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The American University in Cairo
School of Global Affairs and Public Policy

**INDETERMINACY OF THE BEST INTEREST OF THE CHILD AND SHARI'A
RULES IN CUSTODY ADJUDICATIONS: EGYPT CASE**

A Thesis Submitted by
Hala Ahmed Nour El-Din
To the Department of Law

Spring 2021

**in partial fulfillment of the requirements for the Masters of Arts in
International Human Rights Law and Justice**

The American University in Cairo

School of Global Affairs and Public Policy

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DEDICATION

To the soul of the strongest woman I have ever known - Safaa Sawan.

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INDETERMINACY OF THE BEST INTEREST OF THE CHILD AND SHAR'A
RULES IN CUSTODY ADJUDICATIONS: EGYPT CASE

Hala Ahmed Nour El-Din

Supervised by Professor Jason Beckett

ABSTRACT

This thesis argues the rigidity of custody adjudications in the Egyptian Law owing to the indeterminate legal terms and Islamic rules that guide the decision-making process of custody cases. It also proposes reconsideration of the best interest principle's guiding criteria and custody Shari'a presumptive rules in light of the subjective interpretation of the judges in custody related matters. The principle of best interest (BI) which is the prevailing guiding criterion in regulating all matters related to children, particularly in custody-related decisions. Even though the principle has been present in international law at the beginning of the 20th century, there is no consensus on its definition and the term itself is ambiguous. The definition is highly contested with regards to governing custody settings or arrangements. While in Muslim and Arab countries, Shari'a presumptive rules guide the current legal reasoning particularly in custody after marriage dissolution. I argue that these rules require a scrutiny of the requirement of its application in the custody decision making process. I take Egypt as a model showing the limited transformation in custody rules. Finally, I reflect on some legal practices in custody adjudications in Australia and Tunisia to explore the best practices beyond the best interest and Islamic rules, introducing a reform proposal to illuminate a tangible path toward reform of custody legislation in Egypt in light of the indeterminacy of legal terminology and the presumption of Shari'a.

KEY WORDS: Best interests of the child – Child Custody- Shari'a presumptive rules-Custody Law reform- Custody adjudications- Family Law

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I. INTRODUCTION

"Children are not mini persons with mini rights, mini feelings, and mini human dignity.

They are vulnerable human beings

*with full rights which require more, not less protection."*¹

Deputy Secretary-General, Council of Europe (2005)

A- Back ground

The 1989 United Nations Convention on the Rights of the Child, adopted by the United Nations General Assembly, marks a significant step in recognizing the well-being of children around the world. This convention is playing significant role in all decisions and actions concerning the child. The term 'best interest of the child' stated in Article (3) of the Convention has become the fundamental principle for legal decisions in family law courts in most countries.² Article (18) states that the best interests of the child are the parent's basic concern. The term BIC has received its popularity on the academic level more than any other term mentioned in the treaty.³ However, the convention does not provide guiding criteria on what establishes the best interest of the child. There is no consensus among scholars or the members of the general committee of the UNCRC about what constitutes the best interest of the child, and there is a clear gap in the agreement of certain criteria that should be considered when determining the best interest for the child, particularly after marriage dissolution. While in countries that honor Islamic legal tradition, jurists base their assumptions about child welfare in custody-related matters on presumptive calculations such as the child's custody termination of age, the marriage restrictions of the mother, , the religion of the custodian, and lifestyle choices.

These presumptive rules that assume to be working in the interest of the child have governed custody adjudications in Islamic countries from the sixteenth century until today. This contributes to the solidification of legal terms, but also to substantively rigid custody rules.

¹ Speech by Maud de Boer-Buquicchio at a conference on violence against children in Europe on 20 October 2005Berlin, retrieved from: https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/DSG_Malaga_Conf_speech_en.pdf

² <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³ Application manual for the Convention on the Rights of the Child, UNICEF 36 (July 1999).

These presumptive rules may be rebutted since they are not divine, but in some cases they seem to be inflexible and not logical or even convincing, as will be tackled later.⁴

As will be discussed later in this paper, the BI term began to be used primarily by state and international actors to protect the welfare of children from mistreatment by their legal guardians. In Egypt, the state's responsibility to protect the interests of children is enshrined in law. According to Article 1 of Egyptian Child Law No.126 for 2008, the state's role is to protect children and provide appropriate conditions for their upbringing to ensure their dignity and freedom. The rights of children as stated in the Convention on the Rights of the Child and other relevant international covenants must also be guaranteed in Egypt.

Given this context, it is worth noting that the state plays a significant role in protecting children's rights through various state actors such as the Probate Prosecution (*Al-niyaba Al-hisbya*), the Juvenile Court, and the Administrative Judiciary Court.

When it comes to the financial affairs of children, the Probate Prosecution, which is under the authority of the general prosecution, regulates the financial transactions and properties of minors in accordance with Law 99 of 1947. These transactions are subject to complicated procedures overseen by the public prosecutor. The judge decides whether minors have the right to manage their financial affairs based on the evaluation of the best interest of the child and after hearing the statements of the child's guardian.⁵

When a child commits a crime, the state intervenes by establishing juvenile courts. "The Juvenile Court shall have exclusive jurisdiction to consider the matter of the child when he is accused of a crime or subjected to delinquency," according to Article (122) of Law No. 12 of 1996 promulgating the Child Law. The judges of the juvenile court examine the child's circumstances, home environment, family status, and the reasons that led them to commit the crime with the assistance of social workers.⁶

Meanwhile, for administrative decrees that govern custody arrangements in family courts, the state gives the Court of Administrative Justice (CAJ) of the state council the authority to overturn these decisions, particularly if they may cause harm to the child and work against the child's best interests. This occurred in 2019, when the CAJ repealed the ministerial decree

⁵ <http://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=306&related>

⁶ https://www.cc.gov.eg/judgment_single?id=111147296&ja=150446

1078/2000 regulating the child's vision in certain locations (youth centers, social or sports clubs, public gardens, motherhood and childhood centers) with certain hours between three and five hours that may not be suitable for the child in the location, time, and psychological environment. The decision was canceled because the Administrative Judiciary Court found an omission and overruled of the judge's authority in the decision. However, this cancellation serves the best interests of the child, which should be considered on an individual basis rather than being generalized through such decisions.⁷

Thus, the BI application is being mainstreamed in Egypt through various state stakeholders on the basis of protection provision and the preservation of the child's dignity in accordance with international conventions. However, the judge's discretionary power remains the primary player in determining what is best for the child from a subjective standpoint.

B- SIGNIFICANCE OF THE STUDY

Ultimately, custody disputes gain their complexity from being part of the post-divorce proceedings where the issues of allocation and custodian lifestyle are auxiliary. This means that we have both partners who are engaged in a divorce settlement and at the same time involved in the arrangements of the child custody.⁸ Thus, the term of the best interest is presented in the context of its conflict or competition with other interests, such as the interests of parents.

The literature covering this area is sparse and more work should be done to consider children's welfare particularly in Egypt. This maybe returns to the difficulty of the legal situation in custody related issues. As described by John Elston, "Few legal situations are as agonizing as child custody disputes in divorce cases."⁹ He explains that the situation is painful as it involves two parties: the parents and the children. Also, custody disputes are traumatic even for the judges, who report that they are very hard to decide on.¹⁰

⁷ <https://www.youm7.com/story/2019/8/3/-إلغاء-القرار-المنظم/4359368>

⁸ CHEN Wei et XIE Jingjie . *A commentary on the principle of the child's best interests-the weakness and improvement of marriage and family law*, 59, (2008).

⁹ Jon Elster. "Solomonic Judgments: Against The Best Interest Of The Child". *The University Of Chicago Law Review*, vol 54, no. 1, 1, (1987).

¹⁰ *Id.*

C- SCOPE

The paper proposes a reassessment of the guiding criteria of the best interest principle and Shari'a presumptive rules in custodial disputes in light of the absence of well-defined term of BI. It questions the issue of self-abstraction that may be one of the major challenges while interpreting the situations that child can live and making decisions in the name of his/her interest. I am not asking for these principles and laws to be debunked, but what I am discussing is having a set of criteria that would guide the decision of the judge instead of having adjudications under the name of child's best interest while it is fully based on individual opinion.¹¹

Also, this paper reflects on some of advanced legal practices of countries to identify the best interests of the child in custodial disputes to better advocate for the children's rights such as Australia and light reforms in Tunisia that would give insights into the way forward to have a reformist proposal in custody law in Egypt.

D- METHODOLOGY

I will go through the texts of international conventions to analyze the development of BI term. Also, I will show the different opinions of Islamic legal schools in some custody rules and its impact on the child's wellbeing. Finally, through my interview with family law attorney, I will analyze the interview transcript and try to incorporate my observations in my argument.

My paper includes three chapters. Chapter one sets out the origin and the evolution of the BI term in the international legal framework, more precisely, human rights instruments. Since this guiding principle is the legal construct of custody adjudications in many domestic laws, it is important to shed light on the evolution of the term in the international context. It also reflects on the controversial debate surrounding the term which has prevailed in most literature and on other platforms tackling the concept.

Chapter two discusses the elements that were considered in the early interpretation of Islamic jurisprudence as protective factors for the child's well-being, particularly when it comes to custody issues after separation. I elaborate on the presumptive rules or the legal reasoning of different Islamic schools that guide the custody adjudications in most of countries following Shari'a as a source of Law, including Egypt. The purpose of this reflection, as mentioned before, is the assumption of its indeterminacy that produce solid and rigid adjudications that can be rebutted in certain situations. Also, in this chapter, I analyze my field notes from the

¹¹ Jean Zermatten, *The Best Interests of the Child Principle: Literal Analysis and Function*, *The International Journal Of Children's Rights*, 18(4), 483-499. (2010)

interview of a lawyer specialized in personal status law and also some notes from Law cases in custody in Egypt.

Chapter three studies legal practices in Australia and Tunisia. And to what extent these legislations and its applications considered the child's welfare in custody disputes. Exploring the best practices of these models illuminates a tangible path toward reform of custody legislation in Egypt in light of the indeterminacy of legal terminology and the presumption of Shari'a.

II. BEST INTEREST OF THE CHILD IN THE INTERNATIONAL LAW

The concept of the child's best interest has a long, and controversial history. The debates surrounding BI of the child continue to today. This chapter looks at the historical development of the term BI to see how this indeterminate was developed to guide all matters related to the child. I will start by reflecting on the history of the development of the western term BI. It begins with a historical perspective of the term BI followed by the evolution of the term BI in the human rights instruments, it concludes by the debates on the indeterminacy of the BI in different academic and practical fields.

A. Historical perspective of BI term

Gaining a historical perspective of child best interest's supports an understanding of the development of the term in the western societies and how they did perceive it .

The in-depth search of the roots of the term BI guides the researchers interested in the field of child's custody to understand how the term was historically developed and provide a framework within which the key point of my dissertation can be understood, which is the indeterminacy of legal term would result in rigidity and inflexibility of the decision making process in custody adjudications of the term in custody.

