

INTERPRETATION OF THE BEST INTERESTS PRINCIPLE IN ISLAMIC FAMILY LAW

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INTRODUCTION

Article 3 of the UN Convention on the Rights of the Child provides that in all actions concerning children the best interests of the child shall be a **primary consideration**. Article 5(b) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women provides:

“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”.¹

Section 28(2) of the Constitution of South Africa provides that a child's best interests are of **paramount importance** in every matter concerning the child. In its Discussion Paper on Islamic Marriages and Related Matters² the South African Law Commission states that the guidelines laid down by Muslim jurists relating to custody of, and access to, minor children are based on the welfare of minor children as the **paramount consideration**. This, the Commission argues, is consistent with section 28(2) of the Bill of Rights. However, one must be aware and take into account the age limits and guidelines furnished by Muslim jurists in this regard.

¹ Alston P (ed) *The Best Interests of the Child Reconciling Culture and Human Rights*, Oxford 1994, 3.

² Discussion Paper 101, 2001. The recently drafted Islamic Marriages Bill reiterates this view.

Whether one uses the term ‘primary consideration’, ‘primordial consideration’ or ‘paramount importance’, the concept of ‘best interests’ remains a malleable concept, shaped as it is by economic circumstances, culture and religious norms.³

Before discussing the Islamic approach to the interpretation of a child’s ‘best interests’ it is perhaps apt to look at the list of criteria/factors set out by the court in the 1994 South African decision of *McCall v McCall*⁴. The criteria listed include, *inter alia*, the following:

- (a) the love, affection and other emotional ties which exist between parent and child;
- (b) the character and temperament of the parent and the impact thereof on the child’s needs;
- (c) the ability of the parent to provide for the basic physical needs of the child;
- (d) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular.
- (e) the ability of the parent to provide for the child’s emotional, psychological and cultural development.
- (f) the mental and physical health and moral fitness of the parent, and
- (g) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into account.⁵

THE ISLAMIC LAW APPROACH

The primary sources of Islamic law (*Shari’ah*) are the Holy *Qur’an* and the *Ahadith* (sing. *hadith*) the latter being the sayings and exhortations of the Prophet Muhammad (peace be upon him⁶). Although Allah does not directly address the question of custody in the *Qur’an*, the following verse is often quoted as authority:

“The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child nor father on account of his child.”⁷

³ Blair DM and Weiner MH *Family Law in the World Community* Durham 2003 553.

⁴ 1994 (3) SA 201 (C).

⁵ See page 205 of the judgment.

⁶ Hereinafter abbreviated to pbuh.

⁷ *Surah Al-Baqarah* (Chapter on Women) 2, verse 233.

There are a number of sayings of the Prophet (pbuh) relating to the issue of custody. Two illustrations are given here. First, a woman once complained to the Prophet that upon divorce, her husband wished to remove her child from her custody. The Prophet commented that ‘you have the prior right to the child as long as you do not marry’⁸. Secondly, on another occasion, a woman complained that her husband wanted to take her son away from her, although her son was a source of great comfort and warmth to her. Her husband simultaneously denied her claim over the child. The Prophet (pbuh) said:

“Child, here is your father and here is your mother; make a choice between the two as to whom you prefer.”⁹

The son took hold of his mother’s hand and they dispersed.

Following upon the direction and spirit of the first *hadith*, all four Sunni schools of thought, namely the Hanafi, Maliki, Shafi’i and Hanbali - as well as the Shia school hold that the mother has the prior claim to the custody of the child. In terms of Islamic law, both males and females must comply with two important conditions to be eligible for custody. First, they must be sane and of the age of majority and, secondly, they must have the ability to raise the child. This second condition entails, *inter alia*, protecting the child both physically and morally as well as looking after the interests of the child.¹⁰ In addition to these conditions a female custodian (*hadina*) should not marry someone whom the child is not prohibited from marrying in terms of Islamic law. This condition is based on the saying of the Prophet (pbuh):

“You have the first right to the child as long as you do not marry.”¹¹

Nasir explains that although the tradition implies that the mother and, *a fortiori*, any other female custodian would lose the right to custody of the child if she remarries, it is not interpreted so broadly. The Hanafis and Malikis restrict the marriage that deprives the mother of her right to custody to that with a relative who is not prohibited from marrying the child.¹² For example, if the mother marries a cousin of the child she forfeits her prior right of custody, whereas if she marries the child’s uncle she retains that right.

