of the family courts agreed to provide copy of the judgments and allowed access to record rooms on personal requests. Again, even the physical records are kept and maintained very poorly, making it cumbersome to track year wise cases on relevant subjects. As such the cases were collected randomly and the family court cases could not be analysed as per year and districts.

Moreover, the thesis is only doctrinal and issues such as challenges in accessing the laws in practice and problems in enforcement of the laws are not analysed. At the same time, as the thesis collected and analysed only copies of judgments, the analysis does not aim to reflect on the judicial behaviours and attitudes in custody cases, although some assumptions have been made from some of the observations of the judges that were included in the final judgments. Such reviews can form

²⁶ Although, this cannot be supported by any statistical authority, there had not yet been any published study or research paper which had covered such substantial number of contested cases on child custody.

subject matter of future research that may aim to gather evidence on court practices to understand how the best interests principle is being applied in custody cases, and what are the gaps in the process and judicial approaches.

1.6. Contribution of the Study

The study has highlighted how the courts in Bangladesh have approached child's best interests or child rights for that matter, in custody disputes. It covers not only an in-depth analysis of all the relevant SC cases but also includes an extensive review of unreported judgments of the family courts, which has not been analysed in any of the existing literature on the subject. More so, the research reviews not only the cases that reflect the best practices of the SC and of the family courts in which best interests of the child had been relied upon by the courts, it also reviews cases where the courts were rather influenced by traditional rules based interpretations of child custody. By analysing the judicial trends in custody matters in both tiers of the judiciary, the research highlighted how certain preconceived notions and biases sometimes influence the courts in deciding family disputes.

Chapter 2: Understanding the Principle of Best Interests within the Framework of Article 3 of the CRC

2.1. Introduction

The principle of best interests is one of the fundamental principles of the CRC. The principle 'has long been a central feature in family law at the national level in various countries'.²⁷ However, as gradually the best interests standard 'has deepened its hold in domestic and international instruments',²⁸ it now informs child-centric decisions in varied social and policy contexts.²⁹ Especially with the adoption of the CRC, it has gained general acceptance³⁰ at the international level placing the best interests standard 'at the heart of international children's rights law'.³¹ However, as Alston had conceded, the national jurisprudence on best interests or 'welfare' does not generally act as 'persuasive precedent'³² in relation to the CRC. The reason being that unlike the national laws, where the principle had been largely applied only in a limited scope of family matters - mainly in disputes over child custody, the scope of the principle as embodied in Article 3(1) of the Convention is much broader. The best interests principle in Article 3 not only applies to custody matters, it also informs the application of all other provisions of the Convention as a guiding principle.³³ However the CRC does not define the concept of best interests. As such, the

²⁷ Philip Alston and B. Gilmour Walsh, *The Best Interests of The Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF Innocenti Research Centre 1996) 3.

²⁸ Stephen Parker, 'The Best Interests of the Child - Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26, 27.

²⁹ Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (Cambridge University Press 2017) 51.

³⁰ Philip Alston, 'Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law and the Family* 1,4.

³¹ Parker (n 28) 27.

³² Alston and Walsh (n 27) 6.

³³ *ibid.*

concept is frequently described as ‘indeterminate’³⁴ having been interpreted differently in different societies and in different historical time-frames.

2.2. Principle of Best Interests in the CRC

Article 3, paragraph 1, of the Convention ‘gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere’.³⁵

Article 3(1) provides:

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 Convention thus mandates member states to give priority to the best interests of the child and requires them to ensure care and protection necessary for his/her wellbeing.³⁶ In its General Comment No. 5 the Committee on the Rights of the Child³⁷ required states to ensure realization of all rights in the Convention for all children, echoing Article 4 of the Convention which mandates states to ‘undertake all appropriate legislative, administrative, and other measures’ for the implementation of the rights contained therein.³⁸ The Committee emphasized on the rights framework of the CRC and urged states to effectively implement those rights in light of Article 3, which along with three other Articles of the Convention, were identified as ‘general principles’ to guide the member states in their implementation efforts. The

³⁴ Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007) 27.

³⁵ UN Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (CRC /C/GC/14) 2013, para 1.

³⁶ CRC, art 3(2); Elaine E. Sutherland, ‘Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities’, in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child*, (Cambridge University Press 2017)) 21.

³⁷ Hereinafter referred to as ‘the Committee’.

³⁸ UN Committee on the Rights of the Child, General comment 5 on General measures of implementation of the Convention on the Rights of the Child (CRC/GC/2003/5) 2003, para 6.

Committee thus holds that under Article 3(1) ‘every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions’.³⁹ The other three general principles are non-discrimination in Article 2, the right to survival and development in Article 6 and respect for the child’s views in Article 12.⁴⁰ However, although none of the four principles is more important than any of the other three, it is often considered that recognition of the ‘child’s best interests underpins all the other provisions in the Convention’.⁴¹ The Committee in its General Comment No. 14 further describes Article 3 as expressing ‘one of the fundamental values of the Convention’.⁴²

2.3. Comparison between Article 3(1) and other Articles in the CRC

The CRC also refers to the principle of best interests of a child in a number of other Articles with variations. Article 21 for instance, consider best interests to be the ‘paramount consideration’ in case of adoption, as opposed to a more generalized use of the principle in Article 3(1) that uses an indefinite article *i.e.* ‘a’ instead of ‘the’. Alston therefore considered the use of the principle in Article 21 to be its ‘strongest version’ used in the Convention.⁴³ The logical reason for placing a higher standard in adoption is perhaps the fact that severing a child’s tie from his or her birth family is perceived to be a serious act that can only occur in very limited situations when adoption happens to be the last resort for the child.⁴⁴ Similarly, in custody disputes the domestic laws often consider the best interests or welfare standard as ‘paramount’ and not ‘primary’. Although in a custody litigation giving paramountcy to the child’s interests had sometimes faced criticism for being too child-rights centric posing the risk of parents’ or other children’s interests being overlooked,⁴⁵ that would

³⁹ *ibid* 12.

⁴⁰ UNICEF, ‘Four principles of the Convention on the Rights of the Child: Four Principles that together Form New Attitude toward Children’(UNICEF 2019) <<https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> > accessed 19 February 2023.

⁴¹ Freeman (n 34) 1.

⁴² General Comment 14 (n 35) para 1.

⁴³ Alston (n 30) 13.

⁴⁴ *ibid*.

⁴⁵ Goonesekere, ‘The Best Interests of the Child’ (n 7) 118.

not be contradictory to the CRC as 'Article 41 gives the benefit of a domestic standard if it is seen as higher than the Convention's standard'.⁴⁶ That in a custody dispute such different standard of paramountcy can be adopted had been highlighted by Lord McDermott in *J v C*.⁴⁷ In this case involving custody dispute between foster and natural parents of a minor, he interpreted the concept of 'paramountcy' to mean 'more than that the child's welfare is to be treated as the top item in a list of terms relevant to the matter in question...They connote a process whereby when all the relevant facts, relationships, claims and wishes of the 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. That is ... the paramount consideration, because it rules upon or determines the course to be followed'.⁴⁸

The European Court of Human Rights (ECHR) also reinforces the paramountcy of best interest principle in adoption. In case of placement in alternative care the Court observed that 'in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are *paramount*'.⁴⁹ The ECHR is often required to balance interests of the child with the parents' rights to family life under Article 8 of the European Convention on Human Rights,⁵⁰ especially in case of placing a child for adoption in an alternative care facility. In *Yousef v Netherlands*⁵¹ for example, while denying the biological father's rights to live with the child, the Court held that where 'the rights under Art.8 of parents and those of a child are at stake, the child's rights must be the *paramount* consideration'. The Court further stated that 'if any balancing of interests is

⁴⁶ *ibid.*

⁴⁷ *J v C* [1970] AC 668.

⁴⁸ Goonesekere, 'The Best Interests of the Child' (n 7) 118.

⁴⁹ *YC v United Kingdom* (2012) 55 EHRR 33, 134.

⁵⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8 reads as follows:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

⁵¹ [2003] 36 EHRR 20.

necessary, the interests of the child must prevail'.⁵² In adoption cases thus, the general approach of the ECHR is consistent with Article 21 of the CRC that require the principle to be the 'paramount' consideration.⁵³

Article 21 had attracted reservations from several Muslim state parties⁵⁴ as the practice of adoption is generally considered contrary to Muslim legal traditions.⁵⁵ The system of *kafalah* instead is considered an accepted practice developed within the Islamic law, which is 'a permanent form of foster care that generally stops short of the child taking the family name or having inheritance rights'.⁵⁶ The practice of *kafalah* is recognized by the CRC in Article 20 as an alternative placement for a child who is 'temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment'.⁵⁷ However, despite such provision, 'four Arab States (Brunei Darussalam, Egypt, Jordan and Syrian Arab Republic) have entered explicit reservations to Article 20 on the grounds that adoption is incompatible with the principles of Islam'.⁵⁸

Further, in the preparatory discussion of the CRC, the representative of Bangladesh, expressed its objection to Article 21 noting that the provision was 'liable to give difficulties in Muslim countries since the understanding of Bangladesh [was] that adoption is not recognized institution under Muslim law'.⁵⁹ The delegate further added that, the recognition of adoption would raise complex problems regarding, in

⁵² [2003] 36 EHRR 20.

⁵³ Janys M. Scott, 'Conflict between Human Rights and Best Interests of Children: Myth or Reality?' in Elaine E. Sutherland and others (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016) 67.

⁵⁴ Including, Bangladesh, Brunei Darussalam, Egypt, Indonesia, Jordan, Kuwait, the Maldives, Oman, Syria and the United Arab Emirates.

⁵⁵ However, Shaheen Sardar argues that Muslim law does not negate the practice altogether. For a detail discussion on the debate, see Shaheen Sardar Ali, 'A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law: Law Reform and Children's Rights in Muslim Jurisdictions' in UNICEF (ed), *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (Cambridge 2007) 142.

⁵⁶ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (rev 3rd edn, UNICEF 2007) 295.

⁵⁷ CRC, art 20.

⁵⁸ UNICEF, *Implementation handbook* (n 56) 281.

⁵⁹ Travaux Préparatoires (UN Doc. E/CN.4/1986/39); Sylvain Vité and Hervé Boéchat 'Adoption: Article 21' in André Alen and others, (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2006) 19.

particular, inheritance rights in Islamic jurisdictions'.⁶⁰ The Libyan Arab Jamahiriya also raised this concern.⁶¹ In response, the introductory paragraph was added to Article 21, which implies that the Article does not apply to all States Parties to the CRC, 'but is limited to those countries that recognize and/or permit the system of adoption.'⁶² But despite such formulation, several Muslim countries including Bangladesh had entered reservation to the Article. The Committee had thus condemned such reservations as being 'superfluous' and recommended state parties to withdraw the same.⁶³

Compared to the formulation of the best interests principle in Article 21 as a 'paramount consideration', the principle is formulated in a more neutral sense in other Articles.⁶⁴ For example, Article 18(1) mandates that the best interests of the child will be the 'basic concern' of the parents or legal guardians, in the upbringing and development of the child. Article 9(1) allows separation of a child from his or her parents when such separation is necessary for the best interests of the child. Such determination is to be made by competent authorities subject to judicial review. Article 9(3) recognizes the right of the child who is separated from one or both parents to maintain contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 9(1) gives two examples when separation is considered necessary for the best interests of the child – in cases involving abuse or neglect of the child by the parents, or in which the parents are living separately and a decision must be made as to the child's place of residence. However, other than these two illustrations, the

⁶⁰ *ibid.*

⁶¹ The delegate noted that the practice of adoption contradicts 'one of the imperative principles of the Islamic Sharia.' and instead proposed 'the inclusion of a stipulation confirming the application of this Article to the States that recognize or permit the practice of adoption.' Vité and Boéchat (n 59) 20.

⁶² *ibid* 19.

⁶³ For instance, in its concluding observation on Jordan, the Committee noted that 'the State party's reservation to Articles 20 and 21 of the Convention is superfluous. It points out that Article 20 (3) of the Convention expressly recognizes *kafalah* of Islamic law as alternative care, and Article 21 expressly refers to those States that "recognize and/or permit" the system of adoption, which in any case does not apply to Jordan'. UN Committee on the Rights of the Child, Concluding Observations on Jordan, (CRC/C/15/Add.125) 2000, paras 10–11; also see, UN Committee on the Rights of the Child, Concluding Observations on Egypt (CRC/C/15/Add.145) 2001 paras 9–10.

⁶⁴ Alston (n 30) 13.

Child Rights Committee had on several occasions considered other situations where best interests principle needed to be applied to justify separation of children from their parents. For example, the Committee had recommended that children should not be separated from their parents when they are hospitalized for pro-longed period⁶⁵, or when the parents are detained in prisons.⁶⁶ The Committee had also enjoined States to initiate ‘efforts to find sustainable, rights-based solutions’ when children get separated from their parents due to the enforcement of immigration laws.⁶⁷

Article 37, which prohibits torture or other cruel, inhuman or degrading treatment or punishment against children also specifically, mentions the principle of best interests. Article 37(c) requires that ‘every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so’. The paragraph reinforces one of the oldest UN standards in the area of criminal justice⁶⁸ - to keep children separate from adults.⁶⁹ The provision thus connotes a particular aspect of the ‘general rule of treatment with respect and dignity’ aiming at protecting a child from possible adverse impact of being in an adult setting.⁷⁰ The provision however does provide an exception to depart from the standard only when the best interests of the child so requires and not on any other grounds. However, a number of countries have placed reservations to Article 37(c) on the ground of shortage of

⁶⁵ UN Committee on the Rights of the Child, Concluding Observations on Croatia(CRC/C/15/Add.243) 2004 para 52.

⁶⁶ UN Committee on the Rights of the Child, Concluding Observations on Nepal(CRC/C/15/Add.261) 2005.

⁶⁷ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Comment 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (CMW/C/GC/4-CRC/C/GC/23) 2017 para 34.

⁶⁸ William Schabas and Helmut Sax, ‘Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty’, in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2006) 92.

⁶⁹ UN Standard Minimum Rules for the Treatment of Prisoners (1957) rule 8 provides: ‘Young prisoners shall be kept separate from adults’. <https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf > accessed 8 March 2023.

⁷⁰ *ibid.*

facilities.⁷¹ The CRC Committee also had on several occasions recommended state parties to ensure separation of children from adults in facilities. The Committee, for instance, expressed concern over placing children in detention or custody with persons up to the age of 25 years in Germany,⁷² and recommended Tunisia to ensure detention of juveniles in separate facilities expressing concern over such joint detention that resulted in 'in sexual abuse or other ill-treatment'.⁷³

Article 40(2) (b) (iii) mandates that 'every child alleged as or accused of having infringed the penal law' will have the guarantee to have the matter determined without delay by a competent authority ... 'in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.' Thus, this provision allows participation of juveniles' parents or guardians in the proceedings, as such presence may provide emotional assistance and support to the child.⁷⁴ However, states have the right to withhold their consent to such participation, on a consideration of the child's best interests. With regard to ensuring accused children access to legal and other assistance as mandated under Article 40(2) (b) (iii), the CRC Committee had voiced concerns over unavailability of such legal assistance and lack of access of parents during the pre-trial detention of their children.⁷⁵

2.4. Juristic Assessment

Even though the principle of best interests of the child is referred to in other provisions in the CRC, having been identified by the Committee as 'a dynamic

⁷¹ For example Canada's reservation stated that it 'reserves the right not to detain children separately from adults where this is not appropriate or feasible'; New Zealand's reservation to Article 37(c) is due to 'shortage of suitable facilities that makes the mixing of juveniles and adults unavoidable'.

⁷² UN Committee on the Rights of the Child, Concluding Observations on Germany (CRC/C/15/Add.226) 2004 para 60.

⁷³ UN Committee on the Rights of the Child, Concluding Observations on Tunisia (CRC/C/15/Add.181) 2002 paras 45-46.

⁷⁴ Geraldine Van Bueren, 'Article 40:Child Criminal Justice' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (, Martinus Nijhoff Publishers 2006) 20.

⁷⁵ UN Committee on the Rights of the Child, Concluding Observations on China (CRC/C/15/Add.56) 1996 para 22.

concept that requires an assessment appropriate to the specific context',⁷⁶ it is Article 3(1) that embodies the 'best interests principle, as it has become known'.⁷⁷ The Committee in its General Comment 14 attempted to address the relationship between Article 3 and other rights in the Convention by presenting Article 3(1) as 'a right, a principle and a rule of procedure' suggesting thereby that 'Article 3(1) can deliver more rights-based decision-making, designed to further implementation of the Convention'.⁷⁸

In terms of this relationship between Article 3 and the rights set out in other Articles of the Convention, Professor Michael Freeman noted that the 'best interests of the child' principle cannot be applied without reference to the substantive rights of the child recognized in the Convention.⁷⁹ Likewise, writing specifically about a child's health rights, Tobin notes that any proposed outcome for a child cannot be in conflict with the other guiding principles and other rights listed under the CRC.⁸⁰ In *Re W*,⁸¹ a 16 year old girl suffering from anorexia nervosa was transferred from an adolescent residential unit to a specialized hospital against her will on the ground that the hospital was in the child's best interests. The English Court of Appeal considered that adhering to the wishes of the girl could cause her death or severe permanent injury.⁸² Consequently, although ensuring child's right to express his/her views is in the best interests of the child, the principle itself may require imposing restrictions to the exercises of such right. Again, there are other considerations or principles that may sometimes constraint the application of best interests principle. An obvious example would be policies to detain young offenders, or even measures taken under immigration control that may not always be in the best interests of the concern children.⁸³ The principle thus can be said to be 'both informed by and constrained by

⁷⁶ General Comment 14 (n 35) para 1

⁷⁷ Kilkelly (n 29) 54.

⁷⁸ *ibid* 56.

⁷⁹ Freeman (n 34) 9.

⁸⁰ J. Tobin, 'Beyond the Supermarket Shelf: Using A Rights Based Approach to Address Children's Health Needs' (2006) 14 International Journal of Children's Rights 275, 287.

⁸¹ *Re W (A Minor) (Medical Treatment)*. All Engl. Law Rep. [1992] 4:627-49.

⁸² See *Re R (A Minor) (Wardship: Consent to Medical Treatment)* [1991] 4 All ER 177; *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386

⁸³ Freeman (n 34) 5.

the rights', and other principles and considerations.⁸⁴

Emphasizing on the relationship of best interests principle with the other rights in the Convention, Van Bueren noted, '[N]ot only ought the application of the best interests principle not violate one of the rights of the child, but also the very exercise of best interests ought to reinforce and strengthen each of the rights of children'.⁸⁵ To further emphasize on the significance of the principle, Alston and Walsh noted the significant role that the principle of best interests has to play in relation to rights of the children. Firstly, it can 'support, justify or clarify a particular approach to issues arising under the Convention'.⁸⁶ Thus it can act as 'an aid to construction as well as an element, which needs to be taken fully into account in implementing other rights'.⁸⁷ The Committee strongly emphasizes this role of Article 3 by making vast references to the same when it identifies 'particular substantive problems in State Parties' reports'.⁸⁸ Secondly, 'it can act as a mediating principle that can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention'.⁸⁹ The third role as identified by Stephen Parker is that in matters 'not governed by positive rights in the Convention'⁹⁰ Article 3 can serve to evaluate 'the laws and practices of the States Parties'.⁹¹ Alston as such deems that the 'principle should apply where failure to observe it would affect the enjoyment of any children's right'.⁹²

In view of Alston, Article 3(1) underlines the fact that 'the principle applies not only in the context of legal and administrative proceedings, or in other narrowly defined

⁸⁴ *ibid*; see Alston and Walsh (n 27) 32.

⁸⁵ Geraldine Van Bueren, 'Children's Rights' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018) 330.

⁸⁶ Alston and Walsh (n 27) 37.

⁸⁷ *ibid*.

⁸⁸ Freeman (n 34) 32; For instance, in its 1995 report on Nicaragua the Committee expressed concern about the early and lower marriageable age for girls and raised questions as to that country's laws compatibility with Article 3. ;

⁸⁹ Alston and Walsh (n 27) 37.

⁹⁰ Parker (n 28) 27.

⁹¹ *ibid*.

⁹² Alston and Walsh (n 27) 37; Freeman (n 34) 32-33.

contexts', but in relation to *all actions concerning children*.⁹³ Alston considered this as representing 'a very significant extension of a principle which was originally little more than a way of ensuring that the interests of any children involved would be taken into account in divorce or custody cases.'⁹⁴

The principle nevertheless has been contested even in the limited context of child custody decisions by a number of scholars including Mnookin⁹⁵ and Ekelaar.⁹⁶ The legislative history of the principle also reflects divergence of opinions with regard to the indeterminacy surrounding the concept as well as the issue of primacy to be accorded to the principle in different contexts. Yet as Alston noted, 'despite its very limited-jurisprudential origins, the principle has come to be known in one form or another to many national legal systems and has important analogues in diverse cultural, religious and other traditions.'⁹⁷

2.5 Best Interests Principle in other International and Regional Instruments

The CRC is known to have been the most authoritative legally binding instrument on children's rights.⁹⁸ However use of the best interests principle at the international level is not new,⁹⁹ and as Alston and Walsh had noted, it is 'almost as old as international concern for the situation of the children.'¹⁰⁰ The principle has been reflected with variations in a number of child rights centric international instruments. The Geneva Declaration of the Rights of the Child,¹⁰¹ adopted by the League of Nations in 1924 is for instance, considered by Alston and Walsh as 'an embryonic

⁹³ Alston (n 30) 4.

⁹⁴ *ibid.*

⁹⁵ Rober Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 260.

⁹⁶ John Ekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8(1) *International Journal of Law, Policy and the Family* 42.

⁹⁷ Alston (n 30) 4.

⁹⁸ Wouter Vandenhoe, 'A Children's Rights Perspective on Poverty' in Wouter Vandenhoe and others (eds), *Why Care? Children's Rights and Child Poverty* (Intersentia 2010)16.

⁹⁹ General Comment 14 (n 35) para 2.

¹⁰⁰ Alston and Walsh (n 27) 4.

¹⁰¹ Commonly known as 'Declaration of Geneva', <<http://www.un-documents.net/gdrc1924.htm> > accessed 27 June 2023.

formulation¹⁰² of the principle of best interests.

The Declaration was closely connected to the aftermath of the war, as its third principle reflected an idea of primacy to be given to the children: 'The child must be the first to receive relief in times of distress.'¹⁰³ The destruction of the war gave 'new credence to the child in distress as the symbol of the problems of social life' and 'equality of all children in front of disasters added a new legitimacy to the idea of social action devoted to all children'.¹⁰⁴ Nevertheless, the Declaration of Geneva was limited in its scope and was an 'aspirational document'¹⁰⁵ which merely invited the member states to be 'guided by its principles in the work of child welfare'.¹⁰⁶ However, the first international human rights document that specifically referred to the principle of best interests was the UN Declaration on the Rights of the Child proclaimed in 1959.¹⁰⁷

2.5 (a) UN Declaration on the Rights of the Child

Based on the same premise as of the Geneva Declaration, that 'mankind owes to children the best it has to give'; the UN Declaration on the Rights of the Child (hereinafter referred as 1959 Declaration) contained 10 principles with broad endorsement towards the concept of children's rights.¹⁰⁸

Principle 2, which includes best interest as a paramount consideration states:

¹⁰² Alston and Walsh (n 27) 4.

¹⁰³ D. Marshall, 'The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations, 1900–1924' (1999) 7 *International Journal of Children's Rights* 133, 144.

¹⁰⁴ *ibid* 145.

¹⁰⁵ Freeman (n 34) 11.

¹⁰⁶ Jane Fortin, *Children's Rights and The Developing Law* (3rd edn, Cambridge University Press 2009) 37.

¹⁰⁷ Hereinafter referred as the 1959 Declaration.

¹⁰⁸ Philip Alston and John Tobin, *Laying the foundations for children's rights: An independent study of some key legal and institutional aspects of the Impact of the Convention on the Rights of the Child* (UNICEF Innocenti Research Centre 2005) 5.

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the *paramount consideration*.

The Declaration refers to the best interests principle also in principle 7, which states:

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

Although Alston and Tobin considered the Declaration as ‘ground-breaking’ in respect of its rights connotations, its status was still limited to being a declaration.¹⁰⁹ Unlike the CRC, the rights enumerated in the Declaration did not constitute any legal obligations. While acknowledging that the Declaration was the first serious attempt to describe in a reasonably detailed manner, what constitutes children’s overriding claims and entitlements,¹¹⁰ Jane Fortin noted that ‘some of the principles set out in the 1959 Declaration now appear idealistic, others simply vague and out-dated’.¹¹¹ Especially while noting the Declaration’s emphasis on children’s emotional wellbeing, Fortin criticized some part of principle 6 as reflecting ‘outmoded stereotyped ideas about the roles to be played by mothers and fathers in the lives of their children.’¹¹²

Although some of the ideas in the 1959 Declaration were modern and resurfaced later in the CRC (e.g. *child’s rights to name and nationality, right to non-discrimination etc.*), including the principle of best interests - it failed to ‘list any of the first generation human rights’.¹¹³ Professor Freeman noted that despite of the ‘modern ring’, the 1959 Declaration emphasized on protection of the child rather than

¹⁰⁹ Alston and Tobin (n 108) 5.

¹¹⁰ Fortin (n 106) 38.

¹¹¹ *ibid*

¹¹² *ibid*; Principle 6 mentions the ‘child’s need to grow up in the care and under the responsibility of his parents [...] in an atmosphere of affection and of moral and material security’. It also asserts that a ‘child of tender years shall not, save in exceptional circumstances, be separated from his mother’.

¹¹³ Fortin (n 106) 38.

on the child's rights.¹¹⁴ Similarly Alston and Tobin pointed out the Declaration's emphasis on the need to 'safeguard and protect the child, rather than to empower him or her',¹¹⁵ as one of the striking weaknesses of the document. Growing concern over the lack of protection from harm for children and persistent violations of their rights throughout the world¹¹⁶ then led to a call for a more structured approach to protecting children's rights leading to the adoption of the CRC.¹¹⁷

2.5 (b) Convention on the Elimination of All Forms of Discrimination Against Women

Subsequent to the 1959 Declaration, the principle of best interests of children was reflected in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW is often described as the international bill of rights for women¹¹⁸ and is the result of global efforts to promote the international principle of non-discrimination on the basis of sex. The clear linkage between the CRC and the CEDAW is that both the Conventions protect rights of the girl child and both have been ratified overwhelmingly by the Muslim majority States.¹¹⁹ Savitri Goonesekere rightly describes that rights of children and those of women 'are intrinsically linked, both because the core agenda is one of human rights, and because gender inequality cannot be addressed without linking women's issues to the issue of equality of the girl child'.¹²⁰

It is noteworthy that CEDAW uses both the terms 'paramount' and 'primordial' consideration in upholding the best interests principle, although in somewhat different contexts, in two of its provisions. Article 5(b) obligates States Parties to take

¹¹⁴ Freeman (n 34) 14.

¹¹⁵ Alston and Walsh (n 27) 5.

¹¹⁶ Douglas Hodgson, 'The Historical Development and "Internationalisation" of the Children's Rights Movement' (1992) 25(6) Australian Journal of Family Law 275, 276.

¹¹⁷ Fortin (n 106) 38; Alston and Walsh (n 27) 6-7.

¹¹⁸ UN Women < <https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth> > accessed 26 June 2023.

¹¹⁹ Sardar Ali (n 55) 163.

¹²⁰ Savitri Goonesekere, *The Links between the Human Rights of Women and Children: Issues and Directions*, keynote address at the consultation meeting of UNICEF, IRAW (Save the Children Alliance 1998) 8.

all appropriate measures:

To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the *primordial consideration* in all cases.

The core concern of Article 5(b) is thus the ‘parental gender roles’¹²¹ as it challenges the ‘stereotypical assignment of sole or major responsibility for childcare to women’.¹²² However, Article 5(b) uses the phrase ‘interest of the children’ without using the term ‘best’ and the standard is set to be ‘primordial’ and not ‘paramount’ unlike the 1959 Declaration. The *travaux préparatoire* of CEDAW does not discuss the reasoning for using the term primordial,¹²³ the literal meaning of which is ‘existing at or since the beginning of the world or the universe.’¹²⁴ Thus the word can be said to be more akin to ‘paramount’ than it is to ‘primary’.¹²⁵

Article 16(1)(d) on the other hand adopts the ‘paramount’ standard. It requires equal rights and responsibilities for both parents ‘in matters relating to their children’ and emphasizes that ‘in all cases the interests of the children shall be paramount’. The same ‘paramount’ standard is also adopted in Article 16(1)(f) which requires state parties to ensure that both parents have the ‘same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children’. CEDAW thus carried forward the standard adopted in the 1959 Declaration and subsequently

¹²¹ Marsha A. Freeman and others ‘Article 5’ in Marsha A. Freeman and others (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 142.

¹²² Frances Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’ in HB Schöpp-Schilling and C Finterman (eds), *The Circle of Empowerment: Twenty-Five Years of The UN Committee on The Elimination of Discrimination against Women* (The Feminist Press 2007) 74.

¹²³ Marsha A. Freeman (n 121) 149.

¹²⁴ Cambridge Dictionary, <<https://dictionary.cambridge.org/dictionary/english/primordial>> accessed 14 April 2023.

¹²⁵ Sutherland (n 36) 27.

in the 1967 Declaration on the Elimination of Discrimination against Women,¹²⁶ in holding interests of the children to be the ‘paramount’ consideration. The Article excludes considerations stemming from various gender stereotypes that are sometimes used to assess parents’ ability to take care of the child.¹²⁷ Often customary or religious practices create presumptions that custody of children of a certain age should belong to one or the other parent.¹²⁸ The CRC Committee had also emphasized on how the principle of best interests is sometimes interpreted in a way that is prejudicial and discriminatory to the parental rights of women.¹²⁹ In its concluding observations on the Islamic Republic of Iran, the Committee reiterated ‘that custody determined solely on the basis of a child’s age is both arbitrary and discriminatory’.¹³⁰ The Committee in its concluding observations on Niger expressed its concern over ‘the custom applicable in divorce cases which holds that children are entrusted to their mothers before they are 7 years old and to their fathers when older, without the views of the child and his/her best interests being taken into account’.¹³¹

It is important to mention that because of this apparent conflicting position between women’s equal rights over child’s care and certain prevailing customs and religious practices of state parties, Article 16 of CEDAW attracted a number of reservations especially from Muslim countries.¹³² For example Bahrain places reservation to

¹²⁶ Declaration on the Elimination of Discrimination against Women (adopted 7 November 1967) UNGA Res A/RES/2263(XXII) art 6(2)(b),.

¹²⁷ Marsha A. Freeman (n 121) 149.

¹²⁸ *ibid.*

¹²⁹ In its Concluding observations on the Islamic Republic of Iran, the Committee reiterated ‘that custody determined solely on the basis of a child’s age is both arbitrary and discriminatory’ (CRC/C/IRN/CO/3-4) 2016, para 33; the Committee in its concluding observations on Niger expressed its concern over ‘the custom applicable in divorce cases which holds that children are entrusted to their mothers before they are 7 years old and to their fathers when older, without the views of the child and his/her best interests being taken into account.’ (CRC/C/118) 2002.

¹³⁰ UN Committee on the Rights of the Child, Concluding Observations on Islamic Republic of Iran (CRC/C/IRN/CO/3-4) 2016 para 33.

¹³¹ UN Committee on the Rights of the Child, Concluding Observations on Niger (CRC/C/118) 2002.

¹³² Most of the CEDAW reservations from Muslim state parties are against Article 2 and Article 16. For instance, Jordan, Libya, Syria, Kuwait, Lebanon and Tunisia have reservations particularly against Article 16(1)(d) and 16(1)(f); while Algeria, Bahrain, Egypt, Iraq, Morocco and Israel have reservations against the whole Article 16. For country wise reservations status see, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-8&chapter=4&clang=en#EndDec> accessed 12 July 2023; also See, Amnesty International, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination against Women

Article 16 ‘in so far as it is incompatible with the Islamic Shariah’. Bangladesh also uses similar language in its reservation to Article 16(1)(c) along with its reservations to Article 2. The reservation says ‘The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of Article 2 [and] ...16 (1) (c) as they conflict with *Sharia* law based on Holy Quran and Sunna.’ Placing reservations particularly against Article 16(f) Kuwait’s similarly declares that it does not ‘consider itself bound by the provision contained in Article 16 (f) inasmuch as it conflicts with the provisions of the Islamic Shariah, Islam being the official religion of the State.’ Some Islamic countries have also placed reservations to Article 16 simply for being in conflict with national legislations, e.g., Jordan, Lebanon, and Tunisia.

However considering Article 16 as one of the core provisions of the CEDAW,¹³³ on number of occasions the CEDAW Committee had expressed its concern over the number and extent of reservations entered to the Article. The Committee in its General Recommendation 21 thus insisted that ‘States parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom, and progress to the stage where reservations, particularly to Article 16, will be withdrawn’.¹³⁴

In an individual’s complaint case against Spain¹³⁵ where the complainant’s daughter was murdered by her abusive former husband during an unsupervised visit allowed by the Spanish authorities, the CEDAW Committee found that Spain had failed to take into consideration the best interests of the child and had thereby failed to ‘fulfil their due diligence obligations under the Convention’.¹³⁶

Weakening the protection of women from violence in the Middle East and North Africa region’ (2021)¹⁵ <<https://www.amnesty.org/en/wp-content/uploads/2021/09/ior510092004en.pdf> > accessed 13 July 2023.

¹³³ See UN Woman, Reservations to CEDAW <<https://www.un.org/womenwatch/daw/cedaw/reservations.htm> > accessed 13 July 2023.

¹³⁴ CEDAW, CEDAW General Recommendation 21: Equality in Marriage and Family Relations 1994 paras 41, 44.

¹³⁵ *Gonzalez Carreño v Spain* IHR 3927 (CEDAW 2014) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/58/D/47/2012&Lang=en > accessed 12 July 2023.

¹³⁶ United Nations Human Rights, Office of the High Commissioner <<https://www.ohchr.org/en/calls-for-input/2022/call-inputs-custody-cases-violence-against-women-and-violence-against-children> >

2.5 (c) *The ICCPR and the ICESCR*

The International Covenant on Civil and Political Rights (ICCPR) has in Article 24 addressed rights of children. Article 24 provides that – ‘Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State’; ‘shall be registered immediately after birth’ and ‘shall have a name’ and ‘the right to acquire a nationality’.

Although the phrase ‘best interests of children’ is not specifically referred in the ICCPR, the Human Rights Committee had referred to the principle as ‘the paramount interest of the children’. In its General Comment No. 17, the Human Rights Committee mandated the states to take steps to ensure necessary protection to children in case where the marriage is dissolved, keeping in view their paramount interest.¹³⁷ Article 23, paragraph 4, of the ICCPR requires states to take appropriate steps to ‘ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution and to make provision for the necessary protection of any children in case of dissolution. In its General Comment on the Article, the Committee emphasized on the paramount interest of the children while prohibiting any discriminatory treatment with regard to the grounds and procedures for separation, maintenance, visiting rights, and child custody.¹³⁸

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognised as ‘the most comprehensive international treaty protecting economic, social and cultural rights’¹³⁹ also makes provision for protecting children, including children at work. Article 10(3) of the ICESCR states that: ‘[s]pecial measures of

accessed 12 July 2023.

¹³⁷ UN Human Rights Committee, CCPR General Comment 17: Article 24 (Rights of the child)(UN doc A/44/40) 1989, para 6.

¹³⁸ *ibid* 9.

¹³⁹ Manisuli Ssenyonjo, ‘The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa’ (2017) 64 *Netherlands International Law Review* 259, 260.

protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions...'

2.5 (d) African Charter on the Rights and Welfare of the Child

The rights framework addressed in the African Charter on the Rights and Welfare of the Child (ACRWC)¹⁴⁰ is strongly influenced by the CRC and the underlying principles of the Charter are also same as those of the CRC, including the best interests of the child.¹⁴¹ Both treaties are often said to be complementary¹⁴² providing for a common framework 'within which children and their welfare are increasingly discussed in Africa'.¹⁴³ However the treaty differs significantly in certain aspects from the CRC¹⁴⁴ and the differences are often said to be result of the Charter taking into account of the 'peculiarities of the African context'.¹⁴⁵ One of the most significant differences between the Charter and the Convention 'is in the formulation of the best interests principle'.¹⁴⁶ Article 4(1) provides that, best interests of the child shall be 'the primary consideration' while under Article 3(1) it is only 'a primary consideration'. Thus in the CRC, other considerations and principles may at times override the principle of best interests, but the Charter 'seems to maximize the influence of the best interests principle in proclaiming its supremacy over other considerations'.¹⁴⁷ Article 4(1) also 'extends to all actions by 'any person' so that parents are

¹⁴⁰ Adopted by the Organisation of African Unity (OAU) in 1990 and Entered into force on 29 November, 1999.

¹⁴¹ Alston and Tobin (n 108) 14.

¹⁴² Dejo Oluwu, 'Children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 International Journal of the Rights of the Child 127, 128.

¹⁴³ Ibid; see also Amanda Lloyd 'The African regional system for the protection of children's rights' in Julia Sloth-Nielsen (ed), *Children's Rights in Africa: A Legal Perspective* (Routledge 2008).

¹⁴⁴ Alston and Tobin (n 108) 13.

¹⁴⁵ Afua Twum-Danso Imoh, 'Realizing children's rights in Africa: An introduction' in Afua Twum-Danso Imoh and Nicola Ansell (eds), *Children's Lives in an Era of Children's Rights: The Progress of the Convention on the Rights of the Child in Africa* (Routledge 2013) 6.

¹⁴⁶ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Republic of South Africa: 2002) 25; Also see, Frans Viljoen, 'Supra-national Human Rights Instruments For The Protection Of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31(2) The Comparative and International Law Journal of Southern Africa 199.

¹⁴⁷ Gose (n 146) 25.

included'.¹⁴⁸ Whereas 'only state parties have duties in the CRC framework',¹⁴⁹ states are to 'respect the responsibilities, rights, and duties of parents'.¹⁵⁰ Commentators thus have noted the scope of article 4(1) of the Charter to be wider than Article 3(1) of the Convention.¹⁵¹

2.5 (e) *The European Convention on Human Rights*

The jurisprudence under the European Court of Human Rights also extensively refers to the principle of best interests although there is no reference of it in the European Convention on Human Rights. As already discussed, the principle is frequently cited while interpreting Article 8 of the Convention with regard to right to respect for private and family life, which can be interfered with by a public authority for the protection of the rights and freedoms of others. Thus, in a custody dispute between a father and maternal grandparents,¹⁵² the ECHR advised that when interpreting Article 8(2) of the Convention, domestic courts should consider "...the interests and rights of all concerned. [...] and more particularly the best interests of the child and his or her rights".¹⁵³

2.6 Indeterminacy of the Principle of Best Interests

Long before the CRC, the best interests principle or welfare principle as it is sometimes referred in domestic law¹⁵⁴ had been subjected to rigorous criticisms for being vague and indeterminate. The most frequently expressed scholarly criticism

¹⁴⁸ Freeman (n 34) 20.

¹⁴⁹ Viljoen (n 146) 209.

¹⁵⁰ CRC, art 5.

¹⁵¹ Freeman (n 34) 20; Viljoen (n 146) 207; Danwood Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 International Journal of Children's Rights 157.

¹⁵² *Hokkanen v Finland* [1996] 1 FLR 289, 305.

¹⁵³ Freeman (n 34) 20; Further examples are cited in, European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (European Court of Human Rights 2021) <https://www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed 29 March 2023.

¹⁵⁴ see Children Act 1989 (England and Wales) and Care of Children Act 2004 (New Zealand). Several scholars had referred to best interests and welfare as alternative concepts, for example see Sutherland (n 36); John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 Child & Family Law Quarterly 237.

relates to 'the difficulty of identifying the criteria that should be used to evaluate alternative options that are open to a decision-maker seeking (or purporting) to act in the child's best interests.'¹⁵⁵ For instance, in 1975, Mnookin pointed out that: 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself'¹⁵⁶. He argued that '[T]he choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice'.¹⁵⁷

Regarding the principle's inclusion in the Convention, Herring noted that the application of the best interests principle is so unpredictable that it is often impossible for the court to determine what is in the best interests of the child.¹⁵⁸ Writing in the context of custody disputes, Herring argued that the best interests principle requires the court to predict the possible outcomes for a child, which is extremely difficult.¹⁵⁹ He pointed out that 'even if the outcomes were known and the likelihood of these outcomes were calculable, there might still be much uncertainty over which outcomes a court would think was in the best interests of the child'.¹⁶⁰ Due to the indeterminacy of the principle, scholars had also pointed out the risk of other principles and policies or prejudices exerting influence 'from behind the smokescreen of the best interests principle'.¹⁶¹ Eekelaar had thus conceded:

[T]he heavily subjective nature of the power granted to the judge means that, so long as he or she does not claim to be applying it as a conclusive rule of law, a judge can consider almost any factor which could possibly have a bearing on a child's welfare and assign to it whatever weight he or she chooses.¹⁶²

¹⁵⁵ Alston (n 30) 18.

¹⁵⁶ Mnookin (n 95) 39.

¹⁵⁷ *ibid.*

¹⁵⁸ Jonathan Herring, 'Farewell Welfare?' (2005) 27(2) *Journal of Social Welfare and Family Law* 159, 160.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ Freeman (n 34) 2; see also Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267.

¹⁶² John Eekelaar, *Regulating Divorce* (Clarendon Press 1991) 248.

Much of the literature on best interests similarly focuses on how the principle's vagueness can lead to judicial bias and 'capricious decision making'¹⁶³ thereby letting a decision-maker to impose his or her preferred values¹⁶⁴ sometimes by being under the guise of 'neutral or scientific data'.¹⁶⁵ In an Australian case the guardians were allowed to authorize the sterilization of a 14-year-old child with a severe mental disability without a court order.¹⁶⁶ Pointing out the risk of best interests principle being highly subjective the court observed:

It must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline that approach simply creates an un-examinable discretion in the repository of the power.¹⁶⁷

Such scope of exercising judicial discretion consequently 'allows gender biases and subjective value judgments to replace objective considerations.'¹⁶⁸ The principle as such had been criticized especially in the context of its application in child custody disputes from various aspects - as means of imposing anti-gay or anti-lesbian sentiments to deny parents' custody claims;¹⁶⁹ as reinforcing patriarchal authority over women and children;¹⁷⁰ as a way to justify discriminatory approach against various other groups;¹⁷¹ or simply as a means for imposing dominant ideology on those who do not conform to the standard pattern.¹⁷² Professor Freeman thus rightly

¹⁶³ Parker (n 28) 26.

¹⁶⁴ Sutherland (n 36) 37.

¹⁶⁵ Katherine Bartlett, 'Re-Expressing Parenthood' in Will Freeman (ed), *Family, State and Law* (Ashgate 1999)173.

¹⁶⁶ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B.* High Court Of Australia [1992] HCA 15, [1992] 175 CLR 218, FLC 92-3.

¹⁶⁷ Ibid Brennan J 21.

¹⁶⁸ Robert A Warshak, 'The Approximation Rule, Child Development Research, and Children's Best Interests After Divorce' (2007) 1(2) *Child Development Perspectives* 119, 120.

¹⁶⁹ Helen Reece (n 161)

¹⁷⁰ Susan Maidment, *Child Custody and Divorce* (Croom Helm 1984); in the context of Bangladesh see Nowreen Tamanna, 'The "welfare of the child" in Sharia law: an Analysis of Child Custody Law and Practices in Bangladesh from a Feminist Perspective' (2014) 26(3) *Child and Family Law Quarterly* 283.

¹⁷¹ For instance, against the interest of father or any cultural minority group; see Herring (n 158) 162.

¹⁷² Sutherland (n 36) 37; such prejudices against native American children were pointed out in Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts over American*

emphasizes that ‘conclusions should be supported by reasoned argument and that bias or worse prejudice should be eliminated’.¹⁷³

The same concern of vagueness of the concept of best interests was raised during the drafting of Article 3(1) of the CRC without however offering any alternative formulation.¹⁷⁴ Article 3(1) does not define best interests nor does it provide any checklist of factors to apply to the best interests test. Referring to the ‘general nature’ of the concept of best interests at the drafting stage, several delegates expressed concern over possible efforts by states to import ‘a purely nationalist content and interpretation’ in deciding what is best for children with dual origin.¹⁷⁵

The first Polish draft of the Convention¹⁷⁶ however had attempted to give more certainty to the concept by adopting the language of the 1959 Declaration referring to development of a child’s physical, mental, moral, spiritual and social development in a healthy and normal manner. Article II of the first Polish draft, which is most closely related to the present article 3, provided:

The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the *paramount consideration*.¹⁷⁷

The concerns over vagueness were raised also on the content of the first Polish draft. The term’s openness to varied interpretations was noted by the New Zealand raising its concern that the phrase will be ‘defined nationally in terms of the laws and

Children’ (Carolina Academic Press 2010) 8.

¹⁷³ Freeman (n 34) 27.

¹⁷⁴ Sutherland (n 136) 22.

¹⁷⁵ United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (2007) vol 1 341.

¹⁷⁶ In 1978 the first draft of the Convention was proposed by Poland.

¹⁷⁷ Legislative History, (n 175) 334.

child-rearing practices which are adopted and acceptable within that nation'.¹⁷⁸ Attempts were also made at the drafting stage to 'flesh out the concept'.¹⁷⁹ Spain for instance, proposed to insert the words 'avoiding anything that damages or may impair his physical or mental health, especially drugs in any of their forms';¹⁸⁰ while the Food and Agriculture Organization proposed to add reference to child's 'emotional development',¹⁸¹ and UNESCO proposed to add reference to 'cultural development with due regard for national or regional realities', alongside physical, mental, moral, spiritual and social development.¹⁸² The World Health Organization expressed its concern over lack of clarity regarding the terms 'special protection' used in the first Polish draft and recommended to include clarification.¹⁸³

The first Polish draft did not receive favourable reactions from several delegations for its 'wide-ranging application',¹⁸⁴ and in 1980, a revised draft was submitted to the Working Group of the Commission on Human Rights, which was responsible for the drafting of the Convention.¹⁸⁵ The revised draft read as follows:

In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interests of the child shall be *the paramount consideration*.

The legislative history of the Convention specifically mentions that a number of delegates agreed that 'the Polish version of Article 3(1) was wider and better protected the child', but 'in search for compromise' the revised text of paragraph 3(1) was taken up for discussion.¹⁸⁶ However, throughout the drafting process there had

¹⁷⁸ *ibid* 336.

¹⁷⁹ Freeman (n 34) 50.

¹⁸⁰ Legislative History (n 175) 336.

¹⁸¹ *ibid*.

¹⁸² *ibid*.

¹⁸³ *ibid*.

¹⁸⁴ Alston (n 30) 10.

¹⁸⁵ *ibid*.

¹⁸⁶ Legislative History (n 175) 339.

not been much deliberation on the meaning of the terms ‘best interests’ despite the ‘extensive debates at the national level of various countries and the misgivings expressed by many commentators’.¹⁸⁷ Only much later in the negotiating process, the representative of Venezuela raised their objection on the vagueness of the terms again, noting that with the exclusion of express reference to ‘the physical, mental, spiritual, moral and social dimensions of best interests’ - terms which were present in the first Polish draft, its interpretation would be left ‘to the judgment of the persons, institutions or organizations applying the rule’.¹⁸⁸ In the subsequent debate however, ‘a number of delegations expressed satisfaction with the phrase as it stood, without either offering elaboration or seeking any more precise definition’.¹⁸⁹ Alston therefore pointed out that, the meaning of best interests ‘seems either to have been taken for granted or to have been considered unimportant’.¹⁹⁰ He argues that such lack of deliberation about the meaning of the term might stem from the ‘drafters familiarity with the phrase from its extensive usage in the domestic law of many countries’.¹⁹¹ The inclusion of best interests principle in Article 3(1) can thus be said to have been ‘largely uncontroversial in the Convention’s drafting process’.¹⁹² However, after adoption of the Convention, the Committee had, on several occasions, ‘sought to reduce the ambiguity surrounding the best interest test, most notably in General Comment 14’.¹⁹³

Even though there is extensive academic scholarship that is critical of the subjective nature of the principle of best interests, there is also vast academic literature defending the principle against any claim of being vague and indeterminate. One of the arch critiques of the best interests test Robert Mnookin explains why despite such controversy the principle attracted acceptance.¹⁹⁴ He argues, ‘while the indeterminate best-interests standard may not be good, there is no available

¹⁸⁷ Alston (n 30) 11.

¹⁸⁸ Legislative History (n 175) 345.

¹⁸⁹ Alston (n 30) 11.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid* 12-13.

¹⁹² Kilkelly (n 29) 53.

¹⁹³ Sutherland (n 36) 22.

¹⁹⁴ *ibid.*

alternative that is plainly less detrimental'.¹⁹⁵ Sutherland expressed the view that the 'variety and complexity of the circumstances in which children live, requires a standard for decision-making that is flexible and the price of flexibility is a degree of uncertainty'.¹⁹⁶ Sutherland thus holds flexibility of the best interests test to be its greatest strength 'since it can be applied in the vast array of circumstances in which children find themselves'.¹⁹⁷

Herring also defends the best interests test arguing that it cannot always be assumed that a test is bad only because it is unpredictable.¹⁹⁸ He concedes that indeterminacy rather reflects the fact that 'a judge is assessing the facts of each case carefully, with consideration being given to the characters and relationships involved'.¹⁹⁹ Contextualizing the best interests test in family law disputes, Herring argues that 'in our present society - with such a wide range of families, styles of parenting and structures of relationships - we need flexible, responsive, albeit indeterminate, legal principles'.²⁰⁰ Responding to the charge of judicial prejudices often influencing determination of best interests, Herring argued that such risk of judicial biasness is 'inherent in the judicial role' and 'there is hardly an area of the law where it is not claimed that judicial decisions reflect as much the personal opinions of the judiciary as they do legal doctrine'.²⁰¹ Herring thus concludes that the benefits of indeterminacy are that 'it enables courts to produce results which are flexible and responsive to the individual needs of each child'.²⁰²

In support of this need for flexibility of the best interests test, especially in the context of family law, Alston noted:

[a]ny enterprise which is avowedly universalist in its aspirations and aims to

¹⁹⁵ Mnookin (n 95) 282.

¹⁹⁶ Sutherland (n) 22.

¹⁹⁷ *ibid*36.

¹⁹⁸ Herring (n 158) 161.

¹⁹⁹ *ibid*.

²⁰⁰ *ibid*.

²⁰¹ *ibid* 162.

²⁰² *ibid* 169.

address a very wide range of issues involving, inter alia, the relationship between the state, the family and the child, must be characterized by a significant degree of flexibility and adaptability.²⁰³

Thus Alston concluded that rather than leading to paralysis, indeterminacy of human rights standards 'serves to emphasize the importance both of institutions as a means through which to pursue the interpretive enterprise and of the need to develop a better understanding of the different cultural dimensions of the relevant norms.'²⁰⁴ Stephen Parker on the other hand offers to remedy the lack of determinacy issue by holding that 'such indeterminacy can be mitigated through the application of localized conventions or understandings in relation to such values which are constructed by community of rule users.'²⁰⁵ Alston further argued that the 'Convention as a whole, to a certain extent, provides the broad ethical or value framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interests principle'.²⁰⁶ Writing in the context of South Asia, Goonesekere argues that 'if the Constitutional and international standards could be used to set the guidelines for determining what is in the best interests of the child, it will be possible to reduce the current subjectivity in decision making both by judges and policy makers.'²⁰⁷ She thus agrees with Alston's position that the rights listed in the CRC could be used as a broad framework to provide meaning to the otherwise indeterminate standard of best interest.

The Committee addressed the 'indeterminacy' debate quite elaborately in its General Comment 14, explaining what is involved in a 'best interests assessment and determination'.²⁰⁸ The Committee noted that assessing the child's best interests 'should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general'.²⁰⁹ It

²⁰³ Alston (n 30)18.

²⁰⁴ *ibid.*

²⁰⁵ *ibid* 19; see also Parker (n 28) 26-41.

²⁰⁶ Alston and Walsh (n 27) 32.

²⁰⁷ Goonesekere, 'The Best Interests of the Child' (n 7) 145.

²⁰⁸ General Comment 14 (n 35) para 46.

²⁰⁹ *ibid* 48.

prescribed to use ‘a non-exhaustive and non-hierarchical list of elements’²¹⁰ which could provide decision-makers with ‘concrete guidance, yet flexibility’²¹¹ in applying the best interests test. The list of elements provided by the General Comment 14 includes the child’s views; the child’s identity; preservation of family environment and maintaining relations; care, protection and safety; situations of vulnerability; right to health and right to education.²¹² Although providing a checklist of elements for best interests assessment is not new in the context of national laws,²¹³ the formulation of elements considered by the Committee in evaluating the child’s best interests is considered ‘more comprehensive than domestic checklists’.²¹⁴

2.7 Conclusions

The General Comment 14 thus, attempted to provide a more definitive framework to the principle of best interests by stating that the ‘full application of the concept of the child’s best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.’²¹⁵ Thus, it echoed the spirit of the first Polish draft and of the 1959 Declaration, which emphasized on the child’s physical, mental, spiritual, moral and social development to determine his or her best interests.

Central to General Comment 14 however, is the articulation of Article 3(1) as ‘a right, a principle and a rule of procedure’.²¹⁶ The Committee thus presents Article 3(1) firstly as a substantive right of the child ‘to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake’.²¹⁷ Secondly, in

²¹⁰ *ibid* 50.

²¹¹ *ibid* 50.

²¹² *ibid* 52–79.

²¹³ Sutherland (n 36) 48.

²¹⁴ *ibid*.

²¹⁵ General Comment 14 (n 35) para 5.

²¹⁶ *ibid* 6.

²¹⁷ *ibid*.

terms of Article 3(1) being a fundamental, interpretative legal principle, the Committee guides that 'if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'.²¹⁸ Finally, in terms of enumerating the best interests principle as a rule of procedure, the Committee indicates that 'whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned'.²¹⁹

Therefore, it is implicit in the way in which the General Comment 14 has been formulated that the Committee is seeking to assert a rights-based approach to the assessment of best interests principle.²²⁰ Echoing the rights-centric language, the General Comment 14 explained that its objective is to 'to promote a real change in attitudes leading to the full respect of children as rights holders'.²²¹

²¹⁸ *ibid.*

²¹⁹ *ibid.*

²²⁰ Kilkelly (n 29) 55.

²²¹ General Comment 14 (n 35) para 12.

Chapter 3: Primacy of the Best Interests Principle and Concerns Regarding Influence of Paternalism and Cultural Considerations

3.1 Introduction

One of the principal criticisms of the application of the best interests test is that, 'by prioritising adult perceptions of the child's welfare, it undermines the place of the child's agency'.²²² Since the adoption of the Convention, authors have questioned whether 'this notion of the child's best interests, conceived at a time when the child was perceived more as object than subject, retains its *raison d'être* within a context of rights?'.²²³ It is frequently argued that the notion of best interests is inherently paternalistic, often dominated by adults' perspectives - rather than being rights-based, or viewing the child as a rights-holder.²²⁴

Eekelaar raises this concern in many of his papers that because 'best interests' principle is inherently indeterminate, when the courts reach a decision regarding a child's 'welfare' or 'best interests', the decision may not have properly taken into account the child's views. He fears that judicial decisions may subject children to 'coercive paternalism' by ignoring their views and life choices.²²⁵ Eekelaar develops a method of determining what is in the child's best interest by proposing the concept of 'dynamic self-determinism', which is intended 'to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice'.²²⁶ He argues that the 'determination of what is in a child's best interests should combine both objective and subjective elements' as only 'objective standards cannot take into account all the small ways in

²²² Sutherland (n 36) 34; see Fortin (n 106).