The child's best interest is a concept that already has historical origins in Western and Islamic jurisprudence. Today, it does not only incorporate international agreements and treaties but also dominates the decision-making process in the family courts with regard to post-separation parenting conflicts.

one of the arguments of BI term that was established in favor of some gender. However, there has been a move away from gendered and moral assumptions on what is best for children in terms of child's well-being to focus on the needs and rights of children.¹²

The term BI shaped the social morals and standards of the societies as Moloney illustrated that Social values and standards emerged out of the best interests of children, and the law that inspired modern laws, such as those Canada, Australia, and Britain, goes back to Roman law.¹³ The Roman concept 'Paterfamilias' was based on many factors, including the father's

¹² Moloney Lawrence, *The Elusive Pursuit Of Solomon: Faltering Steps Toward The Rights Of The Child*, FAMILY COURT REVIEW 39, (2008).

¹³ *Id* at 40.

ability to provide financial support, schooling, and the assumption that children were the property of their father.¹⁴

An example of this is Kelly's 1994 study of a household male being the primary legal decision-maker in the early Roman Republic, which ultimately gave him full custody of his descendants and absolute power to even trade and sell his children.¹⁵

In English common law, the father was the family member who had control over all the children's concerns as he was considered the primary guardian of the child. This guardianship allowed the father to have absolute power and the legal right to support, protect, and educate his children.¹⁶ In contrast, a mother's role was described in terms of nurturing and caring for her children.

When the industrial revolution took place in Britain in the eighteenth century, men had to find work, and women became the center of the household.¹⁷ Consequently, the courts at these times provided the custody of the children to their mothers. This approach was based on the biological features of the mother to provide care for her children. While in Islamic discourse, the father is the natural guardian of his children in property and personal matters.¹⁸ The role of women as a legal custodian prevailed the Islamic legal tradition and the word "basic interest" or "child welfare" has been used to refer to the well-being of children, which is under the primary responsibility of the mother.¹⁹

In the eighteenth century, when divorce cases grew more common, fathers' applications in the court were submitted to prove that the mother was incapable of being the custodian.²⁰ At this point, the judges started to consider the welfare of the child in the decision-making

¹⁴ Radin, M. (1927). *Handbook of Roman law*. St Paul, MN: West Publishing Co. Cited in *supra* 14 at 42

¹⁵ Joan.B.Kelly, *The Determination Of Child Custody, The Future of Children*, 121 (1994).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ In Shari'a, there are two forms of guardianship; the first is the guardianship of the person and the second is the guardianship of property, where the first is defined as the power and conduct of the ward's personal affairs, such as marriage, schooling, discipline, medical treatment, career prospects, and the second is the power to conduct, administer and conclude contracts and other legal conduct. In case the death of father, the guardianship goes to a male relative or appointed guardian.

¹⁹ Ahmed Fekry Ibrahim, *Child Custody in Islamic Law: Theory and Practice in Egypt since the Sixteenth Century*, Cambridge Studies in Islamic Civilization, 3, (2018).

²⁰ Margo Ann Kushner, *Is "best interests" a solution to filling potholes in child custody planning?*, *Journal of Child Custody*, 3, 71–90. (2006)

process, particularly in divorce cases.²¹ Consequently, calls to have gender-neutral laws in custody matters were mainstreamed.²²

When the best interest term began to float around the international legal system, some argued that there had been a shift from the traditional family relationship to the state since it was claimed that children did not receive proper treatment and support from their legal guardians.²³ There was a need to provide a system within which the relationship between the family and the state could be more controlled. Gradually, society has become more involved in the well-being of children, and protection laws and educational responsibilities have arisen in developed countries.

B. Evolution of the BI Concept in Human Rights Instruments

The evolution of the BI concept in human rights instruments is rarely traced and mostly referred in the 1989 United Nations Conventions for the Rights of the Child. However the coming section will reveal the evolution of the term of term in the Human rights instruments earlier than 1989 UNCRC.

1. 1902 Hague Convention.

The Guardianship Convention 1902 or the Hague Convention, was the first convention to question the guardianship of minors. This convention was a clear translation of the shift that has happened from traditional family relationships, to the point where the state has an interest in children who are its subjects. It connected children to the state through nationality, which was shared, by force of the law, with the father.²⁴ Through this convention, the state gives itself the right to take the necessary steps or legal measures when a household fails to provide protection for its children.

The purpose of the Convention is to safeguard the guardianship of minors and govern by the law through local authorities in case of a failure of the responsible guardian. In Article 7 of the 1902 convention stated that where no appointment of a guardian had been made, or in urgent

²¹ Danaya.C.Wright, *The crisis of child custody: A history of the birth of family law in England*. Columbia Journal of Gender and Law, 187, (2002).

²² Lawrie Moloney, *Family Formation and Family Transition: Law, predictability, and context*, Journal of Family Studies,184-191, (2010).

²³ *Id.*

²⁴ Peter Nygh, *The Hague Convention On The Protection Of The Children*, Netherlands International Law Review, 2, (1998).

cases, the local authorities, presumably of the place where the minor was present, could take temporary measures for the protection of the person of the minor or its (property) interests.²⁵

2. 1924 Geneva Declaration of the rights of the child

The concept of protection or safety of the minors was strengthened by the Geneva Declaration through its five principles, which added further pillars to the principle of protection, including the well-being of children, the right to growth, assistance, relief, and safety, particularly after the first world war. The Geneva Declaration was the first to discuss children's rights. In the context of the declaration, children's rights to be protected against slavery, child labor, child trafficking, and child prostitution were prioritized.²⁶

The Geneva Declaration was a major effort to recognize the obligations states have towards children, and it was concerned with the children's rights to access the basic needs which are essential to their spiritual and material development.²⁷ Thus, this declaration was a pillar to recognize children's fundamental right, though it was not legally binding.

The Geneva declaration of the rights of the child was based on the principle that "mankind owes to the child the best it has to give." In fact, this principle was embodied in its preamble. It reads as follows: By the present declaration of the rights of children, men and women of all nations, acknowledging that humanity owes the best it has to give, declare and embrace as its obligation to the child."²⁸

However, it was not determined what is best for the child that should be provided. The declaration offers more a rhetorical text than a legal guiding instrument in children's rights.

3. 1948 Universal Declaration of Human Rights

This convention states that everyone, including children, has a right to a quality of life that is appropriate for their health and well-being. The basic rights refers to food, clothes, housing, medical care, and other required social services. This declaration did not add too much to the Geneva Declaration. The only shift was in addressing the right of the child for education.

²⁵ See Article (7), Hague convention 1902.

²⁶ <https://www.humanium.org/en/geneva-declaration/>

²⁷ Jeanne Holcomb, *Children's Rights*, University Of Dayton, 1-6, (2015).

²⁸ Aron Degol and Shimelis Dinku, *Notes On The Principle "Best Interest Of The Child" Meaning, History And Its Place Under Ethiopian Law*, Mizan Law Review, 322, (2011).

Whereas, It puts the burden on the parents to determine what is best for the child, with no clear-cut obligation nor consequences if the parents fail to provide the education a child needs.

4. 1959 Declaration of the Rights of the Child

Unlike, the dominant knowledge in the academia that the best interest concept was first introduced in 1989 UNCRC, the United Nations General Assembly adopted the Declaration of the Rights of the Child in 1959 Geneva should be marked as the first convention containing the term of BIC. Whereby the child protection has become from the significant field in the international society.²⁹ It is worth noting that for the first time, the term best interest is clearly set out in principles 2 and 7 of the Convention;

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.³⁰

The convention stipulated rights to name and nationality, as well as attempts to ensure that children grow up in caring and understanding households, preferably with their mothers, and free and compulsory education.

Also, the declaration put more weight on the importance of the psychological well-being of the child inside the family. However, the 1959 convention did not reflect on the best interest standard in child custody disputes.

5. 1966 International Covenant on Civil and Political Rights

The 1966 ICCP convention was the first to acknowledge the rights of the child in circumstances of dissolution of marriage, where, in Article 23, (4), the State Parties are to take the necessary steps for the protection of the child., state parties are legally obliged to create a legal as well as an institutional framework within their domestic legal and judicial frameworks in order to ensure what is best for the child in dealing with issues such as custody and guardianship in cases of divorce. Also, Art. 24 puts an obligation on the family and

²⁹ عائدة اليماني، مصلحة الطفل الفضلي من خلال بعض المسائل الأسرية " تونس مثالا". رسالة لنيل الماجستير المتخصص في حقوق الطفل ، ص ٧، (٢٠٠٥)

³⁰ <http://humanrts.umn.edu/instreet/k1drc.htm>

society to provide the protection of the child's right in general and the best interest in particular.³¹

6. 1989 UNCRC convention between popularity and inconsistencies

The most recent reference for the best interests principle originated from the 1989 UNCRC, which suggested that BIC be the primary consideration in all actions that concern children regardless of whether the action was undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.³²

1989 UNCRC adopted by the UN General Assembly in November 1989 on the rights of children within the international legal system. Poland's initiative aimed to adapt the terms of the 1959 Declaration of the Rights of the Child, which was officially non-binding, so that they could be included in a legally binding treaty.³³ However, the 1989 convention expands upon the ten articles of the 1959 declaration, consisting of 54 articles tackling different facets of the child's life.

The most famous article of the CRC is Article 3 of the Convention which reinforces the guiding principle of the "best interests of the child to be a primary consideration in all actions," where "all actions" is very generic term that do not specify certain interventions. Some scholars have called for limiting this phrase by adding the word "official" to actions. However, this means to exclude the best interest of the child from the parental domain.³⁴ And this is not always applicable, especially in custody-related matters, since measuring or assessing the parents' capacity and interventions in regulating the best interest of the child are essential.

The debates continue to criticize some other terms like best interest should be "primary" or "paramount". This debate took place in the 1980's by the Human Rights Commission Working Group. Some see it as a different way of defining the terms, and other delegates in working group expressed their concern that the use of the word "paramount" in the revised Polish draft was too large and could affect the rights of others, including parents.³⁵ Nevertheless, as

³¹ <https://www.loc.gov/law/help/child-rights/international-law.php?loclr=bloglaw>

³² <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

³³ https://legal.un.org/avl/pdf/ha/crc/crc_ph_e.pdf

³⁴ Jean Zermatten, *The Best Interests Of The Child Principle: Literal Analysis and Function*, International Journal of Children's Rights, 487-488 (2010).

³⁵ Degol and Dinku , *Supra* 28 at 327.

Philip Alston observed, such formulation would “impose a burden of proof on those seeking to achieve a non-child centered result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.”³⁶

Meanwhile, this argument that using “paramount” could affect the rights of the other parties is reflected in Quranic verses, “No soul is to be tasked except according to its capacity: neither the mother shall be made to suffer harm on her child s account, nor the father on account of his child.”³⁷ This verses negates the term “paramount consideration” as it calls for a balance between the interests of the parents and the child. At the end the term “primary consideration” was adopted and the justification for that is that BI requires inclusive measures by all state bodies.³⁸

Other provisions of CRC reinforce the principle of the best interest, like Article 18, which sets out the general responsibility of the state and the family or guardian of the child. This provision imposes an international legal obligation on state parties to make every effort to ensure that the idea that both parents share responsibility for the child's upbringing and development is accepted. States have an obligation to set up administrative structures, formulate policies, and pass legislation to provide facilities and programs, such as child-care programs for working parents' children. This may, in effect, establish a favorable situation in the performance of the responsibilities of working parents to give the child what is best. However, these responsibilities may differ from one context to another based on religion, social attributes, or cultures.

While in terms of marriage dissolution, Article 9 clause 3 of CRC points out the right of the child in a situation of separation between both parents, but does not provide clear mechanisms in the situation of marriage dissolution.

³⁶ H. J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, 2nd ed., (Oxford University Press), 512,(2000). Quoted in *supra* 32 at 328.

