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Judicial Trends in Child Custody Cases in Bangladesh: Traditional Islamic Law Rules Versus Welfare Considerations

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Abstract
In Bangladesh, disputes over custody and guardianship involving Muslim parties are principally governed by Muslim personal law. There remains a constant dilemma in judicial decisions over custody and guardianship matters as to what should be the paramount consideration in awarding child custody to a party – should traditional Muslim personal law rules or the welfare of the child prevail? The findings of this study indicate that there is a steady but inconsistent trend towards child welfare considerations. However, it cannot conclusively be said that a child's welfare is now the *most* dominant, or the *only* consideration for the courts. Focusing on this shift towards a welfare approach, this article critically examines some of the leading reported judgments of the Supreme Court of Bangladesh on the issue.

I. BACKGROUND

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 legislation and judicial precedents. Muslim family law discourse in Bangladesh is characterized by significant efforts made by the courts (in particular, the higher judiciary) to apply traditional principles to modern circumstances. Through these efforts, the courts have occasionally overridden traditional interpretations of Islamic legal principles and based their decisions on equity, justice, and good conscience. This 'activist'[1] role of the Bangladeshi courts is even more manifest in the interpretation of the law relating to the custody of children.[2]

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1. A relevant discussion on judicial activism in Bangladesh with regard to applying Muslim law principles in modern circumstances is 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; see also Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (OUP 2011).

2. Serajuddin (n 1) 97.

This article looks into the trends evinced by judicial decisions of Bangladeshi courts that apply (or override) Muslim law principles of child custody, while balancing their considerations with the welfare or best interests of the child. With this objective in mind, this article first analyzes the current legal framework of child custody laws for Muslims in Bangladesh, including a brief discussion of the governing statute that deals with guardianship matters, as well as the Muslim law principles that are traditionally followed by the courts in awarding child custody. This article then chronologically analyzes the leading judgments of the Supreme Court of Bangladesh[3] in order to understand whether there has been any consistent shift in the courts' emphasis on welfare considerations from the traditional Muslim law principles of child custody in deciding custody disputes.

In Bangladesh, the *Guardians and Wards Act of 1890* (GWA) is the main statute that addresses guardianship and custody disputes. After the enactment of the *Family Court Ordinance of 1985* (FCO), special courts[4] were established with jurisdiction over family matters,[5] 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.[6] Besides the Family Courts awarding custody under the GWA, the HCD (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.[7]

The GWA is a British colonial-era statute promulgated when the English principle of equity played a dominant role in shaping the laws of the Indian sub-continent. As a secular piece of legislation (applicable to parties of all religions), the GWA incorporated English child welfare considerations, which play a central role in deciding the guardianship of minors. However, because of the conscious distance that the colonial policy maintained from the religion-based family laws prevailing in the subcontinent during their regime,[8] rules of personal laws were also given priority under the Act in deciding guardianship disputes. The provisions, as they appeared in the original Act, have not been altered much in substance in the context of Bangladesh since its promulgation.

As any description of the GWA would necessarily entail a discussion of the prevailing Muslim law principles on child custody (as the Act also allows for the

3. The Supreme Court of Bangladesh comprises the Appellate Division (AD) and the High Court Division (HCD).

4. Courts of Assistant Judges were deemed to be family courts under s 4 of the FCO.

5. Under s 5 of the FCO, 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.

6. 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.

7. 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 principles, as well as the principles of the welfare of the minor.

8. For further comments on this discussion, see N J Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 164; Wael B Hallaq, *An Introduction to Islamic Law* (CUP 2009) 115.

application of the personal law of the minor), this article includes a brief description of the traditional principle of child custody as envisaged and practiced by South Asian jurists and scholars including, in particular, the judiciary in Bangladesh. The discussion on the GWA subsequently follows.

A. *Traditional Concepts of Muslim Child Custody Law in Bangladesh*

Out of the four major Sunni schools of Muslim law, the *Hanafi* School has the largest following owing to its official adoption by the Ottoman Turks in the early sixteenth century.[9] In the Indian sub-continent, although there are both Sunni and Shia Muslims, numerically the *Hanafi* Sunnis constitute a dominant majority there.[10] Hence, classical *Hanafi* jurisprudence (*fiqh*) predominantly defines the body of law that is considered to be the 'traditional Muslim law principles' in South Asia. This is again qualified by the fact that some specific *Hanafi* law compilations or textbooks have gained a 'special kind of reputation, authority and reverence in South Asia',[11] as judges and later commentators frequently refer to them as evidence of ancient or classical Muslim law texts.[12]

Alamgir 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.[13] Two such highly important documents are the English translations of the *Hedaya* and the *Fatawa-i-Alamgiri*. The *Hedaya* was originally authored by a Central Asian lawyer – Burhanuddin al-Marghianani – in the twelfth century, which was the standard legal textbook in Muslim India under the Delhi Sultans and which remained the basis of Muslim law for centuries.[14] Commissioned by Warren Hastings, the *Hedaya* was translated by Charles Hamilton in 1791 and later edited by S.G. Grady in 1870.[15] The *Fatawa-i-Alamgiri* on the other hand is a collection of authoritative *fatwas*,[16] compiled under the orders of the Moghul Emperor Aurangzeb in the seventeenth century by a panel of *ulama*[17] headed by Shaikh Nizam Buhanpuri.[18] This was again translated under the orders of Hastings, by N.B.E. Baillie under the title of *A Digest of Moohummudan Law, Part I* in 1856.[19] Part II of the Digest, however, was a

9. Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (OUP 2008) 73.
10. Syed Tahir Mahmood, *The Muslim Law of India* (Law Book Company 1980) 34.
11. Serajuddin (n 1) 18.
12. Some instances of such reliance on the texts are *Bazloor Ruheem v Shamsoon Nissa Begum*, 11 Moo IA 551 and *Aga Mahomed v Kulsun Bibi*, 25 Cal 9, cited in Sir Abdur Rahim, *The Principles of Muhammadan Jurisprudence: According to the Hanafi, Maliki, Shafi'i, and Hanbali Schools* (first published 1911, Cosmo Publications 2010) 44-45.
13. Serajuddin (n 1) 18.
14. V P Bharatiya and Syed Khalid Rashid, *Syed Khalid Rashid's Muslim Law* (3rd edn, Eastern Book Company 1996) 31.
15. Hallaq (n 8) 86; Serajuddin (n 1) 18; Burhan al-Din al-Marghinani, *The Hedaya, or Guide: A Commentary on the Mussulman Laws* (Charles Hamilton tr, Islamic Book Trust 1982) 138 (hereinafter referred as the 'Hedaya').
16. Legal opinion by qualified Islamic jurists, or *muftis*.
17. Muslim religious scholars who specialize in Islamic jurisprudence.
18. Serajuddin (n 1) 19.
19. ibid; Neil Benjamin Edmonstone Baillie, *A Digest of Moohummudan Law: Compiled and Translated from Authorities in the Original Arabic, with an Introduction and Explanatory Notes*, vol 1 (first published 1856, Premier Book House 1965).

translation by Baillie of the *Shara'i' al-Islam* of Nizamuddin Hali, a thirteenth century authoritative text on *IthnaAshari* Shia law.

In modern South Asian jurisprudence, although instances can also be found where judges were not very receptive to the authoritative value of Hamilton's translation of the *Hedaya* and Baillie's Digest,[20] the two documents continue to provide judges and legal scholars of the subcontinent with the most significant and sometimes the only authoritative guideline in cases involving interpretations of Muslim law. Hence, in order to provide a brief account of the relevant *Hanafi* law principles on child custody in Bangladesh, this article draws significantly from these two texts along with other Islamic textbooks and commentaries by later authors, which are frequently relied on by the South Asian courts.

1. *Custody distinguished from guardianship*

The traditional Muslim law principles 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 its early years. The term '*hizanat*' has been used commonly by South Asian writers as an Arabic term denoting custody of a child, following its use in Hamilton's *Hedaya* and Baillie's Digest. *Hizanat* generally means 'to maintain, supervise, and take custody and care of someone';[21] in other words, 'to nurse, to bring up, or to raise a child'.[22] The concept of guardianship or *wilayat* (in Arabic), on the other hand, is sometimes defined as a 'right'[23] or 'power',[24] and sometimes as a 'duty incumbent on a person on the grounds of kinship, by testament or by court order towards another person of imperfect or no legal capacity',[25] for instance – 'an infant, an idiot, or a lunatic'.[26] Thus, guardianship is broadly defined as either guardianship of person or guardianship of property. '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'.[27] '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 or her behalf.[28] All Islamic jurists agree that the father is the natural or legal guardian[29] of both the person and property

20. A relevant discussion on this issue is Rahim (n 12) 44-45.
21. According to Hassan Amid's *Farhang-e Amid* [*The Amid Persian Dictionary*], as cited in S N Ebrahimi, 'Child Custody (*Hizanat*) under Iranian Law: An Analytical Discussion' (2005) 39(2) Family Law Quarterly 459, 463.
22. J M Cowan (ed), *Arabic-English Dictionary: The Hans Wehr Dictionary of Modern Written Arabic* (4th edn, Spoken Language Services 1993); Mahdi Zahraa and Normi A Malek, 'The Concept of Custody in Islamic Law' (1998) 13(2) Arab Law Quarterly 155, 156.
23. Rahim (n 12).
24. Zahraa and Malek (n 22) 156.
25. Jamal J Nasir, *The Islamic Law of Personal Status* (3rd edn, Brill Archive 2009) 186.
26. Rahim (n 12) 344.
27. W Al-Zuhayli, *Al-Islami WaAdilatuhu, Dar Al-Fikr*, vol 4 (Damascus, 1989) 140-41, as cited in Zahraa and Malek (n 22) 157.
28. Rahim (n 12) 345; guardianship of the person for a girl can also be in respect of marriage, which is usually dealt with in the Islamic texts separately under the subject area of 'marriage'.
29. The terms 'natural guardian' or 'legal guardian' are of English usage and are not used by Muslim jurists. The Arabic term '*wilayat*' is used instead to mean 'guardianship': Bharatiya (n 14) 150. The father holding the guardianship of person of his ward is called the '*wali*': Mahmood (n 10) 163.

of his young children.[30] 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.[31]

All schools of Muslim law unanimously accept that the 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'.[32] 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'.[33]

Under *Sharia* 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 described *hizanat* as 'the earliest form of guardianship of person',[34] when an infant needs a woman to care for it.[35] The difference then between custody and guardianship is not neatly distinguished at all times,[36] and their relationship necessarily manifests 'a complex structure of rights and duties distributed between the entitled person(s)'.[37]