²²³ Alston (n 30) 18; Kilkelly (n 29) 56.

²²⁴ Barbara Bennett Woodhouse, 'Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family' (1993) 8 *BYU Journal of Public Law* 321, 323.

²²⁵ See John Eekelaar 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161; John Eekelaar, 'The Importance of Thinking that Children Have Rights' (1992) 6(1) *International Journal of Law, Policy and the Family* 221.

²²⁶ Eekelaar 'The Interests of the Child' (n 96) 53.

which children's experiences differ'.²²⁷ The Committee also echoes this standard holding that best interests of the child 'is a right, a principle and a rule of procedure' which must be based on 'an assessment of all elements of a child's or children's interests in a specific situation'.²²⁸

In attempting to remedy the challenges of determining best interests, scholars like Eekelaar and Woodhouse²²⁹ have sought to 'infuse the best interests principle with the child's voice in order to ensure that it operates as a 'fair and just' principle to advance children's rights'.²³⁰ 'The danger of over-reliance on best interests'²³¹ has been also acknowledged by the Convention itself, in its Article 12, which guarantees the child's right to freely express his or her views and to have them taken into account in matters affecting the child. Academic scholarship discusses this potential tension between Article 3 and Article 12 'where the adult perception of what will serve the child's best interests is in direct conflict with the child's clearly articulated preference'.²³² Initially the Committee denied presence of any such tension between the two Articles and considered them to be simply complementing each other - one being the objective and the other being the approach for reaching the goal.²³³ However, in its General comment 14, it addresses the tension by clarifying that 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'.²³⁴ More generally, however, the Committee has developed the concept as a procedural rule by identifying child's views as one of the elements that must be taken into account in the determination of the child's best interests.²³⁵

²²⁷ Ibid; Alston and Walsh (n 27) 12.

²²⁸ General Comment 14 (n 35) para 46.

²²⁹ Woodhouse (n 224) 817.

²³⁰ Kilkelly (n 29) 59.

²³¹ Sutherland (n 36) 34.

²³² *ibid*; see also Fortin (n 106).

²³³ UN Committee on the Rights of the Child, General comment 12 on The right of the child to be heard (CRC/C/GC/12) 2009 para. 74.

²³⁴ General Comment 14 (n 35) para 4.

²³⁵ Kilkelly (n 29) 59.

3.2 Debates Surrounding Primacy of the Principle

Besides indeterminacy, the other question that dominated the negotiations at the drafting stage of the Convention was whether the principle should be accorded a primary or a 'paramount' status. Both in the 1959 Declaration and in the Polish draft, best interests principle was considered to be 'the paramount consideration'. However, the debate was eventually settled by 'opting for the formulation that the child's best interests is "a primary consideration" in all actions concerning children'.²³⁶ This was the result of concerns some of the delegates had raised during the negotiations, that there might be other competing interests that may conflict with the principle at times, for example interests of 'justice and society', which then would make 'paramountcy' unsuitable.²³⁷

The word 'paramount' used in the revised Polish draft was considered 'too broad'²³⁸ by some delegations. For instance, one delegate pointed out that best interests could not be the 'overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some cases (e.g., medical emergencies during childbirth)'.²³⁹ Professor Freeman discusses briefly the difference between the two terms. He explains that 'the word "paramount" emphasises that the child's best interests are determinative: they determine the course of action to take.'²⁴⁰ Thus when considered paramount it would be 'more than just the top item in a list: they would come close to being the only consideration.'²⁴¹ However, he refrained from saying that 'paramount' would be same as being 'sole consideration' and left the question to be decided by the judgments of the decision-maker.²⁴²

²³⁶ Sutherland (n 36) 28.

²³⁷ Russell Lawrence Barsh, 'The Convention on the Rights of the Child: a Re-assessment of the Final Text' (1989) 7 New York Law School Journal of Human Rights 142, 143; Legislative History (n 175) 345.

²³⁸ Legislative History (n 175) 339.

²³⁹ *ibid.*

²⁴⁰ Freeman (n 34) 60.

²⁴¹ *ibid.*

²⁴² *ibid.*

Writing in the context of how best interests principle often promotes paternalist approach, Sutherland also emphasized on the perils of the principle when considered to be the sole determinant in the decision making process. She pointed out that as ‘societies have always felt freer to impose adult perceptions of best interests on children’, if the best interests principle is treated as the sole consideration, ‘it could lead to the complete disempowerment of children and young people’.²⁴³ Thus Eekelaar has rightly noted:

[g]iven the well-known problem of indeterminacy of the best interests principle, it is not surprising that the way children’s interests are factored into such decisions has caused much discussion, in particular with regard to ‘weighting’ or prioritization, to be given to those interests vis-a-vis other relevant interests.²⁴⁴

The deliberations during the drafting of Article 3(1) were not only confined to primary versus paramount debate, the use of the words ‘a’ and ‘the’ was also debated. It was suggested that the word ‘a’ should be replaced with ‘the’ before the words ‘primary consideration’ in the draft on the basis that such a position would be more consistent with other international instruments.²⁴⁵ However such proposals were not accepted as those international instruments were considered as having much narrower scope (mostly applicable in adoption and custody matters) than the all-encompassing scope of Article 3(1).²⁴⁶ For instance, at the second reading of the revised text, Canada suggested that, Article 3(1) ‘should make the interests of the child “a” primary consideration, noting that other instruments making the interests of the child “the” primary consideration were directed to more limited circumstances than those provided for in the Article’.²⁴⁷

²⁴³ Sutherland (n 36) 34.

²⁴⁴ Eekelaar ‘The Interests of the Child’ (n 88) 99.

²⁴⁵ Alston (n 30) 12; Legislative History (n 175) 345-346.

²⁴⁶ Legislative History (n 175) 345-346.

²⁴⁷ *ibid* 345.

For Alston ‘the objective implicit in opting for the word “a” is to ensure that there is sufficient flexibility, at least in certain extreme cases, to enable the interests of those other than the child to prevail’.²⁴⁸ Alston and Gilmour-Walsh explained that the drafters wished to ensure:

a degree of flexibility in the application of the principle, not because they thought that the children’s interests should not be paramount (sic) in some circumstances, but because the principle as contained in Article 3 was to be of broad application, and an approach that gave paramountcy to children’s best interests could not be justified in all of the situations to which the Article might apply.²⁴⁹

Alston further makes the point that by adopting such a formulation of ‘a’ primary consideration instead of using ‘the’, a burden of proof would be imposed on those seeking a ‘non-child-centred’ outcome to show that, ‘under the circumstances, other feasible and acceptable alternatives do not exist’.²⁵⁰

The Committee in the General Comment 14 also acknowledged ‘the need for a degree of flexibility’ in the application of Article 3(1) as it ‘covers a wide range of situations’.²⁵¹ Addressing a potential conflict between the best interests principle and other competing interests (for instance, interests of other children, of parents or of public, etc.) the Committee recommended that such conflicts ‘have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise’.²⁵² Even in cases where such harmonization becomes impossible the Committee insists that in such cases rights of all concerned parties must be weighed and analysed ‘bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations’.²⁵³ Emphasizing on the

²⁴⁸ Alston (n 30) 13.

²⁴⁹ Alston and Walsh (n 27) 11.

²⁵⁰ Alston (n 30) 13.

²⁵¹ General Comment 14 (n 35) para 39.

²⁵² *ibid.*

²⁵³ *ibid.*

priority to be given to the children's interests particularly in situations directly affecting children, the Committee further commented that:

Viewing the best interests of the child as “primary” requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.²⁵⁴

Although the Committee had attempted to resolve the questions surrounding the indeterminacy and primacy of the principle of best interests, the uncertainty around the terms will remain contentious. As Sutherland puts it, that is not, however, ‘a flaw in Article 3... [I]t is simply a reflection of the reality that children's lives are infinitely varied’.²⁵⁵ Similarly, the process of harmonizing competing rights is not always easy, but ‘it is one with which legal and administrative systems are familiar’ and which can be achieved with adopting ‘adequate procedural safeguards’ by the decision-makers.²⁵⁶

3.3 Best Interests Principle and Influence of Cultural Considerations

Compared to the traditional approach towards the best interests principle that viewed it predominantly as adults' right to exercise power on behalf of children,²⁵⁷ the CRC no doubt has given the child much greater agency in deciding what is in his/her best interests.²⁵⁸ It is true, however, that the very indeterminacy of the best interests principle allows, to a certain extent, diverse cultural contexts to influence determination of the best interests of children in a given context. The influence that culture has on the value structure of a society explains the indeterminacy aspect of the best interests principle.²⁵⁹ Alston describes the principle to be ‘inextricably linked

²⁵⁴ *ibid* 40.

²⁵⁵ Sutherland (n 36) 49.

²⁵⁶ *ibid*.

²⁵⁷ Bueren, ‘Children's Rights’ (n 77) 330.

²⁵⁸ Freeman (n 34) 33.

²⁵⁹ Alston and Walsh (n 27) 17.

to the cultural context in which it is invoked'.²⁶⁰ The CRC similarly 'reflects sensitivity to the impact of contextual factors and cultural considerations' on the principles and rights framework that the Convention purports to set.²⁶¹ The preamble to the Convention also recognizes 'the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'.²⁶² The Committee in its General Comment 14 has now emphasized more specifically on the relevance of cultural context in interpreting best interests. In drawing up the non-exhaustive list of elements to assist the decision makers in assessing best interests, the Committee expressly mentions that other elements that 'are deemed appropriate in accordance with [the state's] *legal tradition* may be added'.²⁶³

The influence of the cultural contexts however inevitably leads to the inherent tension between the requirements of the contextual diversities on the one hand, and the 'normative ambiguity' surrounding rights of the child on the other.²⁶⁴ For instance, questions like whether children should be allowed to work or to marry,²⁶⁵ or whether certain forms of corporal punishment by the parents be allowed,²⁶⁶ or whether children should obey their parents are sometimes answered differently in different social and cultural contexts. The role of the best interests principle in reconciling with such varied cultural contexts²⁶⁷ indeed, had long been debated in the academic scholarship.

Writing on how some aspects of childhood in Africa is understood differently as compared to the developed world, Ncube recognizes that, 'the normative universality achieved in the definition and formulation of children's rights has to contend with diverse and varied cultural and traditional conceptions of childhood, its role, its rights

²⁶⁰ Alston (n 30) 5.

²⁶¹ Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' (1994) 8(1) International Journal of Law, Policy and the Family 62,62.

²⁶² Preamble to the CRC.

²⁶³ General Comment 14 (n 35) para 51.

²⁶⁴ An-Na'im (n 261) 63.

²⁶⁵ Freeman (n 34) 33.

²⁶⁶ See An-Na'im (n 261) 63.

²⁶⁷ Freeman (n 34) 33.

and obligations.²⁶⁸ An-Na'im concedes that 'normative universality' of the rights of the child achieved without considering 'alternative perceptions and interpretations of cultural norms and institutions' runs the risk of being 'superficial and perfunctory'.²⁶⁹ An-Na'im thereby emphasizes 'the need to maximize opportunities for contesting the nature and rationale of action regarding children from as many different perspectives as possible', so that different cultural norms on rights of the child can develop and contest with the already established 'dominant' norms.²⁷⁰ However, the goal of achieving normative universality of the best interests principle should not be abandoned because of such 'difficulty of cross-cultural communication and understanding', rather An-Na'im emphasizes on 'the need to take that difficulty into account in seeking to achieve normative universality'.²⁷¹ He suggested that the 'paradox of normative universality can be mediated through processes of internal discourse and cross-cultural dialogue' between countries which would 'deepen genuine and substantive consensus' over the interpretations of best interests principle.²⁷² However, Alston and Walsh questioned the practical viability of such a proposition emphasizing that 'it is not easy to envisage a process of dialogue in which all member or groups in a particular society will have equal opportunities to present their views', thereby risking to perpetuate the existing inequalities.²⁷³

Alston rather offered a different approach to the reconciliation process and emphasized on taking into account cultural considerations at a stage when international norms are being implemented at the domestic level.²⁷⁴ He insists that to provide such a scope of contextualizing culture in international norms at the national level, works 'as a type of elastic glue which enables the overall human rights

²⁶⁸ Ncube Welshman, 'Prospects and Challenges in Eastern and Southern Africa: The Interplay Between International Human Rights Norms and Domestic Law, Tradition and Culture' in Ncube Welshman (ed), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate 1998) 5.

²⁶⁹ An-Na'im (n 261) 63.

²⁷⁰ *ibid.*

²⁷¹ *ibid* 67.

²⁷² *ibid.*

²⁷³ Alston and Walsh (n 27) 39.

²⁷⁴ *ibid.*

enterprise to be held together and remain coherent'.²⁷⁵

Alston further elucidates the debate surrounding the extent to which cultural norms may inform the determinations of best interests principle by drawing analogy from the concept of 'margin of appreciation' within the jurisprudence of the ECHR.²⁷⁶ Invoking the concept to the rights of children would mean that state authorities would be able to use a certain degree of discretion to accommodate cultural considerations within the best interests norms. A key indicator of how cultural diversity is accommodated within the norm setting process of children's rights is then seen through the entering of reservations by Member States to the Convention. For Professor Freeman, entering of reservations by states is a 'functional equivalent' of the doctrine of 'margin of appreciation', which Alston had referred to elucidate the extent of cultural diversity that can be accommodated into the human rights norms.²⁷⁷

This discussion is even more significant in the context of reservations entered by the Muslim state parties mostly in the name of Muslim law and Sharia. The CRC notably, is the only human rights instrument that specifically mentions Islam²⁷⁸ and has been ratified by all Muslim states.²⁷⁹ Among them, majority had entered reservations to the Convention²⁸⁰ based mainly on the reason of being contrary to the Islamic law and Sharia. However, as Professor Shaheen Sardar Ali argued, the responses of the Muslim states to the CRC, particularly the picture of reservations to the Convention, reflect the inherent plurality of Islamic legal traditions and the 'lack of homogeneity' in the Muslim state practices regarding rights of children.²⁸¹ She pointed out there are

²⁷⁵ Alston (n 30)19.

²⁷⁶ *ibid* 20.

²⁷⁷ Freeman (n 34) 35.

²⁷⁸ *Kafalah* of Islamic law is mentioned in Article 20 of the CRC.

²⁷⁹ 'Muslim State Party' indicates 'a UN member state which is either a member of the Organization of Islamic Cooperation (OIC) or whose majority profess the Islamic religion'. Sardar Ali (n 55) 286.

²⁸⁰ CRC along with CEDAW have the highest number of religion-based reservations by Muslim states.

²⁸¹ Shaheen Sardar Ali and Sajila Soha Ali Khan, 'Evolving Conceptions of Children's Rights: Some Reflections on Muslim States : Engagement with the UN Convention on the Rights of the Child' in Nadjma Yassari and others (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (Springer 2017).

disparate reasoning for reservation - some Muslim countries entered reservations (either to particular Articles or generally to the Convention as a whole) in the name of Sharia²⁸² - while some other countries cited cultural practices, constitutions, national laws, etc. For instance, countries like Bangladesh, Malaysia and Indonesia do not mention religion or Islamic law as a reason for their reservation. Bangladesh specifically cited 'existing laws and practices' as reasons for its reservations to Articles 14(1) and 21 of the CRC²⁸³ - clearly, 'practices' would mean 'customs, traditions, and cultures that include religious practices'.²⁸⁴ Articles 14 and 21 in fact have attracted most number of reservations from the Muslim states for being at variance with the traditional Muslim law rule regarding a child's freedom of religion and the practice of adoption respectively.

On the other hand, there are Muslim countries, which ratified the CRC without any reservation. For example, countries like Bahrain and Yemen entered no reservation despite constitutional declaration of being Islamic states. At the same time, there are Muslim countries, which, having once entered reservations in the name of Sharia, had subsequently withdrawn them. For example, Egypt had entered reservation to Articles 20 and 21 of the CRC on the reasoning that the system of adoption is not recognized by Sharia. However In 2003, Egypt withdrew its reservation without offering any explanation as to the previously assumed contradiction of the provision with the Sharia.²⁸⁵ Similarly Pakistan's initial reservation, which stated that, 'Provisions of the Convention be interpreted in the light of the principles of Islamic laws and values' was withdrawn in 1997 without any reasoning shown.²⁸⁶ This shows how Muslim states' responses to substantive provisions of the CRC had been varied and evolving over time.²⁸⁷ A closer read of the country reports by the Muslim State

²⁸² For example countries like Iran, Iraq, Jordan, Kuwait and Afghanistan have all entered reservations in the name of Sharia or Islamic law.

²⁸³ See <<https://indicators.ohchr.org>> accessed 19 July 2023.

²⁸⁴ Sardar Ali (n 281) 310.

²⁸⁵ *ibid* 309.

²⁸⁶ *ibid*.

²⁸⁷ For instance, Syria in its second country report stated specifically that practice of adoption conflicts with the Islamic Shari'a and with the national legislation, for which it had entered reservation to Article 21. (CRC/C/28/Add. 2) 1996 However, it withdrew the reservation later on and in its third and fourth country report Syria referred to the system of *kafalah* (guardianship) being allowed within the Islamic traditions and acknowledged permissibility of adoption for Christian communities. (CRC/C/SYR/3-4)

parties, also demonstrates to some extent a 'positive engagement with the CRC'.²⁸⁸ Application of the CRC in Muslim jurisdictions thus reflects their varied and complex legal and cultural traditions that frequently interact with the determination of the best interests of children in those jurisdictions.

3.3 (a) Limits of Cultural Context

Although there are cultural practices, which are reconcilable with the best interests standard, some cultural and legal traditions may not be so, which would fall outside any margin of appreciation as pointed out by Professor Freeman.²⁸⁹ It is thus important to note that in order for varied cultural contexts and legal traditions to be taken into consideration in the child rights framework, they must not be in clear contradiction with the human rights norms. For instance, practices like female infanticide, slavery and forced prostitution can never be allowed under any cultural defence.²⁹⁰ Alston thus argues that culture must not be 'accorded the status of a meta-norm which trumps rights'.²⁹¹ In other words, 'they should not be permitted to override the established children's rights norms'.²⁹² Alston and Walsh summarize the point:

Through the best interests principle there will be some scope for adopting a culturally sensitive interpretation of various provisions of the Convention. By the same token there are important limits in this respect, and the best interests principle must always be applied in a manner that is consistent with respect for

2010 Malaysia addresses both adoption and *kafala* in its reports observing that 'adoption is allowed in Malaysia, and the legislation pertaining to adoption is aimed at protecting the welfare and best interests of the child.' (CRC/C/MYS/1) 2006. Similarly Indonesia's country reports reflected their growing engagement with the CRC provisions especially with regard to Article 21. Its third and fourth country report mentions the European Convention on the Adoption of Children and acknowledged its role in inspiring Indonesia 'to take action in anticipation of the possibility of inter-country adoption'. Although during the first report in 1993, Indonesia lacked any law on adoption, by the third and fourth report, national laws were developed with 'guarantees that adoption of a child is conducted on a basis of the principle of best interests of the child and in accordance with local customs and traditions and applicable laws.' (CRC/C/IDN/3-4) 2012 para 23.

²⁸⁸ Sardar Ali (n 281) 322.

²⁸⁹ Freeman (n 34) 35.

²⁹⁰ Contrast D. Coleman, 'Individualizing justice Through Multiculturalism: The Liberals' Dilemma' (1996) 96 Columbia Law Review 1093.

²⁹¹ Alston (n 30) 21.

²⁹² Alston and Walsh (n 27) 39.

all of the substantive rights recognized in the CRC.²⁹³

Alston thus rightly insists that ‘it must be accepted that cultural considerations will have to yield whenever a clear conflict with human rights norms becomes apparent.’²⁹⁴ The CRC Committee also invokes the principle of best interests to ‘criticize many such laws, policies and practices of States Parties’ that encroach upon the fundamental human rights norms and frequently notes the ways culture, religion and tradition frustrate the implementation of the best interests principle’.²⁹⁵

The Committee on several occasions criticized state parties for having laws that allow early marriage, female genital mutilation and corporal punishment. In its concluding observations on Morocco the Committee expressed its ‘deep concern at the persistence of discriminatory attitudes towards girls, including the practice of early marriage’ and ‘the lower marriageable age for girls than for boys’.²⁹⁶ The Committee observed in respect of Senegal that ‘specific provisions should be included with a view to clearly forbidding female genital mutilation and any form of torture or cruel, inhuman or degrading treatment or punishment, as well as of any form of corporal punishment within the family’.²⁹⁷ In respect of Azerbaijan, the committee in its 2023 observation expressed serious concern over ‘the high sex ratio at birth as a result of sex-selective abortions favouring boys’ and recommended the state party to take actions to eliminate the practice.²⁹⁸

3.4 CRC Committee on Religious Traditions Relating to Child Custody Limiting Implementation of the Best Interests Principle

The CRC committee had in a number of occasions announced its concern over

²⁹³ *ibid.*

²⁹⁴ Alston (n 30) 21.

²⁹⁵ Freeman (n 34) 41-42.

²⁹⁶ UN Committee on the Rights of the Child, Concluding Observations on Morocco (CRC/C/15/Add. 60) 1996 para 25.

²⁹⁷ UN Committee on the Rights of the Child, Concluding Observations on Senegal (CRC/C/15/Add. 44) 1995 para 24.

²⁹⁸ UN Committee on the Rights of the Child, Concluding Observations on Azerbaijan (CRC/C/AZE/CO/5-6) 2023 para 35-36.

custody disputes being determined by parental rights and not by best interests of the concerned child. Noting that ‘decisions regarding custody, residence, contact or other issues ... have an important impact on the life and development of the child’, the Committee in its General Comment 14 emphasized on the risk of the concept of child’s best interests being abused ‘by parents to defend their own interests in custody disputes’, as the flexibility attached to the concept leaves room for such manipulation.²⁹⁹ The committee had in its concluding observations on certain Muslim States’ country reports, disapproved laws ‘under which custody is determined by the child's age rather than the child's best interests’³⁰⁰ and considered such laws as arbitrary and discriminatory against women.

For instance, in its concluding observations on Initial Report of Iran in 2000, the Committee expressed its concern that ‘the general principle of the best interests of the child [...] is not [always] a primary consideration’ in Iran, ‘including in matters relating to family law’³⁰¹. The Committee specifically referred to the duration of custody given under Articles 1169 and 1170 of the Civil Code of the Islamic Republic of Iran as arbitrary. Previously the law gave a male child’s custody to mother for only up to two years. Article 1169 of the Code was amended in 2002 which now provides that that after divorce of the parents, the mother has priority over the custody of the child until the age of seven after which period, the custody will devolve upon the father. The Article further provides that after reaching seven years of age, if there is a dispute with regard to best interests of the child, the court will decide who receives custody.³⁰² As per Article 1170 of the Code, mother’s preferential right over the custody lapses if she becomes insane or marries again during her period of

²⁹⁹ General Comment 14 (n 35) paras 29, 34.

³⁰⁰ Kamran Hashemi, ‘Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation’ (2007) 29(1) Human Rights Quarterly 194, 114.

³⁰¹ UN Committee on the Rights of the Child, Concluding Observations on Islamic Republic of Iran (CRC/C/15/Add.123) 2000 para 25.

³⁰² Iran’s response to the communication from the Working Group on Discrimination against women in Law and in Practice (2015)

<<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=32658>> accessed 12 July 2023; Andrew Hanna, ‘Art 3: Iranian Laws on Women’ The Iran Primer (1 May 2009) <https://iranprimer.usip.org/blog/2020/dec/08/part-3-iranian-laws-women> accessed 13 July 2023.

custody.³⁰³ The Committee further in its concluding observations on the second periodic report of Iran in 2005 stated that:

‘The Committee regrets that Article 1169 of the Civil Law relating to the custody of children after divorce prevents the court from taking the best interests of the child into account. In the Committee’s view, custody determined solely on the basis of a child’s age is both arbitrary and discriminatory against the mother.’³⁰⁴

Similarly, with respect to Indonesia the Committee raised concern regarding its religion based determination of custody disputes:

The Committee [...] notes with concern that decisions regarding adoption and custody are often taken on the basis of the child’s religion, rather than his or her best interests, and remains concerned that according to Sharia law applicable to Muslims, in divorce proceedings decisions relating to custody of children are based on their age.³⁰⁵

The Committee thus recommended Indonesia to ‘review its legislation relating to custody of the child with a view to ensuring that all decisions are based on the principle of the best interest of the child, in line with Articles 3 and 12 of the Convention’.³⁰⁶

With regard to Jordan, the Committee specifically referred to Article 173 of the Interim Status Code Act that ‘grants the mother custody of her children in case of divorce, until they reach 15 years old and until 7 years old only if the mother is non-Muslim’ and urged the state party to ‘review its legislation relating to the custody of

³⁰³ Civil Code of the Islamic Republic of Iran 1928 <<https://www.refworld.org/pdfid/49997adb27.pdf> > accessed 13 July 2023.

³⁰⁴ UN Committee on the Rights of the Child, Concluding Observations on Iran (CRC/C/15/Add.254) 2005 para 28; The Committee reiterated its previous recommendation to review Iran’s ‘legislation and administrative measures to ensure that Article 3 is reflected therein and implemented in all actions concerning children’.

³⁰⁵ UN Committee on the Rights of the Child, Concluding Observations on Indonesia (CRC/C/IDN/CO/3-4) 2014 para 21.

³⁰⁶ UN Committee on the Rights of the Child, Concluding Observations on Indonesia (CRC/C/15/Add.223) 2004 para 46.

the child with a view to ensuring that all decisions taken are based on the principle of the best interests of the child in line with Articles 3 and 12 of the Convention and removing provisions that discriminate against children of non-Muslim mothers.³⁰⁷ The Committee further emphasized to revise the law to ensure that both parents equally share legal responsibility for their children referring to the state's responsibility to comply with Article 18 of the CRC. Such equal sharing of responsibility between the parents was also emphasized in respect of other countries.³⁰⁸ The Committee in its 2017 concluding observations on Qatar recommended to 'repeal all family law provisions that have a negative impact on children' including 'those that assign custody to a mother or to a father on the basis of the age of boys and girls, without an individual child's best interests assessment'.³⁰⁹ Similarly in respect of Kuwait, the Committee expressed its concern over unequal division of parental responsibilities under Kuwait's family laws, which consider fathers as the 'sole legal guardians of their children'.³¹⁰

Similarly condemning the relevant family law provisions in Egypt, the Committee expressed concern that 'in all actions concerning children, the general principle of the best interests of the child contained in Article 3 of the Convention is not sufficiently taken into consideration, including in matters relating to family law'.³¹¹ As an example, the Committee referred to Article 20 of the Law No. 25/1929 which determines custody of a child upon separation by the child's age and not by the child's best interests and considered it 'discriminatory'.³¹²

³⁰⁷ UN Committee on the Rights of the Child, Concluding Observations on Jordan (CRC/C/JOR/CO/4-5) 2014 para 37; UN Committee on the Rights of the Child, Concluding Observations on Yemen (CRC/C/15/Add.267) 2005.

³⁰⁸ UN Committee on the Rights of the Child, Concluding Observations on Qatar (CRC/C/QAT/CO/3-4) 2017 para 26.

³⁰⁹ *ibid.*

³¹⁰ UN Committee on the Rights of the Child, Concluding Observations on Kuwait (CRC/C/KWT/CO/2) 2013 para 51; Article 209 of the Personal Status Law of Kuwait states that 'the person with the most right to guardianship of a minor is the father, followed if he is unfit by the father's father and the male relations in the order of inheritance'; see, <<https://www.international-divorce.com/2017/01/notes-on-kuwait-child-custody-and-child.html>> accessed 23 July 2023.

³¹¹ UN Committee on the Rights of the Child, Concluding Observations on Egypt (CRC/C/15/Add.145) 2001 para 29.

³¹² *ibid.*; discriminatory laws against women in custody matters were similarly condemned by the UN Committee on the Rights of the Child in the concluding observations on a number of states including United Arab Emirates (CRC/C/118) 2002 para 387 and Saudi Arabia (CRC/C/103) 2001 para 397.

Also with regard to Pakistan the Committee recommended in its Concluding Observation in 2009 to incorporate the principle of best interests of the child in legislation and other actions on areas of ‘child custody in cases of divorce, *kafalah* of Islamic law, child protection, guardianship and juvenile justice’.³¹³ The Committee in 2016 recommended Pakistan ‘to strengthen its efforts to ensure that this right [of the child to have his or her best interests taken as a primary consideration] is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions, and in all policies, programmes and projects that are relevant to and have an impact on children’.³¹⁴

The CRC Committee had also emphasized in its concluding observations, especially with regard to the Muslim State parties, on the views of the child involved in a custody dispute as provided in Article 12 of the CRC. For instance, the Committee recommended Pakistan to strengthen in light of Article 12 of the Convention ‘the implementation of measures aimed at ensuring children’s right to be heard, in accordance with the child’s age and maturity, at any proceeding which may impact on their rights, particularly in the case of marriage, divorce and custody’.³¹⁵ Similar recommendation was made in case of Lebanon where the Committee expressed concern that in Lebanon ‘the religious and sharia courts decide on issues related to custody and care of the child without hearing the child’s opinion’.³¹⁶ In respect of Qatar, the Committee recommended to ‘ensure that the opportunity of the child to express his or her opinion with regard to custody after divorce [is] considered as a right and not an obligation’.³¹⁷

With regard to Bangladesh, however, the Committee’s observations were not

³¹³ UN Committee on the Rights of the Child, Concluding Observations on Pakistan (CRC/C/PAK/CO/3-4) 2009 para 34.

³¹⁴ UN Committee on the Rights of the Child, Concluding Observations on Pakistan (CRC/C/PAK/CO/5) 2016 para 21.

³¹⁵ (n 313)40.

³¹⁶ UN Committee on the Rights of the Child, Concluding Observations on Lebanon (CRC/C/LBN/CO/3) 2006 para 35.

³¹⁷ UN Committee on the Rights of the Child, Concluding Observations on Qatar (CRC/C/QAT/CO/3-4) 2017 para 26.

specifically addressed to custody issues in family laws, but the Committee did note with concern that, ‘the right of the child to have his or her best interests taken into account as a primary consideration is not adequately and systematically interpreted or applied by administrative, legislative and judicial bodies’ and recommended to take efforts ‘to ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions, [...] that are relevant to and have an impact on children’.³¹⁸

3.5 Conclusions

The Committee’s observations thus indicate that applying best interests principle in custody cases would clearly exclude applying any policy or rule that leads to a determination of custody dispute on the basis of religious traditions that solely rely on the age or sex of the child or any of the parent’s interests or rights. Within the setting of this interpretation, clearly the traditional custody principles derived from the *Hanafi* law texts³¹⁹ that are perceived to be based on a particular age and sex of a minor giving priority to one parent over another, would not be aligned with how best interests principle is to be ensured within the domestic law’s framework.

Unlike some of the Muslim majority states discussed above, Bangladesh does not have any statute that specifies any age-sex rule for awarding custody. Nonetheless, as will be discussed in the next chapters, the legal framework principally consisting of a British colonial statute that is applicable in Bangladesh left the question of the status of ‘welfare’ with regard to traditional rules of personal law of the child, ambiguous. Such ambiguities had on one hand given the courts in Bangladesh ample opportunities to reconcile traditional rules of custody with the principle of best interests of the child. On the other hand, absence of clear provisions upholding the primacy of best interests principle in custody cases had also left the scope open for integrating rigid interpretations of traditional rules into deciding custody cases.

³¹⁸ UN Committee on the Rights of the Child, Concluding Observations on Bangladesh (CRC/C/BGD/CO/5) 2015 para 28,29.

³¹⁹ Detail of these rules and texts will be discussed later in the thesis.

Part – II: Child Custody Laws in the South Asian Judicial Discourse

Bangladesh, India and Pakistan, the three major countries of South Asia share a common historical background being once combined together as the Indian Subcontinent and being ruled under the British colonial reign.³²⁰ The three countries thus understandably share familiar trends in the development of their individual legal systems and accordingly the family laws governing the family relations of citizens in all these jurisdictions have significant commonalities. The religion based personal laws of the individual communities still govern their family matters although through state legislations and judicial precedents, new principles have also been introduced to regulate disputes regarding family matters. Among these countries, Bangladesh and Pakistan are Muslim majority states and in India Muslims form a substantial minority.

As such, development of Muslim personal law in these three jurisdictions, both in the pre colonial and postcolonial era, has gained and continue to gain considerable interest for researchers and legal scholars.

³²⁰ The term 'South Asia' is popularly used (especially in modern legal literature) as an alternative to Indian subcontinent referring to India, Bangladesh and Pakistan together. For instance, Pearl and Werner Menski used the term South Asia generally to refer to India, Bangladesh and Pakistan. David Pearl, *Muslim Family Law* (3rd edn, Sweet and Maxwell 1998); see also Serajuddin, *Muslim Family Law* (n 2). However, the region of South Asia geographically includes a number of other countries located in the southern part of the Asian Continent. With regard to the presence of varied opinions regarding the meaning of South Asia, reference can be found in John McLeod, *The history of India*, (Greenwood Publishing Group 2002)1; Milton Walter Meyer, *South Asia: A Short History of the Subcontinent* (Adams Littlefield 1976)1. The thesis uses the terms 'Indian subcontinent' and 'South Asia' interchangeably to generally refer to the region comprising of Bangladesh, India and Pakistan.

Chapter 4: Overview of the Child Custody Law in South Asia (Bangladesh, India and Pakistan)

4.1 Introduction

In order to properly understand the judicial discourse in Bangladesh reflecting a constant effort to balance between traditional Muslim law rules and the principle of welfare or best interests of the child, it is essential to go back to the historical origins of South Asian Muslim law which had allowed significant infusion of English legal principles, particularly that of equity into the existing legal system. Perhaps, this infusion has allowed Muslim Law as applied today in Bangladesh, India and Pakistan to gather a unique characteristic distinct from the strict Muslim law or the *Sharia*³²¹ and its original formulations by the classical jurists.³²² This is mainly attributable to the historical interaction of traditional Muslim law rules with the English law and jurisprudence during British colonial rule. Many twentieth century writers as well as modern writers on South Asian Muslim law have thus termed this unique legal system as 'Anglo-Muhammadan law'.³²³ Writing in 1964, Coulson made the following remarks:

In the Indian sub-continent the administration of Sharia law by British or anglicised courts, subject to the supreme authority of the decisions of the Privy Council, led to a remarkable fusion of the two systems. This is aptly termed *Anglo-Muhammadan law*, because, through the introduction of English legal principles and concepts, the law applied by the Indian courts came to diverge in many particulars from traditional Muslim law.³²⁴

³²¹ Sharia refers to the general normative system of Islam as historically understood and developed by Muslim jurists. Abdullah An Na'im(ed), *Islamic Family Law in a Changing World* (Zed Books 2002) 1. Because Sharia embraces all human actions, it is not 'law' in the modern sense; it is fundamentally a doctrine of duties, a code of obligations and 'an infallible guide to ethics'. Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (Tahir Mahmood ed 5th edn, OUP 2008) 10.

³²² Serajuddin, *Muslim Family Law* (n 2) 21; Pearl and Menski, *Muslim Family Law* (n 320) 13.

³²³ N. J. Coulson, *A History of Islamic Law* (Edinburgh 1964)164; Joseph Schacht, *An Introduction to Islamic Law* (OUP 1964) 96.

³²⁴ Ibid 164.

Hence, it is pertinent to give a brief overview of the British colonial legacy in the Indian subcontinent and how English law principles and jurisprudence influenced shaping up the South Asian Muslim Law. However, the analysis will first draw on the nature of Muslim law before focusing on the convergence of English law and South Asian Muslim Law.

4.2 Nature of Muslim Law and Relevance of *Ijtihad*

Muslim law is generally used to refer to the legal aspects of 'Sharia', which literally means 'the path to the watering place, the clear path to be followed and the path which the believer has to tread in order to obtain guidance in the world and deliverance in the next'.³²⁵ In this sense of the term, Sharia has a much wider scope than being confined to legal subject matters only. Sharia refers to the general normative system of Islam as historically understood and developed by Islamic jurists.³²⁶ Because Sharia embraces all human actions, it is not 'law' in the modern sense; it is fundamentally a doctrine of duties, a code of obligations and 'an infallible guide to ethics'.³²⁷ The concept of Muslim family law consequently, 'encapsulates primarily those areas of the Sharia that deal with marriage, divorce, maintenance, custody of children and succession'.³²⁸

Sharia again needs to be understood from the point of view of *fiqh*, a term which is often used interchangeably with Sharia. The terms Sharia refers to the 'main sources of the law, i.e. the Qur'an and the Sunnah, which are divine and textually immutable while *fiqh* refers to the human understanding and interpretation of the Sharia, which may change according to time and circumstances'.³²⁹ Kamali similarly explains that whereas Sharia is mainly conveyed through divine revelation contained in the Quran and authentic *hadith*, *fiqh* refers mainly to the *corpus juris* that is developed by the

³²⁵ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld 2008) 14.

³²⁶ An Na'im, 'Islamic Family Law in a Changing World' (n 321) 1.

³²⁷ Fyze, *Outlines of Muhammadan Law* (n 321) 10.

³²⁸ Javaid Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining The Theory And Practice of Polygamy And Talaq' (2007) 21 International Journal of Law, Policy and the Family 108, 109.

³²⁹ Mashood A. Baderin, *Islamic Law: A Very Short Introduction* (OUP 2021) 83.

legal schools, individual jurists and judges by recourse to legal reasoning (*ijtihad*).³³⁰ Thus, the rules of *fiqh* being largely result of speculative reasoning,³³¹ do not have the same immutability as Sharia and are susceptible to new interpretations in changed circumstances. Referring to the often-blurred distinction between the two terms, Esposito thus comments that it is the confusion of this distinction between Sharia and *fiqh*, reinforced by the doctrine of *taqlid* or adherence to established law that has led to the overly sacrosanct attitude toward the classical *fiqh*.³³²

The complex web of 'religious, ethical and moral raw materials derived from the two principal sources, Quran and Sunnah, were given shape and direction by Islamic scholars and jurists during the second and third centuries of the Muslim calendar.'³³³ It was during this period when the four Sunni schools of jurisprudence were established, 'producing systematic doctrines which differed from one another according to their interpretation and knowledge of texts, their customs, social environments and their political allegiances'.³³⁴ As Nasir noted, 'Islamic juristic thought reached its peak during this period. ... Islamic jurists devoted their lives to recording the general discursive rules and codifying the various juristic doctrines, based either on political grounds, or on scholarly research.'³³⁵ In questions where Quran and Sunnah did not offer any specific answer, Muslim jurists would search for equivalent situations where a conclusion had been drawn and through this process 'relied upon a range of secondary sources including *Ijma* (consensus) and *Qiyas* (analogical reasoning)'.³³⁶ Such deduction of legal norms from secondary sources of *Ijma*³³⁷ and *Qiyas*³³⁸ was through the process of *Ijtihad*.³³⁹

³³⁰ Kamali (n 325) 3.

³³¹ *ibid*.

³³² John L. Esposito, 'Muslim Family Law Reform: Towards an Islamic Methodology' (1976) 15(1) *Islamic Studies* 19, 23; see Ali Khan, 'The Reopening of The Islamic Code: The Second Era of *Ijtihad*' (2003-2004) 1 *University of St. Thomas Law Journal* 341, 344.

³³³ Rehman (n 328) 112.

³³⁴ Jamal J. Nasir, *The Islamic Law of Personal Status* (3rd edn, Brill 2009) 10.

³³⁵ *ibid* 9.

³³⁶ Rehman (n 328) 112.

³³⁷ Kamali defines *ijma* as the 'unanimous agreement of the *Mujtahidun* of the Muslim community of any period following the demise of the Prophet Muhammad on any matter'. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Islamic Texts Society 2013) 230.

Each school (also known as *Madhab*) developed detailed rules and regulations on different legal aspects that together constituted the body of 'classical fiqh', which is thus not a 'monolithic corpus but contains the rules, some at odds with each other'.³⁴⁰ The principles established by the founders of these schools of jurisprudence thus reflected their 'own subjective understanding of Islam'.³⁴¹ In subsequent centuries the jurists of the later generations worked within the established boundaries set by each school of jurisprudence, 'refining, rather than reforming, the existing laws'.³⁴² For considerable periods *Ijtihad* or 'the power of independent interpretation of law' was thus greatly restricted³⁴³ and 'Muslim scholars remained reluctant to rely upon the doctrine of *Ijtihad*, since such an exercise implied questioning the time-honoured (though static) principles of the Sharia'.³⁴⁴ Schools or *madhabs* became so prominent in Islamic civilization 'that Muslim communities were identified with their association with particular *madhabs* ... as if one could not be separated from the other'.³⁴⁵ The following period was thus termed as *taqlid*³⁴⁶ or imitation, which saw an increased reluctance of the followers and jurist disciples of different schools to undertake independent research and a higher emphasis on rigidly following the doctrines framed by their respective imams. Referring to such 'contested position' of right to exercise *Ijtihad* Professor Rehman wrote:

On the one hand it was vehemently argued that all doors towards *Ijtihad* were closed leading to *Taqlid*, ... and the acceptance of established authority. On the other hand there are modern theorists ...who have presented an aggressive rebuttal of the position that *Ijtihad* was ever formally abandoned,

³³⁸ Hallaq explains that Qiyas 'provides a set of methods through which the jurist arrives at legal norms'. Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 22.

³³⁹ Rehman (n 328) 112.

³⁴⁰ Ali Khan (n 332) 348.

³⁴¹ Rehman (n 328) 112.

³⁴² Ali Khan (n 332) 348.

³⁴³ Fayzee, *Outlines of Muhammadan Law* (n 321) 21.

³⁴⁴ Rehman (n 328) 112.

³⁴⁵ Ali Khan (n 332) 348-349.

³⁴⁶ '*Taqleed* is defined juristically as the acceptance by a person, the *muqallid*, of a judgment, and/or the acting thereupon, without a binding authority, as in the case of a layman accepting or acting upon a statement by another layman, or even a *mujtahid*, accepting or acting upon an opinion of another *mujtahid*.' Nasir, *Islamic law* (n 334) 12.

claiming instead its continuation throughout Islamic history.³⁴⁷

Amongst the critics of the closure of *Ijtihad* Hallaq had been most prominent with his scholarly work challenging such closure holding that the gate of *Ijtihad* was neither closed in theory nor in practice.³⁴⁸ Hallaq perhaps has rightly represented the true relevance and significance of *Ijtihad* in the modern time holding that:

Ijtihad provided and still provides a legal mechanism which is indispensable to legal theory as a device for discovering judicial judgments as set out in the Quran by Allah, and by this token a means of effecting legal reforms in accordance with the times and customs of society.³⁴⁹

By the turn of twentieth century, contemporary jurists thus increasingly claimed the right to an independent interpretation of the original divine texts in the light of modern social circumstances.³⁵⁰ Jamal J Nasir described this as re-opening of the door of *Ijtihad* as a response of the Muslim society to the impact of western influence.³⁵¹ Thus during this period, modernist legislations were adopted in many Muslim countries reforming a number of traditional rules on the basis of novel interpretations of the Quran and Prophet's Sunna.³⁵² Coulson thus termed it as 'modernist *Ijtihad*' or 'Neo-*Ijtihad*'.³⁵³ In respect of the Indian Subcontinent in the post-colonial period, *Ijtihad* also manifested itself through judicial decisions and scholarly opinions, in addition to reformist legislations. The next section contextualizes this discussion.

³⁴⁷ Rehman (n 328) 112.

³⁴⁸ Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle Eastern Studies 3, 13.

³⁴⁹ Rachel Anne Codd, 'A Critical Analysis of the Role of Ijtihad in Legal Reforms in The Muslim World' (1999) 14 Arab Law Quarterly 112, 113.

³⁵⁰ Nasir, *Islamic law* (n 334) 14.

³⁵¹ *ibid.*

³⁵² Example of such reform would be the prohibition on polygamy, in the Tunisian Code of Personal Status of 1957 where polygamy was prohibited based on an interpretation of the Quranic Verse on Polygamy which requires that the all wives should be treated impartially. As the reformers declared, in today's social and economic condition such impartial treatment would be a practical impossibility and hence polygamy was prohibited outright. See Coulson, *A History of Islamic Law* (n 323) 202-217.

³⁵³ Coulson, *A History of Islamic Law* (n 323) 202 – 217.

4.3 Historical Background of Muslim Law in South Asia

The Muslim rulers during the Moghul period enforced public laws of Islam in the Indian Subcontinent particularly in the sphere of criminal law, while in civil matters other religious communities were allowed to be governed by their own religion-based laws and usages.³⁵⁴ When British East India Company entered India from 1600 onwards for commercial purpose, they adopted the policy of preserving the existing legal system, which was the traditional *Hanafi* law applied by the Moghul Emperors and administered by the Muslim judges or *Kazis* (*qadis*).³⁵⁵ One of the chief objectives behind adopting such policy was to maintain security in social conditions so as to facilitate trade by not interfering with the religious susceptibilities of their subjects.³⁵⁶ 'For about a century and a half, the East India Company tried gradually to increase its political and military influence, but it was not until 1757³⁵⁷ that it asserted its almost total military dominance, henceforth embarking upon the massive project of colonizing India, both economically and juridically.'³⁵⁸ Up till 1765 the responsibility of East India Company for the administration of law was confined to three 'presidency towns' of Madras, Bombay and Calcutta, where it had established its factories. In 1726, 'Mayors' courts' belonging to the British Crown and not to the company, were established in these three towns.³⁵⁹ 'The law to be applied was, by implication, the law of England, but these courts were precluded, under a charter of 1753, from trying cases between Indians except by consent of both the parties - and this no doubt, represented existing practice.'³⁶⁰ In the year of 1765 the East India Company obtained the grant of Diwan or fiscal administration over some parts of Bengal, 'which meant that it now acted as a local authority under continued Moghul

³⁵⁴ Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent* (2nd edn, All India Reporter 1983) 1.

³⁵⁵ Coulson, *A History of Islamic Law* (n 323) 154.

³⁵⁶ Fayzee, *Outlines of Muhammadan Law* (n 321) 55.

³⁵⁷ When the East India Company achieved its decisive victory over the last independent *Nawab* of Bengal at a war, historically known as the battle of *Palassy*.

³⁵⁸ Hallaq, *An Introduction to Islamic Law* (n 338) 85.

³⁵⁹ J N D Anderson, *Law Reform in the Muslim World* (Athlone Press 1976) 41.

³⁶⁰ *ibid.*

supremacy. From then on judicial administration demanded still more attention.'³⁶¹ When Warren Hastings was appointed as the Governor of Bengal in 1772, 'a new stage in the British legal redesign of India got underway'.³⁶² After the reorganization of the courts by Hastings, English law was specifically applied by the courts in presidencies, but elsewhere Islamic criminal law was applied by Muslim judges, and in civil matters personal law was applied.³⁶³ In a series of proclamations between 1772 and 1793 the East India Company confirmed its policy that Hindus and Muslims were to be governed by their own laws in all suits relating to inheritance, succession, marriage and caste, and other religious usages and institutions.³⁶⁴ In 1772, British magistrates replaced the *kadīs* in British India and until 1864 they were assisted by *pandits* and *moulvis* whose duty was to assist the magistrate by stating the correct doctrine of Hindu and Muslim law respectively. The jurisdiction of the Privy Council was upheld as a final court appeal.³⁶⁵ Although in later periods the judges were increasingly recruited from the Indian Muslims themselves, the whole judiciary was trained in English law and as such inevitably English legal concepts such as precedent and general principles of English common law and equity infiltrated more and more into the fabric of Muslim law as applied in the British India.³⁶⁶ Thus Anderson writes that the judges as Company's servants with little or no knowledge on any legal system other than English law increasingly resorted to English principles of law as the embodiment of 'justice, equity and good conscience'.³⁶⁷ At the same time there was a 'manifest need for greater uniformity and certainty' on the part of the English rulers particularly in the field of criminal law, for it was applied to both Muslims and Hindus and 'here company's title was distinctly questionable'.³⁶⁸ Thus between 1790 and 1861 Muslim criminal law was gradually replaced by its British counterpart, so that by the latter year no trace of Muslim

³⁶¹ Pearl and Menski, *Muslim Family Law* (n 320) 37.

³⁶² Hallaq, *An Introduction to Islamic Law* (n 338) 85.

³⁶³ Coulson, *A History of Islamic Law* (n 323) 155.

³⁶⁴ Pearl and Menski, *Muslim Family Law* (n 3202) 37.

³⁶⁵ Joseph Schacht, *An Introduction to Islamic Law* (OUP 1964) 95.

³⁶⁶ *ibid.*

³⁶⁷ Anderson, *Law Reform* (n 359) 42.

³⁶⁸ *ibid.*

criminal law was being applied.³⁶⁹ With the promulgation of the Indian Penal Code in 1860, the period of codifications began and legislations such as the Code of Criminal Procedure, the Indian Succession Act, the Indian Evidence Act, the Indian Contract Act, the Indian Majority Act and the Transfer of Property Act soon followed. These were all firmly based on English principles.³⁷⁰ *Muftis* or *moulvis* were also withdrawn from their offices in 1864 as their engagement was no more considered desirable or necessary.³⁷¹ Since the services of the *muftis* were no longer available to British judges, they encountered challenges in ascertaining the terms of the law from the authoritative Arabic literature and inevitably resorted to principles of justice, equity and good conscience. Writing on this aspect, Alamgir Serjuddin explains, that during the British administration ‘cases were not rare where it was found that there was no specific rule of Muslim law applicable, or the rule was uncertain and ambiguous or very much out of tune with the prevailing social conditions’.³⁷² In such cases, the British Courts then relied on equitable principles of English law³⁷³ to navigate the domain of Muslim law. The application of this principle by the British judges was described by Pearl and Menski as a device to ‘mask judicial ignorance of Muslim law’³⁷⁴ by either rigidly applying or moving away from the traditional meaning of Muslim law.³⁷⁵ Difficulties in applying Muslim law was thus noted by Markby J. in the case of *Khajah Husain Ali v. Shazadih Hazari Begum* where he observed that ‘the means of discovering Muhammadan law which this court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected therewith’.³⁷⁶ Another similar expression was given by Garth C.J. in a well known passage in his judgment in *Mullick Abdool Gaffoor v Mulika*³⁷⁷

³⁶⁹ Hallaq, *An Introduction to Islamic Law* (n 338) 87.

³⁷⁰ Anderson, *Law Reform* (n 359) 43.

³⁷¹ Alamgir Muhammad Serajuddin, *Shari’a Law and Society: Tradition and Change in the Indian Subcontinent* (Asian Society of Bangladesh 1999) 11; Abdur Rahim, *The Principles of Muhammadan Jurisprudence: According to the Hanafi, Maliki, Shafi’i and Hanbani Schools* (University of California Libraries 1911) 37.

³⁷² *ibid* 31.

³⁷³ see J. Duncan M. Derrett, ‘Justice, Equity and Good Conscience’ in J. N. D. Anderson (ed), *Changing Law in Developing Countries* (Routledge 1963) 114

³⁷⁴ Pearl and Menski, *Muslim Family Law* (n 320) 35.

³⁷⁵ SyedAmeer Ali, *Mahommedan Law* (4th edn, Kitab Bhavan, 1985) vol 1

³⁷⁶ [1869] 12 W.R., 344; Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (n 371) 38.

³⁷⁷ [1884] ILR 10 Cal 1123.

where he observed: 'Although we do our best hearing suits between Muhammadans to follow the rules of Muhammadan law, it is often difficult to discover what these rules really were, and still more difficult to reconcile the differences, which so constantly arose between the great expounders of Muhammadan law ordinarily current in India'.³⁷⁸ The observation further reflects on how in order to overcome the difficulty of understanding the rules of Muslim law the courts opted for applying modern English principles of law by holding – 'We must endeavour as far as we can to ascertain the true principles upon which [Muslim] law was founded, and to administer it with due regard to the rules of equity and good conscience, as well as to the laws and state of society and circumstance which prevail in this country'.³⁷⁹ Continuing this trend, in 1886 the Privy Council held in *Waghela Rajsanji v Sheikh Masludin*,³⁸⁰ while deciding on a question of whether a Hindu talukder was bound to pay a debt contracted by his guardian on his behalf, that 'in point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian Society and circumstances'.³⁸¹ Thus indeed 'justice, equity and good conscience' became in practice 'synonymous with English law'.³⁸² Coulson rightly observes in this context that many of the decisions of the British Indian courts which had in effect modified traditional Muslim law rules by the superior standards of the equitable jurisdiction, was interestingly taken just around the time when supremacy of equity in the English legal system had been finally established by the Judicature Acts of 1873 and 1875.

This process of a unique fusion of the two completely different legal systems which came to be known as the Anglo-Muhammadan law can thus be attributed to the judicial decisions of the British Indian courts on one hand and to the codifications of vast areas of both criminal and civil laws in the nineteenth century on the other. Again, both of these attributes of the Anglo-Muhammadan law were naturally influenced by the English legal principles or to state more precisely, by the principles of 'justice, equity and good conscience'. Thus, the scope of application of Muslim law

³⁷⁸ *ibid* 1124.

³⁷⁹ Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (n 371) 43.

³⁸⁰ [1887] 14 Ind App 89; Pearl and Menski, *Muslim Family Law* (n 320) 35.

³⁸¹ *ibid* 90.

³⁸² Coulson, *A History of Islamic Law* (n 323) 155.

principles had gradually been reduced and from the latter part of the nineteenth century the application of Muslim law was confined in the Indian subcontinent to the domain of family law³⁸³ (namely, marriage, dower, divorce, maintenance, guardianship of children, succession and inheritance, religious institutions and usages and disposition of property by gift, will and waqf³⁸⁴). Some of the scholarly writings on this subject hold the view that the reason why British rulers did not make any attempt to reform or codify these personal laws was that any such attempt would inevitably hurt the religious susceptibilities of the people of the Indian subcontinent.³⁸⁵ However, Hallaq notes that although colonialist Europe and its academics attempted to promote the idea that the personal law was sacred to Muslims and that, colonial powers left it alone out of sensitivity and respect, the real reason why family law remained unaffected by colonial influences, was that 'it was of no use to the colonial powers as a tool of domination'.³⁸⁶ Thus, Hallaq rightly comments that if family law emerged as the symbol of Islamic identity in the sub-continent 'it did so not only because it was built into Muslim knowledge as an area of a sensitive nature, but also because it represented what was taken to be the last fortress of the Sharia to survive the ravages of modernization'.³⁸⁷

Even this 'last fortress' of family law had undergone considerable modifications by introduction of a number of statutes in the late nineteenth century and early twentieth century and also during the post-colonial period through reform legislations and judicial decisions. One of such colonial period statute touching upon an important area of family law is the Guardians and Wards Act of 1890 (GWA). Promulgated during the time when the principle of equity was the dominant influence in shaping up the laws of the subcontinent, this secular law had expressly made way for English principle of welfare of the child to play a central role in deciding guardianship of minors.³⁸⁸

³⁸³ *ibid.*

³⁸⁴ Serajuddin, *Muslim Family Law* (n 2) 14.

³⁸⁵ *Ibid*; David Pearl, *A Textbook on Muslim Law* (2nd edn, Croom Helm 1987) 28.

³⁸⁶ Hallaq, *An Introduction to Islamic Law* (n 338) 115.