³⁷ Verses “ 233” , Soret Al-Bakra

³⁸ Committee on the Rights of the child, General comment no. 5/2003 (34th session on the general measures of implementation of the convention on the rights of the child) 19 September/2003. Online: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiQql8gX5Zxh0cQqSRzx6Zd2%2fQRsDnCTcaruSeZhPr2vUevjbn6t6GSI1fheVp%2bj5HTLU2Ub%2fPZZtQWn0jExFVnWuhiBbqgAj0dWBoFGbK0c>

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.³⁹

The wide acceptance of the CRC meant that it was spared much harsh criticism. Or in another sense, The 196 states that ratified the convention agreed to demonstrate how committed they are to children's rights. Thus, it is accepted as a canon for children's rights, ignoring the texts of other conventions that could give more meaning to children's rights, as discussed above. Some scholars, such as Archard, argue that the UNCRC is a "codification of children's rights," defining "a recognizable canon of thought on children's rights."⁴⁰ Others, such as Holzscheiter, argue that the CRC convention is the primary driving force behind a global culture of children's rights that dominates international policy on children.⁴¹

Drawing on the above, it is clear that scholarly work has not provided much to address the gaps of the CRC. However, the work that has been done in this area tackled certain critical points that appeared in the drafts of the convention. Among these critical points is "there was a consensus to accept the vagueness in language in order to finalize the convention, otherwise the other alternative would be the failure of the state parties to have an instrument of human rights for children."⁴²

Tobin contends that the state parties have given little weight to the agreement on fundamental concepts of children's rights, but have agreed on the concept of children's rights being recognized. Consequently, any disagreement with the publication of this convention under the name of the CRC convention has been set aside. However, the underlying moral vision remained unclear.⁴³

Surprisingly, the BI principle, as stated in Article (3) was never debated as per Alston's argument. He argued that the meaning itself of the term BIC was never debated even when one of the committee members raised the subjective character of the term.⁴⁴ This confirms the divergence of UNCRC committee members to discuss the nature of BI term.

³⁹ <https://archive.crin.org/en/home/rights/convention/articles/article-9-separation-parents.html>

⁴⁰ David Archard, *Children: Rights and Childhood*, 108–109, (2015).

⁴¹ Anna Holzscheiter, *Children's Rights in International Politics*, Palgrave Macmillan, 87, (2010).

⁴² Ann Quennerstedt, Carol Robinson & John l'Anson, *The UNCRC: The Voice of Global Consensus on Children's Rights?*, *Nordic Journal of Human Rights*, 41, (2018).

⁴³ *Id* at 42.

7. 1990 African Charter on the Rights and Welfare of the Child (ACRWC)

The 1990 African charter is significant as it puts more weight to the situation of marriage dissolution by providing the child with protection in marriage dissolution in article 18.

State Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.⁴⁵

UNHCR (2006) guidelines

The 2006 UNHCR guidelines concerning the formal mechanism to determine the best interests of the child in the refugees context.⁴⁶

According to the United Nations High Commissioner for Refugees (UNHCR), the term "best interests" broadly describes the well-being of a child. However, the provisional document on UNHCR Guidelines on the formal determination of the Best Interests of the Child released in May 2006 contended that it is not possible to give a conclusive definition of what is in the best interests of the child, as this depends on a variety of individual circumstances, such as the age and the level of maturity of the child, the presence or absence of parents, the child's environment, and more. Later many guidelines were produced to provide international organizations with in-depth assessment tools to involve refugee child in decision-making processes related to their lives, including assessment of their psychological well-being and ability to be part of the decision-making process. However, the concept itself is absent from the 1951 refugee convention.

C. Best interest: The inherent indeterminacy

As illustrated above, The best interests of the child principle is regarded as the normative basis of children's rights., even though it remains vague and weak. Before analyzing the indeterminacy of the best interest term, Hohfeld's theory of rights has been extremely useful in offering in-depth insights into legal terminology and the use of language in formulating laws to direct decisions. It has served to demonstrate the utter ineptness of legal words like "title," "due process," "privilege," and "ownership." In view of Hohfeld's theory, I would add the term "best interest" to the list of terms that he criticizes in understanding the essence and function of rights. Hohfeld brilliantly indicates that the judicial decisions heard in court have provided ample proof of an embodied and unsuccessful propensity to confuse or mingle non-legal and

⁴⁵ <https://www.achpr.org/legalinstruments/detail?id=46%20%C2%A0> Article (18) Protection of the family

⁴⁶ <https://www.unhcr.org/4ba09bb59.pdf>

legal amounts in any given question, which, in turn, consists of the complexity and vagueness of legal terminology.⁴⁷

This framework introduces the problem of definition that controls most of the child-related decisions in the national legislations. And thus it poses the questions of What are the mechanisms and criteria that qualify for defining this interest and who is assigned the task of determining this interest?

The definition of (BI) of the Child as found in the online legal dictionary is “ BI of child is a standard used in family law to make decisions impacting a child in matters of adoption, child custody, guardianship, and visitation, among other issues. It is a subjective, discretionary test, in which all circumstances affecting the child are taken into account” .⁴⁸

Others, like Family law professionals in the United States of America, have defined best interests as the basic developmental interests such as physical, emotional, psychological, and intellectual care that children need to enter adulthood without disadvantage .⁴⁹

Jean Zermatten defined it as “the best interest for the child, as the legal tool that allows achieving the child's well-being at the physical, psychological and social level, and it bears the duty on public and private institutions and structures to verify that this criterion is then taken into account when making a decision regarding the child and that it guarantees that the best interest of the child in the long term as the unit of measurement should be, and there should be competition between several interests”⁵⁰

Apart from this inclusive definition provided by Zermatten, other definitions were for BI introduced the general Comment No. 14 of the Committee on the Rights of the Child. The definition of BI entails a threefold concept as below.⁵¹

The first concept is referred to as the interpretative legal principle: Supporting the most effective legal interpretation that works for the best interest of the child in case of conflict with more than one interpretation. A fundamental, interpretative legal principle: If a legal provision

⁴⁷ Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale Law Journal, p.16-24 (1913).

⁴⁸ <https://definitions.uslegal.com/b/best-interest-of-the-child/>

⁴⁹ American Psychological Association, 2010; Eekelaar, 1992; Garber, 2010) as cited by Nadia Dias, *Best Interests Of The Child Principle In The Context Of Parent Separation Or Divorce : As Conceptualised By The Community*, Edith Cowan University, 20, (2014).

⁵⁰ Zermatten, *supra* 34 at 485.

⁵¹ <https://www.refworld.org/docid/51a84b5e4.html>

is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its optional protocols provide the framework for interpretation. While the second concept is referred to as the substantive right where the Child is the right holder, and their interest should be taken as a primary consideration, when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing), and can be invoked before a court. And for the third concept which is the rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children, or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child requires procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

These three overarching definitions ascertain the lack of consensus on the term itself and offer more unclarity to the concept in public international law.

The concept of BI was highly debated by Robert Mnookin. In his paper "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy." Mnookin emphasises the principle's "indeterminacy," equating it to the concept of the lowest negative alternative.. He contends that the principle itself is not appropriate for the child in as much as the inconsistency between the indeterminacy of the principle as a norm and the official legal procedures in regulating it and the prediction of the decision-making outcomes.⁵² Furthermore, he argues that adjudication usually requires the determination of the past facts, while the BI of the child requires predictive assumptions, literally speaking, Who would this child be better off with in the future?. Others described this standard as "very finely tuned"⁵³ Mnookin does not only argue the indeterminacy of the best interest standard, but he also sees that using this standard in custody adjudications is unfair and insufficient since the child custody adjudications include both child protection and private settlement disputes which

⁵² Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, Law and Contemporary problems, 226, (1975).

⁵³ Elster, *supra* 6 at 38.

means it should not be one single substantive standard that governs all custody disputes. This reflects the inefficiency of the best interest standard in custody disputes as there should be two standards to perform the two functions of adjudication.

While in terms of application, Jonathan Todres argues, in line with Mnookin, the UNCRC does not give enough weight to the position of domestic courts in ensuring that children's rights are fully realised. He contends that the lack of adequate attention is the result of the absence of predictive law in legal discourse.⁵⁴

While discussing the various interpretations of the BI term, it is important to shed light on some insights from the European Conference on the Best Interests of the Child, “ a dialogue between theory and practice”. This conference was organized by the Belgian authorities, the Council of Europe, the Council of Europe Children’s Rights Division in order to emphasize the role of BIC , discuss more about the normative provisions of the term, and explore the challenges of decision makers while implementing the BI. This conference took place in Brussels in December 2014.⁵⁵

The participants in the conference included experts, policy makers and practitioners involved in decisions that have an impact on children’s lives, as well as representatives of the major European institutions and non-governmental organizations protecting the rights of the child.⁵⁶ The publication of this conference is very huge, however, I will shed the light on some of views presented on the BI term.

Among these views is Cantwell, International consultant on child protection policy, who argues that, despite the fact that the concept of "best interests of the child" is undefined, it has been mostly used as a guideline for making decisions about children. At the same time, in cases of parental divorce, courts in many countries have relied on the standard of best interest in custody and access. Moreover, he recognizes the ambiguity of the concept in any sense of human rights, and its rules of practice have not been properly discussed.⁵⁷

⁵⁴ Jonathan Todres, *Emerging Limitations On The Rights Of The Child: The U.N. Convention On The Rights of the Child and Its Early Case Law*,159 (1998).

⁵⁵ Edited by Milka Sormunen *The best interests of the child – A dialogue between theory and practice*, Council of Europe, 5 (March, 2016)

⁵⁶ *Id* at 6.

⁵⁷ Nigel Cantwell, *The concept of the best interests of the child: what does it add to children’s human rights? The best interests of the child – 18-26*,The Best Interest of The Child: A dialogue between theory and practice, 18-26 (Council of Europe, 2016).

In the same discussion, Jorge Cardona Llorens, Professor of Public International Law at University of Valencia and member of the committee on the rights of the child, tried to identify the other side of the coin and how the committee on the Rights of the Child in General Comment No.14 provided interpretations on the concept itself and the difficulty in fulfilling the term in the decision-making process.

Llorens, complains about the lack of guiding principles for evaluating and determining the child's interests. The concept's breadth allows for some leeway, which may allow the state to manipulate the child's best interests by protecting the parents' interests, especially in post-divorce proceedings, and by practitioners who dismiss the evaluation of the child's best interests.

The convention's nature is reflected in the concept of "the child's best interest." A child, for example, has the right to live with his or her parents under Article 9. He or she may, however, be removed from them by a court order if the decision is made in the best interests of the child. This is the case when a child is a victim of neglect or mistreatment from his own parents.⁵⁸

Thus, the absence of the criteria for the BI of the child allows an individual interpretation for a case-by-case. In fact, the legal application of this concept is dependent on the decision-makers' understanding making it adaptable to a variety of circumstances. Aside from this positive feature, the definition can give decision-makers so much leeway that they can enforce their own version of BI of the child. Aida Grgić, a lawyer at the European Court of Human Rights, who works on the idea of best interests in juvenile justice and migrant children, discussed the importance of Article (8) of UNCRC.⁵⁹

Aida confirms that most cases that appear in the court that have provoked the court to have its jurisprudence related to the children are "family cases."⁶⁰ Since the BI principle is left to the discretion of domestic judges, it may impede the enjoyment of family life. Consider the decision to give one parent custody of the child while denying the other. This is a violation of the convention's Article (8), which affirms the right to respect for family rights.

