

# THE CUSTODY OF MINOR CHILDREN DURING THE DISSOLUTION OF MARRIAGES: A COMPARISON OF CHILD CUSTODY IN SOUTH AFRICAN ISLAMIC LAW AND COMMON LAW

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## **Abstract**

*In Islamic law, child custody is divided into physical custody and legal custody. Physical custody is given to a child's mother during the age of dependency, while legal custody is automatically assigned to the child's father. For a mother to qualify for custody and retain it in terms of Islamic Law, she must, among other things, not remarry. This requirement unfairly discriminates against women because the same is not expected of the father. Moreover, a mother is expected to reside in an environment where the father can visit and come back the same day. Failure to adhere to the above requirements may lead to custody being taken away from the mother. Again, this is discriminatory and leaves much room for arbitrary decisions that might not be in children's best interests. The South African Common Law regulation of child custody is more likely to promote the best interests of the child than its Islamic counterpart. In a recent landmark judgment, the South African Supreme Court of Appeal (SCA) held that the failure to give full legal recognition to Muslim marriages amounted to the violation of Muslim spouses' right to equality, dignity, children's rights, and the right of access to courts. Moreover, all provisions of South Africa's Divorce Act will now apply to all Muslim marriages dissolved by divorce. Therefore, the SCA rightfully extended the Common Law position on child custody to Islamic marriages to safeguard the best interest of the child.*

**Keywords:** custody in Islamic law; custody in Common law; best interest of the child.

**JEL Classification:** K36

## **1. Introduction**

According to Sharia, the mother has physical custody of the child while the child's father has ultimate legal custody. Islamic religion places much value on the gender of parents and the religious upbringing. All Islamic groups require a child to be raised Muslim.<sup>3</sup> According to all Muslims Schools of Interpretation, child custody (*Hidhana*) is given to the child's mother during the age of dependency.<sup>4</sup> The age of dependency is usually the age of seven years for boys and nine years for girls. However, it is noted that there is no uniformity amongst different schools of Islamic interpretation regarding the issue of the age of dependency. Even if the mother has custody, many countries that practice Islamic law prohibit her from “moving any substantial distance from the father without the father's permission.” On the contrary, a father is free to travel wherever he pleases without seeking his wife's approval; and his travelling does not affect his custodial rights. One of the pre-conditions necessary for physical custody is that a child should reside in an environment where the child will not be exposed to moral risk and physical risk. The mother loses child custody when she changes her place of residence and stays a long-distance away where the father, who cannot visit the child and come back the same day. The father is presumed to be the protector and provider of his family. He is deemed to be better positioned to fulfil the important part of the child's upbringing and enhancement of righteousness.

Islamic custody law places paramount importance on the child's religious upbringing based on the belief that it is in the child's best interest to be raised as a Muslim.<sup>5</sup> In contradiction, South

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<sup>3</sup> Hightower, Zadora M ‘Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases’ 2013 (22) 2 *Michigan State International Law Review* 637 at 653; see also Foley, Thomas ‘Extending Comity in Foreign Decrees in International Custody Disputes Between Parents in the United States and Islamic Nations’ 2003 (41) *Fam. CT. Rev* 261.

<sup>4</sup> Oloyede, Ishaq ‘Al-Hadanah: An Integral Part of Islamic Matrimonial Law’ 1989 (9) *Islamic and Comparative Law Quarterly* 143-145.

<sup>5</sup> Aiyar, Smita ‘International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach’ 2007 (21) *Emory International Law Review* 277 at 308.

African law places little emphasis on the child's religious upbringing. Islamic law discriminates based on gender and religion for preferring paternal parents and the Muslim faith. This paper compares child custody in Islamic law and South African common law. It welcomes the landmark judgment that extended the existing common law benefits during the dissolution of a marriage by divorce to Islamic marriages. The first part discusses the regulation of child custody in Islamic law and argues that the regulation of child custody under Islamic law discriminates against women and is unlikely to pass constitutional muster in its current unmodified form. Additionally, the first part also answers the question of who has the custodial right in terms of the Quran and what requirements a mother must comply with to qualify for custody.

The second part of this paper discusses the common law position on child custody and submits that the extension of the common law position to Islamic law is commendable. The extension is more likely to promote the best interests of the child.

## 2. Child custody in Islamic Law

The term *Hidhana* (custody) is an Arabic word that is derived from the root *hadhana*. In Arabic, the term *hadhana* means "the distance between the armpits to the loins," "the chest and the two arms and what includes in between," and that can literally be said to mean "to embrace or to hug."<sup>6</sup> Be that as it may, in Islamic jurisprudence, *hidhana* connotes nursing, nurturing, raising, or bringing up a child.<sup>7</sup> Under normal circumstances, custody does not arise during the subsistence of the marriage because it vests with both the mother and the father as parents. It is noted that no matter how religious the parties to a marriage may be, they still face challenges and problems that may eventually lead to the breakdown of a marriage relationship. Islamic law permits parties to a marriage to dissolve their marriage through divorce. A classical and conservative Muslim divorce interpretation offers unequal rights between men and women and is adopted by the South African Ulama.<sup>8</sup> In South Africa, Muslim men often file a divorce petition through a triple *talaq*<sup>9</sup> without seeking permission from anyone. This has the effect of instantly terminating the marriage without providing a wife with any form of defence or recourse to prevent the termination of her marriage.<sup>10</sup> Unlike men, Muslim wives have to get permission to divorce either by getting their husbands' consent to exercise *khula* or *tafwid al-talaq* or getting *faskh* from the Ulama. It is noted that *tafwid al-talaq* is commonly included as a provision in a marriage contract.

