THE BEST INTERESTS OF THE CHILD:  
A SOUTH ASIAN PERSPECTIVE

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ABSTRACT

This paper examines the effect of the introduction of the ‘best interests’ concept into the law of the countries of the Indian sub-continent. It shows how the received colonial laws partly coincided with, and partly differed from, the indigenous laws of the region. Initially, the received laws, like the indigenous laws, gave prominence to paternal rights, but they also introduced the ‘best interests’ concept, which was used by the courts and certain legislation to introduce a degree of uniformity which undermined the pluralism of the region. Today, religious and ethnic awareness is threatening that uniformity. However, the paper concludes by indicating that constitutional norms are showing signs of playing a similar role to the earlier colonial principles of equity and may maintain some uniformity based on constitutional standards in the region.

Article 3 (1) of the Convention on the Rights of the Child sets a general standard that must be observed by the major agencies of government, the legislature, the executive, Courts of law and private social welfare institutions within a country that is a party to the Convention. When taking any action concerning children, these agencies are all required to make the best interests of the child a ‘primary consideration’. All the countries which belong to the South Asian region, namely Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, have ratified the Convention. They have therefore taken on a commitment to realizing this standard in their domestic jurisdictions.

I. BEST INTERESTS AS A ‘PRIMARY’ CONSIDERATION AND THE ‘PARAMOUNTCY’ PRINCIPLE

When the Convention states that the best interests of the child shall be a ‘primary’ consideration it is departing from a standard of ‘primordial’ or ‘paramountcy’ that has already been incorporated into international law, English law, case law and some legislation on religious law in this region.1 The Convention’s article 21 (on adoption) also uses the term ‘paramount’ rather than ‘primary’ consideration, and draws attention to the difference between these expressions.

The fact that these terms can be interpreted differently in custody litigation has been highlighted in a dictum of Lord McDermott in J v C:

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"these words" said his lordship, referring to the 'paramountcy' concept, mean 'more than that the child's welfare is to be treated as the top item in a list of terms relevant to the matter in question ... They connot a process whereby when all the relevant facts, relationships, claims and wishes of the parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is ... the paramount consideration, because it rules upon or determines the course to be followed." In this particular case, the House of Lords decided to give the care and custody of a child to foster parents rather than natural parents, despite the fact that the parents were unimpeachable, on the basis that the child's interest in remaining with the foster parents outweighed any other concern. The welfare of the child therefore became the sole consideration.

Giving paramountcy to the child's welfare in guardianship litigation has sometimes been criticized as too child-rights oriented, and as undermining the need to consider the interests of parents and other children in the family. On the other hand, it has also been argued that the concept of the 'child's welfare' is only ostensibly child-centred because courts in fact use it as a tool for making decisions based on adult perspectives whether religious, moral or social, rather than the needs of children.

Domestic courts may perceive the child's interests or welfare as a 'paramount' consideration so as to provide a different standard to that envisaged in the Convention. This would not be in conflict with the Convention, since Article 41 gives the benefit of a domestic standard if it is seen as higher than the Convention's standard. On the other hand, the perception of best interests as a 'primary' standard of concern can encourage the exercise of discretion with awareness of the dynamics of the child's own environment. Making children's interests a 'primary' consideration will thus be useful in creating sensitivity to the need for a holistic perception of the child's interests, without the child's interests becoming the sole concern. However, the emphasis on an open-ended concept of 'child welfare', combined with an interpretation of best interests as a primary rather than paramount concern, can undermine commitments to realize the ideal standards on child rights articulated in the United Nations Convention, unless the concept itself is interpreted within the framework of those rights and international standards.

II. PERCEPTIONS OF THE CHILD'S 'BEST INTERESTS' IN SOUTHERN ASIA: COMPARATIVE APPROACHES

Countries of South Asia have a variety of indigenous social and legal traditions that came to be viewed as 'customary' or religious personal laws in the British Colonial period. They were, and are still, perceived as
‘personal law’ since they are based on norms that deviate from uniformly applicable state or received colonial laws. The latter, together, are the ‘dominant’ legal regimes, while the indigenous systems apply as personal laws to particular ethnic or religious communities within these countries. It is relevant to compare the child-centred concerns in these indigenous systems with colonial laws, particularly in a context where the ‘best interests’ concept in the Convention can be interpreted as a tool for exposing values and ideologies that may conflict with the basic rights guaranteed to children by the Convention.

The Colonial Laws

English Common law has been described as a system which showed ‘brutal indifference to the child’s fate’. Early English common law recognized the superior parental right of a man in a family unit created within marriage, and was more concerned with safeguarding his paternal rights than the interests of children. A child born out of wedlock by contrast was considered ‘filius nullius’ or the child of no one. Blackstone remarks on this difference between marital and non-marital children, and the exclusion of the mother of marital children from parental status. Parental power and authority over minor marital children were identified by him with paternal power ‘for a mother as such is entitled to no power, but only to reverence and respect’. Not surprisingly, at common law, the father’s legal right of custody over a marital child was so absolute that he could claim the physical custody of a child who was being nursed at the mother’s breast. The right to physical control was the essence of the paternal right, and the procedure for enforcing the right was the writ of habeas corpus.

Child-oriented developments in English law took place initially through the intervention of the Court of Chancery, which exercised a special jurisdiction in Equity distinct from the ordinary jurisdiction of the Common law courts. The Court of Chancery was authorized to intervene on behalf of children in the exercise of the prerogative power of the Crown to act as ‘pares patræ’. This jurisdiction provided a procedure for intervening between parent and child by making a child a ‘ward of court’. It also allowed the court to make and enforce a variety of orders concerning matters such as the education of the child. The impact of Equity eventually led to a modification of the position in Common law, so that the ‘best interests’ or welfare of the child came to be perceived by the English courts as the first and paramount consideration in any litigated dispute involving the care and custody of children born within lawful marriage. By the beginning of this century, the concept that the child’s welfare and best interests should be the paramount consideration had a strong impact in the determination of custody disputes in English law.
The child-centred approach that developed through the intervention of Equity was also endorsed in legislation in England from the early part of the nineteenth century. The Common law concept of the father's custodial right was qualified by a series of nineteenth century statutes which empowered the courts to give the mother custody of a legitimate child. The Guardianship of Infants Act 1925 was the culmination of the process and introduced the basic principle that courts called upon to make decisions on the custody and upbringing of children must regard 'the child's welfare as the first and paramount consideration'.

