

# Chapter 2

## India

Jean-Philippe Dequen

**Abstract** Despite India not being a Muslim country, its Muslim citizens are nonetheless governed by Islamic law in matters relating to custody and guardianship through a personal legal system. Irrespective of the large number of Muslims it affects, Muslim personal law remains however a minority law, and it is both administered and fashioned within a secular legal framework inherited from British colonisation. This chapter seeks, through a legal-historical approach, to present the evolution of Islamic guardianship and custody laws in India, particularly in relation to the Guardians and Wards Act of 1890, which still holds force today. After briefly detailing the place of Islamic law within the Indian legal order, it will be shown how the Guardians and Wards Act 1890 has profoundly changed the legal characterisations pertaining to guardianship and custody, which but partially reflect the classical Islamic dichotomy between *wilāya* and *ḥaḍāna*. It is argued that the subsequent ‘secular’ legal categories of ‘guardianship of the person’ and ‘guardianship of property’, upon which Muslim personal law is applied, have had an adverse effect on both the rights of the mother and on the minor’s property. Furthermore, it is submitted that the status of Islamic law as a minority law in India has also hindered the enforcement of the notion of the ‘best interests of the child’. Although Islamic law has traditionally integrated this concept within its jurisprudential framework, its transformation into Anglo-Muhammadan law within the British Raj has impeded the incorporation and development of the ‘best interests of the child’ principle within Muslim personal law, especially if compared to the evolution of Hindu personal law or English law in that regard.

**Keywords** Muslim personal law • Custody and guardianship • India • Legal history • Best interests of the child • Islamic law

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The author is a research fellow at the Max Planck Institute for European Legal History, Frankfurt.

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J.-P. Dequen (✉)  
Max Planck Institute for European Legal History, Hansaallee 41, 60323, Frankfurt am Main,  
Germany  
e-mail: dequen@rg.mpg.de

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## 2.1 Introduction

India is not per se a Muslim country. It does not recognise Islamic law as a general source of law,<sup>1</sup> and Muslims are but a minority within an otherwise Hindu dominated population.<sup>2</sup> However, despite not being a ‘Muslim’ jurisdiction, India remains particularly relevant in the analysis of the incorporation of the notion of the ‘best interests of the child’ vis-à-vis the Islamic legal concepts of *ḥaḍāna* (custody) and *wilāya* (guardianship).

Indeed, with a little over 172 million people, Indian Muslims represent on the one hand the second largest Muslim national community in the world behind that of Indonesia and on par with Pakistan. Hence, the legal framework upon which Indian Muslims settle their disputes relating to custody and guardianship directly impacts over ten per cent of the global Muslim population.<sup>3</sup> On the other hand the

<sup>1</sup> The Constitution of India 1950 in its ‘Preamble’ defines India as a ‘sovereign socialist secular democratic republic’ (the term ‘secular’ having been added by section 2 of the Constitution (Forty-second Amendment) Act 1976). The ‘Preamble’ is considered as an integral part of the Constitution, see *Kesavanda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461.

<sup>2</sup> According to the 2011 Census, Muslims amount to 14.2% of the Indian population, making it the second largest religious community, behind Hindus (79.8%), Census of India, [www.censusindia.gov.in/2011census/C-01.html](http://www.censusindia.gov.in/2011census/C-01.html). Accessed 01 November 2015.

<sup>3</sup> Based on an estimate of approximately 1.6 billion Muslims worldwide, who for the most part (73%) reside in Muslim-majority countries, Pew Research Center (Religion & Public life), [www.pewforum.org/2012/12/18/global-religious-landscape-muslim](http://www.pewforum.org/2012/12/18/global-religious-landscape-muslim). Accessed 27 January 2015.

Indian Sub-Continent, given its long history of Muslim rule, has had a lasting influence on the Islamic legal tradition, which has partly survived through both a colonial and post-colonial personal legal system, whereby Indian Muslims remain governed by Islamic law in specific subject matters (including custody and guardianship) in the absence of superseding statutes of general application. Therefore, the study of *ḥaḍāna* and *wilāya* vis-à-vis the notion of the ‘best interests of the child’ in India constitutes an important part of any analysis pertaining to Islamic law, both for empirical as well as theoretical reasons and despite the latter’s status as a ‘minority’ law.

Nevertheless, one must bear in mind the specificity of the Indian legal context in regards to Islamic law’s ‘minority’ status, within which the latter is not only influenced by internal debates among Muslim jurists and confronted with the incorporation of international standards but is also subject to an inherent tension with the overarching Indian secular constitutional legal framework.

It is thus necessary to first present the history of the place of Islamic law within the Indian colonial and postcolonial legal orders in order to explain how a secular statute (Guardians and Wards Act 1890) grounds the application of the Islamic norms pertaining to guardianship and custody. The main effect of this architecture has been to apply both *ḥaḍāna* and *wilāya* substantive rules through the non-Islamic legal categories of ‘guardianship of the person’ and ‘guardianship of property’, which but partially reflect this classical Islamic legal dichotomy. As such, the incorporation of the notion of the ‘Best Interests of the Child’ (hereafter BIC) in India has been deeply influenced by the Common Law’s own evolution in the matter, where beyond legislative enactments, the influence of the judiciary has played a key role.

### ***2.1.1 Historical Setting: Muslim Personal Law Within the Indian Legal Order***

#### **2.1.1.1 The Circumscribed Applicability of Islamic Law to Family Matters: The Invention of Muslim Personal Law**

Despite the deposition of the last Mughal emperor in 1858, the status of India as *Dār al-Islām*, irrespective of its non-Muslim government in the form of the British Raj, remained an open question for both British authorities and Muslim elites.<sup>4</sup> Indeed, Islamic law had remained the generally applicable law in most parts of the country, as it had been the policy of the East India Company—continued under the Crown’s direct rule—for different communities to be administered by their own

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<sup>4</sup> See Guenther 1999, Ghose 2014.

laws in the absence of general statutes. As such, Indian Muslims remained governed according to the Islamic legal framework, despite the latter's domain shrinking from that of a general legal system to a set of special laws.<sup>5</sup> The field of application of Muslim law, as well as its potential conflict with customary law, was however settled and embedded through the Muslim Personal Law (Shariat) Application Act 1937 (hereafter the Shariat Act).<sup>6</sup>

### 2.1.1.2 The Sources of Muslim Personal Law

The sources of Muslim personal law (hereafter MPL) fluctuated throughout the 19th century. Whereas Hastings had envisaged the *Qu'rān* as its sole basis,<sup>7</sup> later regulations would be more vague so as to encompass a greater diversity of

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<sup>5</sup> The personal legal system in India is deemed to have originated in Warren Hasting's 1772 'Plan for the administration of justice', whereby Hindu and Muslim laws would apply to their respective communities in matters 'regarding marriage, inheritance, caste and other religious usages and institutions' (see Monckton Jones 1918, p. 324). Henceforth, Islamic criminal and contract laws were quickly superseded by general statutes such as the Indian Penal Code 1860 and the Indian Contract Act 1872. Even within the scope of the aforementioned subject matters regarding family relations, Muslim law was sometimes set aside in favour of the English concept of 'Justice Equity and Good Conscience' introduced by section 60 and 93 of the Regulations for the Administration of Justice in the Courts of Dewanee Adaulut 1781 (see Giunchi 2010), albeit only in the absence or vagueness of any personal legal rule (see section 9 of Regulation VII of 1832, and *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1867) 11 MIA 551). Custom could also override Muslim law if the former was both duly recognised according to English legal standards (see Sinha 1976; also *Muhammad Ismael v. Lale Sheomukh* (1913) 17 Calcutta Weekly Notes 97; and section 112 of Government of India Act 1915 (5 & 6 Geo 5 C 61)) as well as provided for by a series of local or personal statutes (for instance the Punjab Laws Act 1872, the Oudh Laws Act 1876, and the Cutchi Memons Act 1920 among others).

<sup>6</sup> Whilst repealing the multiple statutes allowing Islamic law's suppletive nature vis-à-vis customary law (section 6), the Act entrenches Muslim law's imperative character in regards to matters of guardianship. Section 2 thus states: '[n]otwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding ... guardianship ... the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)'. Guardianship must here be construed following the Guardians and Wards Act 1890 (section 4(2)) as encompassing both guardianship of a person (thus custody) and/or of the latter's property. It is worth mentioning that this Act does not apply in Goa where the Portuguese Civil Code 1867 has never been repealed (see the Goa, Daman And Diu (Administration) Act 1962), nor to the 'Renoncants' of Pondicherry (see the Pondicherry (Extension of Laws) Act 1968); finally Muslim personal law's overriding character vis-à-vis customary law in Jammu and Kashmir has only recently been entrenched through the Jammu and Kashmir Muslim Personal Law (Shariat) Application Act 2007.

<sup>7</sup> See Monckton Jones 1918, p. 324.

bases in line with different juristic schools.<sup>8</sup> Although the existence of a dual judicial system within British controlled territories<sup>9</sup> and the subsequent presence of law officers in *mufaṣṣal* territories allowed for a wider variety of interpretations and decisions in the first half of the 19th century, their progressive dismissal, as well as the standardisation, and the hierarchal organisation of the British Indian judicial apparatus have greatly impeded Muslim law's pluralistic nature in favour of authoritative textual references whose interpretation was also subject to the doctrine of *stare decisis* and the precedents of the Privy Council.<sup>10</sup>

The fact that predominantly non-Muslim judges now had to apply Islamic legal provisions, and the necessity of greater legal certainty as to the latter, became a growing concern among colonial authorities, illustrated by Lord Macaulay's famous speech in the House of Commons:

We do not mean that all the people of India should live under the same law; far from it ... whether we assimilate those systems or not, let us ascertain them, let us digest them .... Our principle is simply this – uniformity where you can have it – diversity where you must have it – but in all cases certainty.<sup>11</sup>

As such, compendiums of Muslim law were progressively translated and held authoritative value in front of State jurisdictions.<sup>12</sup> In parallel, the non-State legal

<sup>8</sup> Regulation IV of 1793 subsequently uses the term 'Muhammadan laws' as to include both a greater variety of traditions (*hadīth*) as well as to allow the incorporation of custom. Judicial decisions also progressively took into account the litigant's own sect and juristic school as the basis of their ruling, hence forgoing Hanafi law's general application (as was the case under the Mughals) and hence the progressive recognition of both Shi'i law (see *Rajah Deedar Hosseen v. Zuhooroon Nissa* (1841) 2 Moo IA 441) and Shafi'i law (see *Mohamed Ibrahim v. Ghulam Ahmad* (1864) 1 Bom HCR 236).

<sup>9</sup> Until the fall of the Mughal Empire, the judicial administration of British India was divided between Supreme Courts, composed of English judges whose jurisdiction did not extend beyond Presidency towns (Calcutta, Madras and Bombay), and 'Company Courts' composed of East India Company administrators assisted by native law officers, who had jurisdiction over *mufaṣṣal* territories (nominally still under the sovereignty of the Mughal Emperor).

<sup>10</sup> Law officers, whose opinions had become only advisory at the beginning of the 19th century, were officially dismissed by Regulation IV of 1832. Following the deposition of the Mughal Emperor, the Indian High Courts Act 1861 was enacted as to fuse both existing Supreme Courts and Company Courts, with the Privy Council in England as the ultimate appellate jurisdiction (see Judicial Committee Act 1833 (3 & 4 Will 4 C 27)).