However, empirical evidence suggests that most South African Muslims do not enter into marriage contracts. This may be attributable to the lack of knowledge or power imbalances in a relationship where the husband refuses to sign a marriage contract to regulate his marriage relationship and its consequences. As a result of this, Muslim wives may find themselves trapped in an unhappy marriage relationship against their will. If a husband opposes a divorce, Ulama frequently agrees with the husband and advises the wife to reconcile with her husband.<sup>11</sup> The reconciliation path between the husband and the wife commensurate well with the tenets of Islamic law, which discourages divorce because it is regarded as an unpleasant evil before Allah's eyes. Unfortunately, if the marriage is eventually dissolved by divorce, then the question of who will reside with children will arise. Islamic law classifies custody into physical custody and legal custody. Physical custody refers to taking care of the child's daily needs, such as living arrangements, medical care, and other

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<sup>6</sup> Omar, Justice Mohamed Lawal (Sharia Court of Appeal, Katsina State) 'Custody and Guardianship of Children: Shari'a Perspective' 2019 A Paper Presented at the Refresher Course for Judges and Kadis Organised by the National Judicial Institute, Abuja on the 11<sup>th</sup> - 15<sup>th</sup> March; see also Rafiq, Aayesha 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (an analysis)' 2014 (4) 5 *International Journal of Humanities and Social Science* 268.

<sup>7</sup> Ibid.

<sup>8</sup> Waheeda, Amien "Judicial Intervention in Facilitating Legal Recognition (and Regulation) of Muslim Family Law in Muslim Minority Countries" 2020 (1) 1 *Journal of Islamic Law* accessed through <https://journalofislamiclaw.com/current/article/view/3> (accessed on the 1<sup>st</sup> of April 2021).

<sup>9</sup> Triple talaq means that a husband would renounce his wife three times and the marriage will come to an end. It is noted that a husband do not require permission from anyone in order to divorce his wife.

<sup>10</sup> Ibid.

<sup>11</sup> Fn 8 supra.

necessities.<sup>12</sup> A mother is generally presumed to be caring, loving, and compassionate than her husband and having experience when rearing children. Primarily children have the right to receive love and to receive proper upbringing from their parents. Both parents must ensure that their children receive love and a good upbringing. It is believed that a child who received love from his or her parents is more likely to be compassionate because love enhances it. A mother is presumed to be in a better position of showing love than a father. In our view, this approach unfairly discriminates against women and is unlikely to pass constitutional scrutiny. It is easy and quick for a man to obtain a decree of divorce because he can reject his wife three times, while it is complicated and time-consuming for a wife to get a divorce. In the absence of a marriage contract, a Muslim wife is more likely to be economically disadvantaged during the dissolution of her marriage because Muslim marriages are generally out of community of property, and women are usually economically inactive. The decision in the case of *Women Legal Centre Trust v. President of the RSA and others*<sup>13</sup> is hailed because it extends civil law divorce benefits to Muslim marriages. Henceforth, all Muslim marriages terminated through a divorce will be regulated by the Divorce Act, thereby extending all the legal protections available in terms of the Act to Muslim marriages.

On the other hand, the father is presumed to be better positioned to fulfil the more significant part of proper upbringing and enhance the child's righteousness. Physical custody is typically granted to the mother of the child. On the contrary, legal custody refers to the making of major decisions on behalf of the child, such as how the child will be educated, religious education, whether the mother may travel with a child, the right to determine where the child will reside, and the general welfare of the child. The child's legal custody is consistently awarded to the father of the child.<sup>14</sup> Our submission is that the allocation of child custody in Muslim personal law discriminates against women and brings back the ugly memory of the marital power of a husband where men took major decisions while women were viewed as perpetual minors.

## 2.1. Who has a right of child custody in terms of the Quran?

There is no explicit mention of the right to custody of the mother in the Quran.<sup>15</sup> Muslim jurists presumed it from the following verse "the mothers shall give suck to their children for two whole years if the father desires to complete the term."<sup>16</sup> Based on this verse, Muslim jurists have drawn an inference that mothers should be given custody of their young children.<sup>17</sup> The Quran is silent about persons who are entitled to child custody, but few hadiths have discussed the mother's preferential right to child custody. According to tradition, a woman came to the prophet and said, "O prophet of God! This is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care", to which the prophet replied, "thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger".<sup>18</sup>

It is beyond any doubt that the period of custody commences from the child's birth and is usually not in dispute during the subsistence of the marriage. There is a difference of opinion among Muslim jurists regarding when the right of custody terminates.<sup>19</sup> The rationale for this difference of views may be due to the fact that both the Quran and *Sunnah* (normative behaviour of the prophet Muhammad documented in a book form called hadith) are silent about the limitation of the period of

<sup>12</sup> Uhlman, Kristine and Kisselburg, Elisa 'Islamic Shari'a Contracts: Pre-Nuptial and Custody Protections' 2013 *Journal of Child Custody* at 365.