English law provided a value base for countries in the subcontinent of India which experienced British Colonial rule. Sri Lanka, which was a British Colony, also experienced another received colonial system, Roman-Dutch law. This system, which combined Roman Law with Germanic custom, recognized the husband's marital power over his wife and his natural guardianship over minor children. His protective authority over the wife and marital children was deeply entrenched in the system. However, Roman-Dutch law accepted the overriding responsibility of the Princeps and later the courts to act as "pares patriae" and safeguard the interests of children. The courts, acting as 'upper Guardian of minors', could deprive the father of any or all of the incidents of paternal power. Roman-Dutch law, like English law, did not have the institution of adoption. Yet, unlike English Common law, it emphasized the importance of mutual obligations of support between parents and children, and imposed a duty on a man to maintain his marital and non-marital children. Though the distinction between marital and non-marital children was accepted in Roman-Dutch law, and the latter suffered disabilities, duties of support were conceded and the concept of 'upper guardianship' could be used to safeguard the interests of such a child in guardianship or custody litigation.

The Indigenous Systems

These perceptions of the child's best interests in the received colonial heritage were in some respects similar to and in others different from some indigenous legal traditions in South Asia. This is apparent in an overview of concepts in Hindu and Islamic law and in Buddhist values which affected Sri Lankan indigenous law.

It has sometimes been suggested that child-rearing practices in medieval Islamic societies revealed a greater concern for the child's needs than in early European societies. However, the concept of paternal power was just as strong in that system, and enabled adult interests to prevail over the health and developmental needs of children. Thus the controversial concept of marriage guardianship recognizes that a father may impose the status of marriage on a minor child. There is no minimum age of marriage, and the male guardian (wali) becomes the contracting party to the marriage. These norms have encouraged the practice of child marriage in Islamic societies. Yet Islamic law permitted an
'option of puberty' or the right to annul a marriage contracted by a
guardian contrary to the interest of a child, gave a child bride a right
to her marriage portion (mahr) and placed constraints on unilateral
repudiation by the husband seeking to divorce his wife by pronouncing
ululak. A woman's separate property rights were recognized by Islamic
law.

There are no specific injunctions in the Koran stating an order of
guardians. However, jurists of different schools concede that the mother
has a preferential right to the custody of a child of tender years. The
child's nurturing needs were considered important enough to permit
using the exceptional and limited doctrine of independent juristic
reasoning to modify the Islamic law on hire. The consideration normally
required for hire of a person was an object like gold or silver. However,
Islamic law permitted a wet nurse to be hired in return for her food
and clothing. Unlike English Common law, which did not create an
enforceable legal duty of maintenance, Islamic law imposed parental
obligations to support marital children.

Islamic law, like English Common Law, considered a non-marital
child filius nullius, and did not recognize adoption. Yet adoption is prac-
tised by some. Islamic communities in South Asia, and has been
described as a practice which is not prohibited, but an act that is mubah—
'towards which religion is indifferent'.

The approach of Hindu law to children reflected a similar dualism
between child-centred concerns and disregard for the needs of the
child. Child care and nurturing were recognized in various principles
of Hindu Law. The State (represented by the king) and members of the
joint family had rights and responsibilities in regard to the child. Various
legal protections focused on the King's power to protect and safeguard
the child's proprietary interests. Since family authority was distributed among several elders, an order of guardians was not clearly
identified. Hindu law also recognized the paternal obligation to main-
tain both marital and non-marital children, irrespective of the nature of
their parents' union. Nevertheless, unlike Islamic law, this system
was marked by an all-encompassing concept of male protection over females that encouraged a perception that a woman had no rights and
belonged to her father or husband. According to the interpretation of
texts of Manu, 'the father protects a woman in childhood, her husband
protects (her) in youth, and her sons protect (her) in old age; a woman
is never fit for independence'. This perception of the female is combined
with strong son preference, or a concept of 'sonship'. The scriptural
texts declare that 'through a son one conquers the world. Through a
grandson one obtains immortality, and through the great grandson one
ascends to the highest heaven'.

There is some indication in the scriptural texts that marriage was not
perceived as sale. Thus Manu states that 'no father who knows (the
law) must take even the smallest gratuity for his daughter; for a man
who through avarice takes a gratuity is a seller of his offspring'. Nevertheless the idea of a father gifting his daughter to a husband was all pervasive. This was combined with a later development in Hindu law which suggests that she could be given in marriage before puberty. Consequently Brahmin girls could be married between the ages of eight to ten years.

The practices of child marriage and dowry that are current in India, and expose young girls to physical violence and abuse, are legitimized by the scriptural sources on age of marriage, and the concept of a parental right to gift a bride. Despite the constraint on bride sale, the perception of the right to own and gift 'a daughter decked with ornaments and jewels' conflicts with a perception of the girl as someone with her own human identity. The customary practice of female infanticide which is known to be common in parts of Tamil Nadu, appears to be as much a response to the need to provide dowry as lack of concern for the individual identity of a girl child.