To conclude, first, through this legal framework, one could understand how the term BI was enshrined in many conventions with intentional ignorance on its credibility and consistency

⁵⁸ <https://www.humanium.org/en/the-childs-best-interest/>

⁵⁹ Aida Grgić , *Jurisprudence Of The European Court Of Human Rights On The Best Interests Of The Child In Family Affairs*, *The Best Interest of The Child: A dialogue between theory and practice*, 105,(Council of Europe, 2016).

⁶⁰ *Id* at 106.

when it comes to the field of implementation and application. Also, the debate on the UNCRC convention demonstrates the pressure put on the shoulders of the state to have an articulate, ratified text on the rights of the children far away from the real sufferings of the children in the court battles, especially when it comes to post-divorce disputes. This legal framework highlights the complexity, vagueness, and impracticality of the concept of BIC, as well as the undefined roles of family, society, and the state. Although some argue that there is an abrupt need to address this relation to protect the child, this relation was not clearly identified. Second, The term BI itself was developed gradually in the legal framework with very limited application and unclear guidelines and principles that describe the child's well-being.

Third, consensus and the theory of clarity are missing in the best interests of the child. In addition, in family matters where there might be a conflict of interest, it is strongly debated because the relationship between the children and their parents may be deeply strained, especially in the case of divorce. The main issue of the best interest standard emerges from the lack of uniformity with respect to what interests to consider, how to identify and weigh the various variables, and how to account for the evolving developmental needs of children over time. All these gaps, which have been analyzed by scholars, show that some vagueness and ambiguity have been enshrined in the CRC text since the early start of the writing phase. Calls for a re-opening of discussions on children's human rights and a review of the convention of CRC, in particular, are essential in the light of the current inconsistencies, tensions, and concerns.

The result of such ambiguity is that lawyers, court staff, and judges can view and emphasize different variables or interpret the same principles in diametrically opposite ways, such as consistency or stability, intended to support or favor the parent they serve or favor. Judges also make these agonizing decisions without specific guidance by depending on their own subjective value assessments and life experiences, leading to unevenness in outcomes even within jurisdictions.⁶¹

Thus, the key takeaway from this chapter is the development of the principle of the best interest in the western context, which provides no specific criteria for achieving what is considered the best interest. This term, which is seen as the central concept of all custody adjudications until this moment in family courts in many countries, remains ambiguous and problematic. This term requires a way out of it from comprehensiveness to privacy and from generality to accuracy in implementation and measurability in the extent of application.

III. BEST INTEREST OF THE CHILD IN ISLAMIC JURISPRUDENCE

⁶¹ Elster, *supra* 6 at 2.

This chapter delves into the protective factors that Islamic jurisprudence consider to be in the interests of the child's welfare, especially when in custody issues following the dissolution of a marriage. The chapter begins with exploring the protective factors of the child's welfare as considered in different Islamic legal schools (madahib), followed by reflection on BI term in the Egyptian custody law, discussing the reform in the custody law in Egypt since 1985.

A. Protective factors of child's welfare in Islam

The protective factors in Islam are considered the presumptive rules that guide the custody adjudications in Muslim and Arab countries. These protective factors originally stem from one of the sources of Islamic Shari'a called *Ijtihad*. *Ijtihad* is generally understood as "the exertion of mental energy in the search of a legal opinion to the extent that the faculties of the jurist become incapable of further effort."⁶² However, these protective factors consider as presumptive rules offered by Islamic legal thoughts. These schools of legal thought are referred to as *madhāhib* (sing. *madhhab*).⁶³ *Madhhab* means that which is followed and, more specifically, the opinion or idea that one chooses to adopt.⁶⁴

Hallaq argues that schools evolved from personal into doctrinal schools, where initially schools revolved around individual opinions, but later became more systematic.⁶⁵ The Hanafi *Madhhab* dominates Egyptian custody rules in personal status law, which brings more rigidity to custody adjudications, which could negatively affect the child's well-being.⁶⁶

Furthermore, the term "best interest of the child" has been enshrined in Egyptian law, allowing judges to decide what is best for the child based on their cultural experience and the judge's subjective understanding of custody adjudications.

Thus, Ahmed Fekry Ibrahim argues that Islamic custody law reflects the hybridity between presumptive Islamic rules and the Euro-American concept of best interest. As a result, child

⁶²Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, International Journal of Middle East Studies, Vol. 16, No. 1,3,(Mar., 1984).

⁶³Nesrine Badawi, *Introduction To Islamic Law*, Program on Humanitarian Policy And Conflict Research, Harvard University, Thematic Workshop on Islamic Law and Protection of Civilians,8, (2009).

⁶⁴ Hallaq, Wael, *Origins and Evolution of Islamic Law*, p. 150. As cited by Nesrine Badawi, *supra* 66

⁶⁵ Hallaq, Wael, "From Regional to Personal Schools of Law, a Re-evaluation", Islamic Law Yearbook, vol. 8, 1-26 (2001)

⁶⁶ Fekry, *supra* 19 at 7

custody law falls short — caught between the vagueness of the best interest doctrine and the presumptive rules of Islamic tradition.⁶⁷

Various terms were used to indicate the well-being of the child in premodern Islamic legal discourse. However, it was not used in a technical sense as the best interest principle in modern times. Instead, it reflects the importance of caring for children and providing them with appropriate care. These terms are "the benefit of the child" (Man'at al-wald), "the welfare of the child" (Maslahat al-walad), and "the good fortune of the child" (Maslahat al-walad) (hazz al-walad).⁶⁸

Regardless of these terms, The aim of custody law, according to jurists, is to promote the protection of the children. Jurists, wards, custodians, and guardians all have rights that are intertwined. When a conflict arises, all jurists prioritize the child's most fundamental interests to avoid harm to the child's physical health or moral uprightness. To elaborate, when there is a tension between the child's right to be cared for and the custodial parent's right to claim custody, the child's well-being takes priority in marital conflicts .⁶⁹

By putting the child's rights at the center of any conflict related to them, Islamic jurisprudence advocated for moving away from the ancient practice of slaying their children, especially the girls who were afraid of poverty and shame.⁷⁰ They also followed the Prophet's instructions to support the good treatment of children and the elderly. The Prophet said, "He is not one of us who does not have mercy on young children or the elderly."⁷¹

Child custody appears to be one of the most complicated issues because custody decisions are based on Ijtihad opinions instead of inheritance and divorce cases, which draw the majority of their legal rules from the Quran (Soret Al-Nesa2). Thus, this brings us to question how the first source of Islamic Law (Quran) addressed the child's welfare.

The Quran only emphasized the importance of marriage and having children and appropriately celebrating and breastfeeding them. Despite the fact that the Quran contains no

⁶⁷ *Id* at 8.

⁶⁸ Muwaffaq al-Din Ibn Qudama al-Maqdisi, Al-Mughni, ed. Ra'id b. Abi Alafa (Beirut: Bayt al-afkar al-Dawliyya,2004),2:2007-2008;Ibn Qayyim al-Jawziyya, Zad Al Maad Fi Huda Al-Ibad,ed.Shu'ayb al-Arna'ut and Abd al-Qadir al-Arna'ut,3rd edn (Beirut:Mu'assasat al-Risala,1998),5:392 cited by Fekry, *supra* 12 at 4.

⁶⁹ Fekry, *supra* 19 at 4.

⁷⁰ George W. Holden and Paul Alan Williamson , *Religion and child well-being*, Handbook of child Well-Being, 1138, (2014).

⁷¹ <http://etori.tripod.com/on-children.html>

verse addressing custody conflicts, Islamic jurists agree that the mother should be the custodian because (Ayat al Radha't) states that a mother should breastfeed her child for two years if she wishes. As a result, during the child's first years of life, the mother should be responsible for his upbringing and care.⁷² While protecting the child's rights in marital disputes, Ijtihad and schools of legal thought brought presumptive rules based on their own subjective opinion even if these rules are justified from their end. This demonstrates that custody law is not divine and that it could be subjected to reform.

To know more about these presumptive rules that still govern the custody adjudications in most Islamic and Arab countries, I will introduce the commonly used terms that are still enshrined in Islamic countries' personal status law.

1. Definition of Custody (*Hadanah*)

There is a distinction in Islamic jurisprudence between raising a child and caring for the child's affairs such as property, discipline, and education, which is known as "guardianship." Both, however, contribute to the well-being of the child and have different legal implications.⁷³

Custody (*hadanah*) is derived from (*hodn*), which means to hug someone, and has also been used to enlist the help of a nurse, raise a child, and provide care.⁷⁴

It can also refer to the place where the child is raised or nurtured for an extended period. *Hadanah* is a term that refers to the protection provided to those who are unable to act for themselves, such as a child or a mentally ill person, of the care provided to them, such as their food, drinks, and so on, in order to promote whatever they may benefit from. Because this term appears to have an emotional and physical connotation, jurists believed it was best suited to the Islamic legal system of custody.⁷⁵ As a result of her nature of providing care and compassion to her children, mothers are granted the right to custody.

⁷² Aayesha Rafiq, *Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)*, International Journal of Humanities and Social Science, 269,(2014).

⁷³ *Id* at 268.

⁷⁴ Lisan Al-'Arab Al-Mukeatt, edited by Yusif Khaiyyatt and Nadean Mar'ashi, Beirut, Ve1. 1, pp. 661-662; see also, Hans Wehr, A Dictionary of Modern Written Arabic, edited by J, Mileon Cowan, MacL:onald & Evans Ltd, London,185, (1980). As Cited by Mahdi Zahraa and Normi A. Malek, *The Concept of Custody In Islamic Law*, Arab Law Quarterly, 156, (1998).

⁷⁵ Khatib, Mughni al-MuAtaj, p. 452. See also A1-Nawawi, Muhyee Al-Din Abu Zakariyya Yahya ibn Sharaf, Minhaj al-Talibeen, Engl. trans., E.C. Howard, Law Publishing Company, Lahore, Pakistan, n.d., p. 391; Al-Sayyid Sabiq defines *hadanah* as *the caring or protection of children or insane persons who*

2. Types of guardianship

There are two types of guardianship in Islam. The first type is guardianship of person is the authority and responsibility for managing the child's personal affairs, such as marriage, education, discipline, or medical care. And the second type of guardianship is guardianship of property, which is the authority to conduct, administer, and conclude contracts and other legal transactions involving the child's property.⁷⁶ According to the jurists, a male representative (either the father or male relatives in the case of the father's death) is the natural guardian (Wali) of the minor child's self and property. This is not to say that the rule of assuming that a male representative should be the guardian of property and self does not always result in the child's welfare, especially after the marriage disintegrates. Sometimes a mother who assumes full responsibility for her child can better manage her children's property, especially if she is the custodian because she is more aware of their needs. As a result, some argue that the relationship between custody and guardianship is hugely complicated in terms of rights and duties.⁷⁷ As Jasmine Moussa commented, "Nonetheless, the overriding consideration in appointing the guardian is the right of the father followed by the grandfather and the agnatic line, even where the children are in the mother's exclusive custody."⁷⁸

Islamic Law assumed that women could not manage their children's financial affairs and thus limited their role to providing care only. However, in today's social context, where the father is not always the sole financial provider and the mother shares financial responsibility, the right to "guardianship of person and property" should be granted to her as well.⁷⁹

To summarize, Islamic jurisprudence considers the father to be the child's natural guardian, even when the mother takes on the role of the custodian in divorce cases. This assumption is due to the father's legal obligation to pay alimony (nafaqa) to his child. While mothers retain custody until a certain age, which, as we will see later, was not agreed upon in Islamic fiqh, or

are still dependent, by undertaking whatever makes them better, protecting them from harm and developing their body, soul and mind in order to promote their future life and enable them to be responsible for themselves later, Al-Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, Dar al-Kitab Al-'Arabi, pp 301-302. As cited by As Cited by Mahdi Zahraa and Normi A. Malek, The Concept of Custody In Islamic Law, Arab Law Quarterly, 156, (1998).