<sup>13</sup> *Women's Legal Centre Trust v President of RSA and Others, faro v Bingham NO and Others, Esau v Esau and others* (22481/2014, 4466/2013, 13877/2015; 2018 (6) SA 598 (WCC) – Case No 612/19) [2020] ZASCA 177 (18 December 2020) para 51.

<sup>14</sup> Fn 12 supra at 365.

<sup>15</sup> Moosa, Najma 'Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa' 1998 *South African Law Journal* at 489.

<sup>16</sup> Quran 2: 236. The English translation of the Quran used for this work is by Abdullah Yusuf 'Ali (Beltsville: Amana Publications, 1997).

<sup>17</sup> Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Hamdard Academy, 1978), 1: 719.

<sup>18</sup> Sabreen, Mudarsa 'Custody in Islamic Law: A Law Based on Presumptions' 2017 (56) 3-4 *Islamic Studies* 277.

<sup>19</sup> *Ibid* 277.

custody. As a result of the difference of opinion, if the Muslim marriage is eventually dissolved by divorce and both parties demand their right to custody, the right to custody would have to be resolved. According to the *Imam-Hashafi* school of interpretation, the mother has a right of custody until the child can take care of himself. A child is regarded as capable of taking care of himself if he can feed himself, bathe himself without assistance, and use the toilet without assistance. The approximate age is seven years for boys.

According to the *Hanbali Madhab* School of interpretation, custody in the case of divorce is granted to the mother of the child. The mother of the child continues to have child custody until the child reaches the age of seven years for a boy and until marriage for a girl.<sup>20</sup> After that, the boy has a right to exercise his freedom of choice by choosing which parent he wants to reside with. If the mother decides to remarry, she loses her right to child custody, and the custody will pass to the one who is next in line. According to the *Maliki Madhab* School of interpretation, custody of the child after divorce is granted to the mother of the child. The mother of the child is permitted to have custody of the boy child until he reaches puberty. After he reached puberty, he can exercise his freedom of expression by choosing whether to stay with the mother or stay with the father.

On the other hand, the mother continues to have custody of the girl child until she marries<sup>21</sup> and marriage is consummated. There is no transfer of custody to the father later. According to the *Hanafi Madhab* School of interpretation, custody of the child remains with the mother of the child. The mother retains the boy child's custody until the age of puberty or the age of discernment. After the age of puberty, a boy can choose between staying with his father or his mother. The *Hanafi* differed on the age of transfer of custody for a boy, with some of them putting it at seven years while others opted for nine years. When he reaches the age of discernment, he can decide which parent to reside with. The girl's custody remains with the mother until the girl is nine years or eleven years.<sup>22</sup> When she reaches puberty, she is transferred to the father's custody so that he can prepare her for marriage. According to the *Shafi-Madhab* School of interpretation, the custody of children (both girls and boys) remains with the mother until they reach seven or the age of discretion. Both girls and boys choose to stay with the mother or live with the father.<sup>23</sup> The lack of clarity from the Quran on child custody is attributable to the lack of consensus among different Islamic schools of thought. The following section discusses the requirements a mother must fulfil to qualify for physical custody in Islamic law.

## 2.2. Requirements for a mother to qualify for physical custody of the child

The mother's intellect or sanity is one of the critical requirements considered when determining whether the mother is a fit a proper person to be granted child custody.<sup>24</sup> This is an important requirement because even common sense dictates that a madwoman needs to be taken care of and cannot take care of another person, let alone a minor child. Trustworthiness is another crucial requirement that is considered when awarding child custody in Islamic law. If the mother frequently indulges in sin such as adultery, there is fear that she might negatively influence the child, thus reducing her chances of getting custody of her child.<sup>25</sup> If the mother is affected with a chronic or contagious disease, she is considered not worthy of having custody of the child because of fear that she might affect the child. The child's mother is expected to be a person of good character to qualify for child custody. She is not expected to remarry for her to retain custody of her child. She loses custody if she marries a *Ghayr Mahran*, described as a stranger or a person who is not related to the child according to the prohibited degree of consanguinity. If she marries within her deceased husband's family, she does not lose custody of her child. This prohibition against the mother's remarriage is discriminatory and is not likely to pass constitutional muster. Moreover, it is not likely

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<sup>20</sup> Ibid ( note 11) at 229.

<sup>21</sup> Ibid (note 11).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid (note 5).