Some of the indigenous laws of Sri Lanka, of the Sinhala and Tamil Communities, reflect child-centred concerns as well as ideas of parental power and family authority which tend to deny the identity of the child. The Tesawalamai Code of the Tamils of the North, which applies even today, originally contained several sections in the part on sales which referred to the sale of children. Child marriages were familiar to these Tamil Communities. Nevertheless, the provisions in the Tesawalamai Code also reflect the values of Hindu law and do not recognize an order of guardians, but make an assumption of wider family responsibilities for nurturing a child. For instance, the Tesawalamai Code declares that 'if a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they are still young) in order to bring them up'. Similarly the code contains a provision which states that 'if the father and mother die . . . and their surviving children are infants under age, then the relations of both sides assemble to consult to whose care the children are to be entrusted; and a person being chosen, the children are delivered to him'. There is no corresponding statement of an order of guardians. Some concept of family support and family provision after death from inherited property is found in isolated provisions of the Code. Adoption is also permitted, and there are detailed provisions which were subsequently removed from the code by legislative intervention.

A similar perception of wider family responsibilities for the care and nurture of children can be seen in the early records of the law of the Sinhala Community in the Central (Kandyan) provinces of Sri Lanka. Kandyan (Sinhala) law does not indicate a specific order of guardians, except in the event of dissolution of marriage. A surviving mother is preferred over other relatives, but there are instances in which paternal relatives are preferred. The focus on guardianship only in the event of
dissolution suggests that, as in Hindu law and Tasawalamai, imposition of authority on a single parental or paternal guardian was not considered important in a situation where the wider family assumed responsibility for the child's nurturing and other needs.

The perception of individual family responsibility is, however, reflected in an important Buddhist text on the responsibilities of the hayman or woman. According to the Mangala Sutra 'caring for mother and father, and the cherishing of spouse and children' are important obligations in lay life. The high value placed by Buddhism on individual human potential and individual responsibility affected social and legal values in the pre-colonial period. These values were strengthened by the impact of South Indian matriarchal social influences of later centuries. Kandyan law and indigenous laws in Kerala share concepts on gender and family relations that suggest a common legal heritage.

Kandyan law recognizes the separate legal identity of men and women, and did not allow parental authority to impose marriage on minor children of either sex. This system also appears to have accepted that a child of sufficient understanding could leave a guardian and 'commit himself to the guardian of another relation'. Kandyan law emphasized the importance of family obligations in providing support to children, and held that inheritance rights could be claimed on the basis of 'familial assistance' or support provided during a person's lifetime. Rights of inheritance and support extended to both marital and non-marital children, and Kandyan law did not distinguish between these two categories sharply. This was consistent with a legal and social system that had a liberal view of sexual relations, and recognized consensual divorce and the reality of marriage breakdown.

Early British administrators and residents appreciated the difference in the approach to family relations in Sri Lanka and remarked on what seemed to be to them a striking egalitarianism. Accounts of the country note that 'the natives of Ceylon are more continent with respect to women than other Asiatic nations and their women are treated with more attention'. Nineteenth Century Victorian British administrators found it remarkable that 'as fathers and mothers and sons and daughters'... 'family attachments were strong and sincere', infanticide even among the very poor seemed to be rare, and 'natives' treated children 'with utmost' kindness and 'too often spoiled them by over-indulgence'. It was thought equally strange that a child should be adopted by persons who wanted merely to provide care and nurturing, and accepted him/her as a full member of the family with legal rights within it. A child who was considered 'unlucky' in one family could be given to another, who would 'take such child and bring them up with Rice and Milk' as a natural child of the adoptive family. This type of indigenous adoption was different from adoption for succession and was perceived
by the British administration in the early years as fostering, without legal consequences.

Despite these nurturing traditions, extensive parental authority was also recognized in Kandyan law. Parents had the right to sell or pawn children when they could not afford to maintain them or in order to discharge their own liabilities. Nevertheless, feudal patronage could be benevolent; children received in affluent families could be cared for as members of the household.

III. RECEPTION OF COLONIAL VALUES AND THEIR INFLUENCE ON LAW AND POLICY

Hindu law, Islamic law, and systems which represent the indigenous socio-legal culture on children thus reflect perceptions of parental authority and the position of children which were familiar to Common law, Roman-Dutch law and European law, several centuries ago. These indigenous systems did not operate in isolation from the centuries of colonial influence. It has been observed how trading contacts with the Byzantine and Persian Empires resulted in aspects of Islamic law absorbing influences from Roman and Jewish law, and that Greek ideas influenced the attitude to child care and nurturing in some early Islamic societies. This process has taken place in the colonial period in South Asia.

A comparison of the received and indigenous legal heritage in South Asia shows that indigenous systems reflected some child-centred concerns that were not found in the early English Common law and Roman-Dutch law. On the other hand, there are also similarities of perceptions in regard to parental or family authority. The focus on these adult interests impinging on the capacity to address a child’s individual needs. While English and Roman-Dutch law developed in their own environment, the indigenous systems of South Asia were denied the opportunity to grow and develop on their own momentum. The South Asian experience of the application of the ‘best interests’ standard in law and policy as well as future interpretations of that standard must therefore be understood in the context of the received, rather than the indigenous heritage. The ‘best interests’ concept derived from the colonial legal heritage has influenced law and policy in the post-independence period, and set child-centred standards. These come into conflict with norms in indigenous systems which do not reflect current social realities. For instance, the focus on wider family responsibility and authority and the value placed on care and nurturing are not reflected in today’s reality of sweeping paternal authority, exploitation of girl children, child marriage and infanticide. Infanticide and child abandonment are reported in the press and by social welfare authorities, even in Sri Lanka, which has comparatively high social indicators for children.
Guardianship Law in the Subcontinent