2. *Traditional age-sex rule for custody or hizanat*

The prevailing *Hanafi* view in Bangladesh, as well as in other parts of the sub-continent, is that the mother (or in her absence, other female custodians) is entrusted with the custody of her son until he attains seven years of age, and of her daughter until she attains puberty. This position has held relatively firm ground to this day in custody disputes before the South Asian courts,[38] and it is mainly derived from the *Hedaya* and Baillie's Digest. With respect to the custody of a girl, it belongs to the mother (or in her absence, to the next female custodian in the order of priority given by the Hanafi jurists), 'until the first appearance of the menstrual discharge', which is generally the age of attaining puberty.[39]

All four Sunni schools, however, differ on the ages when female custody of the children should come to an end.[40] Contrary to the *Hanafi* position, the *Shafi'is* hold that there is no fixed age limit for the period of female custody. It will continue until the infant reaches the age of discretion, after which both male and female children are given the choice as to whom they would prefer to stay with.[41] The *Hanbalis* also do not

30. Zahraa and Malek (n 22) 157.
31. 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 14) 143.
32. The *Hedaya* (n 15) 138.
33. Baillie's Digest (n 19) 435.
34. Nasir, *The Islamic Law of Personal Status* (n 25) 186.
35. ibid 187.
36. David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet and Maxwell 1998) 411.
37. Zahraa and Malek (n 22) 157.
38. Although, as this article will show later, there have been significant departures from this position.
39. The *Hedaya* (n 15) 139.
40. Nasir, *The Islamic Law of Personal Status* (n 25) 170.
41. ibid 171.

distinguish between the custody of a boy and of a girl, holding that the duration of female custody shall run till the child's seventh year of age, at which time the child shall be given the right of choice between either parents.[42] On the other hand, the *Malikis* are of the view that female custody of a boy shall continue until he attains puberty,[43] and of a girl until she gets married.[44]

Thus, there are substantial differences as to the length of the mother's right to custody (and that of other female relations) under Islamic law. This is true even with regard to the *IthnaAshari* Shia school, where the rule is that female custody of a boy runs until he reaches two years of age and of a girl until she reaches seven years of age.[45] This existing disparity regarding the length of custody is further exacerbated by the absence of any direct Quranic provision[46] or any tradition of the Prophet providing any indication as to the age and sex rule of the custody of the child.

3. *Disqualification of mother on remarriage*

Besides the age-sex rule, another rule of traditional Muslim law principles of child custody that is frequently relied upon (and frequently debated) before Bangladeshi courts (as well as courts in India and Pakistan) is the disqualification of the mother on her remarriage. According to this rule, if the mother or any other woman having the right of *hizanat* marries a stranger,[47] or a relative who is not within the prohibited degree[48] to the child, her right is thereby annulled.[49] This disqualification on the ground of a mother's remarriage, and the balancing of this rule with considerations of the welfare of the child, remains central to the discourse on a mother's entitlement to *hizanat* in South Asia. This issue will be revisited in detail in later sections of this article.

B. *The Guardians and Wards Act 1890: Influencing Judicial Interpretations of Muslim Child Custody Laws*

Since the GWA, the courts in the sub-continent were, to some extent, persuaded to interpret the welfare of the child and Muslim law principles as two competing considerations, which warranted a decision as to which is paramount. In practice, however, the courts seldom drew their attention to the question of whether *Sharia* law itself endorses considerations of child welfare. This is largely due to the framework of

42. ibid.

43. ibid; Zahraa and Malek (n 22) 167.

44. Nasir, *The Islamic Law of Personal Status* (n 25) 171; Zahraa and Malek (n 22) 168.

45. Bharatiya (n 14) 144.

46. However, 'Muslim jurists have often referred to the verse of fosterage (Al-Quran 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'. Aayesha Rafiq, 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)' (2014) 5(4) International Journal of Humanities and Social Science 267.

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

48. Islamic 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, *Mulla Principles of Mahomedan Law* (Iqbal Ali Khan rev, 20th edn, LexisNexis 2013) 339-41; Jamal J Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (3rd edn, Brill 2009) 44-49.

49. The *Hedaya* (n 15) 138, Baillie's Digest (n 19) 436.

the GWA which, being a secular law, tried to import welfare principles as a product of English equity and, at the same time, retained the authority of the religious personal laws of the respective subjects to govern disputes under the Act. The two parallel streams brought under the Act naturally overlapped with each other's scope, creating ambiguities in the overall application of the Act. Moreover, not all religious laws on guardianship issues in the sub-continent carried the same features and principles. For instance, the concept of *hizanat* was intrinsically attached to classical Muslim law principles and was unknown to traditional Hindu law at the time when the GWA was passed.[50] The logical end result was a constant tension being raised between the welfare principle viewed from the Western perspective, and traditional Islamic law principles viewed from the perspective of the authoritative translations of the Islamic law textbooks, which were applied by the British courts during the colonial regime with utmost rigidity in questions of family law. This tension persists in Bangladesh, as well as in India and Pakistan, with the GWA being enforceable in its entirety (with some amendments, albeit mostly procedural) in all three jurisdictions.