<sup>25</sup> Ibid.

to promote the best interests of the child.<sup>26</sup> The mother should stay in an environment where the child will not be exposed to any moral or physical risk and where the father can visit and come back on the same day.<sup>27</sup> This is so because the father is viewed as the protector and the provider of his family. The latter requirement might have good intentions, but it gives an impression that the husband is the only one who is wise and capable of making important decisions with the wife as his subordinate. This requirement is unlikely to pass constitutional scrutiny because it discriminates unfairly against women. The following section is devoted to discussing circumstances that may lead the mother of the child to lose her custodial rights.

It is noted that once child custody is granted, it is not permanent, and the mother will lose it if she becomes insane. In a similar vein, the mother of the child loses her custodial rights if she remarries a *Ghayr Mahran* (stranger, according to Sharia). A person who is not blood-related to the child is regarded as a stranger, but if the child's mother remarries within her deceased husband's family, she does not lose custody of her child.<sup>28</sup> If she does not attend to the child because she is often away from home, she might lose custody of her child. The above gives the impression that a woman's place is in the kitchen where she is expected to cook for her husband and not to be an employee because if you are employed, you are likely to be constantly away from home. This is not cognisant of the fact that women are also employees in our contemporary society because of the pressing financial needs. This raises the issue of equality and is not likely to pass constitutional muster.<sup>29</sup> When she changes a place of residence and resides in a long distance where the father cannot visit the child and come back the same day, she might lose her custodial rights. Again, this raises the issue of equality between the spouses and is not likely to pass constitutional muster. And if the mother is infected with a contagious disease, she may lose her custodial rights in terms of Islamic law. In the following section of this paper, the restoration of custodial rights would be discussed.

If the barriers are removed, then the right to custody is restored. However, if she remarries a stranger (a person not from the ex-husband's bloodline), custody will not revive. If she marries a total stranger, she will not lose custody until the marriage is consummated. The father or other legal guardian must claim custody of the child within one year; if not, the child will reside with her and the *Ghayr Mahran* husband.<sup>30</sup> On the other hand, if she lost custody involuntarily, for example, through sickness or the father moving to another place of residence, her right to custody will revive as soon as she gets healing or the father returns to his former place, or she moves to the father's new place of residence. This also raises the issue of equality between the spouses, and again this is not likely to pass constitutional muster. The following section of this paper intends to discuss the regulation of child custody under common law.<sup>31</sup>

Thus far, our position has been that custody in Islamic Law is likely to clash with the Constitution of South Africa; hence we insist that another legal regime may accommodate the child's best interests. We consider the South African Common Law next.

### 3. Custody in terms of the Common Law

The custody of the child implies control over the child and assuming the responsibility of caring for the child daily. The Children's Act<sup>32</sup> provides an extensive definition of care concerning a child. It commences by stipulating that caring for the child means providing the child with a suitable place of residence, the living conditions favourable to the child's health, well-being, development, and the necessary financial support. In doing so, the custodian parent is expected to provide the latter mentioned necessities within his or her available means or according to his or her affordability.<sup>33</sup>

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Children's Act 38 of 2005.

<sup>33</sup> Section 1 of the Children's Act 38 of 2005.

Caring for the child also means 'respecting, protecting, promoting and securing the fulfillment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights, and the principles set out in chapter 2 of this Act.'<sup>34</sup> In addition to this, caring for the child extends to include 'guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development.'<sup>35</sup> Caring for the child also includes humanely managing the child's behaviour, 'advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development.'<sup>36</sup> Keeping a complete and good relationship with the child is also a custodian parent's duties and catering for any special needs that the child may have. In taking care of the child's specific interests above, it is important to ensure that the child's best interest is paramount in all matters affecting the child.<sup>37</sup> The Children's Act portrays parents and children not as enemies but as partners who undertake the joint responsibility for the harmonious development of the child's personality.<sup>38</sup>

### 3.1. Who has a right of child custody under Common Law

In contradistinction to Islamic Law, the common law may grant custody to any interested party regardless of the gender of that person, provided that it is in the child's best interest to do so. According to Islamic law, the child's mother loses custody if she marries a *Ghayr Mahran*. In terms of the Common Law, the contrary, the remarriage to a *Ghayr Mahran* has no impact on the child's custody remaining with the mother. Therefore, custody does not depend on who the mother remarries. In terms of the common law, if the mother is constantly away from home due to her work's nature, she cannot lose her child's custody. This position sharply contrasts with its Islamic Law counterpart. The Common Law allows a custodial mother to change the child's place of residence without having to seek consent from the father. Changing a child's place of residence will not result in custody being lost. However, if she wants to take the child out of the country, she needs the other parent's consent unless the court has ordered otherwise. On the contrary, a mother loses custody of her child under Islamic law if she changes the place of residence and stays in a place where the father cannot visit the child and come back the same day.