(a) The development of the welfare principle

Guardianship law in the subcontinent of India has been influenced greatly by the Guardianship and Wards Act 1890, introduced in the colonial period. This legislation is said to have originated in the difficulties the British administration experienced in determining guardianship disputes concerning royal children in the Indian states. Nevertheless, the Act was introduced as a uniform law applicable to all communities, and has been retained in Bangladesh, Pakistan and India. None of these countries has chosen to deviate from this legislation in the post-independence period. The 1890 Act is applied today in all these countries as a uniform law in custody and guardianship litigation. The Act reflects the English law of the time and therefore concedes the superior paternal right of the father which will prevail unless he is 'unfit' to be a guardian. Nevertheless, the Act also requires a court to determine custody according to the 'welfare of' the minor child.23

We have observed that Hindu law did not specify an order of guardians. Yet very early judicial decisions in British India held that the father was the superior and preferred guardian. In Skinner v. Orda (1871)24 the Privy Council stated that a child in India must be presumed to have the father's religion. The Guardianship Act made it easier for the courts to state, as in the leading case of Besant v. Narayanaswami,25 that 'there is no difference in this respect between English and Hindu law. As in this country, so among the Hindus, the father is the natural guardian of his children during their minorities'.

During the colonial period the father's preferred right of guardianship became a fundamental legal principle in the uniform law of guardianship through a combination of legislative and judicial intervention. The child's welfare, however, provided the court with a tool to interfere with the paternal right. That principle was often used to introduce a child-centred approach into judicial decision-making in custody disputes, even as the colonial legislation entrenched a concept of a 'natural' paternal rights of guardianship.

In India, the 1890 Act envisaged that the courts would give due recognition to the 'personal law' of the parties. Thus it declared that the court had the power to appoint guardians according to 'the law of which the minor was subject'. They should interpret the welfare of the child 'consistently with the law to which the minor is subject' and have regard to 'the religion of the minor'.26 Yet judicial developments on guardianship in the subcontinent indicate that the child's welfare has been given paramountcy even though the 1890 Act did not give the child's welfare that significance.27 They show how the Courts have modified even parental rights conferred by the personal laws on the basis
that consideration of the child’s welfare cannot be undermined by these
laws.28

There are many Indian court decisions holding that the father is the
preferred guardian and that the onus is on the party seeking to displace
those rights to show that he is ‘unfit’ and that it would be contrary to
the child’s interests to recognize that custody. These decisions identify
the paternal right to custody with the child’s interests. The guardianship
of the father has been described by the courts as a ‘sacred trust’, a right
which should not be denied unless he is ‘utterly unfit’.29 Thus courts
have sometimes ignored the fact that a child might be happier or more
comfortable with other relatives.30 In a competing claim between the
father and maternal relatives, the latter have been considered as not
‘expected to eince the same interest in the health, welfare and upbring-
ing of the minor that a natural parent or a step parent may take’.31 The
sentiments contrast sharply with the perception of the role of relatives
in the indigenous systems discussed earlier. These decisions clearly
identify the paternal right to custody with the child’s best interests, and
accept that it is in the child’s best interests to be with the father whose
legal rights law recognizes. But the Indian courts have not been consist-
ent in this approach. There are many judicial decisions indicating a
willingness to use the child’s best interests to award custody to the
mother or a foster parent.

The parent who has given custody to a third party will not therefore
be allowed to assert natural rights and the dispute will be decided on
the basis of what is best for the child. The focus on the child’s welfare
has also enabled some courts to confer custody rights on the mother.32
In Saraswatibai v Shripad (1941)33 the court stated that ‘if the mother is
a suitable person to take charge of the child, it is quite impossible to
find an adequate substitute for her, for the custody of a child of tender
years’. The idea that the welfare of the child creates a right in the
mother of an infant is reflected in the dictum that ‘the mother’s lap is
God’s own cradle’, and in many judicial pronouncements.34 A mother’s
poverty has not been considered a reason for denying the child’s nurtur-
ning needs, although it has also resulted in a denial of the mother’s
custody.35

These judicial views were subsequently entrenched in statute law.
The mother’s preferential right as custodian parent was upheld by the
Hindu Minority and Guardianship Act 1956 which codified Hindu law.
Section 6(a) declared that ‘the custody (as distinct from guardianship)
of a minor who has not completed the age of five years shall ordinarily
be with the mother’. Section 13(1) made the welfare of the minor a
‘paramount’ consideration. This provision has enabled courts to focus
more clearly on the child’s need to retain a close relationship with the
mother. It has been pointed out that the father’s ‘right is not absolute;
nor is it indefeasible in law; it is circumscribed by the consideration of
the benefit and welfare of the minor." Although Indian courts continue
to afford preferential status to the father, there are adequate precedents
to support awarding custody to the mother in the child's interests.

A provision in the 1890 Act sets certain guidelines for determining
whether an order is in the best interests of the child. The court must
have regard to certain considerations such as the age, sex and religion
of the child and the character and nearness of kin to the child. These
guidelines have encouraged courts to give weight to factors such as
kinship relationship of wider family members, and the 'morals' of a
parent, particularly of the mother. Nevertheless, in general the major
consideration has been whether giving custody to the mother is conduc-
tive to the general well-being of the child, or whether the paternal right
should be conceded.

(b) Islamic principles

We have observed that the 1890 Act envisaged the application of the
personal law of the child, a perception strengthened by reference to the
need to take account of the child's religion. The Indian courts have
adopted an ambivalent approach to Islamic-law principles on guardian-
ship, when they come into conflict with the court's perception of the
child's welfare. We have observed that the Koran does not set an order
of guardians, but that different schools of Islamic law recognize specific
rules in regard to the custodial rights of either the father or the mother.
Early cases on Islamic law in India considered these custodial rights to
be subordinate to the the child's welfare. However, there are cases
where courts have applied only the personal law, sometimes stating that
'the Guardianship and Wards Act 1890 does not permit the court to
subordinate the law to which the minor is subject to the consideration
of what will be for the minor's welfare.' But in 1983 Anand J. in the
Jammu and Kashmir High Court interfered with custodial rights under
Islamic law by applying the concept that the child's welfare is the para-
mount consideration.