LEGISLATION IN ISLAMIC JURISDICTIONS

As stated earlier, there is no express reference in the *Qur’an* on the question of custody. Arab and Islamic countries, in their modern legislation on the issue, have upheld the spirit of the Prophetic sayings and the approaches of the Sunni and Shia schools of thought. Inherent in the spirit of the Prophetic traditions and the various schools of law is the principle of the ‘best interests’ of the child. A few illustrations suffice.

⁸ Sunan Abu Dawud, *Kitab-at-Talaq* (Vol 2) 616.

⁹ See n 8 *supra* at 617.

¹⁰ Nasir JJ *The Islamic Law of Personal Status* London 1986 178

¹¹ See n 8 *supra* .

¹² See n 10 *supra* at 179.

Article 20 of the Egyptian Law on Personal Status of 1929¹³ provides that the right of a woman to custody of her children shall cease on the attainment of the age of 10 years in the case of a male child and 12 years in the case of a female child. After the child has reached that age the *qadi* can order that the child continue in such custody until the male child reaches 15 and the female child gets married, if he/she is satisfied that the welfare of the child demands this. The Article grants the mother the prior right to custody - in terms of the *hadith* of the Prophet - and then awards custody in accordance with the Hanafi school of thought.

The Tunisian Code of Personal Status¹⁴ provides that a person entitled to the custody of a child must be major, reliable and capable of undertaking the duties of custody. Where the custodian is a woman she must not be cohabiting with a husband with whom living with would be prejudicial to the interests of the child.¹⁵ Where the woman who is entitled to the custody of a child is a follower of a religion different from that of the child's father, she is entitled to such custody only until the child reaches five years of age provided that there is no risk that the child shall become inclined to her religion - unless she is the guardian of the child.¹⁶ Article 67 of the Tunisian Code states that the court will decide the matter in the best interest of the child.

The Islamic Family Law (Federal Territory) Act of 1984 in Malaysia provides as follows:

“(1) The right of the *hadina* [female custodian] to the custody of a child terminates upon the child attaining the age of seven years in the case of a male and the age of nine years in the case of a female - but the court may, upon application by the *hadinah*, allow her to retain custody of the child until the attainment of the age of nine years in the case of a male and eleven years in the case of a female.

(2) After termination of the right of the *hadinah* the custody devolves upon the father, and if the child has reached the age of discernment (*mumaiyiz*), he or she shall have the choice of living with either of the parents, unless the court otherwise orders.”¹⁷

In almost all the Islamic jurisdictions the court may, in its discretion, extend the period of custody, or withdraw a child from the mother's custody and transfer it to another relative should the child's interests so require.¹⁸

¹³ As amended by Law 100 of 1985.

¹⁴ 1956, as amended.

¹⁵ Article 58.

¹⁶ Article 59.

¹⁷ Article 84.

¹⁸ See Mahmood T *Personal Law in Islamic Countries* New Delhi 1987 295.

CASE LAW IN ISLAMIC JURISDICTIONS

How have the courts in Islamic countries approached the issue? This paper looks very briefly at a few court decisions in Malaysia, Pakistan and India.

Malaysia

A number of cases have been decided in the Shari'ah Courts of Malaysia on the question of the custody of children. One of the leading cases has been that of *Nooranita bte Kamaruddin v Faiez bin Yeop Ahmad*¹⁹. The facts of the case were as follows. The parties were married in September 1977 and had a daughter in 1978. The parties were divorced in 1980 and custody was awarded to the mother. In 1982 the mother married a man who was not related within the prohibited degrees of marriage to the child. The maternal grandmother, too, had remarried a man who was not so related to the child. The father removed the child from the mother's custody and the child then lived with the father for over two months before she was returned to the mother. The father, also having remarried, applied to the Shari'ah Court for custody of the child. The Chief Kadi held that since the mother had married a person whom the child was not prohibited from marrying she had lost her prior right to the custody of the child. The Chief Kadi further held that the father possessed the requisite qualities for the custody of the child to be awarded to him since he was able, *inter alia*, to maintain the child. The mother then appealed to the Shari'ah Appeal Committee.