³⁸⁷ *ibid.*

³⁸⁸ Writing on how equity influenced principle of welfare of the child to override other considerations in child custody disputes in the nineteenth century England, authors have duly noted that by the middle of the nineteenth century Chancery courts had firmly re-established as a principal of English equity

However, because of the conscious distance that the colonial policy had maintained from the religious family laws prevailing in the subcontinent, rules of personal laws were also given priority under the GWA in deciding guardianship disputes. Thus on one hand the Act says that the court will only appoint a guardian when it is satisfied that it will be for the welfare of the minor,³⁸⁹ and on the other it upholds the authority of the personal law rules holding that in appointing or declaring a guardian, the court will be guided by welfare considerations in a manner which will be consistent with the personal law of the minor.³⁹⁰

4.4 Concept of Child Custody under the Traditional rules of Muslim Law (As Applied in South Asian Context)

Out of the four major Sunni schools of Islamic jurisprudence,³⁹¹ the *Hanafi* School³⁹² has the largest following owing to its official adoption by the Ottoman Turks in the early sixteenth century.³⁹³ In fact numerically the *Hanafi* Sunnis constitute a dominant majority in the Indian subcontinent, although there is the presence of both Sunni and Shia Muslims.³⁹⁴ From the early twentieth century, the courts in the Indian subcontinent had developed a number of presumptions with regard to the particular sect of the Muslim litigants and these presumptions are mainly based on the 'relative numerical strength of the followers of various schools of law in the region'.³⁹⁵ Thus

jurisprudence that courts were to award custody of children not on the basis of the parent's rights, rather 'courts were to structure custody and access in a way that best advanced the interests of the children'. Tom James, *The History of Custody Law: From Ancient Times of 21st Century America* (Charlseton 2014) 780.

³⁸⁹ The Guardians and Wards Act, 1890. (ACT NO. VIII OF 1890) (GWA) sec 7.

³⁹⁰ GWA, s 17.

³⁹¹ 'A legal school implies a body of doctrine taught by a leader or Imam and followed by the members of that school...Their differences on the principles of the faith, at least among the Sunni schools are negligible. But disagreement on subsidiary matters extends to a great variety of themes' Kamali, *Shari'ah Law* (n 325) 68. There are four Sunni Schools which survived today, they are, *Hanafi*, *Maliki*, *Shafii* and *Hanbali* School.

³⁹² *Hanafi* School was founded by and named after Imam Abu Hanifa al-Numan (700-767 AD), born in Kufa (now in Iraq). The *Hanafi* doctrine was later developed by his two disciples Abu Yusuf and Imam Muhammad al- Shaybani.

³⁹³ Kamali, *Shari'ah Law* (n 325) 73.

³⁹⁴ Fayzee, *Outlines of Muhammadan Law* (n 321) 34.

³⁹⁵ *ibid* 41.

courts have held the presumption that when a Muslim comes before the court he/she is a Sunni (unless contrary is proved) and that if the litigant is a Sunni, he/she follows *Hanafi* law and if Shia, then he/she follows *Ithna Ashari* Shia³⁹⁶ law.³⁹⁷ Hence classical *Hanafi* jurisprudence (*fiqh*) predominantly defines the body of law that is considered to be 'traditional Muslim law rules' in the Indian subcontinent.

This is again qualified by the fact that some specific *Hanafi* law compilations or textbooks have gained 'special kind of reputation, authority and reverence' in South Asia,³⁹⁸ as judges and later commentators had frequently referred to them as evidence of 'ancient or classical Muslim law texts'.³⁹⁹ Serajuddin rightly comments that 'the Muslim law as administered in South Asia is the law that is to be found' in these celebrated and authoritative legal texts.⁴⁰⁰ Two of such most important documents are the English translations of the *Hedaya*⁴⁰¹ and *Fatawa-i-Alamgiri*⁴⁰². The *Hedaya* was originally authored by the Central Asian lawyer, Burhanuddin al-Marghianani in the twelfth century, which was the standard legal text book in Muslim India under the Delhi Sultans and which remained the basis of Muslim law for centuries.⁴⁰³ Commissioned by Warren Hastings, the *Hedaya* was translated by Charles Hamilton in 1791 and later edited by S.G. Grady in 1870.⁴⁰⁴ The *Fatawa-i-Alamgiri* on the other hand is a collection of authoritative *fatwas*⁴⁰⁵ compiled under the orders of Moghul Emperor Aurangzeb in the seventeenth century by a panel of *ulama*⁴⁰⁶ headed by Shaikh Nizam Buhanpuri.⁴⁰⁷ This was again translated under the

³⁹⁶ *Ithna-Ashari* is by far the largest Shia sect, deriving their name (the twelvers) from their belief in twelve Imams. Nasir, *Islamic law* (n 334) 13.

³⁹⁷ *Bafatun v Bilaiti* [1903] 30 Cal. 683; *Akbarally v Mahomedally*, [1931] ILR 57 Bom 551; Fayzee, *Outlines of Muhammadan Law* (n 321) 41.

³⁹⁸ Serajuddin, *Muslim Family Law* (n 2) 18.

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

⁴⁰¹ Burhan al-Din al-Marghinani, *The Hedaya, or Guide: A Commentary on the Mussulman Laws* (Charles Hamilton tr, Islamic Book Trust 1982) 138 (The Hedaya)

⁴⁰² Neil Benjamin Edmonstone Baillie, *A Digest of Moohummudan Law: Compiled and Translated from Authorities in the Original Arabic, With an Introduction and Explanatory Notes*, (first published 1856, Premier Book House 1965) vol 1 (Baillie's Digest).

⁴⁰³ VP. Bharatiya, *Syed Khalid Rashid's Muslim Law* (Eastern Law Book Company 1996) 31.

⁴⁰⁴ Hallaq, *An Introduction to Islamic Law* (n 338) 86; Serajuddin, *Muslim Family Law* (n 2) 18.

⁴⁰⁵ Legal opinion by qualified Muslim jurists or *muftis*.

⁴⁰⁶ Muslim religious scholars specialized in Islamic jurisprudence.

orders of Hastings, by N.B.E Baillie under the title of *A Digest of Moohummudan Law, Part I* in 1856.⁴⁰⁸ Part II of the Digest, however, was a translation by Baillie of the *Shara'i' al- Islam* of Nizamuddin Hali, a thirteenth century authoritative text on *Ithna Ashari* Shia law.

Being critical of the translation of these texts commissioned by the colonial rulers, Hallaq writes that immediate purpose of such translation was to 'make Islamic law directly accessible to British judges who deeply mistrusted the native Muslim legists advising them on points of law' and also because they thought 'reliance on these few texts would reduce likelihood of juristic disagreement'.⁴⁰⁹ Hallaq further comments that these translations had largely succeeded in codifying Muslim law and had in effect severed the texts from their Arabic interpretative and commentarial tradition.⁴¹⁰ More importantly, both these texts have been faced with one major criticism, that for a lawyer who has not studied Muslim law in the original Arabic writings, it is not always possible to accurately convey in English the exact legal significance of many technical Arabic expressions.⁴¹¹

Being particularly critical of Hamilton's translation of *Hedaya*, Abdur Rahim comments,

The terseness of its style, makes *Hedaya* a most difficult book to translate, and that is apparently the reason why Mr. Hamilton did not attempt to translate the bare text; for his work, as is well known, is a translation of a Persian commentary...especially prepared for him. On doubtful points therefore, it often becomes necessary to refer to the original *Hedaya*, and its authoritative commentaries.⁴¹²

⁴⁰⁷ Serajuddin, *Muslim Family Law* (n 2)19.

⁴⁰⁸ *ibid.*

⁴⁰⁹ Hallaq, *An Introduction to Islamic Law* (n 338) 86.

⁴¹⁰ *ibid.*

⁴¹¹ Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (n 371) 40.

⁴¹² *ibid.*

Abdur Rahim thus concludes that 'Mr. Hamilton's way of stating the arguments of jurists has at time led to the misapplication of their dicta'. Again, in the celebrated case of *Imambadi v. Mustaddi*⁴¹³ Justice Ameer Ali made the following comments doubting the credibility of the translations: 'Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added phrases which do not exist in the original, but on the whole, the English versions of the *Hedaya* and of the *Fatwa-i-Alamgiri* are valuable works on Mahomedan law.'⁴¹⁴ Similarly Justice Mahmood observed in an earlier decision in *Jafri Begum v. Amir Muhammad*⁴¹⁵ that the 'English terms employed in Mr. Hamilton's translation are frequently not the equivalents of the original Arabic terms, and are not used with the degree of definiteness essential for a book on law'.⁴¹⁶

Although in modern South Asian jurisprudence, instances can also be found where judges are not very receptive of the authoritative value of Hamilton's translation of *Hedaya* and Baillie's Digest; the two documents continue to provide the judges and legal scholars of the subcontinent with the most significant and sometimes the only authoritative guideline in cases involving interpretation of Muslim law. The area of child custody largely reflects this position and even in relatively recent cases of the courts in South Asia, citations from these two documents are given as the highest source of authority for *Hanafi* jurisprudence.⁴¹⁷ Thus for the present study which looks into how the courts in Bangladesh have reconciled the relevance of the Muslim traditional rules of child custody with the application of the best interests standard in custody cases, child custody provisions in Hamilton's translation of *Hedaya* and Baillie's Digest will be considered at length.

It also needs to be mentioned that unlike other areas of family law,⁴¹⁸ child custody law as stipulated in the two translations have not been challenged on the ground of

⁴¹³ [1917/1918] 45 L.R. I.A. 73, 89.

⁴¹⁴ Pearl and Menski, *Muslim Family Law* (n 320) 33.

⁴¹⁵ (1885) ILR 7 AL. 822

⁴¹⁶ Serajuddin, *Muslim Family Law* (n 2)19.

⁴¹⁷ Detailed discussion on these cases will follow in the later chapters of the thesis.

⁴¹⁸ For instance, the English translation of *waqf and gift* by Hamilton had been considered to have misguided the courts in importing the true meanings of the institutions as contemplated by Sharia. See also Serajuddin, *Muslim Family Law* (n 2) 19-20.

their being inconsistent with the original Arabic texts. However, the South Asian courts had several times denied relying on these two texts on the ground that in the absence of any Quranic provision or specific tradition of the prophet (pbuh) on child custody issue, the court can come to its own conclusion deviating from what has been written in *Hedaya* or *Fatwa-i-Alamgiri*. Hence, to provide a brief account of the relevant *Hanafi* law principles on child custody in South Asia, the study would significantly draw from these two texts along with other Islamic textbooks and commentaries by later authors, frequently relied on by the South Asian courts.

The traditional Muslim law rules perceive custody as a concept distinct from guardianship of a child acknowledging that a mother is naturally better qualified to take care of a child during the early years. The term '*hizanat*' has been used commonly by South Asian writers as an Arabic term of custody of a child, following its use in Hamilton's *Hedaya* and Baillie's Digest.⁴¹⁹ *Hizanat*, generally means 'to maintain, supervise, and take custody and care of someone'⁴²⁰ or in other words, 'to nurse, to bring up or to raise a child'.⁴²¹ The concept of guardianship or *wilayat* (in Arabic) on the other hand is sometimes defined as a right⁴²² or power⁴²³ and sometimes as a duty⁴²⁴ 'incumbent on a person on the grounds of kinship, by testament or by court order towards another person of imperfect or no legal capacity',⁴²⁵ for instance 'an infant, an idiot or a lunatic'.⁴²⁶ Guardianship thus is broadly defined as either guardianship of person or guardianship of property.

⁴¹⁹ Baillie's Digest has provided a clarification regarding the spelling of the word confirming that it can be spelt either with a 'u' (i.e. *Hizanut*) or with an 'i' (i.e. *Hizanit*) - Baillie's Digest (n 402) 435, Hamilton's *Hedaya* for instance has used the term '*hizanit*'. However the term '*hizanat*' spelt with an 'a' has been more commonly used by Muslim jurists. See, S.N. Ebrahimi, 'Child Custody (*Hizanat*) under Iranian Law: An Analytical Discussion' (2005-2006) 39 Family Law Quarterly, 463. The term is more popular among Muslim law authors in South Asia [for instance, Abdur Rahim (n 371)]. The terms '*hidana*' or '*hadanah*' has been also used interchangeably as an Arabic terminology meaning custody of children. See Nasir, *Islamic law* (n 334) 15.

⁴²⁰ Hassan Amid, *Persian Dictionary* (17th edn) 566 ;ibid 463.

⁴²¹ J.M. Cowan (ed), *The Hans Wehr Dictionary of Modern Written Arabic*, (4th edn, Spoken Language Service 1993); Mahdi Zahraa and Normi A. Malek, 'The Concept of Custody in Islamic Law' (1998) 13(2) Arab Law Quarterly 156., 157

⁴²² Abdur Rahim (n 371) 41.

⁴²³ Zahraa and Malek (n 421) 158.

⁴²⁴ Nasir, *Islamic law* (n 334) 186.

⁴²⁵ ibid.

⁴²⁶ Abdur Rahim (n 371) 344.

Guardianship of person can be defined as the 'power and conduct of taking care of the ward's personal affairs such as marriage, education, discipline, medical care, career prospects, and the like'.⁴²⁷ 'Guardianship of property' on the other hand refers to the power of the guardian to hold the property of the minor and to administer and manage it on his/her behalf.⁴²⁸ It is agreed among all the Islamic jurists that the father is the natural or legal guardian⁴²⁹ of both the person and property of his small children.⁴³⁰ The father can also appoint a testamentary guardian by will, who is called a *wassi*. The father, his executor, and then the grandfather in that order have the power to appoint a testamentary guardian under the Sunni system.⁴³¹

It is unanimously accepted among all schools of Muslim law that mother has the first claim to the custody of her child at an early age. Describing *hizanat*, Hamilton's *Hedaya* says 'if a separation takes place between a husband and a wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother'⁴³². Similarly, Baillie's Digest describes it in these terms: 'the mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband'.⁴³³ Thus Muslim law from the beginning has been 'acutely aware'⁴³⁴ of the mother's role in the life of her child, when such role was not recognized even in the European family law almost until the end of eighteenth century.⁴³⁵ Thus, Paras Diwan describes this as the 'foresightedness' of the Islamic

⁴²⁷ Al-Zuhayli, *Al-Islami Wa Adilatuhu* (Dar Al-Fikr Al-Mouaser 1989) vol 4; Zahraa and Malek (n 421) 157.

⁴²⁸ Abdur Rahim (n 371) 344.

⁴²⁹ The terms 'natural guardian' or 'legal guardian' are of English usage and are not used by the Muslim jurists. The Arabic term 'wilayat' is used instead to mean guardianship. Bharatiya (n 403) 150. The father holding the guardianship of person of his ward is called the '*wali*'. Fayzee, *Outlines of Muhamadan law* (n 321) 163.

⁴³⁰ Al-Zuhayli (n 427).

⁴³¹ The Shia father cannot appoint a testamentary guardian if the grandfather is alive; the latter acquires the power only on the father's death. Bharatiya (n 403) 143.

⁴³² Al-Marghinani, *The Hedaya* (n 401) 138.

⁴³³ Baillie's Digest (n 402) 435.

⁴³⁴ Jamal J. Ahmad Nasir, *Status of Women under Islamic Law and Modern Islamic Legislation* (3rd edn, Brill 2009) 186.

⁴³⁵ Tom James (n 388) 57-67.

jurists that 'in an essentially patriarchal society, they could lay down that the custody of children of tender years belonged to the mother'.⁴³⁶

Under Muslim law, however, custody is often perceived only as a form of 'guardianship of person', as it rests with the mother only during the early years of the child; the natural guardianship being always entrusted with the father. Thus, Jamal Nasir had described *hizanat* as 'the earliest form of guardianship of person',⁴³⁷ when an infant needs a woman to care for it.⁴³⁸ The difference then between custody and guardianship is not neatly distinguished at all times⁴³⁹ and their relationship necessarily manifests 'a complex structure of rights and duties distributed between the entitled person(s)'.⁴⁴⁰

This difference was also not appreciated during the colonial administration in the subcontinent, which is reflected in the writings of South Asian Islamic law text books as well as in some of the early judicial interpretations of the law.⁴⁴¹ As Menksi had noted, many textbooks do not contain separate sections on 'custody' and cover the subject under 'guardianship'.⁴⁴² This ambiguity in terms of the relative positions of the custody and guardianship of persons is also reflected in the GWA, which had to some extent, further contributed to the ambiguity in the application and interpretation of child custody laws in the subcontinent. This issue will be revisited when the relevant premise of the GWA would be discussed in the later sections.

Muslim law in South Asia, as it has evolved from the judicial decisions and interpretations, places greater emphasis on certain aspects of the traditional rules of child custody. In other words, a number of areas of traditional custody principles stated in the classical textbooks of Muslim law, have been heavily relied on by the

⁴³⁶ Paras Diwan, *Muslim Law in Modern India* (5th edn, Allahabad Law Agency 1991) 114

⁴³⁷ Nasir, *Status of Women* (n 434) 186.

⁴³⁸ *ibid* 187.

⁴³⁹ Pearl and Menski, *Muslim Family Law* (n 320) 411.

⁴⁴⁰ Zahraa and Malek (n 421) 157.

⁴⁴¹ Paras Diwan, *Law of Adoption, Minority, Guardianship & Custody* (Universal Law Publishing 2012) in Law Commission of India, 'Reforms in Guardianship and Custody Laws in India' (2015) (Report No.257)15,114.

⁴⁴² Pearl and Menski *Muslim Family Law* (n 320) 412.

judges in the subcontinent in deciding custody issues. At the same time, their applicability to suit modern social conditions had also frequently come under judicial scrutiny. Duration of custody of the child and respective rights of the parents depending on the duration is one such rule that has gained tremendous focus in the custody disputes.

The prevailing *Hanafi* view in the Indian subcontinent regarding the length of custody is that the mother (or in her absence the other female custodians) is entrusted with the custody of her son until he attains seven years and of her daughter until she attains puberty. This position is relatively relevant till now in the custody disputes before the South Asian courts⁴⁴³ and is mainly derived from *Hedaya* and *Fatwa-i-Alamgiri*. The *Hedaya* states that the right of custody of a male child continues till he is independent of himself, which ceases at the end of seven years, as in general 'a child at that age is capable of performing all the necessary offices'. After such period the *Hedaya* contemplates that his charge is devolved upon the father or next paternal relations entitled to the office of guardian, because, 'it then becomes necessary to attend to his education in all branches of useful and ornamental science, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are best qualified'.⁴⁴⁴ With respect to the custody of a girl child, it belongs to the mother (or in her absence to the next female custodian) 'until the first appearance of the menstrual discharge' which is generally the age of attaining puberty.⁴⁴⁵ When a girl attains puberty she is considered as ready to get married and at this time the classical Muslim law stipulates that she needs her father more than her mother because the father is her guardian in marriage.⁴⁴⁶

Similarly Baillie's Digest states the rule for the male child in these words: 'a mother and grandmother have the best right to the custody of a boy till he is independent of their care; and that is till he is seven years old ... [and] to the custody of girl till she attains to puberty.'⁴⁴⁷ The underlying principle in entrusting mother with the primary

⁴⁴³ Although as the thesis would focus, there had been significant departure from it.

⁴⁴⁴ Al-Marghinani, *The Hedaya* (n 401) 139.

⁴⁴⁵ *ibid.*

⁴⁴⁶ Zahraa and Malek (n 421)168.

⁴⁴⁷ Baillie's Digest (n 402) 437-438.

right of *hizanat* is driven by the consideration of what is best for the child in question. The *Hedaya* illustrated the reason for such preference of female relations by stating that: 'a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child'.⁴⁴⁸

All four Sunni schools, however, differ on the ages when female custody of the children should come to an end.⁴⁴⁹ Contrary to the *Hanafi* position, the *Shafiis* hold that, there's no fixed age limit for female custody period. It will continue till the infant reaches the age of discretion, after which stage both male and female children are given the choice as to whom they would prefer to stay with.⁴⁵⁰ The *Hanbalis* also do not distinguish between the custody of a boy and a girl, holding that duration of female custody shall run till the seventh year of age at which time the child shall be given the right of choice between either parents.⁴⁵¹ Noted *Hanbali* jurist Ibn Qudamah explained that such right of choice is justified on the ground that the child will be naturally inclined towards the parent who is more kind and loving to it.⁴⁵² Hence, the right of choice is acknowledged to ensure the child's wellbeing is best protected. Again, *Malikis* are of the view that female custody for a boy shall continue till he attains puberty⁴⁵³ and for the girl until she gets married, for reasons again related to how classical jurists viewed the question as to with whom a child's interest will be best protected after a certain age.⁴⁵⁴

Thus, there is wide difference as to the length of custody right of mother (and other female relations) in Muslim law. This is true even with regard to the *Ithna Ashari Shia* School where the rule is that female custody of a boy runs till he completes two years of age and of a girl till she completes seven years of age.⁴⁵⁵ This existing

⁴⁴⁸ Al-Marghinani, *The Hedaya* (n 401) 138.

⁴⁴⁹ Nasir, *Islamic Law* (n 334) 170.

⁴⁵⁰ *ibid* 171.

⁴⁵¹ *ibid*.

⁴⁵² Zahraa and Malek (n 421)166.

⁴⁵³ Nasir *Islamic Law* (n 334)171; Zahraa and Malek (n 421) 167.

⁴⁵⁴ *ibid*.

⁴⁵⁵ Bharatiaya (n 403) 144.

disparity regarding the length of custody is further emboldened by the absence of any direct Quranic provision⁴⁵⁶ or any tradition of the Prophet (pbuh) providing any indication as to the age and sex rule of the custody of the child. The similar variance in opinions is also present in terms of the persons entitled to *hizanat* in case the mother, who has the first claim to the custody of her child, is dead or otherwise disqualified on any of the grounds stipulated by Muslim law. For instance, while in *Hanafi* law, paternal grandmother comes immediately after maternal grandmother in the order of priority; the *Malikis* place uterine maternal aunt, and *Shafiis* place father after mother and maternal grandmother in the order of priority of persons entitled to custody.⁴⁵⁷

Another rule of traditional Muslim law of child custody that is often relied upon (and frequently debated), before the South Asian courts is the ground of disqualifications of the mother (and other female custodians) from getting custody of her child. Particularly the disqualification on the ground of mother's remarriage has remained central to the discourse on mother's entitlement to *hizanat* in South Asia.

The traditional *Hanafi* rule on marriage restriction is that if the mother or any other woman, having the right of *hizanat* marries a stranger,⁴⁵⁸ or a relative who is not within the prohibited degree⁴⁵⁹ to the child, her right is thereby annulled.⁴⁶⁰ This rule of disqualification mainly finds its authority from the Prophetic tradition (*hadith*), which translates: 'You have more right to the child so long as you do not marry a stranger'.⁴⁶¹ The ground for this rule seems to be the apprehension that if she marries a stranger she would not be able to devote the same care to the child in the

⁴⁵⁶ However, 'Muslim jurists have often referred to the verse of fosterage (Al-Quaran 2:233) which says that the mother should breastfeed their infants for two complete years. It has been inferred from this that in the years of infancy the right of upbringing and fostering remains with the mother'. Ayesha Rafiq, 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)' (2014) 4(5) International Journal of Humanities and Social Science 267, 269.

⁴⁵⁷ Nasir, *The Islamic Law* (n 334) 160-161.

⁴⁵⁸ A stranger is someone not related to the child by blood.

⁴⁵⁹ Muslim law prohibits a man from marrying specific classes of women who are related to him through blood, affinity or by fosterage. See Sir Dinshaw Fardunji Mulla, M *Principles of Mahomedan Law* (Iqbal Ali Khan rev, 20th edn, LexisNexis 2013); Nasir, *Status of Women* (n 434) 44-49.

⁴⁶⁰ Al-Marghinani, *The Hedaya* (n 401) 138.

⁴⁶¹ *ibid.*

home of the stranger.⁴⁶² In the event that a mother has lost her right to custody through marriage or any other impediment, and that marriage is dissolved, or the impediment is removed, then most Muslim jurists allow that she would recover the custody of her child, except the *Malikis*, who do not allow the woman to regain her right to custody once that right is lost.⁴⁶³ Although in South Asia this ruling based on *Hedaya* and *Fatwa-i-Alamgiri* has found much ground as being a statement of an undisputed Muslim law principle, there are some jurists who maintain that the right of the female custodian does not lapse as such by remarriage. Some jurists questioned the authenticity of the above cited *hadith* and believed that it's ruling cannot be taken as such as authority.⁴⁶⁴ However, the majority opinion favours the view that the *hadith* in dispute is actually an authentic one,⁴⁶⁵ and has also been cited by *Hedaya*.

Other than remarriage, some common disqualifications of the female custodians that are held strongly by the judges are lack of trustworthiness or misconduct and inability to bring up the child, separate residence from the father and apostasy.⁴⁶⁶ These are again rules that are derived from *Hedaya* and *Fatwa-i-Alamgiri*. With regard to restrictions concerning place of residence, *Hedaya* holds that 'a mother cannot remove her child to a strange place'.⁴⁶⁷ As Muslim law entrusts the father with the duty to supervise the upbringing of the child including providing for his/her maintenance; if the mother wants to travel to a place where the father will not have easy access to the child, her right to *hizanat* may be affected.⁴⁶⁸ However, this is subject to the nature and location of her separate residence. For instance, if the

⁴⁶² Bharatiya (n 403) 145.

⁴⁶³ Nasir *Status of Women* (n 434) 194.

⁴⁶⁴ In particular, Hasan Al-Basri and Ibn Hazm, see Zahraa and. Malek, (n 421) 174.

⁴⁶⁵ Zahraa and Malek (n 421) 174.

⁴⁶⁶ The *Fatwa-i-Alamgiri* states the rule by holding that: 'the mother is ... best entitled to the custody... unless she be an apostate, or wicked, or unworthy to be trusted'. (p.435) *Radd-ul-Muhtar* which is another valuable and authoritative work on *Hanafi fiqh* and is also used sometimes by the South Asian courts and academics as an authoritative work, puts down the following as conditions of *hizanat*: 'the *hazina* (female custodian) should be free, adult, trustworthy and capable of bringing up the child, and not married to a stranger'. *Radd-ul-Muhtar*, Vol. II, p. 1042; Ameer Ali (n 375) 214.

⁴⁶⁷ Al-Marghinani, *The Hedaya* (n 401)139.

⁴⁶⁸ Zahraa and Malek (n 421) 171.

mother resides in her native place where the marriage contract was executed, her right of *hizanat* will not lapse according to *Hedaya*.⁴⁶⁹

With regard to misconduct on the part of the *hazina* (female custodian), the *Fatwa-i-Alamgiri* illustrates that misconduct would include 'acts injurious to the child'; for instance, adultery, theft or neglect of her child and leaving them hungry.⁴⁷⁰ Having a reasonable standard of moral character perhaps is a condition that applies to both male and female custodians under Muslim law.⁴⁷¹ Through this rule classical Muslim law 'tries to ensure that one who is entrusted with the duty of custody is the one who possesses good qualities and character, as the child may, and very often will follow his/her way of life.'⁴⁷² Similarly the condition of ability to bring up the child is common for both male and female custodians. The inability to look after the child can be due to several reasons including a physical defect, serious disease or old age, which disables the person from properly conducting custodial duties and responsibilities.⁴⁷³

A further disqualification on the part of a female custodian is apostasy, which is stated in Baillie's Digest although the same is not mentioned in *Hedaya*. The principle lays down that 'where a Muslim woman renounces Islam she forfeits at once the right of *hizanat*'.⁴⁷⁴ However, Baillie's Digest importantly mentions that apostasy can be no longer held to be a disqualification in British India because of the operation of the Caste Disabilities Removal Act, 1850⁴⁷⁵ which provided that there was to be no forfeiture of civil or property rights by reason of renouncing or being excluded from a caste or religious group.⁴⁷⁶ However, as the claim of a custodian who has renounced Islam either before or after receiving custody of the child, has not been commonly encountered by the South Asian courts in the post-colonial

⁴⁶⁹ Al-Marghinani, *The Hedaya* (n 401)139

⁴⁷⁰ Baillie's Digest (n 402) 435.

⁴⁷¹ Nasir, *Status of Women* (n 434)192; Zahraa and Malek (n 421)169.

⁴⁷² Zahraa and Malek (n 421)169.

⁴⁷³ *ibid.*

⁴⁷⁴ Ameer Ali (n 375) 228.

⁴⁷⁵ The Caste Disabilities Removal Act, 1850 [Act, No. 21 of 1850; Baillie's Digest (n 402) 435; Mulla, *Principles of Mahomedan Law* (n 459) 440.

⁴⁷⁶ Marc Galanter, 'Caste Disabilities and Indian Federalism' (1961) 3(2) Journal of the Indian Law Institute 205, 211.

period; there is scarcity of judicial literature, which can indicate towards a practice or prevailing rule addressing such claims.

It is also important to note that, opinions surrounding the disentitlement to the right of *hizanat* for a non-Muslim mother are divided among different schools of Muslim law. For instance, while the *Hanbalis* require the custodian to be a Muslim, the *Malikis* and *Hanafis* maintain that a non-Muslim mother who is a *kitabiyah* (followers of non-Islamic revelations,⁴⁷⁷ such as a Jew or a Christian) may have the right to *hizanat* provided that the child will not be exposed to any harm both religiously or physically.⁴⁷⁸ According to Al-Marghinani who was a leading *Hanafi* law scholar, 'the child may stay with a non-Muslim provided that it is still under the age of forming any judgment with respect to religion and there is no indication that the child will incline to infidelity'.⁴⁷⁹ Hamilton's *Hedaya* also inscribes similar rule regarding custody right of non-Muslim mother.⁴⁸⁰

Another traditional *Hanafi* rule of custody that has been explicitly reinforced by the courts in South Asia is the rule regarding access rights of both the parents to the child. Jamal J. Nasir states the rule as follows: 'under the Shariah no *Hadina* (or *Hazina*), whether she is the child's mother or not, may prevent the child's father from seeing it whilst it is in her care. But neither can she be compelled to send the child to the father's home. She must, however, take the child to neutral place where the father can see it'.⁴⁸¹ Similarly, if the father has the custody, he must also allow the mother access to the child.⁴⁸²

The rules discussed above thus reflect the traditional distribution of parental roles with an obvious stronghold of male dominance, which perceives females mainly as natural caregivers. The traditional rules as such are clearly not aligned with child's best interests as they are viewed from the perspective of parental authorities.

⁴⁷⁷ Kamali, *Principles of Islamic Jurisprudence* (n 337) 524.

⁴⁷⁸ Zahraa and Malek (n 421)170.

⁴⁷⁹ Zahraa and Malek (n 421) 170.

⁴⁸⁰ Al-Marghinani, *The Hedaya* (n 401)139.

⁴⁸¹ Nasir, *Status of Women* (n 434) 200.

⁴⁸² *ibid.*

However, it is also noticeable that the ultimate objective of all the rules are aimed at protecting the interests of the minor although the methods to reach that goal are certainly not compatible to how the best interests standard is viewed within the purview of the CRC. This underlying objective of the traditional rules however indicates the child-rights-centric approach of Muslim child custody law, echoing the views held by contemporary Islamic scholars expressing custody or *hizanat* as a 'right of the child' as opposed to the right of the parents.⁴⁸³ However the South Asian courts, while relying on best interests standard had not explored the opportunity to assess the principle as being one that is embedded within the fundamental tenets of Muslim law rules. Promulgation of the GWA by the British administration had in effect swayed the courts further away from addressing this question.

4.5 The Guardians and Wards Act 1890: Influencing Judicial Interpretations of Muslim Child Custody Laws in South Asia

At the time when the GWA was passed as a secular statute, 'the British legal system was torn between two competing doctrines: on one hand the almost unfettered power of the father over his children within the common law, and on the other a greater consideration for the welfare of the child in the care of his/her mother through equity. With the fusion of the Chancery and Common Law Courts,⁴⁸⁴ equity led to a modification in Common law with regard to the superior paternal rights, so that 'the best interests or welfare of the child came to be perceived by the English Courts as the first and paramount consideration in any litigated dispute involving the care and custody of children born within lawful marriage'.⁴⁸⁵ This child-centred approach influenced by equity was also endorsed by a series of 19th century statutes at a time when the concept of maternal custody was almost absent from the English jurisprudence. It was with the enactment of the 1839 Custody of Infants Act⁴⁸⁶ that

⁴⁸³ Nasir, *The Islamic Law* (n 334)158.

⁴⁸⁴ The Supreme Court of Judicature Act 1873 (36 and 37, Vict. c. 66)

⁴⁸⁵ Goonesekere, 'The Best Interests of the Child' (n 7) 119.

⁴⁸⁶ In 1765 Blackstone famously articulated this absence of maternal custody rights - 'mother, as such, is entitled to no power, but only to reverence and respect'. Custody law prior to 1839 in his words was 'the empire of the father'. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765—1769* (University of Chicago Press 1979) 453. However, as Sarah Abramowicz had argued, Father's right of custody during that time was never 'absolute' (contrary to what many scholars had articulated); it was only held superior against mother's claims but

mother's petition to the Court of Chancery for custody of her child younger than 7 years and access to the older children was allowed. Following that, the Custody of Infants Act, 1873 extended mother's custody for children under 16 years of age. Subsequently the Guardianship of Infants Act 1886 allowed mother to apply for the child's guardianship on the death of the father and also declared that mother's application for a custody order would be allowed 'having regard to the welfare of the infant'.⁴⁸⁷ These earlier statutes culminated into the adoption of the Guardianship of Infants Act 1925, which declared that the decisions on custody must be based on 'the child's welfare as the first and paramount consideration'.⁴⁸⁸

Although the GWA included the principle of welfare,⁴⁸⁹ the common law's paternal superiority over child's custody was also retained.⁴⁹⁰ However, 'the manner in which welfare standard was incorporated into the GWA, it did not connote paramountcy to the principle. Rather, the premise of the GWA made welfare to be considered as one of the considerations or in other words a 'primary' consideration as the Act required the appointment of a guardian to be consistent with the personal laws of the minor.⁴⁹¹ The innate tension between the principle of best interests of the child and respecting the personal laws of different religious communities is reflected in how welfare is perceived within the framework of GWA. On one hand, the GWA says that in appointing guardian (under sections 7 and 17) or in allowing an application with regard to custody (under sections 12 and 25) child's welfare is to be considered. On the other hand, the Act declares that welfare should not be construed 'to take away

not to the judicial power to restrain the father's custody rights. Abramowicz specially discussed the 1804 case of *de Manneville v de Manneville* (32 E.R. 762 [1804]) to elaborate on this position where the Court of Chancery emphasized that the court would decide whether or not to curtail paternal custody at its own discretion and it need not consult mother's rights over such custody. In applying such discretion the Court in *de Manneville* restrained the father from removing the child out of England on one hand and ordered not to deliver the child to the mother on the other, as the mother had separated from her husband without any legal separation or divorce. Sarah Abramowicz, 'English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody' (1999) 99 [5] Columbia Law Review 1344.

⁴⁸⁷ The Guardianship of Infants Act 1886, s 5.

⁴⁸⁸ The Guardianship of Infants Act 1925, s 1. In the later developments in English law, the Children Act 1989 also includes the standard of welfare being the 'paramount' consideration in section 1.

⁴⁸⁹ Supreme Court of Judicature Act 1873.

⁴⁹⁰ Under GWA, s 19, the Court cannot appoint or declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be such guardian.

⁴⁹¹ GWA, s 17; See, Jean-Philippe Dequen, 'India' in Nadjma Yassari and others (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (Springer 2017) 57.

or derogate from any power to appoint a guardian of person or property, or both, which is valid by the law to which the minor is subject' (under section 6). Again, in appointing or declaring the guardian of a minor, the GWA declares that the 'Court shall [...] be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor' (under section 17).⁴⁹² That the paternal supremacy over child's guardianship not only existed in the traditional personal laws but also in the English law at the time, is again reflected in section 19 of the Act which bars the court from appointing or declaring a guardian in person of a minor 'whose father is living and is not, in the opinion of the Court, unfit' to be such guardian. As such, the result of the interaction between sections 7 and 17 on one hand and section 19 on the other, renders application of welfare subordinate to the fathers right of guardianship.⁴⁹³ Clothing the two considerations of welfare and religious law, with languages which apparently imply pre-eminence of both, the GWA had further paved the way for varied, and to some extent contradictory judicial interpretations regarding what should guide the courts in appointing or declaring a person guardian of a minor under the Act.⁴⁹⁴

Moreover, not all religious laws on guardianship issues in the subcontinent carried the same features and principles. As for instance, the concept of *hizanat* was intrinsically attached to the classical Muslim law principles and was unknown to traditional Hindu law at the time when the GWA was passed.⁴⁹⁵ The logical end result was a constant tension being raised between the welfare principle viewed from

⁴⁹² Section 17 provided a number of other considerations, which the court would weigh while determining what would be in the welfare of the child. These include, age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or with his property and the minor's wish if he/she is old enough to form an intelligent preference; GWA, s 17(2-3).

⁴⁹³ See Arun Kumar, 'Guardianship and Custody of the Person of a Minor Child - Conflicting Claims (1975) 17(2) Journal of the Indian Law Institute 299.

⁴⁹⁴ In addition, the conflicting rules that the courts had to confront when GWA was passed as a secular law also included the Muslim Personal Law (Shariat) Application Act (XXVI of 1937) which provided that in all questions regarding 'guardianship', 'the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)' (Section 2). The Act consequently 'aggravated the problem of what law applied under the Guardians & Wards Act'. Davis (n 6) 122.

⁴⁹⁵ 'In fact classical Hindu law did not contain principles dealing with guardianship and custody of children because of the concept of the Joint Hindu Family, where the *Karta* (family head) was responsible for the overall control of all dependents and management of their property, and therefore specific legal rules dealing with guardianship and custody were not thought to be necessary.' Paras Diwan (n 401) 15.

the Western perspective, and traditional rules of Muslim law viewed from the perspective of the authoritative translations of the Muslim law textbooks, which were applied by the British courts with utmost rigidity in questions of family law. This tension perhaps is still continuing in India, Pakistan and Bangladesh, with GWA being still enforceable in its entirety (with some amendments, mostly procedural) in all three jurisdictions.

The confusing premise for dealing with guardianship issues under the GWA is manifest in the way 'guardian' has been defined by the Act. Because this Act is not particularly addressing Muslim custody laws (as the Act is made applicable to all citizens irrespective of their religion or class),⁴⁹⁶ the definition inevitably gives a description of 'guardian', which is not fully consistent with how Muslim law perceives it to be. According to the Act, 'guardian' means 'a person having the care of the person of a minor or of his property, or of both his person and property'.⁴⁹⁷ Thus under the law two types of guardianship have been recognized, guardianship of person and guardianship of property, both of which can rest in either the same person or in two individual persons. However this definition ignores the special attributes of the institution of *hizanat* which primarily rests with the mother or other female custodians and which forms only a part of guardianship of person (as discussed earlier), while the father remains the legal guardian. Thus, in the sense of the definition, a mother who is not perceived to be the legal guardian under traditional rules of Muslim law, having only the actual custody of the minor, can be said to be its guardian under the Act.⁴⁹⁸

The inconsistencies in the GWA with regard to the Muslim law of custody also have implications for the interpretation of section 25 of the Act. Section 25(1) is the only

⁴⁹⁶ Statement of Object of the Original GWA passed by the British Administration.

⁴⁹⁷ GWA, s 4.

⁴⁹⁸ Davis (n 6)121; However, this already confusing position is further convoluted by section 19 as noted above, which ignored the preferential right of the mother and holds father to be the sole guardian in all respects, reflecting thereby the supremacy of the father's right over children's custody. This provision has been subject to varying judicial interpretations with respect to the custody questions of Muslim minors, and it is still the present law in Pakistan and Bangladesh; while India has in 2010 placed mother in the same position as the father in whose presence the Court would not intervene to appoint guardian. [Section 19(b) was amended in India by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father. The Law Commission Report (n 401) 14.

provision in the GWA, which concerns custody of the minor. According to the provision, 'If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.' Although on its face, it appears that the section is merely giving authority to the court for re-establishing the original arrangement, the provision in fact had been widely applied by the courts to transfer custody from one parent to the other on the ground of welfare, as both divorced parents may retain a form of custody - the mother exercises actual custody while the father relies on legal custody.⁴⁹⁹

However, if a court chooses to rigidly follow the traditional Muslim law rules of custody and guardianship, then the GWA could however be interpreted as having no scope for a mother or any person other than the father to apply for guardianship. If traditional rules of guardianship are to be followed to interpret the definition of 'guardian' given in section 4 of the Act, both guardianship of person and property of a minor would belong to the father. What the mother has, is the right to *hizanat* or custody, which is not mentioned in the definition. Under section 25 although 'custody' is referred, a conservative court may interpret it as merely an actual custody, which the mother has (as given under the traditional rules), and a father can at any time apply under the section for return of the ward from her on the ground of welfare. However, if the same rigid interpretation is followed, when the child is with the father, a mother can never apply for return of minor under section 25 as for the provision to apply there must be a 'leaving' or 'removal' of the minor from the 'guardian of his person' and not from the 'custodian'. In that case, the only provision that the mother can rely on is section 19 (b) which would require her to prove the father to be 'unfit to be guardian of the person' of the minor. Again, unlike section 25 or section 17, section 19(b) does not include the same 'welfare' standard in its wordings. As such a conservative court may not choose to look at the application of the mother from the 'child's welfare perspective and can very well import its own criteria of a father's 'unfitness' to be a guardian.

⁴⁹⁹Davis (n 6) 121.

Such interpretation of the father's right is reflected in the early 20th century's judicial decisions from the British colonial courts where, 'guardian' as defined in section 4(2) of the GWA was interpreted as referring to only the person having 'constructive or legal custody'⁵⁰⁰ which under traditional rules belong to the father (even though he may not have the 'actual' physical custody). As pointed out above, such interpretation drawing a differentiation between actual and constructive custody and holding GWA to be applicable only for the latter, made it difficult for Muslim mothers to apply for custody of minor, as under the traditional rules she is only entitled to a preferential right over the actual physical custody of the minor while the legal guardianship of the person and property belong to the father.⁵⁰¹

In *Mt Siddiquunnissa Bibi v. Nizamuddin*,⁵⁰² the dispute involved an application under section 25 of the GWA for return of the minor, filed by the concerned minor's father against the maternal grandmother. The court observed that, 'it must be conceded that the custody need not be the actual physical custody of the minor and may even be a constructive custody of the guardian. [...] There is no reason to restrict the meaning of the word 'custody' to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody.' It was further stated that, 'Under the Muhammadan Law, the maternal grand mother is not the guardian of the person of the minor grand-daughter. She has the right of *hizanat* till the girl attains puberty, but *hizanat* is not the same thing as guardianship of the person.' Similarly in *Mt Ghuran v. Syed Biaz Ahmad*⁵⁰³ the court elaborated on the rights and duties of the father as having the 'constructive' custody' of a minor as his/her guardian of the person: '*hizanat* is only custody for the rearing up of the child. Although the maternal grandmother has the right of *hizanat* under the Mahomedan

⁵⁰⁰ *Mushaf Husain v Mohammad Jawad* AIR [1918] Oudh 376 cited in Dequen (n 491) 50.

⁵⁰¹ The traditional Muslim law rules differentiate Guardianship (*Wilayat*) from the concept of Custody (*Hizanat*). *Hizanat* essentially referred to the actual physical custody belonging to the mother or other female relations involving duties in nature of affection and upbringing of a child. While *Wilayat* which includes both guardianship of person and property of the minor, referred to the child's material needs (education, health etc.) The concept is elaborated in the later chapter discussing the law of custody as applicable in Bangladesh.

⁵⁰² AIR [1932] All 215.

⁵⁰³ AIR [1935] Oudh 492.

Law, yet the father is responsible for providing funds for the maintenance of the minor and is her natural guardian. Thus he must be deemed to have the care of the person of the minor within the meaning of the definition of “guardian” in section 4(2) ... even though the minor is not in his actual physical custody.’

Such interpretation not only caused hardship for women seeking custody of their minor children, with such legal reasoning the principle of best interests of the child was also rendered practically non-existent in case of guardianship of property.⁵⁰⁴

Although the South Asian courts had generally interpreted these provisions of the GWA more liberally to include mother’s applications, leaving scope for such rigid interpretation in the Act is not only discriminatory, it also affects proper determination of the welfare or best interests of the child in question.

4.6 Conclusions

During the early post-colonial period, the age/sex rule and other traditional *Hanafi* principles dominated the custody decisions in the Indian sub-continent. Nonetheless, there were a number of instances where the higher judiciary in the post-colonial period took up proactive role by adhering to a child-centric approach and reclaimed their authority to depart from the classical *Hanafi* law texts if the welfare of the minor so required. Thus, in South Asia, a welcoming trend is discernible from the decisions of the higher judiciary, where the courts have favoured welfare or best interests considerations of the child over personal laws, in interpreting the GWA.⁵⁰⁵

However, despite this progressive trend, it cannot be presupposed that to the three South Asian jurisdictions, welfare has become the dominant rule with traditional *Hanafi* principles taking a backseat. Rather, the broader judicial practices indicate

⁵⁰⁴ In which case, the supremacy of the father’s right still holds firm ground based on traditional rules. Although guardianship of property is not within the scope of the present research, yet the later chapters discussing judicial decisions in Bangladesh indicate that the natural or legal guardianship of the father over the properties of the minor had remained largely unchallenged. Similar reasoning is discussed in Dequen (n 491) 51.

⁵⁰⁵ Although in modern times reference of best interests principle is noticeable in the judicial decisions in the South Asian courts, for the most part, the judicial discourse uses the term ‘welfare’ as a standard to determine custody and guardianship disputes.

that alongside these progressive decisions, there exists a pool of cases even of relatively recent times, where the courts could not seem to have overcome the influence of the traditional *Hanafi* principles as perceived since the colonial time.

Chapter 5: Overview of the Judicial Trends in Applying Best Interests Principle in Child Custody Cases in India

5.1 Introduction

In the fifties and sixties of the twentieth century, in applying Muslim personal law, the Indian courts mostly followed the Privy Council's ruling emphasising on the immutability of the rules of law settled by the classical schools.⁵⁰⁶ In the celebrated 19th century cases of *Aga Mahomed v Kulsoom Bee Bee*⁵⁰⁷ and *Baker Ali Khan v Anjuman Ara*⁵⁰⁸ the Judicial Committee of the Privy council set the rule that 'courts should not, as a rule put their own construction on any Quranic text in opposition to the express rulings of commentators of great antiquity and high authority'.⁵⁰⁹ While after the independence in 1947 the Pakistan courts refused to follow such decisions of the colonial courts and claimed their authority to reinterpret the traditional rules held by the recognised schools of thoughts in the classical period; the Indian courts held that such ruling of immutability to the traditional classical texts was binding upon them.⁵¹⁰ As a result Muslim personal law in the post-colonial era 'remained more or less rigid and conservative in India but became flexible and progressive in Pakistan'.⁵¹¹

An example of such rigid application of Muslim personal law in first two decades of the 20th century India is, *Amad Giri v Mst. Begha*⁵¹² where the High Court of Jammu Kashmir rejected the Quran-and-*Hadith*-based interpretation of the Tehsilder

⁵⁰⁶ The Privy Council thus relied on the traditional Islamic doctrine of *taqlid* which is similar to the common law doctrine of *stare decisis*. As *stare decisis* makes it binding on a judge to follow previous decisions of the higher judiciary. The doctrine of *taqlid* claims immutability to the rules of the classical jurists making it obligatory upon the subsequent generations of Muslims to follow those rules without any departure. Serajuddin, *Muslim Family Law* (n 2) 15.

⁵⁰⁷ [1897] 24 I.A. 196.

⁵⁰⁸ [1903] 30 I.A. 94.

⁵⁰⁹ Serajuddin, *Muslim Family Law* (n 2) 15.

⁵¹⁰ *ibid* 41.

⁵¹¹ *ibid*.

⁵¹² AIR [1955] (J&K) 1.

Magistrate who held *talaq-i-bidat*⁵¹³ as invalid and ineffective. Cautioning against the departure from views of the classical jurists, the court observed:

Times without number the highest Judicial Courts in India including the Privy Council have sounded a note of warning against entertaining new and novel interpretations of the texts of the Quran and Hadiths by persons who are not recognized as competent to give such interpretations. So far as these are concerned, we have to rely on the interpretation of only such commentators ... whose authority is acknowledged throughout the Muslim world.⁵¹⁴

Citing similar decisions⁵¹⁵ in the post-colonial India, Alamgir Serajuddin thus aptly commented that 'in the early years, the Indian courts suffered from an inertia characteristic of the colonial judicial tradition in India' by adhering to *taqlid* while denying their competence to exercise *ijtihad*.⁵¹⁶

5.2 Changing Approach of the Indian Courts: Between the Post-colonial Period and the Decades Following the 70's

Continuing the legacy of the British India, the personal laws in post-colonial India were governed by the religious laws of the individual religious communities. The pluralism in the family law system in India coexists with the constitutional guarantees of equality and freedom from discrimination.⁵¹⁷ The Indian Constitution also guarantees freedom of religion and protection of the rights of minorities.⁵¹⁸ Plurality in the family law system however had been subjected to wide criticisms for its 'sharp contrast to these equality guarantees'⁵¹⁹ and for restricting scope for legal reforms

⁵¹³ *Talaq* by triple declarations - a disapproved form of divorce in which three pronouncements are made in a single *tuhr* (period of sexual purity) either in one sentence or in three sentences. Fayzee, *Outlines of Muhammadan Law* (n 321) 121.

⁵¹⁴ *Amad Giri Case* (n 512) 3.

⁵¹⁵ *Mohd Ismail v Abdul Rashid*, AIR 1956 ALL.1; *K. Veerankutty v Pathummakutty Umma*, AIR 1956 Mad. 514; *Imdad Ali v Ahmad Ali*, AIR 1952 Oudh 518.

⁵¹⁶ Serajuddin, *Muslim Family Law* (n 2) 43.

⁵¹⁷ The Constitution of India 1950, Arts. 14 and 15.

⁵¹⁸ *Ibid* art 25 and 29.

⁵¹⁹ Vrinda Narain, 'Muslim Women's Equality in India: Applying a Human Rights Framework' (2013) 35(1) Human Rights Quarterly 91, 94.

due to the 'inherent inequalities'⁵²⁰ contained in the personal laws. However, although the Constitution of India placed a directive 'to homogenize family law in the indefinite future, leading to a Uniform Civil Code (UCC)',⁵²¹ policy makers have not followed this course.⁵²² Rather, while maintaining the plurality, internal reforms in different personal laws had occurred at varying degrees both by legislative reforms and by judicial activism.⁵²³

In the post colonial India, the criticisms surrounding the plural family law system largely focused on Muslim law, mainly because of the resistance of Muslim elites against any legal changes in the family laws applicable to the Muslims in India.⁵²⁴ Post independence and thereafter, 'Muslim elites voiced the most assertive demands for the continued recognition' of the Muslim personal law as applied in the British India, which were largely un-codified.⁵²⁵ Thus, in debates about Muslim personal law, the classical texts and religious traditions are taken as standards of reference much more often than in debates about other family law systems in India.⁵²⁶ Thus, during India's Constituent Assembly debate, the Muslim members strongly opposed the proposal of UCC and insisted on the preservation of religious traditions based personal law. Following the debate, UCC was included in the Directive Principles of State Policy and the religion based personal laws remained in force.⁵²⁷

Such position by the conservative elites was one of the reasons that in the first decade of the post-colonial period the legislative reform focused mainly on Hindu

⁵²⁰ Tanja Herklotz, 'Shayara Bano versus Union of India and Others: The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice' (2017) 50(3) Law and Politics in Africa, Asia and Latin America 300, 301.

⁵²¹ Uniform Civil Code for the Citizens, art 44.—'The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India'.

⁵²² Narendra Subramanian, 'Legal Change and Gender Inequality: Changes in Muslim Family Law in India' (2008) 33(3) Law & Social Inquiry 631,632.

⁵²³ Herklotz (n 520) 301; for the debate on the demand for UCC in the post colonial decade and changing realities of the claims for UCC see Menski Werner, 'The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda' in M. McLauren (ed), *The Many Faces of India: Law and Politics of the Subcontinent* (Sanskriti 2012) 136.

⁵²⁴ Subramanian (n 522) 632.

⁵²⁵ *ibid* 633.

⁵²⁶ *ibid*.

⁵²⁷ Sagnik Dutta, 'From Accommodation to Substantive Equality: Muslim Personal Law, Secular Law, and the Indian Constitution 1985–2015' (2017) 4 Asian Journal of Law and Society 191,192.

religious majority.⁵²⁸ For a legislature, which was predominantly Hindu, it seemed more appropriate to bring changes in the Hindu religious laws, than those of the minority communities, particularly of Muslims.⁵²⁹ Likewise the courts in the first two decades of the post-colonial era, did not engage in much interpretation of the religious traditions especially those of Muslims (as discussed in the forgoing section) and mainly drew from the British courts' rulings based on the Anglo-Muhammadan law. The reason for such choice for the courts was perhaps the 'limited knowledge' of the judges on the traditional Muslim law rules and the opposition by the conservative Muslim elites to any reinterpretation, especially by those whom they considered non-expert in Muslim law.⁵³⁰

However since the 1970s, 'the potential for reform premised on the cultural practices and traditions', began to be slowly recognized by the courts and the legislature.⁵³¹ The activist role of the Indian judiciary during this decade was especially significant in the area of triple *talaq* and maintenance of Muslim women. Courts considered triple *talaq* as valid only if there was a reasonable cause for pronouncing *talaq* or if it was preceded by efforts of reconciliation between the husband and wife.⁵³² In case of interpreting the maintenance provisions of section 125 of the Criminal Procedure Code (CrPC),⁵³³ the courts during the 70's and early 80's had held on occasions that this provision would apply to divorced Muslim women entitling them to receive maintenance beyond the *iddat*⁵³⁴ period,⁵³⁵ which was contrary to the traditional

⁵²⁸ Subramanian (n 522) 633.

⁵²⁹ *ibid* 637.

⁵³⁰ *ibid* 640.

⁵³¹ Dutta (n 527) 194.

⁵³² *Jiauddin Ahmed v Anwara Begum* [1981] 1 Gau. L.R. 358; *Mst. Rukia Khatun v Abdul Khalique Laskar* [1981] 1 Gau L.R. 375.

⁵³³ The Code of Criminal Procedure Code, 1973 (hereafter CrPC), s 25 is a 'secular provision given in the Indian Constitution, which guarantees the right to monthly financial maintenance to women from their divorced husband irrespective of their religion'. Ummul Fayiza, 'From Shah Bano to Shayara Bano (1985–2017): Changing Feminist Positions on the Politics of Muslim Personal Law, Women's Rights and Minority Rights in India' (2021) 41(1) *Journal of Muslim Minority Affairs* 122, 138; 'Following an Amendment in 1973, the CrPC expanded the definition of wife to include divorced wife. This judgment was considered by some sections of the Muslim society as interfering with Muslim personal law in requiring the husband to pay the wife maintenance beyond the *iddat* period' Dutta (n 527) 193.

⁵³⁴ Refers to the 'term by the completion of which a new marriage is rendered lawful for a Muslim woman'. (The *Hedaya* (n 401); *Re Din Muhammul* [1882] 5 All 226, 227 (Mahmood J). 'It is a period of continence imposed on a woman on the termination of a marriage in the interest of certainty of

views of the classical jurists on maintenance.⁵³⁶

In 1985 in the highly controversial decision of *Shah Bano Begum*⁵³⁷ the Supreme Court of India relied on the interpretations of certain Qur'anic verses to decide that Muslim husband was bound to pay maintenance beyond the *iddat* period. Additionally, the *Shah Bano* court observed that 'Islam disregarded women's dignity, and that a UCC should be introduced.'⁵³⁸ The judgment promptly gave rise to massive outrage in the Muslim community considering the ruling as contradicting Muslim personal law and constitutional rights of religious minority.⁵³⁹ Consequently in 1986, the Indian Government enacted the Muslim Women (Protection of Rights on Divorce) Act 'which excluded divorced Muslim women from the purview of Section 125 of the CrPC which grants women a monthly financial maintenance right from her divorced husband'.⁵⁴⁰ However, the Act eventually lent itself to the liberal judicial interpretation that 'the husband should make a lump-sum payment to support his ex-wife for an indefinite period within three months of pronouncing divorce',⁵⁴¹ which interpretation was later decisively settled by the Supreme Court in the land mark judgment of *Danial Latifi v Union of India*.⁵⁴² Unlike *Shah Bano*, the judgment in *Danial Latifi* however, did not receive backlash from the conservative Muslim leaders mainly because the judgment relied on sound interpretations of the Quranic verses to justify permanent alimony without invoking the UCC related debate or without justifying the reasoning from constitutional validity.⁵⁴³

paternity'. Mahmood, *Outlines of Muhammdan Law* (n 321) 81.