<sup>11</sup> HC Deb (3rd series), 10 July 1833, vol 19, col 533.

<sup>12</sup> Some compendiums or textbooks date back from the Mughal period and have been subsequently translated either in full, such as *Al-Hidāya* (see Marghinani and Hamilton 2008), or in part, such as *Al-Fatāwā al-Ālamgīriyya* (see Baillie 1875). Digests incorporating the growing case law have also been published and constantly updated (see Mulla and Hidayatullah 1990; Tyabji and Tayyibji 1968; Fyzee 2005). However, only one legal treatise has had a lasting influence, due largely to the author's position as the first Indian national to sit on the Judicial Committee of the Privy Council: Syed Ameer Ali's *Mahommedan Law* (Ali 1985).

apparatus, although recognised as a mode of alternative dispute resolution and registrar, was stripped of its judicial powers.<sup>13</sup> Following independence, this judicial organisation remained—albeit with the institution of the Indian Supreme Court as the ultimate appellate jurisdiction in place of the Privy Council.<sup>14</sup> Indian Courts have also followed the colonial tradition of relying on well-established sources in regards to Muslim law and only exceptionally on new interpretations or authorities.<sup>15</sup> Parliament has also not ventured into reforming Muslim personal law, unless at the behest of the Muslim community itself, in line with Jawaharlal Nehru’s policy regarding minorities.<sup>16</sup> Finally, the legal recognition of non-State actors’ opinions (*fatwā*) or rulings through unofficial *fora* such as *dār al-qāḍā*’ has been repeatedly denied.<sup>17</sup>

Hence, despite having never undergone a formal codification, Muslim law in India is composed of a relatively fixed set of authoritative sources interpreted through the lens of English jurisprudence, coined as Anglo-Muhammadan law.<sup>18</sup>

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<sup>13</sup> Kaziz Act 1880. The judicial role of the *qāḍī* was subsequently transferred to civil courts (see *Shama Charan Roy v. Abdul Kabeer* (1899) 3 CWN 158).

<sup>14</sup> Articles 124 to 143 of the Constitution of India 1950.

<sup>15</sup> Some decisions have cited living authors (such as Mahmood 1980 and Engineer 2008) or have relied on more recent compendiums established by Muslim non-governmental organisations (for example the All India Muslim Personal Law Board, *Compendium of Islamic Laws* (AIMPLB 2002)). It is but recently that the Supreme Court and certain High Courts have ventured into new interpretations of Islamic legal sources, most notably in the field of post-divorce maintenance (see *Mohd. Ahmed Khan v. Shah Bano Begum and Ors* 1985 SCR (3) 844, on the interpretation of the term *matā*’ in Q 2:241) and on unilateral divorce initiated by the husband (see *Mohammad Naseem Bhat v. Bilquees Akhter and Anr*, 561-A n 158/2009, IA no 336/2009, HC Jammu and Kashmir at Srinagar, 22 October 2009 (on file with author)).

<sup>16</sup> The first Indian Prime Minister had thus declared that whereas Hindu law could be reformed, it would be an abuse of power to do so in regards to minorities: ‘The primary responsibility of the majority is to satisfy the minority. The majority by virtue of its being a majority naturally has strength to have its way; it requires no protection. Sometimes it is right to give statutory protection to minorities. It is the duty and responsibility of the majority community to pay particular attention to what the minority there wants, to win it over. I am personally in favour, where such question arises of the minority, whether it is a linguistic minority or a religious minority.’ (Lok Sabha Debates, vol. x, pt 2, col 3504 (21 December 1955)). It was then under the Muslim community’s pressure that the Mussalman Wakf Validating Act 1913, the Muslim Personal Law (Shariat) Application Act 1937, the Dissolution of Muslim Marriages Act 1939, and the Muslim Women (Protection of Rights on Divorce) Act 1986 were enacted (although the latter with consequences unforeseen by the community). This situation is at odds with the legislative activism pertaining to Hindu law where, acting under Article 25(2)(b) of the Constitution of India 1950, allowing the legislature to circumvent freedom of religion provisions in order to ‘[provide] for social welfare and reform ... to all classes and sections of Hindus’, several statutes reforming Hindu personal law were enacted, among which was the Hindu Minority and Guardianship Act 1956.

<sup>17</sup> For a recent example see *Vishwa Lochan Madan v. Union of India & Ors* (2014) 7 SCC 707.

<sup>18</sup> It is thus hardly surprising that the Shariat Act’s ‘Statement of Object’ states that MPL ‘exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research’.

As such, some authors have advanced its rather fossilised state as ‘something it had never been: a fixed body of immutable rules beyond the realm of interpretation and judicial discretion’.<sup>19</sup> This strict observance of what one may qualify as *taqlīd* is illustrated by Justice Shahmiri’s reprimand of a local magistrate who endeavoured to expound Islamic law on his own:

However learned the Tehsildar Magistrate may be in theology, he should have known that he was acting as a Judicial Officer, and it was not for him as such Officer to give his own interpretations of the verse of the holy Quran. Times without number the highest Judicial Courts in India including the Privy Council have sounded a note of warning against entertaining new and novel interpretations of the texts of the Quran and Hadis.<sup>20</sup>

The Justice’s reference to the Privy Council only emphasises the influence of English law principles and colonial statutory legacy on the standing of MPL within the Indian constitutional framework, as well as MPL’s potential conflicts with otherwise ‘secular’ legislation which explicitly puts forward the notion of the ‘best interests of the child’.

### ***2.1.2 Internal Conflict of Laws Between Muslim Personal Law and Indian Legislative and Constitutional Provisions in Relation to BIC***

Given MPL’s reliance on a set of fixed rules, the relative reticence on the part of Indian judges to expound novel Islamic legal concepts, and the extreme cautiousness of Parliament regarding unilateral legislation on minority issues, the application of the notion of the ‘best interests of the child’ to legal disputes involving Muslims has for the most part been framed within the logic of conflict of laws, or whether Muslims could be subject to ‘secular’ legislation within the ambit of personal legal matters.

#### **2.1.2.1 Legislative Exceptions in Relation to Muslim Personal Law**

British colonial legislation has for the most part provided explicit exceptions to its application within subject matters falling within the fields of personal law. As such, the Majority Act 1875, which sets the majority age at 18 years old, states that its provisions shall not affect ‘the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption’ under their

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<sup>19</sup> Anderson 1993, p. 172.

<sup>20</sup> *Amad Giri v. Mst Begha* 1955 Cri LJ 1067.

personal law.<sup>21</sup> Similarly, the Transfer of Property Act 1882 removes the obligation of a registered document in order complete a gift of immoveable property in the case of Muslim transactions<sup>22</sup>; whilst the Code of Criminal Procedure 1973 also provides that post-divorce maintenance can be altered or cancelled if ‘the woman ... has received ... the whole sum which, under any customary or personal law applicable to the parties, was payable on such divorce’.<sup>23</sup> Finally, whereas ‘secular’ legislation provides for the maintenance of illegitimate children,<sup>24</sup> it does not provide for a legitimation procedure, which does not exist in Islamic law.<sup>25</sup> The only legislative—although in large part unforeseen—intervention in MPL was that of sections 112 and 114 of the Indian Evidence Act 1872 relating to the

<sup>21</sup> Section 2(a) of the Act. As such it allowed for Muslims to marry after attaining puberty, which in India is set at 15 years old (see Mulla and Hidayatullah 1990; Tyabji and Tayyibji 1968). The recent Prohibition of Child Marriage Act 2006 (PCMA), which sets the capacity to marry at eighteen for a woman and twenty-one for a man—thus circumventing the exception of the Majority Act 1875 by distinguishing between the terms ‘child’ and ‘minor’—has had conflicting applications in regards to Muslims. Whereas the Delhi High Court has deemed it supercedes personal legal provisions in rendering any marriage voidable at the request of the minor party (section 3(1) of the PCMA, see *Jitender Kumar v. State*, WP (CrI) 1003/2010 HC Delhi 10 August 2010 (on file with author)), the Gujarat High Court has held that save for forced marriages (void as per section 12), the resulting marriage is nevertheless valid as per MPL’s provisions read in conjunction with the Majority Act 1875 if both parties agreed to it (see *Yusuf Ibrahim Mohammed Lokhat v. State*, CrI Misc App no 13658/2014 HC Gurajat 2 December 2014 (on file with author)).

<sup>22</sup> Section 129 of the Act, thus in line with Muslim contract law which does not require a written deed for such gift to be effective (see also *Hafeeza Bibi and Ors v. Shaikh Farid (dead) by LR and Ors*, (2011) 5 SCC 654).

<sup>23</sup> Section 127(3)(b) of the Code, this provision was used to deny maintenance to a Muslim divorced wife beyond the ‘*idda*’ period until the *Shah Bano* decision (see *supra* n 15) which interpreted Islamic law as internally allowing such provisions to be made, later entrenched through the Muslim Women (Protection of Rights upon Divorce) Act 1986, as construed by the Supreme Court in *Danial Latifi and Anr v. Union of India* (2001) 7 SCC 740.

<sup>24</sup> Section 125(1)(b) and (c) of the Code of Criminal Procedure 1973 (formerly section 488 of the Code of Criminal Procedure 1898), see *Sukha v. Ninni* AIR 1966 Raj 163; also *Noor Saba Khatoon v. Mohammed Qasim* AIR 1997 SC 3280 on the application of section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act 1986). It is worth mentioning that the personal law of the illegitimate child is that of his/her mother, whereas it will be that of his/her father if legitimate (as per the father being the natural guardian of the child, see section 19 read in conjunction with section 25 of the Guardians and Wards Act 1890). Hence the illegitimate child of a Muslim father and a Hindu mother can claim maintenance from his father under the Hindu Adoption and Maintenance Act 1956 (see *K.M. Adam v. Gopala Krishnan* AIR 1974 Mad 232).

<sup>25</sup> Although Muslim personal law recognises the acknowledgment of a child under certain conditions (see Mulla and Hidayatullah 1990), this is different from a legitimation procedure: ‘while legitimacy is a status which results from certain facts, legitimation is a proceeding which creates a status which did not exist before’ (Fyze 2005, p. 189). It is worth noting however that acknowledgment has been made easier through the presumption of marriage after a prolonged cohabitation, provided by section 114 of the Indian Evidence Act 1872 (see *Mohammed Amin v. Vakil Ahmed* AIR 1952 SC 358).

presumption of legitimacy,<sup>26</sup> which remains contested as to its application in regards to Muslims.<sup>27</sup>

### 2.1.2.2 Constitutional Exceptions in Relation to Muslim Personal Law

Save for the Muslim Women (Protection of Rights upon Divorce) Act 1986, there has been no direct legislative intervention in MPL following independence. However, inspired by the Universal Declaration of Human Rights, whereby ‘motherhood and childhood are entitled to special care and assistance’,<sup>28</sup> the Constitution of India incorporates in several of its articles the notion of the ‘best interests of the child’. As such, Article 14 proclaims the right to equality, Article 21 the right to life, and Article 15 prohibits discrimination whilst allowing the State to make ‘special provisions for women and children’ (Article 15(3)). In that regard, Article 23 prohibits human trafficking and forced labour, and Article 24 proscribes the hazardous employment of children below 14 years, notably in factories and mines. In pursuance of these fundamental rights, the Constitution also includes ‘Directive Principles of State Policy’ which, although non-enforceable, have been considered as the ‘book of interpretation’ upon which the former must be construed and implemented.<sup>29</sup> Henceforth, Article 39(e) enjoins the State to ensure that ‘the tender age of children [is] not abused’; Article 39(f) requires that

<sup>26</sup> This conclusive presumption of section 112 can only be rebutted by proving non-access, and thus even a DNA test proving non-paternity of the child would be disregarded by the Courts (see *Shaik Fakruddin v. Shaik Mohammed Hasan* AIR 2006 AP 48). section 114 provides for a presumption of ‘any fact which [the Court] thinks likely to have happened, regard being had to the common course of natural events’, which *a contrario* dismisses Islamic law’s own presumption of legitimacy for child born several years after the dissolution of marriage (doctrine of the ‘dormant foetus’).