Any person having an interest in the care, well-being, or development of the child may make an application in the High Court, Divorce Court in divorce matters, and Children's Court for an order granting custody to the applicant on such conditions that the court may deem fit.<sup>39</sup> When considering an application for child custody, the court must take into account the following important factors: '(a) the best interest of the child; (b) the relationship between the applicant and the child, and any other relevant person and the child; (c) the degree of commitment that the applicant has shown towards the child.'<sup>40</sup> Furthermore, the court must consider '(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and (e) any other fact that should, in the opinion of the court, be taken into account.'<sup>41</sup>

The concept of the best interest of the child as it applies in terms of the South African common law warrants a separate discussion.

### 3.2. The best interest of the child

The Convention of the Right of the Child (CRC) provides that the doctrine of the best interest

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Admark Moyo "Reconceptualising the 'Paramountancy Principle': Beyond the Individualistic Construction of the Best Interest of the Child" 2012 (12) African Human Rights Law Journal 171.

<sup>39</sup> Section 23 (1) of the Children's Act 38 of 2005.

<sup>40</sup> Section 23 (2) (a) (b) & (c) of the Children's Act 38 of 2005.

<sup>41</sup> Section 23 (2) (d) and (e) of the Children's Act 38 of 2005.

of the child shall be a primary consideration in every matter concerning the child.<sup>42</sup> South Africa is a signatory to the Convention and is therefore bound by the provisions of the Convention. It is commendable that South Africa has domesticated the Convention by including the concept of the best interest of the child in the Constitution<sup>43</sup> and the Children's Act.<sup>44</sup> The Act provides that 'in all matters concerning the care, protection and the well-being of a child the standard that the child's best interest is of paramount importance must be applied.'<sup>45</sup> The determination of the best interest of the child is not an easy exercise, and the matter has been exacerbated by the fact that the concept of the best interest of the child has not been given an exhaustive treatment in the South African, foreign, and international jurisprudence.<sup>46</sup> The imprecision surrounding the concept of the best interest of the child has led one of the legal commentators that it is indeterminate and working with it is similar to exercising the Solomonic judgment.<sup>47</sup> It has been observed that there is another difficulty regarding the application of the concept of the best interest of the child, in that 'what is best for a specific child or children cannot be determined with absolute certainty.'<sup>48</sup> In the Constitutional Court judgment in *S v. M*,<sup>49</sup> Sachs J acknowledged the indeterminacy of the concept of the best interest of the child and held that it provides little guidance to those given a task to apply it. The learned judge held that: it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child. Furthermore, the list of factors competing for the core of the best interests is almost endless and will depend on a particular factual situation.

The children's Act ameliorated the situation by providing for the factors that ought to be considered 'whenever a provision of this Act requires the best interests of the child standard to be applied.'<sup>50</sup> During child custody disputes some factors have to be taken into consideration when determining the best interest of the child, namely: '(a) the nature of the personal relationship between the child and the parents, or any specific parent and the child and any other care giver or person relevant in the circumstances;<sup>51</sup> (b) the approach of the parents or any specific person towards the child and the implementation of parental duties and rights in respect of the child;<sup>52</sup> (c) the capacity of the parents, or any specific parent or caregiver to provide for the needs of the child together with emotional and intellectual needs will also be taken into consideration in determining the best interest of the child;<sup>53</sup> (d) the likely effect on the child of any separation from both or either of the parents or 'any brother or sister, or other child, or any other caregiver or persons, with whom the child has been living;<sup>54</sup> (e) the practical difficulty and experience of a child when having an interaction with both parents or any specific parent and whether that difficulty will primarily affect the child's right to maintain personal relations and direct contact with the parents or any particular parent on a regular basis;<sup>55</sup> (f) the necessity for the child to continue in the care of his or her parents, family and extended family;<sup>56</sup> (g) the child's age, maturity and stage of development, background and any other relevant features of the child will be taken into consideration when determining the best interest of the child.'<sup>57</sup>

The child's views should be considered in all matters affecting the child,<sup>58</sup> such as during

<sup>42</sup> Article 3 (1) of the United Nations Convention on the Rights of the Child (1989).

<sup>43</sup> Section 28 (2) of the Constitution, 1996.

<sup>44</sup> Section 9 of the Children's Act 38 of 2005.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

<sup>47</sup> Kaime, Thoko *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* 2009 Pretoria University Press at 110.

<sup>48</sup> Mahlobogwane, FM 'Determining the Best Interest of the Child in Custody Battles: Should a Child's Voice be Considered?' 2010 *Obiter* 233; Heaton, J 'Some General Remarks on the Concept: Best Interest of the Child' 1990 *THRHR* 96-97.

<sup>49</sup> *S v M* 2008 (1) SA 232 (CC) para 24.

<sup>50</sup> Section 7 (1) of the Children's Act 38 of 2005.

<sup>51</sup> Section 7 (1) (a) of the Children's Act 38 of 2005.

<sup>52</sup> Section 7 (1) (b).

<sup>53</sup> Section 7 (1) (c).

<sup>54</sup> Section 7 (1) (d).

<sup>55</sup> Section 7 (1) (e).

<sup>56</sup> Section 7 (1) (f).