The Shari'ah Appeal Committee relied on a number of earlier decisions, including the Kelantan cases of *Wan Abdul Aziz v Siti Aishah*²⁰ and *Harun v Che Gayah*²¹ as well as the Penang decision of *Zawiyah v Ruslan*.²² After referring to the *ahadith* on the right to custody²³ as well as leading authorities such as Imam Al-Shafi'i and Syed Sabiq, the Court concluded that:

“(1) The primary consideration in all cases of custody under the Islamic law is that the right of the child over whom custody is claimed must be given preference to the right of the persons claiming custody, as the purpose of custody is for the interest and welfare of the child and not for the interest and welfare of the parties contending for custody.

(2) Based on this legal principle of the Shari'ah and having considered all the facts of the case, including the reluctance of the child herself to choose between the father and her

¹⁹ (1989) 2 *Malayan Law Journal* cxxiv.

²⁰ (1975) 1 *Journal Hukum* (1) 47.

²¹ (1978) 1 *Journal Hukum* (1) 79.

²² (1980) 1 *Journal Hukum* (2) 102.

²³ See ns 8 and 9 *supra*.

mother, the Appeal Committee is of the opinion that it is to the welfare and interest of the child that she should continue to stay with the father, a situation which has existed for over four years, even though the mother-appellant could not be blamed for the delay in the hearing of the appeal.”

Pakistan

In Pakistan the courts have developed the presumption that the minor’s welfare lies in granting custody in accordance with the personal laws of the minor. In the case of *Atia Waris v Sultan Ahmad Khan*²⁴, Mahmud J stated:

“In considering the welfare the court must presume initially that the minor’s welfare lies in giving custody according to the dictates of the rules of personal law, but if circumstances clearly point that his or her welfare lies elsewhere or that it would be against his or her interest, the court must act according to the demand of the welfare of the minor, keeping in mind any positive prohibitions of the personal law.”²⁵

In this case, custody was given to the paternal grandparents so as to ensure that the minor was raised as a Muslim, despite the positive rule of Muslim law - all four Sunni schools of thought are *ad idem* on this rule - which states that if the mother is found unsuitable to have custody of her female child, the custodial right devolves on the maternal grandmother.²⁶

However, some six year later, the same court, in the case of *Zohra Begum v Latif Ahmad Manawwar*²⁷ stated that it is permissible for the courts to differ from the rules of custody as stated in textbooks on Muslim personal law because there is no *Qur’anic* injunction on the point and the courts, which have taken the place of *qazis* can, therefore, reach their own decisions by the process of *ijtihad* (individual or personal reasoning).²⁸ It would thus be permissible to depart from the rules if, on the facts of a particular case, its application would prejudice the welfare of the minor.

India

²⁴ 1959 PLD (WP) Lah 205.

²⁵ See n 24 *supra* at 214.

²⁶ Pearl D *A Textbook on Muslim Personal Law* London 1987 93

²⁷ 1965 PLD (WP) Lah 695; See also *Fahmida Begum v Habib Ahmad* 1968 PLD Lah 1112.

²⁸ See Iqbal M *The Reconstruction of Religious Thought in Islam* New Delhi 1981

The flexibility of the Pakistani court in the *Zohra Begum*²⁹ case is also evident in the 1983 Indian case of *Mohd Ramzan v Taja*³⁰. In applying section 17 of the Jammu and Kashmir Guardians and Wards Act the court argued that when appointing guardian the court is charged with the duty of appointing the most suitable person amongst the rival claimants for guardianship. Under section 17 a person who under his/her personal law would be entitled to the custody of the minor child in preference to anyone else should be appointed as the guardian. The court stated that this is, however, a flexible rule.