<sup>27</sup> As a statute of general application without explicit exceptions provided for personal law, it was held to apply to all Indians irrespective of their communal affiliation (see *Sibt Muhammad v. Muhammad Hameed and others* AIR 1926 All 526). However, in making the time of birth—rather than the time of conception as per traditional Islamic law—the determinant factor of legitimacy, whilst not defining the term ‘valid marriage’, it was questioned whether if, as a rule of substantive law, it would be superseded by the Shariat Act, especially in regards to its effects on many of the subjects included in the latter, such as *li‘ān* and inheritance. If the overriding nature of section 112 seem to have been settled in *Dukhar Jahan v. Mohammed Farooq* AIR 1987 SC 1049, Islamic legal provisions regarding the validity of marriage could still be taken into account in relation to the facts of a particular case involving such presumption, as in *Abdul Rehman Kutty v. Aisha Beevi* AIR 1960 Ker 101.

<sup>28</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 25(2); it was preceded by the Geneva Declaration of the Rights of the Child (adopted 26 September 1924 (1924) 21 LoN Official Journal 43), and followed by the Declaration of the Rights of the Child (adopted 20 November 1959 UNGA Res 1386(XIV)).

<sup>29</sup> See *Ashoka Kumar Thakur v. Union of India and Ors* (2008) 6 SCC 1.

‘children are given opportunities and facilities to develop in a healthy manner’ assuring their freedom, dignity and protection against both exploitation as well as ‘moral and material abandonment’; and Article 45 enjoins the State to provide for early childhood care in addition to free and compulsory education for children under the age of 6 years old. Moreover, the Constitution has empowered the Supreme Court with extensive powers as to the review of existing laws vis-à-vis fundamental rights provisions.<sup>30</sup>

Although not explicitly mentioning the Convention on the Rights of the Child (hereafter CRC),<sup>31</sup> the Constitution (eighty-sixth Amendment) Act 2002 serves for a part of its transposition into the Indian internal legal order by not only adding a new fundamental right to education for children up to 14 years old (Article 21A), but also by adding a new directive principle (Article 51A(k)) that declares a fundamental duty requiring the ‘parent or guardian to provide opportunities for the education of his child or, as the case may be, ward between the age of 6 and 14 years’. Since independence, several policies and statutes have also incorporated the notion of the ‘best interests of the child’, whether in terms of procedure<sup>32</sup> or substantive norms.<sup>33</sup> Muslim personal law has nonetheless stayed away from this fundamental rights revolution, mainly due to the conjunction of its status as a minority law and its uncodified nature.

As aforementioned the Muslims’ minority position in society made it politically tricky for parliament to unilaterally amend MPL without seeming to distort it following secular or Hindu principles. Notwithstanding, it is its un-codified character

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<sup>30</sup> Article 32(A) provides that ‘the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the rights conferred by this Part’. The judiciary has grandly extended its prerogatives in such matters notably through Public Interest Litigation (see Deva 2009).

<sup>31</sup> Adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3 (CRC). It is worth mentioning that the Indian legal order is a dualist system, whereby international treaties are not directly actionable in a municipal Court, despite their ratification, unless transposed by statute (the CRC was ratified by India on 12 November 1992).

<sup>32</sup> As a transposition of the CRC, one could point to the Family Courts Act 1984 creating Family Courts which have exclusive jurisdiction over family matters (including guardianship and custody, see section 7(1)(a)) and whose composition shall be ‘committed to the need to protect and preserve the institution of marriage and to promote the welfare of children’ (section 3(4)(a)); to the Juvenile Justice (Care and Protection of Children) Act 2000 (amended by the Juvenile Justice (Care and Protection of Children) Amendment Act 2006); and to the institution of ‘Child Welfare Committees’ (section 29).

<sup>33</sup> The most striking inclusion of this notion is in the Hindu Minority and Guardianship Act 1956: Article 13(1) providing that in the appointment of a guardian ‘the welfare of the minor shall be the paramount consideration’. Save for MPL, other personal laws have either recognised the legitimacy of a child whose parents’ marriage was void or voidable or have been amended accordingly (section 16(3) of the Hindu Marriage Act 1955; section 26(3) of the Special Marriage Act 1954; section 3(2) of the Parsi Marriage and Divorce Act 1936); however, children of a void Christian marriage would only be legitimate in regards to a party who entered the union in good faith or in full capacity (section 21 of the Indian Divorce Act 1869).

that has rendered it immune from judicial scrutiny. Indeed, the Constitution had provided for the ‘laws in force’ before its commencement to be adapted in order to be consistent with its provisions<sup>34</sup>; moreover ‘laws in force’ which subsequently derogated from fundamental rights were considered void.<sup>35</sup> Whereas Christians and Parsis had codified most of their personal laws,<sup>36</sup> and Hindus theirs soon thereafter,<sup>37</sup> MPL remained substantively uncoded, the Shariat Act being but a conflict-of-law rule. As such, MPL did not fit in the category of ‘laws in force’ as defined by the Constitution so as to become amenable to judicial review.<sup>38</sup> Although Article 13 left the possibility for ‘laws in force’ to be characterised ‘as the context otherwise requires’, this context never seems to have arisen, with the Supreme Court considering personal laws in general and Muslim law in particular as not falling within the ambit of Article 13 and the judiciary thus passing on the responsibility of their reform to the legislature.<sup>39</sup> However, subsequent statutes substantively amending or codifying parts of Muslim law would be subject to scrutiny and would if need be interpreted in accordance with fundamental rights provisions, as was the case with the Muslim (Protection of Women upon Divorce) Act 1986.<sup>40</sup> The will not to exercise undue influence, on one hand, and the fear of altering religious norms deemed to preserve a minority’s social and cultural identity, on the other, have thus left Islamic law with but little opportunity to evolve past its Anglo-Muhammadan inception.

The progressive integration of the notion of the ‘best interests of the child’ in the Indian legal order has hence been largely done both outside and contrary to Muslim personal law. Outside, as the ‘best interests of the child’ has but multiplied

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<sup>34</sup> Articles 372 and 372A of the Constitution.

<sup>35</sup> Article 13(1).

<sup>36</sup> Parsi and Marriage Divorce Act 1936; Christian Marriage Act 1872; Indian Divorce Act 1869.

<sup>37</sup> Reference is made here to the Hindu Code Bills which regrouped the Hindu Marriage Act 1955, the Hindu Succession Act 1956, the Hindu Minority and Guardianship Act 1956, and the Hindu Adoption and Maintenance Act 1956.

<sup>38</sup> Article 13(2)(b) defines ‘laws in force’ as including ‘laws passed or made by a Legislature or other competent authority ...’, whereas ‘law’ would include ‘ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law’ (Article 13(3)(a)). MPL’s substantive provisions do not fit in any of the above categories, neither procedurally nor formally.

<sup>39</sup> Justice Gagendragadkar in *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84 thus states: ‘The Constitution of India itself recognises the existence of these personal laws in terms which it deals with the topic falling under personal law in item 5 in the Concurrent List-List III. ... Thus it is competent either to the State or Union Legislature to legislate on topics falling within the purview of the personal law. ... [The framers of the Constitution] must have been aware that these personal laws needed to be reformed ... yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression laws in force.’ See also in regards to MPL, *AWAG [Ahmedabad Women Action Group] and Ors v. Union of India* AIR 1997 SC 3614.

<sup>40</sup> See *Danial Latifi v. Union of India* (*supra* n 23), not to the great satisfaction of the Muslim community.

the legislative and judicial ‘opt-out’ mechanisms for Muslims, in favour of a ‘secular’ legal status; and contrary to, as even the interpretation of the legislative framework—which had originally been enacted in accordance with Islamic legal principles—has evolved to seemingly set aside MPL. On a more general level, the example of MPL in India illustrates the difficulty in reconciling Article 2 (i.e. prohibition of discrimination) and Article 3 (i.e. primary consideration to be given to the best interest of the child) of the CRC in its transposition into a pluralist legal system where the protection of minority rights often involve derogations from the full implementation of the ‘best interests of the child’ principle.<sup>41</sup> The issues of custody and guardianship are at the forefront of such tensions, both for historical reasons as well as because of their inherently encroaching on the field of family law, traditionally regulated by personal law.<sup>42</sup>

## 2.2 Guardianship and Custody Under Muslim Personal Law and the Guardians and Wards Act 1890

Throughout the nineteenth and beginning of the twentieth centuries, Islamic law was considered as having pioneered the incorporation of the notion of the ‘best interests of the child’ within the Indian legal order, especially if compared to the then British colonial legal system (subsequently influencing Christian personal law) and Hindu personal law. Indeed, the ‘best interests of the child’ was largely a primary consideration in the application of MPL, whereas British and Hindu legal frameworks were still largely under the influence of *patria potestas*. This can be shown in regards to the curtailment of the powers conferred to the guardian in relation to the marriage and property of a minor, as well as in the issues surrounding the latter’s custody.<sup>43</sup>

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<sup>41</sup> The most recent example is the judicial review of the Right of Children to Free and Compulsory Education Act 2009, enacted in pursuance of Articles 21A and 15(5) of the Constitution and which provided for a compulsory reservation quota in favour of disadvantaged children, including within private un-aided institutions (section 12(1)(c) of the Act). The Supreme Court ruled that this section could not apply to minority institutions as it contravened Article 30(1) of the Constitution (i.e. the right of minorities to establish educational institutions), characterised as an absolute right (*Pramati Educational & Cultural Trust and Ors v. Union of India* WP (C) no 416 of 2012, SC 6 May 2014 (on file with author)). For a critical review of the argument leading to the ruling, see Kumar 2013.

<sup>42</sup> The other major fields of law in which the ‘best interests of the child’ have been incorporated are criminal law (see the Juvenile Justice (Care and Protection of Children) Act 2000 and the Commission for Protection of Child Rights Act (CPCRA) Act 2005), labour law (see the Child Labour (Prohibition and Regulation) Act 1986), and education (see the Right of Children to Free and Compulsory Education Act 2009).

<sup>43</sup> Unless otherwise stated, MPL’s regulations in regards to guardianship (*wilāya*) and custody (*ḥaḍāna*) will be those of the Hanafi school, which is followed by the vast majority of Muslims in India.