The approach to Islamic law principles in the context of the 1890
Act, which applies as a uniform law in Bangladesh and Pakistan, indi-
cates that the child's welfare can be used to deny the custodial rights
confirmed by that law. One view is that in Pakistan the concept of the
child's welfare is the sole criterion when a guardian is being appointed,
but due consideration must be given to personal law when a guardian
is being removed. Pakistan Courts have sometimes departed from the
traditional principles of Islamic law on the basis that there are no Kor-
anic rules on the subject. Thus it has been stated that 'it is permissible
for Courts of law to depart from the rules of custody as stated in the
textbooks . . . since there was no Quranic or Traditional texts on the
point, and courts which have taken the place of Quazis can, therefore,
come to their own conclusions by process of Ijihad (exposition) . . .
Therefore it would be permissible to depart from the rules stated ... if on the facts of a given case its application is against the welfare of the minor.\textsuperscript{43} Courts apply an initial presumption that the child's welfare is identified with custodial rights, but show willingness to interfere with them. In \textit{Atia Warsi v. Sultan Khan} (1959) Mahmud J stated that 'initially the minor's welfare lies in giving custody according to the dictates of personal law; but if circumstances clearly point that his or her welfare dominantly lies elsewhere, or that it would be against his or her interest, the court must act according to the demand of the welfare of the minor'.\textsuperscript{44} Factors such as the mother's apostasy or remarriage which prejudice her custodial rights in Islam may also be disregarded in the interest of safeguarding the child's welfare, though these rules are presumed initially to be in the child's interests.\textsuperscript{45}

The open-ended nature of the best interests concept has led to the exercise of a wide judicial discretion in Pakistan. As in India, this has resulted in conflicting judicial decisions where judges' attitudes and personal perceptions determine the choice between recognizing traditional rights and deciding the issue without any preconceived notions of a 'suitable' guardian. One writer has commented that 'despite exceptional judgements to the contrary, the law to which the minor is subject is assigned a relatively subordinate position to that of the rules of welfare', and that courts have been willing to grant custody to the mother. However she comments that, with the recent trend towards expanding the significance of Islamic law as a source of family law in Pakistan, guardianship cases between 1981 and 1988 indicate a preference for the father.\textsuperscript{38}

\textit{(c) Access}

The Guardianship Act 1890 has certain other aspects relevant to the best interests of the child. Although that Act and the Hindu Guardianship Act 1956 do not refer to rights of access, Indian courts have considered such rights to be an aspect of the child's welfare. Access rights of the non-custodial parent are therefore recognized as a matter of course. Denial is an exceptional measure that can be justified on the basis that allowing access will be prejudicial to the child. A relative may also be granted rights of access in the interests of the child. The Supreme Court has pronounced that courts must give full and clear directions on access, and avoid practical difficulties as far as possible.\textsuperscript{47}

\textit{(d) Non-marital children}

The Hindu Guardianship Act now accepts that the mother is the preferred natural guardian of non-marital children, followed by the father. The Act has therefore modified the traditional law, which gave the father preferential status. In these cases, the welfare of the child has been used to award custody to the mother or other relatives. The mother's
'immorality' has sometimes been considered relevant in these cases, but has also been ignored. Though the 1890 Act permits the courts to consider the 'character' of the guardian, an early Indian case held that 'an immoral father has just as good a right to his own children as a moral man and in many cases... is likely to see that his children are properly brought up'.

(e) The child's wishes
The child's best interests have been used in custody and guardianship litigation in India to give significance to the child's wishes and preferences. The Guardianship and Wards Act 1890 states that the child's welfare must be determined in the context of the age of the child and that 'if the minor is old enough to form an intelligent preference the court may consider that preference'. This has been used by the Indian courts to focus on the maturity of the child, rather than his or her age. Indian courts have sometimes been influenced by the early English law's concept of an 'age of discretion' at which the writ of habeas corpus could not be brought to question 'the detention' of a girl over the age of sixteen and a boy over the age of fourteen. However, the predominant view of the Indian Courts is to approach the issue of the child's wishes flexibly, considering the ages of discretion too artificial to be applicable in the Indian context. Reported cases also show that, in the absence of some guideline as to the weight to be attached to the child's wishes, there is a great deal of subjectivity in decision making, leading to a situation where a teenager's wishes are disregarded, while young children have been considered competent to express an 'intelligent preference'.

(f) Religion
The father's right to control religion appears to be given special significance in India and Pakistan in some cases, so as to determine the issue of guardianship and custody, irrespective of other considerations. One commentator therefore notes that in India the 'parental (father's) right to control the religion of his children has not been tested on the touchstone of the welfare of children'. Thus the child's preferences may be deemed subordinate to the importance a court attaches to enabling the father to control the child's religious upbringing. Since Islamic and Hindu law presume that children will follow the religion of their father, public policy appears to make it difficult to depart from this view. Nevertheless, we have observed that the 'best interests,' concept has been used to displace rights under personal law. This willingness to depart from the personal law strengthens the argument against attaching special significance to the father's rights in this regard where they conflict with other considerations.
Section 17 (2) of the Guardianship and Wards Act merely mandates
the court to consider the religion of the minor when making its decision
on what is in the child’s welfare. However, the judicial approach goes
further than that in identifying the parental right over religion with the
child’s interests. If the parental rights in this regard are given greater
significance in the current environment of religious fundamentalism,
further rationales are likely to be developed to justify interpreting the
child’s interests in terms of the father’s parental rights. This could even-
tually lead to erosion of uniformity and resurgence of principles of per-
sonal law.