The main forum created by the Act that allows the courts to assess both welfare and traditional Muslim law principles as two contrary considerations is through the wordings of section 7 and section 17 of the Act. Section 7 of the GWA states that an order appointing or declaring a guardian of the person or property of the minor shall be made only when the court is satisfied that such an appointment would be in the 'welfare' of the minor. Thus, section 7 implies that in an order of guardianship under the Act, the welfare of the child should be the paramount consideration. On the other hand, section 17(1) states that in appointing a guardian under section 7, the court's decision of what is in the welfare of the minor should be consistent with the minor's personal law. Thus, this provision implies that the personal law of the minor is a superior consideration in appointing or declaring a guardian under the Act. Section 17 provides a number of other considerations that the court would assess in 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; any existing or previous relations of the proposed guardian with the minor or with his property; and the minor's wish if he or she is old enough to form an intelligent preference.[51] However, in considering all these elements, 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'.[52]

Expressing the two considerations of welfare and religious law with a statutory language that apparently implies the pre-eminence of both, the GWA has paved the

50. 'In fact classical Hindu law did not contain principles dealing with guardianship and custody of children because of the concept of 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.' See Law Commission of India, 'Report of the Law Commission of India on Reforms in Guardianship and Custody Laws in India' (Report No 257, Government of India 2015), 15.

51. S17 of the GWA.

52. ibid.

way for varied, and to some extent, contradictory judicial interpretations regarding what should guide the courts in appointing or declaring a person as a guardian of a minor under the Act. As discussed earlier, when the personal law of the Muslim ward was relied upon, the South Asian courts typically followed the age-sex rule of *Hanafi* law. Although during the early post-colonial period, the age-sex rule and other traditional *Hanafi* principles dominated custody decisions, there were a number of instances where the higher judiciary, especially in Pakistan, had taken up a 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. Although in India the earlier judicial decisions saw a strict adherence to the traditional custody rules,[53] with the passage of time, the Indian judiciary had also demonstrated substantial progress in interpreting the GWA and other custody rules in a manner which favours the interest and well-being of the child without strictly following the traditional principles of Muslim personal laws.

In the case of Bangladesh, since its independence from Pakistan in 1971, the Bangladeshi judiciary has not only accepted the progressive decisions of the Pakistani judiciary but has also made its independent contribution in interpreting child custody rules in a more child rights-based approach, without blindly following the rigidity of the classical *Hanafi* law texts. Thus, in Bangladesh, a welcoming trend is discernible from the decisions of the higher judiciary, where the courts have favoured welfare considerations of the child over personal laws in interpreting the GWA. Even though not many of such progressive judgments have ventured into assessing whether welfare is ingrained within the broader framework of *Sharia* law, the courts have certainly taken a stance in favour of protecting the interests of the child in question.

II. JUDICIAL TRENDS IN APPLYING WELFARE CONSIDERATIONS *VIS-À-VIS* TRADITIONAL RULES

A. *Traditional Custody Rules Dominating the Earlier Decisions in East Pakistan: Reliance on an 'Irrefutable Presumption of Welfare'*

In East Pakistan (what is now modern-day Bangladesh), one of the earlier custody cases which reflected the court's strict adherence to the traditional *Hanafi* law of *hizanat* is *Ali Akbar v Mst Kaniz Maryam*.[54] In this case, a twelve-year-old boy was given to the custody of his father on the ground that the father had an 'inalienable right to the custody of his children'.[55] 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 former, 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

53. Serajuddin (n 1) 41.
54. PLD 1956 Lah 484.
55. ibid 489, quoting *Mst Basant Kaur v Gian Singh and others*, AIR 1939 Lah 359.

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 interest of the minor.'[56]

Besides the rule of 'ordinary presumption of welfare',[57] the court in *Ali Akbar* also based its reasoning on the father's superior right of custody which was bestowed on him by the rules of Muslim law. The child's custody was mainly viewed in that case 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 seems to have accepted that even such a right of the father's can 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 two siblings were held to be insufficiently 'strong reasons' and 'hardly a serious consideration' to deprive the father of his right of custody.[58] 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.[59]

Adopting the same rigid application of the rules of guardianship, a number of other custody cases defined the orthodox position of the earlier (East) Pakistani courts' decisions. Balancing the welfare test with the 'consistently with the law to which the minor is subject' requirement in section 17 of the GWA, the court in *Chand Bibi v Bulbullah*[60] 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'.[61] This approach thus leaves no scope for considerations of the overall welfare of the child to influence the decision.

This view was further extended in *Khanamji v Farman Ali*,[62] where the court held that even if the father otherwise neglects the children of the first wife and fails to maintain them despite a court order, the courts have no authority to deny him the custody of the children under the GWA.[63] Thus, the earlier decisions reflected a rigid application of the traditional *Hanafi* texts on custody laws, and were less concerned with the true welfare of the child in question. This earlier trend was also significantly instigated by prevailing, deep-rooted patriarchal biases.

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

However, in contrast to these decisions, the 'welfare of the minor' approach gained a determinative role in the much celebrated decision of *Mst Zohra Begum v Latif*

56. ibid 488.
57. ibid.
58. ibid 489.
59. Although, as previously discussed, the lower court's decision was rejected on appeal.
60. PLD 1958 Pesh 26.
61. ibid 28.
62. PLD 1962 Lah 166.
63. ibid 168.

Ahmad Munawwar,[64] 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'.[65] Relying on the ruling of the High Court of Lahore in *Khurshid Jan v Fazal Dad*,[66] which held that in such a situation the court 'may resort to private reasoning',[67] 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*.'[68]

Thus, the role of *Ijtihad*[69] as an 'articulation of new legal norms on matters not settled by definitively-known indicants in the foundational texts',[70] gained force in custody disputes through the authoritative decision of *Zohra*. 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*[71]and *Ali Akbar*, the court in *Rahimullah Chowdhury v Mrs Sayeda Helali Begum and others*[72] clearly laid down that welfare should be the primary decisive factor in a child custody case 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.[73]

The *Rahimullah Chowdhury* court, while upholding the custody right of a mother who had apparently 'forfeited her right by removing the children from the ordinary place of residence of the father'[74] under the traditional rules of *hizanat*, had clearly deviated from the irrefutability of the welfare presumption as held by the *Ali Akbar* court. The court also emphasized that the facts and evidences of individual cases would be the determining consideration for the minor's welfare.