⁷⁶ Mahdi Zahraa and Nomi A. Malek, Child custody in Islamic law, Arab Law Quarterly, 157, (1998).

⁷⁷ *Id.*

⁷⁸ Jasmine Moussa, *Parental Care and the Best Interests of the Child in Muslim Countries*, N. Yassari et al. (eds.), 26, (2017).

⁷⁹ Rafiq, *supra* 72..

until the child is questioned by the court to choose which parents they would continue living with. As a result, both forms of custody are advantageous to the child.

3. Conditions of the Custodians

According to Islamic Law, to be a custodian, you must meet certain requirements. The jurist considers these conditions assuming that they are serving the interest (maslahah) of the child. The principle of maslahah (interest) of the child has become the foremost guiding principle in determining custody rights.⁸⁰

According to some, the concept of maslahah is very relevant and applicable in Islamic law concerning the right of custody of a child. According to Islamic jurisprudence, maslahah can be divided into three categories based on the degree of priority, and these three categories of maslahah are discussed in detail below.⁸¹

1. *Maslahah al-Dharuriyyat*, the essential, is mainly concerned with life, religion, intellect, and property.

2. *Maslahah al-Hajjiyyat*, the complementary, in the case of *hadanah*, this type of *maslahah* aims to ensure a child's comfort and repel hardship from the child, such as providing healthy meals and comfortable housing.⁸² Based on this *maslahah*, it is the court's responsibility that the custody of the child is awarded to the right person who is in the position to fulfill such needs of the child.

3. *Maslahah al-Tahsiniyyat*, the embellishment, in terms of custody, the custodian is encouraged to provide more than a child's basic needs to improve the child's quality of life.⁸³

There are several conditions which act as guidance for the judge to provide maslah to the child based on the abovementioned assumptions. They are legal capacity, trustworthiness, the ability to bring up the child, religion, marriage restrictions, and the termination of custody age.

⁸⁰ Roslina Che Soh et Nora Adul Hak, *Application of Maslahah (interest) in Deciding the Right of Hadanah (Custody) of a Child: The Practice in the Syariah Court of Malaysia*, Journal of Applied Sciences Research, 2183, (2011).

⁸¹ *Id* at 2184.

⁸² *Id* at 2186.

⁸³ *Id*.

The first condition concerns legal capacity. In this case, the custodian must have full legal capacity, must have reached the age of puberty and maturity.⁸⁴ A minor or insane person is ineligible to be a custodian because they require supervision themselves. The mother, according to Hanafi school, is the most qualified to have custody of her children.

In addition to legal capacity, the second condition is trustworthiness. The custodian must have a set of moral standards to be qualified for custodianship, as it is in the child's interest to follow someone with good moral qualities.⁸⁵ The appearance of the custodian has no bearing on this condition. If there is any doubt about the trustworthiness of the would-be custodian, the case should be decided by a judge using his discretion, and evidence should be presented.⁸⁶

The third condition concerning the ability to bring up the Child. The capacity of the custodian to care for the child determines this condition. For example, the absence of any physical defect or disease that would render a person incapable of caring for the child, evidence of negligence, physical or emotional abuse, and so on. These conditions are set for all custodians, male or female, in general. If the custodian is a woman, additional conditions must be met as below.

The fourth condition concerning the religion . According to the jurists, a non-Muslim cannot be an ahl al-hadanah. However, when a mother is non-Muslim, this contradicts the assumption that the mother is, by nature, more passionate and caring. However, it does not state explicitly that non-Muslim mothers are barred from caring for their children. Table (1) shows Madahib Opinions on the custody of Non-Muslims

⁸⁴ Al-Zuhayli, op. cit., Vol. 7, p.726 as cited by Zahraa and Malik, *supra* 76 at 168.

⁸⁵ Haskafi, Muhammad Alauddin, The Durr-ul-MukAtar, Eng, trans. B. M. Dayal, Kitab Bhavan, New Delhi, Reprinted 1992, p. 303 as cited by Zahraa and Malik, *supra* 79 at 169.

⁸⁶ Al-Khaiib, Al-Iqna', op. cit., p. 196 as cited by Zahraa and Malik, *supra* 76 at 169.

TABLE 1 MADAHIB OPINIONS ON THE CUSTODY OF NON-MUSLIMS

Hanablis ⁸⁷	Hanafi ⁸⁸	Maliki ⁸⁹
<p>Non-Mulsim is ineligible for custody.</p> <p>This is referred to in verses 141 "..... and Allah will never grant the disbelievers a way (to triumph) over the believers."⁹⁰ Non-Muslims have no authority over Muslims, according to this interpretation of the verses.</p>	<p>Non-Muslims have the right to custody as long as the child is not subjected to any religious harm. This is based on prophetic opinion when there was a dispute over custody of the children between a Muslim and a non-Muslim woman. The prophet granted the child the right to choose, implying that a non-Muslim could have custody.</p>	<p>This school maintained that the child may remain in the care of a non-Muslim mother as long as the child is well-cared for, and that if there is a fear that the mother will raise the child in a religion other than Islam, the child should be removed from this environment.</p>

Thus, although different points of view appear to provide flexibility in deciding to protect the child's religion, the main goal is to prevent the child's right to follow other religions than Islam.

While the fifth condition is the marriage Restriction. According to Islamic jurists, a female custodian does not have the right to keep the right of custody if she marries someone who is not mehrem (other than their relatives) to the child after her divorce. This is also based on a prophetic tradition: "If you do not marry, you have more right to get the custody than him." This is based on the assumption that once the woman marries, she will be preoccupied with her duties as a wife, which would be against the child's interests.⁹¹

Also, the second husband is regarded as a stranger who could treat the child in an unkind and unfair manner. This presumption does not apply if the custodian is the father and remarries another woman who may also treat the child unkindly or unfairly. However, some

⁸⁷ Regarding this point, Al-Mughni provides further: "If (the duty of hadanah) cannot be entrusted to a fasiq then it definitely cannot be entrusted to a non-Muslim, as the harm to which the child might be exposed by the non-Muslim is more than that by a fasiq. There is a danger that the non-Muslim may lead the child to denounce Islam by his/her teachings, attractions and upbringings and this is a great detriment in Islam. Hadanah is established for the welfare of the child and it is wrong to do something which will harm the child or its religion'a, see Ibn Qudamah, *Op. cit.* p. 613 as cited by Zahraa and Malik, *supra* 76 at 170.

⁸⁸ Al-Marghinani, *op. cit.*, p. 139; Al-Sarakhasi, *op. cit.*, p. 210 as cited by Zahraa and Malik, *Supra* 79 at 170.

⁸⁹ Al-Asbahi, Al-Mudawana, p.245-246 as cited by Zahraa and Malik, *supra* 79 at 170

⁹⁰ The Qur'an: al-Nisa'a; verses 141.

⁹¹ Ibn Qudamah, *op. cit.*, p. 139; Al-Sarkhasi, *op. cit.*, p. 210. As cited by Zahraa and Malik, *supra* 76 at 173.

schools allow women to remarry while still having custody of their children. Table (2) shows the diversity of madahibs' opinions regarding the marriage restrictions.

TABLE 2 MADAHIB OPINIONS ON MARRIAGE RESTRICTIONS FOR THE CUSTODIAN.

Hanabli and Shafi ⁹²	Maliki ⁹³	Imam Ahmed ⁹⁴
If the mother marries from Ahl al-hadanah, custody will be terminated without any consideration.	This category has been extended to include the child's mahram, who may have a close relationship with the child, as well as the child's affections.	If the child is a girl, the female custodian's right was preserved if she is married until the girl is seven years old or until puberty.

Other Islamic opinions (Hassan Al-Basri and Ibn-Hazm) state that even if the mother marries, the right will not be lost because the prophetic hadith is not authentic. Thus its ruling cannot be considered authoritative.⁹⁵

Another presumptive factor that is very controversial is the termination of custody period condition and the different madahib opinions are illustrate below in table (3)

TABLE 3 MADAHIB VIEWS ON TERMINATION OF CUSTODY AGE

Hanafis ⁹⁶	Maliki ⁹⁷	Shaifi and Hanbalis
When a boy reaches puberty (7 years old), these schools assume that custody is terminated, and when a girl reaches puberty, differentiate between the girl who has reached puberty but has not had a previous marriage experience and the	The mother has custody of her son until he is able to communicate clearly, and the daughter has custody of her daughter until she marries.	The mother has the right to custody or upbringing of both son and daughter until the age of seven, according to Shafi'i and Imam Hanbal. Children will be able to choose who they want to live with after this age.

⁹² Ibn Qudama p.139 as cited by Zahraa and Malik, *supra* 76at 173

⁹³ Ibn Rushd, *Op. Cit.*, p. 261. as cited by Zahraa and Malik, *supra* 76 at 173.

⁹⁴ Ibn Qayyim al-Jawziyyah, *Zad al-Ma'ad fi Hadyie Khair al-'Ibad*, Vols. 3-4, Dar al-Furqan, Jordan, p.130 as cited by Zahraa and Malik, *supra* 76 at 174.

⁹⁵ Ibn.Hazm, *op.cit.*p.147 as cited by Zahraa and Malik, *supra* 76 at 174.

⁹⁶ Al-Khatib, Mughni Al-Muhtaj, *op. cit.*, p. 459 as cited by Zahraa and Malik, *supra* 76 at 176

⁹⁷ Ibn Rushd, *op.cit.*, p. 262; Al-Asbahi, Al-Mudawwanah, *op. cit.*, p. 24 as cited by Zahraa and Malik, *supra* 76 at 176.

woman who has had a previous marriage experience. Whereas the first must relocate to her father, the second may leave wherever she pleases.		
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These age assumptions are rationalized based on the mother's essential role in providing love and care, and then the father has more effect in terms of guidance and discipline. However, I see that focusing on the age of custody, as mentioned above, might not lead to child protection in its whole essence. It should be taken on a case-by-case basis not to be mainstreamed in all cases.

Finally, residence comes as one of the child's well-being protective factor, whereas, Mothers and other female custodians who are usually granted custody cannot travel to another country with their children unless the father, who remains the guardian, consents. This is a significant problem nowadays, especially if the mother seeks better job opportunity abroad with a better income for her children rather than relying on alimony awarded by the court, which in some cases barely covers her children's basic needs.⁹⁸

This rule exists because travelling can endanger the child and deprive the father of his right to visitation. Despite the fact that travel could be in the best interest of the child, this rule has not been amended, and the rule has remained rigid, as many presumptive rules are still used in current laws.