### 2.2.1 Powers of the Guardian in Relation to the Marriage of a Minor

Within the South Asian social context, the issue of guardianship in marriage is deeply linked to the practice of child marriages. During colonial times, this question was left for the most part un-touched by British colonial authorities, their only influence being on the very lax characterisation of marital rape, which only applied if the wife was under the age of consent.<sup>44</sup> The Child Marriage Restraint Act 1929 had also but little influence in curbing the power of a guardian to marry off his ward.<sup>45</sup>

MPL was, however, deemed at the time to be more inclined than other personal laws to incorporate the ‘best interests of the child’ within its legal framework, especially in an era when Anglo-Muhammadan law was more fluctuant in relations to sources and interpretation. Hence, while child marriages were permitted under Islamic law, they were curtailed in that they would be void *ab initio* if the child was under the age of discretion<sup>46</sup> and voidable in the case of a minor who, although possessing understanding, had not attained puberty. This was notably the case when a minor’s guardian had exercised his power of *jabr* in consenting to his/

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<sup>44</sup> This threshold was originally set at 10 years old (section 375 (Exception) of the Indian Penal Code 1860); the age was then elevated to 12 years (Age of Consent Act 1891) and finally to sixteen (Criminal Law (Amendment) Act 1983). The notion of the ‘best interests of the child’ seem to have been foreign to British criminal law at the time, as illustrated by the lack of criminalisation of incest—merely an ecclesiastical sin to be dealt with according to personal law—which only entered English criminal law (but not Indian law) through the Punishment of Incest Act 1908 (8 Edw 7 C 45), whose purpose was to protect ‘children from the vice’, in pursuance of the Prevention of Cruelty to Children Act 1904 (4 Edw 7 C 15).

<sup>45</sup> Under the original Act, a female child was defined as being below fourteen (section 2(a)), and offences under the Act were not cognizable save for a complaint to be filed within 1 year of their alleged committal (section 9). Although a presumption of negligence was provided against guardians of the minor party of a child marriage (section 6(2)), the procedural requirements (such as the obligation of a preliminary inquiry (section 10)) made it almost unenforceable, whilst the marriages could still be recognised as valid under personal law (see *Munshi Ram v. Emperor* AIR 1936 All 111, where Justice Ganga Nath states: ‘the question of validity and invalidity of the marriage is beyond the scope of the Child Marriage Restraint Act 1929’; see also *supra* n 21). The addition of the power of injunction (section 12 added by the Child Marriage Restraint (Amendment) Act 1938), the elevation of the minimum age of the bride to 15 years (Child Marriage Restraint (Amendment) Act 1949) and then to 18 years (Child Marriage Restraint (Amendment) Act 1978), and its total overhaul through the Prohibition of Child Marriage Act 2006, which has established the voidability of such marriage (section 3(1)) and rendered the offence cognizable and non-bailable (section 15), had little effect on the statute’s already poor implementation (see Law Commission of India (2008) Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws, Report No. 205, pp. 33–34. <http://lawcommissionofindia.nic.in/reports/report205.pdf>. Accessed 31 January 2015).

<sup>46</sup> Ali 1880, p. 218.

her marriage, which the minor could then cancel upon attaining puberty by exercising the ‘option of puberty’ (*khiyār al-bulūgh*). Even though this option was only available against a marriage consented to by guardians other than the father and the grandfather, and immediately upon puberty, the judiciary progressively extended this period so as to start only when the bride or groom had been made aware of their legal right,<sup>47</sup> whilst also allowing it to be exercised against the father or grandfather if the resulting marriage was prejudicial to the interest of the child.<sup>48</sup> This paved the way to the enactment of the Dissolution of Muslim Marriages Act 1939, which opened the ‘option of puberty’ to all minors, irrespective of the person of their guardian, from the age of fifteen up to 18 years old.<sup>49</sup>

## 2.2.2 Powers of the Guardian in Relation to the Property and Person of the Minor

### 2.2.2.1 Characterisation of the ‘Natural’/de jure Guardian vis-à-vis the de facto Guardian

According to traditional Islamic law in India, the ‘natural’ or *de jure* guardian of a minor is the father, and in his absence the grandfather.<sup>50</sup> Both can name a testamentary guardian (who may well be the mother) in the event of their passing; otherwise the role will fall unto their executor. However, the Muslim *de jure* guardian is not necessarily the ‘factual’ guardian of the minor, who might have the custody of the latter and/or have possession of his/her property. This right of ‘factual’ guardianship of the person in Muslim law constitutes *ḥaḍāna* and is separate from the ‘factual’ guardianship of the minor’s estate, which has been coined as *de facto*

<sup>47</sup> See *Bismilla Begum v. Nur Mahommad* AIR 1922 All 155.

<sup>48</sup> See *Aziz Bano v. Mohammad Ibrahim Husain* AIR 1925 All 720. Justice Sulaiman in his judgment moved beyond the restrictive conditions whereby fraud or negligence on the part of the father or grandfather was required to exercise the ‘option of puberty’ and included, more widely, the sentiment of the bride (she was Shi’i and considered her marriage to a Sunni as being invalid): ‘I hold that the marriage of Shiah woman with a Sunni husband ... is valid and legal ... [but] I also hold that such marriage, if performed by her guardian, no matter whether he is the father or the grandfather, is capable of being repudiated by her attaining puberty because it may affect her religious sentiment and may, therefore, be made to be to her manifest disadvantage. This is a liberal view to take and is obviously in accordance with justice, equity and good conscience as well as the requirements of the time.’

<sup>49</sup> Section 2(vii) of the Act—provided the marriage had not been consummated.

<sup>50</sup> One may also add the husband of his minor wife (section 19(a) of the Guardians and Wards Act 1890). Although in the presence of the father, he will not have a preferential right of guardianship under section 12 or 25. He may however sue for the restitution of conjugal rights.

guardianship (albeit sometimes exercised by the same person). Whereas the right of *ḥadāna* does not confer any power over the ward, a *de facto* guardian's actions on behalf of the minor may be given legal recognition.<sup>51</sup>

It was the Guardians and Wards Act 1890 (hereafter GAWA) which unified the previous laws pertaining to each Presidency and which is still of general application today. The drafting of the Act shows the will of British colonial authorities to both reflect on English law's own evolution in the matter<sup>52</sup> whilst at the same time granting sufficient leeway for each of India's communities to enforce their own notion of guardianship. As such, whereas the minor's welfare is to be taken in consideration in the appointment of a guardian<sup>53</sup> or in the issuance of orders in relation to his/her custody,<sup>54</sup> it shall however not be construed as 'to take away or derogate from any power to appoint a guardian ... which is valid by the law to which the minor is subject' (i.e. personal law).<sup>55</sup> The only duties imposed on a 'natural'/*de jure* guardian in relation to the minor's property is to manage it as a 'man of ordinary prudence' acting reasonably for the

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<sup>51</sup> There was no consensus on the issue, but in *Hasan Ali and Anr v. Mehdi Hussain and Ors* (1877) IRL 1 All 533 the sale of two minors' estate by a *de facto* guardian in order to satisfy an ancestral debt on the grounds of necessity was upheld (it is worth noting however that the minors had no *de jure* guardians alive). See also *Hurbai v. Hiraji Byramji Shanja* (1896) ILR 20 Bom 116; *Mafazzal Hosain v. Basid Sheikh* (1907) ILR 34 Cal 36; *Ram Charan Sanyal v. Anukul Chandra Acharjya* (1907) ILR 34 Cal 65, and *Ayderman Kutti v. Syed Ali* (1914) ILR 37 Mad 514. According to these decisions, a *de facto* guardian can act upon a minor's immoveable property if it complies with the requirement of necessity. In parallel, a question also arose as to whether a *de facto* guardian could take possession of a gift to a minor in order to render it effective. This practice seems to have been widespread among Indian Muslims, whose social set-up followed the joint family structure, where it was not uncommon for the head of the family (and thus *de facto* guardian) to make a gift of property to minors who would otherwise be excluded by Islamic inheritance rules (such as the maternal grandfather for instance). Indian Courts seem to have accepted this usage at first within the realm of MPL (*Nawab Jan v. Safiur Rahman* AIR 1918 Cal 786, for a general overview see Carroll 1994).

<sup>52</sup> At the time the British legal system was torn between two competing doctrines: on one hand the almost unfettered power of the father over his children within the Common Law, and on the other a greater consideration for the welfare of the child in the care of his/her mother through Equity. The latter progressively held sway following the fusion of the Court of Chancery and the Common Law Courts (Supreme Court of Judicature Act 1873 (Vic 36 & 37 C 66)). Through a series of legislative enactments the mother gained a preferential right of custody for minors of a tender age (up to 7 years through the Custody of Infant Act 1839 (2 & 3 Vic C 54), extended to 16 years in application of the Custody of Infant Act 1873 (36 & 37 Vic C 12)), whilst being allowed to apply for the child's guardianship in the event of the father's death in pursuance of the child's welfare (Guardianship of Infants Act 1886 (49 & 50 Vic C 27)). The subsequent presumption in favour of the mother's custodial privilege was dubbed the 'tender years doctrine'.

<sup>53</sup> Sections 7 and 17 of the Act.

<sup>54</sup> Sections 12 and 25.

<sup>55</sup> Section 6.

protection and benefit of the property.<sup>56</sup> Only if the guardian has been appointed or declared by the Court are his actions circumscribed in regards to the minor's immoveable property<sup>57</sup> and under judicial oversight,<sup>58</sup> consequently facing the risk of being voidable.<sup>59</sup>

The inherent tension between respecting personal legal provisions and the notion of the 'best interests of the child' is pronounced in the interaction between sections 7 and 17—whereby the appointment of a guardian must be guided by the welfare of child—and section 19, which forbids the Court from appointing or declaring a guardian of the minor's person if the latter's husband or father is alive.<sup>60</sup> Furthermore, section 19 provides for the removal of a 'natural'/*de jure* guardian under the sole condition of being unfit; the lack of a reference to the 'welfare of the child' thus renders sections 7 and 17 inoperative in that regard.<sup>61</sup> This apparent contradiction has served nonetheless a purpose, namely the legal empowerment of the *de facto* guardian within a socio-economical context dominated by the joint family structure, whilst at the same time precluding women from gaining full guardianship of their child.

As aforementioned, the paternalistic bias of English jurisprudence at the time, albeit recognising the nurturing role of mothers through the 'tender years' doctrine, was not ready to put the mother on par with the father in regards to guardianship. But perhaps more importantly, within a coparcenary structure whereby the

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<sup>56</sup> Section 27.

<sup>57</sup> Section 29 runs thus: 'Where a person other than a Collector, or than a guardian appointed by will or other instruments, has been appointed or declared by the Court to be guardian of the property of the ward, he shall not, without the previous permission of the Court,—(a) Mortgage, or charge or transfer by sale, gift, exchange or otherwise, any part of the immoveable property, or—(b) lease any part of that property for a term exceeding 5 years or for any term extending more than 1 year beyond the date on which the ward will cease to be a minor.'

<sup>58</sup> Section 31 provides that the Court's permission for disposing immoveable property will be considered only 'in case of necessity or for an evident advantage to the ward'.

<sup>59</sup> Section 30.