⁵³⁵ *Khurshid Khan Amin Khan v Husnabanu* [1976] 78 Bom. L.R. 240; *Mehbubabi Nasir Shaikh v Nasir Farid Shaikh* [1976] 78 Bom. L.R. 25. The decisions were reinforced by Supreme Court in *Bai Tahira v Ali Hussain Fisalli Chothi* AIR 1979 SC 362, *Fuzlunbi v Khader Vali* AIR [1980] SC 1730, and *Mohammad Ahmed Khan v Shah Bano Begum* AIR [1985] SC 945.

⁵³⁶ The traditional *Hanafi* view on maintenance is that on divorce a wife is only entitled to receive maintenance from husband during the *iddat* period and not beyond that. Mahmood, *Outlines of Muhammdan Law* (n 321) 174.

⁵³⁷ *Mohammad Ahmed Khan v Shah Bano Begum* AIR [1985] SC 94.

⁵³⁸ Subramanian (n 522) 645.

⁵³⁹ Ummul Fayiza (n 533) 124.

⁵⁴⁰ *ibid.*

⁵⁴¹ Subramanian (n 522) 648.

⁵⁴² [2001] 7 SCC 740.

⁵⁴³ Subramanian (n 522) 648.

In the last few decades, the Indian courts had approached proposals for changes in the Muslim personal law more cautiously. Specific references were made to ‘features of statutory Muslim law, Islamic legal and normative traditions, and transnational Islamic law’ in addressing validity of any traditional text of Muslim law.⁵⁴⁴ Courts had also made reference to constitutional guarantees, but ‘departed from precedent only when they felt that group law and group norms also offered plausible support’.⁵⁴⁵ Addressing the reason for such change in judicial approach over the last decades, Subramanian noted that two factors have influenced such patterns of adjudication - ‘legal mobilization’ by rights based organizations and Muslim religious groups both at the national and community level; and by judge’s and policy makers’ understanding and orientation towards norms and initiatives of the religious communities.⁵⁴⁶

However, the issue of ‘majoritarian norms shaping the political rights of the minority in India’⁵⁴⁷ is a major concern that is often debated in attempts to bring changes in religious personal laws of the Muslims. The Supreme Court’s decision of 2017 in *Shayara Bano v. Union of India & Others*,⁵⁴⁸ which had declared triple *talaq* as unconstitutional, is criticized by some of the feminist scholars as simply ‘an exercise of majoritarian Hindu nationalist pride in order to tamper with the existence of the Muslim community as an autonomous political unit’.⁵⁴⁹ The contemporary politics of UCC in the context of the ‘the rise of majoritarian Hindu nationalist politics’ is also often considered a danger against the religion based cultural identity of the Muslim community in India.⁵⁵⁰

Thus in the context of such legal and political climate, any question involving religious laws of the Muslim community in India is surely a complex one that is often

⁵⁴⁴ Subramanian (n 522) 644.

⁵⁴⁵ *ibid.*

⁵⁴⁶ *ibid.*

⁵⁴⁷ Ummul Fayiza (n 533)133.

⁵⁴⁸ [2017] 9 SCC 1.

⁵⁴⁹ Ummul Fayiza (n 533)134; see also Nivedita Menon, *Seeing Like a Feminist* (OUP 2012); Flavia Agnes, ‘Aggressive Hindu Nationalism: Contextualizing the Triple Talaq Controversy’ in Angana P. Chatterji and others (eds), *Majoritarian State: How Hindu Nationalism is Changing India* (OUP 2019) 335, 336; Flavia Agnes, ‘From Shah Bano to Kausar Bano: Contextualizing the “Muslim Woman” within a Communalized Polity’ in Ania Loomba and Ritty A. Lukose (eds), *South Asian Feminisms* (Zubaan 2012) 33.

⁵⁵⁰ *ibid.*

addressed with caution, considering the political sensitivity attached to it. This explains the related reserved approach of the Indian courts in the last few decades, in addressing question involving traditional rules of the Muslim personal law.

Similar arguments explain the judicial trends in the child custody cases under Muslim law in India with which this present chapter is concern. The Indian courts from 70's onwards had on several occasions interpreted the religious texts on custody on the basis of child's welfare and made efforts to harmonize those traditional rules with the constitutional guarantees of social justice and fundamental human rights. However, compared to Pakistan and Bangladesh, the overall approach of the courts in India is relatively restrained in terms challenging the boundaries set by the norms of the classical jurists especially in custody matters.

5.3 Welfare or Best interests as the Paramount Consideration in Custody Disputes

The influence of the common law developments holding welfare as the paramount standard slowly led to inclusion of this standard in the custody disputes under the GWA in the post-colonial India. Along with the liberal judicial discourse, the paramount standard of child's best interests was also increasingly reflected in the legislative and policy efforts in the post-colonial India. The Hindu Majority and Guardianship Act, passed in 1956 (HMGA) thus expressly declared in section 13 that 'in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be *the paramount consideration*.'⁵⁵¹ As a result of such emphasis on the paramountcy of the standard, the Indian Courts had reinterpreted the very question of the interaction between section 7 and 17 with section 19 within custody disputes among Hindus and had thus imbedded the 'superseding nature' of the best interests or welfare principle under section 17.⁵⁵² With the passage of time the Indian judiciary nevertheless had also demonstrated substantial progress in interpreting the GWA and Muslim legal traditions on child

⁵⁵¹ The Hindu Majority and Guardianship Act 1956 (HMGA), s 13.

⁵⁵² Dequen (n 491) 57.

custody in a way, which favours the best interests of the child without strictly following the traditional rules. However, as discussed previously in this chapter, with regard to custody litigations involving Muslim parties, the judicial decisions during the early post-colonial era in India saw a strict adherence to the traditional custody principles. Although in recent decades courts have been much more liberal in interpreting traditional rules of child custody, those principles to some extent, continued its influence over the decisions involving Muslims in the Indian courts.

Before examining how the higher courts in India approached Muslim personal law relating to child custody, the judicial approach in custody cases between Hindu litigants is briefly discussed in the following section for a clearer understanding of the overall judicial approach.

5.4 Effect of the Hindu Minority and Guardianship Act

Although the Hindu personal law also endorses father's superior right over guardianship and custody of children,⁵⁵³ incorporating the paramount standard in the HMGA as noted above, had persuaded the courts' increased reliance on the principle of best interests. In *Captain Rattan Amol Singh v Smt. Kamaljit Kaur W/O Captain*⁵⁵⁴ the reinterpretation of GWA in light of the enactment of the HMGA was described thus:

By virtue of Section 2 of the Hindu Minority and Guardianship Act [...] we are obliged to read together and harmonise the provisions of Section 19 of the Guardians and Wards Act and of Section 13 of the Hindu Minority and Guardianship Act; construing them together the rigour of the prohibition contained in Clause (b) of Section 19 of the Guardians and Wards Act must be considered to have been relaxed to a great extent in the interest of the minor's welfare as laid down in Section 13 of the Hindu Minority and Guardianship Act.

⁵⁵³ Debarati Halder, 'Who Wins the Battle for Custody? An Analysis of the Nature of Modern Judicial Understandings of Women's Rights in Cases of Custody of Minor Children in Matrimonial Disputes Under the Hindu Laws in India' (2012) < <https://ssrn.com/abstract=2089867> > Accessed 25 July 2023.

⁵⁵⁴ AIR [1961] Punj 51.

Thus, such interpretations calling for a harmonized application of section 19 in light of the paramount consideration of welfare eased the rigidity of GWA in terms of the superfluous division between ‘actual’ and ‘constructive custody’. However, the inflexibility was left unaddressed in respect of Muslim litigants and those of other personal laws. The Supreme Court had also similarly addressed the interaction between section 17 and 19 of the GWA in the 2006 case of *Nil Ratan Kundu and Anr v Abhijit Kundu*⁵⁵⁵ holding that:

In such cases, it is not the ‘negative test’ that the father is not ‘unfit’ or disqualified to have custody of his son/daughter which is relevant but the ‘positive’ test that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of a minor in favour of father, mother or any other guardian.

Thus, the apex court settled the issue regarding the overriding effect of the welfare principle vis-a-vis father’s legal right over custody under section 19 of the GWA. Holding that ‘in selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child’, the court emphasized on factors such as ‘child’s ordinary comfort, contentment, health, education, intellectual development, favourable surroundings [and] moral and ethical values’ to be taken into consideration to decide to whom welfare of the child would be better protected. The court thus observed that in deciding the custody as such, ‘A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents.’ However, the court did not venture into addressing the applicability of the decision in contexts where the parties are not Hindus. As such, whether the same principles would apply to Muslim parties, remained doubtful.⁵⁵⁶

⁵⁵⁵ [2008] 9 SCC 413, 414.

⁵⁵⁶ Dequen (n 491) 58; Crucially, in 2010 section 19 of the GWA was amended in India, which had removed the apparent discrimination between father and mother in terms of guardianship application, [The Personal Laws (Amendment) Act, 2010 (Act No. 30 of 2010)] adding ‘mother’ alongside ‘father’ in section 19(b). As the provision stands at present, a court is barred from appointing or declaring anyone as guardian of the person of a minor under the GWA if either the father or the mother is alive and is not in the opinion of the court unfit to be such guardian. However, when it comes to Muslim parties, as long as the overriding effect of the paramount consideration of welfare over the personal

Although the HMGA made appointment of guardian subject to the paramount consideration of welfare, the Act retained the superior paternal authority of the father. Article 6(a) of the Act provides that the natural guardians of a Hindu minor's person and property is the father, and *after him*, the mother. The clause however gives the mother a preferential right over the custody of her child under the age of five years. The term 'after' in section 6(a) although generally was understood as 'after the death of the father' the Indian Supreme Court gave liberal interpretation to the word by favouring the mother's right of guardianship even during the lifetime of the father. In *Githa Hariharan v Reserve Bank of India*⁵⁵⁷ the Supreme Court interpreted the term 'after' as having the same meaning as 'in the absence of' the father, whether it be 'temporary or otherwise'. The term 'absence' was further explained by the court to include factors like 'total apathy of the father towards the child' or his 'inability [...] by reason of ailment or otherwise'.

The court emphasized that the word 'after' cannot be attributed its literal meaning as that would be contrary to the 'legislative intent' and the 'constitutional guarantee of gender equality'. Indicating that a gender discriminatory provision would be prejudicial to the best interests of the child, the court held that the word 'after' appearing in section 6(a) 'shall have to be given a meaning which would sub-serve the need of the situation [*i.e.*] welfare of the minor'.

Section 13(1) however, 'has enabled courts to focus more clearly on the child's need to retain a close relationship with the mother'⁵⁵⁸. Over the years, the judicial trends seemed to have been favouring the position that father's right of custody is not absolute.⁵⁵⁹ In *Snehlata Mathur v Mahendra Narain*⁵⁶⁰ the Rajasthan High Court observed: 'it is well established that the right of a father as a natural guardian to the custody of his minor child is not an indefeasible right in law; it is circumscribed by the

laws is not expressly acknowledged the equal status of a mother introduced in section 19(b) would not limit the superior guardianship authority of the father.

⁵⁵⁷ AIR [1999] SC 1149.

⁵⁵⁸ Goonesekere, 'The Best Interests of the Child' (n 7) 126.

⁵⁵⁹ *Amol Singh v Kaur* AIR [1961] Punj 51; *Batra v Batra* AIR [1986] Del 149; Goonesekere (n 7) 126.

⁵⁶⁰ AIR [1980] Raj 64.

consideration of the benefit and welfare of the minor.’ Courts had similarly denied custody to the father on the basis that he had taken no interest in child from his birth, such inaction being unsuitable for the child’s welfare.⁵⁶¹ The Supreme Court of India also on occasions had generally supported welfare principle as opposed to father’s absolute right of guardianship. In *Jijabai Vithalrao Gajre v Pathankhan*⁵⁶² the Supreme Court held that the ‘mother could be considered to be the natural guardian of her minor daughter’ if the father was not taking any interests in the minor’s affairs.

In *Mausami Moitra Ganguli v Jayanti Ganguli*⁵⁶³ the Supreme Court observed:

The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.

The court further pronounced that for custody issues, ‘each case has to be decided on its own facts’ and as such the father could not be considered as suitable with regard to the welfare of the child in all cases although the statute presumed such role for him.⁵⁶⁴

Similarly in *Anjali Kapoor v Rajiv Bajjal*⁵⁶⁵ where on death of the mother, the custody of a minor child with the maternal grandmother was disputed by the minor’s father, the court again subjected the father’s ‘natural’ right of custody to the paramount consideration of welfare. It was held: ‘[o]rdinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that

⁵⁶¹ *Kota Karrenna v Kota Paravathamma* AIR [1978] AP 398; M.R Mallick, *B.B. Mitra: The Guardians and Wards Act* (16th edn, Eastern Law House 2014)224; In *Kaliappa Goundan v Valliammal* the Madras High court held that ‘though father is the natural guardian of the Hindu child, if the mother is suitable and living, it is impossible to find an adequate substitute for her for custody of the child of tender years, and it is in the interest of the child, whose interest should be the paramount consideration with Courts, that the mother should have the custody’. [1949] 1 MLJ 248,250.

⁵⁶² AIR [1971] SC 315.

⁵⁶³ [2008] 7 SCC 673, 678.

⁵⁶⁴ See *Roxann Sharma v Arun Sharma* [2015] SCC 318.

⁵⁶⁵ [2009] 7 SCC 322.

right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child'. Considering that the child had been living with the grandmother for a long time since its birth in a positive environment and had developed an emotional bonding with her, the Supreme Court overturned the decisions of the High Court and decided that the custody should remain with the grandmother.

In a more recent decision of *Rajeswari Chandrasekar Ganesh v The State of Tamil Nadu and ors*⁵⁶⁶ the Supreme Court again in a habeas corpus writ petition stated its position regarding welfare to be the paramount consideration in question of child custody. Referring to the relevant provisions in the GWA and the HMGA the court held that:

A mere reading of the provisions of the two Acts [...] makes it obvious that the welfare of the minor predominates to such an extent that the legal rights of the persons claiming to be the guardians or claiming to be entitled to the custody will play a very insignificant role in the determination by the court. (para 8).

The Court as such unequivocally stated that welfare of the child must be the 'dominant consideration to which all other considerations ... remain subordinate'. Elaborating on what considerations should the court weigh in deciding welfare of the child, the court further stated that 'It must be the aim of the Court, ... to choose the course which will be best for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult' (para 9).

Nevertheless, the provision in the HMGA still retains the superior authority of the father, as 'the father continues to have a preferential position when it comes to natural guardianship and the mother becomes a natural guardian only in exceptional circumstances'.⁵⁶⁷ As such it is only the paramount consideration of welfare as incorporated in section 13 of the HMGA that 'a mother may use to argue for

⁵⁶⁶ MANU/SC/0890/2022.

⁵⁶⁷ Law Commission of India, 'Reforms in Guardianship And Custody Laws in India' (2005) (Report No 257) 11.

custody/guardianship in case of a dispute'.⁵⁶⁸

5.5 Best interests *vis-à-vis* Traditional Rules of Muslim Law

From the 1970s onwards, child custody decisions The judicial approach in India had followed a somewhat different route when it came to addressing the best interests of the child as the paramount consideration overriding traditional rules of Muslim personal law. Writing on this aspect, Savitri Goonesekere notes: 'the Indian courts have adopted an ambivalent approach to Islamic-law principles on guardianship, when they come into conflict with the court's perception of the child's welfare.'⁵⁶⁹ Although courts usually had deemed welfare or best interests principle to override traditional Muslim law rules, commonly a significant weight is also given to the traditional *Hanafi* law texts on custody and guardianship.

In *Hassan Bhatt v Ghulam Mohamad Bhat*⁵⁷⁰ the court interpreted the reference in section 17(1) of both the personal laws of the minor and his/her welfare, holding that the latter had overriding effect over the former. It was held:

Section 17(1) no doubt provides that the court is to be guided by the personal laws of the minor, but the words 'subject to the provisions of this section' clearly indicate that the consideration of the welfare of the minor should be the paramount factor and cannot be subordinated to the personal law of the minor.

In *Smt. Ainunnisa v Mukhtar Ahmad*⁵⁷¹ the Allahabad High Court referred to a series of past decisions⁵⁷² on child custody issues of the Indian courts and upheld the pre-eminence of the welfare or best interests principle identifying a judicial trend that

⁵⁶⁸ *ibid.* The Law Commission of India had recommended as far as in 1989 to amend Section 6(a) to 'constitute both the father and the mother as being natural guardians "jointly and severally", having equal rights in respect of a minor and his property', which recommendation nonetheless had not been acted upon.

⁵⁶⁹ Goonesekere, 'The Best Interests of the Child' (n 7) 126.

⁵⁷⁰ AIR [1961] J & K 5.

⁵⁷¹ AIR [1975] All 67.

⁵⁷² AIR [1959] AP 670; AIR [1935] All 840, AIR [1955] Mad 451.

reflected such conclusion. The court held: '[T]he trend of the recent decisions is clear, namely, that in [...] matters [related to custody] the welfare of the minors is of supreme importance and not much weight is to be attached to the rights of the natural guardian.' The past decisions based on which the court had identified a consistent trend in favour of best interests of the child nonetheless were mostly cases between Hindu litigants. Acknowledging father's right of natural guardianship under the traditional rules of Muslim law, the court considered such right not as important as welfare of the child under a proceeding under section 25 of the GWA. The court held:

It is true that the father is a natural guardian of his minor son under the Mohammedan Law. But still, as is too well established to be disputed, in proceedings under Section 25 of GWA it is not the guardianship of the minor, which is of importance, but the welfare of the minor, which has to be taken into consideration while deciding about the custody of the minor.

In *Mohd. Yunus v Smt. Shamshad Bano*⁵⁷³ the court referred to the texts by *Mulla's Principles of Mahomedan Law*⁵⁷⁴ (as cited by the parties as an authoritative source of Muslim law) that laid out the *Hanafi* texts regarding the grounds of disqualification of mother's custody rights. Referring to such texts the court held that such provision cannot be read 'in isolation and divorced from the provisions of the Guardians and Wards Act', which gives a discretion to the court to order return of a minor to the custody of a person whom the court finds more suitable in terms of welfare of the minor. The court importantly stressed on harmonizing the two laws – Muslim law principles and the GWA provisions and held that: 'the personal law applicable has to be read harmoniously with the provisions of the Guardians and Wards Act, and in the final analysis the Court has to strike a balance between the two, the dominant consideration being the welfare of the ward'.⁵⁷⁵

⁵⁷³ AIR [1985] All 217.

⁵⁷⁴ Mulla, *Principles of Mahomedan Law* (n 459).

⁵⁷⁵ See also *Rayees Ahmad and Ors. v Respondent: Smt. Suriya and Ors.* [1896] the court held that 'From a reading of the entire petition, it is clear that it will not be in the interest of the [minor] to give her custody to [the grandmother] , though under Section 353 of the Mulla's Principles of Mahomedan Law, the maternal grand-mother would be entitled to the custody till the [minor] attains puberty'. (MANU/UP/0441/1986) para 6. ;*Shoib alias Shebu v Sabir Ali alias Shaboo* (MANU/UP/0480/1986);

Courts' attempt to such 'harmonized' interpretation of traditional Muslim law rules and welfare considerations is also evinced in *Irshad Alam v Isma Alam*⁵⁷⁶ where the court while upholding the overriding authority of the welfare consideration vis-à-vis traditional rules, noted that to some extent personal law rules would also be another 'important facet of welfare of the child' and hence 'cannot be completely side-lined'.

Again, in an attempt to interpret welfare as a consideration within and not contrary to the traditional rules of Muslim law on child custody the High Court of Bombay in *Imran Khan v Sobiya Tabassum*⁵⁷⁷ emphasized on the fact that mother's second marriage cannot outright disqualify her from getting the custody of her minor as Muslim law could not take such 'pedantic view to disqualify [the mother] for the custody of child'. The court further held, 'the principles of Mohammedan Law like other Personal Law would never be expected to be so harsh to ignore the welfare of minor child'.⁵⁷⁸ Similarly in *Yusuf v Sakkeena*⁵⁷⁹ the court held that 'When Section 17(1) of the Act is read conjunctively with the provisions contained in Section 352 [of *Mulla*], what would reveal is that the paramount welfare of the minors is the sole consideration for allowing or disallowing an application for custody of the minor children.' In similar attempt to harmonize the Muslim personal law and welfare principle, the court in *Mumtaz Begum v Mubarak Hussain*⁵⁸⁰ stated:

When personal laws are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints and prophets found any faith, they act as benefactors of the mankind as a whole, if man is God's child and if child is the father of the Man, no personal law claiming divine sanction, can afford to deny paramount consideration to the welfare of the child.

Mumtaz Begum V Mubarak Hussain, AIR [1986] MP 221; *Mohammad Khalid v Smt. Zeenat Parveen and Ors*, AIR [1988] All 252.

⁵⁷⁶ MANU/UP/0780/2013.

⁵⁷⁷ MANU/MH/1132/2016.

⁵⁷⁸ *Seelrfan Ahmed Shaikh v Mumtaz w/o Abdul Karim Sarfani & another* (AIR 1999 Bom 25).

⁵⁷⁹ AIR 1999 Ker 54.

⁵⁸⁰ AIR 1986 MP 221

In *Md. Fayaz and Smt. Amthullah Bee v Smt. R. Sabiha Begum*⁵⁸¹, the natural guardianship of the father under the traditional Muslim law rule was conceded by the court; however, welfare was viewed as an exception to this principle which could authorise the court to give custody to any other person in disregard of such natural guardianship of the father. On the ground of the father facing allegation of causing death to the minor's mother, the court found it unsafe to award custody to him as against the claim of the maternal aunt.

Similarly, mother's caregiving role was relied upon by the court in *Ali Azhar and ors v State of U.P. and ors*⁵⁸² to allow an exception to the natural right of the father. The case was initiated by filing a petition by the father for the custody of the minor son aged 10 years, stating that retention of the child by the mother is illegal. In deciding the case in favour of the mother's custody, the court took into account the wish of the child who preferred staying with the mother. With regard to the age and sex rule, the court stated-

In Muslim Law after seven years the father becomes the only guardian of the minor, specially, of male child but mother has not been relegated to the status of stranger. The nature has given her right to see, to care for and to shower affection on her off spring. For this reason the law does not recognize custody of the child with his/her mother to be illegal. (para 12).

In a number of cases involving Muslim parties, the court had directly addressed the question of conflict between the traditional rules and the welfare or best interests of the child as held under the GWA, holding welfare to be the paramount consideration overriding personal law rules. For instance, in *Rafiq v Smt. Bashiran*⁵⁸³ it was held 'where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter prevail over the former.' The court further illustrated that personal law should be taken into account only where its rules are not

⁵⁸¹ MANU/AP/3316/2013.

⁵⁸² MANU/UP/3196/2016.

⁵⁸³ AIR 1963 Raj 239.

in conflict with the provisions of the GWA.⁵⁸⁴ Similarly in *Seikh Simran Rahaman v Sekh Jiayur Rahaman*⁵⁸⁵ upholding the paramount standard of welfare principle, the Calcutta High Court held that 'if there is a conflict between personal law to which the minor is subject and consideration of his or her welfare, the latter must prevail'.

The traditional rule regarding disqualification of mother's custody right on her remarriage had been also referred to in several cases. Often in such cases, the courts had considered welfare of the child as an exception to the traditional rules or sometimes an overriding consideration that would allow departure from such traditional rule. Generally the court appears sympathetic towards mother's right of custody considering her natural care-giving role and bond of affection a child shares with her. For instance, in *Mst. Sundri V Respondent: Mohamad Fafoo and another*⁵⁸⁶ the court held:

A mother or a female relation of a minor child may lose her preferential right to be appointed as a guardian if she contracts a remarriage with a stranger but that fact by itself does not disqualify her to be appointed as a guardian if it is otherwise in the interest of the minor. The welfare of the minor is of paramount consideration ...⁵⁸⁷

In *Saiful Ismal Habeeb Ali v Asma Begum*⁵⁸⁸ the court similarly held that 'only on the ground that the respondent [mother] has remarried, [he] cannot claim right of custody relying on the provision under Section 352 of the Mahomedan Law. The ultimate consideration for custody of the child is the welfare and well-being of the child and desire of the child.' Although the court had clearly declared welfare to be the overriding consideration denying superiority of traditional established norms, the judgment did not explain as to why the court chose to give such weight to the child's welfare despite presence of a contrary traditional norm. Court in this case, was perhaps particularly convinced by the child's express wish to live with his mother.

⁵⁸⁴ See *Noushad M. v Jubuna S.S* (MANU/KE/0908/2013).

⁵⁸⁵ F.M.A. Nos. 1969 and 1970 of 2015.

⁵⁸⁶ AIR 1971 J&K 43.

⁵⁸⁷ *ibid* 46.

⁵⁸⁸ MANU/AP/3305/2013.

Also the child's young age together with his perceived emotional and physical dependence on the mother might have influenced the court in deciding the case in favour of the mother.

In *Hassan Rawther K.K. and Another v Dr. S. Abdul Azeez*⁵⁸⁹ the Kerala High Court granted custody of the minor girl aged 11 to the mother on the ground that by entrusting her with the custody, the interests of the child will be best served. Setting aside the traditional rules of custody (regarding disqualification on mother's remarriage and father's superior authority of being the natural guardian of the minor) the court gave the following reasoning:

The fact that the [the mother] got remarried is, [...] by itself not a sufficient ground to reject her claim for interim custody. That the father is the natural guardian is also not reckoned by us as a sufficient reason to entrust the child to the custody of the father.

Although welfare had been frequently considered as the overriding consideration justifying departure from traditional rules, the Indian courts had also taken relatively rigid approach in several cases in terms of applying the traditional rules of Muslim law. There are cases where the court had directly followed the traditional rules in deciding the custody of a child, while on the other hand there are decisions, which although had considered welfare of the child, were mainly influenced, by those traditional rules.

In *Smt. Imtiaz Bano v Masood Ahmad Jafri and Ors*⁵⁹⁰ the Allahabad High Court allowed the habeas corpus petition by the mother on the express ground that the writ would provide immediate relief whereas a suit under GWA would lead to a long drawn litigation and by the time it ends mother's right of custody as per Muslim law would end. The court awarded custody to the petitioner mother on the ground of the traditional age-sex rules stating: 'The Hanafi Mohammedan Law by which the contesting parties are governed entitles the petitioner as mother to the custody of her

⁵⁸⁹ Mat. A. No. 1011 of 2009.

⁵⁹⁰ AIR 1979 All 25.

two infant sons who are below the age of seven years in preference to the claim of the father'. Additionally, although the court also relied on certain welfare-based considerations like father's remarriage, the traditional rules nevertheless served as a strong attributor to the decision.

In *Shoib alias Shebu v Sabir Ali alias Shaboo*⁵⁹¹ the court again made extensive reference to the traditional rules of *hizanat* citing from *Mulla's Principles of Mohammedan Law* which states that the mother has custody rights over a male child till he attains seven years of age. The court on the other hand also endorsed the natural guardianship right of the father which would allow him to even retain the custody of a minor boy of below seven years of age unless 'it would be in the interest of welfare of the child to ensure that his custody is restored to the mother'. The court not only found that there was no ground for denying father's right but had also relied on the 'anticipation of the mother settling down in Pakistan and getting married' again in giving the custody to the father.

In *Master Mehdi Hasan v State of U.P. and ors*⁵⁹² the custodial dispute was between the maternal grandparents and the mother of the child who had remarried her deceased husband's brother. The court took a rigid approach in applying the rule regarding mother's remarriage in holding that the maternal grandparents were better suited for the custody of the child. It reasoned that: 'The legal position is not disputed that the mother is a better guardian than maternal grandmother and grandfather. But this consideration changes the moment the mother remarried with the brother of her late husband.' This decision firstly reflects the court's rigid approach towards applying the traditional rules in disregard of child's best interests. However the fact that the mother in this case had actually married the husband's brother who is within the prohibited degrees⁵⁹³ in relation to the daughter was entirely ignored by the court. Perhaps the court's failure to account for such a fact points towards court's limited knowledge on the traditional texts of the Muslim personal laws.

⁵⁹¹ MANU/UP/0480/1986.

⁵⁹² MANU/UP/1219/1996.

⁵⁹³ Islamic law prohibits a man from marrying specific classes of women who are related to him through blood, affinity or by fosterage. Mulla, *Principles of Mahomedan Law* (n 459), 354.

Such strong endorsement in favour of the traditional rule on mother's remarriage was also seen in *Arafathunnisa v T.I. Zeeyavudeen, Taraja Beevi and Mohammed Yasin*.⁵⁹⁴ The main issue in this case was whether the mother could retain the custody of the minor daughter despite her second marriage. The court decreed in favour of the father stating that:

If a woman marries a person not related to the child within a prohibited degree i.e. a stranger, it is a disqualification under the Mohammedan Law to have the custody of the child. Though under the Mohammedan Law she is entitled to have the child till she attains puberty, since the mother had married a stranger secondly she is not entitled to have the custody of the child. (para 9).

The court however did refer to 'the paramount interest and the welfare of the child', but such reference seemed merely formal as the decision was heavily influenced by the traditional rule of mother's disqualification on remarriage.

In *Musstt. Rahima Khatoon v Musstt. Saburjanessa*,⁵⁹⁵ the Gauhati High Court rescinded the guardianship order obtained earlier by the mother, on an application by the minor's paternal grandmother on the ground of her remarriage. The court explicitly referred that, 'as regards the mother or a female guardian, marriage to a person not related to the child within the prohibited degrees is a bar to guardianship'. The court further illustrated the list of preferred female custodians in case of mother's disqualification and accordingly awarded the custody of the minor to the maternal grandmother. However the court did mention the relevance of welfare in deciding guardianship, although the key reasoning for the court was entirely based on the traditional rules of custody without considering the case from the perspective of the child's best interests.

Commenting on the judicial trends in India with regard to custody cases between Muslim parties, the Law Commission of India in its 2015 Report had noted that the 'High Courts have mostly decided in favour of the mother only when her right to

⁵⁹⁴ MANU/TN/2723/2010.

⁵⁹⁵ AIR [1996] Gau 33.

custody was supported by Muslim law'.⁵⁹⁶ Indeed, in cases where the courts had relied on the overriding effect of the welfare consideration in disputes between Muslim parties, cases were largely decided in favour of the mother who was otherwise entitled to the custody according to the traditional rules. Thus courts' emphasis on welfare in a case, may have been due to the fact that the traditional norms also support the mother's right with whom the court considered that welfare of the child would be better protected in that case. Which then leads to the analogy that courts may find it difficult to emphasise on welfare with the same vigour in cases where the religious norms are in clear contradiction to court's considerations of welfare.

Thus, in *Suharabi v. D. Mohammed*,⁵⁹⁷ when the father of a one-year-old girl claimed her custody from her mother on the ground of the mother being in poor financial situation, the Kerala High Court held that 'the mother was authorized to have custody of a daughter of that age under Islamic law'.⁵⁹⁸ On the other hand, in *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda*,⁵⁹⁹ the Andhra Pradesh High Court regarded a mother as not entitled to the custody of an eleven-year-old boy under the traditional rules of *hizanat*, and 'awarded the custody to the father, on the ground that Muslim law allowed the mother to have exclusive custody only until the age of seven'.⁶⁰⁰ The above decisions clearly reflect influence of the traditional rules of *hizanat* and court's rigid interpretation of what those principles would pertain.

In *Mohd. Atiq v Shamim Begum*,⁶⁰¹ the court stated its unequivocal support in favour of welfare of the minor, but in granting custody of a male child below 7 years of age to the mother, the court also expressly relied on the traditional age-sex rule of Muslim law which favours mother's custody right over boys till seven years of age.⁶⁰² It also appeared from the case analysis that the Indian courts had often relied on the

⁵⁹⁶ . Law Commission Report (n 567).

⁵⁹⁷ AIR 1988 Ker 30.

⁵⁹⁸ Law Commission Report (n 567).

⁵⁹⁹ AIR 1983 AP 106.

⁶⁰⁰ Law Commission Report (n 567).

⁶⁰¹ MANU/UP/0691/1989.

⁶⁰² See also in *Irfan V State of U.P* [(2015)ILR 1All17].

mother's caregiving role vis-à-vis children of tender age in disregard of the traditional rules of Muslim law.⁶⁰³

Again in *Vakil Ahmad v Aqila Khatoon and anr*⁶⁰⁴ the court in awarding custody to the mother considered that welfare was presumed to be in the person who is entitled under the personal law rules to such custody. It held: 'the question of the welfare of the child cannot be weighed in golden scales and a person, who is, in law, entitled to the custody of the child, cannot be deprived of that right simply because the other parents may bring up the child in a slightly better way'.

In *Irfan v State of U.P.*,⁶⁰⁵ in an appeal against a judgment passed in a habeas corpus writ, the Allahabad High Court relied on the welfare consideration in giving custody of a minor girl to the mother. It was held: 'in a proceeding concerning the custody of a minor, the courts must have supreme regard to the welfare of the minor as first and paramount consideration and must treat any rights, priorities or preferences of the parents or of either of them or of any other person as subordinate thereto'. However, although religious law was stated to be a subordinate consideration, the court had explicitly mentioned all the relevant traditional rules of Muslim law that entitled the mother to the *hizanat* of the daughter. In finding the mother to be more suitable in ensuring welfare of the child, the fact that she did not marry again was considered crucial - which again is a traditional rule of disqualification under the Muslim personal law. Significantly, despite considering welfare to be the paramount consideration, the court expressly made the order of custody of the minor daughter in favour of the mother 'till she attains the age of puberty'. By reference to such a criteria that was essentially the traditional rule of *hizanat* and making mother's custody subject to such a condition, the court had in fact disregarded the principle of best interests of the child despite its extensive reference in the judgment.

⁶⁰³ For instance in *Suharabi v D. Muhammed* (AIR 1988 Ker 30), the court held that: 'Merely because the respondent is better placed economically the custody of the child cannot be denied to the petitioner especially in view of the fact that the child is of tender age and as the personal law of the parties make definite preference on the mother. [...] From every angle welfare of the minor in this case will be better protected if she is allowed to remain with her mother who alone can bestow best attention possible on her'.

⁶⁰⁴ MANU/UP/0151/1994.

⁶⁰⁵ Special Appeal No. - 1015 of 2014.

In a habeas corpus writ petition in *Aisha (Minor) and another v State of U.P.*,⁶⁰⁶ the court stated that ‘it is clear from the position of law as it stands that so far as the custody of a minor child is concerned, the mother is entitled to it until the child is of tender age, unless there be a clear disentitlement inferable.’ However, as an illustration of the grounds for such ‘disentitlement’, the court referred to the traditional rule of Mother’s disqualification from *hizanat* on her remarriage holding: ‘This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life.’ Here also reference was made to the relevant *Hanafi* texts (including *Hedaya*) to illustrate mother’s preferential right of custody over the minor children under the traditional rules of Muslim law.

Similarly, in a 2022 decision of the High Court of Karnataka⁶⁰⁷ the court in bestowing custody to a Muslim mother, in addition to the welfare principle, relied on the texts by *Mullah*⁶⁰⁸ as per which a mother would not be disqualified for custody of a child on being divorced. In a 2021 decision of *Ujaif v State of U.P. and ors*⁶⁰⁹ the court again relied on the text by *Mulla*, which stated the *Hanafi* list of priority for the female relations who would be entitled to the custody of a minor in the absence of the mother. Relying on the rule the court viewed custody of the child to the maternal grandmother and maternal grandfather as legal. The court added that the ‘entitlement of the mother or failing the mother, the mother’s mother of the minor child, is up to a certain age according to the sex of the child’. The court further emphasised that the maternal grandmother is nevertheless ‘not the natural guardian and it is the father who is the legal guardian under the personal law’. In coming to such conclusion the court relied on the Privy Council decision in *Imambandi and others v Mutsaddi and others*.⁶¹⁰

Thus, the judicial trend in India in custody litigations between Muslims cannot be said to be one that has wholeheartedly embraced the principle of best interests of

⁶⁰⁶ Habeas Corpus writ petition no. - 484 of 2020.

⁶⁰⁷ *Riyaz v Noorjan A* (MANU/KA/3631/2022).

⁶⁰⁸ Mulla, *Principles of Mahomedan Law* (n 459) 354.

⁶⁰⁹ MANU/UP/0621/2021.

⁶¹⁰ ILR (1918) 345 PC 878.

the child. Although the general reliance on the principle in other decisions have led the courts to also include the principle in determining custody and guardianship issues between Muslims, the courts have generally shown reservation in abandoning Muslim law principles altogether in favour of welfare considerations. Moreover, in terms of guardianship and custody cases particularly between Muslim parties, many discrepancies still remain 'both within and between High Courts'.⁶¹¹ The standard of best interests and its juxtaposition with traditional rules in custody disputes thus does not seem to have followed any coherent trend in the different High Courts of India. Also, very few cases actually reach the Supreme Court 'given the nature of the proceedings relating to guardianship and the delays incurred by litigation' limiting as such prospects to 'unify the law' in this regard.⁶¹²

The Indian Supreme Court however was confronted with the question of a possible conflict between traditional rules of Muslim personal law and the provisions of the welfare considerations under the GWA in *Athar Hussain v Syed Siraj Ahmed*.⁶¹³ In this case the maternal grandfather was awarded interim custody of the two minors by the High Court of Karnataka, which had based its decision on the traditional custody principles that gave preference to the female relations of the mother, including maternal aunt, in case of her absence. The High Court held that 'preferential rights regarding the custody of the minor children rests with the maternal grandparents'.⁶¹⁴ On appeal by the father the Supreme Court maintained the decision of the Karnataka High Court. Although the Supreme Court had considered the High Court's position regarding the overriding nature of Muslim personal law as 'doubtful', it did not also 'explicitly strike personal law down completely'.⁶¹⁵ Typical to the cases involving Muslim litigants, the Supreme Court here was also cautious in not challenging the natural guardianship of the father under the traditional rules principles. The court held:

As far as the matter of guardianship is concerned, the prima facie case lies in

⁶¹¹ Dequen (n 491) 58.

⁶¹² *ibid.*

⁶¹³ AIR 2010 SC 1417.

⁶¹⁴ Civil Appeal No.11 of 2010, para 25.

⁶¹⁵ Dequen (n 491) 59.

favour of the father, as under section 19 of the [GWA], unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. (para 25).

The Court then emphasized that the question of 'custody' would be different from that of 'guardianship', whereby the father could continue to be the natural guardian of the children while the custody of the child may remain with another person to whom best interests would be better served. Thus, the court to some extent expressed a position similar to the actual and constructive custody doctrine. However as evident from the recent judgments, 'such "constructive" custody is no longer used to assert the father's 'natural/*de jure* right of physical custody, but rather is a natural duty of maintenance'.⁶¹⁶

5.6 Conclusions

The position of the Indian courts in terms of addressing the question of custody between the two considerations of child's best interests and traditional rules of custody and guardianship is rather inconsistent. Although generally principle of best interests of the child has been well established to be the paramount judicial consideration in child custody cases in India,⁶¹⁷ for Muslims the judicial approach appeared to be more restrained in terms of relying on new interpretations or authorities. Even when the courts applied the best interests standard to decide a dispute between Muslim litigants, efforts to justify the reasoning in light of the traditional rules of custody under Muslim law were evident.

There is also a noticeable reliance in most cases relating to Muslim parties, on the translated compendiums from the colonial period, such as Baillie's Digest, as well as on the Digests of compiled and updated case laws, such as those compiled by Mulla and Hidayatullah.⁶¹⁸ Such sweeping reliance on these particular sources of traditional

⁶¹⁶ *ibid.*

⁶¹⁷ However, with regard to family court cases, the concept of best interests of the child or welfare is not commonly mentioned Asha Bajpai, 'Custody and Guardianship of Children in India'(2005) 39(2) Family Law Quarterly 446.

⁶¹⁸ Mulla, *Principles of Mahomedan Law* (n 459).

Hanafi texts on custody, signifies the reservations of the Indian judiciary to ‘expound novel Islamic legal concepts’ which may have been due to the Muslim law’s minority status in India.⁶¹⁹ Writing on this cautiousness of the Indian judiciary in respect of applying best interests principle in cases involving custody, Dequen thus rightly remarked, ‘The will not to exercise undue influence, on one hand, and the fear of altering religious norms deemed to preserve a minority’s social and cultural identity, on the other, have thus left Islamic law with but little opportunity to evolve’.⁶²⁰ The political sensitivity attached to the questions of adjudicating Muslim personal laws in India and the past context of judicial decisions facing backlash from the Muslim religious groups as discussed in the beginning of this chapter perhaps explain this restricted judicial attitude of the Indian courts in addressing best interests of the child in Muslim child custody disputes.

⁶¹⁹ Dequen (n 491) 35.

⁶²⁰ *ibid* 39.

Chapter 6: Overview of the Judicial Trends in Applying Best Interests Principle in Child Custody Cases in Pakistan Prior to 1970s (1947 – 1970)

6.1 Introduction

Pakistan was created in 1947 for the Muslims of the Indian subcontinent on the basis of 'Muslim Nationhood'⁶²¹ and as such by design Pakistan was a Muslim majority state. Although until 1956, Pakistan did not have a constitution, the 'role of Islam in Pakistan's state nationalism'⁶²² was revealed clearly in 1949 when the Constituent Assembly passed the Objective Resolution which provided 'hints of Pakistan's Islamic identity'.⁶²³ The Resolution, considered as one of the most important constitutional documents of Pakistan, accepted the 'sovereignty' of Allah and made specific references to Islam as set out in the 'Quran' and 'Sunnah'.

The 1956 Constitution further established the significance of the role of Islam in Pakistan by adopting the Objectives Resolution in the Preamble⁶²⁴ and naming Pakistan as the Islamic Republic of Pakistan.⁶²⁵ Article 198 of the Constitution significantly declared that: 'No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions'.

The 1956 Constitution was abrogated in 1958 after a military coup led by General Ayub Khan and the 1962 Constitution was promulgated thereafter. With Ayub Khan's modernist approach and generally opposing stance to *ulamas*, the original 1962 Constitution 'tried to reduce Islam's Role in Pakistan's state nationalism'.⁶²⁶

⁶²¹ Raja M. Ali Saleem, 'Effect of Islam's Role in State Nationalism on the Islamization of Government: Case Studies of Turkey and Pakistan' (PhD Thesis, George Mason University 2015) 127.

⁶²² *ibid* 128.

⁶²³ Zahid Shahab Ahmed and Ihsan Yilmaz, 'Islamists and the Incremental Islamisation of Pakistan: The Case of Women's Rights' (2021) 59(3) *Commonwealth & Comparative Politics* 275, 276.

⁶²⁴ Preamble to the Constitution of Pakistan 1956.

⁶²⁵ *Ibid* art 1(1).

⁶²⁶ For instance, the name Islamic Republic of Pakistan was changed to being the Republic of Pakistan and there was no Article similar to Article 198 of the 1956 Constitution. Saleem (n 621) 130-132.

However, most of the changes faced criticisms from the religious groups and traditionalists and were later inserted back again by the first amendment to the 1962 Constitution.⁶²⁷

Through Ayub Khan's military rule, Pakistan underwent a 'different kind of Islamisation from the eras that followed'.⁶²⁸ As a modernist he created the Advisory Council of Islamic Ideology (ACII) in 1962, which was thought to be a step towards limiting the influence of *ulama* in matters of state.⁶²⁹ However contemporary authors have noted, this did not happen the way Ayub Khan had intended because of the 'meanings associated with "Islamic Ideology" by Islamists who began demanding more presence in the ACII, considering its mandate their domain.'⁶³⁰

That 'Islam was an important part of Pakistan's state nationalism' was substantiated by the 'Islamic provisions' of both the 1956 and the 1962 constitutions.⁶³¹ Such Islamic state identity of Pakistan, coexisting with the constitutional guarantee of gender equality and non-discrimination, induced tension between traditionalists and the reformists. However, because of the significant normative pluralism in the family laws in Pakistan,⁶³² the disagreement was even more significant where proposals for reforming the family laws were strongly opposed by the traditionalists.⁶³³

⁶²⁷ Saleem (n 621) 130.

⁶²⁸ Ahmed and Yilmaz (n 623) 278.

⁶²⁹ *ibid* 279; Saleem (n 621) 131-132.

⁶³⁰ Ahmed and Yilmaz (n 623) 279.

⁶³¹ Saleem (n 621) 132.

⁶³² 'Family law in Pakistan ... is influenced by formal and informal plural normative orders which appear in the form of statutory law, as well as customary, religious and patriarchal norms.' Ayesha Shahid, 'Post-Divorce Maintenance Rights for Muslim Women in Pakistan and Iran: Making the Case for Law Reform' (2018) 15 *Muslim World Journal of Human Rights* 59, 60.

⁶³³ See Siobhan Mullally, 'Women, Islamisation and Human Rights in Pakistan: Developing Strategies of Resistance' in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law A Critical Examination of Islamic State Practices* (Studies in Religion, Secular Beliefs and Human Rights Series, Brill 2007) vol 6 379, 387.

6.2 The MFLO and the Efforts of Modernization of Family Law in Pakistan

The family law reform in Pakistan during 1947 to 1970 is marked by the most noteworthy⁶³⁴ reform legislation - the Muslim Family Law Reform Ordinance, 1961 (MFLO)⁶³⁵ which faced serious resentment from religious groups and *ulamas* and questions surrounding its repugnancy with Islam was constantly debated within the Pakistani legal discourse.⁶³⁶ The MFLO is often noted in academic writings as culminated out of the campaigns of the All-Pakistan Women's Association (APWA) - the prominent women rights organization active in the post independence period in Pakistan.⁶³⁷ APWA's campaign for ensuring equal status for women, led to the initiation of the official enquiry set up by the Pakistan government through formation of the Commission on Marriage and Family Laws in 1955⁶³⁸ to consider necessary reforms in the family laws. The Commission gave its report in 1956 recommending a number of substantive changes in Muslim family law,⁶³⁹ relying broadly on '*ijtihad*' for the theoretical foundation of their recommendations.⁶⁴⁰ The Commission asserted the necessity of reforming the traditional rules of Muslim personal laws in the post-colonial Pakistan:

What was accepted as the personal law of the Muslims was conservative, rigid and in many respects undefined, but owing to political subjection any liberalization or reconstruction was well nigh impossible. Now that Pakistan is a free and sovereign State created expressly with the purpose of giving Muslims an opportunity to remold their lives and laws according to the fundamentals of

⁶³⁴ Ahmad Hussain and others, 'The Muslim Family Law Ordinance 1961: Pioneer of Women Empowerment in Pakistan' (2021) 58(1) Journal of the Research Society of Pakistan 210.

⁶³⁵ Ordinance No. VIII of 1961.

⁶³⁶ See Serajuddin, *Shari'a Law and Society* (n 371).

⁶³⁷ See Sarah Ansari, 'Polygamy, Purdah and Political Representation: Engendering Citizenship in 1950s Pakistan' (2009) 43(6) Modern Asian Studies 1421; Muhammad Zubair Abbasi, 'Judicial Ijtihad as a Tool for Legal Reform' (2017) 24(4) Islamic Law and Society 384.

⁶³⁸ Preamble to the MFLO 1961 also refers to the Commission's report: 'An Ordinance to give effect to certain recommendations of the Commission on Marriage and Family Laws'.

⁶³⁹ Muhammad Rashid Feroze, *The Reform in Family Laws in the Muslim World* (Islamic Studies 1962) vol 1 107.

⁶⁴⁰ Serajuddin, *Shari'a Law and Society* (n 371) 35.

Islam, there is no excuse for any further delay in converting that aspiration into reality.⁶⁴¹

However the Report of the Commission was severely opposed by the *ulama* for distorting the injunctions of the Quran and the Sunnah. The note of dissent by *Maulana* Ihtisham-UI-Huq, the lone religious scholar in the seven-member Commission, vigorously criticised the recommendations and challenged the qualifications of the Commission member to exercise *ijtihad*.⁶⁴² To the *ulama*, the exercise of *ijtihad* by the Commission to bring about the changes in Muslim law was 'anathema and heresy'.⁶⁴³ Due to the intense pressure from the orthodox traditionalists against the Commission's recommendations, the report was shelved till Ayub Khan took over power in 1958. Being approached by the APWA, General Ayub Khan who was 'highly contemptuous of the *ulama* and closer to the modernists point of view' agreed to implement the report.⁶⁴⁴ Accordingly despite the clear resentment shown by the orthodox religious groups in March 1961, Ayub Kahn promulgated the Muslim Family Law Ordinance, 1961. Crediting the modernist judicial trend in the Muslim family laws during the 1960s, Pearl noted that the process of modernist reforms was 'given an added impetus because of the active campaigning of the All Pakistan Women's Association whose primary target throughout the 1950's and 1960's has been to make the women of Pakistan aware of their basic human dignity'.⁶⁴⁵

However, the MFLO did not fully reflect the recommendations of the Commission and was considered as a 'compromise between the dramatic reforms proposed by the Commission and the practices advocated by conservative Muslims'.⁶⁴⁶ The years following the 1947 partition and independence of Pakistan, the legal climate characterized mainly by the MFLO was in favour of modern and socially desirable

⁶⁴¹ Serajuddin, *Sharia Law and Society* (n 371) 37.

⁶⁴² Ijtihad was considered to be an exercise only within the competence of a *mujtahid* who had the knowledge and scholarship in the original sources of Islamic law, Serajuddin, *Shari'a Law and Society* (n 371) 55.

⁶⁴³ Serajuddin, *Shari'a Law and Society* (n 371) 55.

⁶⁴⁴ *ibid* 57.

⁶⁴⁵ Pearl (n 385) 171.

⁶⁴⁶ Davls (n 6) 123.

changes to traditional Muslim law rules particularly those that impacted gender equality. 1960's onwards the Pakistani judiciary likewise demonstrated their support for modernist approach and boldly claimed their right to exercised *ijtihad*. Since such exercise by the judges through liberal interpretations of established traditional rules of the classical jurists were not similar to how *ijtihad* is commonly perceived under Muslim law,⁶⁴⁷ such exercise of *ijtihad* by the courts had been often described by the academic scholarship as 'judicial activism'⁶⁴⁸ 'judicial *ijtihad*'⁶⁴⁹ or an 'enlightened judicial application of *ijtihad*'.⁶⁵⁰

While MFLO was not entirely successful in bringing radical reforms within the Muslim personal laws having faced backlash from the traditionalists and religious political groups, the Pakistan judiciary especially the 1960s onwards had strongly demonstrated judicial activism by reforming the traditional rules held by the classical *Hanafi* jurists. Commenting on the prevailing legal climate post partition in Pakistan and the significant reformist role of the judiciary, Lucy Carroll wrote:

Given the political and ideological turmoil in Pakistan, a self proclaimed Islamic Republic, still divided on exactly what that means and resultant opposition that greeted the reforms introduced by the Muslim Family Law Ordinance, judicial innovation and reinterpretation are the only practical and possible modes of introducing reform.⁶⁵¹

6.3 Activist Role of the Judiciary Post Independence

Indeed post independence; the superior judiciary of Pakistan played the key role in reinterpreting the Muslim law principles based on Quran and Sunnah and disregarded

⁶⁴⁷ Under Muslim law only a 'mujtahid' having religious scholarship over sharia law could interpret rules of Muslim law by exercising *ijtihad*. See Kamali, *Principles of Islamic Jurisprudence* (337).

⁶⁴⁸ Serjuddin, *Muslim Family Law* (n 2) 5.

⁶⁴⁹ Lucy Carroll, 'The Muslim Family Laws Ordinance, 1961: Provisions and Procedures - A Reference Paper for Current Research' (1979) 13(1) Contributions to Indian Sociology (NS) 141.

⁶⁵⁰ Hoque and Khan (n 2) 204.

⁶⁵¹ Carroll, 'The Muslim Family Laws Ordinance' (n 649) 141.

the established views of the majority of the classical jurists on several occasions.⁶⁵² One important area where Pakistan judiciary had played such crucial reformist role was Muslim wives' right to dissolve marriage (*khul*)⁶⁵³. According to the traditional *Hanafi* texts wife can release herself from the marriage through *Khul* by giving such compensation as may persuade the husband to give his consent to release her from the marital tie⁶⁵⁴. Earlier, the British courts had established the precedent based on *Hanafi* texts that for *Khul*, husband's consent is required.⁶⁵⁵ The similar rigid interpretations were followed also in the post-colonial Pakistan⁶⁵⁶ until 1959, when the Lahore High Court in the *Balqis Fatima*⁶⁵⁷ case, decided on the basis of reinterpretation of the relevant Quranic verse⁶⁵⁸ that consent of the husband was not necessary for the wife to dissolve her marriage by *Khul*.⁶⁵⁹ The court emphasized on its competence to reinterpret Quranic provisions without having to blindly follow the opinions of the classical jurists.⁶⁶⁰ Writing on the *Balqis Fatima* case, Hoebel observes:

In one resounding stroke the court ... resolved in its own favor the great

⁶⁵² Abbasi (n 637) 387.

⁶⁵³ According to the traditional *Hanafi* law, 'in the *Khul* form the divorce takes place at the instance of the wife and with the consent of the husband, for which the wife as a rule gives some consideration to the husband'. Asaf A.A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh* (Tahir Mahmood ed, 2nd edn OUP 2005) 123.

⁶⁵⁴ Lucy Carroll, 'Qur'an 2:229 "A Charter Granted to the Wife"?' (1996) 3(1) *Islamic law and Society* 91,93.

⁶⁵⁵ *Monshee Buzl-ul-Ruheem v Luteefut-oon-Nissa* [1867] 8 MIA 379;

⁶⁵⁶ *Sayeeda Khanam v Muhammad Sami* PLD [1952] Lahore 113, 136, the Lahore High Court held:

'If wives were allowed to dissolve their marriages, without the consent of their husbands, by merely giving up their dowers, paid or promised to be paid, the institution of marriage would be meaningless as there would be no stability attached to it.'

⁶⁵⁷ *Mst. Balquis Fatima v Najm-ul-Ikram Qureshi*, PLD [1959] Lahore 566.

⁶⁵⁸ Q. 2:229 reads: 'Divorce is only permissible twice: after that, the husbands should either retain wives on equitable terms, or let them go with kindness. It is not lawful for you, [men], to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye [judges] do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah; so do not transgress them. If any do transgress the limits ordained by Allah, such persons wrong [themselves as well as others]'. Abdullah Yūsuf 'Alī, *The Holy Qur'an* (Islamic Book Trust 2007) 39-40.

⁶⁵⁹ The judges observed: 'The words [in Q. 2:229] "if you fear" being addressed to the state or the judge, they can only mean that the judge is entitled to pass an order even though the husband does not agree.' PLD [1959] Lahore 566, 578.