To summarize the previous section, given the variety of different madhabs, the child's welfare is considered in some presumptive rules, which allows judges in Islamic courts some flexibility to rationalize their adjudications based on them. However, some academics regard these rules as exhaustive.⁹⁹

B. Best interest in the Egyptian Custody Law

Custody rules are included in Egypt's Personal Status Law and do not have separate laws. This complicates the custody adjudications as it intersects with other types of personal status legislation, especially divorce. In this section, I argue that although some transformations have been noted in the custody area through different Law modifications, some rules remain

⁹⁸ Transcript with Mohamed Hafez (Attorney at the high court of Appeal and State Council) on the challenges of custody rules (An analysis)

⁹⁹ *Id.*

rigid and discretionary power given to the judges is rationalized based on Shar'ia presumptive rules of the Hanafi madhab. Whereas Hanafi Madhab was declared as the official Madahab to be applied in personal status adjudications. In 1897, *the Egyptian Code of Organisation and Procedure for Family*.¹⁰⁰

Before going through how the Egyptian Law tackled the term of the best interest, it is essential to reflect on the interpretation of the custody concept according to the Supreme Constitutional Court (SCC). The SCC has played a critical role in interpreting the provisions of Egypt's legislation regarding child custody to serve the child's best interests.¹⁰¹

Another important definition of custody that the legislature defined is the Egyptian Supreme Court on May 15, 1993 in Case Number 7 for judicial year 8 is:

The legal essence of custody in Islamic law is that it constitutes a guardianship over the upbringing of a child (*wilāya li-l-tarbiya*) whose purpose is to guarantee attention and care for the child and his/her affairs during the early period of the child's life. Its fundamental principle is the child's interest, which is achieved by keeping him/her at the side of the (woman) custodian – who is more entitled to raise him/her – as she is considered better capable of protecting, caring for and safeguarding the child and because tearing the child from her – while she is the most compassionate with the child, the closest to him/ her, the most aware of his/her needs and the most patient with the child – is harmful to the child in this critical period of his/her life, in which he/she is not independent in his/her affairs and cannot be entrusted to someone that is not trustworthy, who might eat [i.e. steal] from the child's maintenance, feed the child the bare minimum or look down upon the child. Neither the Islamic shari'a, in its explicit legal principles, nor the laws of the Orthodox Copts, mainly determined by the Holy Bible, establish limits for the age of custody that cannot be surpassed. This is because raising a child is a grave matter, which if affected by a defect even in some aspect, could lead to the loss (straying) of the child. Its range must therefore be limited by what upholds the child's interests and what is more likely to spare him/her harm, considering that custody concerns the child's benefit. Care for the child takes priority over any interest of any other party, even according to those who state that

¹⁰⁰ Moussa, *Supra* 78 at 4.

¹⁰¹ *Id.*

custody does not arise from the right of the child but also involves the rights of [the custodial woman] to whose care the child is entrusted”¹⁰²

This interpretation given by the Supreme Court confirms the idea that the custody rules are not divine, and the legal reasoning is based on Ijtihad, which is up to individual opinion. However, the custody rules are still rigid.

C. Transformation of Custody Rules in the Egyptian Law

The transformation of custody rules in Egyptian law seemed to be very narrow in its perspective and fall short between the termination of custody age and the order of the father in the list of custodians. This is traced through the reflection on the constitutional amendments since 1985.

1. Constitutional Challenges of Law No.100 for year 1985

Law No.100 for the year 1985 witnessed many challenges on custody issues as it modified some basic rules in Law 25 for 1929, the age of custody termination and visitation rights. The principle of the child's well-being was argued in Law No. 100 of 1985, which increased the custody termination ages to ten for sons and twelve for daughters. While in some cases, the judge extended maternal custody to the daughter until she was 15 or until she married, depending on the judge's evaluation of the child's welfare.

Another consideration was also given to the psychological factor for the child's well-being concerning the place where visitation occurs. The law stipulates that visitation should be qualified for psychological well-being (Nafsyet El-tifl) with no implications for any harm on the child, which is not the current case of visitation adjudications in current days if the parents disagreed on visitation.¹⁰³

However, before Article (20) of Law No. 100 of 1985, which specified that both parents had the right to see their children and that the grandparents had the same right if the parents were not present, no legislation discussed visitation specifically.¹⁰⁴ The matter of arranging visitation (Ruya'a) was left to the parents under Law No. 100 of 1985. However, if they failed to agree, then a judge had the authority to arrange things in a way that would not be harmful

¹⁰² Supreme Constitutional Court, Judgment in Case no. 7 of the 8th Judicial Year (15 May 1993), (translated by Jasmine Mousa). See Moussa, *supra* 81 at 23.

¹⁰³ The common form of access that we see in many Muslim jurisdictions involves "seeing" (ru'ya) the child. In Egypt, it is not a living arrangement in which the child sleeps at the non-custodial

¹⁰⁴ Law No.100 (1985) Amending Certain Provisions of Egypt's Personal Status Laws," Al-Jarida Al-Rasmyiaa 27 (July 4, 1985): 4-11 as cited by Fekry, *supra* 12 at 214.

to the child's psychological well-being.¹⁰⁵ If the custodial parent refuses to allow the other parent visitation, the law states that the judge may issue a notice to warn the custodian. If he or she refuses the other parent's visitation, the judge has the right to pass custody to the next-in-line custodian temporarily.

However, due to the lengthy litigation in the Egyptian legal system, visitation conflict resolutions are futile, and the child is ultimately the one who suffers.¹⁰⁶ Moreover, the non-custodial is often granted few hours per week in a public place determined by The Ministry of Justice. Although the Islamic jurists did not discuss the conditions of visitation, they asserted the right of Ru'ya to the non-custodial parents. Modern judges left this area with only minor conditions of places and hours without building a comprehensive nor stable visitation system, considering the child's best interests.

Case No.7 of the eighth judicial year in 1993 questioned the constitutionality of Law No.100 of 1985, claiming that it violated articles (2) and (10) of the Egyptian Constitution. Article (2) states that "the values of Islamic Sharia are the primary source of legislation," and Article (10) states that "the family is the pillar of society based on faith, morality, and patriotism."¹⁰⁷ The case stated that increasing the age at which custody is transferred and giving the judge more power in such transfers violated Arts. 2 and 10, even though the Supreme Constitutional Court stated that jurists have demonstrated that the child's interests are of paramount importance to a judge's rulings. This is one of the jurisprudential issues on which opinions differ, where every point of view is considered responsible for what the judge deems to achieve good for the child within a framework of truth and justice.

Increasing the age of custodianship also ensures the child's stability. However, the reason for raising the age was based on the Maliki School, which held off on determining the age until the child's well-being is stable (refer to table 3) and since ijihad is permitted. The court added that the child's emotional and psychological well-being should be considered when deciding the ages of custody, and that holding the child with the mother would serve the child's best interests. While what should be considered here is that Islamic Law itself does not determine any limits for the age of custodianship.¹⁰⁸

¹⁰⁵ *Id.*

¹⁰⁶ *Supra* 98.

¹⁰⁷ https://www.constituteproject.org/constitution/Egypt_2014.pdf

¹⁰⁸ Fekry, *supra* 19 at 216.

This ruling, issued in 1993, came after Egypt ratified the CRC in 1990. It strengthened the state's authority to grant judges broad discretion in determining what is best for children.

4. Law No.12 for 1996 (Child Law)

Influenced by CRC ratification in 1990, the concept of the best interest embedded in the 1996 Child Law. Most of its articles resemble the wording of CRC.)¹⁰⁹

For example, Art. 3 states that all decisions and procedures relating to children, by whoever initiated and enforced, must prioritize the protection of the child and the child's interest. This is the same as Article (3), which states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

5. Law No.1 of 2000

In Law no.1 for year 2002, Art. 70 granted the public prosecutor the authority to investigate and decide on the child's custody until the ruling court is issued.¹¹⁰

6. Law No.10 of 2004

Law No. 10 for 2004 established the family courts to speed up litigation in custody disputes and for the child's best interest. These courts consist of three judges, one psychiatrist to help the judges, and a mediation office affiliated with the Ministry of Justice that should include social workers. Before resorting to litigation, a case should be referred to the mediation office at least fifteen days before litigation. Up to this point, it is too soon to judge the effectiveness of these offices in settling disputes. Their effectiveness has not been analyzed in any texts.¹¹¹

The word "best interest" (maslaha fudla) was first used in Art.10 of this Law to ensure that the court's decisions are made in the child's best interests. There is no reason why the legislator used this word, as Ahmed Fekry argues.¹¹² The new legislation prioritizes social scientists to counsel judges about what is best for a specific child in a given case, as is usual in contemporary Euro-American jurisdictions.

7. Law No.4 of 2005:

¹⁰⁹ <https://www.refworld.org/docid/5a4cb6064.html>

¹¹⁰ "Law No.1 (2000), " Al-Jarida Al-Rasmiyya 4:2 (January 29: 20000) 2-30 as cited by Fekry, *supra* 12 at 217.

¹¹¹ *Supra* 98.

¹¹² Fekry, *supra* 19 at 217.

The Law No. 4 of 2005 achieved a victory according to women's perspective in terms of extending the age of custody termination.

The age of custodianship has been raised as an issue, considering an extension of the age to 15 for both genders based on Hanafi school. After that, the judges asked the child if they wished to continue living with the mother or be transferred to the father. So, instead of automatically transferring custody to the father at the age of 15 in Law 2000, the judge allowed the child to express their preferences. However, the law's constitutionality was challenged in 2008, just like the Law 100 of 1985 and on the same grounds. The court used the same justification of the child welfare strategy rather than the women's rights strategy.¹¹³

8. Law No.126 of 2008: (Child Law)

Law No. 126 of 2008 came to assure that the child's best interests should take priority in all decisions and procedures relating to childhood. It also grants education guardianship to the female custodian.

Draft Personal Status Law

Since 1985, there have been areas of transformation in custody rules, as described in the preceding historical introduction. With any new draft of personal status law, however, constitutional challenges to custody rules remain debatable. On February 23rd of this year, the Egyptian Cabinet's draft Personal Status Law was published in Egyptian media. The draft law has been referred to the joint committee on constitutional and legislative affairs of the parliament, where it will be further discussed and amended.

The draft Law sparked heated debate and opposition, particularly among men and women. The Egyptian Centre for Women's Rights issued a press release condemning the draft personal status law, claiming that it is out of step with "current progressive times" and is founded on a regressive and rigorous jurisprudential school.¹¹⁴

The new draft discussed custody rules in only a few articles, focusing on the father's priority to take custody of the mother and grandmothers of the family, the non-custodian's right to visit the child, which is primarily the father in the Egyptian context, and the guardian's rights to register the child's birth and choose his education.

¹¹³ *Id* at 218.

¹¹⁴ <https://egyptianstreets.com/2021/02/27/a-woman-cannot-annul-marriage-new-draft-personal-status-law-sparks-outrage-in-egypt/>

First, Article (89) of the draft law stipulated a change in the father's priority to take over the custody of the child. Whereas the current situation is that the mother is the custodian according to the eligible conditions of the Islamic shari'a as discussed above. And if the mother died or re-married, the custody goes to the grandmother and if the grandmother does not fulfill the custodian conditions, it goes to the grandmother from the father's side and it continues to go for the females from the family members of the mother's side and then from the father's side.

The reason for giving females priority custody is that females, by nature, are better able to provide care and emotions to children than males. While in the new draft, the father takes over custody after the grandmother, this does not take into account the child's BI, who will require someone to provide care, nutrition, and upbringing.¹¹⁵ The females argue that the father, who is busy working all day, will not be able to provide such care, and that the child's rights to care must remain in the hands of female custodians in order to protect the child's rights. This is also the rule of Islamic Shari'a.