<sup>60</sup> As a result, the paternal control over guardianship appears to override considerations of the welfare of the child, which only resurfaces if the 'natural' guardian applies for custody under section 25 of the Act. Despite some dissenting decisions (see *Kamini Mayi Debi v. Bhusan Chandra Ghose* AIR 1926 Cal 1193), the majority view was indeed that as a 'natural' guardian, the father (or be it the husband) cannot ask to be appointed or declared as such under section 19 (see *Annie Beasant v. Narayaniah* AIR 1914 PC 41; *Mt. Siddiquinissa v. Nizamuddin* AIR 1932 All 215; *Mst Teja Begum v. Gulam Rashul* AIR 1925 Lah 250). For a review of case law and the interaction of section 19 with sections 7 and 17, see Diwan 1978, pp. 151–166.

<sup>61</sup> At least until the 1940s, Courts had—in regards to the place of section 19 within the scheme of the Act and its plain wording—consistently upheld its overriding effect on sections 7 and 17, and concluded that if the welfare of the child was a primary consideration, it would be presumed to rest with the father unless he was proven unfit (see *Harbans Rai v. Mst Biro* AIR 1926 Lah 393; *Sheikh Moideen v. Kunha Devi* AIR 1929 Mad 81; *Mt. Siddiquinissa v. Nizamuddin* (n 60)).

‘natural’/de jure guardian is not necessarily the manager of the joint property—and as such has de facto delegated the guardianship of the property of the minor to another<sup>62</sup>—allowing this other person’s action or status as de facto guardian to be unrestrictedly challenged would put in peril the existence of the coparcenary as a whole. The protection the de facto guardian acquires from section 19 is thus dual in nature: first, he cannot be removed save by the de jure guardian; secondly, in acting as the de jure guardian’s delegate, he does not have to be appointed or declared by the Court and hence is not circumscribed by the limitations imposed by section 29 relating to the transfer, mortgage or lease of the minor’s immoveable property.<sup>63</sup> Although not mentioned in any textual source, the existence of the de facto guardian was soon recognised by Courts, the leading case being that of *Hunooman Pershad Pandey v. Mussamut Babooee Munraj Koonweree*,<sup>64</sup> where the Privy Council stated that:

... under Hindu law, the right of a *bona fide* incumbrancer, who has taken as *de facto* guardian a charge of land, created honestly, for the purpose of saving the estate, or the benefit of the estate, is not affected by the want of union of the *de facto* with the *De jure* title.<sup>65</sup>

The powers conferred to the unappointed and undeclared de facto guardian are thus far greater under personal law than the ones otherwise provided by the secular legislation, which leaves in large part to the de facto guardian the extent to which the notion of the ‘best interests of the child’ ought to be exercised. In this regard, Muslim personal law was deemed far more protective of the de facto guardian’s rights.

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<sup>62</sup> Within a coparcenary structure (typically the one of a Hindu Undivided Family), the child has a right to the ancestral property by birth (system of survivorship). The power of delegation from the de jure guardian to a de facto guardian (in most instances the manager of the coparcenary) is thus presumed.

<sup>63</sup> Which in reality is but a share of a larger coparcenary estate otherwise managed by him. The scheme of the 1890 Act is hence very close to the one already put in place through Act XL of 1858 whereby a certificate of administration granted by the Court was not compulsory (section 3) and restrictions on actions taken in relation to immoveable property only applicable to guardians holding such certificate (section 18), despite contradicting interpretations as to the last point (see Ali 1880, p. 424).

<sup>64</sup> (1856) 6 MIA 393. For a discussion of the case in light of its historic setting, see Trevelyan 1878, pp. 330–341.

<sup>65</sup> The conditions of *bona fide* and ‘benefit of the estate’ bear a resemblance to the duties set forth in the 1890 Act in relation to the duties of the guardian of property (section 27), which runs thus: ‘A guardian of the property of a ward is bound to deal as carefully as a man of ordinary prudence would deal with it, if it were his own and subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.’

### 2.2.2.2 The Exclusive Powers of the ‘Natural’/de jure Guardian under MPL vis-à-vis the de facto Guardian in Relation to Property

Muslims in India are not foreign to the notion of a *de facto* guardian. Most of them live under a joint family structure, which could be enforced up until the Shariat Act through custom and is otherwise statutorily established for certain sub-communities, notably in matters pertaining to inheritance, through integration of the survivorship system.<sup>66</sup> Nonetheless, in the beginning of the twentieth century, in the wake of both a growing divide between Hindu and Muslim political elites and the progressive fixation of MPL’s sources within a set of authoritative texts, the use of custom was increasingly criticised by Muslim jurists as leading to legal uncertainty, perverting the due course of justice by incurring multiple delays through endless continuances, and, moreover, being least favourable to the ‘best interests of the child’.<sup>67</sup>

Even before the Shariat Act, judges—of whom Ameer Ali<sup>68</sup> was at the forefront—had started to curb the influence of custom in the application of Muslim law in regards to guardianship. The leading case is that of *Imambandi v. Sheikh Haji Mutsaddi*,<sup>69</sup> where a wealthy man had died and left considerable immoveable property to three widows and several children. One of the widows—Zohra—had conveyed shares belonging to her and her two minor children to purchasers, who subsequently had asked for the mutation of names within administrative registers. The other widows and children opposed the sale, notably on the ground that Zohra was not the *de jure* guardian of her children and thus could not act on their behalf in regards to immoveable property. The purchasers argued that Zohra was acting as a *de facto* guardian and as such could alienate the property of the minors. Giving the judgment, Ameer Ali cancelled the sale and went to great length in his exposition of Islamic law in regards to guardianship.

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<sup>66</sup> See *supra* n 5.

<sup>67</sup> The same arguments were used in Jammu and Kashmir when the judiciary clearly advocated for the instauration of a Muslim Personal Law Act superseding customary law (which was eventually enacted in 2007). Hence, Justice Hussain in an *obiter* urged the State to enact a clear rule of decision in regards to customary law, which ‘resulted in chaos and often gives rise to endless litigation and causes delay ... [whilst] some of the customs recorded are, on the face it, unreasonable’ (*Yaqoob Laway and Ors v. Gulla and Anr* 2005 (3) JKJ 122).

<sup>68</sup> Syed Ameer Ali (d. 1928) was a prominent scholar, jurist and political activist. He was instrumental in advancing Indian Muslims’ political agency, notably as a founding member of the All India Muslim League in 1906, whilst as a scholar he championed the modern development of Islam and Islamic law. In 1890, he was made a judge at the Calcutta High Court, before becoming the first Indian to be appointed member of the Judicial Committee of the Privy Council in 1909.

<sup>69</sup> (1918) 20 Bom LR 1022.

Relying on *Mata Din v. Ahmad Ali*, where a deed executed by the *de facto* guardian of an infant was annulled following a claim from the latter once he had attained his majority,<sup>70</sup> Ameer Ali set out to complete the decision by detailing both the character and duties of the guardian according to Muslim law, almost exclusively in reference to the *Al-Hidāya* and *Al-Fatāwā al-‘Ālamgīriyya*,<sup>71</sup> whilst confirming their consistency with the framework of the GAWA. As such, he acknowledged that in the want of a ‘natural’/*de jure* guardian, it is the responsibility of the sovereign (i.e. the Court) to appoint one, which might very well be the mother, who is not barred from being the executrix of the father and as such becoming a legal guardian. Notwithstanding, he does note a distinction between the guardian so appointed and the ‘natural’/*de jure* guardian (i.e. father or grandfather). In the first case, the appointed guardian may not sell immoveable property which the minor inherited from his father; in the second, such power is granted, albeit restricted to cases of extreme necessity.<sup>72</sup> In the instance of a fatherless child (*yatīm*) and when no guardian has been appointed (either by the Court or through a will), the existence of a *de facto* guardian may be acknowledged, but with his actions being strictly limited and depending ‘on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction’.<sup>73</sup> As such, even more so than an appointed guardian, the *de facto* guardian cannot under any circumstances dispose of the immoveable property of the minor. In fact, Justice Ali considers any action on the part of the *de facto* guardian to amount to a *faḍūlī* sale—i.e. a dependent or unauthorised sale which, although complete according to Hanafi doctrine, may be confirmed or dissolved by the proprietor. Although in the case of moveable property such sale is merely voidable, the sale becomes void *ab initio* at the request of the minor child if its object is immoveable property.<sup>74</sup>

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<sup>70</sup> (1911) 39 IA 1. Lord Robson in this instance stated that ‘it is difficult to see how the situation of an unauthorised guardian is bettered by describing him as ‘*de facto*’ guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor’s property, but he cannot thereby cloth himself with legal power to sell it’. However, his lordship shied away from answering the general question whether the acts of the Muslim *de facto* guardian were void or merely voidable, leaving the door open for their ratification by the ward upon attaining majority.

<sup>71</sup> See *supra* n 12.

<sup>72</sup> In the same manner, the purchase of property on behalf of the minor would only be available to the ‘natural’/*de jure* guardian, in as much as it is for the benefit of the minor (see *Amir Ahmad v. Meer Nizam Ali* AIR 1952 Hyd 120).

<sup>73</sup> *Supra* n 69. Ameer Ali also authorises a *de facto* guardian to accept gifts on behalf of his fatherless ward if it is purely advantageous.

<sup>74</sup> In normal circumstance all *faḍūlī* sales are merely voidable, for they are based on the analogy with the notion of agency, but Justice Ali remarks that this concept cannot be applied to an infant.

For the foregoing considerations their Lordships are of opinion that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a '*de facto* guardian', has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. *It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.*<sup>75</sup> [emphasis added]

Following this decision, Courts were increasingly restrictive in their characterisation of the actions of the *de facto* guardian of a Muslim minor. In *Vekama v. SV Chisty*<sup>76</sup> the sale of the minor's property by the mother acting as *de facto* guardian was deemed void; it was however held that the minor had to seek a declaration from the Court to recover the property and, moreover, that compensation under section 41 of the Specific Relief Act 1877 was available to the *bona fide* purchasers as an equitable remedy. In *Kharag Narain v. Hamida Khatoon*<sup>77</sup> however, such compensation was denied as the sale was considered void *ab initio*.

In *Imbandi v. Sheikh Haji Mutsaddi*, the 'best interests of the child' is not a determinant factor and is for the most part absent. Ameer Ali solely presumes that Islamic legal norms in relation to guardianship are inherently for the child's welfare<sup>78</sup> and thus finds it superfluous to ground his interpretation of Islamic law on the 'best interests of the child' principle. Rather—and in line with the historical context—he considers that it is by a precise and binding formulation (falling short of codification) of the law that such welfare will be achieved. As a consequence, the respected jurist in his taxonomical endeavour renders the issue of guardianship a question of law rather than of fact, supported by the drafting of the GAWA under which the 'welfare of the child' is a primary but not a 'paramount' consideration. In light of the legal framework of the day, Ameer Ali was certainly not wrong in his approach, and indeed Muslim wards were considered more protected than Hindu or even British and European ones. However, the reason underlying this preferential treatment was because Islamic legal norms *happened to be* more protective and not as a direct application of the notion of the 'best interests of child', which was merely incidental in the Justice's reasoning. As such, Ameer Ali did not foresee how this notion would soon be incorporated within the Indian legal

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<sup>75</sup> *Supra* n 69.

<sup>76</sup> AIR 1951 Mad 399.

<sup>77</sup> AIR 1955 Pat 475.