64. PLD 1965 (WP) Lah 695.
65. ibid 702.
66. PLD 1964 (WP) Lah 558.
67. ibid 562.
68. *Mst Zohra Begum* (n 64) 702.
69. '*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.' See Bernard Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihād' (1978) 26 (2) American Journal of Comparative Law 199, 200.
70. Muhammad Rashid Rida, 'al-As'ilah al-Barisiyaah' (Cairo: Dar-al-Manar, 1367-1374 AH) 5: 295, as cited in Muhammad Qasim Zaman, 'Evolving Conceptions of Ijtihād in Modern South Asia' (2010) 49(1) Islamic Studies 5, 7.
71. PLD 1953 Lah 73, 80.
72. 20 DLR (1968) (SC) 1.
73. ibid 4.
74. For details on this disqualification, see Mulla (n 48).

C. *'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'.[75] However, an analysis of the most-cited custody cases of the Supreme Court of Bangladesh reveals that the gradual process of how 'welfare' gained a determinative role has not followed any consistent or coherent trajectory. Although there are a number of decisions of the apex court giving primacy to considerations of the child's welfare, there is also a set of decisions that co-exists with this stream of liberal interpretation, which adheres more closely to the orthodox interpretation of child custody rules. Moreover, it appears that – from a close reading of a number of judgments which have been repeatedly cited for their non-conventional take on the rules of custody – to a certain extent, even those judgments have been unable to go beyond the orthodox route by making the custody order conditional upon some rigid considerations, mostly reflecting the classical text-based custody rules.[76]

One of the earlier indications of the prominence of the higher judiciary's concern with a child's welfare after independence is *Rahimannessa v Ashraf Mia*,[77] where the stepmother of the minor was given custody of his 'person and property' in preference to the claim by the minor's grandmother and full paternal uncles. In interpreting section 17 of the GWA, the court concluded that the 'welfare of the minor is the dominant consideration' and if the minor's welfare so requires, even strangers can be appointed as guardians as against near relations. Another interesting departure from the orthodox position in the post-independence period (though not specifically concerned with the welfare of minors) is seen in *Mvi Rehanuddin v Azizun Nahar*.[78] 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.

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 right of the mother in the case of guardianship of property has not been recognized by the Bangladeshi judiciary as forcefully as her right of custody. Indeed, it is settled 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,[79] cannot legally undertake any transaction concerning the minor's immovable

75. Hoque and Khan (n 1) 213.
76. This issue will be addressed in greater detail in the later part of this article.
77. 25 DLR (1973) (HCD) 167.
78. 33 DLR (1981) (HCD)139.
79. Commonly referred to as the 'de facto guardian' by most of the commentators.

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 leap 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 rules of custody and guardianship.[80]

The true spirit of the *Zohra* case has been reinforced by the Appellate Division in the well-celebrated case of *Abu Baker Siddique v S M A Bakar*.[81] 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. 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 ... [T]here 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 father's 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 a rule] would seem permissible as the paramount consideration should be the child's welfare.[82]

Since the *Abu Baker* decision, the welfare doctrine seems to have become an essential test through which the claim over a minor's custody is assessed, although the test was not always applied in its true essence, a point which this article will discuss below.

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'.[83] 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 capable of being rebutted, depending on the facts and circumstances of a given case and when the interests of the child so requires.

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80. However, the court was silent about any linkage between the mother's ill-treatment and the grandparents' rights to custody. Hence, 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. 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 that breaks away from the conventional judicial mindset.

81. 38 DLR(1986) (AD) 106.

82. ibid 113-14.

83. Martha F Davis, 'Child Custody in Pakistan: The Role of Ijtihad' (1985) 5(2) Third World Law Journal 119, 124 (discussing *inter alia*, the role of *Ijtihad* in a period following the *Zohra* case).

D. *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*[84] held welfare to be the sole consideration 'without recourse to a presumption'.[85] This progressive interpretation was also reflected in the Pakistani decisions following the *Zohra* case, particularly in the *Rahimullah Chowdhury* case, as discussed earlier.[86] The court in *Ayesha Khanam* held that 'the provisions of the personal law of the parties or even the provisions of the statute law as to such custody may be subject to ... [the] paramount need of the welfare of the child.'[87] In holding this opinion, the court also relied on the Indian Supreme Court decision of *Smt Surinder Kaur Sandhu v Harbax Singh Sandhu and anor*[88] 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, 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 welfare doctrine] were [in conflict], the welfare doctrine would have precedence'.[89] 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.

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.[90] Thus, the court in *Nargis Sultana v Aminul Bor Chowdhury*,[91] having held that the mother was entitled to the concerned minors' custody both under the rules 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

84. 46 DLR (1994) (HCD) 399.
85. ibid 401.
86. For a similar discussion on the rebuttable presumption, see Davis (n 83).
87. *Ayesha Khanam* (n 84) 302.
88. AIR 1984 (SC) 1224.
89. *Ayesha Khanam* (n 84) 302.
90. *Rumana Afrin v Fakir Ashrafuddin Ahmed and others* 1 MLR (1996) (HCD) 331.
91. 50 DLR (1998) (HCD) 532.