The Convention requires States parties to realize the right of the child
to ‘freedom of thought, conscience and religion,’ and to respect the ‘right
and duty of guardians to provide direction to the child’ in the exercise
of this right ‘in a manner consistent with the evolving capacity of the
child’. The Convention’s approach to religious upbringing is therefore
consistent with its general value system in regard to parental responsi-
bility and protection and autonomy rights. The Constitutions of India,
Bangladesh and Pakistan also recognize the right to freedom of con-
science and of religion. These provisions and the Convention’s value
system are difficult to reconcile with the existence of a parental right to
control the religious upbringing of a child in circumstances where the
wishes of a child are disregarded to accommodate the parent’s interests.

(g) Child marriage

The application of the Guardianship Act 1890 and the child welfare
concept has clearly helped to introduce uniformity into personal law
and also resulted in judicial modifications of personal law. They have
also contributed to developing a uniform body of legal principles that
have benefited women by modifying personal law.

Despite these developments, child marriage remains an area where
the child’s welfare has not been used to modify values of the personal
laws. We have observed that Hindu and Islamic law permit child mar-
rriage. Uniformly applicable legislation, the Child Marriage Restraint
Act, was introduced in the subcontinent of India in 1929. This legisla-
tion has been amended to increase the minimum age in the post-
independence period in India, Bangladesh and Pakistan. Yet child mar-
rriages solemnized in violation of the law have not been declared void.
Despite the policy stated in the Act, provisions in the Guardianship and
Wards Act 1890 and the Hindu Marriage Act 1956 continue to refer to
the ‘husband’s guardianship of his minor wife’. This ambivalence in
legal policy encourages social and legal legitimacy for the practice.

Indian cases thus discuss the issue of the ‘child’s interests’ in the
context where they are considering whether or not to award the guar-
dianship of a child bride or a child widow to a husband or father-in-law.
The courts use the welfare of the child to interfere with the husband’s
or male relatives' right of physical custody and control of a child wife.\textsuperscript{56} There are, however, occasions when this is not done. In \textit{Poras Ram v State} (1960)\textsuperscript{57} the Allahabad High Court permitted the father-in-law of a minor widow and other persons forcibly to remove her from her mother's house and contract a subsequent marriage for her against her wishes.

Research has revealed the extent of the abuse of girls in child marriage. Its connection with child trafficking is apparent from the fact that girls are taken across national borders for prostitution or marriage. The case of Ameena (1991), a child bride discovered travelling on an international flight to Saudia Arabia with her sixty-year-old husband, attracted media attention, and is one case among many which reveal the new dimensions of the problem of child marriage.\textsuperscript{58}

\textbf{IV. BEST INTERESTS OF THE CHILD IN A MIXED JURISDICTION: THE SRI LANKAN EXPERIENCE}

The concept of the child's 'best interests' entered Sri Lankan law through the combined influence of Roman-Dutch law and English law. The early Dutch jurists proclaimed that courts were 'upper guardians of minors' and could intervene to deprive a parent of any or all of the different components of parental power. These principles applied in Sri Lanka in a context where the colonial British administration established a legal system based on English law. Thus, as in the Indian subcontinent, the Superior Appeals Courts could grant relief in custody disputes by the writ of habeas corpus, while the civil courts, known as District Courts, were given a special jurisdiction to appoint guardians of minors.

In the absence of specific guardianship legislation, as in the Indian subcontinent, from an early date applications for custody in Sri Lanka were made in the Supreme Court by writ of habeas corpus, on the ground of the child's wrongful detention. These applications became the common method for litigating custody disputes, and provided an avenue for introducing English legal values. The initial focus was thus on parental rights and especially on the rights of the father. Court intervention was constrained, as it had been in India, by the fact that he had to be proved to be 'unfit'. We have noted how indigenous laws did not have an order of guardians. Yet court decisions and statutes in the colonial period introduced exclusive paternal authority.\textsuperscript{59}

In Sri Lanka, the child's best interests are identified with the parental rights of the father or mother and the concept has been developed entirely by the judiciary without any legislative intervention. The courts have invariably focused on the preferential right of the father to custody and guardianship, deriving inspiration from early cases in English law, and more recently from the Roman-Dutch law. The leading South African case of \textit{Calitz v Calitz},\textsuperscript{60} on the award of custody in the modern
Roman-Dutch law, has been followed in utilizing the court's jurisdiction to intervene into parental rights as 'upper guardians of minors'. Court interference with the father's preferential right on the basis of prejudice to the 'child's life, health and morals' has been established by many cases which interpret the child's welfare within the framework of paternal rights, and require proof of his 'unfitness'. The general view is that the courts 'will recognize the father's prima facie right except when the element of danger or detriment is positively established'. 61 Sri Lankan law is in this regard similar to Indian law developed under the Guardianship and Wards Act. 62

Isolated judicial decisions in the Supreme Court have interpreted the child's welfare as a paramount consideration, so as to recognize the mother as preferred custodian of the child. Weeramanatry J said in Fernando v Fernando (1968) that 'there is a rule commended by law and ordinary human experience that the custody of very young children ought ordinarily to be given to the mother'. 63 Nevertheless, in the absence of statutory reforms which focus on the mother's custodial rights, and a paramountcy principle, the current trend in Sri Lankan courts focuses on the need to interpret the child's best interests within the framework of the Roman-Dutch law's preferential paternal right. This legal position cannot be faulted because both Roman-Dutch law and Sri Lankan statute law in other areas emphasize the father's natural guardianship and his preferred position as custodian parent. In recent years Sri Lankan Courts have not followed the earlier cases which used a paramountcy principle to confer preferential custodial rights on a mother.