<sup>78</sup> He had already stated in one of his earlier works that the numerous instances of misappropriation and embezzlement by family members under pre-Islamic customary law had '[necessitated] the introduction of most stringent rules for the protection of minors in Islamic legislation ... [which are] extremely solicitous for the interests of minors' (Ali 1880, pp. 408–424).

system<sup>79</sup> nor how his stringent definition of guardianship in Islamic law would have adverse effects upon its interaction with the provisions of the GAWA. The same logic was nonetheless applied to the question of custody.

### 2.2.2.3 The Right of *Ḥaḍāna* vis-à-vis the Definition of the Guardian of the Minor's Person

The right of custody of a minor child by his/her mother<sup>80</sup> is a well-established principle in Islamic law, which in accordance with the 'tender years' doctrine rests on the presumption that a minor child would be best nurtured for by the mother during his/her young age<sup>81</sup> and thus grants her a preferential right of custody.<sup>82</sup> This right is inalienable,<sup>83</sup> and a mother can only be deprived of its exercise if she disqualifies herself, either by having contracted another marriage which is not

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<sup>79</sup> The Justice did not envisage how Hindu law would so radically change its approach of guardianship in favour of the welfare principle, as imported from English law's own evolution on the subject. In fact, solicitous of the preservation of indigenous legal systems in India, he would add as an *obiter* to his judgment in *Imabandi v. Sheikh Haji Mutsaddi* (*supra* n 29) that: 'Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring to largely foreign decisions. However useful in the scientific study of comparative jurisprudence, foreign judgments ... based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of justice.'

<sup>80</sup> Which is transferable upon death or unfitness to the maternal grandparents and then to other maternal or uterine relatives.

<sup>81</sup> Hanafi law has set these ages at seven for a boy and until a girl attains puberty. On this last point, historically Muslim law was in apparent conflict with section 21 of Regulation X of 1793, re-iterated in section 27 of Act XL of 1858, under which the guardian of the person of a female minor should be entrusted with no one other than a female. In *Kajo and Ors v. Fuseehun* (1884) IRL 10 Cal 15, Justice Mitter, in reference to Ameer Ali, decided however to use *istihsān* (i.e. juristic preference) to favour Shafi'i law, which allows the mother's custody of a minor girl until marriage. The Act of 1890 has repealed these previous statutes and thus has reinstated the Hanafi doctrine.

<sup>82</sup> It is worth noting that despite the growing importance of the 'welfare of the child' principle in recent decades, the 'tender years' doctrine is still prevalent in India (see *Kurshid Gauhar v. Siddiqunnissa* AIR 1986 All 314; *Mahdu Baia v. Arun Khana* AIR 1987 Delhi 81).

<sup>83</sup> A divorce settlement, such as in the case of a *khul'* divorce, cannot supersede a mother's right of *ḥaḍāna* (*Hasmat Ali v. Smt Suraya Begum* AIR 1971 All 260), nor can a 'natural' *de jure* guardian's will deprive her of this right (*In re Issa* AIR 1942 Sind 113).

within the prohibiting degrees of the minor,<sup>84</sup> by living an immoral life,<sup>85</sup> or by residing far away from the minor's 'natural'/*de jure* guardian.<sup>86</sup>

In order for these restrictions to apply however, the right of custody should not have been confused with the guardianship of the person. Indeed, following *Imbandi v. Sheikh Haji Mutsaddi*, it was now settled that 'the mother is entitled only to the custody of the one person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian: the father alone, or be he dead his executor (under Sunni Law) is the legal guardian'.<sup>87</sup> Notwithstanding, the question arose as to how to know if the custodian could be defined as the guardian of a person characterised as someone 'having the care' of a minor under section 4(2) of the GAWA. There could clearly be an inconsistency between the Act and MPL if the mother in virtue of her right of *ḥaḍāna* could claim the benefits of guardianship under the Act, on par with that of the father as the 'natural'/*de jure* guardian. To resolve this issue and in order for MPL to be consistent with the Act, it was first considered that a differentiation could be made between the 'actual' custodian and the 'legal' custodian.<sup>88</sup> Only the latter would be able to fit within the definition of guardian of a person as per the GAWA, whereby the word 'care' was construed as not relating to the nurturing or physical custody of the minor, but rather care for his/her material and

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<sup>84</sup> In *Ulfat Bibi v. Bafati* AIR 1927 All 581, the Court thus considered in a very patriarchal fashion that: 'A woman who has been divorced ... and has married a second husband is not a person herself better suited than the father, however unsuitable the father may be, and not a person who ought to be heard to say that the father is unsuitable. She has abandoned her home and husband either by her own free will, or as the result of her conduct and in the eyes of the law she has lost the right to assert a claim against the father of the child.' Certain decisions have extended this disqualification as to be absolute even in the absence of the father as 'natural'/*de jure* guardian (*Mt Kundan Begam v. Mt Aisha Begam* AIR 1939 All 15). However, in *Tumina Khatun v. Gaharajan Bibi* AIR 1942 Cal 281, it was held that whereas a mother's remarriage with a stranger could deprive her of the *preferential* right of custody; it did not automatically bar her from claiming such right in the absence of a 'natural'/*de jure* guardian (i.e. father or grandfather).

<sup>85</sup> Such was the case of prostitutes or 'courtisanes' (see *Mt Kundan Begam v. Mt Aisha Begam* (*supra* n 84)); however the Supreme Court held that in the case of an illegitimate child, a mother cannot be deprived of the minor's custody despite being a 'singing woman' and the mistress of the child's father (*Gohar Begum v. Suggi alias Nazma Begum* 1960 SCR (1) 597).

<sup>86</sup> However, the appreciation of the suitable distance is a question of fact and 'it all depends on the circumstances. It the stay is only temporary or is forced or is due to circumstances beyond her control, it is difficult to hold that [the mother] should even then be deprived of the custody of her own children' (*Mt. Sakina Begam v. Malka Ara Begum* AIR 1948 Mad All 198).

<sup>87</sup> *Supra* n 69.

<sup>88</sup> *Mushaf Husain v. Mohammad Jawad* AIR 1918 Oudh 376.

educational needs, all vested in the ‘natural’/de jure guardian and coined as ‘constructive’ custody.<sup>89</sup>

As such, and similarly to issues relating to the guardianship of property, the ‘best interests of the child’ is an almost irrelevant factor within the legal reasoning pertaining to custody. The aim is rather to fix stringent rules and definitions as to preserve Islamic law from any conflict it might have with custom and secular legislation. Within this endeavour, if the right of *ḥadāna* is cemented, it is however at the expense of any acknowledgment of the legal guardianship of the mother, being quarantined to a role of rearing in line with the ‘tender years’ doctrine. The notion of the ‘best interests of the child’—although not completely absent—remained for the most part presumed and considered as the logical outcome of this process. However, both the adverse effects created by the aforementioned internal evolution of MPL in relation to the GAWA, as well as the influence of the external and growing recognition of this notion within the broader Indian legal system have ultimately led to its ‘paramourcy’.

### 2.3 The Integration of the Notion of the ‘Best Interests of the Child’ Within Litigation Amongst Indian Muslims

In the middle of the twentieth century the Muslim personal law of custody and guardianship began to come into conflict with the ‘best interests of the child’. The independence of India, coupled with the instauration of its constitutional system incorporating numerous fundamental rights, as well as the rapid transformation of other personal legal systems in line with English law’s own evolution in the matter, have all but progressively isolated the application of Muslim law. Whilst the latter had been deemed ahead of its time in its integration of the notion of the ‘best interests of the child’ within its legal philosophy, it was soon considered adverse to its mechanical application under the newly interpreted GAWA provisions.

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<sup>89</sup> In *Mt Siddiqunnissa Bibi v. Nizamuddin* (supra n 60), Justice Sen stated: ‘[the grandmother] has the right of *hizanat* till the girl attains puberty, but *hizanat* is not the same thing as guardianship of the person. The guardianship of the person rests in the father’. In *Mt Ghuran v. Syed Biaz Ahmad* AIR 1935 Oudh 492, Justice Srivastava would explain the rights and duties attached to the ‘constructive’ custody of the father as the guardian of the person: ‘In my opinion *hizanat* is only custody for the rearing up of the child. Although the maternal grandmother has the right of *hizanat* under the Mahomedan Law, yet the father is responsible for providing funds for the maintenance of the minor and is her natural guardian. Thus he must be deemed to have the care of the person of the minor within the meaning of the definition of “guardian” in section 4(2) ... even though the minor is not in his actual physical custody.’ The elaboration of ‘constructive’ custody vested in the ‘natural’/de jure guardian also definitely allows the latter to claim the restitution of his ward under section 25 of the 1890 Act, which is only open to guardians of the person as defined in section 4(2). Arguably however, this action was already open to them following *Mohideen Ibrahim Nachi v. Mahomed Ibrahim* AIR 1917 Mad 612, which had construed the section to refer to both actual and legal guardians, but not mere custodians.

### 2.3.1 Adverse Effects of MPL Under the GAWA Relating to the ‘Best Interests of the Child’

The progressive ‘fossilisation’ of MPL’s sources and reasoning, which arguably are definitely settled through the enactment of the Shariat Act, have rendered its application immune to juristic evolution or legislative reform. As such, in its application through the provisions of the GAWA, MPL appeared ill-prepared to cope with the consequences of the ‘best interests of the child’ principle and the substantive norms imposed on the minor’s property and most importantly custody.

#### 2.3.1.1 Adverse Effects on the Minor’s Property

While the curtailment of the powers of the *de facto* guardian was aimed at protecting the child’s interests from embezzlement by unscrupulous members of the family, it also had the effect of ‘freezing’ the assets of other relatives, especially if the property could not be divided.<sup>90</sup> This posed a problem in the event of an inheritance of immovable property, whereby the co-heirs could not dispose of it until the ward’s majority at the risk of a subsequent contract being void *ab initio*.<sup>91</sup> Directly in conflict with the minor’s interest was the impossibility for the *de facto* guardian to take possession of a gift to the minor if the father was still alive, which would have had the result of the gift being declared void,<sup>92</sup> as a direct consequence of *Imbandi v. Sheikh Haji Mutsaddi*.<sup>93</sup> The voidability of such gifts through the *de facto* guardian had a direct impact on the minor’s inheritance and thus financial well-being. Indeed, such gifts were often made in order to circumvent Islamic inheritance rules which could otherwise exclude certain classes of heirs or limit their shares, rules which were emphasised by the passing of the Shariat Act repealing all customary provisions in that regard. In order to

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<sup>90</sup> See for instance *Kharag Narain v. Hamida Khatoon* (supra n 77).

<sup>91</sup> Certain High Courts were thus forced to be creative. *Maimunissa Bibi v. Abudul Jabbar* AIR 1966 Mad 470 thus held that the alienation of property by the mother in concurrence with the majority of the other heirs would be valid as far as the shares of the latter are concerned. In another instance, the mother acting as *de facto* guardian was allowed to transfer the property of the minor without the approval of the Court under section 29 of the 1890 Act in her capacity as guardian *ad litem* during a legal procedure (*Babu Gyanu v. Mohammed Sardar* AIR 1955 Nag 192).

<sup>92</sup> *Musa Miya Muhammad Shaffi v. Kadar Bax Khaj Bax* (1928) 30 Bom LR 766. See also *supra* n 49.