> reached between the parties, that cannot debar the court from deciding as to where the 'welfare' and the 'benefit' of the minors lies.[92]

The next significant decision reflecting a liberal judicial stance in custody disputes is *Abdul Jalil v Sharon Laily Begum*[93] (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 doctrine to be the paramount consideration.[94] Although in the earlier cases, the welfare of the child had been reiterated as a primary 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*,[95] the Appellate Division observed that 'in a proceeding [relating to the custody of the child] it is not the rights of the parties but the rights of the child which are at issue'.[96]

Following this trend, a recent decision which departed from the traditional age-sex rule of *Hanafi* law is *Zahida Ahmed v Syed Noor Uddin Ahmed*.[97] 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 the minor was deceitfully removed by his father 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 hand without waiting for adjudication of the custody and welfare of the children in an appropriate forum.[98]

Although the court made specific reference to the Islamic law principles of custody, it ultimately 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'.[99] Thus, the *Zahida Ahmed* court not only reinforced the supremacy of the welfare principle, but 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.

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92. ibid 540.
93. 50 DLR (1998) (AD) 55.
94. ibid 59.
95. AIR (1982) (SC) 792.
96. With almost identical facts as the *Abdul Jalil* case, the HCD in *Farhana Azad v Samudra Ejazul Haque and others* (2008) 60 DLR (HCD) 12 (arising from a writ petition) gave interim custody to the mother of the minors, until the matter could be adjudicated by a competent court. 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.
97. 14 MLR (2009) (HCD) 465.
98. ibid 469.
99. ibid.

The latest development in the higher judiciary's liberal trajectory towards the welfare doctrine is the 2012 case of *Anika Ali v Rezwanul Ahsan*,[100] which in many respects defines and clarifies this progressive judicial trend in custody or guardianship matters. This case is discussed in detail in a later section to explain the current judicial position on the modern approach. However, before such an analysis, another important issue that has largely informed the transition towards a wider interpretation of custody cases concerns the remarriage of a mother. This issue demands a separate in-depth analysis of the relevant judicial literature, to which we now turn.

E. *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 the mother 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 the early Pakistan (i.e., East Pakistan) period, the Pakistani judiciary displayed a more tolerant attitude towards a mother's remarriage. For instance, the court in *Amar Ilahi v Mst Rashida Akhtar*,[101] 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 by a process of interpretation came to the following finding:

> 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 that 'the right' referred to [in Baillie's Digest which states: '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.[102]

Thus, the court positively argued 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 the Indian case of *Mst Samiunnisa v Mst Saida Khatun*[103] where, in discussing the corresponding rule in Hamilton's *Hedaya*, Malik J of the Allahabad High Court 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 and may ill-treat her

100. 17 MLR (2012) (AD) 49.
101. PLD 1955 Lah 412.
102. ibid 413.
103. AIR 1944 All 202.

> 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.[104]

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 possess custody rights under Muslim law. Ultimately, custody will be given to the one 'to whom the welfare of the minor can be safely and properly entrusted'.[105]

The Pakistan High Court examined the issue of remarriage in a number of subsequent cases and reiterated the observation that a mother is not disqualified merely by a second marriage, but her entitlement to custody will then be assessed by the court against the minor's welfare.[106] Although welfare 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*.[107] 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.'[108]

The reasoning was extended in the 1971 case of *Rahela Khatun v Ramela Khatun*,[109] 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 to whose charge care of the minor may be given.[110]

Thus, a consistent trend is seen in the early Pakistani cases regarding the interpretation of the rule of disqualification of a woman from her child's custody on account of her remarriage. The Bangladeshi judiciary has also successfully carried on with such a liberal interpretation in a good number of reported cases. In *Nilufar Majid v Mokbul Ahmed*,[111] the court referred to the mother's right of custody as 'a traditional religious right'[112] that she had lost by her remarriage. Affirming the decisions of *Rahela Khatun*, the court

104. ibid 204.
105. *Amar Ilahi* (n 101) 416.
106. *Nazeer Begum v Abdul Sattar* PLD 1963 (WP) Karachi 465; *Haji Ali Baksh v Mst Bhagul* PLD 1963 (WP) Karachi 1030.
107. 16 DLR (1964) 695.
108. ibid 698.
109. PLD 1971 Dacca 24.
110. ibid 28.
111. 4 BLD (1984) (HCD) 79.
112. ibid 81.

held that the mother would then be entitled to the custody only on welfare considerations. However, considering the overwhelming evidence in favour of the father as the best person to ensure the welfare of the minor as against the mother, the court awarded custody to the father.

Similar interpretations of the rule concerning a mother's remarriage continued to guide the court in subsequent custody cases.[113] However, as will be discussed in the following section, a stretch of 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*.

III. TRADITIONAL APPROACH UNDERLYING THE LIBERAL JUDICIAL TREND

As indicated earlier, although 'welfare' has been well-recognized by the Bangladeshi courts in custody matters, a pattern of decisions leaning towards the orthodox interpretation of the rules of *hizanat* co-exists with this liberal approach. This more orthodox interpretation is evident in some of the recent judgments of the Supreme Court, where reference to the 'welfare' standard seems merely ornamental and in spirit, the reasoning behind the judgments reflects the conventional mindset of the judiciary. One such case is the 2004 Appellate Division decision in *Keratul Ain @ Rita and another v Md Salimullah Khan*,[114] 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 the 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 the mere fact that they (the minors) 'were not successful in school examinations'.[115] This reasoning was affirmed by the Appellate Division. 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. For instance, in *Abdul Jalil*, the court observed:

> It is now well 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 interest of the child would do or ought to do. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can ties of affection be disregarded.[116]

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

113. *Rumana Afrin v Fakir Ashrafuddin Ahmed and others* 1 MLR (1996) (HCD) 331; *Rahmatullah (Md) and others v Sabana Islam and others* 54 DLR (2002) (HCD) 519; *Sefina Ferdousi Shimla v Johar Kabir* 61 DLR (2009) (HCD) 346.