<sup>57</sup> Section 7 (1) (g).

<sup>58</sup> Van Bueren, Geraldine 'The International Protection of Family Members Rights as the 21<sup>st</sup> Century Approaches' 1995 *Human Rights Quarterly* 732 at 742; Tobin 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' 2005 *SAJHR* 86.

custody battles. Every effort should be made to hear the opinion of the child even the child is very young.<sup>59</sup> The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>60</sup> also protects the best interests of the child<sup>61</sup> in similar terms to those provided by the United Nations Convention on the Rights of the Child (CRC). It provides that the views of the child have to be taken into consideration in matters affecting the child as follows:

In all judicial or administrative proceedings affecting the child who is capable of communicating his or her own views, [an] opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate law.<sup>62</sup>

The latter human rights instruments' provisions lead to an inference that child custody in Islamic law fails to protect the best interests of the child adequately. The consideration of a child's opinion in matters affecting him or her is crucial because it enables the court to be acquainted with the child's needs, problems, aspirations, the kind of relationship he has with each parent, and the child's personality.<sup>63</sup> The following section discusses the South African legal framework post-December 2020 and examines the changes brought to child custody under Muslim marriages. This is an important period for the Muslim community in South African history. It brought about the recognition of Muslim marriages for all purposes for the first time while simultaneously spelling out such marriages' consequences.

#### **4. The impact of the post-December 2020 legal framework on custody under Muslim marriages**

The South African Supreme Court of Appeal ordered that section 6<sup>64</sup> of the Divorce Act<sup>65</sup> was inconsistent with the equality clause,<sup>66</sup> human dignity,<sup>67</sup> best interests of the child,<sup>68</sup> and the right of access to courts.<sup>69</sup> The main reasoning behind the condemnation of the section was that it fails to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of the dissolution of the Muslim marriage in the same or similar manner as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.<sup>70</sup>

This means that the court has extended the common law position on regulating child custody to Islamic marriages. In Islamic Law, there is a general presumption that the mother is well-positioned to nurture and care for the child during the age of dependency. The regulation of child custody in

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<sup>59</sup> Boniface, Amanda E 'Revolutionary Changes to the Parent-Child Relationship with Specific Reference to Guardianship, Care and Contact' (*LLD Thesis, UP, 2007*) 536.

<sup>60</sup> Adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999.

<sup>61</sup> Article 4 (1) of the African Charter on the Rights and Welfare of the Child (1990).

<sup>62</sup> Article 4 (2) of the African Charter on the Rights and Welfare of the Child (1990).

<sup>63</sup> Grossman, CP and Scherman, IA 'Argentina: Criteria for Child Custody Decision-Making upon Separation and Divorce' 2005 *Family Law Quarterly*.

<sup>64</sup> Section 6 (3) provides that "a court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent."

<sup>65</sup> Divorce Act 70 of 1970.

<sup>66</sup> Section 9 of the Constitution, 1996 provides that '(1) everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms...'

<sup>67</sup> Section 10 of the Constitution, 1996 provides that 'everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>68</sup> Section 28 (2) of the Constitution, 1996 provides that 'a child's best interests are of paramount importance in every matter concerning the child.'

<sup>69</sup> Section 34 of the Constitution, 1996 provides that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

<sup>70</sup> *Women's Legal Centre Trust v. President of RSA and Others, faro v Bingham NO and Others, Esau v. Esau and others* (22481/2014, 4466/2013, 13877/2015; 2018 (6) SA 598 (WCC) – Case No 612/19) [2020] ZASCA 177 (18 December 2020) para 51.



Islamic law is not likely to promote the best interest of the child. It is commendable that the Supreme Court of Appeal has extended common law custody to Islamic law because there is now a high likelihood of promoting the best interest of the child. However, although we welcome extending the common law to Islamic law, this is not free from other challenges. New legal developments might not be adhered to by the Muslim community if they strongly feel that those developments are contrary to the tenets of the Islamic faith. Muslims are commanded to follow Islam wherever they find themselves globally and reject everything else that contradicts their Islamic teachings.<sup>71</sup>

This form of judicial intervention is very important because the legislature has been dilly dally around the recognition of Muslim marriages for the past two decades. The Appeal Court has declared the Marriage Act and the Divorce Act to be inconsistent with the equality clause, human dignity, the best interest of the child, and the right of access to courts with respect to the failure to recognize the validity and consequences of marriages solemnised under Islamic law.<sup>72</sup> The declaration of invalidity of the Marriage Act and the Divorce Act above was suspended for 24 months. During the suspension, the president and his cabinet and parliament will be expected to remedy the identified defects by amending existing legislation repealing it within 24 months. The amendment or repeal will ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and regulate the consequences of such recognition.<sup>73</sup> Since South Africa is in the process of enacting legislation to regulate Muslim marriages for the first time in history, we have devoted the following section to an investigation of the regulation of the custody of children born out of Muslim marriages in England as a comparative study.