The scope of section 17(1) of the Act is such that the court has to decide which of several applicants has a preferential right to be appointed guardian of the minor in terms of the personal law of the minor bearing in mind the welfare of the minor. The court added that neither physical comforts nor economic well-being that can be provided by one of the claimants can override the interests of the minor. The capacity of the guardian to maintain the minor cannot depend solely upon the former's financial resources, but such capacity includes the ability to uphold the physical, moral and psychological well-being of the minor.

Counsel for the appellant argued that since the child had been living with the father for the last two years the preference of the minor should be given due weight and, since the minor had expressed his wish to live with the father, it should not be ignored. However, the court based its decision on section 17(2) of the Guardians and Wards Act which provides that:

“In considering what will be for the welfare of the minor the court shall have regard to the 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 his property.”³¹

The court stated that under Muhammadan Law³² the mother is entitled to the custody of a male child up to the age of seven years and in the case of a female child up to the age of puberty. In this case, since the male child was below the age of seven, the mother was the preferential guardian under Islamic law. There was no evidence that the mother had any defect of character which would render her unfit for custody. The only ground on which custody was sought to be denied was that the mother had no independent financial resources to maintain the child. In Judge Anand's opinion, this was not a valid ground on which custody should be denied her.

²⁹ See n 27 *supra*.

³⁰ AIR 1983 Jammu and Kashmir 70

³¹ See n 30 *supra* at 72.

³² Indian courts have over many years wrongly referred to Islamic law or Muslim law as Muhammadan law.

The court added that irrespective of the right to custody, the responsibility of maintaining his minor son until he attains majority rests primarily upon the father so long as he is capable of doing so because, just like a Hindu father, a Muslim³³ father's duty to maintain his son until he attains majority is absolute.. Thus the lack of financial resources cannot stand in the way of the mother being awarded custody of the child. The court also stated that although the personal law of the parties is relevant it has become subservient to the Guardians and Wards Act in so far as the appointment of a guardian and custody of the minor is concerned. The primary question is - what order would be best for securing the welfare of the minor. This is the paramount consideration.³⁴

However, in a 1994 Allahabad decision, that of *Master Zubeen v Principal Judge, Family Court Lucknow*³⁵ the court found that financial considerations were important in deciding whether or not to award custody to the mother. Since it was quite clear that the mother was unable to maintain herself, Judge Bhargava ruled that she would be unable to maintain the minor child. He stated that the welfare of the minor is not safe in the hands of such a mother since the child could not be raised nor properly educated in such an environment. In addition, the child's necessary needs could not be fulfilled in such circumstances.

Thus the court ruled that the welfare of the child would be best served by the child remaining in the father's custody since the father was in a position to maintain and him and to see to his education.

On occasion Indian courts have also expressed the view that while the wishes of the child is a relevant consideration, the welfare of the child is the paramount consideration and if the welfare of the child requires the wishes of the child may be disregarded.³⁶

CONCLUSION

Notwithstanding legal reform and much case law in the past 100 years, not only in Asian and Islamic countries but in the Western world as well, perhaps Lord Justice Lindly summed up the position cogently when, in 1893, he stated:

“The dominant matter for consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by monet only nor by physical comforts only. The moral and religious welfare of the child must be considered as its physical well being. Nor can ties of affection be disregarded.”³⁷

³³ The judge referred to him as a Muhammadan father!

³⁴ See n 30 *supra* at 74.

³⁵ AIR 1994 Allahabad 147 (Lucknow Bench)

³⁶ *Jaswant Kaur v Chanan Singh* AIR 1962 Manipur 60; *Pamela v Patick* AIR 1970 Mad 427.

³⁷ *In re McGrath* (1893) 1 Ch 786.

Thus whenever the question arises before a court pertaining to the custody of a minor child, the matter ought to be decided, not on considerations of legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.³⁸

³⁸ See Diwan P and Diwan P *Children and Legal Protection* New Delhi 1996 163