⁶⁶⁰ *ibid* 584.

question as to who is competent to determine the precepts of Islam. The traditional position of the ulamas the exclusive knowers of the law is brushed aside.⁶⁶¹

The *Balqis Fatima* case thus represented an 'important milestone on the road toward emancipation of the Muslim women in the subcontinent'.⁶⁶² In 1967, the Supreme Court of Pakistan confirmed the principle upheld in the *Balqis Fatima* case in *Khurshid Bibi v Baboo Muhammad Amin*,⁶⁶³ where the court similarly interpreted the relevant *Quranic* verses and *Hadith* and concluded that husband's consent is not required for a wife to obtain *Khula*. Challenging the binding authority of the opinions of the classical jurists the court observed:

The opinions of jurists and commentators stand on no higher footing than that of reasoning of men falling in the category of secondary sources of Muslim law and, cannot therefore, compare in weight or authority with, nor alter, the Quranic law or the *Ahadith*. If the opinions of the jurists conflict with the Quran and the Sunnah, they are not binding on courts and it is our duty as true Muslims to obey the word of God and the Holy Prophet.⁶⁶⁴

Another area where the superior judiciary of Pakistan had reinterpreted established *Hanafi* rules was the issue of past maintenance. Under the traditional *Hanafi* law a court decree of maintenance was to be operable only from the date of issuance of the order and arrears of maintenance as such could not be claimed.⁶⁶⁵ The Pakistan Supreme Court in 1966 in *Sardar Muhammad v Nasima Bibi*⁶⁶⁶ allowed past maintenance to a Muslim women holding that '*Hanafi* rule is inconsistent with the Sharia principle that a husband's obligation to maintain his wife commences with the

⁶⁶¹ E. Adamson Hoebel, 'Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan' (1965) 67(6) *American Anthropologists* 50, 51.

⁶⁶² Carroll (n 654) 102.

⁶⁶³ PLD [1967] SC 97.

⁶⁶⁴ *ibid* 61.

⁶⁶⁵ Serajuddin, *Muslim Family Law* (n 2) 137.

⁶⁶⁶ PLD [1966] (WP) Lah 703.

performance of the marriage'.⁶⁶⁷

Thus in the 1960s onwards in a number of decisions, the Pakistan superior judiciary had forcefully claimed its right to reinterpret traditional rules of Muslim personal law holding that 'reading and understanding the Quran is not the privilege or right of one individual or two [and]... the commentaries [of the classical jurists] cannot be said to be the last word on the subject.'⁶⁶⁸ Such judicial activism by the Pakistan judiciary in the 1960s was equally reflected in the decisions regarding custody of children.

6.4 Judicial Trends Prior to the 1960's

Prior to the mid-1960s, the decisions on custody and guardianship however reflected more or less rigid interpretation of the traditional rules. The Anglo Muhammadan law rigidly applied by the colonial courts had in fact continued to influence the Pakistan judiciary immediately after independence. In the post-colonial period one of the earlier custody cases in Pakistan, which reflected the court's strict adherence to the traditional *Hanafi* law of *hizanat*, is, *Ali Akbar v Mst. Kaniz Maryam*.⁶⁶⁹ In this case, a twelve-year-old boy was given to the custody of his father on the ground that the father had 'inalienable right to the custody of his children'.⁶⁷⁰ The father's application was originally filed under section 25 of the GWA, which requires return of the ward to the guardian only if it is in the welfare of the latter, and the court accordingly addressed the issue of the welfare of the child. However, the court interpreted the requirement of 'welfare' under section 25 as not being in conflict with the traditional age-sex rule of Muslim law because, in the opinion of the court, there was an irrefutable presumption of welfare in favour of the person to whom Muslim law gives custody rights. The court observed that 'it cannot possibly be assumed that Muhammadan Law grants the custody to a person the grant to whom of custody is not in the interests of the minor'.⁶⁷¹ Thus the presumption of welfare placed upon the

⁶⁶⁷ Serajuddin, *Muslim Family Law* (n 2) 138.

⁶⁶⁸ *Mst. Rashida Begum v Shahab Din*, PLD [1960] (WP) Lah 1142, 1153-1154.

⁶⁶⁹ PLD [1956] Lah 484.

⁶⁷⁰ *ibid* 489, quoting *Mst. Basant Kaur v Gian Singh and others*, AIR [1939] Lah 359.

⁶⁷¹ *ibid* 488.

father's right over child's custody under the traditional rules of *hizanat* was considered generally undisputable.

Besides the rule of 'ordinary presumption of the welfare',⁶⁷² the court in *Ali Akbar* also based its reasoning on the father's superior right of custody which was bestowed on him by the principles of Muslim law. The child's custody was mainly viewed by the court as a parental right, which is conditioned by what was considered to be the 'law' for custody and not by the interests of the child in question. Nevertheless, the court in *Ali Akbar* also seemed to have accepted that even such a right of the father could be varied, only if there were 'overwhelming circumstances' for 'depriving' him of the custody of his child. However, the father's remarriage and the separation of the boy from his mother and his other two siblings were held to be insufficiently 'strong reasons' and 'hardly a serious consideration' to deprive the father of his right of custody.⁶⁷³ It is worth mentioning, however, that for these same reasons, the lower court in this case had in fact granted the custody of the boy to the mother, thereby espousing a non-orthodox route.⁶⁷⁴

Adopting the same rigid application of the rules of guardianship, a number of other custody cases defined the orthodox position of the earlier Pakistani courts' decisions. Balancing the welfare test with the requirement in section 17 of the GWA which emphasizes that in appointing a guardian the court shall be guided by the 'law to which the minor is subject', the court in *Chand Bibi v Bulbullah*⁶⁷⁵ held that, 'the language of the phrase 'consistently with the law to which the minor is subject' clearly means that the appointment should be consistent and not inconsistent with the personal law of the minor'.⁶⁷⁶ However, needless to mention that following the personal law rules rigidly will not always result in ensuring child's overall welfare. This approach thus practically leaves no scope for the best interests of the child to be taken into consideration in coming to a decision on custody and guardianship.

⁶⁷² *ibid.*

⁶⁷³ *ibid* 489.

⁶⁷⁴ Although, as previously discussed, the lower court's decision was rejected on appeal.

⁶⁷⁵ PLD [1958] Pesh 26.

⁶⁷⁶ *ibid* 28.

This view was further extended in *Khanamji v Farman Ali*,⁶⁷⁷ where the court held that even if the father otherwise neglects the children and fails to maintain them despite a court's order, the courts have no authority to deny him the custody of the children under the GWA.⁶⁷⁸ Consideration of welfare or best interests of the children thereby was completely abandoned by the indisputable presumption of welfare placed upon the traditional rules. The earlier decisions thus reflected a rigid application of the traditional *Hanafi* texts on custody laws. Courts were less concerned with the welfare of the children in custody disputes and were rather enforcing superior right of the father as a legal guardian under the traditional rules. This earlier trend was rather influenced by the prevailing, deep-rooted patriarchal biases that further endorsed such rigid legal interpretations.

6. 4 (a) Decisions Favouring Mother in Respect of Child Custody

However, even during this period prior to 1960s, cases involving custody rights of mother had displayed a more liberal approach in interpreting the rule regarding mother's disqualification from *hizanat* on her remarriage. Perhaps the feminist movement for law reform that was on-going in the post-colonial Pakistan in the context of the formation of the Marriage Law Commission, together with Ayub Khan's support for modernist reforms, had influenced such progressive trend of the superior judiciary of Pakistan. Serajuddin thus commented that after the independence of Pakistan, 'the views of the activist judges of Pakistan' on liberal interpretation of the fundamental sources of Muslim law were 'remarkably similar to the recommendations of the Commission'.⁶⁷⁹ The Pakistani courts had consistently displayed an attitude of sympathy towards mothers in custody cases 'away from classical rules of Islamic jurisprudence'.⁶⁸⁰ Analysing cases between 1947 and 1992, Balchin thus had noted that even in cases where remarriage of the parents was the key issue, the courts did not display any particular discredit towards the mother despite the traditional rule that disqualifies a mother from *hizanat* on her remarriage.⁶⁸¹ Balchin further noted that the concern of the courts in Pakistan

⁶⁷⁷ PLD [1962] Lah 166.

⁶⁷⁸ *ibid* 168.

⁶⁷⁹ Serajuddin, *Muslim Family Law* (n 2) 119.

⁶⁸⁰ *ibid* 48.

⁶⁸¹ Cassandra Balchin (ed), *A Handbook of Family Law in Pakistan* (2nd edn, Shirkat Gah 1994) 158.

regarding welfare of the child in custody cases had ultimately benefitted women 'in contrast to the generally unfavourable legal atmosphere' towards them during the post independence of Pakistan.⁶⁸²

Thus, the Lahore High Court in *Amar Ilahi v Mst Rashida Akhtar*,⁶⁸³ gave a liberal interpretation to the rule of mother's disqualification on remarriage although its validity was not challenged altogether. The court being concerned with a minor girl's custody to her divorced mother, who had remarried a stranger, endeavoured to assess whether this rule of disqualification is an absolute one under Muslim law. The court referred in particular to the chapter on *hizanat* in Baillie's Digest, and interpreted the provision as follows:

It is true that such a view [in favour of absolute prohibition] has been expressed in some reported cases, but there is no warrant for it in the original texts of Muslim law ... Keeping in view the entire scheme of Muslim Law regarding *hizanat*, there can be no doubt that 'the right' referred to [in the *Baillie's Digest* which stated: 'the rights of all the women before mentioned are made void by marriage with strangers'] is the preferential right of certain female relations of the minor to its custody.⁶⁸⁴

Thus, the court positively took the view that since the right is merely a preferential right created by Muslim law principles, having lost such a right the person only becomes equal with all other qualified persons but does not lose the right altogether. The court relied principally on the reasoning of a 1944 decision of Allahabad High Court of *Mst Samiunnisa v Mst Saida Khatun*⁶⁸⁵ where, in discussing the corresponding rule in Hamilton's *Hedaya*, Malik J. provided the following important observation:

The reason [for the disqualification] given in the *Hedaya* is that the stranger to whom the mother may be married will not have the same affection for the child

⁶⁸² *ibid* 186.

⁶⁸³ PLD [1955] Lah 412.

⁶⁸⁴ *ibid* 413.

⁶⁸⁵ AIR [1944] All 202.

and may ill-treat her and the context in which the whole matter is discussed is the respective merit of the various relations and the central idea is as to who is more likely to look after the welfare of the minor. There seems to be nothing in that chapter to indicate that it is a sort of punishment to the mother when she, by reason of the fact that she has married a stranger, is to be punished by not being allowed to have the custody of the child even though there may not be any other person capable of looking after the minor.⁶⁸⁶

Thus, the *Amar Ilahi* court was of the view that by marrying a stranger the mother only loses her preferential right of custody as she will not then be entitled to claim custody of the child 'as of right', but her claim would be weighed on par with other relatives who had custody rights under Muslim law. Ultimately, custody would be given to the one 'to whom the welfare of the minor can be safely and properly entrusted'.⁶⁸⁷ Thus compared to the focus on traditional age-sex rules of custody noticeable during the early postcolonial period, Pakistani judiciary displayed a rather tolerant attitude towards the rule of disqualification on mother's remarriage.

6.5 Welfare Gaining Determinative Role in Custody Decisions: The *Zohra* Case

However, in contrast to the rigid application of the traditional rules of custody, 'welfare of children' gained a determinative role in the much-celebrated decision of *Mst. Zohra Begum v Latif Ahmad Munawwar*,⁶⁸⁸ in 1965 where custody of a minor son aged over seven and a daughter below the age of puberty was awarded to the mother. The *Zohra* court attempted to answer the question of 'what is the law to which the minor is subject' as required by section 17(1) and found that there is no uniformity in the rules of *hizanat* 'as stated in various text books on Muslim law for there is no Quranic or traditional text on the point'.⁶⁸⁹ Relying on the ruling of the High Court of Lahore in *Khurshid Jan v Fazal Dad*⁶⁹⁰ which held that in such a

⁶⁸⁶ *ibid* 204.

⁶⁸⁷ *Amar Ilahi* (n 676) 416.

⁶⁸⁸ PLD [1965] (WP) Lah 695.

⁶⁸⁹ *ibid* 702.

⁶⁹⁰ PLD [1964] (WP) Lah 558.

situation, the court 'may resort to private reasoning',⁶⁹¹ the *Zohra* court declared that 'where there is no Qur'anic or traditional text or an *Ijma* on a point of law, and if there be a difference of views ... courts which have taken the place of Qazis can, come to their own conclusions by process of *Ijtihad*.'⁶⁹²

Thus, the role of *Ijtihad*⁶⁹³ as 'articulation of new legal norms on matters not settled by definitively-known indicants in the foundational texts',⁶⁹⁴ gained force in custody disputes through the authoritative decision of *Zohra*. Such an approach opened up avenues for the courts to determine best interests of the children in custody disputes based on particular facts and evidence and not on the basis of presumption. Subsequent to the *Zohra* decision, 'welfare' became a dominant consideration for courts in deciding custody disputes. As against the rule of presumption of welfare set out by *Muhammad Bashir v Ghulam Fatima*⁶⁹⁵ and *Ali Akbar*, the court in *Rahimullah Chowdhury v Mrs Sayeda Helali Begum and others*⁶⁹⁶ clearly laid down that welfare should be the primary decisive factor in deciding a child custody dispute under section 25 of the GWA by holding that:

[A]s against a mere presumption attributed to Muslim Law, section 25 [of the GWA] recognizes it as a right of the guardian that his ward who leaves or is removed from his custody be returned into his custody, but subject to his welfare. 'Welfare' being a question of fact will, therefore, have to be resolved on the material placed before the Guardian Judge and not on the basis of any presumption.⁶⁹⁷

⁶⁹¹ *ibid* 562.

⁶⁹² *Zohra Begum* (n 688) 702.

⁶⁹³ '*Ijtihad* literally means 'endeavour' or 'self-exertion'. In legal usage, it refers to [the] endeavour of a jurist to formulate a rule of law on the basis of evidence found in the sources. *Ijtihad* is contrasted to *taqlid* or 'imitation', a term which refers to the acceptance of a rule not on the basis of evidence drawn directly from the sources, but on the authority of other jurists.' Bernard Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihad*' (1978) 26 (2) *American Journal of Comparative Law* 199, 200.

⁶⁹⁴ *ibid*.

⁶⁹⁵ PLD [1953] Lah 73, 80.

⁶⁹⁶ 20 DLR [1968] (SC) 1.

⁶⁹⁷ *ibid* 4.

Both the children involved in the *Rahimullah Chowdhury* case however were boys below 7 years of age and the parties had agreed that the mother had rights of *hizanat* till they attain 7 years. The key question however was whether by removing the children from their 'ordinary place of residence' mother's right of *hizanat* was lost. Most of the traditional texts on *Hanafi* law had endorsed this rule of forfeiture of *hizanat*. Sayed Ameer Ali in his textbook on Muhammadan law states the rule as follows:

The right of *hizanat* is also liable to forfeiture in case the *hizanee* removes the child without the consent of his father or guardian to such a distance from his usual place of residence as would prevent him from exercising the necessary supervision or control over the child.⁶⁹⁸

In *Rahimullah*, the court did not in fact question the validity of this rule of forfeiture but tried to draw a conclusion to the effect that the concerned mother in the case did not remove the children at a place where the father was unable to exercise control and supervision over them and thus had not forfeited her right of *hizanat*. However, on questions of returning children under section 25, the court strongly opposed the proposition that 'welfare' as given in that section should be presumed to be with the person to whom the traditional rules give the custody rights. The court gave an elaborate explanation to the effect that the requirement of 'consistently with the law to which the minor is subject' as given in section 17 should not be applicable in a decision involving return of minor under section 25. The court held:

The question to be decided under section 25 is, however, not the right of the guardian to obtain the custody of the ward as that right is given to him by the statute, but the welfare of the ward. A natural or certificated guardian may turn out to be an undesirable person or the court may find it not for the welfare of the minor to deliver him into the custody of the guardian. It is, therefore, provided specifically that although the guardian is entitled to such custody no

⁶⁹⁸ Ameer Ali (n 375) 260.

order will be made to that effect unless the court is satisfied that it will be for the welfare of ward.⁶⁹⁹

In *Rahimullah Chowdhury*, the court, while upholding the custody right of the mother, had thus deviated from the irrefutability of the welfare presumption as held by the *Ali Akbar* court when deciding question of return of minor under section 25. The court nevertheless strongly supported the traditional age-sex rule in case of appointment of guardian under section 17.

In the 1960's, the Pakistan High Courts have also examined the issue of remarriage in a number of cases and reiterated the observation in the *Amar Ilahi* case that a mother was not disqualified merely by a second marriage, but the question of her custody to the minor would then be assessed by the court in light of the minor's welfare.⁷⁰⁰ Although welfare of the child had been the controlling standard in these rulings, its dominance was more clearly laid down by the 1964 case of *Johara Begum v Maimuna Khatun*.⁷⁰¹ In its judgment, the court observed that a table of preferences is given by Muslim law having regard to the minor's welfare and, as per the table, the mother has the first preference if she is not otherwise disqualified. However, it was clearly asserted by the court that the presence of such a provision does not necessarily take away or override the duty of the court to protect the minor's interest. Thus, it was observed that 'the court, having regard to the provision of the Mahomedan law and also the welfare of the minor, should appoint a guardian, and not blindly merely because a mother has lost her preferential right after having taken a second husband not related to the minor within the prohibited degrees.'⁷⁰²

Interpreting the requirements of section 17, the *Johara* court quoted from the Allahabad High Court's 1932 ruling in *Siddiqunnessa Bibi v. Nizamuddin Khan*⁷⁰³ which held the view that personal law of the concerned minor would have to be taken

⁶⁹⁹ *ibid* 5.

⁷⁰⁰ *Nazeer Begum v Abdul Sattar* PLD [1963] (WP) Karachi 465; *Haji Ali Baksh v Mst. Bhagul* PLD [1963] (WP) Karachi 1030.

⁷⁰¹ 16 DLR [1964] 695.

⁷⁰² *ibid* 698.

⁷⁰³ AIR [1932] Alla 215.

into consideration for appointment of guardian, but those personal law rules would not necessarily be binding upon the court, 'which must look to the welfare of the minor consistently with the law'.⁷⁰⁴ The court further observed that even if welfare required the guardianship to be given to a person, to whom awarding guardianship would not be consistent with the personal law, the court could ignore it if that person was more 'proper person to be appointed as guardianship'.⁷⁰⁵ The court was oscillating between the paternal grandmother and mother of the concerned minor, and the court specifically found that welfare of the child would be ensured with the mother. The court even gave reasoning as to why it would not be in the child's welfare to give guardianship to the grandmother (grandmother being old and without any financial means of subsistence). Nevertheless, the court divided the guardianship order and gave the mother only the guardianship of person while the grandmother was awarded guardianship of property of the minor. Although the court clearly emphasized importance of welfare in guardianship cases, not much explanation was given⁷⁰⁶ as to why the grandmother would be fitting for guardianship of property of the minor despite being found unsuitable by the court for ensuring welfare of the minor's person.

Next in the 1970 case of *Rahela Khatun v Ramela Khatun*,⁷⁰⁷ the reasoning with regard to disqualification on remarriage of a mother was further discussed where the court observed that the marriage of a female with a stranger does not annul her custody right absolutely, provided the female in question is found to be the best of all persons in whose charge, care of the minor may be given.⁷⁰⁸ The court observed that:

The texts of the Muslim personal Law do not seem to warrant, ... any conclusion that the particular female whose preferential right has been lost because of her marriage with a stranger, cannot be appointed the guardian if

⁷⁰⁴ *ibid* 217.

⁷⁰⁵ *ibid*.

⁷⁰⁶ Other than mentioning that the paternal grandmother managed the properties.

⁷⁰⁷ PLD (HC) Dacca [1971] 24; 22 DLR [1970] (HC) 608.

⁷⁰⁸ *ibid* 28.

she is the most suitable of all persons for appointment, the dominant consideration always being the welfare of the minor.⁷⁰⁹

To some extent, a consistent trend therefore is noticeable in the cases during the 1960s' onwards regarding the interpretation of the rule of disqualification of a woman from child's custody on account of her remarriage.

6.6 Conclusions

Immediately after the independence of Pakistan, the judiciary more or less continued the legacy of the British courts and adjudicated the family cases with same rigor as the colonial courts when it came to interpreting any traditional rule of custody. As the above analysis showed, the custody cases after independence till early 1960s, reflected the same rigidity where the courts were rather conservative in their approach in applying a traditional rule of Muslim law. The courts had diligently followed the traditional interpretations of Muslim law and refrained from questioning established opinions of classical jurists on the basis of modern changes. In a number of custody cases during this post-colonial period the age-sex rule of the *Hanafi* jurisprudence were strictly applied. Especially in interpreting requirement of 'welfare' as given in section 25 of the GWA the court had insisted on an irrefutable presumption that welfare belongs to the person to whom the traditional rules give custody. The courts also had emphasised that the clause in section 17 of the GWA which prescribes appointing guardian consistently with the personal law of the minor to be a clear indication of the overriding effect of the traditional rules.

However, in the context of the feminist movement supported by the then political ruler of Pakistan that culminated into the Marriage Commission and enactment of the MFLO, a clear shift could be discerned in the judicial trend in Pakistan from early 1960s onwards. Similar to the Commission's report which advocated for the right to exercise *ijtihad*, the judiciary also proactively participated in the law reform efforts and boldly claimed its right to exercise judicial *ijtihad* in several cases including cases related to custody, defying the opinions of the classical jurists. With regard to

⁷⁰⁹ *ibid.*

custody disputes, absence of clear provision in the Quran and Sunnah and absence of unanimity on the traditional rules on custody among different schools of thoughts had rather enabled the courts to depart from those traditional rules.⁷¹⁰

In relation to question of remarriage however, the Pakistan judiciary during the post independence period had been rather consistent in their favourable attitude towards mothers in respect of custody of the child. Courts had also invariably relied on the natural caregiving role of the mother considering her to be the best person to care for the child. Such presumption often worked in favour of the mother, assigning her to the custody in contradiction to the traditional rules. Thus the natural care-giving role of mother towards children of tender age is presumed by the courts to be the ultimate rationale behind the age-sex rule of the *Hanafi* jurisprudence. In *Hurbai v Usman*⁷¹¹ for instance the court explained that:

The rule of Muslim Law that the custody of a boy under seven years of age and of a girl under the age of puberty should remain with the mother is based on certain fundamental human considerations, namely that it is only a woman and a mother who can look after the needs of the child under the ages specified, and who can give that love, affection and guidance which are necessary for the proper development of the child. A mother can do all this even though she be poor.⁷¹²

The reason for such sympathetic approach of the courts towards mother's custody was thus the consideration of best interests of the child as the courts' presumption of child's welfare was strongly associated with mother's perceived caregiving role. Nevertheless, the prevailing climate of reform during the 1960s at the backdrop of the feminist movements had enabled the courts to defy the authority of the classical jurists' opinions and make child's welfare the central consideration in a custody disputes.

⁷¹⁰ Serjuddin, *Principles of Muslim Law* (n 2) 148.

⁷¹¹ PLD [1963] (W.P.) Kar. 889.

⁷¹² *ibid* 891.

Chapter 7: Judicial Trends in Child Custody Cases in Pakistan From the 70's Onwards

7.1 Introduction

The political agitation in Pakistan during 1968-1969 led to the fall of Ayub Khan.⁷¹³ The strong opposition by the *ulamas* to the MFLO and the parallel movement by women rights organizations to defend the Ordinance are thought to be one of the important factors that had attributed to the end of the Ayub Khan's regime.⁷¹⁴

After the separation of East Pakistan and emergence of Bangladesh as an independent state in 1971, the Presidency was taken over by Zulfikar Ali Bhutto. Thereafter, the Interim Constitution of 1972 was promulgated⁷¹⁵ keeping intact most of the Islamic provisions of the constitutions of 1956 and 1962.⁷¹⁶ The influence of Islam was even more prominent in the 1973 Constitution with Islam being declared as the state religion.⁷¹⁷ Article 40 of the new Constitution stated: 'The State shall endeavor to preserve and strengthen fraternal relations among the Muslim countries based on Islamic unity'. Thus, reflecting Bhutto's foreign policy post the 1971 defeat, more than any of the previous Constitutions, the Constitution of 1973 had given significant emphasis on 'promoting unity among the Muslim countries'.⁷¹⁸ However, despite Bhutto's efforts to promote ties with the Muslim world he was ousted in a military coup led by General Zia in 1977 'after a protest movement mainly led by the religious parties'.⁷¹⁹

⁷¹³ Serajuddin, *Shari'a Law and Society* (n 371) 66.

⁷¹⁴ *ibid.*

⁷¹⁵ The interim constitution was effective from April 1972 till August 1973. Saleem (n 621) 134.

⁷¹⁶ Saleem (n 621) 134.

⁷¹⁷ The Constitution of Pakistan 1973 (which is the present constitution of Pakistan), art 2 states: 'Islam shall be the State religion of Pakistan'.

⁷¹⁸ GW Choudhury, 'New Pakistan's Constitution 1973' (1974) 28(1) Middle East Journal 10,13.

⁷¹⁹ Saleem (n 621) 138.

During the regime of General Zia, the Islamization process ‘continued with increased vigour’⁷²⁰ as he made extensive changes to the constitution.⁷²¹ The changes included establishment of the Federal Shariat Court and Shariat Bench of the Supreme Court⁷²² and adopting the ‘Objective Resolution’ as a substantive part of the Constitution⁷²³. A number of Islam inspired laws were enacted as part of the process of Islamization of Pakistan - the Offences of Zina (Enforcement of Haddood) Ordinance, 1979 being one of the most controversial⁷²⁴ of them. The Ordinance ‘made no legal distinction between adultery and rape’ and its enforcement as such was extremely prejudicial for women.⁷²⁵ The Islamization process and the resultant overall legal structure ‘placed women in unequal positions to men’ with legal and social changes brought about since the 1980s.⁷²⁶ The repugnance of the MFLO to the Islamic injunctions resurfaced and claims were made in courts challenging the Ordinance as unconstitutional.⁷²⁷ Progressive judges were removed from the Bench and were replaced by ‘outspoken advocates of judicial conservatism’⁷²⁸ and consequently ‘the progress of judicial reform of Muslim personal law to adapt it to the conditions of modern life was arrested’.⁷²⁹ A clear reflection of such judicial conservatism can be discerned also in the analysis of the custody case of the Pakistan’s superior judiciary during the 1980s onwards.

⁷²⁰ *ibid.*

⁷²¹ The Constitution (Eighth Amendment) Act, 1985 (Act No. XVIII of 1985).

⁷²² *Ibid* art 203A - 203J.

⁷²³ *ibid* art 2A says: ‘The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly’.

⁷²⁴ Ahmed and Yilmaz (n 623) 275-295; Md Ziaul Haque Sheikh and Zahid Shahab Ahmed, ‘Military Authoritarianism and Islam: A Comparative Analysis of Bangladesh and Pakistan’ (2020) 13(2) *Politics and Religion* 333, 351.

⁷²⁵ Anita M. Weiss, ‘Interpreting Islam and Women’s Rights: Implementing CEDAW in Pakistan’ 18(3) *International Sociology* 581, 583.

⁷²⁶ *ibid*; see also Carroll Lucy, ‘Nizam-i-Islam: Processes and conflicts in Pakistan’s Programme of Islamisation, with Special Reference to the Position of Women’ (1982) 20(10) *The Journal of Commonwealth & Comparative Politics* 57.

⁷²⁷ In *Mirza Qamar Raza v Tahira Begum*, PLD [1988] Karachi 169, 171 the court ruled that ‘Article 2A of the 1985 Constitution allowed review of the MFLO on the ground of repugnancy to Islam and, and accordingly [the court] declared several provisions of the Ordinance to be repugnant to Islam.’ Quoted in Serajuddin, *Shari’a Law and Society* (n 371) 6. But the Supreme Court had later set aside this decision. See *Mst. Kaneez Fatima v Wali Muhammad*, PLD [1993] SC 901,915; the MFLO however is ‘specifically exempted from challenges on the grounds of fundamental rights successively in the 1962, 1973 and 1985 Constitutions’. Quoted in Serajuddin, *Shari’a Law and Society* (n 371) 66.

⁷²⁸ Serajuddin, *Muslim Family Law* (n 2) 170.

⁷²⁹ *ibid.*

However, as the Islamization process had ‘slowed down’⁷³⁰ with Zia’s death in 1988, the courts had also gradually regained their earlier position of interpreting traditional rules liberally. A number of new legislations had been enacted to reduce the discriminatory impact of Islamization of laws that took place during Zia’s regime. Most significant was the enactment of the Protection of Women (Criminal Laws Amendment) Law in 2006 during General Musharraf’s regime which ‘for the first time since 1979, distinguished between rape and consensual sex in terms of required evidence’⁷³¹. The Act enabled victims of rape to seek justice without being fearful of penal sanctions in case the allegation could not be proved.⁷³² A series of other laws were passed since the 2006 Act with specific objective of addressing discriminatory and harmful practices against women including laws criminalizing domestic violence and forced marriages.⁷³³

Thus, the impact of Islamization seemed to have gradually lost its popularity in Pakistan although the 1973 Constitution with its later amendments established Islam as the ‘basis of Pakistan’s state nationalism’.⁷³⁴ The current judicial decisions also show a liberal and progressive approach, although the traditional rules of Muslim personal law continue to hold a significant place in the judicial discourse. The following analysis of the custody cases also indicates a shift in the judicial trend towards interpreting the traditional *Hanafi* texts on custody through changing political and legal climate.

7.2 Custody Decisions Post 1971: Departure from Traditional Rules

As discussed in the previous chapter, Pakistani courts in the early custody cases of the 1950’s viewed welfare in line with the traditional views of classical jurists. During

⁷³⁰ Saleem (n 621) 387.

⁷³¹ *ibid.*

⁷³² *ibid* 389.

⁷³³ The Prevention of Anti-Women Practices Act 2011 criminalized forced marriages; Domestic violence legislations had been also enacted in provinces including in Islamabad, Sindh and Balochistan.

⁷³⁴ Saleem (n 621) 140.

this period, courts considered there to be an ‘irrefutable presumption of welfare in favour of the person to whom Muslim law gives custody rights.’⁷³⁵ In the 1960’s, a noticeable shift occurred, away from the traditional Muslim law rules. In the cases of *Rahimullah Choudhury v Mrs. Sayeda Helali Begum*,⁷³⁶ *Mst. Fahmida Begum v Habib Ahmed*⁷³⁷ and *Mst. Rashida Begum v Shahab Din and others*,⁷³⁸ the courts relied upon ‘judicial *ijtihad*’ and claimed their competence to reinterpret fundamental sources of Muslim law without being bound by the opinions of the classical jurists in determining the question of custody. Therefore, it was broadly for the court to decide, according to the facts of the case, what was best for securing the welfare of the child.

In contrast, in the post 1971 cases the Pakistani courts, on the whole, followed a middle path wherein the courts did not wholly defy the traditional rules of custody but considered those principles as creating a rebuttable presumption, which was subject to the welfare of the child. Although a clear demarcation of judicial trend is difficult as there were also contrary decisions, but the leading decisions of Pakistan superior courts during the 1970s seemed to have simply viewed the traditional rules as an initial consideration in determining custody, subject to welfare.⁷³⁹ For example, the Supreme Court in *Mst. Feroze Begum v Lt. Col. Muhammad Hussain*,⁷⁴⁰ first mentioned the father’s natural guardianship over the children under Muslim law, but then went onto examine considerations of the children’s welfare:

Although the guardian is entitled to such a custody, no order will be made to that effect unless the Court is satisfied that it will be for the welfare of the ward ... The overriding and paramount consideration always is the welfare of the minor. Indeed, this is the sole consideration that must prevail in the final analysis and the fact that the father is the lawful guardian of his minor children

⁷³⁵ *Ali Akbar v Mst Kaniz Maryam* PLD [1956] Lah 484.

⁷³⁶ *Rahimullah Chowdhury* (n 696) 3.

⁷³⁷ 20 DLR (WP) [1968] 254.

⁷³⁸ PLD [1960] Lahore 1142.

⁷³⁹ See *Shah Mohd. Quasim Rizvi and anothers v Bibi Rahana and anr.* 22 DLR [1970] 548); *Juma Khan v Mst. Gul Ferosha*, PLD [1972] Peshwar 1; *Ghulam Sakina v Ghulam Abbas* PLD [1978] (HC) Lah 1389 *Haji Mohammad Jamil v Mst. Rahila Nosheen*, PLD [1978] Lah 1389.

⁷⁴⁰ [1978] SCMR 299.

does not compel the court to pass an order in his favour unless it is in their welfare to do so.⁷⁴¹

Thus the court in a way acknowledged the traditional rules of custody to be the first consideration which entitled father to the custody, but emphasised on welfare to be the ultimate or the paramount consideration to which the father's guardianship had to be subjected to. The court in this case, after considering the education of the minors, the father's remarriage, and the lower court's lack of consideration of the parents' intentions and characteristics, granted custody to the mother.

From the 70's onwards, courts thus acknowledged where Muslim law had given preferential rights but examined the circumstances of each case to decide which party ought to be granted custody. Certain cases clearly departed from traditional Muslim law rules to award custody to another party in light of welfare considerations. For example, in *Sultan Mirza v Mst. Shahnaz Akhtar*,⁷⁴² the Lahore High Court awarded custody of a son aged over 7 years old to his mother. The court, after examining all of the circumstances, considered that the father's previous actions while the child was ill and disinclination to pay maintenance showed a lack of concern for the child. It also considered the impact of the father's remarriage, wherein the new partner 'appear[ed] to have exhibited hatred for the minor and his welfare,'⁷⁴³ to justify keeping the child with his mother. Thus in a way the fathers 'entitlement' to the custody had to be shown to have lost by the particular facts of the case, justifying thereby mother's custody of the child.

In *Ghulam Ullah Memon v Mst. Rashid Begum*,⁷⁴⁴ the court departed from the traditional rules of custody to grant an application under section 25 of the GWA to the maternal grandmother over the father's preferential rights. The court specifically took into account the father's dishonest nature and the lack of maintenance payments, and the preferences of the three minor girls. Similarly, in *Jamshed Sultan*

⁷⁴¹ ibid 306.

⁷⁴² PLD [1975] Lahore 194.

⁷⁴³ ibid 199.

⁷⁴⁴ [1983] SCMR 793.

Taimoori v Mst. Anisa Begum,⁷⁴⁵ custody was granted to the mother despite one of the children being over 7 years old. The court's decision was based on the consideration that the mother was a university educated woman who worked as a teacher and had 'no other interest besides bringing up of her two sons,'⁷⁴⁶ compared to the father who had remarried and not paid any maintenance towards the children.

Although the influence of the traditional Muslim law rules was present throughout the cases, it is clear that courts during this period did view welfare as an overriding, and central consideration. Therefore, judgments often involved detailed examination of the circumstances of each parent, including their financial positions, marital status, employment status and general living conditions.

7.3 Influence of the Traditional Approach during the 80's

Despite previous moves towards welfare-based reasoning, a high number of cases in the 1980's distinctly relied on religious principles. Although welfare was mentioned in these cases, the decisions were in reality directly influenced by the traditional rules; in particular, that remarriage of the mother would remove her rights to custody. For example, the Pakistan Supreme Court in *Mst. Rashida Bibi v Muhammad Ismail*,⁷⁴⁷ stated that it made its decision 'not merely on the basis of the presumption arising under the Muslim law, but in the light of all the attendant circumstances of the case.'⁷⁴⁸ However, the decision centres on the remarriage of the mother, with no substantive discussion on the father's lack of maintenance payments and effort in meeting the child. This is despite such factors being material to a finding in favour of the mother in earlier cases.

Some cases also viewed re-marriage as a complete bar to custody, despite earlier cases where specific circumstances were evaluated.⁷⁴⁹ The Supreme Court in *Asma*

⁷⁴⁵ LEX/HSPK/0067/1979.

⁷⁴⁶ *ibid* 7.

⁷⁴⁷ LEX/SCPK/0213/1980.

⁷⁴⁸ *ibid* 5.

⁷⁴⁹ Notably, in *Mst. Nazeer Begum and ors. v Abdul Sattar* 15 DLR [1963] 87, the court recognised that the mother had lost her traditional right of *hizanat*, as she had remarried, yet granted custody of the children to her. This was on the basis that the man was not a stranger to the children given the

v The District Judge, Sialkot and Another,⁷⁵⁰ upheld the Lahore High Court's decision to award custody to the father. The court did consider personal law to be subject to the wellbeing of the child but did not evaluate any other circumstances. Thus, the court, in effect, relied solely on the remarriage of the mother as disentitling her from custody. In *Mst. Nazir v Hafiz Ghulam Mustafa*,⁷⁵¹ the Supreme Court made no reference to welfare and instead granted custody to the father on the basis that the mother had remarried a stranger. The reasoning in *Mst Nazir* was then affirmed in *Saji Muhammad Shafi and Another v Mst. Maqbool Afza and Others*,⁷⁵² wherein custody of a minor girl aged 8 years was granted to the father on the ground that the mother had married thrice and there was an allegation regarding her character. The court did note the child's wish to remain with her father, but there was no other supporting discussion on welfare. Within these cases, there was little to no discussion beyond the remarriage of the mother. Instead of traditional rules of disentitlement on remarriage functioning as a rebuttable presumption, it functioned as the sole determining factor.

In other cases, courts simply followed Muslim law provisions with little to no discussion on welfare principles. In *Mst. Aziz Khatoon and others v Mst. Zubaida Khanum*,⁷⁵³ the Supreme Court reaffirmed the lower court's decision in awarding custody of the young children to the mother. The courts simply focused on the absence of the traditional grounds for disqualifying the mother's right to custody; there was no discussion as to welfare or best interest of the child. In *Mst. Kaneez Sughra v Syed Mushtaq Hussain Shah and Others*,⁷⁵⁴ the courts did not consider the welfare of the child and instead simply applied the traditional 'age-sex' rule. As a result, the court affirmed a lower court's decision to award custody of a 9-year-old son to his father.

duration of the remarriage, the absence of disadvantage for the children due to the remarriage, and as the father had shown no interest in visiting the children prior to the suit being filed.

⁷⁵⁰ LEX/LHPK/0030/1987.

⁷⁵¹ [1981] SCMR 200.

⁷⁵² LEX/SCPK/0536/1986.

⁷⁵³ [1988] SCMR 832.

⁷⁵⁴ LEX/SCPK/0138/1989.

The decisions during this period suggested a move back towards the initial traditional approach of the 1950s wherein welfare, while still mentioned as a 'paramount consideration', was conceptualised only in line with traditional Muslim law rules. This move towards traditional-rules-based reasoning can perhaps be attributed to the political shift towards the Islamization of Pakistan during this period as discussed in the forgoing section. Prior to the 1980's, mechanisms to transform Pakistan into an Islamic state had been 'intentionally weak, vague or ill defined.'⁷⁵⁵ However, with General Zia's Islamization programme, particularly with the introduction of the Federal Shariat Courts in the 1980's, Islamic principles did gain more force within judicial reasoning.⁷⁵⁶ Therefore, this shift towards religious orthodoxy in custody cases may simply have reflected the wider political emphasis on restructuring personal, and other laws, to conform to Muslim law.

It is however worth noting that there were also some cases during this time where courts did place a focus on the welfare of the child. In *Mst. Amina Bi v Muhammad Abbas Butt and another*,⁷⁵⁷ the courts decided against the preferential right of the grandmother under personal law, to grant custody to the father. In determining custody, the court considered that the father was in a better financial position and could rely on family support to help raise the children, and so clearly considered the welfare of the child. The Peshawar High Court in *Mst. Taj Bibi v Khuda Bakhsh*,⁷⁵⁸ also followed a progressive approach emphasising the welfare of the child in granting a section 25 application in favour of the mother. The court in particular emphasised that the father had remarried and had children from his new wife, and how he had not expressed love and affection for the child prior to the suit. Further, in *Muhammad Iqbal v Mst. Irshad Begum and 2 Others*⁷⁵⁹ the Supreme Court made no mention of traditional rules and referred only to the children's welfare to grant custody. Other cases similarly engaged with in-depth evaluation of the

⁷⁵⁵ Charles H. Kennedy, 'Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan' (1992) 41(4) *The International and Comparative Law Quarterly* 769, 782.

⁷⁵⁶ see Ahmed and Yilmaz (n 623).

⁷⁵⁷ [1988] SCMR 1794.

⁷⁵⁸ PLD [1988] Peshwar 57.

⁷⁵⁹ [1984] SCMR 1034.

circumstances of the case to determine which arrangement would secure welfare of the children involved.⁷⁶⁰

Therefore, there does appear to have been some inconsistency in approach throughout this time period.

7.4 Custody Decisions during the 90's

Building upon the brewing inconsistency during the 1980's, judicial discourse in the 1990's followed similarly conflicting approaches that render it difficult to identify a common thread throughout the period. The courts in this time shifted between following a more traditionalist approach, where traditional rules of custody were followed unquestioningly, to cases where welfare was more readily the focus of decision-making.

An example of traditional-rules-based reasoning is the case of *Mst. Tahira v Additional District Judge, Rawalpindi and others*.⁷⁶¹ The Supreme Court in the case granted custody according to the mother's right of *hizanat* and there was nothing to disqualify her from custody under traditional rules, with no discussion on the welfare of the child. Similarly, the Lahore High Court in *Mst. Imtiaz Begum v Tariq Mehmood*,⁷⁶² stated that provisions had to be '*examined and determined in accordance with Islamic principles*' and relied on Quranic verses to find a preferential right to custody on the mother's part during the child's breastfeeding years. As such, the court granted the mother custody of the child until the child was old enough to go to school. Other cases also simply reaffirmed the traditional rules of *hizanat* or relied on Quranic hadith to grant the mother custody for young children.⁷⁶³ Within these cases, traditional rules appeared to be the determining factor when deciding custody.

⁷⁶⁰ See *Shaukat Pervez Butt v Mst. Nargis Sultana and Another*, PLD [1988] Lahore 290; *Mst. Sughra Begum v Ashfaq Ahmad Butt*, PLD [1981] Lahore 393.

⁷⁶¹ [1990] SCMR 852.

⁷⁶² [1995] CLC 800; Mudasra Sabreen, 'The Judiciary-led Islamization of Family Law in Pakistan' (2020) 59(2) *Islamic Studies* 203, 207.

⁷⁶³ See *Mst. Aisha Bibi v Naeem Umar Qadri* [2000] YLR 1171; *Miss Hina Jilani, Director of A.G.H.S. Legal Aid Cell v Sohail Butt*, PLD [1995] Lahore 151.

Further, in *Mrs. Shaukat Khalid v Additional District Judge*,⁷⁶⁴ the Supreme Court transferred custody of a 15-year-old girl from a foster mother to the natural parents, on the basis of traditional rules of Muslim personal law. The court did not consider any disruption that would be caused to the child, the connection between the foster mother and the child, nor the child's preferences. The court, although acknowledging that the child had not learnt 'good manners' due to actions of both the foster and real parents, simply relied on the fact that it would be 'more natural than her passing these very important years of adolescence with a foster- mother. And this is in accord with the principles enunciated by Islam and contained in Quran and Sunnah.'

In contrast, other cases followed the rebuttable presumption approach with detailed examination of the child's welfare. For example, in *Mst. Rubia Jilani v Zahoor Akhtar Raja and two others*,⁷⁶⁵ the Supreme Court granted custody of 3 sons, all over the age of 7, to their father. In deciding so, the court first acknowledged where Muslim law had given preferential rights of custody but subjected it to the welfare of the children, stated to be the 'paramount requirement, which must be kept in view.'⁷⁶⁶ The court went on to consider the welfare of the children in terms of their education and their psychological wellbeing, and ultimately granted custody to the father, but also set up provisions for shared custody during the holidays and visitation provisions for the mother. Similarly, the Supreme Court in *Major Zafar Iqbal v Mst. Rehmat Jan and another*⁷⁶⁷ granted custody to the maternal grandmother because neither parent was fit for custody, as both were overseas and had remarried, and the paternal grandparents had not shown interest in applying for custody. This emphasis on welfare was also present in *Mehmood Ayyaz v Additional District Judge, Chakwal and Other*,⁷⁶⁸ wherein the court took into account the children's wishes, schooling, family care arrangements and the psychological wellbeing of the children when deciding custody arrangements.

⁷⁶⁴ LEX/SCPK/0168/1990.

⁷⁶⁵ LEX/SCPK/0562/1998.

⁷⁶⁶ *ibid* para 9.

⁷⁶⁷ [1994] SCMR 339.

⁷⁶⁸ PLD [1992] Lahore 441.

7.5 Return to a Progressive ‘Rebuttable Presumption’ Approach

Pakistani courts in the twenty-first century have appeared to shift back to a more consistent line of reasoning mirroring the initial ‘rebuttable presumption’ approach, with detailed consideration of the child’s welfare or best interests. Although in many cases, the courts state that welfare is the ‘paramount’ consideration, there is still discussion of when the traditional rules of Muslim law give preferential rights of custody and of the traditional grounds for disentitlement. However, it is clear that the courts do not treat the opinions of the classical jurists as solely determinative, and instead go on to examine the circumstances of the case to devise which arrangement would best secure the welfare of the child. Therefore, it appears that, in contrast to a completely secular best-interests-based reasoning, the courts have instead more reliably deployed an approach wherein traditional rules are followed in essence, unless there is evidence to the contrary regarding the welfare of the child.

The Supreme Court in *Firdaus Iqbal v Shafaat Ali and others*⁷⁶⁹ most clearly sets out how courts can be said to navigate custody law currently:

The welfare of the minor, however, remains the paramount consideration in determining the custody of a minor notwithstanding the right of the father to get the custody after seven years of age of the male minor child. The custody of a minor can, however, be delivered by the Court only in the interest of the welfare of the minor and not the so-called right of the one parent or another... It would, thus, be noticed that right of the father to claim the custody of a minor son is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct in the light of the facts and the circumstances of each case.⁷⁷⁰

This approach directly echoes the reasoning set out in the 1976 case of *Mst. Feroze Begum v Lt. Col. Muhammad Hussain*, by acknowledging traditional rules of Muslim law, but subjecting them to considerations of welfare. In *Firdaus Iqbal*, the court granted custody of the son to his mother, as the father had not shown any interest in

⁷⁶⁹ [2000] SCMR 838.

⁷⁷⁰ *ibid* 842.

looking after the child. The remarriage of the mother was not considered to disqualify her, instead the court found it material to note that the mother continued to care for the child despite remarrying. In *Mst. Rabia Bibi v Abdul Qadir and others*,⁷⁷¹ the Lahore High Court explicitly reaffirmed *Firdous Iqbal* to state that ‘the paramount consideration is the welfare of the minor and nothing else’, and that ‘the rules of personal law should be subservient to the welfare of the minor’.⁷⁷² Similarly, in *Sardar Hussain v Mst. Parveen Umar*,⁷⁷³ the court considered that the mother’s second marriage was not a disentiing factor as her current husband had helped raise the children.

As a further example of the courts’ approach, the Lahore High Court in *Syed Tahseen Razi v Dr. Farhana Shaheen and another*⁷⁷⁴ stated that personal law was to be considered in deciding custody, but that the paramount consideration was the welfare of the minors. Other cases also subscribed to a similar reasoning, treating the traditional age and sex rule as a presumption subject to welfare.⁷⁷⁵

Although decisions currently signal a conception of welfare that does largely align with traditional rules, there does appear to be a greater focus on the welfare or best interests of the child. The courts have seemingly re-imagined and extended traditional rules and the nature of factors considered in order to make decisions that secure the welfare of the child.

Several cases emphasise the importance of a child ‘of tender age’ to be looked after by their natural mother, and as such echo principles around *hizanat*. For example, in *Dr. Fauzia Haneef v Dr. Raashid Javaid*,⁷⁷⁶ the court emphasised how ‘both the minors require affection being of very tender age,’ and granted custody to the mother in the absence of other disqualifying factors. Going further in *Ambreen Khanam v*

⁷⁷¹ [2016] CLC 1460; Sabreen (n 762) 207.

⁷⁷² *ibid*.

⁷⁷³ [2003] YLR 3054.

⁷⁷⁴ [2003] YLR 1067.

⁷⁷⁵ See *Riasat Mehmood v Mst. Nadia Parveen*, [2014] MLD 374, *Imran Ahmed v Madiha Younus* [2018] YLR 649, *Mst. Farah Iqbal v Muhammad Anwar and 2 Others*, PLD [2003] Que 131.

⁷⁷⁶ LEX/LHPK/0004/2010.

Government of Sindh,⁷⁷⁷ the court found that as the children are of a ‘tender age,’ assigning custody to the father would be ‘improper if not illegal.’⁷⁷⁸ Pakistani courts do appear to be influenced by their perceptions on mother’s natural care-giving role for a young child.⁷⁷⁹ The court in *Gull Arzoo V SHO and ors*⁷⁸⁰ found that ‘there is logic and wisdom behind the proverb that lap of the mother is a cradle of God.’⁷⁸¹ In other cases, the courts also mention that ‘minors are of tender age requiring love and affection of their real mother,’⁷⁸² and that the ‘mother is symbol of sacrifice for the child, there is no earthly substitute for love, affection and care of mother; therefore where all things are equal concerning parents, mother has preference in the matter of custody of minor.’⁷⁸³

In other cases, typically where the children in question are older, the courts have undertaken detailed evaluation when determining where the welfare of the child lies. In doing so, the courts have expanded their conception of welfare to include the relevance of maintenance payments, whether there is genuine interest from the parties towards safeguarding the minor, such as considering care arrangements and efforts to meet the child, and whether petitions for custody aligned with claims for maintenance.

Although non-payment of maintenance by the father is not a disqualifying factor towards custody in Muslim law, the court in *Mst. Razia Bibi v Riaz Ahmad*⁷⁸⁴ considered it ‘one of the circumstances for determining the welfare of the minor.’⁷⁸⁵ In the instant case, the court granted custody of the child to the mother as she had taken care of the son since birth, not remarried and was devoted to the child’s upbringing.

⁷⁷⁷ LEX/SKPK/0004/2014.

⁷⁷⁸ *ibid* 4.

⁷⁷⁹ Ishaque and Khan (n 7)80.

⁷⁸⁰ [2015] YLR 1765.

⁷⁸¹ *ibid* 1769.

⁷⁸² *Mrs. Khurshid Begum v Additional District Judge, Rawalpindi and 2 Others*, PLD [2004] Lahore 395.

⁷⁸³ *Dr. Ashfaq Ahmed Sharif v Dr. Shireen Qasim Bham and Others* PLD [2004] Lahore 395, 399.

⁷⁸⁴ [2004] SCMR 821.

⁷⁸⁵ *ibid* 823.

This approach was later affirmed in *Abdul Azeem v Addl. District Judge*⁷⁸⁶ wherein the father's lack of payment of maintenance and absence of effort in meeting the minor, resulted in the mother being granted custody of the child. Similarly, in *Zareena Bibi v Muhammad Ashraf*,⁷⁸⁷ the court decided against the father, given he did not pay any maintenance towards the children and only made efforts to meet the children once a claim was made for maintenance. In contrast, the court noted that despite her remarriage, the children received love and affection from their mother. As a further example of the court's consideration of such factors, in *Mst. Iram Shahzad and 2 Others v Additional District Judge, Lahore*,⁷⁸⁸ the courts awarded custody of a son over 7 years old to the mother as the father had never paid any sums of maintenance towards him and would be taking him overseas to a place that the son was unfamiliar with.

The courts have also moved away from considering remarriage of the mother as a disqualifying factor for custody. Instead of viewing remarriage as a complete bar to custody, the courts have approached the remarriage of either party as one of many considerations when evaluating custody; the High Court in Lahore in *Mst. Hifsa Naseer v ADJ Gujar Khan*⁷⁸⁹ explicitly mentioned that 'second marriage of mother or father is not the sole fact to decide the fate of the custody petition rather it is the welfare of the minor which will prevail upon all other considerations.'⁷⁹⁰ Similarly, in *Mst. Yasmin Bibi v Mehmood Akhter*,⁷⁹¹ the courts held that the 'mere fact of remarriage of the petitioner would not ipso facto result in the handing over of custody of the child to the father when it is not otherwise in her welfare.'⁷⁹² This can be interpreted as a return to the initially more tolerant examination of remarriage during the 1960s.

⁷⁸⁶ LEX/LHPK/0344/2014.

⁷⁸⁷ PLD [2015] Lahore 253.

⁷⁸⁸ PLD [2011] Lahore 362

⁷⁸⁹ PLD [2017] Lahore 153.

⁷⁹⁰ *ibid* 156.

⁷⁹¹ [2004] YLR 641.

⁷⁹² *ibid* 648.

Notably, the courts have more explicitly continued to extend the traditional rules of remarriage as a disqualifying factor to apply to the remarriage of the father. For example, in *Muhammad Zaman v Ameer Hamza*,⁷⁹³ the Shariat Court of AJ&K explicitly stated that ‘where both father and mother contract a second marriage the mother stood on no worse position than the father and the decisive factor should only be the best interests of the child.’⁷⁹⁴

In particular, the courts have focused on whether any disadvantage is present through the re-marriage, and on the specific nature of the case. For example, in *Mehmood Akhtar v District Judge and 2 others*,⁷⁹⁵ the court considered it against the child’s interest ‘to deprive her from natural love and affection of mother and compel her to face the step motherly treatment in the house of father.’⁷⁹⁶ In *Barkat Bibi v Zahida Parveen and 2 others*⁷⁹⁷ the court appeared to make the decision based on the lack of the mother’s interest in the children’s welfare, as opposed to merely on her remarriage. In *Rukhsana Malik and 2 others v Abdul Aziz and 2 Others*,⁷⁹⁸ the court considered that the rules around re-marriage might be applicable to female children, in view of Muslim law’s principles surrounding feminine chastity, but did not extend to male children. However, the court then went on to state that as ‘woman is no longer a weaker person in the society’ each case requires ‘determination on its own peculiar facts’.⁷⁹⁹

Although section 17 of the GWA requires courts to have regard to the religion of the child when considering welfare, the courts have not placed significant emphasis on it when determining custody and taken a more holistic view of welfare.

⁷⁹³ [2009] CLC 230 [Shariat Court (AJ&K)] ;Ishaque and Khan (n 7).

⁷⁹⁴ *ibid*.

⁷⁹⁵ LEX/SCPK/0297/2004.

⁷⁹⁶ *ibid* 11.

⁷⁹⁷ [2003] YLR 1105.

⁷⁹⁸ PLD [2004] Lahore 801.

⁷⁹⁹ *ibid* 811.

In a notable departure from religious orthodoxy, the Lahore High Court in *Peggy Collin v Muhammad Ishfaq Malik*,⁸⁰⁰ granted custody of the child to his French, Christian mother. The court was not swayed by submissions regarding the father's position as a Muslim, and instead focused on the child's welfare. The court emphasised how the father could not rely on traditional rules of Muslim law solely when it was beneficial for him, and how the father had neglected the child's schooling and psychological wellbeing. In contrast, the mother was seen to be of good character and had shown love and affection towards the son, and so was determined to be with whom the welfare of the child would be best secured.

Further, reaffirming *Peggy Collin*, the Lahore High Court in *Roshni Desai v Jahanzeb Niazi*⁸⁰¹ also granted custody to a Hindu mother. In doing so, the court confirmed that Muslim personal law protected custody rights of a non-Muslim mother, such that custody cannot be claimed solely on the basis that one parent is non-Muslim. It is however worth noting that the mother in the instant case did assure the court that the child would be brought up Muslim, which may have impacted the judges' reasoning in granting custody.

The courts in these cases did not consider religion to be the sole determining factor. In doing so, the courts signal their willingness to be flexible in its interpretation of both legislative provisions and religious principles in order to ensure best interests of the child.

7.6 Traditional Approach Parallel to the Current Liberal Stance

Although the general trend among the courts is a shift towards welfare being the predominant consideration, there are cases that are inconsistent with this. In *Asifa Babar v Mumtaz Ali Khan*,⁸⁰² the court granted custody to the mother solely on the basis of *Hizanat* in the absence of any traditional factors disqualifying her; there was no discussion on welfare.

⁸⁰⁰ PLD [2010] Lah. 48.

⁸⁰¹ PLD [2011] Lahore 423.

⁸⁰² LEX/LHPK/0391/2005.