The modern Roman-Dutch law as interpreted in the South African case of Calitz authorizes the court to make the interests of the child the sole criterion when a divorce or judicial separation is granted in court proceedings. Early Sri Lankan cases ignored this, interpreting the best interests of the child in the context of the preferential right of the father, even in matrimonial disputes. Recent cases, however, have emphasized that the sole consideration is the child's welfare. 64 A strong commitment to interpreting the child's best interests in the context of the natural parents' rights continues, however, to be reflected in custody disputes with foster parents. Courts have stressed that 'one starts with the assumption that the natural parent has a natural right'. Strict and clear proof of 'danger to the life, health or morals of the child' is required to displace parental rights, even in circumstances where informal arrangements for custody have been made with caring foster parents or grandparents. 65

Judicial decisions reveal that 'danger to life, health or morals of the child' is interpreted flexibly to refer to any indications of prejudice to the child's welfare. Factors such as parental neglect and indifference, even due to poverty, are given weight. However, poverty or immorality
in themselves have not been considered relevant if there is evidence of concern and care. Nevertheless, the focus on the natural parents’ rights, and the presumption in their favour, means that the courts take the view that they are ‘called upon to adjudicate in the best interests of the child but the adjudication must be reached within the framework of the law’ on parental rights. The generally held view is that ‘the rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child . . . (and) the petitioner who seeks to displace those rights makes out his or her case.’

The same focus on parental status is seen in regard to access rights. Sri Lankan judicial decisions invariably refer to the ‘access rights’ of a non-custodian parent. There is judicial authority that ‘natural ties ought not to be completely disregarded and denied unless the interests of the children are likely to be substantially prejudiced’.

Consequently, courts awarding custody during a de facto separation or in matrimonial litigation usually make an order giving ‘reasonable access’ to the other parent. Since the parents of a marital child share the parental power as natural guardians, subject to the father’s preferential status, access rights under Roman-Dutch law are considered an aspect of guardianship that continues even when custody has been granted to one parent. The legal position is that access rights are available to a non-custodian parent unless a court order on custody has either limited or denied them in the child’s interests.

The idea of legally recognized parental rights in regard to ‘non-marital’ children in Sri Lanka has determined the parameters within which the concept of ‘best interests’ functions. Sri Lankan indigenous law, as represented in principles of Kandyan law, accepted that some non-marital children could be acknowledged and acquire legal rights in the father’s family. The parental status of both father and mother was recognized. Yet modern law, influenced by English law, principles of Roman-Dutch law and statutes, perceives the mother as the exclusive guardian of these children. Custodial status can be conferred on the biological father on the basis that there is good reason to deny the mother’s parental rights, and award custody to him in the child’s interest. He has no right of access, though access may be claimed on the basis that he has a continuing relationship with the child, and it is the child’s interest to maintain that association.

Roman-Dutch law, as we have observed, gives the courts a wide discretion to determine the issue of custody in the child’s interests. Nevertheless, Sri Lankan courts have often applied the English law concept of the ‘age of discretion’ and decided that the wishes of a girl of sixteen and a boy of fourteen are conclusive in determining the issue of custody. There is also a judicial pronouncement in an early case in support of the view that a court must respect the wishes of an adolescent girl under sixteen who wishes to leave her parents and reside elsewhere.
These decisions accord with the Convention's perception that parental rights must diminish in significance with the evolving capacities of the child. Yet they do not reflect the balance that the Convention seeks to achieve. The emphasis on particular and different ages for assessing the maturity of boys and girls, and the constraints on judicial discretion, are out of harmony with the court's responsibility to act as upper guardian to protect the child's interests.\textsuperscript{70} The absence of guidelines on the exercise of this discretion is felt especially in this area, where the courts often apply the 'age of discretion' mechanically.

A basic problem in any event in ascertaining the wishes of a child in Sri Lanka lies in the absence of a procedure for ensuring that this information is available to court. Since there are no facilities for a court welfare officer's report, nor independent representation for a child in custody and guardianship litigation, the courts must rely on the lawyers for the parties. A judge sometimes interviews a child in his chambers, a procedure that is not conducive to determining what is best for the child. A formal brief interview in a judge's chambers can be traumatic for the child, and hardly an atmosphere in which to ascertain his or her wishes. A child-centred focus in the law clearly requires facilitating the child's wishes being presented to court in a manner that is truly geared to finding out what the child's view is on the matter of his or her custody and guardianship. Sri Lankan court decisions on guardianship indicate that a balance between protection and participation has not yet been worked out by allowing the child's wishes to be considered as an important but not conclusive factor.

\textbf{PLURALISM IN PERSONAL LAW IN SRI LANKA, GENDER EQUITY, AND BEST INTERESTS}

The fact that the development of the child's best interests came through English or Roman-Dutch law, and not the indigenous systems, has undermined pluralism in the subcontinent. In an early case on custody decided in the colonial period, the Supreme Court of Sri Lanka declared that it was committed to making the child's welfare and interests a paramount consideration, irrespective of parental rights recognized in indigenous laws. The court stated that it 'decides nothing here about Moors and Sinhalese, about followers of Buddhism and disciples of Islam'.\textsuperscript{21} In the post-independence period, Sri Lanka's Supreme Court has utilized its jurisdiction as upper guardian to intervene on the basis that 'under any system of law, a paramount, indeed a valid consideration ... is the interests of the child, any other consideration being subordinate to it'.\textsuperscript{72} The use of a common procedure by an application for a writ of habeas corpus and the absence of a distinct procedure exclusively for determining custody disputes in the only 'customary court' (the Quazi Court), has affected the substantive law. In the law on custody
and guardianship, principles of indigenous systems have to be applied within the context of the uniformly applicable norm of the child's best interests. Parental rights recognized in the indigenous systems have been displaced by the 'best interests' concept. The mother's custodial status has been recognized on the basis that it is in the child's best interests to award her custody. The child's right to express his/her preference has been conceded on the basis of the 'age of discretion'.