Second, the current law does not grant the non-custodial parent (father) the right to visitation and only regulates the vision rules. To clarify, visitation entails hosting the child for an extended period of time at the father's home, whereas vision entails seeing the child in public for a short period of time (between 3 and 5 hours). Article (91) of the new draft states that non-custodial parents have the right to visit their children. It also limits the time period to no less than eight hours and no more than twelve hours per week, as long as it is between the hours of 8:00 a.m. and 10:00 p.m.¹¹⁶

However, the issue of visitation is very complex. The child who should be brought up in a balanced environment and has the right to live with both parents is the victim of the post marriage proceedings in the court. The males claim that they have the right to host and raise their children after separation, and that the vision prevents them from having such a connection or bond with their children. On the other hand, mothers claim that fathers intend to use visitation to exact revenge on the mother who requested the divorce or Khulu in front of the court, inciting the children to despise their mother. Clearly, the child is the only victim of this battle, in which the judge, with the assistance of social specialists, examines the entire circumstances of the divorce settings and decides on the best situation for the child on a case-by-case basis.

¹¹⁵ مسودة قانون الأحوال الشخصية الجديدة ، قرار رئيس مجلس الوزراء بمشروع قانون بإصدار قانون الأحوال الشخصية الشخصية

¹¹⁶ *Id.*

The new draft law also addressed another gap by depriving the mother of her current right to obtain educational guardianship in order to choose the child's education. The mother, who is the custodian and manages the child's affairs, is unable to receive education guardianship, register the child's birth, or obtain a passport or identification card. And the new draft law only grants this right to the father, which may have negative consequences for the child's life.

Furthermore, if the father fails to submit proof of his actual income within fifteen days of receiving the court's statement, he faces a variety of penalties, including financial fines and restitution. However, the draft laws do not provide guidance in other critical areas such as marriage restrictions, children's participation in life decisions, and alimony deprivation cases.

As a result, the current draft law does not prescribe any solutions to family court issues, particularly alimony cases that can last for years with no protection for the child, nor does it address the issue of the child's best interests in the decision-making process. Also, it ignores the participation of relevant actors in proposing other custody issues to be tackled in this draft and affects the best interest of the child such as psychologists, Social therapists, child protection specialists, lawyers.

Thus, the key takeaway from this chapter have been, firstly, the argument about custody-age extension has been a priority for Egyptian feminists as an exclusive right for the mother after marriage dissolution and not necessarily on the grounds of the child's best interest.¹¹⁷ Secondly, given that visitation (Ru'ya) is the right of parents, the process of its application does not consider the child's interest. Additionally, visitation (istidafa) remains a conflict or argument between male and female custodians.

Eventually, despite the narrow view of the child's welfare that focuses on determining the child custody age, Islamic jurisprudence appeared to be flexible in providing a wide range of rules that could be used on a case-by-case basis. While current Egyptian law follows only the

¹¹⁷ Moussa, *Supra* 78 at 25.

Hanafi Madhhab, it has made custody adjudications more rigid by not considering elements of the child's well-being that may differ from case to case. In light of these rules' rigidity, the discretionary power and subjective interpretation of the judge to the child's best interest make the situation more complex.

Thus, In Islamic Law, the custody issue is not divine, and involving faith in custody adjudications can be exploited by the judge's discretionary authority, which can be used subjectively with detrimental implications for the child.¹¹⁸

IV. BEYOND THE BEST INTERESTS

Some national legislation either in Westers or Arab countries were able to recognize the indeterminacy of the BI term in governing the child's well-being , particularly, in the custody disputes. This chapter reflects on legal practices in custody adjudications in Australia and Tunisia as they introduced an advanced approach to legal reasoning in the context of BI's indeterminacy. These models illuminate a tangible path toward reform of custody legislation in Egypt.

My aim here is not to find a flawless model, but rather a guiding model advocating for a law reform in Egypt which the best interest of the child is not held and used as a positive term in Egyptian adjudications, leaving the judge's discretion with his culture and beliefs over the child's fate. The chapter begins with reflection on Australia model and the guiding criteria they are following in custody disputes, followed by discussing the reforms in Tunisia, concluded by some psychosocial models adopted in certain courts in the United States and I finalize the chapter by proposing some amendments in the custody rules.

A- Australia Model

The Australia Model reflects an advance model of having clear guiding criteria to consider the child at the center of the judge adjudication after marriage dissolution.

In child-related cases, particularly post-separation disputes, the family court in Australia experimented with non-adversarial methods of engaging both litigating couples and the children's voices. This was advocated by Chisholm, a former academic lawyer who is now a Family Court judge.¹¹⁹ Chisholm observed that children's voices were almost non-existent,

¹¹⁸ Holden & Williamson *Supra* 70 at 1163.

¹¹⁹ Lawrie Moloney & Jennifer McIntosh, *Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions*, Journal of Family Studies, 71-86, (2004).

and that child participation should be considered a basic human right.¹²⁰ And the reason behind this denial of children's voice is that the lack of research-based knowledge and skills to represent children in the legal practices as noted by Kelly and Moloney.¹²¹

The principle of the Best interest of the child is enshrined in the Australian Family Law Act (1975) (FLA). The significance about this model is that the legislator set a criteria by which the best interest of the child is measured. Where several parameters are defined for evaluating BIC, it is assumed that decisions are made using the rational actor model, which involves the aggregation and weighting of all applicable data before making a decision.¹²²

The FLA requires that the court should act to protect the children and promote their welfare.¹²³ The best interest of the child is considered to be the primary consideration in all relevant matters. The FLA states " ...to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children"¹²⁴.

In Australia's Family Law , the term "best interest of the child" has been thoroughly investigated.¹²⁵ Given the debate over the meaning of the word "best interest." Australia's Family Law and its narrow interpretation, The importance of making a list of considerations to decide the child's best interests was emphasised by FLA, which began with the child's involvement in communicating his or her desires and wishes. However, Justice Chisholm questioned the court's ability to decide the child's best interests, especially in legal procedural matters such as divorce. He went on to say that the goal is unclear.¹²⁶

The High Court gave great leeway to concerns for the best interests of the child in the Family Law Reform Act (1995). In Division 10 of the 1975 Australian Family Law legislation, there

¹²⁰ *Id.*

¹²¹ An interview with Joan Kelly and Lawrence Moloney : *Working with high parental conflict (2002)* cited by Moloney, *see supra* 119.

¹²² Antoinette L. Harmer & Jane Goodman-Delahunty, *Practitioners' Opinions of Best Interests of the Child in Australian Legislation*, Psychiatry, Psychology and Law, 251-271, (2014).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

was a list of considerations that concerned independent representation of the child's interests.
¹²⁷ The list of factors acts as a guideline criteria to be taken into consideration in the judges adjudications.

- (A) Any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) The nature of the relationship of the child with each of the child's parents and with other persons;
- (c) The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;

¹²⁷ <https://www.legislation.gov.au/Details/C2017C00385> , Division (10) at 267-268.

- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

This is not an exhaustive list; the best interests of the child were recognized in many other aspects of the law by the Family Law. It also pays careful attention to the child's well-being in matters of separation, acknowledging that the child's interests in parenting orders are the most significant things to consider.

According to a survey of 710 legal and professional practitioners in the field of the child and family Law in Australia, the majority of the factors outlined in the BIC criteria are significant, with some things rating higher than others.¹²⁸

The meaningful bond between the child and both parents is one of the significant factors that is considered in court decisions but is not taken into account in other rules. As a result of the incorporation of this feature, the value of a healthy relationship with both parents was recognised by the legislature.

The importance of this research is that it shows the legal rationale behind the decision which provides more consistency in the adjudication.

Last but not least, legal, social, and psychological data's ability to predict child outcomes can be constrained in the best interests of the child; however, communication between multiple stakeholders (Australian child and family law practitioners, including lawyers, child protection officers, family counsellors, and court experts) is critical.

Through different reading in Australian Family Law particularly in marital disputes over children, I can say that the studies through Law professionals, Psychologist, social workers, and judges have been so extensive.

Whereby, 2000 professionals and non-professional opted for changes that would take decision-making process in a non-adversarial direction in post-divorce arrangement as reported by the House of Representatives Inquiry in 2003.¹²⁹

Efforts to improve the quality of the decision making process in manner that is consistent with best interest of the child became has been recognized by the Attorney General's Department

¹²⁸ Harmer and Delahunty, *see Supra* 123.

¹²⁹ Moloney and McIntosh, *Supra* 119.

in 2001 and 2003. Thus, a child in focus program was funded and other program named Changing the Face of the Practice aimed to provide training to legal practitioners about the child-focused and child-inclusive practices.¹³⁰ The goal of these efforts is to support the child's needs after separation in more practical with evidence-based approach rather than depending on narrow term of the (BI)

The key takeaway from Australian model is that the court recognized the urgency of moving away from the vagueness of (BI) which does not add any weight in the decision making process and move towards consistent criteria which is child-focused.

A. Tunisia Model

Tunisia has a unique position for the personal status law compared to the other Muslim Jurisdictions. The reforms in personal status Law in 1950's have showed a departure from Islamic legal doctrine. This was clear in 1960's when the term BI was announced to be the paramount consideration in custody cases particularly after marriage dissolution. This transformation came earlier than the ratification of UNCRC convention. The decision making process in custody related matters reflected some development even beyond the term (BI). While the Tunisian Law remains to adopt the Islamic legal aspects of custody and guardianship which entails a division between the two genders in the parenting functions.¹³¹

Regardless of the justifications for the reform in custody law, it is clear that some of these reforms departed from conventional Islamic presumptive rules and placed some emphasis on the child's well-being following the separation of parents.

In 1966, the Tunisian legislature made a significant reform in which the term (maslahat al-mahdun) the child's interest was first introduced as a decisive factor in the attribution of child custody.¹³² In the same year, the rule of ending the mother's right of custody at certain age was abolished. Such a reform increased the mother's right to child-care and reinforced the nuclear family. However, the reason for this change is that deciding on custody solely on the basis of age can lead to risky circumstances, such as separating a child from their familiar

¹³⁰ *Id.*

¹³¹ Souhayma Ben Achour, *Parental Care and the Best Interests of the Child in Muslim Countries: Tunisia*, (N. Yassari et al. (eds.), 259, (2017).

¹³² *Id at 196*

environment and requiring them to live in a new one, potentially upsetting their moral and affective equilibrium.

In 1981, the Tunisian legislature modified the law on child custody, allowing a child to live with their mother if she remarried as long as it was in the child's best interests. Also, in 1993, the legislator decided that if the father is incapable of guardianship- which is considered in Islamic Law as a right for the father only- the mother should be granted (*Wilaya*) and this to promote the child's education and the management of his/her financial affairs. Another significant reform in child protection code in 1992, is that this code allows the parents to file an appeal against the temporary measures taken in the course of divorce proceedings.

In 2006, the legislator picked up the topic of childcare again: Article 66 *bis* grants visiting rights to grandparents in case of the death of one of the parents, when this is in the interest of the child. In this way, the regime recognized the importance of the extended family.

The legislator also observed that the lengthy legal process in divorce proceedings may negatively impact a child's education and basic needs. As a result, the judge takes responsibility for making immediate decisions to protect the child's private interests in the name of public order.¹³³ Given that the general family system's protective role is focused on protecting the family unit on the one hand, and on protecting each family member against the rest of the family on the other.