<sup>93</sup> *Supra* n 69.

circumvent this new legal framework, the Madhya Pradesh High Court<sup>94</sup> upheld a gift from a mother (and *de facto* guardian) to her ‘adoptive’ child by simply ignoring the most recent precedent in favour of an older one.<sup>95</sup> Given the inconsistency of the rulings however, the Supreme Court, whilst not directly tackling the issue, started to reinstate exceptions relating to the succession law of certain Muslim sub-communities.<sup>96</sup>

### 2.3.1.2 The Non-enforceability of *Ḥaḍāna*

Notwithstanding, the notion of the ‘best interests of the child’ was even more directly challenged by the non-enforceability of the right of *ḥaḍāna*, when –paradoxically—claimed under section 12<sup>97</sup> or more commonly section 25 of the GAWA, despite the latter’s wording conditioning an order from the Court to return a minor to his or her guardian precisely on the former’s welfare. However, read in conjunction with section 17(1) enjoining the Court to name a guardian consistent with the law the minor is subject to, section 7(3) [under which a guardian cannot be named unless the previous guardian has been removed (to be read in connection with section 39(j) conditioning the removal of a guardian—save for ill-treatment or being unfit—to personal law)] and section 19 [prohibiting the Court from appointing or declaring a guardian of the person if either the husband or the father of the minor is alive] have—when coupled with the interpretation of MPL in *Imambandi v. Sheikh Haji Mutsaddi*<sup>98</sup>—made it almost impossible for a mother to ask the Court for the return of a child which has been removed from her.

Indeed, while the possibility for the ‘natural’/*de jure* guardian to act under section 25 had been allowed from a very early stage,<sup>99</sup> a mother in the presence of the father had virtually no *locus standi* under the ‘constructive’ custody doctrine. As such, if the father happened to have forcefully taken away the child from her custody, she could not exercise her right of *ḥaḍāna* under section 25 as she was deemed not to have been the guardian of the person of the minor (as defined in section 4(2)) but a mere ‘actual’ custodian, and thus she could not pursue legal

<sup>94</sup> *Muni Bai v. Abdul Gani* AIR 1959 MP 225.

<sup>95</sup> *Ameerounissa Khatoon v. Abedoonissa Khatoon* (1875) LR 2 IA 87, which stressed only the *bona fide* nature of the gift for it to be complete, irrespective of its delivery. However, this solution was not upheld by other High Courts, which followed the more recent Privy Council decision and thus voided the gift (see *Abdul Raheman Mahamud v. Mishrimal Shrimal Picha* AIR 1960 Bom 210).

<sup>96</sup> Notably in regards to Khojas and Kutchi Memons (see *Controller of Estate Duty Mysore, Bangalore v. Haji Abdul Sattar Sait and Ors.* AIR 1972 SC 2229).

<sup>97</sup> Empowering the Court to make an interlocutory order for the production of the child in order to place him under temporary custody of an appointed person.

<sup>98</sup> *Supra* n 69.

<sup>99</sup> See *Mohideen Ibrahim Nachi v. Mahomed Ibrahim* (*supra* n 89).

action under the 1890 Act.<sup>100</sup> The overall guiding principle upheld by High Courts was to construe the Act in accordance with MPL regulations if the welfare of the child was not prejudiced; the child's welfare, however, was one concern among others and in any case was deemed not to take precedence over personal law. As such, 'where the [personal] law definitely lays down that an appointment of a certain guardian cannot be made, the [secular, i.e. 1890 Act] law cannot disregard the [personal law] law even in the interest of the minor'.<sup>101</sup>

### 2.3.2 *The Changing Nature of the Notion of the 'Best Interests of the Child' Within Muslim Disputes*

The mechanical application of Muslim personal law under the GAWA was rendered even more problematic after it appeared that the former's norms, applied under *habeas corpus* proceedings, were more favourable to the child's interest, which incurred a change in the interpretation of the GAWA provisions, notably in favour of the mother or maternal relative. However, the notion of the 'best interests of the child' was still viewed through a strong paternalistic bias. Its changing nature from a 'primary' to a 'paramount' consideration within other personal laws did however change its role within guardianship and custody disputes amongst Muslims, but at the expense of MPL's traditional jurisdiction.

#### 2.3.2.1 *The Influence of the Notion of the 'Best Interests of the Child' Under Habeas Corpus Proceedings*

In light of the impossibility to claim the right of *ḥadāna* under the procedural provisions of the GAWA, mothers began to use the procedure of *habeas corpus* instead in order to retrieve the custody of minor children.<sup>102</sup> In this regard, their claim was not only rendered admissible but also more likely to succeed. The High

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<sup>100</sup> The legal logic at play would even counter the 'tender years' doctrine as even a child of 4 years could not be retrieved by his mother, as in *Hasmat Ali v. Smt Suraya Begum* (*supra* n 83). The same reasoning applied to section 12, whereby it was considered that being inserted in the chapter dealing with the appointment of guardians, the mother—not being qualified to be a guardian in the presence of the father—also lacked *locus standi* (see *Ruzmaniben Tribhovandas Jethabhai v. Minor Narmada* AIR 1962 Guj 227).

<sup>101</sup> *Ansar Ahmad v. Samidan* AIR 1928 Oudh 120.

<sup>102</sup> This procedure was available under the Letter Patents of the different High Courts, then under section 491 of the Code of Criminal Procedure 1898, and finally pursuant to Article 226 of the Constitution of India. Acting as *parents patria*, the High Courts are free from the 1890 Act, in line with the procedure's English origins whereby 'in the jurisdiction *Parents Patria* there are unquestionably some principles of judicial inquiry which are not observed' (per Lord Devlin in *In re K.* [1965] AC at 239).

Courts were not bound by the GAWA (lacking jurisdiction to determine guardianship)<sup>103</sup> but only by personal law, and interestingly they did not follow the ‘constructive’ custody doctrine.<sup>104</sup> Subsequently, they tended to be considerably more favourable to the mother or maternal relatives, even in the presence of the father, whilst putting greater emphasis on the welfare of the child, albeit influenced by the ‘tender years’ principle.<sup>105</sup>

The growing discrepancy in the formulation of MPL between the two procedures forced the High Courts to react. They did so by slowly incorporating the notion of the ‘best interests of the child’ within custody disputes under the GAWA. Clumsily at first,<sup>106</sup> they nevertheless tended to abolish the differentiation between ‘actual’ and ‘constructive’ custody in order to bestow on the mother (or maternal relative) the guardianship of the person of the minor in her own right.<sup>107</sup> However, although the ‘welfare of the child’ was to be of ‘paramount’ concern, it was interpreted as being consistent with MPL, so that the newly based right of *haḍāna* could not exceed its prescribed duration<sup>108</sup> unless achieved by declaring the father unfit.<sup>109</sup> Moreover, in their appreciation of the facts, the Courts still held a some-

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<sup>103</sup> Which, since 1984 is under the exclusive jurisdiction of Family Courts (*supra* n 32). It was however recently held that custody could be determined through a *habeas corpus* proceeding, albeit in application of the substantive provisions of the 1890 Act (*M Kuthbunisha v. SA Jabar*, OP no 777/2008 and A no 5738/2008, HC Madras, 2 February 2009 (on file with author)).

<sup>104</sup> Hence, it could be submitted that the restrictive notion of ‘constructive’ custody is but an invention of Anglo-Muhammadan law in light of the 1890 Act, rather than being something taking its sources directly from Islamic legal precepts.

<sup>105</sup> See *Mt Haidri Begum v. Jawwad Ali Shah* AIR 1934 All 722.

<sup>106</sup> Often cited, *Mt Samiunnissa v. Mt Saida Khatun* AIR 1944 All 202 declared the mother guardian of her minor daughter’s person under section 17 of the 1890 Act, arguing that if ‘the personal law of the minor concerned is to be taken into consideration, ... that law is not necessarily binding upon the Court which must look to the welfare of the minor consistently with that law’. However, in not addressing the interaction between sections 17 and 19 of the Act, even though the father was still alive, one could submit that the Court decided this case *per incuriam*.

<sup>107</sup> In *Zynab Bi Alias Bibijan v. Mohammad Ghouse Mohideen* AIR 1952 Mad 284, the mother’s claim under section 25 of the 1890 Act was declared admissible upon the grounds she could be qualified as a *de facto* guardian of the person of her minor children per section 4(2). This is one of the first instances where the term ‘care’ was not construed as to refer exclusively to the ‘natural’/*de jure* guardian of the child. The notion of the welfare of the child under the guise of the ‘tender years’ doctrine was also put forward: ‘in a petition of this nature, the paramount consideration to be taken into account is the welfare of the minors. The boy being less than 2 years, it is ordinarily necessary that he should have the benefit of the mother’s milk’. Notwithstanding, this position was resisted by other High Courts (see *Hasmat Ali v. Smt Suraya Begum* (n 83)).

<sup>108</sup> See *Shama Beg v. Khawaja Mohiuddin Ahmed* ILR 1972 Delhi 73.

<sup>109</sup> See *Mohammad Saddiq and Anr v. Wafati* AIR 1948 Oudh 51.

times very strong patriarchal bias in favour of the father's right of custody.<sup>110</sup> Therefore, although in practice the judicial decisions often led to the same result in favour of the father's right of custody, their legal basis was fundamentally transformed, moving from the mother's legal incapacity to a factual or social basis.

As such, although the Courts were prospectively freed to reflect societal change,<sup>111</sup> their judgments did not make clear whether the notion of the 'best interests of the child' superseded personal law as a 'secular' innovation contained in the GAWA or if it were in fact the application of the 'spirit' of Muslim personal law, which had otherwise been legally restrained by the same Act.<sup>112</sup>

### 2.3.2.2 The Paramountcy of the 'Best Interests of the Child' in Relation to Muslim Personal Law

It is worth noticing that from the 1940s onwards; the welfare of the child has increasingly been qualified as 'paramount', although this term is nowhere to be found in the GAWA. Here, one cannot deny the influence of English law which, despite Ameer Ali's warning,<sup>113</sup> has consistently been referred to by Indian Courts.<sup>114</sup> Indeed, the term's first inception is in section 1 of the Guardianship of Infants Act 1925,<sup>115</sup> stating that the welfare of the child should be of 'first and par-

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<sup>110</sup> Hence, in *Mir Mohamed Bahauddin v. Muje Bunnisa Begum Sahiba* AIR 1952 Mad 280, the Court granted the father's petition to remove his minor daughter from the custody of her mother on the grounds the latter had re-married for 'it is unlikely that a woman who has married a second husband would be in a position to pay much attention to the upkeep and well-being of the child as she would, if she had not taken to a second husband'; the father, who also had re-married was however deemed a 'fit and proper person to take charge of the custody of the minor ... [so as the child] could very well live with the father and it is stated that the father's mother is in the family to look after the child'.

<sup>111</sup> For instance, in favour of women's growing social independence movement, Courts no longer considered their social capacity in light of their economic capabilities (which at the time was more often than not in the hands of the father/husband) and thus disregarded any financial argument usually advocated as being conducive to the child's welfare (*Mohd Yunus v. Smt Shamsad Bano* AIR 1985 All 217).

<sup>112</sup> It was thus decided in principle that in case of a conflict between the 1890 Act and personal law, the former would prevail (*Rafiq v. Bashiran* AIR 1963 Raj 289), but left open the question of the interaction between section 17 (child welfare) and section 19 (guardianship of the person as the right of the father). Hence, was the child's welfare truly limited by MPL, or rather by the Act—precisely contrary to the MPL 'guiding principle'? Mr Latifi (counsel for the appellant, the maternal grandmother) argued in *Shama Beg v. Khawaja Mohiuddin Ahmed* (*supra* n 108) for the latter—although unsuccessfully in this case—interestingly referring to Ameer Ali as an authority.