The discussion was more complex in *Mst. Jamila Bano v Mirza Muhammad*.⁸⁰³ In determining custody of two sons, both over 7 years of age, the Peshwar High Court did recognise that the right of custody for the father could only be instituted for the benefit of the minors and considered the minors' education and wishes. However, the court also stated that the mother would be the best guardian, unless she had fallen within the traditional grounds for disentitlement. In doing so, the court appears to have made a decision that seemingly subscribes to welfare principles, but in effect was reflective of traditional rules. Thus, as the reasoning implies, if the mother had fallen within the orthodox grounds for disqualification, she would not have been granted custody, regardless of the above discussion as to welfare.

7.7 Conclusions

The welfare or best interests of the child has clearly become a key consideration in determining the question of custody in the higher judiciary of Pakistan, yet the influence of traditional rules of Muslim law on custody remains evident. However, the Pakistani courts do appear to be flexible in their interpretation and evaluation of circumstances in order to ensure that the traditional rules of Muslim law are subject to the best interests of the child; for example, by returning to a more tolerant view of remarriage and examining the actions and intentions of both parties. Reviewing the judicial approach of the superior judiciary of Pakistan, Ayesha Shahid and Ali Khan therefore concluded that: 'welfare or best interests of the child has been the guiding factor in deciding on the custody of children; and personal law based on classical Islamic principles has remained subordinate to such consideration before the courts.'⁸⁰⁴ It is also worth noting that although the courts in Pakistan have relied on the best interests principle in general, examples of specific reference to the CRC or to the terms 'best interests' is not readily available in the decisions.⁸⁰⁵ It is rather the GWA that seemed to have provided the broad legal basis for reference to the principle of welfare.

⁸⁰³ [2003] YLR 1337.

⁸⁰⁴ Sardar Ali and Ali Khan (n 7) 204.

⁸⁰⁵ *ibid.*

Part – III: Judicial Trends in the Child Custody Decisions in Bangladesh

In Bangladesh, although since the MFLO in 1961 in the Pakistan period, legislative or policy reform regarding the traditional interpretation of Muslim law principles had been slow, yet Bangladesh had demonstrated ‘remarkable judicial maturity and activism’,⁸⁰⁶ in the area. Since independence of Bangladesh in 1971 the higher judiciary had, largely followed the progressive interpretations of the Muslim law principles given by the superior judiciary of Pakistan prior to 1971. However, as Serajuddin rightly remarked, it will be ‘wrong to think that the Bangladesh courts have only blindly followed the decisions of the courts of Pakistan and made no independent contributions of their own to the modernization of Muslim personal law in the subcontinent.’⁸⁰⁷ In fact, the judicial activism of particularly the Supreme Court is significant in the area of Muslim child custody laws, especially in the last decade where the courts have readily relied on the best interests principle to counter the colonial approach of rigid application of the traditional rules of child custody.

The Guardian and Wards Act 1890 (GWA)⁸⁰⁸ is the main law that addresses guardianship and custody disputes in Bangladesh. As noted in the previous chapter, although GWA is a secular law, as per the provision of the Act personal law of the minor has to be considered by the court in deciding an application under the Act.⁸⁰⁹ In addition, the Muslim Personal Law (Shariat) Application Act, 1937 passed in the colonial period is still enforceable in Bangladesh. The cumulative result is that the plural legal system of Bangladesh also acknowledges relevance of the Muslim personal law in family matters.⁸¹⁰

⁸⁰⁶ Serajuddin, *Muslim Family Law* (n 2) 170.

⁸⁰⁷ Ibid.

⁸⁰⁸ Act No. VIII of 1890.

⁸⁰⁹ GWA, s 6 and s 17.

⁸¹⁰ Although such rules are not codified and courts usually refer to certain translated versions of the *Hanafi* texts (as will be discussed later in this chapter) and digests of case laws and textbooks of a number of South Asian authors [in particular of Mulla (459), Fayzee (n 321)] to refer to the applicable rules of Muslim family law.

After the enactment of the Family Court Ordinance of 1985 (FCO), special courts⁸¹¹ were established with jurisdiction over family matters,⁸¹² including exclusive jurisdiction to try all guardianship and custody related matters. All applications that were previously filed before the District Courts under the GWA are now filed before the family courts, although the provisions of the GWA remain the governing statutory law in deciding such applications.⁸¹³ Besides the family courts awarding custody under the GWA, the High Court Division of the SC in addition to its appellate jurisdiction, also occasionally decides custody disputes in cases of ‘unlawful detention’ of the minor, on a petition usually referred to as a *habeas corpus* writ.⁸¹⁴

Bangladesh and the CRC

As noted earlier, Bangladesh is a ratifying state to the CRC and as such it is obliged to ensure best interests of the child in all spheres that include its legislative framework and judicial discourses. Considering that the international treaties ratified by Bangladesh do not automatically become enforceable unless they are incorporated in the domestic law⁸¹⁵, referring particularly to Bangladesh’s obligation under Article 3(1) of the CRC, the HCD had held that ‘the court should look into these conventions and covenants as an aid to interpretation of the provisions of Part III (fundamental rights)’ in the Constitution.⁸¹⁶

⁸¹¹ Courts of Assistant Judges were deemed to be family courts under the FCO, s 4.

⁸¹² Under the FCO, s 5, the Family Courts have jurisdiction over the following family matters: a) Dissolution of marriage; b) Restitution of conjugal rights; c) Dower; d) Maintenance; and e) Guardianship and custody of children.

⁸¹³ According to s 24(1) of the FCO, a Family Court shall be deemed to be a District Court for the purpose of the GWA and, in dealing with matters specified in that Act, will follow the procedures specified therein.

⁸¹⁴ Whereas in a family suit the provisions of the GWA and the personal laws of the minor govern the matter, in a *habeas corpus* petition the court is mainly concerned with assessing whether the minor is ‘unlawfully confined’ or not. In doing so, the HCD has often ventured into deciding the issue of entitlement of the parties to the custody of the minor in light of the traditional *Hanafi* law rules, as well as the rules of the welfare of the minor.

⁸¹⁵ In the case of *H.M. Ershad v Bangladesh*, [2001] BLD (AD) 69, the Appellate Division held that ‘the national courts should not straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments’

⁸¹⁶ *Bangladesh Jatiyo Mahila Ainjibi Samity (BJMAS) v Ministry of Home Affairs and Others* [2008] BLD 580).

Since ratifying in 1990, Bangladesh has adopted certain laws and policies that reflect principles of best interests of children. In 2013, Bangladesh enacted the Children Act repealing the earlier Children Act of 1974, which allows the court to exempt the presence of a child in a court proceeding taking into account his/her best interests.⁸¹⁷ Article 54 of the Children Act authorizes the court to make certain orders to ensure security and privacy of a child who has come in contact with law considering his/her best interests.⁸¹⁸ Section 19 of the Child Marriage Restraint Act, 2017 also incorporates the principle of best interests of the child in section 19. The provision authorizes the court to allow a marriage below the prescribed age limit if the best interest of the child so requires. For obvious reasons the provision had faced criticisms from civil society actors for allowing a scope to authorize child marriages.⁸¹⁹ Further, the Prevention and Suppression of Human Trafficking Act, 2012 also incorporates the principle of best interests of the child. As per section 38 of the Act, the special tribunal established under the Act and all concerned persons are directed to take into account the best interests of the child who is a victim of trafficking or is a witness in a trafficking case.⁸²⁰

The principle of best interests of the child is also reflected in certain national policies. One of the fundamental principles of the National Children Policy, 2011, for instance, is to ensure child rights in light of the CRC as well as the Constitution and the Children Act. Children's right to participation and to express views in order to protect their best interests is also expressly included as one of the fundamental principles of the said Policy.⁸²¹ The National Plan of Action to Eliminate Child Labour (2020-2025) further highlights the best interests of the child principle as one of the key principles

⁸¹⁷ The Children Act 2013, s 22.

⁸¹⁸ The Children Act 2013, s 54.

⁸¹⁹ A closer scrutiny to the provision however reveals that neither the Act, 2017 nor the supplementary Child Marriage Restraint Rules, 2018 details what would be considered 'special circumstances' in this context. The provision also does not mention anything about obtaining the consent of the concerned minor and fails to set a minimum age limit beyond which the court would not grant permission to allow the marriage. Taslima Yasmin, 'A Review of the Effectiveness of the New Legal Regime to Prevent Child Marriages in Bangladesh: Call for Reform'. (Plan Bangladesh 2021) <https://plan-international.org/uploads/2021/12/a_call_for_reform_report.pdf> accessed 16 March 2023.

⁸²⁰ The Prevention and Suppression of Human Trafficking Act 2012, s 38.

⁸²¹ National Children Policy 2011.

to eliminate child labour in Bangladesh.⁸²² National Women Development Policy 2011, on the other hand, recommends enacting new laws and regulations, and amending the existing laws, if necessary with a view to safeguarding the interests and rights of children.⁸²³

However, despite best interests of children being considered in laws and policies, there remain significant gaps in the overall legal and policy framework in ensuring rights of the children as enumerated in the CRC.⁸²⁴ The CRC Committee had provided a similar reflection on the inadequate implementation of the principle of best interests. In its concluding observation on the fifth periodic review by Bangladesh, the Committee while appreciating the inclusion of best interests principle in both the Children Act and National Children Policy, noted that the principle is not well integrated or interpreted in actions taken by legislative, judicial or administrative bodies in Bangladesh. Hence, the Committee in light of the General Comment 14 on the principle of best interests, recommended Bangladesh to ‘a) strengthen its efforts to ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions, as well as in all policies, programmes and projects that are relevant to and have an impact on children; (b) develop procedures and criteria to provide guidance to all relevant persons in authority on determining the best interests of the child in every area and on giving due weight to those interests as a primary consideration.’⁸²⁵

In the third and fourth periodic report of Bangladesh, the Committee while providing its concluding observation also expressed concern about the weak implementation of the principle of best interests in national legislations. On the matter related to allocation of resources, the Committee recommends Bangladesh to use the system

⁸²² National Plan of Action to Eliminate Child Labour (2020-2025).

⁸²³ National Women Development Policy 2011.

⁸²⁴ As per Bangladesh’s alternative CRC Report, 2014 prepared by *Manusher Jonno Foundation* (MJF) (a civil society organization), the efforts of government in integrating the principle in both laws and policies were considered as lacking proper implementation. (*Manusher Jonno Foundation*, Bangladesh’s Alternative CRC Report, 2014 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRC%2FNGO%2FBGD%2F21453&Lang=en> accessed 12 March 2023).

⁸²⁵ UN Committee on the Rights of the Child, Concluding Observations on Bangladesh (CRC/C/BGD/C 0/5).

of expenditure indicators and a separate set of data for assessing the impact on the improvement of investment for the best interests of the children.⁸²⁶ The Committee further provided a number of recommendations to ensure the effective implementation of the principle. For example, one of the recommendations was to define and include the principle in judicial and executive matters. The Committee also invited the government to launch training and social awareness raising events by targeting the judges, lawyers or policy makers on the knowledge of the principle. Actions taken by both government as well as civil societies were recommended to be assessed in light of the principle of best interests of the children.⁸²⁷

⁸²⁶ UN Committee on the Rights of the Child,, Concluding Observations to the Third and Fourth Periodic Reports (CRC/C/IRL/CO/3-4).

⁸²⁷ *ibid.*

Chapter 8: Judicial Approach of the Supreme Court of Bangladesh in Applying Best Interests in Custody Cases

8.1 Introduction

This chapter looks into the trends evinced by decisions of the higher judiciary of Bangladesh in applying the principle of best interests of the child in custody disputes by analysing the leading reported judgments of the Supreme Court of Bangladesh.⁸²⁸ It aims to understand whether there has been any consistent shift in courts' approach in deciding custody disputes, *i.e.* whether the courts have increasingly relied upon welfare or best interests principle as opposed to the traditional rules of Muslim law. Consequently, the analysis also throws light on how the best interests principle had been interpreted and viewed by the judiciary over the years.

8.2 'Welfare' Significantly Influencing Bangladeshi Decisions on Child Custody in the Post-Independence Period

Following the independence of Bangladesh in 1971, the higher judiciary 'has retained [in custody matters] the tendency of Pakistani courts to interpret traditional *Sharia* principles liberally to meet the socio-economic conditions [and to some extent] has established its competence to (re)interpret traditional rules'.⁸²⁹ However, analysis of the reported custody cases of the SC reveals that the gradual process of 'welfare' or 'best interests of children' gaining a determinative role has not followed any consistent or coherent trajectory. Although there are a number of decisions of the apex court giving pre-eminence to considerations of the child's best interests, parallel with this stream of liberal interpretations, a set of higher judiciary decisions co-existed (even as recent as in 2010) that adhered more closely to the orthodox interpretation of child custody rules. Moreover, from a close reading of a number of judgments, which have been repeatedly cited as progressive decisions upholding best interests of the child as the paramount consideration, it appeared that, even

⁸²⁸ The Supreme Court of Bangladesh comprises the Appellate Division and the High Court Division.

⁸²⁹ Hoque and Khan (n 2) 213.

those judgments were still influenced to a certain extent by the classical text-based rules of custody.⁸³⁰

One of the earlier indications where the higher judiciary emphasized on child's welfare after independence is *Rahimannessa v Ashraf Mia*,⁸³¹ where the stepmother of the minor aged 11 years was given custody of his 'person and property' in preference to the claim by the minor's grandmother and full paternal uncles.⁸³² The traditional rules of custody include paternal grandmother and paternal uncles in the order of priority of female relations who are entitled to get custody of a minor but do not include stepmother.⁸³³ However, in this case despite the paternal grandmother claiming the custody along with paternal uncles, the court found the stepmother to be more suitable for ensuring welfare of the concerned child. That the welfare of the minor would be in custody of the stepmother was deduced by the court from the recorded evidence from the trial court that showed close bond between the child and the stepmother, and the child's strong preference to be with her. The court also found that the paternal uncles' conduct after death of the minor's father showed their ulterior motive to seek custody only for the purpose of taking over the property and not for the care of the minor which ultimately led the court to award both guardianship of person and property to the stepmother. However, as per the traditional *Hanafi* rules, the guardianship of property belongs to father and in his absence to father's executor and then to father's father.⁸³⁴ Since paternal uncles are not within the list of legal guardianship it was perhaps easier for the *Rahimunnessa* court to exclude near relations over stepmother for both person and property of the minor on the ground of welfare.

While coming to the decision based on section 17 of the GWA the court concluded that 'the provision is clear enough to show that welfare of the minor is the dominant consideration for the appointment of a guardian of a minor' and if the minor's welfare so requires, even strangers can be appointed as guardians as against near

⁸³⁰ This issue will be addressed in greater detail in the later part of this chapter.

⁸³¹ 25 DLR [1973] (HCD) 167.

⁸³² *ibid* 169.

⁸³³ Nasir, *The Islamic Law* (n 334)160-161.

⁸³⁴ See Zahraa and Malek (n 421)157.

relations.⁸³⁵ Addressing the requirement in section 17 with regard to being consistent with personal law of the minor, the court expressed that,

It is true that this welfare is to be ascertained, consistently with the personal law of the minor, but there is no warrant for the contention that so long as there is a relation alive in the order of the relations entitled, according to Muhammadan law, to the guardianship of the minor, no body else be appointed his guardian.⁸³⁶

Another interesting departure from the orthodox position in the post-independence period is seen in *Mvi Rehanuddin v Azizun Nahar*.⁸³⁷ In this case, the court itself admitted that the settled rule of guardianship (*wilayat*) is that in the absence of the father, the paternal grandfather is the natural guardian of the minor. However, the court, on the consideration that the minors' mother was ill treated by her in-laws, allowed the application of guardianship filed by the mother under the GWA, as against the paternal grandfather. However, the court refrained from expressly addressing the issue of primacy of welfare over traditional rules of custody and guardianship. The court did not expressly note that ill treatment against mother may impact child's welfare or interests,⁸³⁸ or that the child was also under risk of being abused by the paternal relations, but it appeared that ultimately best interests of the child was the main consideration for the court in awarding guardianship to the mother, although such reasoning was not clearly stated in the judgment.

This bears a more significant implication on the rule of guardianship of property, as the paternal grandfather is regarded, by all schools of Muslim law, as the legal guardian of property of the minor in the absence of the father. The Bangladeshi judiciary has not recognized the right of the mother in the case of guardianship of

⁸³⁵ (n 831) 171.

⁸³⁶ *ibid*.

⁸³⁷ 33 DLR [1981] (HCD)139.

⁸³⁸ Malik commented that the court's reliance on the ill-treatment of the mother can be appreciated either 'as an overt attempt to reach a particular result' or 'as a bid to broaden the grounds on which a decision in favor of a mother may be justified and rationalized'. See Shahdeen Malik, 'Recent Case Law on Custody and Second Marriage in Bangladesh: A Trend Towards Secularization of the Legal System?' (1995) 28(1) *Verfassung und Recht in Übersee* (Law and Politics in Africa, Asia and Latin America) 103-125.

property as forcefully as her right of custody.⁸³⁹ The reason perhaps is the fact that whereas in case of rules of custody or *hizanat*, there were clear discrepancies even amongst the various Sunni Schools of Muslim law; that was not the case for guardianship in which all Schools unanimously uphold father's superior right of guardianship and in his absence guardianship of the paternal grandfather. In fact in a number of past decisions in the Pakistan period, the court had departed on the express reasoning that there were divergence of opinions amongst the Islamic jurists with regard to duration and entitlements of *hizanat*. Indeed, it is settled principle of Muslim law (though not beyond scope for re-interpretation) both under the traditional rules of guardianship and under the judicial decisions in the subcontinent, that a mother who is in charge of the minor's person and property without being appointed as a guardian by will or by court,⁸⁴⁰ cannot legally undertake any transaction concerning the minor's immovable property. By contrast, the father or, in his absence, the grandfather, is considered to have such authority without being appointed by a court. The court's preference for appointing the mother (as against the grandfather) as the guardian of both the person and property of the minor in the *Rehanuddin* case can hence be described as a notable step towards a liberal interpretation of a minor's guardianship, which takes into consideration the particular circumstances of the child in question without rigidly following the traditionally accepted principles of guardianship.⁸⁴¹ Nevertheless, despite this progressive decision, the position of mother vis-à-vis guardianship of property of minor has not changed much.⁸⁴² The *Rehanuddin* court was also cautious about the prospect of remarriage by the mother during the tenure of her guardianship. Interestingly, the issue of remarriage was not mentioned as part of the traditional rule of

⁸³⁹ see *Meherun Hossain and others v Nazrul Islam and others*, 46 DLR [1994] 86, where the HCD had unequivocally upheld fathers absolute right over guardianship of property without putting the same to a test of best interests of the child.

⁸⁴⁰ Commonly referred to as the 'de facto guardian' by most of the commentators.

⁸⁴¹ However, the court was silent about any linkage between the mother's ill treatment and the grandparents' rights to custody. However, even though a clearer indication by the court (as to the ill-treatment against the daughter-in-law is considered a potential threat against the well-being of the grandchild) would have provided a clearer guideline for future cases, it is still considered an important decision breaking away from the conventional judicial mind-set.

⁸⁴² As a general rule (influenced by the traditional Muslim law rules) in the family courts mothers are considered de-facto guardian when it comes to the property of the child that he/she had inherited from the deceased father. If the mother then wants to make any transaction with regard to the property she would have to file an application for being appointed a guardian by the Court under the GWA.

disqualification of mother from custody but was considered from the perspective of safeguarding 'interests of the minor'. The court observed:

[T]hat the mother who was hardly 26 years old might re-marry, particularly when she was so young. We, however, feel that the interests of the minors ought to be safeguarded in the event of the mother deciding to re-marry and whether or not she should continue to be the guardian, should be re-examined and decided afresh.⁸⁴³

This is clearly influenced by the traditional rule of disqualification, as apart from remarriage by the mother, there could arise several other situations that could require re-assessment of protecting interests of the minor, but the court's only emphasis was on remarriage.

Next, in the well-celebrated case of *Abu Baker Siddique v S M A Bakar*,⁸⁴⁴ the Appellate Division had reinforced the true spirit of the *Zohra* case from the Pakistan period. Rejecting the traditional age-sex rule of *hizanat*, the apex court in that case denied the father's entitlement to the custody of his eight-year-old son on considerations of the special needs of the child who was suffering from rare medical complications. The mother being a doctor was considered better suited as she had the means to bear expenses of the child's treatment and was in a better position to take care of the child. Thus, offering a similar reasoning as the *Zohra* case, the Appellate Division held that:

Rules of Hizanat or custody are seen to differ from school to school ... there was no consensus among the jurists of these schools on the question of guardianship of minor children leaving scope for difference of opinion, there being no definite rule in the Quran or Sunnah on that matter... [Hence] this rule [a fathers entitlement to the custody of a son who has attained 7 years] would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure ... [Thus] deviation [from such

⁸⁴³ (n 837) 145.

⁸⁴⁴ 38 DLR [1986] (AD) 106.

rule] would seem permissible as the paramount consideration should be the child's welfare.⁸⁴⁵

As discussed before, even prior to *Abu Bakar* case, there had been some progressive decisions that had also displayed court's preference towards welfare or best interests of the child. However, it was this case where the Appellate Division of the SC had first directly addressed the conflict between interests of child and traditional *Hanafi* rules of custody and allowed departure therefrom on the ground of the 'paramount consideration' of child's welfare. Challenging the automatic effect given to the age-sex rule, the court expressed that, 'court's power to determine the entitlement of a party to the *hizanat* is not limited to mere observance of age rule so as to exclude the consideration of the interests of the child which would, however, depend on the facts and circumstances of a given case'. Echoing the *Zohra* case, the court emphasized on absence of any Quranic or traditional text on custody, which had authorized courts to come to their own conclusions by way of *ijtihad*.

Since the *Abu Baker* decision, welfare seems to have become an essential test based on which the claim over a minor's custody would be assessed, although the test was not always applied in its true essence, a point which this chapter will discuss later.

Up to this stage, the judicial literature in independent Bangladesh largely centred on the notion of a 'rebuttable presumption in favour of the parent who would have rightful custody under *Hanafi* Law'.⁸⁴⁶ Thus, the *Abu Baker* court agreed that the presumption of welfare may arguably lie on the person to whom the traditional rules give custody, but declared that such a presumption is not indisputable and can be rebutted, depending on the facts and circumstances of a given case and when the interests of the child so requires.

⁸⁴⁵ *ibid* 113-114.

⁸⁴⁶ Davis (n 6) 124 (discussing *inter alia*, the role of *Ijtihad* in a period following the *Zohra* case).

8.3 From 'Rebuttable Presumption of Welfare' to Welfare being the 'Paramount Consideration'

Following a different path in the trend of liberal interpretation of rules of custody and guardianship, the HCD in *Ayesha Khanam and others v Major Sabbir Ahmed and others*⁸⁴⁷ held welfare to be the sole consideration 'without recourse to a presumption'.⁸⁴⁸ This progressive interpretation was also reflected in the Pakistani decisions following the *Zohra* case, particularly in the *Rahimullah Chowdhury* case, as discussed earlier.⁸⁴⁹ The court in *Ayesha Khanam* held that 'the provisions of the personal law of the parties or even the provisions of the statutory law as to such custody may be subject to ... [the] paramount need of the welfare of the child.'⁸⁵⁰ In holding this opinion, the court also relied on the Indian Supreme Court decision of *Smt. Surinder Kaur Sandhu v Harbax Singh Sandhu and another*⁸⁵¹ in which the court, while interpreting section 6 of the *Hindu Minority and Guardianship Act 1956* which recognizes the father as the natural guardian of a minor son,⁸⁵² held that the provision cannot supersede the paramount consideration of the welfare of the minor. The court observed in *Ayesha Khanam* that as the minor son whose custody was in dispute had not attained the age of seven years, there was no conflict with the personal law in terms of the mother's entitlement to the custody of the minor. However, what makes this judgment more significant in the judicial literature is the court's assertion that 'even if [the personal law and the child's welfare] were [in conflict], the welfare doctrine would have precedence'.⁸⁵³ Thus, the court unhesitatingly settled the law that in the case of a conflict between the traditional rules of *hizanat* and the welfare of the minor, the latter would prevail.

⁸⁴⁷ 46 DLR [1994] (HCD) 399.

⁸⁴⁸ *ibid* 401.

⁸⁴⁹ For a similar discussion on the rebuttable presumption, see Davis (n 6) 124.

⁸⁵⁰ (n 847) 401.

⁸⁵¹ AIR [1984] (SC) 1224.

⁸⁵² HMGA, s 6(a) provides:

'The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother'

⁸⁵³ (n 847) 302.

In subsequent cases, the welfare-as-the-paramount-consideration approach continued to dominate custody decisions, so much so that prior agreements between the parties regarding custody were held not to be an obstacle for the courts to decide with whom the child's interest will be better protected, even if it meant ignoring the terms of the agreements. For instance, in *Rumana Afrin v Fakir Ashrafuddin Ahmed and others*⁸⁵⁴ the court declared the mother as the guardian and custodian of her two minor daughters as against the father's claim on the ground of welfare, despite an agreement between the parties whereby the mother had agreed to hand over the custody of the daughters to their father 'unconditionally and forever'. The court considered applying the rule of *promissory estoppel* in the case would be 'absurd'. Following the *Abu Bakar* case observations, the *Rumana Afrin* court had also emphasized on the absence of reference to the age-sex rule in Quran or Hadith. The court held the view that those are 'personal opinions of jurists' based on prevailing social norms and as such 'have no binding force'.⁸⁵⁵

Similarly, the court in *Nargis Sultana v Aminul Bor Chowdhury*,⁸⁵⁶ having held that the mother was entitled to the concerned minors' custody both under the principles of *hizanat* and under welfare considerations, tried to determine whether the mother's express consent in handing over the minors to their father disentitled her from getting back custody of her children when she was otherwise entitled. The court answered in the negative and offered the following reasoning:

It is very much within the jurisdiction of the court to decide the matter with regard to the custody of the minors after determining the 'welfare' irrespective of the fact that any of the parties ... surrendered her or his right to their custody. If any agreement or any assurance is reached between the parties, that cannot debar the court from deciding as to where the 'welfare' and the 'benefit' of the minors lies.⁸⁵⁷

⁸⁵⁴ 1 MLR [1996] (HCD) 331.

⁸⁵⁵ *ibid* 339.

⁸⁵⁶ 50 DLR [1998] (HCD) 532.

⁸⁵⁷ *ibid* 540.

The next landmark decision reflecting a liberal judicial stance in custody disputes is *Abdul Jalil v Sharon Laily Begum*⁸⁵⁸ (delivered by the Appellate Division), where an interim order of custody was made on a *habeas corpus* petition. Interestingly, in this case, both the contending parties' arguments were founded on an expressed acceptance of the welfare principle to be the *paramount consideration*.⁸⁵⁹ Although in some of the earlier cases, the welfare of the child had been also considered to be a dominant or paramount consideration, the notion that a custody matter is not about the parents' rights but is only about the rights of the child had not been so unequivocally accepted until the *Abdul Jalil* case. Relying on the decision of the Indian Supreme Court in *Dr (Mrs) Veena Kapoor v Shri Varinder Kumar Kapoor*,⁸⁶⁰ the Appellate Division observed that 'in a proceeding [of custody of the child] it is not the rights of the parties but the rights of the child which are at issue'.⁸⁶¹ The *Abdul Jalil* Court had also referred to the 1959 UN Declaration of the Rights of the Child, which declared best interests of the child to be the paramount consideration. Such reference to an international document on child rights in custody cases had not appeared in previous reported cases on child custody.

The *Abdul Jalil* court, agreeing with the *Abu Bakar* case, expressed that interests of the child cannot be viewed from a fixed age-sex rule and must be determined on the basis of facts and circumstances of a particular case. The court quoted from the colonial time English court's decision of *Queen v. Gyngall*⁸⁶² to elucidate the meaning of the term 'welfare':

It is now settled that the term "welfare" must be read in the largest possible sense as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do. The moral and religious

⁸⁵⁸ 50 DLR [1998] (AD) 55.

⁸⁵⁹ *ibid* 59.

⁸⁶⁰ AIR [1982] (SC) 792.

⁸⁶¹ *ibid* 795.

⁸⁶² [1893] 2 QBD 232.

welfare of the child must be considered as well as its physical well-being. Nor can ties of affection be disregarded.⁸⁶³

On coming to a conclusion of welfare, the court however stressed on the natural care-giving role of the mother for her young children, observing that ‘normally the children should be with their mother as long as she does not earn any disqualification’. Dr. Kamal Hossain, who appeared as a counsel on behalf of the mother, argued that ‘the concept of hizanat (custody) or the preferential right of the mother to custody which could just as well be characterized as the “entitlement” of the children to be with their mother, which was part of the corpus of Muslim Law over 1400 years ago is now universally recognized, and is a concept which transcends time and space’. The court along with mother’s natural caregiving role, however also emphasized on the fact that the father is the ‘first and primary natural guardian’ and as such had an ‘abiding interest in the welfare of the children’. This however reflected the court’s approach in favour of a presumption of welfare in the father acknowledging him to be the natural guardian of minors. Noticeably, although Bangladesh had ratified the CRC in 1990, the judgment only referred to the UN Declaration of the Rights of the Child without referring to Article 3 of the CRC. The only analogy that can be drawn to explain such absence of reference to CRC is the limited orientation of the judges and advocates with the Convention considering that it was still a relatively new instrument at the time when hearing of the case had commenced. In fact although Bangladesh had ratified the Convention in 1990 it was only in 1995 that it submitted its initial report to the CRC Committee.⁸⁶⁴ However, it is true that in some of the later cases analysed in this chapter, CRC or best interests principle is mentioned, but such instances are rare and courts have more or less relied on the ‘welfare’ principle as understood within the framework of GWA.

Next in 2004, the Appellate Division in *George Bin Shams v Amir Ali Chowhdury*⁸⁶⁵ held welfare of the minor to be the paramount consideration. Interestingly, contrary

⁸⁶³ ibid 237.

⁸⁶⁴ UN Treaty Body Database https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&CountryID=14&DocTypeID=29 accessed 23 June 2023.

⁸⁶⁵ LEX/BDAD/0261/2004.

to the past decisions, the court referred the mother as ‘the natural guardian’ of the minor girl (perhaps not from a legal aspect but from the point of view of her natural care-giving role) and further held that even after attaining puberty the minor girl could continue staying with her mother if she preferred so and a ‘mere legal guardianship’ (of the father) would not stand in the way of mother’s custody of the child. This decision thus although did not expressly question the well accepted position of the father being the legal/natural guardian of minors under the traditional rules, by holding such view, the court made a clear assertion that no rules of legal guardianship is above the paramount consideration of the best interests of the child.

With almost identical facts as the *Abdul Jalil* case, the HCD in *Farhana Azad v Samudra Ejazul Haque*⁸⁶⁶ (arising from a *habeas corpus* writ petition) gave interim custody to the mother of the minors, until a competent court could adjudicate the matter. The court made specific reference to welfare as the paramount consideration based upon which the family court would have to decide to whom the custody of the minors would belong. The court also ruled upon the validity of a compromise reached between the parties regarding child custody, holding that custody and guardianship issues cannot be settled by a private compromise or by any arbitration.

Following this trend, a 2009 decision, which departed from the traditional age-sex rule of *Hanafi* law, is *Zahida Ahmed v Syed Noor Uddin Ahmed*.⁸⁶⁷ In this judgment, the HCD awarded an interim custody to the mother, again on a *habeas corpus* petition, even though the minor in question was a ten-year-old boy, on the ground that his father deceitfully removed him from the custody of his mother. Although the court accepted the traditional rules of *hizanat* by holding that the father is undoubtedly entitled to the custody of his minor son when he attains the age of seven years, it interpreted the rule as being limited to the following consideration:

The rule of *hizanat* has not given any unfettered right to the father to remove a minor son aged about 10 years from the custody of his mother at will. By resorting to deceptive means ... [the father] has taken [the] law in[to] his own

⁸⁶⁶ [2008] 60 DLR (HCD) 12.

⁸⁶⁷ 14 MLR [2009] (HCD) 465.

hand without waiting for adjudication of the custody and welfare of the children in an appropriate forum.⁸⁶⁸

The *Zahida Ahmed* court also endorsed the approach taken by the *Abdul Jalil* court by viewing custody matters from the perspective of the child's rights and interests and not as a right of the contending parties. The court had also referred to the CRC and its Article 3(1), which mandates that best interests principle to be the primary consideration in all actions concerning children.

Another interesting departure from the traditional rules in custody awards is the judgment in the 2008 habeas corpus writ petition - *Nadia Khalil v Rudress Karim*,⁸⁶⁹ which offers an interesting example of a shared custody order. In this case, the contending parents agreed to a shared custody arrangement of their minor daughter (four days weekly custody to the mother and three days weekly custody to the father), which was enforced by the court as an interim order until disposal of the pending family suit.

Although the mother's lawyers argued their case based on *hizanat* rules (since the minor child was a 6-year-old girl), the court in its decision in supporting the shared custody, had mainly relied on welfare of the child without deciding on entitlements of the parents according to the traditional rules. In fact, allowing shared custody of 6-years-old girl was clearly contrary to the traditional *hizanat* rules. The court held the view that giving shared custody would render the 'best possible welfare to the minor child'; since such shared arrangement would ensure the 'beloved companion of both the parents which will create her mental peace, which is one of the elements of welfare of the minor child'.⁸⁷⁰

In *Abdul Quddus v Syed Ahsan Sajjad*⁸⁷¹ custody of a boy aged 13 and a girl aged 7 were given to the maternal grandmother against the claim of the minors' father. The court did acknowledge that father was the legal guardian of minors, yet held that on

⁸⁶⁸ *ibid* 469.

⁸⁶⁹ 28 BLD [2008] (HCD) 599.

⁸⁷⁰ *ibid* 613.

⁸⁷¹ 30 BLD [2010] HCD 595.

the ground of welfare custody could be awarded to any person. There were allegations against the father of committing murder of his former wife - mother of his two children, which led the court to clearly disregard the traditional rule of Muslim law, which gives legal guardianship of both person and property to the father. The court held the view that:

It is true that in Muslim law father if alive is the natural guardian of the persons and properties of his minor child. He does not require an order of the court to support his right to act as guardian in any matter, but when the court is satisfied that it is for welfare of children that an order should be made for their custody, the court may make an order accordingly.⁸⁷²

The *Abdul Quddus* case draws a clearer picture of the fallacy in the age-sex rule as a one-size-fits-all solution to protect interests of the children in custody disputes. Situations like the above case where the allegations against parents are as severe as murder of the child's own mother, there is no scope of considering any predetermined entitlements of parents under any law.

In *Rayana Rahman v Bangladesh and others*⁸⁷³ upon a writ petition the court similarly held welfare to be the paramount consideration and gave shared custody of the 3 years old minor son to both his contending parents. However, what is noticeable here is that although the court heavily relied on the earlier cases where welfare is considered paramount and had also mentioned Article 3(1) of the CRC, the court gave five days custody to the father and only two days to the petitioner mother who complained that the child was taken away by the father from her custody without her consent. The reason for such unequal distribution of the days for the shared custody arrangement was not made clear by the court, however the fact that mother had remarried after her divorce might have influenced the court in finding the mother to be less fitting to be a custodian as compared to the father.

⁸⁷² ibid 603.

⁸⁷³ 63 DLR [2011] 305.

Another important issue that has largely informed the transition towards a wider interpretation of custody cases concerns the remarriage of a mother, which is analysed below.

8.4 Custody Cases on Mother's Remarriage: Influencing the Liberal Judicial Trend

As discussed earlier, the courts have held that a mother's remarriage to a person who is not within a prohibited degree of marriage in relation to her child would disqualify her from claiming custody. This rule of *hizanat* finds support in all four schools of Sunni Muslim law. Debates surrounding the mother's remarriage *vis-à-vis* a child's welfare have occupied a large volume of reported cases on custody matters. Again, a chronological study reveals a shift from a more orthodox interpretation towards a somewhat more liberal interpretation of the rule.

In *Nilufar Majid v Mokbul Ahmed*,⁸⁷⁴ the court referred to the mother's right of custody as 'a traditional religious right'⁸⁷⁵ that she had lost by her remarriage. Affirming the Pakistani decisions of *Rahela Khatun*, the court held that the mother would then be entitled to the custody only on welfare considerations. Similar interpretations of the rule concerning a mother's remarriage continued to guide the court in subsequent custody cases.

In *Rumana Afrin v Fakir Ashrafuddin Ahmed and others*⁸⁷⁶ the court, quoting the relevant hadith⁸⁷⁷, held that after remarriage 'the right of *hidanat* of the mother then will be at par with that of the father and the case of the mother [as against] the father is to be decided vis-a-vis the minor's welfare'.⁸⁷⁸

⁸⁷⁴ 4 BLD [1984] (HCD) 79.

⁸⁷⁵ *ibid* 81.

⁸⁷⁶ 1 MLR [1996] (HCD) 331.

⁸⁷⁷ Narrated Abdullah Ibne Amar Ibne Aas: A woman said to the Prophet (peace be upon him), 'This is my son - my womb was his vessel, my breast was his water-front and my lap was his cradle. His father has divorced me. Now his father is resolved to take him away from me'. Prophet (peace be upon him) said to her, 'you alone have the claim over him till you do not remarry. (This hadith is numbered 2276 in the chapter of 'Book of Divorce' under Vol. II of 'Sahih Abu Daud' and is quoted at page 182 of Vol. II of 'Musnad-i-Ahmad-ibn Hammal').

⁸⁷⁸ (n 876) 337.

Similar reasoning was given in *Rahmatullah (Md) and others v Sabana Islam and others*⁸⁷⁹ in giving both guardianship of person and of property of the minor to the mother, as against the claim of the minor's paternal uncles, despite of the mother's remarriage. The court emphasized that in appointing a guardian, the age, sex and religion of the child are important considerations to be taken into account, but the question of welfare of the minor is central to all other considerations. Thus the court agreed that by marrying a stranger the mother had lost her traditional religious right of custody over her child, but held that she could still be given custody if in the opinion of the court it would serve best the welfare of the child. The reason for the court in finding the mother to be best suited for the child's welfare was that apart for her remarriage 'no other disqualification' was found and that the evidence on record of the trial court showed that the uncles were acting against the interest of the minor by taking recourse to litigation in order to deprive the minor of her inherited properties.⁸⁸⁰

However, as will be discussed in the following section, a stretch of relatively recent cases have examined the rule concerning a mother's remarriage in a way which only expresses the courts' hesitation in going beyond the conventional bounds of the traditional rules of *hizanat*.

8.5 Traditional Approach Underlying the Liberal Judicial Trend

As indicated in the analysis of the progressive cases above, although 'welfare' or best interests principle has been well-recognized by the Bangladeshi courts in custody matters, courts' approach towards determining custody, occasionally reflected upon the judges' own biases towards the orthodox age-sex rule. There were also a number of other reported judgments of the higher judiciary where reference to the 'welfare' standard seemed merely ornamental and in spirit, the reasoning behind the judgments similarly reflected the conventional mind-set of the judiciary.

⁸⁷⁹ 54 DLR [2002] (HCD) 51.

⁸⁸⁰ *ibid* 54.

In *Akter Jahan Tania & another v The State*⁸⁸¹ - where an application for quashment against a criminal proceeding for kidnapping was filed by the concerned minor's (10 years old girl) father against her mother, the court addressed the issue of legality of the child's custody. Contrary to the more obvious position taken in earlier decisions, the court held that by remarriage the guardianship of the mother is automatically lost. The court however did not differentiate between legal guardianship and custody rights as prescribed by the traditional rules,⁸⁸² but unequivocally upheld the disqualification on remarriage rule without leaving any exception to be considered on the ground of welfare. The court observed as followed:

According to Mohammadan Law a mother is the legal guardian of her minor daughter until the girl attains the age of the puberty and this legal guardianship of the mother continues even if she is divorced by the husband; but the guardianship is lost *by operation of law* as soon as she marries another person who is not related to the minor girl with in the prohibited degree.⁸⁸³

One relatively recent case is the 2004 Appellate Division decision in *Keratul Ain @ Rita and another v Md Salimullah Khan*,⁸⁸⁴ where the court awarded custody of the minors in favour of the paternal grandfather as against the claim of the mother who had remarried a stranger. Although the court apparently considered the question of welfare of the minors, the reason that led the HCD to decide that the welfare of the minors would not be best served if the mother was awarded custody, was merely the fact that they (the minors) 'were not successful in school examinations'.⁸⁸⁵ The Appellate Division affirmed this reasoning. However, by denying the mother her right of custody on this very subjective ground, the court appears to have disregarded its earlier decisions where the welfare test had been viewed more objectively. The courts for instance had emphasized earlier that all circumstances need to be taken

⁸⁸¹ [1986] BLD 281.

⁸⁸² Perhaps the unique classification of guardianship under the traditional Muslim law rules was not fully realized by the concerned court.

⁸⁸³ (n 881) 287.

⁸⁸⁴ 9 MLR [2004] (AD) 71.

⁸⁸⁵ *ibid* 71.

into consideration to determine welfare, which must be read in 'widest possible sense'.⁸⁸⁶ The *Keratul Ain @ Rita* court had not only decided the welfare of the child on such trivial grounds but also disregarded the preference of the minors to be with their mother. Thereby, the requirement of section 17 of the GWA⁸⁸⁷ has also not been fully satisfied by the court, which had specifically required child's preferences to be taken into account.

A similar approach was taken by the HCD in *Sayeda Shamsunnar v Morshed Anwar Khan*,⁸⁸⁸ where the remarriage of the mother, who had been appointed by the lower court as the guardian of the person and property of her minor children, had largely influenced the HCD to pass an order for her removal⁸⁸⁹ from guardianship on an application by a first cousin of the minors. Although the welfare standard upheld in previous judgments was referred to in support of the decision, the court rested its reasoning mainly on the argument that by remarrying a stranger, the mother had become 'unfit from the standpoint of the minor's welfare'.⁸⁹⁰ The other reasons cited by the court in concluding the mother's 'unfitness' to protect the interest of the minor were mere procedural reasons, such as her omission in informing the court as to how the sale proceeds of the minor's property were spent. Thus, the court came to this finding without relying on any of the specific grounds of removal as provided in the GWA⁸⁹¹ and without adhering to any objective interpretation of what is in the welfare of the child.

In the case of *Nargis Sultana*, the court considered the welfare of the minor twin sons who were below 7 years of age to be in the custody of their mother. The court heavily relied on the natural caregiving role of the mother for children of tender age holding that 'a mother's affection for her child is, to a great extent, a biological

⁸⁸⁶ Abdul Jalil (n 858) 59 quoting *Queen v Gyngall* [1983] 3 QBD 232; *Walter v Walter* [1956] 55 Cal 730.

⁸⁸⁷ Section 17 considered such a preference as one of the important considerations for the court in determining a child's welfare.

⁸⁸⁸ 10 MLR [2005] (HCD) 148.

⁸⁸⁹ GWA, s 39.

⁸⁹⁰ (n 889) 151.

⁸⁹¹ *ibid* 152.

phenomenon'.⁸⁹² Although the court relied on welfare principle in its reasoning, the court strongly indicated in its observation that it is this natural caregiving role of the mother for her infant child that justifies the reasoning behind age-sex rule as it is only in the welfare of the child that the mother would get his custody till he attains a certain age. The court observed that:

All the rules of Muslim Law relating to the custody (hizanat) of the minor are merely the application of the principle of “benefit” and “welfare” of the minor. “Welfare” of the minor remains the dominant consideration and the rules only try to give affect to what is minor's “welfare” from the Muslim point of view. Therefore, when the Muslim Personal Law gives the custody of the minor to the mother, it is presumed that the welfare of the minor is with the mother unless facts leading to a contrary inference are proved.⁸⁹³

Thus *Nargis Sultana* court although had in several places highlighted the primacy of welfare and interests of the child, the court retained a strong tie with the standing of the earlier courts where an almost irrefutable presumption of welfare was drawn on the custody of persons to whom the traditional *Hanafi* principles would give custody. Because the minor children were not above seven years, there was a strong insistence from the mother's lawyers to support the age-sex rule and the court also awarded custody or guardianship of persons to the mother till the boys attain seven years.⁸⁹⁴

In the landmark judgment of *Abdul Jalil* case, the interim custody of 4 children were divided between father and the mother where mother got custody of the two minor daughters and the youngest son while the father was given custody of the eldest son who was at the time of the decision, 12 years of age. Although the decision had a tremendous role to play in promoting progressive trend in custody cases which focuses more on welfare and interests of the child, it appears that the court might have been still inclined towards the reasoning behind the traditional age sex rule, as

⁸⁹² *Nargis Sultana* (n 856) 538.

⁸⁹³ *ibid.*

⁸⁹⁴ *Aminul Bor Chowdhury v Nargis Sultana*, 19 BLD [1999] AD 213. (The case went up to the Appellate Division which upheld the decision of the HCD)

the allocation of the interim custody between the parents reflected exactly what the age sex rule would have prescribed. The court although relied on mother's caregiving role to award interim custody of the three children to her, why the same reasoning would not apply for the welfare of the 12 years old son was not made clear in the judgment. The court however mentioned that the boy is 'big' now and 'can look after himself'⁸⁹⁵ - a language, which has much resemblance with the custody rules in *Hedaya*. The court although strongly supported that a custody award is a matter of child's right and not rights of the parents, it did not consider how separation of the siblings would impact their psychological well being.

The observation in the case however gave a mixed sign regarding presumption of welfare. At one point the court referred to *Hanafi* law's custody rules saying, 'Indeed, the principle of Islamic Law (in the instant case, the rule of *hizanat* or guardianship of a minor child as stated in *Hanafi* School) has to be regarded, but deviation_therefrom would seem permissible as the paramount consideration should be the child's welfare'.⁸⁹⁶ Thus accordingly, welfare is to be considered only as an exception, when such 'deviation' seems necessary in a particular case. However, the court on the other hand, upheld the primacy of the welfare doctrine by holding that 'the child's welfare is the supreme consideration, irrespective of the rights and wrongs of the contending parties'.⁸⁹⁷

Similarly, In respect of rule of mother's disqualification on remarriage, despite several decisions where welfare superseded the traditional rules of disqualification from custody, the courts sometimes appeared to be not fully ready to depart from traditional rules of *hizanat*. For instance, the *Nilufar Majid* court observed:

Now that the respondent [father], after the remarriage of the appellant [mother], has the legal right of custody of the minor child (he is already the natural guardian under the law) it requires some evidence of incapacity or incapability

⁸⁹⁵ Abdul Jalil (n 858) 59.

⁸⁹⁶ *ibid*

⁸⁹⁷ *ibid*.

on his part in order to disentitle him from the guardianship and custody of the child.⁸⁹⁸

Thus on one had the *Nilufar Majid* court referred to welfare being the yardstick to determine whether mother can receive custody, having lost only her preferential right by remarriage; while on the other hand the court held the view that mother had completely lost her custody rights as against the father by remarriage - welfare then was to be assessed as an evidence justifying 'disentitlement' of father's 'legal right of custody'.⁸⁹⁹ Thus the two statements appear to be contradictory to each other. The court's inclination towards the traditional rules of custody was even more manifest when the court pronounced that 'mother is not the natural guardian of a minor child under the Muslim Law [...]. Even when a mother is given the custody of a minor child her custody is a subordinate custody [...] subject to the control and supervision of the father'.⁹⁰⁰ Such observation indeed casts doubt as to the true intention of the court in considering welfare principle as the 'dominant consideration.

In the *Nilufar Majid* case, based on the apparent determination of welfare, the court awarded custody in favour of the father. The grounds, which led the court to conclude that welfare does not belong to the mother, were to a large extent, degrading and stereotypical of a mother's perceived role. The HCD declared her 'past conduct and way of life' as 'hazardous' based on the evidence on record from the lower district courts.⁹⁰¹ However, looking at the lower courts' observations that were included in the HCD judgment, the courts assessment of the mother's past conduct mainly indicated towards her second marriage and that she worked outside home in a bank till five in the afternoon. The fact that during that time, the child was under the care of a 'maid-servant' was considered not conducive for child's welfare. The district court's observation had even mentioned that the mother is 'a working women not for her livelihood, but for pleasure'.⁹⁰² Such gender insensitive language reflects an implied

⁸⁹⁸ *Nilufar Majid* (n 874) 782.

⁸⁹⁹ *ibid.*

⁹⁰⁰ *ibid* 784.

⁹⁰¹ *ibid.*

⁹⁰² *ibid* 783.

endorsement by the court of the underlying patriarchal norms and social set up that validated the traditional age-sex rule for child custody and guardianship.

A similar orthodox approach was taken in *Sefina Ferdousi Shimla v Johar Kabir*⁹⁰³ where the court again used the same gender-insensitive language as used by the district court in the *Nilufar Majid* case portraying a working woman as unfit to be a mother, stating that she works for ‘pleasure’ only and than she plans to raise her child through a ‘maid- servant’.⁹⁰⁴ Whereas the father was referred by the court as a ‘respectable businessman’ who lives with a joint family with other female relations indicating that he had better child care arrangement. The court considered the mother ‘undeserving’ mainly because she had remarried 4 days prior to completing the *iddat* period and that subsequent marriage had also failed. However, how such conduct prejudices the welfare of the child is not explained in the judgment. Ironically the court then cited all progressive judgments of the earlier courts when mother’s custody right had been upheld despite of her remarriage on ground of welfare and concluded that the ‘welfare’ of the concerned child in this case belonged to the father. Indicating that Muslim law principles actually give guardianship to the person on whom best interests of the child lies (*i.e* the father on remarriage of the mother), the court expressed that: ‘fortunately the principles of Muslim law and the Guardian and Wards Act provide the same’.⁹⁰⁵ Thus the court, despite showing its apparent support for the best interests of the children, ultimately displayed its bias towards the traditional rules of father’s superior legal rights over guardianship.

Another noticeable tendency reflecting the orthodox approach of the courts can be discerned from a number of otherwise progressive decisions where the courts awarded custody based on best interests of the child but ordered that such awards of custody or guardianship would be subjected to further review when the minor (if he is a boy below seven years) attains seven years of age or when the mother decides to remarry. Thus, the scope for review was kept open only on those grounds, which reflect the traditional age-sex rule and the rule of the mother’s

⁹⁰³ 61 DLR [2009] (HCD) 346.

⁹⁰⁴ *ibid* 347.

⁹⁰⁵ *ibid*.

remarriage to be a disqualification, instead of an all-encompassing ground of best interests of the child. In *Rehanuddin*, the court made such an observation by holding that, 'we, however, feel that the interests of the minors ought to be safeguarded in the event of the mother deciding to remarry [,] and [,] whether or not she should continue to be the guardian [,] should be re-examined and decided afresh'.⁹⁰⁶

In *Ayesha Khanam*, a decision that has contributed tremendously in developing the liberal judicial trend, the court awarded custody of the minor son to the mother until he attains seven years of age. The court further cautioned that, 'it should be kept in mind by the petitioner mother that if she remarries, the question of custody of the child would be reviewed and the law will take its course'.⁹⁰⁷ Similarly, in *Rumana Afrin*, the court ordered the mother to be the guardian and custodian of her minor daughters 'till (sic) she remarries'.⁹⁰⁸

8.6 Conclusions

As seen from the analysis of the above cases, on many occasions, the courts applied the welfare principle merely in letter and not in spirit. The criteria that has been followed in a number of cases in according primacy to considerations of welfare appear mainly to have been influenced by the orthodox mind-set of the judges, implying their continued adherence towards the traditional age-sex rule and the rule of disqualification on the mother's remarriage. The coexistence of this conservative attitude of the judiciary along with the liberal stream of interpretation can be said to be a factor holding back the judiciary in Bangladesh from fully realizing the outcome of the welfare-based judicial approach in custody disputes. Further, this parallel approach offers a puzzling guideline to not only to the lower family courts but also to the higher judiciary in future custody disputes. *Sayed Shamsunnar*⁹⁰⁹ offers one such illustration where the court, while denying the mother's custody rights on the ground of her remarriage, made specific reference to

⁹⁰⁶ *Rehanuddin* (n 837) 142.

⁹⁰⁷ *Ayesha Khanam* (n 847) 303.

⁹⁰⁸ *Rumana Afrin* (n 876) 333.

⁹⁰⁹ *Sayed Shamsunnar* (n 889) 148.

*Rehanuddin*⁹¹⁰ which had ordered a review of the custody matters afresh in the event of the mother's remarriage.⁹¹¹

⁹¹⁰ *Rehanuddin* (n 837) 141.

⁹¹¹ *Sayeda Shamsunnar* (n 889) 149.

Chapter 9: Recent Custody Decisions in the Supreme Court: Move Towards a Progressive Judicial Discourse

9.1 Introduction

Despite the parallel judicial trend that leaned towards the traditional Muslim law rules, the higher judiciary in Bangladesh had embraced the principle of best interests in custody decisions. Although the approach is not consistent but slowly the courts had moved towards considering best interests as the ‘paramount’ consideration effectively abandoning the rigid interpretation of the traditional *Hanafi* texts on child custody. The milestone in the higher judiciary’s liberal trajectory towards the welfare doctrine is the 2012 case of *Anika Ali v Rezwanul Ahsan*,⁹¹² which in many respects defines and clarifies this progressive judicial trend in custody or guardianship matters. This decision is discussed in detail in this chapter to explain the current judicial standing surrounding the modern approach.

9.2 *Anika Ali v Rezwanul Ahsan*: Clarifying the Modern Trend in Interpreting Rules of Custody

The Appellate Division, in the *Anika Ali* case, has delivered a number of prudent guidelines that are in line with the principles of the ‘best interests of the child’. The analysis of the case below shows how the apex court through this judgment had explained the role of the CRC and especially best interests of the child in determining custody decisions. In fact, this judgment had set a progressive trend for the subsequent cases where best interests principle had been applied as a paramount consideration in exclusion of traditional rules of *hizanat*. The decision has touched upon a number of important issues pertaining to child custody and the following section discusses those issues separately:

⁹¹² 17 MLR (2012) (AD) 49.

9.2 (a) Custody Orders should Always Remain ‘Fluid’ in Order to Comply with Welfare of the Child

As indicated earlier, custody orders are often coupled with conditions of subsequent review upon a mother’s remarriage or on the minor boy’s attainment of seven years of age. Although it may be argued that the court’s reckoning behind such conditions is nothing more than a manifestation of its concern for the welfare of the minor, this does not find strong grounds of support, as the court in such a case might have just pronounced that the matter would be decided afresh if the best interests of the minor justified such a fresh application. Instead, the courts were precise in making an order conditional upon those two specific grounds, which had been the subject matter of the long-grown tension between the traditional and liberal interpretations of rules of custody.

To this end, the Appellate Division in *Anika Ali* provides a well thought-out observation by holding ‘welfare’ to be the sole and paramount consideration, which can justify a re-examination of the case, without having to specify any other grounds designed principally to disqualify the mother from custody in future. Thus, the court asserted that:

The order in relation to custody of a child should never be presumed to be inscribed in stone. Matters such as custody must always remain fluid since change in circumstances may at any time require the terms of the custody of the child to be varied upon a fresh application in order to comply with the age-old principle that the welfare of the child is a paramount consideration and in modern parlance ‘the best interests of the child’ must be given due consideration.⁹¹³

9.2 (b) Emphasis on Child’s Preference Based on the CRC

As appeared from the case analysis above, in determining custody of a child the higher courts had sometimes made reference to the CRC. However, compared to the earlier cases, the *Anika Ali* court’s emphasis on the CRC was noteworthy, in particular the court had relied on the best interests principle, as a determining factor

⁹¹³ *Anika Ali* (n 18) 56.

for awarding custody. There was also specific reference to the right of the child to express its views⁹¹⁴ in custody disputes, as given in Article 12 of the Convention.