### 5. Regulation of child custody after the dissolution of the Islamic marriage in England

England does not recognise Islamic marriages, commonly known as *Nika*, that are concluded in England. Like many Western countries, England is not likely to recognise Muslim and customary marriages because they are potentially polygynous. This reflects the significant normative differences between Muslim Personal law and European morality.<sup>74</sup> Polygyny is contrary to England's public policy and normative system, and any person guilty of practicing bigamy may attract a prison sentence of up to seven years behind bars.<sup>75</sup> Muslims are permitted to solemnise their religious marriages in England, but their marriages are not legally recognised.<sup>76</sup> For Muslim spouses to conclude a valid marriage, they must undergo an additional civil marriage. A survey conducted in 2017 revealed that many Muslim spouses in England ignore the further civil marriage ceremony required for their unions to be binding.<sup>77</sup> Some couples, usually Muslim men, may deliberately choose to marry only according to Islamic rites, either because they are wealthier and intend to protect their assets or because Islamic divorce can sometimes be quicker and easy to obtain.<sup>78</sup>

The case of *Akhter v Khan* affirms the deliberate choice to disregard marriage formalities. In this case, Nasreen Akhter (wife) and Mohammed Shabaz Khan (husband) concluded a Muslim marriage in 1998 but did not register their marriage under civil law. They initially intended to register their marriage under civil law later, but Khan refused to register it as time went on. They stayed together as husband and wife for 18 years and were blessed with four children. Their relationship became sour when the husband indicated that he wants to marry a second wife and eventually came to an end in 2016. Akhter issued a divorce petition, and her husband defended the divorce on the

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<sup>71</sup> Denson R, Carnelley M and Mukheibir A "The Bastardization of Islamic Law by the South African Courts" 2018 *Obiter* 154.

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*.

<sup>74</sup> Katharine Charsley & Anika Liversage "Transforming polygamy: migration, transnationalism and multiple marriages among Muslim minorities" 2012 *Global Networks* 60.

<sup>75</sup> *Ibid* at 62. Some skeptics view all polygamy as bigamy.

<sup>76</sup> See on a related note Julie Billaud "Marriage Bsharia style: everyday practices of Islamic morality in England" 2019 (13) *Contemporary Islam* 217–232.

<sup>77</sup> Brigitte, Clark "Legally Pluralist and Rights-based Approaches to South African and English Muslim Personal Law-A Comparative Analysis" 2020 (53) 2 *CILSA* 13.

<sup>78</sup> Waheeda, Amien "Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages" 2013 (1) *Acta Juridica* 357-384.

ground that they never entered into a valid marriage according to English law. In her reply, Akter argued that the marriage was a void marriage within section 11 (a) (iii) of the Matrimonial Causes Act<sup>79</sup>. Her argument succeeded, and William J held that it created a void marriage.<sup>80</sup> However, the first court's judgment was overturned by the appeal court<sup>81</sup> when it said that religious ceremony did not create a void marriage because it was a non-qualifying ceremony.<sup>82</sup> English law differentiates between valid, void, and non-qualifying ceremonies.<sup>83</sup> A valid marriage satisfies all the formalities in terms of the Marriage Act. A void marriage fails to meet all the necessary formalities and is null under section 11 of the Matrimonial Causes Act. In a void marriage, the parties reasonably believe that they have done everything necessary under the Marriage Act when in fact, they have not. For void marriages, parties are entitled to the same family law remedies that divorcing couples in valid marriages have under part ii of the Marriage Act. Non-qualifying ceremonies do not fall under the ceremonies envisaged by the Marriage Act at all. Parties in non-qualifying ceremonies are not entitled to any of the legal protections of void and valid marriages.<sup>84</sup>

Islamic marriages solemnised outside England are recognised as marriages in England provided that the marriage ceremony is recognised as a form of marriage by the law of the country where the ceremony takes place. Both parties must have the capacity to marry the other party under the law of the place where they are domiciled.

## 6. Conclusion

*Hidhana* (custody) means nurturing, raising, or bringing up the child in Islamic jurisprudence. Child custody does not usually arise during the marriage relationship because the married couples typically share it. Challenges and problems are an inevitable part of life no matter how religious you may be, and other problems may eventually lead to the severance of marriage by divorce. Typically, the battles of child custody usually arise after a divorce. Even though divorce is permissible in Islamic law, it is highly discouraged because it is regarded as unpleasant before Allah's eyes. Unfortunately, if the marriage ends up being severed by divorce, the question of who will reside with the child can arise. According to Islamic law, the mother of the child is generally presumed to be caring, loving, and more compassionate than her husband. As a result of this, physical custody is usually granted to the mother of the child, while legal custody belongs to the father of the child. Islamic law provides for some requirements for custody to be awarded, namely: intellect (sanity), trustworthiness, unaffected with a chronic or contagious disease, good character, for the mother not to remarry, and the mother should stay in an environment where the child will not be exposed to any moral or physical risk. Some of the requirements for custody are not likely to pass constitutional muster because of their discriminatory nature. A condition that the child's mother should not remarry to retain custody of her child is blatant discrimination because the father is not expected to undergo the same process. The mother of a child is expected to reside in an environment where the father can visit and come back the same day. Failure to adhere to that may lead to custody being taken away from her. Again, this sounds discriminatory and leaves much room for arbitrary decisions that might not be in children's best interests.