114. 9 MLR (2004) (AD) 71.

115. ibid 71.

116. *Abdul Jalil* (n 93) 60 quoting *Queen v Gyngall* (1983) 3 QBD 232; *Walter v Walter* 55 Cal 730; *Saraswathi v Dhanakoti* 48 Mad 299.

mother. Thereby, the requirement of section 17 of the GWA[117] has also not been fully satisfied by the court.

A similar approach was taken by the HCD in *Sayeda Shamsunnar v Morshed Anwar Khan*,[118] 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 removal[119] 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'.[120] 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 for removal as provided in the GWA,[121] and without adhering to any objective interpretation of what is in the welfare of the child.

Another noticeable tendency reflecting the orthodox approach can be discerned from a number of progressive decisions on custody matters where the award was given to the mother, in consideration of her being the best person to ensure the welfare of the child. In a number of such decisions, the courts made an additional observation that such awards of guardianship would be subject to 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 remarriage to be a disqualification instead of an all-encompassing ground of welfare of the minor. 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.'[122]

In *Ayesha Khanam*, a decision which 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'.[123] Similarly, in *Rumana Afrin*, the court ordered the mother to be the guardian and custodian of her minor daughters 'till (sic) she remarries'.[124]

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117. S 17 considered such a preference as one of the important considerations for the court in determining a child's welfare.
118. 10 MLR 2005 (HCD) 148.
119. Under s 39 of the GWA.
120. *Sayeda Shamsunnar* (n 118) 151.
121. S 39 of the GWA.
122. *Rehanuddin* (n 78) 142.
123. *Ayesha Khanam* (n 84) 342.
124. *Rumana Afrin* (n 90) 333.

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 approach in custody disputes. Furthermore, this parallel approach may offer a puzzling guideline to both lower and higher judiciaries when applying the welfare standard in future custody disputes. *Sayeda Shamsunnar* offers one such illustration where the court, while denying the mother's custody rights on the ground of her remarriage, made specific reference to *Rehanuddin* (the relevant paragraph is quoted above), which had ordered a review of the custody matters afresh in the event of the mother's remarriage.[125]

IV. *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 modern principles of the 'best interests of the child'. The decision has touched upon a number of important issues pertaining to child custody. Hence, it is essential to analyze these issues under separate headings.

A. *Custody Orders Should Always Remain 'Fluid' in Order to Comply with the '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 can be decided afresh if the welfare of the minor justifies such a fresh application. Instead, the courts deliberately made an order conditional upon these 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 decision by holding 'welfare' to be the only 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.[126]

125. *Sayeda Shamsunnar* (n 118) 148.
126. *Anika Ali* (n 100) 56.

B. *Determinative Role of the 'Best Interest' Principle in Custody Cases: Child's Preference Needs to Be Considered*

In determining the welfare of the child, the Bangladeshi courts have often made reference to Article 3 of the *United Nations Convention on the Rights of the Child* (UNCRC), which requires the 'best interests of the child' to be the primary consideration in all actions that concern children.[127] Compared to the earlier cases, the *Anika Ali* court had extensively applied this principle as a determining factor for awarding custody and particularly emphasized the right of a child to express its views[128] in custody disputes, which is an offshoot of the 'best interests' principle. Under section 17(3) of the GWA,[129] the court 'may' consider a child's preference in appointing a guardian, but it is not mandatory to take such preferences into account.

An analysis of the Bangladeshi decisions on custody matters also show that a child's wish has never been seriously considered by the courts in determining his or her welfare. In fact, there were instances where the courts had totally disregarded the minors' wish (also without providing any cogent reasons why the child's preference was to be ignored), and where custody was awarded to the other contending party.[130] 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',[131] which the court termed as a 'progression' from the legal position in 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'.[132]

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. According to Tayabji, 'when the child is in the custody of one of its parents the other is not to be prevented from seeing and visiting it.'[133]

The rule of absolute right of access has also been commonly accepted by the courts without any question being raised as to its compatibility with the welfare test in a given circumstance.[134] With regard to this unfettered right of access, the *Anika*

127. See *Zahida Ahmed* (n 97) 465; *Abdul Jalil* (n 93) 55 and *Bangladesh Jatiyo Mahila Ainjibi Samity (BJMAS) v Bangladesh* 61 DLR (2009) 371.

128. Art 12 of UNCRC.

129. S 17(3) of the GWA provides: 'If the minor is old enough to form an intelligent preference, the Court may consider that preference'.

130. *Keratul Ain @ Rita* (n 114) 71.

131. *Anika Ali* (n 100) 56.

132. ibid 58.

133. Faiz Hassan Badrudin Tayabji, *The Personal Law of Muslims in India and Pakistan* (4th edn, NM Tripathia 1968) 238.

134. See, for instance, *Aktar Masood v Bilkis Jahan Ferdous* 50 DLR (1998) (AD) 145.

Ali court again made some important observations, keeping in mind the special situation of children who are 'victims of turbulent or broken-down marriages'.[135] 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.[136]

Thus, this observation by the Appellate Division will provide a clearer guideline to future custody decisions, particularly in 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. 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.