Analysis of the volumes of Bangladeshi decisions on custody matters also shows that the courts in determining welfare do not always seriously consider a child's wish. In fact, according to section 17(3) of the GWA,⁹¹⁵ considering a child's preference in appointing a guardian is at the discretion of the court, as the court is not bound to take such preferences into account. There were instances where the courts had totally disregarded the minors' wish without providing any cogent reasons as to why the child's preference was to be ignored.⁹¹⁶ Contrary to this position, the *Anika Ali* court regarded the child's preference as a 'requirement' of 'the modern concept of custody and other matters concerning children',⁹¹⁷ which the court termed as a 'progression' from the legal posture of section 17(3) of the GWA. Thus, the court emphasized that an application for guardianship will be entertained by the court according to the best interests of the child upon giving the child 'an opportunity to express his/her views'.⁹¹⁸ The court had thus given due weight to the child's wish, as ensuring such right would only be in the best interests of the child as the right of the child to freely express his/her views is embodied in the CRC itself.⁹¹⁹

9.2 (c) Right of Access/Visitation should also be Subject to the 'Welfare Test'

The traditional rule of *hizanat* that both parents will have absolute rights to visit the child when the child is not under his or her custody is found in all the major scholarly texts of Muslim law.⁹²⁰ The courts have also commonly accepted the rule of absolute right of access without any question being raised as to its suitability with the welfare test in a given circumstance. For instance, it was held by the Appellate Division in

⁹¹⁴ CRC, art 12.

⁹¹⁵ GWA, s 17(3) provides: 'If the minor is old enough to form an intelligent preference, the Court "may" consider that preference'.

⁹¹⁶ *Keratul Ain and Rita* (n 885) 71.

⁹¹⁷ *Anika Ali* (n 18) 56.

⁹¹⁸ *ibid* 58.

⁹¹⁹ CRC, art 12.

⁹²⁰ '[W]hen the child is in the custody of one of its parents the other is not to be prevented from seeing and visiting it.' - Faiz Hassan Badrudin Tyabji, *The Personal Law of Muslims in India and Pakistan* (4th edn, NM Tripathia 1968) 238.

*Aktar Masood v Bilkis Jahan Ferdous*⁹²¹ that ‘a father cannot be denied access to his minor son while in the custody of the mother’. With regard to this unfettered right of access, the *Anika Ali* court again made some important observations, keeping in mind the special situation of children who are ‘victims of turbulent or broken-down marriages’.⁹²² The court held:

The decision as to which parent shall have the custody of the child and *how much access may be afforded* [emphasis added] to either parent is a most delicate one. A wrong decision may create a traumatic situation for the child, which would result in indelible psychological damage throughout his/her life. In this context it would be wise to allow the child to freely express his/her views so that the judge adjudicating upon the matter can decide what the welfare or the best interest of the child demands.⁹²³

Thus, this observation by the Appellate Division provides a clearer guideline for subsequent custody decisions, particularly for disputes, which involve physical or mental abuse by one parent, or where domestic violence is the cause of the breakdown of marital ties between the contending parents. Prior to this decision, visitation had been largely viewed by the courts as entitlements of the parents without any scope to review such access based on best interests of the child. The *Anika Ali* court has in fact indicated for the very first time that even the extent of the visitation right has to be weighed against the welfare test.

9.2 (d) Widening the Prospect for ‘Shared-Custody’ Awards

This positive decision of the Appellate Division has successfully opened a further possibility of awarding shared or joint custody to both parents if, depending on the facts of a given case, it appears to the court that such an arrangement would best serve the interests and welfare of the child. Although this has not been precisely mentioned in the *Anika Ali* judgment, the court referred to Article 9 of the CRC, which

⁹²¹ 50 DLR [1998] (AD) 145.

⁹²² *Anika Ali* (n 18) 57.

⁹²³ *ibid.*

deals with the right of the child to live with both parents and not to be separated from them against their will.

In many countries, joint custody is the preferred arrangement and it has now become widely accepted as reflecting the best interests of children of divorced parents.⁹²⁴ Although before *Anika Ali* the higher judiciary in Bangladesh seemed to have been generally apathetic in exploring such a possibility, there were a few cases where the court admitted that both parents were equally fit to serve the welfare of the minor, but in embracing the conventional path, it awarded sole custody to one parent over another.⁹²⁵ However, with regard to shared custody arrangements, the outcome in case of *Nadia Khalil v Rudress Karim*⁹²⁶ as discussed earlier was a welcoming exception. However, the case was a writ petition awarding temporary custody as per the already existing agreement of shared custody between the parents. The court itself had indicated that the final disposal of the family suit would ultimately decide who among the contending parents would get the physical custody. Although *Anika Ali* case did not reiterate such clear ruling regarding relevance of shared custody arrangements, by referring to child's right to not to be separated from the parents, the court in fact had broadened the scope for exploring such a possibility for the future courts.

In light of the above analysis, *Anika Ali* can be said to be a truly positive observation delivered by the apex court, and it offered a milestone in guiding the judiciary in future child custody disputes. Having said that, although the court in *Anika Ali* touched upon important and timely issues pertaining to custody, in most aspects it reserved its views merely to patterned statements without going deeper into the issues. The cases subsequent to *Anika Ali* however had more categorically referred to the best interest principle to determine custody disputes.

⁹²⁴ Kurki-Suonio K, 'Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective' (2000) 14 International Journal of Law, Policy and the Family 183, 184.

⁹²⁵ See Rahimullah Chowdhury (n 696) 1.

⁹²⁶ 28 BLD [2008] (HCD) 599.

9.3 Current Judicial Trends Post *Anika Ali*

Up until the *Anika Ali* case, the higher judiciary in custody cases had overwhelmingly used the term ‘welfare’ to mean best interests of the children. Occasionally the courts had also used terms such as ‘benefit’ or ‘interest’ of the child in addition to or as an alternative of ‘welfare’.⁹²⁷ In few instances the higher judiciary had even used the terms ‘welfare’ and ‘best interests’ together as alternative terminologies.⁹²⁸ However, undoubtedly *Anika Ali*’s emphasis on the best interests principle had set a positive trend for the consecutive courts to use best interests of the child and other rights of children in the CRC more frequently and with greater conviction. The reported judgments on custody and guardianship post *Anika Ali* case show a clear shift towards the CRC and best interests principle in determining custody matters and less reference to traditional rules of custody. The *Anika Ali* court had in fact referred to the best interests principle as the ‘modern parlance’ of the ‘age-old principle of welfare’ being the paramount consideration. This observation by the court is significant as it connotes how welfare is mostly used as the domestic law equivalent of the term ‘best interests’ particularly because GWA incorporates the term welfare to essentially mean the best interests of the child. Since GWA is the governing statute in Bangladesh, in majority cases of child custody in both the lower and higher judiciary, the courts only refer to the GWA and consequently to the welfare principle. Commonly, the judgments of the higher judiciary in family law cases rely on relevant domestic statutes, applicable personal law principles and judicial precedents. International principles and instruments are cited very occasionally. The fact that international instruments ratified by Bangladesh do not automatically become part of the law unless it is incorporated into a domestic legislation also contributes to this approach. There is also lacuna in trainings of the judges as well as of the court officers with regard to the authoritative value of the international instruments that the country ratifies. Writing on this aspect, Karim and Theunissen notes, ‘in the absence of clear national incorporating legislation ... courts in Bangladesh in effect remain barred from relying on international law and only may

⁹²⁷ See Abdul Jalil (n 858) 55.

⁹²⁸ See, Keratul Ain and Rita (n 884).

invoke it as an aid to interpretation when there is no domestic law on the issue or when the domestic law is unclear'.⁹²⁹

After the *Anika Ali* judgment, the 2018 decision of the Appellate Division in *Mainul Islam Chowdhury v Rumana Foiz*⁹³⁰ is significant in several aspects. The custody arrangement that the court had ordered for the contending parents of the two minor children were based on specific reference to the concept of 'joint custody' dividing the custody between both parents in weekdays and weekends. Except in the *Nadia Khalil* case the courts usually did not acknowledge any shared custody concept, as the traditional rules also do not mention any shared or joint custody option. The courts would generally give the custody to one parent and visitation right to the non-custodian parent. In *Nadia Khalil* however the court only decided to continue the shared custody arrangement that was already agreed on by the parties through an agreement. In *Mainul Islam* the court on a petition by the father had expressly relied on the concept of 'joint custody' and gave weekdays to the father and weekends to the mother. From the judgment it appeared that the reasoning for the mother to receive just two days of custody was because the children did not want to visit their mother as she was living with her second husband.

Following the footsteps of *Anika Ali*, the court here emphatically referred to the CRC as basis for any decision on child custody. The court in *Mainul Islam* viewed that:

The principles of international law which guide us in case of custody of children are found in the Convention on the Rights of the Child (CRC), which provides that the best interests of the child shall be a primary consideration when dealing with all matters concerning any child.⁹³¹

The *Mainul Islam* court referred the best interests principle as equivalent to the welfare principle found in section 17 of the GWA. The court noted that best interests of children is not a new concept as GWA has already provided that any order under

⁹²⁹ Bianca Karim and Tirza Theunissen, 'Bangladesh', in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 115.

⁹³⁰ 73 DLR [2018] (AD) 112.

⁹³¹ *ibid* 114.

the Act would be made only when the court is satisfied that such order is in the welfare of the minor. It was observed in the case that the courts were as such bound to take into account these 'statutory provisions of law' (*i.e.* Article 3 of CRC and Article 17 of the GWA) in disputes relating to not only custody but also 'access and other matters which impact the lives of children'. Thus, like *Anika Ali* court, the *Mainul Islam* court had subjected the access and visitation orders too to the ultimate consideration of best interests of children. Also significant is the extensive use of the term 'best interests' by the court in this judgment as opposed to using the term 'welfare', which, prior to *Anika Ali* case, had been mostly in use by the higher judiciary to mean best interests of the children. Such linguistic choice seemed deliberate on the part of the SC, evidencing thereby a greater responsiveness of the apex court towards the CRC and its application in Bangladesh. Other than Article 3, the judgment had also reflected on other provisions of the CRC, for instance, reflecting on Article 9 of the CRC, the court insisted that, separation from the parents or sometimes from siblings 'does not bode well for the best interests of children and should be avoided'.⁹³² Further referring to Article 7 of the CRC the courts viewed that: 'the best interests of any child requires that she/he be cared for by her/his parents'.⁹³³ The court further focused on the provisions of Article 12 of the CRC regarding children's right to freely express their views in matters affecting them and noted that equivalent to such a provision is section 17 of the GWA which requires that 'if the minor is old enough to form an intelligent preference the court may consider that preference'.⁹³⁴

The court also took effort to elaborate on the enforceability of the CRC in the context of Bangladesh's legal system by referring to its earlier decision in *Hossain Muhammad Ershad v Bangladesh and others*,⁹³⁵ which is most frequently cited by scholarly writings as well as by courts in explaining enforceability of international instruments in Bangladesh. The case was even cited by the *Anika Ali* court. It was held in *Hossain Muhammad Ershad* that, 'the courts should not ignore the international obligations which a country undertakes by signing the instruments' and

⁹³² *ibid.*

⁹³³ *ibid.*

⁹³⁴ *ibid* 115.

⁹³⁵ 21 BLD [2001] (AD) 69.

that 'beneficial provisions of the international instruments should be implemented as the obligation of signatory state'.⁹³⁶ With regard to enforceability of the CRC in particular, the *Mainul Islam* court further cited the case of *State v Metropolitan Police Commissioner*,⁹³⁷ which stated that, 'as signatory Bangladesh is obliged to implement the provisions of the CRC.'⁹³⁸

Another important aspect of *Mainul Islam* case is that among the reported judgments, this appears to be the first case where the judgment mentions about appointment of probation officer to issue welfare report. The court here had also directed to appoint a clinical psychologist to provide counselling to the children and their parents. Earlier it was only the *Abdul Jalil* case where the petitioner side had argued and requested the court to appoint an independent welfare or probation officer to assess the welfare situation of the children in question, which however was not considered by the court. On the contrary, in the *Mainul Islam* case, the courts received and reviewed a number of reports from the probation officer and clinical psychologist to assess the views and situations of the children. Since the children were very much against going to their mother's house where she lived with her second husband, the court modified the earlier custody order and allowed visitation to the mother only during the weekends in the office of the Department of Social Services under the supervision of the probation officer. This arrangement was ordered to continue till the disposal of the case in the family court.

Despite the children not willing to be in the custody of the mother, the court allowed her visitation mainly on the ground of mother's natural caregiving role, a ground that had been relied upon frequently by the courts in custody disputes. Thus, the court expressed the view that 'considering the age and gender of the children, [...] their mother must have access to her children and vice versa'.⁹³⁹ The court also did not mention any rights or entitlements of the parties under any existing laws in its judgment and rather focused solely on the best interests of the children in deciding the temporary custody and visitation issues. The fact that mother had remarried also

⁹³⁶ *ibid.*

⁹³⁷ 60 DLR [2008] 660.

⁹³⁸ *ibid* 662.

⁹³⁹ *ibid.*

was not discussed from the point of view of Muslim law disqualification but rather was discussed from the point of view of children's comfort in living in the same house with the stepfather. The case thus certainly reflects a good example of a progressive transition in the judicial trends in awarding custody based on best interests of the child.

This progressive shift towards best interests principle as a determinative factor continued in the next set of recent decisions. In the 2020 case of *Amena Chowdhury Kheya v Bangladesh and ors*⁹⁴⁰ pointing out the negative impact a broken marriage has on children, the court considered it crucial to ensure that the child suffers 'the least harm' (from the separation of the parents) and that his best interest is ensured.⁹⁴¹ Echoing *Anika Ali*, the court emphasized that custody orders need to be regularly monitored by probation officers and the court may modify the order if due to change in situations the best interests of the child so requires.

The court also emphasized on the right of the child to maintain contact with both parents when he/she is separated from them as provided in Article 9 of the CRC and accordingly interpreted child's access to the non-custodian parent as rights of the child and not that of the parents. Following *Anika Ali* judgment the court however did mention that the frequency and duration of such access must be considered keeping in mind the best interests of the child. Thus, even in case of visitation, which had been generally considered in the earlier cases as an unquestionable right of the non-custodian parents under the traditional rules, was made conditional upon the best interests principle.

In the *Amena Chowdhury* case, custody of the 4 years old daughter and 3 years old son was given to the mother and the father was awarded visitation right for once a week. The main reasoning for the court to award the custody to mother was stated to be the young age of the children for whom mother would be the most suitable to ensure their best interests. The court in its observation had also cited a number of earlier progressive decisions of the SC, where mother was given custody (mainly

⁹⁴⁰ LEX/BDAD/0038/2020.

⁹⁴¹ *ibid* para 9.

because of her natural caregiving role towards young children) contrary to the traditional custody principles under the personal law.⁹⁴² The court also made reference to welfare reports and monitoring by probation officer in the custody order based on which it was satisfied that the custody order was appropriate for the best interests of the children and modifications were not necessary.⁹⁴³

In *Nazmun Nahar Mukta v Md. Lutfur Rahman*⁹⁴⁴ a 2020 Appellate Division decision, the apex court again relied on best interests principle alone without mentioning the traditional rules in giving joint custody of two minor sons aged 12 years to their parents. The children were living with the father before and by a decision of the HCD mother was only given visitation right. On appeal, the Appellate Division modified the order and ensured two days' weekly custody to the mother. The reasoning for such modification was stated as 'for better development of the children, [...] they must have company of both their biological mother and father'.⁹⁴⁵ The observation did not mention assessment by any probation officer. The parents and children however were individually interviewed by the concerned judges to determine their situations. In *Serajus Saleheen v Shareen Rahman*,⁹⁴⁶ a 2021 case determining mother's petition to take her minor daughter abroad, the Appellate Division found that giving the child opportunity to retain her immigrant status by letting her travel to the USA was in the best interests of the child. Again, in determining best interests of the child in this case, the apex court made no reference to any traditional rules of *hizanat*. The judgment was however essentially concise and other than the court's analogy that opportunity to receive USA's immigrant status was in the 'best interests of the child', nothing more was added to offer reasoning for such observation.

Thus, since the extensive reference of CRC and best interests principle in the *Anika Ali* judgment, the judicial awareness about the Convention and its core principles seemed to have been improved. However, the very generic use of the term 'best

⁹⁴² For instance, the court cited relevant paragraphs from Abdul Jalil (n 858), Abu Baker Siddique (n 844) and Rumana Afrin (n 876).

⁹⁴³ Amena Chowdhury (n 940).

⁹⁴⁴ LEX/BDAD/0029/2020.

⁹⁴⁵ *ibid* 11.

⁹⁴⁶ LEX/BDAD/0116/2021.

interests' in the judgments also indicate that whereas in past few decades the courts had used the term 'welfare' taken from the colonial statute of GWA; in the more recent years courts are rather using 'best interests' as a term synonymous for 'welfare'.

Similarly, in *Farhana Karim v Shahriar Ahmed and ors*,⁹⁴⁷ in determining access right of a mother to visit her two minor sons aged 15 and 13 years, the court relied on best interests of the children alone, without having any reference to the Muslim law principles. CRC was also not referred in the judgment. Visitation was allowed to the mother despite of specific reports that the children were hostile and non-cooperative towards the mother during the visits. The court here, contrary to some of the earlier observations, considered visitation from mother's rights perspective and held that, 'the mother cannot be deprived of her right to access, as long as such access is not contrary to the best interests of the children'.⁹⁴⁸

Although the court advised the parties that the younger child who was particularly hostile towards the mother should consult a behavioural psychologist, unlike the previous orders the court did not appoint any probation officer. Rather the court directed the mother's lawyer to supervise the visits and had ordered her to submit periodic reports of the visits to the court. Such supervision of visits by representing lawyers happened previously on some occasions. However, what was particularly odd in *Farhana Karim's* case was that the petitioner mother was ordered by the court to pay an extravagant amount by way of remuneration to the advocate for supervising the visits, which was taka one lac (1,00,000) per weekly visit. Such practice of the court ordering the advocate of the petitioner lawyer to supervise visits and provide weekly report to the court, on account of the petitioner's expenses is not seen before in any of the reported judgments.⁹⁴⁹

⁹⁴⁷ LEX/BDAD/0089/2021.

⁹⁴⁸ *ibid* 14.

⁹⁴⁹ Although visits to take place in the advocate's chamber was noticed in few earlier decisions. For example in *Abdul Jalil* (n 858) the court ordered father's visitation of the children to take place in the private chamber of the lawyer representing his case.

In *Zahir Uddin Ahmed and ors v Bangladesh and ors*,⁹⁵⁰ in response to a writ petition, the HCD in 2022 ordered the father of a 9-year-old boy to hand over the child's custody to his maternal grandparents on the ground of his welfare. Through a mutual agreement between the parents (both of whom had remarried after divorce), the mother of the child gave away his custody to the father. However, it was the maternal grandparent who brought the *habeas corpus* writ alleging that the child was not properly taken care of by the father. The crucial factor on which the court was convinced that the custody should not be with the father was that upon getting his custody, he had transferred the child from a renowned English medium school in the Dhaka city to an Islamic Madrassa school. Most importantly the court relied on the child's preference to live with the grandparents and his unwillingness to speak about his living situations with his father and stepmother. Thus despite a clear contradiction with the traditional rules of guardianship, this decision did not refer to any of such rules in the judgment. The court however did acknowledge that the father had the guardianship of the child yet, mentioning 'extenuating circumstances and welfare of the child', the court gave custody to the maternal grandparents. Noticeably the courts choice of terminology was 'welfare' and not 'best interests of the child'.⁹⁵¹

In the latest 2022 *habeas corpus* petition of *Eriko Nakano v Bangladesh*,⁹⁵² the petition was filed on behalf of a Japanese mother to get custody of her two minor daughters aged 9 and 11 respectively. The father who was a Bangladeshi born American citizen brought the two minors who were Japanese nationals (and Bangladeshi by descent) to Bangladesh and it was contended by the mother that the husband abducted the children and brought them to Bangladesh defying a family court's order in Japan. In its decision the HCD did not go into the merit of the case as that would be settled in the pending family suit, but declared the custody of the father as unlawful for the purpose of the *habeas corpus*. The court held:

The custody of the minor children, particularly in this case in which the detainees are 9 & 11 year old girl children and their mother is a Japanese well

⁹⁵⁰ LEX/BDHC/0016/2022.

⁹⁵¹ *ibid* 15.

⁹⁵² LEX/BDAD/0075/2022.

settled doctor and their father being a well settled person is a Bangladeshi by birth and also a citizen of America, the paramount consideration is the welfare of the minors and not the legal right of this and that particular party.⁹⁵³

Although why welfare would not be in the father's custody was not clearly expressed in the judgment, the court indeed had cited from the past SC decisions where mother was considered to be fit for having the custody of the young children so long as she does not earn any disqualification (e.g *Abdul Jalil*; *Mainul Islam* and *Abu Baker*). There was also no mention of traditional rules of *hizanat* in the observation. However, the court's emphasis on the age and gender of the minor daughters seemed to have been the key factor influencing the court to deduce welfare in favour of the mother.

The court's observations in this judgment insisted on the best interests principle being the 'paramount consideration' and in support of this contention the court mentioned several rights enshrined in different Articles of the CRC, mainly Article 21, which clearly states that in decisions like adoption the best interests principle should be the paramount consideration. The court observed as follows:

If we read Articles 7, 12, 20 and 21 together with other Articles of the Convention on the Rights of the Child, it is seen that the best interests of the children have been given the status of paramount consideration. It has been envisaged in Article 7 of the CRC that the children shall have the right to be cared for by his or her parents. It also has been enshrined in Article 12 of the CRC that the child who is capable of forming his views shall have the right to express the views in all matters affecting his or her interests. Article 20 of the CRC enunciates that the State shall give the assistance and protection to those children who are temporarily or permanently deprived of staying in their family environment. In Article 21 of the CRC, the best interests of the children have been given the status of paramount consideration.⁹⁵⁴

⁹⁵³ *ibid* 16.

⁹⁵⁴ *ibid* 21.

Further echoing *Abdul Jalil* and citing the observation in *Queen v Gyngall*⁹⁵⁵ the *Eriko Nakano* court reiterated that that ‘the term “welfare” must be read in the largest possible sense’ which should take into consideration all relevant circumstances including ‘moral and religious welfare’ of the child as well as his/her wellbeing.⁹⁵⁶

9.4 Conclusions

This liberal judicial trend in custody cases ‘epitomizes the fact that Islamic family law is capable of progress and development in order to keep pace with the needs of time and society’.⁹⁵⁷ The current judicial trend of the higher judiciary in Bangladesh can be thus identified as one that is liberal and progressive in as much as the best interests standard has been supported in most of the custody disputes as against age and sex based rigid rules of traditional laws. Although cases prior to *Anika Ali* reflected a mixed approach where the courts often seemed to be shifting from a rebuttable presumption approach to a welfare-being-the-paramount-consideration approach, the more recent judgments had rather showed a consistent pattern where the courts had often relied on a purely secular welfare based approach without having to justify the decision against the traditional *Hanafi* rules of custody.

⁹⁵⁵ *Queen v Gyngall* (n 886).

⁹⁵⁶ *Eriko* (n 952) para 34.

⁹⁵⁷ *Hoque and Khan* (n 2) 223.

Chapter 10: Analysis of the Family Court Decisions Endorsing Best Interests Principle

10.1 Introduction

From an analysis of the contested judgments of the family courts on custody disputes it appears that generally the courts acknowledge the relevance of child's best interests in deciding a custody or guardianship award. However, the constant efforts of the courts to balance the conflict between Muslim law principles and welfare or best interests considerations are clearly reflected in the judgments of the family courts. Although welfare has found a strong ground in guardianship disputes in the family courts, its manifestation had been somewhat different than how it had been addressed and applied in the SC decisions. Welfare in the family courts is mostly addressed as 'exception' to the 'general rule' *i.e.* the traditional rules of custody under Muslim law, and sometimes it is viewed as a consideration to be weighed 'together with' the traditional religious principles. However, as the analysis revealed, there are also instances, especially from recent years where the courts relied only on welfare or best interests principle without referring to relevance of Muslim law principle. Concurrently, the analysis also showed that in a number of cases welfare or best interests of the child has not been considered at all - the judgment is either silent about mentioning any reasoning in the decision or it relies solely on the traditional Muslim law rules of custody and guardianship, ignoring 'welfare' altogether.

Thus, the grounds of awarding custody are more inconsistent compared to the SC decisions. The inconsistency in higher courts' own decisions in terms of defining the relevance of best interests principle and Muslim law principles in custody disputes particularly prior to *Anika Ali*, may have partially contributed to this lack of coherence in the lower court judgments on custody disputes. Another probable reason for such inconsistency could be the fact that oral deposition of the parties, including that of the child (when old enough to give one) generally provides as the most important or perhaps the only source of evidence to guide the trial court in coming to a

decision.⁹⁵⁸ As a result, depending on whose court the trial is taking place, the decision and reasoning may vary on identical or similar sets of facts. The judgments of the family courts also reveal that the progressive trends in custody decisions of the SC could not significantly influence the lower courts, as many of the judgments have either no reference to any of those SC decisions to support their reasoning or they have cited older decisions while more relevant decisions have already come from the apex court. The overall impression appears to be such that not all family courts are well conversant with the recent decisions of the higher judiciary on custody and guardianship issue and more often than not the custody and guardianship cases are decided more subjectively based on the judge's personal belief and assumptions.

10.2 Background of the Case-Law Analysis

Since the family courts have the exclusive jurisdiction to try the family law disputes under the Ordinance,⁹⁵⁹ analysing the decisions of these courts can essentially give a more comprehensive picture of how the family courts view the best interests principle⁹⁶⁰ in respect of disputes over child custody and guardianship and what are the considerations that dominate the judicial trends in the family courts in awarding child custody in Bangladesh. Especially, analysing the judgments of the family courts being the trial court can also shed light on the courts' process of assessment of evidences in child custody cases, which in turn can explain the process of how the decision on custody disputes are determined. Hence, this chapter would attempt to analyse a number of judgments of the family courts, majority of which had been collected from Dhaka and the rest from the family courts of other districts.

Most of the applications filed before the family courts under the GWA concern guardianship of property of the minor. While cataloguing the cases collected for the

⁹⁵⁸ Sometimes when remarriage of one party is alleged by the other, proof of marriage certificates are submitted by way of evidence, as well as proof of economic solvency of the parties. However, depositions of the witnesses remain the most important evidence assessing which the judge would come to a decision of eligibility for guardianship.

⁹⁵⁹ FCO, s 5.

⁹⁶⁰ The family courts however seldom use the term 'best interests of children' - the term 'welfare' is rather widely used to basically refer to the same considerations.

study, it appeared that most of the case records on custody and guardianship are usually compromise decrees⁹⁶¹ where applications for appointment of guardianship are disposed of as per the terms of mutual agreement or '*solenama*' executed between the applicant and the opposite parties whose names are required to be provided in the application.⁹⁶² The language and form of these mutual agreements generally follow a common pattern where the opposite party named in the application declares that he/she would have no objection if the applicant were appointed as the guardian of the minor. In majority of such cases applications are filed when the widow of the deceased husband needs to exercise legal rights over the properties of her children that they had received from their deceased father. As such, these applications based on *solenama* are usually accompanied by a petition seeking permission to dispose of or otherwise use the properties belonging to the minor.⁹⁶³

Thus, dispute regarding physical custody of the minor seldom arises - mainly when both parents of a child are living and are separated or divorced. In some cases, after the death of the father, paternal relations of the minor contest the case instead of giving a 'no objection' to the mother's claim over guardianship. However, it often appeared that the actual purpose for which the minor's paternal relations contested the case was merely to gain monetary benefits out of the property left by the deceased father of the minor; and guardianship of person or physical custody was claimed only as a pretext to justify such intentions and to prevent the mother from disposing of the properties of the minor.⁹⁶⁴

In terms of welfare or best interests of the minor, it is only in the contested cases⁹⁶⁵ that welfare is considered at length, in appointing or declaring his/her guardian.⁹⁶⁶ Apart from the contested cases, welfare or best interests is either merely pronounced in the decision or is absent altogether from the decision. In the

⁹⁶¹ As opposed to a contested case.

⁹⁶² Under GWA, s 10, which prescribes the details of the application form.

⁹⁶³ The common reason that is shown in the petition to justify such disposal on behalf of the applicant is to bear the cost of education and maintenance of the minors.

⁹⁶⁴ In later discussions cases with similar facts will be elucidated.

⁹⁶⁵ Where both parties contest the dispute, as opposed to compromise or ex parte decrees.

⁹⁶⁶ Although as will be discussed later in the thesis not all contested cases base their judgments on welfare considerations.

compromise decrees, the court generally makes a statement to the effect that ‘as the terms and conditions of the *solenama* seemed lawful and appropriate, it is accepted and the applicant is declared guardian of the minor’.⁹⁶⁷ Language used in most of the compromise decrees follow this common pattern without any further assessment with regard to welfare of the minor. On the other hand, in an *ex parte* decision, the court usually refers to welfare as a mere formality often by simply stating that ‘from the application of the applicant and surrounding circumstances it appears that the applicant is best suited for the welfare of the minor and hence he/she is appointed guardian of the property and person’.⁹⁶⁸ However the thesis had also analyzed a number of *ex-parte* decisions where the courts had given cogent reasoning in support of its decision on a custody question.

Thus, in order to identify the trends in the lower courts’ decisions, it is mostly the contested judgments that can help understand the judicial mindset and practices and can help assess whether the courts are guided by the traditional rules or by welfare considerations. The number of contested cases on child custody and guardianship however, is very small compared to the compromise decrees based on *solenama*. As discussed in the methodology, a total of 172 case records had been collected from various family courts amongst which a total of 64 contested cases - decided between 2007-2023, are analysed in this chapter.

10.3 Decisions Principally Based on Considerations of Welfare or Best Interests of the Child

Although welfare consideration is widely relied upon by the family courts, the overwhelming insistence of the courts on the continuing relevance of the traditional Muslim law rules is fairly evident. In the cases where welfare or best interests of the child has been considered in deciding a guardianship dispute, the most common pattern followed in the judgments is to first acknowledge that the Muslim law

⁹⁶⁷ From amongst the case records initially collected for the research documents that were *solenama* included this common phrase.

⁹⁶⁸ This is probably because as there is no opposite party claiming the custody and there is absence of alternative childcare facilities, the courts usually do not venture into questioning the eligibility of the applicant when no other person is available or willing to be appointed as guardian.

principles were still to be considered the main basis of custody rules. Thus, the traditional rules of child custody *i.e.* the age-sex rule and the rule regarding mother's disqualification on remarriage, are cited in most cases even where the entire decision was essentially based on welfare considerations.⁹⁶⁹

In a large number of cases welfare is expressed as 'exception' to the 'main rule' where the facts of a given case do not allow those rules to be rigidly followed. So, the basic premise of this judicial trend is that the ultimate goal of the age-sex rule is welfare or best interests of the child and since following those rules rigidly not always can ensure actual welfare of the child, there can be exceptions where a deviation is justified. Thus, to broadly describe the common approach of the lower judiciary in those cases, it can be said to be taken a position closer to the 'rebuttable presumption of welfare' approach from the SC which had guided a number of its own decisions followed by the *Abu Baker*⁹⁷⁰ judgment, as discussed in the previous chapter.⁹⁷¹ The following section discusses these cases.

10.3 (a) Best Interests as Exception to the General Rule

A good illustration of this approach of the family court towards welfare of the child and traditional custody principles is Family Case no. 177 of 2015 (decided in 2016) (5th Additional Senior Assistant Judge and Family Court, Dhaka). This case concerned a guardianship dispute between the mother of a 13 years old girl and her paternal grandparents. After the death of the minor's father, the mother applied to the court for getting appointed as guardian of person and property of the minor which was opposed by the paternal grandfather on the ground that the mother is not capable of ensuring welfare of the child and also that there is 'possibility of the

⁹⁶⁹ Out of the 64 contested judgments, majority of them had in some way declared the 'relevance' or 'primacy' of the Muslim law rules in a child custody or guardianship dispute. Only 10 judgments had based their reasoning solely on various welfare considerations (such as, the depth of relationship with the minor, the economic solvency, psychological dependency of the child etc.) without referring at all to the rules of Muslim law.

⁹⁷⁰ *Abu Baker Siddique* (n 844) 106.

⁹⁷¹ The *Abu Baker* court agreed that the presumption of welfare may arguably lie on the person to whom the traditional rules give custody, but declared that such a presumption is not indisputable and capable of being rebutted, depending on the facts and circumstances of a given case and when the interests of the child so requires.

mother getting married again'. As it happens in most guardianship applications, the mother initiated this case when the minor inherited properties of her deceased father. Because the general Muslim law rule will not allow a mother to act as a legal guardian of property of the minor,⁹⁷² the mother had to approach the court for guardianship of both person and property. One of the established principles of guardianship of property derived from the traditional rules is that in the absence of the father, the father's father gets to be the guardian of property and this traditional rule is generally accepted amongst all schools of Muslim law.

In deciding the case in favour of the mother, the court made an attempt to justify how Muslim law itself allows exception to the age sex rule (e.g. through remarriage of the mother, when she can no longer claim her *hizanat* as per the age sex rule), without however justifying how the very rule of traditional Muslim law which gives 'guardianship of property' to the father's father (generally without any exception), will not be applied in the case. The court sets out the legal principle of custody in the following words:

One of the *fundamental principles* relating to the custody or *hizanat* of a minor child is that a minor daughter is entitled to be with the mother until the age of puberty. There can be exceptions to the said rule due to number of reasons. For example if the mother marries again then she may lose the right to custody of her minor daughter who has not attained the age of puberty.⁹⁷³

Having stated these traditional rules, the court directly goes onto describing what factors are important in deciding a minor's 'overall welfare' without justifying why, in this particular case, the stated 'fundamental principles' of custody and guardianship will not be followed or why welfare considerations should be given priority over the Muslim law principles. In other words the court deliberately avoided delineating what is the status of welfare considerations in deciding a custody case. The presence of

⁹⁷² In Sunni law the father is the guardian of the minor's property; failing him father's executor, father's father, paternal grandfather's executor are the legal guardians of the property of the minor, in order of priority. (Fayzee, *Outlines of Muhammadan Law* (n 321) 56; Substantive law of Islam does not recognize any other relatives such as the mother as legal guardians. (*Imambandi v Mutsaddi*, [1918] 45 IA 73.)

⁹⁷³ Family Case no. 177 of 2015.

both the principles in the reasoning creates confusion as it neither indicates a contradictory position between the two, nor draws a parallel in terms of the ultimate objective to be achieved by them. The court ultimately awarded both guardianship of person and property to the mother on the ground that she did not remarry, that the child herself expressed her wish to stay with mother and that the grandparents are aged and they were living abroad. So the grounds on which the court decreed in favor of the mother were mostly welfare considerations as opposed to traditional rules and in addition, the court did not venture into a justification as to why the Muslim law rule of paternal grandfather's right over guardianship of property of the minor will not be applicable in the case.

Similarly, in Family Suit No. 310 of 2013 (decided in 2015) (5th Additional Assistant Judge and Family Court, Dhaka) the age-sex rule was set out in clear terms by the court in deciding custody dispute of a 10 years old girl and a 4 years old boy. This judgment likewise, justified applying welfare considerations on the ground that Muslim law itself allowed exceptions to the traditional rules. The court, after citing the traditional Muslim law rules as the primary basis for custody laws, held that 'in order to consider overall welfare of the minor, the general Muslim law principles cannot always be applied mathematically. In that case, the capacity and eligibility of the applicant; and the wishes of the minor will play key roles in determining *hizanat*.' Thus in a way the court is accepting that the 'overall welfare of the minor' should be the foremost consideration and in order to achieve that, Muslim law principles cannot always be strictly followed. This, in turn, is also suggesting that applying the traditional Muslim law principles generally ensures welfare of the child, or in other words that there is presumption of welfare in favour of the person entitled to *hizanat* under Muslim law, which presumption, however can be rebutted on the ground of welfare of the minor.

In the Family Suit No. 199 of 2011 (decided in 2013) (5th Additional Assistant Judge and Family Court, Dhaka) the court similarly described the age-sex rule as the 'general rule of custody' and stated that in order to ensure welfare of the minor there can be exceptions to the rule. To support this contention the court referred to the *Abu Baker* decision which, as discussed earlier, had upheld that there is a presumption of welfare in favour of the person who is entitled to get custody under

the traditional rules, which can be refuted if depending on the facts and circumstance of a particular case, the welfare of the minor so requires.

A clearer expression of the court's reliance on 'rebuttable presumption of welfare' can be found in Family Suit no. 07 of 2012 (decided in 2014) (3rd Additional Assistant Judge and Family Court Dhaka). The court held that,

All the rules of Muslim law relating to custody of the minor are merely the application of the principles of benefit and welfare of the minor. Welfare of the minor remains the dominant consideration and the rules only try to give effect to what is in the minor's welfare from the Muslim point of view. Therefore when the Muslim personal law gives the custody of the minor to the mother, it is presumed that the welfare of the minor is with the mother unless facts leading to a contrary inference are proved.

However, having said that, the court then directly moved on to describing welfare as the 'paramount consideration' which, in view of the court, implied that 'the consideration that the father is not unfit to be the guardian of his child is also a consideration subordinate to the welfare of the minor'. Thus on one hand the court is saying that if contrary evidences are not proved, welfare always rests with the person entitled to custody under the traditional rules (thereby placing traditional rules in a higher position), and on the other hand, the court is emphasizing that all other considerations are subordinate to the paramount consideration of welfare. Such contradictory position might be due to the reason that the court was in principle in favour of the mother's claim and since the boy was below seven years the court emphasized on the relevance of the age-sex rule as that would come in support of the mother. On the other hand, since under the GWA there is still a provision which says that a court will not appoint or declare anyone a guardian of the person of a minor 'whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor',⁹⁷⁴ the court found it necessary to stress that welfare is the 'paramount consideration' as that would necessarily mean that this provision itself was subject to the consideration of minor's welfare.

⁹⁷⁴ GWA, s 19.

Similarly in the Family Suit No.201 of 2013(decided in 2014) (3rd Additional Assistant Judge and Family Court, Dhaka) after stating all the traditional rules of custody by citing the *Hanafi* authorities, (e.g. Fatwa-i-Alaamgiri, Radd-UI-Muhtar) as well as the rules of disqualifications of a mother from *hizanat* as laid out in DF Mulla's *Principles of Mahomedan law*, the court again holds that Muslim law principles only give effect to welfare of the minor from the Muslim point of view. So a presumption of welfare would lie in favour of the person to whom Muslim law would give custody of the minor. Thus the court held the view that only when a fact of a case led to a contrary inference regarding welfare of the minor, the traditional rules could be departed from. However, having said this, the court also asserted that welfare of the minor shall be the paramount consideration in appointing a custodian and that paramount consideration necessarily implies that all other considerations are subordinate to the welfare of the minor.

In the above case, the court, in line of the language of GWA emphasized the significance of both the personal law rules and the welfare considerations.⁹⁷⁵ As a result, in deciding the case the court attempted to assess the eligibility of the mother, both in light of the traditional rules and under welfare considerations, without drawing comparison between the two as to which prevailed over the other. Upon considering the facts and evidences of the case, the court found that the mother would be more deserving from the perspective of ensuring welfare of the child⁹⁷⁶ and that she did not also earn any of the disqualifications as laid down in the *Hanafi* law on *hizanat*.

There are again a number of cases with similar approach where both the traditional rules and welfare considerations are given equal importance in determining custody. For example, in Family Suit no. 418 of 2015 (decided in 2015) (5th Additional Assistant Judge and Family Court Dhaka) the court sets out the rule in the following words:

⁹⁷⁵ As discussed in the previous chapter, the GWA creates an avenue where in two different provisions the Act has given primacy to both personal laws and welfare of the minor.

⁹⁷⁶ Considering the child was only three years old and that she had been reared up by her maternal grandparents and the mother since birth

Under Muslim Law, mother gets the custody of a daughter until she is married provided that the mother remains single. Moreover, if best interests of the child are to be applied then the wish of the child, qualification of parties, economic capability, environmental condition etc. should be considered as well.

Thus the court in a way argued that both the traditional Muslim law principles and best interests principle should guide the court in coming to a decision of custody of a child. In this case, the court found that considering the surrounding circumstances and mother's educational qualification, she was more eligible in terms of protecting best interests of her daughter. However, the fact that the mother was single and that the child was only four and a half years old, did influence the decision, as those were effectively the criteria of eligibility set out by the traditional Muslim law principles. Thus, the courts over the time, had rather diligently followed the confusing forum created by the GWA where on one hand welfare is required to be considered by the court as the key consideration and on the other, it provided that welfare will be subject to the personal law of the minor.

In Family Suit No 563 of 2011 (decided in 2016) (5th Family Court, Dhaka) the court took a slightly different approach while deciding custody dispute of an eight years old girl. It held that:

It is now established that the age limit given for the *hizanat* under the Muslim law, must be considered together with the welfare of the minor. If it appears that in ensuring welfare of the minor the age limit cannot be adhered to; the court may take the necessary decision in order to ensure welfare of the minor denying the natural right of *hizanat* of either party.

Although the court did not fully deny the primacy of age-sex rule referring to it as the 'natural rule', it affirmed that, welfare need to be always assessed together with the traditional rules to make sure that the decision does not go against the well being of the child.

A similar approach was taken by the court in Family Suit No. 45 of 2011 (decided in 2015) (5th Additional Assistant Judge Court, Dhaka) which was a custody dispute of

a boy aged 11. While setting out the rule regarding custody of a child, the court held the view that ‘one of the main principles of guardianship and custody is to take such measures in accordance with the prevailing laws, which will be in the best interest of the minor’. However, going with the dominant trend, the court did mention that although in case of a male child the mother was entitled to the custody until he reached 7 years, that rule could be varied at according to the circumstances. Thus, the court in a way placed best interests in a secondary position describing it as a consideration only to be applied in exceptional circumstances. Echoing the judgments previously discussed, the court further referred to the factors that need to be considered to determine what is in the best interests of the minor, e.g. the wish of the minor, surrounding circumstances, eligibility and capacity of the parties.

In Family Suit No. 190 of 2010 (decided in 2013) (5th Additional Assistant Judge and Family Court, Dhaka) the court expressly relied on the best interest principle in Article 3 of the CRC in deciding the custody dispute of a twelve years old boy. This is perhaps the only judgment where a specific reference to CRC could be found. However, this case also adhered to the ‘rebuttable presumption of welfare’ approach and had in fact cited the *Abu Baker* case in support of the argument. The court expressed the view that in case of deciding custody or *hizanat*, welfare of the child has to be considered irrespective of what the personal laws or the statutory laws prescribe. Referring to the age-sex rule as ‘the general rule of custody’ the court held that ‘with a view to ensure welfare of the minor, there can be exceptions to the general rule’. Relying mainly on the wish of the minor to stay with his mother, the court ordered that to ensure welfare of the child the mother should get the custody of the minor although he was above the prescribed age limit. However, this case had also referred to the specific observation of the Appellate Division in the *Anika Ali* judgment regarding the scope to make fresh application for custody in order to comply with welfare of the child and held that if necessary the court could anytime review the custody order to consider welfare of the child.

In Family Suit No. 69 of 2016 (decided in 2016) (Court of Senior Assistant Judge and Family Court, Sadar, Satkhira) the mother of a minor boy of above 7 years age applied for the minor’s custody and guardianship against the father’s claim. Considering that the boy was 7 years old, the court mentioned the traditional rules of

custody as given in the *Hedaya* with regard to the father's right of custody of his minor son of above 7 years of age. At the same time, the court reiterated the rule that in Muslim law father is the natural and legal guardian of the person and property of the minor so long as he is alive. Based on those rules the court observed that plaintiff father was lawfully entitled to get the custody of the minor boy. However, having mentioned the traditional rules, the court then emphasized on the best interests of the child as the superior consideration in a child custody matter holding that, 'But the settled principle of law is that in determining the custody of a minor child, the best interests and welfare of the child shall be the paramount consideration'. In finding the mother to be best suited to ensure welfare of the concerned minor, the court then emphasized on factors such as child's bonding with the mother as he was living with her since his birth, the care and affection the mother had for the child in rearing him up and most importantly the child's preference as expressed in the open court to stay with his mother. However, the fact that the father had married again and that the child might have to live with the stepmother if the custody was given to the father, had also convinced the court in concluding that the mother would be suitable for custody as opposed to the father.

In Family Suit No. 28/2018 (decided in 2019) (Puthia Family Court, district of Rajshahi), the family court gave custody of a 9-year-old boy to the mother as against the claim of the father. Two of the specific issues framed in the case were to whom best interests of the child would be secured and whether the applicant is entitled to get custody of the minor under the laws. Thus the issues indicated that the court on principle were to consider both best interests and laws of custody to determine to whom custody of the child would be awarded. In determining best interests, the facts that the father denied to pay child's maintenance and that the mother continued her education even after being divorced at a very young age, and that she was of 'good character'⁹⁷⁷ influenced the court in deciding in favour of the mother. On the other hand, determining whether the custody would belong to the applicant father the court discussed the traditional age-sex rule and commented that, 'In Muslim law mother

⁹⁷⁷ The court deduced good character of the mother from the father's deposition stating that during their conjugal life he found no evidence of bad character against the mother; whereas the mother questioned character of the father during her deposition regarding lack of transparency in his second marriage.

gets custody of a minor son till 7 years of age. The father gets the custody after the minor son attends 7 years. Since in this case, the son's age is admittedly above 9 years, the father should get his custody'.

However quoting the above rule the court held the view that such 7 years rule is a 'general rule', which has 'exceptions'. The court gave the following reasoning explaining the exception:

In case of getting the custody, if the father is considered unfit or if the minor's welfare is considered to be better protected with the mother than the father; the mother will be considered eligible to get the custody of the minor, in place of the father. In such case, even if the minor son's age is above 7 years, the court can order custody to be given to the mother under overall consideration.

In support of the above reasoning the court cited reference of a 1932 Indian Supreme court's judgment,⁹⁷⁸ whereas similar decisions are held in a number of recent judgments of the higher judiciary in Bangladesh. Citing another Indian decision⁹⁷⁹ the court further held that since the child had been living with his mother from his birth and had expressed his preference to be with her, 'a mere claim of legal guardianship will not stand on a higher footing than the claim of the real mother to continue to have the custody of the mother'. The court however did award visitation right to the father on certain terms and conditions including the right of the child to decide whose custody he would prefer after he would attain his Secondary School Certificate examination. Thus the decision was based overwhelmingly on best interests of the child; but despite that, the court had to present best interests as an exception to the traditional rules. Similar reasoning was also given in Family Suit No. 47/2021 (decided in 2022) (Assistant Judge Court Cumilla), where custody of a 3 years old minor son was given to the mother relying both on the traditional age sex rule and the welfare or best interests principle.

⁹⁷⁸ *Siddiq-Un-Nissa v Nizam Uddin* [1932] ILR 54 All 128.

⁹⁷⁹ *Smt. Ainnunnisa v Mukhtar Ahmed*, AIR [1975] All 67.

There are also instances where the court simply based its decision on the traditional rules or referred to those, as that would result in the custody being given to the party that the court considered better suited to ensure best interests of the child in question. In a 2018 appeal against a family court case, in the district of Bagura,⁹⁸⁰ which had awarded custody of two minor daughters to the father as opposed to the claims of their maternal grandparents, the family appellate court overturned the decision and gave custody to the maternal grandmother. The court principally relied on the traditional rules of *hizanat* as stated in *Hedaya* where in the absence of the mother, the maternal grandmother is stated to be the next female relation eligible to get custody of the child. However, the observation of the court in the judgment indicated that past allegations against the father of torturing the deceased mother of the children, and most importantly, children's expressed wish to live with their grandparents influenced the court to overturn the decision of the family court. Because the traditional rules were clearly favouring the maternal grandmother's custody rights, the court perhaps resorted to a more straightforward argument to support its decision in favour of the grandparents without expressly referring to welfare or best interests considerations. On similar facts, custody right of maternal grandmother was upheld by the court based mainly on traditional rules in a number of other decisions,⁹⁸¹ although the underlying considerations again were mainly welfare of the concerned child.

On the other hand, in Family Suit No. 251/2016, (decided in 2020) (Family Court Noakhali) the court gave custody of the 10 years old minor daughter to the mother mainly on the ground of welfare. Grounds like mother's care-giving role and her ability to provide for the child as well as the child's specific preference to live with her mother led the court to consider that the welfare of the child would be with the mother. Moreover, the court also cited the case of *Rahmatullah v Shabana Islam*⁹⁸² where remarriage of the mother was held not to be a disqualification on the part of the mother from getting custody of her child. Referring to *Abdul Jalil v Sharon*

⁹⁸⁰ Family appeal No. 157/2017, Joint District Judge, 1st Court, Bagura (decided in 2018).

⁹⁸¹ Family Suit No. 334 of 2013 (decided in 2020) Court of Assistant Judge, Family Court (Rupsha) of Khulna; Family Suit No. 04/2020 (decided in 2020) Court of Assistant Judge, Zakigonj, Sylhet.

⁹⁸² (n 880).

*Laily*⁹⁸³ the court also emphasized that the main consideration in a child custody matter is the welfare of the child. Nevertheless, the court as an additional argument also put forward the traditional rules of *hizanat* according to which a mother would be entitled to minor daughter's custody till she had attained puberty. The court, following the earlier decisions, mentioned that such rule is only a general rule and not without exceptions (the exception being welfare of the child).

Similarly in Family Suit no. 236/2017 (decided in 2019), (Family Court of Rupsha, Khulna) the court based its decision on welfare on the child in deciding custody of a 12 years old boy to his mother. The court mainly relied on the preference of the minor to live with his mother as deposed under section 17(3) of the GWA, holding that 'the paramount consideration in returning the minor to the custody of the guardian is the welfare of the minor'. However, despite relying on welfare principle the court had first referred to the traditional rules of *hizanat* and rule of disqualification on remarriage of mother. Even though it was observed that welfare would be with the mother, the court stressed on the point that the father could not prove the remarriage of the mother, indicating that had there been actual proof of mother's second marriage, the decision might have been different.

In Family Appeal No. 52/2019 (decided in 2020) (2nd Additional District Judge Court, Dhaka) the court gave custody of two minor children (10 years old boy and 12 years old girl) to the father as opposed to the claim of the mother. Contrary to most of the cases, the court here did not expressly mention age-sex rules of *hizanat*, nor did it mention welfare or best interest principle in giving custody to the father. The Court however, based its decision mainly on the rule that father is the 'legal and natural' guardian, which evidently is a principle derived from traditional rules. On the other hand, the court also relied on the minors' deposition in the court as prescribed under section 17 of the GWA in determining the welfare of the minors. The wishes of the minors to live with their father also persuaded the courts to give custody to the father. However, the court refrained from discussing the authoritative source for considering father to be such 'legal and natural guardian' guardian. In fact, the very reason that the court might have refrained from referring to Muslim law principle in

⁹⁸³ (n 858).

arguing father being the legal and natural guardian is that the traditional *Hanafi* law rules in fact give custody of a girl to the mother till she attains puberty. As such at least the daughter's custody would have been with the mother, had the court expressly relied on traditional Muslim law principles. More so, mentioning welfare or best interests test might lead the court to consider the tender age of the minors, and the natural caregiving role of the mother (as followed in most of the cases prior to this) which again would lead to a different conclusion. Thus it appeared that the careful choice of words by the court was perhaps due to the courts' predisposition in favour of the father's right of custody as opposed to the mother's claim.

In Family Suit No. 06 of 2018 (decided in 2022) (Senior Assistant Judge First Additional and Family Court, Chattogram) in deciding custody of a minor boy aged 13 years, the court gave equal emphasis to both welfare and traditional rules. The court held the view that 'the general Islamic law that the father is entitled to the custody of the boy who has attained the age of seven years is not absolute one and a deviation is sometimes justified'. The court cited the case of *Md Abu Bakar v S. M.A. Bakar* in supporting the position of rebuttable presumption of welfare. It held:

It is now a well-established principle of law relating to the custody of the minor that in deciding custody and guardianship the welfare of the child will be paramount consideration. The court is to consider the personal law of the minor concerned vis a vis the overall welfare of the minor. In the first instance, the principle of Islamic law is regarded as conducive to the minor's interest. However, it was held in the *Md Abu Bakar v S. M.A. Bakar* 38 DLR [1986] (AD) 106, para 23, case that *the principles of Islamic law regarding rules of hizanat or guardianship of a minor has to be regarded, but a deviation therefrom would seem permissible as the paramount consideration should be the consideration of the child's welfare. (Emphasis added).*

However, having cited the *Abu Bakar* case, the court further referred to the case of *Ayesha Khatun V. Major Sabbir Ahmed* holding that, 'in appointing or declaring the guardian of a minor, if the application of the welfare consideration of the minor and general principles of Islamic law are likely to yield different decisions in a particular case, then the former will prevail over the later.' The case also referred to

the decision in *Romana Afrin V. Fakir Ashrafuddin Ahmed* in disregarding a prior agreement between the parties whereby the mother had given custody of the child to the father. Mentioning the significance of child's preference in court, the case further held:

Section 17(3) & 17 (5) [of the GWA] specifically enunciate that if the minor is old enough to form an intelligent preference, the Court may consider that preference and the Court shall not appoint or declare any person to be a guardian against his will. Therefore, as the son himself decided to stay with his mother when he was a boy of nearly 10 years of age, it would be totally unjustifiable to reverse his choice by transferring him to the custody of the father.

The court further justified how best interests of the concerned minor will not be protected in father's custody holding that since the child had been living with his mother for a long period of time if the custody was given to the father then, it would certainly hamper his wellbeing as he would have to adjust in a completely new environment. Thus this decision is a good example of a family court decision fully realizing the progressive standards set by the higher judiciary. However, even in such cases, the court had to refer to the traditional rules perhaps because its relevance had been very much present in the SC's decisions and most importantly because the GWA which is the governing law at present still holds 'personal law of the minor' as the consideration subject to which welfare of the child would be determined.⁹⁸⁴

Contrary to the trends in the SC judgments prior to *Anika Ali*, when the courts were more often engaged in questioning whether best interests would prevail over traditional rules; it appeared from the above cases that the family courts often avoid such a debate and take a position which neither suggests conclusively that best interests prevails over the traditional rules, nor denies the relevance or primacy of the traditional Muslim law principles on custody. Although this approach may relieve the court from analysing and comparing rather complicated issues and principles, it

⁹⁸⁴ GWA, s 17.

creates a confusing avenue for the future cases when it comes to applying welfare considerations. For instance, it does not answer why welfare is considered at the first place when the age-sex rule is still deemed to be the ‘fundamental rule of custody and guardianship’ (as a number of judgments had referred to the traditional rules as such)⁹⁸⁵ and if welfare is to be considered only as an exception then what facts and circumstances actually render such exception to be applied. It thus eludes the question of whether best interests principle is to be truly regarded the ‘paramount consideration’ in a custody case.

10.3 (b) Best Interests being the Dominant Consideration

In Family Suit No. 17 of 2015 (decided in 2016) (5th Additional Assistant Judge and Family Court, Dhaka) the court gave custody of an 8-year-old minor boy to his mother as against the claim of the father. In giving custody to the mother the court simply relied on her eligibility in terms of ensuring best interests of the child without referring to any of the traditional rules of *hizanat* or guardianship. The court held the following reasoning based on which the father’s claim of custody was denied:

Considering the age of the child, it can be said that he needs his mother’s exclusive care. Moreover the child is not attached with his father that much. As the mother is a service holder, her economic solvency is ensured. Considering age of the minor, surrounding fact and best interests of the child, the court is of the opinion that the father plaintiff is not the proper person to be the custodian of the child.