<sup>113</sup> See *supra* n 79.

<sup>114</sup> Paras Diwan remarks that 'there is hardly any argument before a [Indian] court where a counsel would not try to cite and a judge would not try to rely on an English authority' (Diwan 1978, p. 152).

<sup>115</sup> 15 & 16 Geo 5 C 45.

amount' consideration, and although the statute was not applicable to India, the notion would travel. The implication of this semantic innovation was not perceived at first and was rather used as a synonym for 'primary'—with the 'best interests of the child' being one concern among others, such as the application of personal law. However, a set of legislative reforms pertaining to personal laws, the adoption of public policies revolving around children rights and the emergence of judicial activism in the 1970s contributed in making this notion central to custody and guardianship litigation.

Indeed, sections 12 and 13 of the Hindu Minority and Guardianship Act 1956 provide that in any appointment or declaration of a guardian, the 'welfare of the minor shall be *the* paramount consideration' [emphasis added]. With it subsequently being the *sole* criterion upon which guardianship must be decided within Hindu personal law, the 'best interests of the child' has forced a re-interpretation of the interaction between sections 17 and 19 of the GAWA within litigation amongst Hindus, and has thus entrenched section 17's superseding nature.<sup>116</sup> Irrespective, section 2 of the 1956 Act clearly states that the provisions of the statute shall be 'in addition to' and not 'in derogation of' the GAWA and thus left the interaction between section 17 and section 19 unresolved in regards to other personal laws.

Notwithstanding, the reform of Hindu law naturally had ripple effects and led to the State adopting a number of policies in regards to children, reiterating the 'paramount' nature of their welfare but falling short of making it the sole criterion.<sup>117</sup> Nevertheless, under the influence of English judicial interpretation,<sup>118</sup> the term 'paramount' soon implied the overriding nature of the notion of the 'best

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<sup>116</sup> Hence in *Rattan Amol Singh v. Kamaljeet Kaur* AIR 1961 Punj 51, Justice Dua stated: 'By virtue of section 2 of the Hindu Minority and Guardianship Act, 1956, we are obliged to read together and harmonize the provisions of section 19 of the Guardians and Wards Act and section 13 of the Hindu Minority and Guardianship Act; construing them together, the rigour and prohibition contained in clause (b) of section 19 of the Guardians and Wards Act must be considered to have been relaxed to a great extent in the interest of the minor's welfare.'

<sup>117</sup> Department of Social Welfare, National Policy for Children (no. 1-14/74-CDD, 22 August 1974) 3(xiv) states: 'existing laws should be amended so that in all legal disputes whether between parents or institutions, the interest of children are given paramount consideration'. It is worth noting, however, that in line with the wording of Article 3 of the CCR, the new policy of 2013 uses the term 'primary' instead of 'paramount', although formally including Court decisions in its realm (Ministry of Women and Child Development, The National Policy for Children, 2013 (no. 16-1/2012-CW-I, 26 April 2013) 3(vii)).

<sup>118</sup> Per Lord MacDermott in *J v. C* [1970] AC at 710: '[Paramount consideration] must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare ... because [paramountcy] rules upon or determines the course to be followed.'

interests of the child', at least in regards to custody disputes. In regards to the ones involving Muslims, a series of decisions illustrates this trend, albeit under specific legal and factual circumstances. In *Hassan Bhatt v. Ghulam Mohamad*, the welfare of the child was deemed to override his personal law<sup>119</sup>; and in *Smt Ainunnissa v. Mukhtar Ahmad*,<sup>120</sup> in consideration of the best interests of the child, the father's claim for the custody of his 10-year-old son was dismissed and the minor's own preference to remain with his mother acknowledged.<sup>121</sup> There remained however many discrepancies both within and between High Courts. Moreover, given the nature of the proceedings relating to guardianship and the delays incurred by litigation in India, there are but very few cases which were pursued in front of the Supreme Court in order to unify the law.

However, in 2006 the apex Court in *Nil Ratan Kundu and Anr v. Abhijit Kundu* seemed to be handed the opportunity to settle the issue of the interaction between sections 17 and 19 of the GAWA in favour of the former, stating that:

In our opinion, in such cases, it is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter which is relevant but the 'positive' test that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of a minor in favour of father, mother or any other guardian.<sup>122</sup>

Moreover, the Court adds that custody cases 'cannot be decided solely by interpreting legal provisions', that in selecting a guardian the welfare of the minor should be the 'paramount' consideration and that for this purpose jurisdictions are bound by neither 'statutes, strict rules of evidence or procedure nor ... precedents'. It thus seemed that the notion of the 'best interests of the child' is to be considered as superseding both personal law and the GAWA, falling short of being a constitutional right. However, for the above reasons and also because the case involved a dispute among Hindus, it was still in doubt if it applied in a Muslim context.

In *Athar Hussain v. Syed Siraj Ahmed* such context arose,<sup>123</sup> and the Supreme Court was directly confronted with a conflict between MPL and the provisions of the GAWA as previously interpreted. The maternal grandfather was awarded interim custody of two minors, which the father successfully contested as their 'natural'/*de jure* guardian; the grandfather appealed the decision in front of the High Court of Karnataka, which decided in his favour per MPL as previously

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<sup>119</sup> AIR 1961 J&K 5; however, the state of Jammu and Kashmir was not at the time subject to a Shariat Act.

<sup>120</sup> AIR 1975 All 67.

<sup>121</sup> Nonetheless, in this particular case the paternity of the child was put in question. Furthermore, while section 17(3) of the 1890 Act provides for the minor's opinion to be taken into account, it is left to the discretion of the Court to assess if he/she can formulate an 'intelligent' preference. There has thus been conflicting views on the admissibility of a minor's testimony: for instance, in *S Rama Iyer v. K V Natraja* (AIR 1948 Mad 294) a girl as old as fourteen was deemed not to be able to formulate such a preference.

<sup>122</sup> 2008 9 SCC 413.

<sup>123</sup> AIR 2010 SC 1417.

interpreted.<sup>124</sup> The father appealed that judgment in front of the Supreme Court. Whilst upholding the High Court's decision, the apex Court based its reasoning on different grounds. While it did find the High Court's statement relating to the superseding nature of personal law over the Act's provision 'doubtful', it interestingly did not explicitly strike personal law down completely. However, it reiterated that the 'welfare of the child' was a paramount consideration which trumped personal law—but only as custody is concerned:

As far as the matter of guardianship is concerned, the *prima facie* case lies in favour of the father as under section 19 of the [1890 Act], unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. ... However, the question of custody is different from the question of guardianship. The father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.<sup>125</sup>

As such, the Supreme Court—in an effort to articulate in a consistent manner the 'best interests of the child' principle, the provisions of the GAWA, and personal law—seem to have resurrected the 'constructive' custody doctrine. However, 'constructive' custody is no longer used to assert the father's 'natural' *de jure* right of physical custody, but rather is a 'natural' duty of maintenance. Similarly, if the right of *ḥaqāna* is considered to qualify as a right of guardianship of the person as per section 4(2) of the GAWA, *prima facie* lying in favour of the mother or maternal relatives, it is similarly not absolute and its duration may be shortened or extended in consideration of the child's welfare.

## 2.4 Concluding Remarks: The 'Best Interests of the Child', a Foreign Notion to Muslim Personal Law in India?

Despite assertions by the High Courts and the Supreme Court, the law of guardianship in regards to litigation amongst Muslims is not well settled in India. Furthermore, as per the apex Court's own rulings, Family Courts are not bound by strict procedural or substantive rules when it comes to determining custody, a freedom emphasised, moreover, by the fact the parties are not represented by legal counsel in this specialised jurisdiction other than in the capacity of *amicus curiae*.<sup>126</sup> Coupled with its obligation to first settle a dispute through mediation,<sup>127</sup> and given that guardianship is more often than not an incidental question

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<sup>124</sup> On the basis that his right of *ḥaqāna* amounted to the 'legal' guardianship of the person of the children (see *supra* n 107). Being an interim order, the conflict was between the interaction of sections 12 and 19 of the Act, the former not explicitly mentioning his/her 'welfare' but his/her 'protection'.

<sup>125</sup> *Supra* n 123.

<sup>126</sup> Family Courts Act 1984, section 13.

<sup>127</sup> *Ibid* section 9.

accompanying divorce proceedings, empirical studies tend to show that in practice the ‘welfare of the child’ is far from the primary concern of the Courts, which—despite not being bound by the principle—tend to uphold parental agreements and confirm interim custody injunctions based on the individual judge’s own subjective criteria.<sup>128</sup> Moreover, regardless of the *suo moto* jurisdiction of the Court in matters pertaining to guardianship,<sup>129</sup> it is rarely exercised save in extreme circumstances, and family unity remains a constant within Indian legislation.<sup>130</sup> Hence, judges tend not to intervene within agreed-upon familial relations, especially when invoking personal law.

The notion of the ‘best interests of the child’ as a foreign or ‘secular’ concept superseding Muslim personal law remains debatable within the Indian legal context. Indeed, although Courts may have grounded its application on MPL’s own legal categories, history shows the latter were formed precisely to evade its paramount character. Whether these Anglo-Muhammadan provisions were themselves in contradiction to Islamic law’s original *ethos* is equally questionable, and it can—paradoxically—be argued either way in reference to the same overarching authority (i.e. Syed Ameer Ali) who influenced Muslim guardianship law in India perhaps more than anyone else. Notwithstanding, there has never been an attempt by Courts to internally incorporate the notion of the ‘best interests of the child’ within MPL solely on its own sources or through notions such as *maqāṣid al-sharī‘a* as was done in the case of unilateral divorce.<sup>131</sup> Additionally, Courts have been precluded from elevating the ‘best interests of the child’ into an enforceable constitutional principle superseding Muslim personal law by guardianship’s status as one of the subject matters listed within the Shariat Act as well as by the Act’s relative immunity to fundamental rights provisions of the Constitution. As such, as the law stands it is only applicable to custody—or ‘actual’/‘physical’ guardianship of the person—and not to the guardianship of the property of the minor, despite it being sometimes adverse to the latter’s interest.

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<sup>128</sup> Unlike criminal proceedings (most notably under the Prohibition of Child Marriage Act 2006), there are no official statistics pertaining to litigation under the 1890 Act. Some empirical studies have been conducted within specific Family Courts (see for instance in regards to Mumbai, Bajpai 2005), but inferring generalisations within a jurisdiction as wide and diverse as India is a hypothetical effort at best.

<sup>129</sup> Sections 12 and 39 of the 1890 Act. However, while section 12 gives unfettered powers to the Court in matters of custody, section 39 circumscribes the Court’s jurisdiction over individuals declared to be or appointed as guardians.

<sup>130</sup> As aforementioned (*supra* n 32), Family Courts Act 1984, section 3(4)(a) requires that Family Court appointments be made so as to ensure a judiciary committed to protecting the welfare of the child *on par* with the institution of marriage, whilst The Juvenile Justice (Care and Protection of Children) Act 2000, section 41(1), states that ‘the primary responsibility for providing care and protection to children shall be that of his family’.

<sup>131</sup> See *supra* n 15.

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