The common law definition of care concerning the child and the factors that are taken into consideration before granting child custody are more likely to promote the best interests of the child. On the other hand, the unmodified regulation of child custody in terms of the tenets of Muslim family law is not likely to promote the best interest of the child. The judicial intervention is highly commendable because it extended all the legal protections available in civil marriages and customary marriages dissolved through divorce to Muslim marriages terminated by divorce. Before the

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<sup>79</sup> Matrimonial Causes Act of 1973.

<sup>80</sup> Para 5.

<sup>81</sup> Attorney General v Akhter and another 2020 EWCA Civ. 122.

<sup>82</sup> Para 123.

<sup>83</sup> Vora, Vishal "The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom" 2020 (40) 1 Journal of Muslim Minority Affairs 150-151.

<sup>84</sup> Para 5.

December 2020 judgment of the Supreme Court of Appeal in *Women Legal Centre and Others Trust v President of RSA and Others*, Muslim marriages were not recognised in South Africa. The above is notwithstanding South Africa having become a democracy in 1994. In the judgment, the Supreme Court also declared section 6 of the Divorce Act<sup>85</sup> to be inconsistent with section 9, 10, 28, and 34 of the Constitution<sup>86</sup> because it fails to provide mechanisms to safeguard the welfare of minor children of Muslim marriages during the dissolution of such marriages in the same manner as provided in the common law for other unions. The Supreme Court further ordered that all provisions of the Divorce Act will apply in Muslim marriages dissolved by divorce. This means that the court has rightfully extended the common law position on child custody to Islamic marriages to safeguard minor children's interests from Muslim marriages after divorce.

As already argued above, it is easy and fast for the husband to petition for divorce, and he does not require permission from anyone to do so. On the contrary, a wife is expected to undergo a stressful and cumbersome process of seeking her husband's consent if she intends to revoke her marriage contract through *khula* or approach Ulama for *faskh* as an alternative. If she succeeds in divorcing her husband through *Khula*, she exposes herself to the possibility of losing every financial benefit associated with the dissolution of her marriage, and she might leave her marriage with nothing. Muslim marriages are generally out of community of property and resemble a marriage out of community of property without an accrual system. Common sense dictates that a financially weaker party sustains untold sufferings during the dissolution of a marriage. Because most women in Muslim marriages are not economically active, dedicating most of their time to house chores and the rearing of children, they are more likely to be financially weaker parties. The decision in the case of *Women Legal Centre Trust* is welcomed because it alleviates the plight of Muslim wives' by extending the common law position to Muslim marriages. In terms of the common law, both spouses have an equal right to petition for divorce if they feel that their marriage is irretrievably broken down. Moreover, now Muslim women can access civil courts to petition for divorce and also have access to legal protections afforded by common law and to challenge any discriminatory practices ascribed to Muslim family law.

The decision mentioned above must also be hailed because it partially addresses the discrimination problem prevalent in Muslim divorces. As a result of this judicial intervention, now both Muslim spouses have an equal opportunity to petition for divorce whenever they deem fit. The regulation of child custody in terms of the tenets of Muslim family law does not adequately protect the best interests of the child. It is not likely to pass constitutional scrutiny, so the appeal court was correct in its decision to extend common law custody to Muslim marriages. If the Muslim marriage is dissolved through divorce, it would immediately attract the intervention of the office of the family advocate and, eventually, judicial oversight. Considering that the South African parliament is currently seized with enacting legislation to regulate Muslim marriages, this comparative study with England will add to the body of available knowledge to enrich the legislative making process. We chose England because it has some Muslim communities resident in it. South Africa can learn from the weaknesses in the relevant law in England and legislate to avoid similar pitfalls. Muslim marriages are not recognised in England simply because they are polygynous in nature. The foregoing is a clear reflection of normative differences between Muslim family law and European values and their sense of morality. Empirical evidence referred to earlier revealed that many Muslims in England only solemnise their religious marriages and fail to undergo an additional civil ceremony to validate their marriages. As a result of this, many women are left out in the cold without any legal protection during the dissolution of their marriages; the other spinoff is that the best interest of the child is not protected in the process. The failure to recognise Muslim marriages in England is blind to the social realities on the ground and the inevitable existence of cultural and religious diversity in a contemporary society. In turn, England can learn one or two things from the South African landmark judgment that recognised Muslim marriages. The landmark decision is cognisant of cultural and religious diversity in South African society and is more like to promote social justice. In passing the new legislation,

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<sup>85</sup> Section 6 of the Divorce Act.

<sup>86</sup> Section 9, 10, 28 and 34 of the Constitution, 1996.

South Africa is warned against lapsing into cultural bigotry and other weaknesses obtaining its English law counterpart.

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