On similar grounds the court gave custody of a 10 years old minor son to the mother in Family Suit No. 887 of 2015 (decided in 2016) (2nd Additional Assistant Judge and Family Court, Dhaka). The facts that the minor had been under his mother’s custody since his birth and that the mother was capable of maintaining him and had ensured quality education for him were considered necessary considerations for welfare of

⁹⁸⁵ The later discussions will reflect upon this in detail.

the child in favour of mother's custody. The court again refrained from discussing any of the traditional rules of custody.⁹⁸⁶

In Family Suit No. 53/2020 (decided in 2021) (Assistant Judge Court Goforgaon, Mymensing) the court entirely relied upon best interests of the child to determine custody dispute between the parents without any reference to the traditional rules of *hizanat*. Considering principally the wish of the concerned minor girl to stay with her mother, the court awarded custody to the mother, as that would be in 'the minor's best interests'. In determining best interests, the court mainly took note of the deposition of the minor who stated that her stepmother did not treat her well in her father's house, while she was happy to live with her mother where she could continue her education peacefully.

Similarly in Family Suit no. 302 of 2018 (decided in 2020) (Family Court Rupsa, Khulna) the court only referred to welfare of the minor who was 4 years old boy in giving his custody to the mother. Again the court's reasoning in finding the mother to be best suited for the child's welfare was the young age of the child who, as per the court's opinion, needed motherly care and affection.

In Family Suit No. 751/2020 (decided in 2022) (5th Additional Assistant Judge and Family Court, Dhaka) the court referred to best interests principle in giving custody of a 2 years old boy to his mother as opposed to the claim of the father. In determining best interests, the court specifically mentioned about mother's natural caregiving role stating that the minor child had been raised with love and care by the mother since his birth and as such considering the age and mental development of the child, there was no alternative to the mother who can bring him up with affection, love and care. However what is crucial is that the court expressly mentioned that the mother would have the custody till the boy completes seven years of age after which it would be upon him to decide with whom would he wish to live. Although the court did not say that after completing 7 years of age, the child's custody would automatically go to

⁹⁸⁶ Similar approach was also taken in Family Suit No. 86 of 2015 (decided in 2016) (5th Additional Assistant Judge and Family Court, Dhaka) where the custody of an 8-year-old male child was given to the mother on similar grounds of welfare.

the father, the very mention of the specific age of 7 years for the boy to remain with his mother does indicate a leaning towards the traditional rules of *hizanat*.

In Family Suit No.36 of 2019 (decided in 2021) (Family Court of Rangpur Sadar, district of Rangpur) the two minor sons both above 7 years age were given to the custody of their mother based on the 'paramount consideration of welfare'. The court specifically cited a number of progressive judgments of the SC in supporting its reasoning as to why despite the child being above 7 years of age, welfare of the child would be in the custody of the mother. The factors that led the court to deduce that the mother was better suited for the children's welfare were that the minors had been residing with her uninterruptedly since birth and that they were being well maintained and given to good school by the mother. Moreover the court also considered wishes of the minor who preferred to live with their mother.

In Family Suit No. 75/2020 (decided in 2021) (2nd Additional Assistant Judge and Family Court, Dhaka) the court again only considered best interests of the 9 years old boy whose custody was given to his mother. The main consideration for the court in deciding against the father was that since their divorce in 2016 the child was with the mother and the father did not provide any maintenance to the child neither he made any effort to get back custody of his son. The order of the court specifically mentioned that the mother is appointed the 'legal guardian' of the minor, thereby giving both guardianship of person and property to the mother without referring to relevance of any traditional rules of *hizanat*.

In Family Suit no 120 of 2017 (decided in 2018) (Senior Assistant Judge Court, district of Rangpur) the court relied mainly on the overall welfare of the two minor daughters and awarded both guardianship of person and property to their mother. The living heirs of the deceased father of the minors filed application for their guardianship against their mother, and the court, although did not mention welfare or best interests principle, found that the mother should be the right person to be appointed as the legal guardian of the minors considering their deposition in court. Similarly in Family Suit no. 701/2017 (decided in 2018) (2nd Additional Assistant Judge and Family Court, Dhaka) the minor daughter was given to her mother on an ex parte decree based solely on considerations of welfare of the child.

In Family Suit No 203/2018 (decided in 2019) (3rd Additional Assistant Judge and Family Court Dhaka) the court relied only on welfare considerations to give custody of two minors to the mother as against the claim of the paternal aunt of the minors, without any reference to Muslim law principles. The court held:

In the matter of appointment of a guardianship of a minor, the welfare of the minor shall be the paramount consideration. Paramount consideration necessarily implies that all other considerations are subordinate to the welfare of the minor. This means that the consideration that the father is not unfit to be the guardian of his child is also a consideration subordinate to the welfare of the minor.

A good example in the family courts where best interests of the child was held to be the primary consideration in awarding custody is the Family Suit No. 35 of 2016 (decided in 2019) (Assistant Judge Court of Cumilla). The court found the mother to be more suitable than the father to ensure best interests of the minor son who was above 7 years of age. The court acknowledged that the father was not entirely ineligible to protect the interests of the child but considering the scope of the profession that the father had of a police officer, the court assumed that it would be difficult for him to spend time for caring the minor, compared to the mother who was a school teacher. The court however imposed very subjective preconceptions about the role of particular professions in relation to how they might affect best interests of a child. The court further attempted to justify its decision of giving custody to the mother by referring to the tender age of the minors holding that 'healthy development occurs when the child is raised by his mother'. Further the court emphasized on the evidences that showed that the mother maintained stronger psychological bond with the child as a result of the daily attention she would provide in terms of 'admitting the child to school, paying his school fees, keeping track of his report card'. Moreover, the child also deposed in court his preference to be in the custody of his mother. The father however was given visitation rights. The case also reflected on another important aspect of the family courts' approach regarding shared custody - even though the court itself admitted that none of the parents had earned any disqualification from getting the minor's custody, the court ended up giving full

custody to the mother without considering scope for joint custody award. Indeed, such shared custody arrangement is not seen in any of the family courts' judgments analysed in the research.

10.4 Conclusions

Thus, it transpired that there are some examples of case where the court principally relied on welfare or best interests of the children without referring to the traditional rules or without justifying its decision in light of those principles. The number of such cases however is very small compared to the large bulk of decisions where the court had either put equal emphasis on both best interests and traditional rules or had applied best interests as an exception to those rules. Although this is encouraging that the family courts in some cases are technically side-lining the rigid religious principles in order to ensure best interests of the child, the continuing presence of the significance of those age old rules in the judgments is perhaps conveying a wrong message for the future courts as to their relevance in a guardianship application. In fact, it is not surprising that there are significant numbers of cases even in recent times where custody or guardianship decisions have been based solely upon traditional rules or where the criteria for determining welfare have been heavily influenced by those rules. The next chapter will be focusing on some of those cases.

Chapter 11: Family Court Decisions Significantly Influenced by Traditional Muslim Law Rules

11.1 Introduction

As elucidated in the previous chapter, there are a significant number of judgments from the family courts where the decisions have been based primarily on welfare or best interests considerations. However, even in those cases, the strong emphasis of the courts on the traditional Muslim law rules as the 'general' or 'fundamental' rule of custody, naturally creates an impression that welfare is perhaps not the 'paramount consideration'⁹⁸⁷, rather it is just one of the several considerations that the court can assess depending on the particular facts of a given case. This approach of the family courts leaning towards the orthodox rules is further endorsed by the fact that there are indeed a significant number of cases where the family courts had exclusively relied upon traditional Muslim law rules, ignoring 'welfare' or 'best interests' altogether. At the same time, there are instances where the courts refer welfare or best interests merely as a formality whereas in principle the courts' orders were purely based on rigid interpretations of religious rules on custody and guardianship.

11.2 Cases Decided on the Basis of Traditional rules

Although from the SC case analysis, a slow and gradual shift could be discerned from the traditional rules towards welfare over a certain period of time (although the trend is not consistent); in the lower court judgments such gradual shift could be difficult to identify. There are both recent decisions (as recent as 2023) and comparatively older decisions, which relied heavily on Muslim law rules ignoring welfare or best interests of the child. This necessarily reaffirms the earlier contention that the judicial trend in the family courts in terms of applying best interests of the child lacks coherence and is even more inconsistent compared to the higher judiciary. This chapter will be discussing a number of these family court judgments.

⁹⁸⁷ According to the dictionary meanings, the word 'paramount' means 'More important than anything else or supreme'. <<https://en.oxforddictionaries.com/definition/paramount>> accessed 13 March 2023.

In Family Suit no. 64 of 2014 (decided in 2015) (Assistant Judge Court of Bagha Thana, Rajshahi) the dispute was regarding custody of a boy who was 7 years old at the time of the judgment. In this case although admittedly both parents of the child had contracted second marriage after their divorce, the court simply considered the mother's remarriage to be a factor affecting her ability to take care of the child. In addition, the child was ordered to be handed over to the father after 90 days of delivering the judgment on clear grounds that the minor son would turn 8 years old within the following 6 months. The court assumed that these rules (*i.e.* the age-sex rule and the disqualification of mother on remarriage rule) were to be invariably followed and hence the court did not even venture to question whether taking away of the child from his mother was at all in his best interests. The judgment is also silent about whether the child's wish had been sought by the court in determining his custody. Thus the judgment illustrated a complete ignorance by the courts of welfare or best interests principle and the related judicial trends.

In Family Suit No. 346 of 2013 (decided in 2015) (5th Additional Assistant Judge and Family Court, Dhaka) the court observed that if the parents of a minor lived separately and they were unable to come to a mutual decision relating to the child's *hizanat* then the court would have to decide by considering the 'existing laws' as well as the welfare of the minor. In this particular case the minor was 3 years old boy and the court assertively stated in the judgment that under Muslim law a father is a natural and legal guardian of his biological children and there is no legal requirement to appoint him as the child's guardian through court. Having also stated the age-sex rule, the court reiterated the exceptions prescribed by Muslim law adding that when the father is not eligible, the court can award custody to the mother even if the child is above the prescribed age. The court tried to justify the mother's right of custody both under the Muslim law rules and under the welfare considerations. The court made specific observation as to the fact that no evidence had been submitted which may suggest that the mother had earned any disqualification under the Muslim law rules, which could deprive her from her right of *hizanat*. To support the mother's claim under welfare considerations as well, the court observed that, 'being in the mother's care is more essential for a proper upbringing of a child, than being with the father'. This case is also a clear illustration of the fact that the 7 years rule continues

to be relevant and is commonly perceived to be the ‘fundamental rule’ regarding custody. The judgment revealed that the lawyer representing the mother made a clear declaration that the child will be returned to the father’s custody after he attains 7 years of age as because a mother is only entitled to keep the child in her custody for up to 7 years. The court, instead of questioning the legality of such submission, had in fact endorsed it by saying that, because the mother was ready to return the child to the father’s custody after he would reach 7 years, it would be more beneficial for the child if he were allowed to remain under the mother’s custody. Interestingly the court referred to the *Anika Ali*⁹⁸⁸ judgment, which held that a custody decision could always be reviewed in a new application in order to comply with the age-old principle of welfare being the paramount consideration. The reference to *Anika Ali*, while endorsing the contention that the mother can have custody till the boy reaches 7 years of age, appears to be somewhat contradictory. Either the court intended to reassure the father that the decision was not final and after attaining 7 years the custody question can be brought up for reconsideration, or the court genuinely believed that it is only when the welfare of the child requires that a fresh application can be made. If the former is the case, then that would perhaps be entirely against the spirit of the *Anika Ali* judgment which required the courts to look into welfare as the only ground (and not the minor’s age or mothers remarriage) to review a child’s guardianship decision.

In Family Suit no. 100 of 2014 (decided in 2015) (1st Additional Senior Assistant Judge and Family Court, Chittagong), decision regarding custody of a 3 years old minor son reflected a similar approach. Although, the court did refer to the welfare considerations, ultimately, the age-sex rule and the mother’s disqualification on remarriage were the main criteria against which the mother’s claim was assessed. Thus while deciding in favour of the mother as against the father, the court specifically relied on two factors; firstly, that the age of the minor at the time of the judgment was 3 years and 6 months and that he was a boy; and secondly, that although the mother had once contracted a second marriage, she had divorced the second husband soon after the marriage. The court mentioned the Muslim law rules

⁹⁸⁸ (n 18) 49.

in support of the reasoning that although by second marriage, the mother had earned a disqualification to *hizanat*, that disqualification had been removed subsequently when she had divorced the second husband. Thus although the court initially referred to welfare of the child, it had actually considered rights of the concerned parties as given under the traditional rules in coming to the decision, and not the rights and well being of the child itself.

In Family Suit no 04 of 2015 (decided in 2016) (5th Additional Assistant Judge and Family Court, Dhaka), the court divided the ‘custody’ and ‘guardianship’ of a minor girl aged 7 years between her mother and paternal grandfather respectively; following the traditional Muslim law rules which suggest that when the father is deceased, the father’s father will be the guardian of the minor. Although the GWA refers to only two types of guardianship orders *i.e.* guardianship of property and guardianship of person⁹⁸⁹, the court following the traditional Muslim law concept of custody and guardianship, ordered the grandfather to be the ‘guardian of the minor’ and the mother to be her ‘custodian’.⁹⁹⁰ Although the court in awarding only ‘custody’ to the mother considered the factors such as that the mother single-handedly took care of the child and that she could take ‘proper interventional measure that the child would need according to her age and gender’, the grandfather was appointed as the ‘guardian’ of the minor. It seemed the court was reluctant to assess the same eligibility criteria when appointing a ‘guardian’ and in such appointment what mattered was the entitlement of the parties under the traditional Muslim law rules. The court expressly based its reasoning on Muslim law rules holding that, ‘According to *law*, as the father of the minor is deceased, the father’s father is the proper person to be guardian of the child.’ Thus, the standard of welfare or best interests of the child was deemed relevant only to justify a mother’s claim of ‘custody’ over her child. By dividing the order in such manner the court had not only paved the way for a possible conflict over the physical custody of the minor (as the court has not provided any clear allocation of rights and responsibilities between a ‘guardian’ and a ‘custodian’), it also ignored the fact that such order might jeopardize the interests of

⁹⁸⁹ Without referring specifically to ‘custody’; the division of guardianship between ‘person’ and ‘property’ in the GWA (which is applicable for all citizens irrespective of their different personal laws) does not entirely address the special institution of *hizanat*, which is unique to Islamic family laws.

⁹⁹⁰ Similar language is used in the FCO, s 5 that includes ‘guardianship and custody of children’ as one of the matters over which the Family courts have jurisdiction.

the minor herself. Especially when the court itself had found that it would not be in the minor's best interests to be in the custody of the grandfather. The decision to award 'guardianship' to that same person was thus a mere compliance to the traditional Muslim law rules of guardianship, in disregard of the best interests of the child.⁹⁹¹

The relevance of the 7 years rule is again emphasized in Family Suit no 140 of 2014 (decided in 2015) (3rd Assistant Judge and Family Court Dhaka). The case was initiated by the father of a minor boy who was below 7 years of age, against his mother who had his physical custody. In her pleadings the mother herself accepted that the child could be with her only up to 7 years of age and his custody would be handed over to the father as soon as he would complete 7 years of age. Regrettably, the court had also endorsed it by saying that since the father is ready to take the child under his custody on his attaining 7 years of age; it would be in the welfare of the child to let him stay in his present situation (in the mother's custody) for the time being. Thus although the mother was allowed to have the custody of the minor, it was made clear that her custody was conditional upon the age of the child.

Similarly in Family Suit No. 869 of 2015 (decided in 2015) (3rd Additional Assistant Judge and Family Court, Dhaka) the father was given custody of the male child on the ground that his mother had remarried and that he was above 7 years of age. Endorsing the age-sex rule, the court held that 'the minor son is now seven years old and his father is [therefore] legally entitled to the custody of his son'. The fact that unlike the mother, the father did not marry for the second time had also influenced the court in giving custody to the father.

⁹⁹¹ However in another case, *i.e* Family Suit no. 314 of 2009 (decided in 2014) (3rd Additional Assistant Judge and Family Court, Dhaka) the court addressed this issue conversely when the dispute was between mother and paternal uncle of a minor girl over guardianship of her property. The paternal uncle's petition to appoint him as the guardian of person and property of the minor was rejected by the court on the ground that since her welfare will be ensured under the custody of the mother, the mother should also get the guardianship of property of the minor. Pointing out the danger of dividing the order or guardianship between two persons, the court observed that, if the court allowed one as a guardian of person and another as guardian of property then there may be dispute over the child's guardianship in future which may harm the well being of the child. The court was also cautious in awarding guardianship to the paternal uncle as from the evidence on record it appeared to the court that the paternal uncle might have filed the case only to benefit from the property left by the minor's father and that her welfare might not be his true concern.

The courts in a number of custody disputes had, similarly insisted upon the rule of the mother's disqualification form *hizanat* on the ground of her remarriage.⁹⁹² In Family Suit no. 911 of 2010 (decided in 2015) (2nd Additional Assistant Judge Court, Dhaka) the court gave the custody of a minor son to the father and the only reason cited for such decision was that the mother had married again. A similar example can be found in Family Suit No. 563 of 2011 (decided in 2015) (5th Additional Assistant Judge and Family Court, Dhaka), wherein a mother of a minor son aged 10 years was denied custody mainly on the ground of her remarriage. However, regrettably, the fact that the father himself had married again and that the child most of the time had to stay with the stepmother, was not considered at all a relevant factor that might affect the wellbeing of the child. In addition, in justifying the claim of the father over the custody of the son, the court in clear terms stated 'a father can claim custody of a son after he attains seven years of age'.

In a relatively older case, *i.e.* Family Suit no. 419 of 2007 (decided in 2010) (Family court of Khulna) custody of a daughter aged 10 years was given to the father expressly on the ground that the mother was disqualified from her right of *hizanat* due to her second marriage with a stranger. The court in its reasoning observed that 'since mother is *legally disqualified* from custody, mother's mother is beyond any legal justification to get the custody of the minor, and father as natural guardian ... is legally entitled to get custody of the minor'. Although in coming to this decision, the court referred to the traditional Muslim law rules relating to mother's disqualification, it ignored the same traditional rule which suggests that if the mother loses her preferential right of *hizanat*, mother's mother would then have the first priority to get the custody of the minor.⁹⁹³ Ignoring this, the custody was straight away given to the father on the ground of being the natural guardian of the minor. The court seemed to have been keen on establishing the father's claim by even bypassing the traditional rules on *hizanat*. This decision not only reflects the court's attitude of applying traditional Muslim law rules, overlooking the child's interest; it also reflects gender-biased approach of the court to a custody claim especially when the mother had married again.

⁹⁹² Out of the 49 contested judgments, in 36 cases remarriage of the mother was considered relevant by the courts in deciding custody or guardianship of a minor.

⁹⁹³ Mulla, *Principles of Mahomedan Law* (n 459) 437.

In Family Suit No. 12/2016 (decided in 2017) (Sadar Senior Assistant Judge Court, Narsingdi) the court rejected the mother's petition of guardianship of property and person of her 12 years old minor daughter relying on the father's legal right of guardianship as upheld by the traditional rules. Despite the minor being already in custody of the mother, she had filed application under the family courts for guardianship due to fear of losing her custody. Echoing section 19 of the GWA which provides that the court will not appoint a guardian of the person of the minor whose father is living and is not unfit to be a guardian, the court held that the respondent father of the concerned child is alive and is her 'natural guardian', whereas the petitioner mother is not her natural guardian. In support of the contention the court referred to the traditional *Hanafi* rules of guardianship from Sayed Ameer Ali's textbook⁹⁹⁴ and further cited a 1952 Pakistani Case,⁹⁹⁵ which held: 'the father being the natural and lawful guardian of a minor does not require to be so appointed. The natural guardianship which vests in him cannot be taken away from him until and unless it is proved that he is unfit to be the guardian of the person of the minor.' upholding the natural guardianship of the father the court held that the mother was unable to prove unfitness of the father and hence her application was rejected. The court did not attempt to discuss the question of best interests of welfare of the child in rejecting the petition perhaps because there was no dispute regarding the physical custody of the minor, which was with mother and was not challenged by the father. This again reflects the courts' strong endorsement when it comes to father's superior right over guardianship of his minor children as established by the traditional rules.

Another similar observation where the family courts' unequivocal support for father's legal guardianship could be discerned is the 2023 judgment in Family Suit No 176/2021 (Assistant Judge Court, Jashore). After divorce the minor son who was above 7 years of age was in the custody of the mother and the father did not pay any maintenance or took any responsibility of the minor. In such circumstances the mother applied for legal guardianship of both person and property of the child. Although the father had not claimed custody of the child, the mother still applied for

⁹⁹⁴ Ameer Ali (n 375) 540.

⁹⁹⁵ *Zebu v Miraj Gul*, PLD [1952] 23.

the legal guardianship as the former husband and her in-laws were allegedly threatening to take away the child from her. More so, without being appointed as legal guardian the mother would not also be allowed to enter into any transaction related to property that may belong to the minor, which perhaps also made her to seek permission for legal guardianship under the GWA.

The court first discussed the traditional rules relating to custody according to which the mother had already lost her right of *hizanat*, the minor boy being above 7 years of age. The court did mention that on the ground of 'best interests' or 'welfare of the minor' custody can be given to 'father, mother or any other person'. However, the court did not elaborate on whether it was 'best interests' on the basis of which the court was determining the guardianship application. Instead it moved on emphasizing on the superior right of guardianship of the father. The court held that, 'according to Muslim Law father, if alive, is the "natural and legal guardian" of the minor child' and that 'there is no scope in Muslim law for the mother to be such "natural and legal guardian" during the lifetime of the father except on exceptional ground'. The court then elaborated on what those exceptional grounds were –

If the father denies to accept the guardianship of the minor or did not inquire at all about the minor's well-being or after getting married again, does not pay any maintenance to the minor or denies paternity in respect of the minor, then considering best interests of welfare of the minor the court can appoint the mother or any other person as legal guardian.

Thus in determining when a father was to be regarded as 'unfit' for legal guardianship, the court formulated its own set of 'exceptions' and it seemed that it was only when such exceptions could be proved, the court would appoint any other person as legal guardian. Determining best interests of the child would be relevant as such only while appointing a mother or any other person as the guardian. This conclusion is evidently regressive and contradictory to the best practices of the higher judiciary where best interests of the child had been upheld to be the paramount consideration.

Again in Family Suit No 157/2015 (decided in 2019) (3rd Additional Assistant Judge and Family Court Dhaka) the dispute was between maternal grandmother and father of a minor daughter and the court discussed the relevance of both traditional rules and best interests principle as set out in the previous SC cases in deciding the guardianship and custody of the minor. Following the language used in earlier SC cases, this court declared that ‘whenever there is a dispute regarding custody of minor children, the court is called upon to give its serious and anxious consideration as to who should be entitled to the custody of the minor considering his/her “welfare”, “benefit” and “interest”.’ However despite such assertion, the court then elaborated all traditional rules of custody or *hizanat* citing from several *Hanafi* law sources⁹⁹⁶ to support the maternal grandmother’s custody rights in absence of mother. The court left unaddressed the question as to why the traditional rules were elaborately cited despite stating that best interests would be the main consideration. However, the court subsequently also cited some of the SC judgments that upheld welfare or best interests of the child including, *Romena Afrin*, *Abdul Jalil and Anika Ali*. However the relevance of all these discussions or their link to the custody dispute in question was not made clear. In the operative part of the order the court simply stated that on the basis of the deposition of the applicant grandmother, the court was satisfied that she could take care of the minor and was therefore awarded to be the custodian. However against her claim of legal guardianship of the minor the court simply relied on the rule that if the father was alive and was not unfit to be the guardian, no one else could be eligible to be the guardian. The court thus gave custody to the grandmother but declared that ‘father as natural guardian, will remain guardian of minor’. The court thus manifestly supported the traditional rules of guardianship where father’s right is considered supreme. The court however did not venture into the question of why ‘father’s natural right of guardianship’ would not be tested against the paramount consideration of welfare which the same court had observed in it’s previous order.

Another recent instance of courts’ endorsement of traditional rules is a decision from 2021 in Family Suit no. 217 of 2018 (3rd Additional Assistant Judge and Family Court, district of Dhaka). This was a case filed by the father of a 5 years old minor

⁹⁹⁶ Baillie’s Digest (n 402) 728.

girl for being appointed as her legal guardian and custodian, against the claim of the mother. The court firstly emphasized that according to Muslim law father is the legal guardian of the minor and as such 'he does not require an order of the court to act as the legal guardian'. As such the father was declared the legal guardian of the minor as he had the unfettered right over such guardianship. With regard to being the custodian, the court perhaps deliberately did not discuss Muslim law rules, as the minor daughter's *hizanat* clearly belonged to the mother under the traditional rules. Instead, the court resorted to questioning integrity and character of the mother by admitting in evidence that the mother had kept her first marriage secret from the petitioner father and presented herself as 'virgin' during her marriage with the minor's father. There was however no suggestion as to how such a factor, even if considered proven, had relevance in determining best interests of a young child. The court further insisted on the child's ill health and held that the father being a government officer and having better financial position than the mother, was able to provide proper medical treatment to the child. However, the court, although had maintained the differentiation between 'legal guardianship' and 'custody' in framing the issues, ignored the point that providing maintenance and bearing treatment and other expenses of the minor was anyway a part of being the legal guardian (as guardianship under traditional rules, includes both guardianship of person and property), and traditional role of custody or *hizanat* is mainly about care and affection which the mother could provide irrespective of her financial abilities. The judgment thus represents a clear endorsement of guardianship being the superior right of father as endorsed by the traditional rules.

In a 2022 decision in Family Suit No. 740 of 2021 (3rd Additional Assistant Judge and Family Court, district of Dhaka) the court again showed a clear bias towards traditional rules of custody. Although the court did mention about best interests of the child as the 'main consideration in child custody cases', the mention was rather ornamental as the court's main reasoning in giving custody of the minor boy of 8 years to the father was based mainly on the traditional rules of *hizanat* as elaborated in the judgment. The court first mentioned that a mother's right of *hizanat* continued only till the minor boy is 7 years of age, indicating thereby that the mother had already lost her right. As an additional reasoning to support the contention the court then mentioned the *Hedaya's* rules on disqualification of mother from getting

custody. Holding that mother by neglecting the child, which is the last of the four grounds of disqualification as given in *Hedaya*, the court concluded that the mother is not entitled to the custody of her daughter. The facts based on which the court came to the conclusion that the mother ‘neglected’ her child were trivial events suggested in the father’s deposition⁹⁹⁷, while the court ignored major factors from the deposition of the mother that could very well show the father to be the neglecting parent. Most importantly, although the court strongly endorsed the *Hedaya*’s grounds of disqualification for mother, which amongst other grounds also included remarriage to a stranger, it entirely overlooked the fact that the same ground of disqualification was applicable for the father as he had remarried and was living with his second wife. Rather the court insisted that ‘as per Muslim law, remarriage of the father of a minor cannot be considered as a disqualification from getting custody of the minor’. The court did not even consider wish of the minor expressed in the open courtroom to live with his mother⁹⁹⁸, neither the judgment contained any indication as to whether the minor’s deposition was at all taken by the court before awarding the custody to the father.

Although most of the above decisions were contested cases, the research also analysed a number of *ex parte* decisions on application for custody and guardianship.⁹⁹⁹ A common aspect identified in all these *ex parte* decisions was that considering the judgment is usually very concise, in an *ex parte* decree the courts use the traditional rules more commonly as a standard to decide either in favour or against the petitioner. For instance, in Family Suit No. 69 of 2022 (decided in 2023) (Family Court of Keshabpur, Jashore), the court rejected the application of the plaintiff father to get custody of a male child aged 3 years. In rejecting the application the court mainly cited the traditional rules of *hizanat*. However, although welfare or best interests of the child was not mentioned in the order, the court did mention that residing with the mother was also necessary for the child’s mental development.

⁹⁹⁷ One of the few examples of neglect, contented by the father was that the mother did not stay overnight with the child when she was once hospitalized while living with the father.

⁹⁹⁸ This was mentioned in the order itself.

⁹⁹⁹ Family Suit no. 90 of 2020 (decided in 20121) (2nd Additional Family Court, Dhaka); Family Suit No. 109/2018 (decided in 2019) 3rd Additional Assistant Judge and Family Court, Dhaka; Family Suit No. 21/2017 (decided in 2019) 3rd Additional Assistant Judge and Family Court, Dhaka.

Again, In Family Suit No. 130 of 2018 (decided in 2019) (Family Court Rupsha, Khulna), the court completely relied upon the rules of traditional Muslim Law in giving custody of a minor boy of above 7 years age to the father on an ex parte decree. The court declared that the mother was ‘bound to give the minor son to the plaintiff [father]’, as the father was the ‘natural guardian’ of the minor son, since the boy was above 7 years of age. On the issue of remarriage of the mother, the court not only referred to the *Hedaya* based traditional rules,¹⁰⁰⁰ but put forward its own interpretation as well in justifying the rule of disqualification of the mother on remarriage. It stated ‘the wisdom of the rule of personal law depriving the mother of the right to the custody of the minor on her re-marriage cannot be gainsaid in that usually there will be other children born after the second marriage who would be [naturally] more loved and protected by the new husband of the mother than the child of the previous husband by the same mother.’ Basing the decision on such subjective interpretation the court thus ignored the leading SC decisions to the same issue that held the mother’s remarriage as not a bar in getting custody of a minor. Being a decision published in 2019 the court ignored to refer to the recent decisions of the apex court that upheld best interests of the child to be the paramount consideration in a child custody case.

These cases perhaps indicate a parallel pattern in the family courts’ judgments where welfare or best interests of the child is manifestly ignored by the courts in their reliance on traditional rules of Muslim law. More so, in some cases, as the above discussion suggests, in applying the traditional rules, the courts sometimes are biased towards father’s superior claim as against the mother.

11.3 Courts’ Approach Towards Granting Visitation Rights

It is a generally accepted principle under the Muslim law that a mother who has the custody of her child cannot prevent the child’s father from visiting while the child is in her care. The same applies to a father if he has the custody of the child.¹⁰⁰¹ This rule can be found also in the modern Muslim law textbooks authored by contemporary

¹⁰⁰⁰ Baillie’s Digest (n 402) and Ameer Ali (n 375).

¹⁰⁰¹ Nasir, *Status of Women* (n 434) 200.

scholars from the subcontinent that are most commonly followed by our courts.¹⁰⁰² Although, the *Hanafi* age-sex rule has been questioned a number of times by our judiciary in respect of its suitability with the best interests principle; the rule regarding access to visit the child, had largely remained outside the welfare test, except few recent instances of the higher judiciary. However in order that welfare can be deemed to be truly the paramount consideration in a child custody dispute, not only the final custody order but the order allowing access to the child should also be assessed in light of the of best interests of the child. However, this is found to be rarely the case, particularly in the lower courts' decisions. Even in cases where custody had been awarded only on the basis of welfare of the child side-lining the traditional rules of Muslim law, it is seen that the right to visit the child is still considered an absolute right of the parents guaranteed by the personal law rules. This approach is more manifest in cases where the father loses the legal battle over custody and is allowed access to visit his minor children. In such cases, courts generally rely on the traditionally accepted principle of guardianship under Muslim law, which holds father of a child to be the 'legal or natural guardian', irrespective of whether he has the physical custody of the child. The following lower court cases are some examples of such decisions.

In Family Suit No. 234 of 2011 (decided in 2014) (3rd Additional Assistant Judges court, Dhaka) the custody dispute was between parents of a 7 years old boy. Considering various factual aspects including the oral depositions of the parties, the court decided that the child should remain in mother's custody, as that would be in his best interests. From the judgment it appears that the court itself found from the evidence that the father used to physically and mentally torture the mother. The mother even had filed a case in the Women and Child Repression Prevention Tribunal¹⁰⁰³ against the father, who was then sentenced to one and half year's imprisonment. However, despite having such serious allegation against the father, the court was unhesitant to declare that the father, being the 'natural guardian' of the minor, had the right to visit the child. Although the complaint did not involve abuse against the child, the fact that the father was abusive to the mother, should have

¹⁰⁰² Mulla, *Principles of Mahomedan Law* (459) and Fayzee (n 321).

¹⁰⁰³ The special tribunal was established to try offences under the Women and Child Repression Prevention Act, 2000.

been considered by the court before allowing him to see the child on a regular basis. Instead, justifying the criminal conviction the court stated, 'Men are not infallible and the general tendency of men is to commit error', thereby displaying an extremely misogynist stance. The court went on building its own assumptions on how allowing visitation to the father who already had two children from his second marriage, would be best for the child by saying that, 'At certain stage when the minor son would know that he has father, then his mind will be in question that why his father was away from him and why did he not look after him? This type of thinking may lead to disastrous effect in his life.' The court thus looked into the child's wellbeing from a very narrow approach reflecting the judge's own preconceived notions of what is best for a child. Neither the court attempted to address the question as to how allowing the child to be in regular contact with an abusive father might jeopardize his wellbeing.

Similarly in Family Suit No. 225 of 2012 (decided in 2014) (2nd Additional Assistant Judge Court, Dhaka) the defendant father was allowed to regularly visit his minor son whose custody was given to the mother. The judgment however did not mention any reasoning as to the grounds based on which custody was given to the mother against the claim of the father. The judgment only contained the factual circumstances of the case, which indicated that father had been physically, and verbally abusing the child's mother and threatening her of kidnapping the child. A number of times the mother had filed General Diary in the concerned police station facing torture and threat from the former husband who in fact was married for the third time when the judgment was given. The complaints of the mother included threat of inflicting harm to the child and she had also filed a separate case for maintenance under the family court as the father had been denying providing anything for the child since the divorce. None of the factors however were taken into consideration by the court before awarding visitation right to the father as access was deemed an unquestionable right of the father.

On similar facts, in Family Suit No. 586 of 2015 (decided in 2016) (2nd Additional Assistant Judges Court, Dhaka), the court's insistence on father's 'natural right' over his children was expressed as follows, '...but it is the strong instruction of the court to the defendant mother that the plaintiff father is *obviously entitled* to meet his minor

daughters *whenever he will desire*'. Thus even though there was serious allegation of torture against the father in this particular case and the minor daughters themselves expressed that they do not wish to meet their father, the mother was categorically instructed by the court to facilitate the father to meet his daughters. The court seemed to have been so convinced with the father's right to visit the children that no other factors were deemed necessary for assessing his claim over visitation right. Thus, more often than not, this 'absolute right' of the father to visit the child when he does not have the custody, is justified on the ground that the father is the 'legal guardian' or the 'natural guardian' of his children under the Muslim law of guardianship.¹⁰⁰⁴

This emphasis on the fathers' superior right over legal guardianship of his children had even led the courts to award visitation right to a father who had been allegedly abusive not only to the mother but also to his children. As for instance, in Family Suit No. 45 of 2011 (decided in 2015) (5th Additional Assistant Judge and Family Court, Dhaka) the father of an 11 years old boy was alleged to be physically abusive to the child and the mother had filed a number of general diaries in the concerned police station against the father. There was also allegation against the father that he was addicted to drugs, which eventually led to the divorce of the parties. Most significantly, in his deposition the minor boy was quoted saying the following, 'My father does not love me. I do not want to go to my father. I don't like him. He often beats me up. He got married again'. Despite these facts, the court allowed visitation right to the father without any further enquiry as to the minor's allegation of physical abuse against the father. The judgment simply states: 'the plaintiff (mother) is hereby directed to facilitate arranging meetings between the minor son and his father'.

Again, in Family Suit No. 1187 of 2009 (decided in 2013) (5th Additional Assistant Judge and Family Court, Dhaka) a 7 years old girl clearly expressed in her deposition to the court that she did not want to see her father. The statement as

¹⁰⁰⁴ There are also a number of other cases where visitation right has been granted to the father for being the 'legal guardian' of the child; for instance, in Family Suit No. 31 of 2011 (decided in 2015) (Senior Assistant Judge Court and Family Court Judge, Meherpur) the court observed that 'as a father and the legal guardian, the plaintiff (father) definitely has the right to meet his children'; in Family Suit No. 721 of 2011 (decided in 2015) (Family Court of Rupsha, Khulna) despite of allegation of torture by the husband against the mother and the child, the court awarded visitation to the father on the ground that being a legal guardian seeing the child is his 'entitlement'.

recorded in the judgment was as follows, 'I do not wish to go to my father. I want to live with my mother. My father used to physically assault us (she had a younger brother whose custody was also disputed) and also tortured us mentally.' However, despite such clear statement, the court decided that it would be in the welfare of all parties if the father were allowed to visit the children at their place of residence. The court further supported the decision by adding 'as a natural guardian of his children a father is always entitled to visit them as such'.¹⁰⁰⁵

Similarly, in Family Suit No. 162/2014 (decided in 2018) (3rd Additional Assistant Judge and Family Court, Dhaka), the court while considering that the father will have visitation right observed that, 'the defendant (father) is the natural guardian of the concerned minor. So he has the right to visitation ... If he is not allowed to visit the son, than the son will grow up without father's affection' which may ultimately harm his overall wellbeing. Similar approach could be seen in some more relatively recent cases, where despite allegations of torture by the husband against the mother, visitation was allowed on the ground that men are infallible and that it is a father's natural right, without evaluating the possible impact of an abusive parent on the child's welfare.¹⁰⁰⁶

11.4 Conclusions

It appears from the analysis above that unlike the SC cases, in the lower courts, it is very difficult to discern a consistent pattern over time in terms of use of best interests in custody decisions. In comparatively recent cases, the courts seem to be more inclined to look into the interests of the minor instead of rigidly following traditional rules. However, the relevance of traditional rules is still very strongly present in the family court cases. The difference with relatively older cases would perhaps be that, while welfare considerations were often used as a supplement or an exception to the

¹⁰⁰⁵ Similar emphasis on father's right over visitation of the minor in question as his 'natural guardian' and the minor being his 'legal heir' was held in Family Suit no. 49 of 2011 (decided in 2012) Senior Assistant Judge Court Daganbhiuyan, district of Feni.

¹⁰⁰⁶ Family Suit No. 189/2017 (decided in 2019) 3rd Additional Assistant Judge and Family Court, Dhaka; Family Suit No. 1960/2017 (decided in 2019) 3rd Additional Assistant Judge and Family Court, Dhaka.

traditional rules, in recent cases the traditional rules rather took a backseat and best interests of the child played an important determining factor in custody cases.

This conclusion however cannot be generalized for all cases of the family courts as the analysis itself showed how reasoning of the family courts did not follow any singular pattern over the years.

Part –IV: Conclusions

Chapter 12: Concluding Remarks

12.1 General Overview

The research has identified an overall shift towards the best interests principle in the Supreme Court's decisions on child custody in Bangladesh. With regard to the family courts, a consistent shift from the courts' reliance on traditional rules to applying the best interests principle could not be so discerned. However, the relatively recent cases showed courts' increased attention towards adopting a more child-centric approach as opposed to the traditional rule-based approach. The influence of the traditional rules nonetheless is still very much present in the decisions of the family courts as the analysis had revealed. Also, in comparison to India and Pakistan, the approach of the higher judiciary of Bangladesh appears to be more receptive of the best interests principle, as well as of the CRC. In India, the outlook of the superior judiciary in cases involving Muslim parties is rather conservative where the courts, although frequently rely on welfare considerations, are generally careful in deciding a custody dispute on the basis of those considerations. Hence the reasoning almost invariably had reference to the Muslim law rules as laid down in the *Hanafi* texts, which were rigidly followed during the British administration. The progressive judicial trend in custody disputes between Hindu litigants in India nevertheless had persuaded some of the courts to determine the case between Muslim parties solely on welfare or best interests of the child. However, such cases are small in number and the majority of cases considered traditional rules of Muslim law as a significant consideration, a departure from which then demanded considerable justifications in the judgment. Moreover, as the analysis has revealed, some of the judgments had rather entirely relied on the traditional rules of Muslim law without considering the case from the perspective of the child's best interests.

Contrary to India, the superior judiciary of Pakistan had shown greater acceptance of the principle of best interests. However, unlike Bangladesh, such endorsement of welfare in the custody related decisions appeared to have emanated from the GWA framework, without much reference to the CRC and to the terms of ‘best interests of the child’. Although as a standard, welfare is considered as the paramount consideration in the child custody decisions in Pakistan, the influence of the traditional *Hanafi* rules of custody is also clearly evident in the reasoning. Moreover, in comparison to Bangladesh, decisions solely based on welfare principle without any reference to the traditional rules, seemed fairly uncommon in the judicial discourse of the Pakistan’s superior judiciary.

12.2 Concluding Remarks on the Supreme Court’s Decisions

The chronological review of the reported decisions of the Supreme Court of Bangladesh in the analysis displays a clear variation between the trends in cases prior to the *Anika Ali*¹⁰⁰⁷ decision and cases subsequent to the decision. Prior to the *Anika Ali* judgment, the discussion around protecting best interests of children mainly centred on welfare, as a standard emanated from the GWA. However, with the CRC coming into greater focus in the judicial literature, especially by the apex courts’ reference to the Convention in the *Anika Ali* case, recent cases mostly referred to the terms ‘best interests principle’ as the paramount consideration for deciding custody disputes. Although prior to the *Anika Ali* case, best interests had been referred as the paramount consideration in several cases, traditional rules of custody were also relied on in justifying court’s reasoning. However, in the recent cases the judicial literature shows a clear deviation from the earlier trends and the traditional rules are almost never insinuated in the judgment.¹⁰⁰⁸ However, having said so, it is important to note that the research has reviewed only the reported decisions of the higher judiciary. Without also reviewing the unreported cases on child custody it cannot be conclusively said that the SC’s decisions have completely moved away from the traditional-rule-based approach that was identified in decisions prior to the *Anika Ali*

¹⁰⁰⁷ (n 18) 49.

¹⁰⁰⁸ Nowrin Tamanna and others, *Muslim Women’s Rights under Bangladesh Law: Provisions, Policies and Practices Related to Custody and Guardianship* (The South Asian Institute of Advanced Legal and Human Rights Studies 2011) 22.

case. However, a consistent pattern seen in a series of reported decisions post the *Anika Ali* judgment does indicate a progressive judicial trend towards adopting best interests principle as the most important determining factor in child custody disputes in Bangladesh.

The role of the CRC is also more strongly advocated in the recent judgments of the higher judiciary. Commenting on the authoritative value of the CRC on the judicial decisions of Bangladesh, the Appellate Division observed in the *Amena Chowdhury*¹⁰⁰⁹ case that the CRC 'is the most accepted international instrument, having been signed by all the nations of the world apart from one [and] can be termed as the Bible of child rights.' Other rights provided in the Convention, especially right not to be separated from parents under Article 9 and right to express views under Article 12 are also expressly relied on in the recent judgments to determine best interests of children in custody disputes.¹⁰¹⁰

When the court relied on best interests of the child standard, it had generally followed individual facts and circumstances of particular cases and the situations of the particular children in dispute. Over the years child's wish had been increasingly emphasised by the higher judiciary in determining custody dispute to the extent that some determinations of welfare were entirely based on the child's deposition in the court. Another significant emphasis has been on mother's care giving role towards her young children in determining welfare. Further, factors like educational opportunities for the child, educational background of the parents, family environment, etc. had been considered by the courts in deciding best interests of the child.

Analysis of the recent cases also indicates a potential shift in the court's approach in determining best interests of the child by appointing probation officers and engaging psychologists and other medical personnel to objectively assess welfare of the child in question. Although such referral to probation officers has not yet become a common judicial practice, the recent cases indicate a positive change where courts

¹⁰⁰⁹ LEX/BDAD/0038/2020.

¹⁰¹⁰ LEX/BDAD/0075/2022 *Eriko Nakano v Bangladesh* (extensively refers to the relevant Articles of the CRC).

are more often relying on reports of probation officers to facilitate objective assessment of best interests of children.¹⁰¹¹

Another welcoming trend from the recent cases that is worth noticing is the courts' liberal approach towards possibilities of shared or joint custody when such arrangement appeared to be most suited for the best interests of the concerned child. Court's increased reliance on best interests principle had in fact instigated this shift in the judicial trends, whereas in the past custody would be awarded to either one of the contesting parties as a standard rule.¹⁰¹² Moreover, following the trend in *Anika Ali* decision, in the subsequent cases the SC had also subjected visitation by the non-custodial parent to the consideration of best interests of the child, as opposed to viewing it as an unconditional right of the parents.

12.3 Concluding Remarks on the Family Courts' Decisions

The analysis of the family courts' decisions indicates that the determination of the custody disputes in the family courts is still influenced, at least to an extent, by the traditional religious rules. Although in a good number of cases the court had awarded custody based on welfare or best interests principle as opposed to traditional rules; in determining what is to be in the best interests of the child, the courts' decisions were again largely influenced by the traditional rules. In particular, the rule of mother being disqualified from *hizanat* on her remarriage does have a strong impact on the courts in deciding what is in the best interests of the child. In cases where the father was awarded custody as against the mother, the main factor amongst other grounds which led the courts to determine that the mother was not fit to ensure welfare of the child, would commonly be her remarriage with a stranger.¹⁰¹³

¹⁰¹¹ See Mainul Islam (n 930).

¹⁰¹² See *Nazmun Nahar Mukta v Md. Lutfur Rahman* (LEX/BDAD/0029/2020).

¹⁰¹³ For example, in Family suit no 175 of 2010 (decided in 2016) (5th Additional Assistant Judge and Family Court, Dhaka), the dispute was concerning custody of two boys aged 14 and 7 respectively. It appeared from the case record that the defendant mother had married again after her divorce with the minors' father. However she submitted an affidavit to the court to prove that she had actually divorced the second husband. The court, while deciding that the welfare of the children would be better ensured under the custody of the father, was on the other hand convinced that the mother had not actually divorced the second husband and was still in a legally effective marriage. The court assumed such position from the deposition of the younger son who stated before the court that the second

Similarly when the mother had been awarded custody on the ground of best interests of her children, the courts had usually given significant importance upon the fact that she had remained single in order to decide in her favour. Although, the courts usually take similar approach when it comes to remarriage of the father,¹⁰¹⁴ generally father's second marriage is considered as ineligibility only when the mother, on the other hand, had not remarried.¹⁰¹⁵ Thus although best interests of the child may have commonly guided the courts in awarding custody, the traditional rule of ineligibility of female custodian on remarriage still holds strong as a criteria for deciding child's custody in the family courts.

Another important factor is the court's emphasis on the child's wish as expressed in his/her deposition, when the custody is awarded on the basis of best interests of the child. Since there are not many sources of evidences which can assist the trial court in ascertaining welfare,¹⁰¹⁶ a child's wish expressed in the court (when the child is considered to be able to give an intelligible preference) often serve as the single most important consideration in deciding to whom the child's best interests should

husband 'stays with his mother at night'. The fact that the mother actually was compelled to claim that she had divorced her second husband (perhaps falsely) and the effort of the court on the other hand to convince itself that the mother's claim of being divorced is false, simply arose out of the court's general reliance on the Muslim law rule relating to remarriage and custody which holds that when a mother loses her right to custody through remarriage, and then that marriage is dissolved, custody should revert to her. Thus the case, although was apparently decided on the basis of welfare of the minors, the court could not fully detach itself from the orthodox mind-set influenced by the traditional religious rules.

¹⁰¹⁴ The courts in such case would usually assume that living with a "step mother" would always be against the well being of a child.

¹⁰¹⁵ For instance, in Family suit no. 721 of 2011 (decided in 2013) (Assistant Judge and Family court (Rupsha) of Khulna) the court observed in awarding custody of a 14 years old daughter, that 'At this age, a girl needs extra care from her mother and also she needs some privacy which can be ensured by the mother, not by the stepmother. The defendant (mother) did not marry again because of thinking better future for her children, whereas the plaintiff married again.' Similarly in Family suit no. 82 of 2015 (decided in 2016) (5th Additional Assistant Judge and Family Court, Dhaka) the court awarded custody of a 6 years old daughter to the mother and made the following observation: 'Her (the daughter's) best interests will not be ensured if she is given to her father who has remarried. Certainly she will be better taken care of by her mother who is single, than her stepmother.'

¹⁰¹⁶ Generally the main evidences that are relied upon by the family courts in deciding a guardianship dispute are the depositions of the opposing parties and of the concerned minor. Along with this generally the documentary evidences that are submitted to the court are marriage and divorce related documents of the parties, documents showing proof of age of the minor and in some cases some other case specific documents such as school admission papers or documents showing payment of maintenance to the child. Hence more often than not it is principally the deposition of the parties from which the court has to build an assumption as to the welfare of the child.

lie.¹⁰¹⁷ However, a child's preference is usually considered relevant when the court has decided the case on the basis of welfare considerations. The cases where decisions were mainly based on traditional rules, child's wish naturally took a backseat or perhaps was rendered irrelevant. In addition, contrary to the SC's position, in case of awarding visitation right to the father, the family courts usually allowed such rights based on the traditional rule of father being the natural guardian.

Additionally, compared to the SC decisions where a gradual change in the language used in the judgments is noticeable where courts were more readily using the term 'best interests of the child' as embodied in the CRC, most of the family court cases still prefer to use 'welfare' as included in the GWA. There are very few cases in the analysis that actually used the term 'best interests' or had included it as an alternative to or in conjunction with 'welfare' although both refer to the same considerations.

Although the courts had never categorically addressed the question of what factors are to be taken into consideration to determine welfare or best interests; similar to the SC, based on particular facts of each case and individual judges' perceptions, different courts had assumed different conditions and circumstances that were considered to be in the best interests of the child in a given case. Amongst the most common grounds, the caregiving role of a mother towards her young children again is insisted upon strongly in most of the cases. The fact that a child in question was habituated in living with her/his mother since birth or for long duration had often been a determining factor as well in awarding custody to the mother. At the same time, factors such as child's access to good education, healthcare, family environment, recreational opportunities, economic capabilities of the parents, their age and abilities to take care of the child, as well as child's bonding with a parent, etc. had been taken into consideration in cases which had side-lined traditional rules and based the decisions on welfare or best interests of the child. Additionally, the

¹⁰¹⁷ In Family suit no. 86 of 2015 (decided in 2016) (5th Additional Assistant Judge Court Dhaka) a father was denied guardianship over his minor son who was 8 years old. Although the progressive decisions of the SC which had established primacy of welfare over any other considerations had not been referred to, this decision was based on best interest of the child and in coming to such decision the court heavily relied upon the deposition of the child himself who expressed his clear unwillingness to visit his father even occasionally.

provision of section 17 of the GWA, which had also given a number of grounds that, the courts are to look into to determine welfare of a child, had guided the family courts in determining custody disputes. Notably, except in one case, the reference to the CRC is absent in all cases analysed in the thesis, which perhaps indicates how the family courts are still leaned towards the traditional interpretation of custody laws.

There were also a number of judgments collected from the family courts the contents of which were so concise that it could not be ascertained from the judgments as to what considerations have actually influenced the courts' decisions. For instance, in Family Suit No. 297/13 (decided in 2014) (2nd Additional Assistant Judge Court, Dhaka) custody of a minor boy of 6 years old was given to the father as against the mother's claim and the order did not mention any reasoning which led the court to reach the decision. Neither traditional rule nor welfare considerations were mentioned except the operative part of the order stating that the minor's custody is awarded to the father.

Moreover as mentioned before, although there had been a series of judgments from the SC indicating a shift towards best interests of the child being considered as the paramount consideration, the family courts had actually referred to such decisions only in a small number of cases. Further, amongst the family court decisions that actually had referred to the SC's judgments, most referred to the cases of *Abu Baker* (1986)¹⁰¹⁸ and *Abdul Jalil* (1998)¹⁰¹⁹ while relying on a rebuttable presumption of welfare approach in determining custody. Few recent decisions had made reference to the *Anika Ali* judgment and no cases were found in the analysis which had referred to any of the progressive judgments of the SC that were pronounced after the *Anika Ali* case.

This perhaps indicates that the lower courts are, to some extent, distant from the progressive jurisprudential developments of the higher judiciary in Bangladesh. The fact that the SC itself has not been able to maintain a consistent pattern in applying welfare considerations for a relatively substantive period, may very well have

¹⁰¹⁸ 38 DLR (AD) (1986)106.

¹⁰¹⁹ 50 DLR [1998] (AD) 55.

contributed to such disparity in the family courts' decisions. Nevertheless, it is important that the judges are aware of the recent trends of the higher judiciary, which would enable them to maintain conformity with the SC's decisions and would help reinforce the progressive and liberal judicial trends of the judiciary.

Thus, the judicial approach of the family courts in awarding custody can be said to be leaning towards the traditional Muslim law rules. Although considerations of welfare and best interests of the child can be found to have been relied upon in several cases, the mind-set of the judges does not seem to be ready yet to ignore the traditional rules altogether and consider best interests of the child as the paramount consideration in deciding child custody cases.

12.4 Final Remarks

Although in recent years best interests principle had been frequently relied upon in custody decisions, it is also noticeable that the SC has largely refrained from directly addressing the conflict between the traditional rules of custody and the best interests of the child in clear terms. What the recent decisions have done is to avoid the reference of the traditional rules altogether. Whereas such approach is helpful in relying on best interests of the child in custody disputes, the fact that applying rigid rules without considering the individual facts and circumstances of a case would run against interests and welfare of the child, needs to be manifested as well in clear terms. Considering that GWA is still the governing law, which clearly retains relevance of the personal law of the child alongside her/his welfare, addressing the incompatibility of those rules with best interests principle is crucial.

From the judgements of both the SC and family courts it also transpired that the judicial decisions have not clearly demarcated the scope and meaning of the terms 'guardian' and 'custodian'. In several decisions the court had simply used both the terms alternatively in the operating part of the order without specifically addressing the very scope that each of those terms would pertain under the traditional rules of Muslim law. Such ambiguities are perhaps a result of the confusing forum imported in the GWA that attempted to retain Muslim law rules in an otherwise secular welfare

based statute. However, in terms of guardianship of property the courts' assertions are very clear, since despite the progressive trend of the judiciary towards adopting best interests standard in custody cases, guardianship of property remained almost an unchallenged territory claiming father's superior rights. Judicial discourses need to explore avenues to challenge such superior guardianship of the father over the property of the minor in order to remove the apparent discrimination that the current legal position has retained.

The fact that the key governing statute on custody and guardianship still contains provisions that would justify the courts in importing the orthodox personal law rules of child custody and guardianship, is effectively a block in the way towards realizing the full potential of the progressive stance of the higher judiciary of Bangladesh. Legislative reform towards a child-rights-centric approach reflecting the CRC Committee's recommendations is thus a crucial next step for Bangladesh in order to embrace fully the principle of best interests of the child.

Such legislative reform would essentially demand repealing the existing GWA and replacing it with a more progressive statute that is aligned with the best interests principle of the CRC. In light of the general principles and substantive rights comprised in the CRC, and the concerns raised by the Committee on discriminatory custody laws of different state parties; the new law should establish 'best interests of the child' as the paramount consideration in all custody and guardianship matters. It should provide non-exhaustive guideline to assist the courts in the process of evaluation of the best interests of the child in individual cases.

Again, the assessment of best interests of the child in a custody or guardianship dispute should adopt a rights-based approach as prescribed by the Committee in its General Comment 14, 'to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.'¹⁰²⁰ In particular, in deciding what is in the best interests of the child in a custody dispute, courts must give due consideration to the child's right to freely express his or her views which is one of the core principles of the CRC under Article 12. The legislative reform thus should also provide procedural safeguards to ensure that children are able to freely

¹⁰²⁰ General Comment 14 (n 35) para 5.

express their views in custody and guardianship matters and that their views are given due weight in court.

Adopting such rights-based approach in holding best interests principle as the highest normative standard in all custody matters, will offer a legal framework that is free of ambiguity; which in turn, will enable the courts to reject orthodox interpretations of religion-based rules on custody and guardianship. However, the process of such progressive legislative reform must include views and opinions of all concerned stakeholders including judges, lawyers, academics, rights-activists and most importantly of children; to formulate an all-encompassing legislation which would uphold the principle of best interests of the child as embodied in the CRC.

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