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 expressly mentioned in the *Anika Ali* judgment, the court referred to Article 9 of the UNCRC, which 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.[137] 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 uphold the welfare of the minor, but in embracing the conventional path, it awarded sole custody to one parent over another.[138] However, with regard to shared custody arrangements, the outcome in the recent case of *Nadia Khalil v Rudress Karim*[139] offers an interesting example. 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. In its reasoning for such an order, the court specifically stated that

135. *Anika Ali* (n 100) 57.
136. ibid.
137. Kirsti Kurki-Suonio, '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.
138. See *Rahimullah Chowdhury* (n 72).
139. 28 BLD (2008)(HCD) 599.

the best possible welfare of the child can be obtained through the shared custody arrangement between the parties.[140]

In light of the above analysis, *Anika Ali* can be said to be a truly promising development by the apex court, and it has the real potential to be 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 formulaic statements without going deeper into the issues. Nevertheless, this can surely be considered to be a stepping stone for the higher courts in Bangladesh to come up with clearer observations to ensure the welfare of the child at all stages of custody disputes in future.

V. CONCLUDING REMARKS

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'.[141] The analyses of the cases suggests that the welfare and best interests of the child have now developed into a major consideration in custody cases. However, the conservative position of the court that co-exists with the liberal approach indicates the reluctance of our higher judiciary to evaluate the welfare of the minor in an objective and comprehensive manner. As seen from the analyses, on many occasions, the welfare principle has been applied by the courts 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 mindset of the judges, implying their continued adherence towards the traditional age-sex rule and the rule of disqualification on the mother's remarriage.

On the other hand, the welfare-based approach of the higher judiciary, as evinced in a number of progressive judgments, is not always able to give welfare a clearer status of being the sole and paramount consideration in child custody decisions. The courts' observations regarding the reopening of a case in future, on account of remarriage of the mother or the boy turning seven years of age, again hinders a progressive judgment from being free from the influence of orthodox interpretations. In this context, the *Anika Ali* decision is a remarkable one, setting out clearly the position that it is only the welfare or best interests of the child that can justify reopening a case for review. Although this case has been reported by all major law digests, it is also important that the specific observations made in the judgment are widely disseminated, particularly among the lower courts, and are adhered to by the higher judiciary in similar custody disputes.

The inconsistent and sometimes contradictory explanations of the higher judiciary nevertheless convey a confused signal to the lower courts. As a result, 'matters are often left to the discretion of the judges of the family courts whether

140. ibid 613.

141. Hoque and Khan (n 1) 223.

or not to follow the welfare-based interpretation in custody cases and it appears that there is rarely any deviation in the lower court decisions from the orthodox age-sex rule'.[142] A duty thus rests upon the apex court to clarify the law and set comprehensive guidelines for the lower courts to follow in custody matters. Before that, the higher judiciary itself should first reach a cohesive position as to whether or not the traditional *Hanafi* rules will be considered at all in a case involving the custody of a child.

One reason behind the courts' hesitation to rely upon a child's welfare as the sole and paramount consideration may very well be the undeniable element of religious sensitivity that is attached to determining custody of a child, or for that matter, to any personal law issue in Bangladesh. Being fearful of inviting public resentment by giving interpretations which would apparently overturn a settled Islamic law rule, the courts sometimes deliberately avoid such outcomes by upholding traditional texts. However, in order to resolve the dilemma, the higher judiciary should engage more actively in exploring the possibility that welfare considerations and the best interests of a child do not stand in opposition with Islamic law or as a concept outside it. Rather, it stands as a principle embedded within the broader Islamic legal framework. To illustrate further, 'justice' has been one of the fundamental themes and objectives of *Sharia*, and principles of fairness and equity, as well as welfare, are concepts inextricably attached to it.[143] A deeper understanding of even the traditional rules of custody would reveal that the ultimate concern underlying those rules is again the welfare of the child, although how welfare would be determined is inevitably conditioned by prevailing social realities. Thus, it can very well be redefined according to changing social phenomena, keeping in mind the ultimate objective of safeguarding the child's welfare. Unfortunately, our higher judiciary has not yet emphasized this aspect of interpretation and has mostly viewed welfare only as a common law principle or a concept parallel to the best interests principle of the UNCRC,[144] having no relevance under Islamic law.

Finally, it is also worth mentioning that the legislature can also play a significant role by assessing the possibility of enacting a new law governing custody matters, which would clearly make welfare the sole consideration instead of creating confusion by allowing traditional rules of custody to apply alongside the statutorily-mandated welfare considerations. Although proposing a framework for such a law is outside the scope of this article, a non-exhaustive list of criteria in determining welfare can be included with a view to guide the courts and, to a certain extent, limit the wide discretion of judges in deciding what is in the welfare of the minor in question. Nevertheless, this may form the subject matter for future analysis. For now, it is essential that a broader in-depth study is undertaken to identify the trends in the lower courts in deciding custody disputes to see how far a child's welfare plays a dominant

142. Nowrin Tamanna, Sara Hossain, Muhammad Amirul Haq, *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.

143. For a detailed discussion on 'justice' in *Sharia* law, see Kamali (n 9) 30-32.

144. Art 3 of the UNCRC.

role as against the traditional rules. In addition, comprehensive guidelines need to be formulated for judges and lawyers, focusing on Supreme Court judgments that took a liberal stance in the welfare versus traditional rules debate on child custody, as well as indicating a set of objective criteria that can assist the judges in formulating their opinion on the welfare question. Our apex court may consider taking the lead in such a step.