As long as the divorce case is pending, these immediate decisions will remain temporary. The judge can revisit the family by making amendments to it on his own initiative or at the request of the spouses, and immediate decisions are always subject to consideration of the child's best interests, which must always take precedence over all other considerations. For example, if it is proved to the judge at some point during the dispute that the father intentionally claims an income that is less than the true one, he will be entitled to pay alimony that is greater than the one he was sentenced to in the first ruling.¹³⁴

This glimpse on the reform in custody rules in Tunisia reveals the direction of having legal decision that may act in the interest of the child as for example the assignment of guardianship to the custodian mother in case the father shows negligence to the child's property. The second direction is having more flexible legislation far from the rigid legal

¹³³ اليماني , *supra* 29 at 23.

¹³⁴ *Id.*

school thoughts (Hanafi madhib) in the termination of custody ages. This does not deny that fact that the decision-making process of all child-related matters should stay as area needs to be re-visited.

B. A way forward in the Egyptian Custody adjudications

I propose a new paradigm for child custody adjudications in Egypt by reflecting on designed models aimed at improving child-custody adjudications decision making process. However, I believe that custody rules in Egypt are currently focusing on two subjects (Termination of custody age and Visitation right). This was revealed in the modifications that took place from Law No.1 in 1985 until Law No.4 in 2005 was evident in the heated debate sparked by the new draft of the Personal Status Law in February 2021.¹³⁵ Whereas the proposed amendments remain far from a child-centered approach and appear to be more of a conflict between the interests of two genders, and who will benefit the most from this battle?.

The consideration of all these stakeholders in the process of reform since the dimension of the psychological well-being of the best interest of the child is extremely critical within the context of dissolution. As Batt convenes in his article that the main aim of giving weight to the psychological dimension is to see how the abstract BI as a legal standard can be implemented to produce more reasonable and consistent outcomes in child custody adjudications.¹³⁶

Batt introduced two paradigms, the first of which was developed by Joseph Goldstein, Anna Freud, and Albert Solnit and is known as the “Beyond the Best Interest” (BBI) model, which has had a significant impact on family law decision-making.

The second model as Batt discussed also benefits those who are involved in the process of resolving child custody disputes. The second model created by Erik Erikson (the

¹³⁵ <https://almaalnews.com/كل-ما-تر-يد-معرفة-عن-مشروع-قانون-الأحوال/>

¹³⁶ John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence*, *Nova Law Review*, Vol 16, Iss 2,622, (1992).

psychoanalytic humanist)¹³⁷ it is called the psycho-social developmental best interests model. As Batt noted that this model has attracted the attention of persons in the child custody disputes.¹³⁸ In the coming lines, I will reflect on two models as a direction to be considered in custody law reform since both models are articulated as guidelines for legal decision-making and their efforts are truly influential as two jurisprudential paradigms.¹³⁹ The significance about these models is that they are study of legal reality directed decision-making models.¹⁴⁰ For a true reform, such models should be considered to enlighten the decision-making process in child-custody disputes where the psychological and social dimensions are of essentials in the child's wellbeing. My aim is not adopt certain models as much as I argue that a direction towards identical paradigms is essential. And a glimpse on these models will push the way forward in custody disputes in the Egyptian Law.

1. Beyond the best interest BBI Model

This model is rooted in psychoanalysis which has been a part of Yale Law school's interdisciplinary program of legal studies.¹⁴¹

The main idea behind the BBI model is that the child's psychological well-being is of paramount importance in the decision-making process of custody adjudications.¹⁴² This has been discussed in relation to the failure of judicial and legislative decision-makers to give weight to and comprehend the significance of the child's psychological and emotional needs.¹⁴³ The reason behind this psychological direction is to protect the child's right of freedom of choice and the importance of Law to evaluate this reality. The BBI decision-

¹³⁷ see Erik Erikson, *The Life Cycle Completed* (1982) (for an introduction to the author's thought process). Erikson is certainly Western culture's foremost student of human development cited in *Supra* 142.

¹³⁸ *Id.*

¹³⁹ Batt, *supra* 136 at 624.

¹⁴⁰ *Id.*

¹⁴¹ Jay Katz, et AL., *Psychoanalysis, Psychiatry And Law*, The Free Press, 411, (1967).

¹⁴² Batt, *Supra* 136 at 622-634.

¹⁴³ *Id.*

making paradigm places great emphasis on the child's need for continuity of relationship with people who act to humanize the child.¹⁴⁴

To reflect more on this model and show how it can be practical in current custody adjudications and give the court a direction to determine the best interest of the child away from subjectivity, two concepts need to be highlighted “ psychological parent” and “Their guidelines”. The first term is the core of BBI paradigm which view the importance of attachment in the normal psychological development.¹⁴⁵ The latter refers to the people who make legal decisions. As stated in previous chapters, text law and presumptive Shari'a rules do not provide clear and consistent insights into what is best for the child, particularly in marriage dissolutions. This confirms that this area of legislation requires extensive research because decision makers are still unable to recognize interpersonal relationships and make long-term predictions in child-to-parent situations.¹⁴⁶ And the inability for long-term predictions by law can later impose serious consequences on child's education, health care, religious up-bringing, visitation arrangements,....etc.¹⁴⁷

The BBI model tried to introduce more progressive test rather than the traditional indeterminate “ best interest of the child” standard.¹⁴⁸

2. Erik Eriskon Model¹⁴⁹

In this psychosocial development model, Erikson considered three important factors to be taken into consideration in the custody decision making process. Which mainly focused on the stages of child's development. I believe that giving weight to these factors would give insights for the resolutions of the custody age termination dilemma in the Egyptian

- 1- The age of attachment and the formation of basic trust during the first years of child's life
- 2- The years of autonomy of the child

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Joseph Goldstein, et AL., *Before The Best Interest of the Child*, 6, (1979), cited in *Supra* 136 at 623.

¹⁴⁷ *Id* at 50.

¹⁴⁸ *Id.*

¹⁴⁹ Batt, *supra* 136 at 677-685.

- 3- The Expansion level where the child is more exposed to social realm
- 4- The learning age whereas the child is moving to school environment and further knowledge
- 5- Who am I? stage: Adolescence stage and the struggle of identity which between age twelve and eighteen

These models can give us insights to consider other measures in custody decision making process in Egypt since it is obvious that there is a lack in a research-based program in the area of custody adjudications in Egypt and how the decision-making process in custody disputes is articulated should be invested in.

Not only that, but also what qualities, experiences, and knowledge do judges need in the field of child protection to be able to make decisions with a child-centered approach rather than a subjective one? What is the effectiveness of the role of psychiatrist and social workers added in Law No.10 for 2004? Do they really help the judge to take the decisions based on the interest of the child?

D - Current gaps and key recommendation suggestions

Although there are clear areas in Egyptian custody rules that require rigorous reform, the greatest effort remains to be made on the rationale of the decision-making process. Some of areas where any law reform remains silent are as follows;¹⁵⁰

1-The protracted litigation of maintenance cases following divorce, which has a negative impact on the child's well-being. And the judge's limitless discretion in deciding on alimony, which have implications for the best interests of the child in terms of covering basic daily needs, as evidenced by the inconsistency of alimony decrees.¹⁵¹

Recommendation: Establishment of a summary circuit particularly to decide on the maintenance cases within a maximum of one month. Secondly, the decision on the amounts to be allocated for the maintenance by the judge should be evidence based to ensure the financial rights of the child. This can be done through the court's order to have access to the bank accounts, assets authorities of the guardian and exclude the related legislations of personal data protection in custody issues

¹⁵⁰ *Supra* 98.

¹⁵¹ *Id.*

- 1- Transfer of guardianship to the custodian if the guardian is found to be negligent and has abused the children's financial rights, or even if he dies.

Recommendation: It is proposed that the custodian can also be granted the guardianship rights with respect to travel, education and financial matters of the child. The objective here is to preserve the welfare of the child.

- 2- Financial rights such as (kindergarten fees, school uniform fees, school bus fees) are not enshrined in law and are left to the discretion of judges, who in most cases do not serve the best interests of the child. While it is acknowledged in judicial precedents and some judges refer to them, it is not mainstreamed among the custody adjudications and also based on the judge's perspective. This shows inconsistency and indeterminacy of the adjudications. To illustrate, the text law refers only to the education fees starting from primary stages which starts from 6-years and remains silent about the pre-educational stages fees. This completely violates the right of the child for education in early developmental stages

Recommendation: it is proposed that any coming amendments should include the education right in early childhood and not to be left to the power of the judge who might give this right based on judicial precedents or ignore that right at all.

- 6- The organization of vision rights is discriminatory. To elaborate more, if the one of the parents - most probably the mother who is the custodian- did not commit to the visionary schedule the judge drop-off of custodian right from the mother while the law remains silent about the absence of the father from the vision commitment. This could have a great negative consequences on the psychological well-being of the child who waited for long time to see his father with no avail.

Recommendation: Vision rights of both parents should be respected and the law should have an equality position from both parents who do not comply to the vision rights to protect the well-being of the child.

The mentioned gaps in the current custody rules are not exclusive, however, it shows the need of Law reform in custody area that remain rigid long time depending on presumptive Shari'a rules and unclear western modern terms like BI. While in reality, the decisions are greatly influenced by the subjectivity of the judges based on their culture and individual opinions and in some times based on their Islamic Madhib In addition, for any custody reform, it is essential to see who proposes the reform and their background. For example, the last law draft is proposed by individual MPs, Egypt's state women's council, and religious

institutions like Al-Azhar.¹⁵² However, In child-related matter, the inclusion of child protection specialists, psychologists, psychiatrist, legal practitioners and social workers are of great importance.

At the end, my stand is not to evaluate these models, rather than advocating for a holistic a decision centered model which permit insights into the complexities of custody disputes and to move away from the limitless discretionary power of the judge.

V. CONCLUSION

In both Western and Muslim countries, custody laws are governed by indefinite legal terms and presumptive rules, as shown in this thesis. BI is still enshrined in many national statutes, with judges being given no specific guidelines. This gives the judge a lot of discretion in making custody decisions, and it also allows for subjective interpretation of the law.

Furthermore, the presumptive rules in Islamic Shari'a provided a variety of rules across various legal schools (madahib) to give judges more flexibility in their decisions. However, the welfare of the child's definition was limited to Do No Harm instead of pursuing benefit.¹⁵³

Although these presumptive rules are still considered to be followed and referred to in custody adjudications, it was necessary to question them in this paper to prove that they are not divine and can be rebutted. Custody laws in Egypt are narrowly based on the age of termination of custody and the order of the father in the custodians arrangement. This was evident while tracing the changes in Egyptian custody laws after Law No. 100 in 1985. The rigidity of custody adjudications based solely on the Hanafi madhab and using the BI definition without any specific guiding criterion was aided by this narrow perspective.

Through this paper, it has become clear that a research-based consideration of children's interests after marriage dissolution should be a priority in Egypt's custody law reforms. This is to avoid the subjective legal opinions that may have a negative long-term impact on the child's life. As a result, custody decisions should be evidence-based, and a child-centered paradigm should be established, with psychological and social professionals participating in the decision-making process to provide insight into the complexities of the best interests of the child.

¹⁵² <https://english.ahram.org.eg/NewsContent/1/64/357467/Egypt/Politics-/A-guide-to-the-proposed-amendments-to-Egypt-famil.aspx>

¹⁵³ Fekry, *supra* 19 at 230