Statutory policies in regard to child marriage, as well as judicial decisions, recognize the right of a girl child not to be given in marriage against her wishes, even when this conflicts with perceptions of the personal law. The experience of Sri Lanka in regard to child marriage provides interesting insights into the way in which the best interests have been used to articulate legal values designed to protect girl children against exploitation in marriage, even where there has been a tradition of social and legal legitimacy for child marriage.

The Sri Lankan legislation on non-Muslim marriages is derived from British Colonial legislation and still stipulates the age of legal capacity to marry as twelve years for girls. This was the original age in early English law, which reflected the influences of Roman law in this regard. Marriages contracted below the statutory age are void. The need for restraints on abuse of parental authority to give a child in marriage have been accepted in legislation and in court decisions. Legislation permits the court to give consent in circumstances where parental consent is unreasonably withheld. Similarly, a person under the age of majority who contracts a marriage is considered to have acquired the status of majority by entering into this relationship. A parent or husband has no rights of guardianship over a married woman and there is no concept of guardianship of a widow or divorcée. Also, consent of the parties is a basic requirement for marriage. There is judicial authority that agreements by parents to give minors in marriage before a certain date are invalid and contrary to public policy. Such an agreement has been viewed as 'an embarrassment upon the absolute freedom to consult the best interests of this child which parents possess'. The consent of parents is therefore not a substitute for the consent of an under-age child; it is an additional requirement and can be dispensed with by court in the child's interests.

The Islamic law on marriage in Sri Lanka reflects a different scale of values in this respect because of the wide power conferred on the father and male relatives as marriage guardians. However some statutory restraints on early marriage have been introduced even in this system, and the concept of the 'option of puberty' is recognized as a principle that can restrict abuse of marriage guardianship. The need to introduce statutory reform on requiring the consent of the bride has been raised by the Muslim Law Research Committee in a published report, and by Muslim Women's groups. There are reported cases in which adverse
coments have been made on the practice of child marriage, and courts have emphasized the importance of obtaining the bride’s consent.\textsuperscript{73} Statistics reveal a low incidence of child marriage in Sri Lanka in general and also in the Muslim community. While other factors, such as accessible educational opportunities have contributed to this situation, it is clear that the legal value-system has moved away from a traditional approach to the permissibility of child marriage just as English Common law moved from acceptance of child marriage and an option to repudiate the marriage at puberty, to enactment in 1929 that such marriages were void and the idea that a parent’s refusal to consent could be overruled by a court.

The undermining of pluralism by the ‘best interests’ concept has recently met resistance in the recent resurgence of religious and ethnic consciousness which has resulted in a new willingness to exclude uniformly applicable laws, even in Sri Lanka. In \textit{Abdul Cader v. Razik} (1952)\textsuperscript{75} the Privy Council refused to determine whether a girl could change her religion without her father’s consent, but there are Supreme Court decisions in Sri Lanka which support the view that the father may control religious upbringing even when he is not the custodial parent. This situation can clearly expose the child to conflicts, but courts and the legislature in Sri Lanka have been unwilling to interfere with this right on the basis of the welfare of the child. Thus early cases and the Education Act 1939 consider the father as the parent with the right to control religious upbringing.\textsuperscript{76}

The right to freedom of ‘thought conscience and religion’ is now articulated as a fundamental right in the Constitution,\textsuperscript{77} and conflicts with the concept of a paternal right to control religious upbringing. The Constitutional provisions also support a balance between parental responsibility for providing religious instruction, and the need to accept the right of a child of sufficient maturity to determine his or her own religious convictions. The child’s wishes should receive priority depending on age and maturity.

A recent case on adoption under a uniformly applicable statute shows how the trend towards uniformity may be undermined when the ‘best interests’ concept is not used to give a child-centred orientation, even when a religious or ethnic law applies. Although Islamic law does not know adoption, Sri Lanka Muslims have adopted children under a uniformly applicable statute introduced in 1941. In \textit{Ghouse v. Ghouse} (1988)\textsuperscript{78} relatives challenged the adoptive child’s right to inherit property according to principles of Islamic law. The Supreme Court of Sri Lanka, dissenting from the decision of the Court of Appeal, decided that the principles of Islamic law prevented Muslim parents who had validly adopted under the uniform statute conferring rights of inheritance. At no point was it argued, nor did the court consider, whether it was correct to hold that Muslims could utilize the general law of adoption without
conferring rights of inheritance on adoptive children despite provisions in the adoption statute which require the Court to permit adoption only if it is in the child's interests and clarify that an adopted child shall be considered to be a legitimate child of the adoptive parents. The highest court of the country thus ignored the cardinal principle that the child's best interests should guide any court in adoption proceedings. In focusing on the right of inheritance of Muslims under personal law and the Constitutional provision recognizing fundamental rights regarding religion, the Supreme Court undermined the judicial duty to take a child-centred approach in all adoption applications. The Constitution has in this case served to erode, rather than support, commitment to uniform legal values.

V. ADOPTION AND PLACEMENT OF CHILDREN 'IN CARE'

Legal policies in India in regard to adoption and 'in care' proceedings indicate perceptions of the best interests concept. Adoption in Hindu law originated in religious ritual and the right of adults to perpetuate their lineage, and did not develop in a context of concerns with child care and nurturing. This perception was not modified in the codifying Hindu Adoption Act 1956.24 The statute has given a court the discretion to consider the suitability of adopters and the child's preference only when a person other than the parents desires to give the child in adoption. These provisions contrast sharply with the child-centred modifications introduced into the codified Hindu Guardianship Act 1956.

Some provisions intended to reflect gender equity in adoption have been introduced into codified Hindu adoption law. Adoption by females and adoption of a girl or non-marital children is now permitted, while a man cannot give a child in adoption without his wife's consent. However, the Act has not introduced safeguards to protect the interests of children in the adoption process, thus creating in some sense a conflict between women's rights in adoption and the child's interests.

We have observed that Islamic law does not recognize adoption. Yet the Sharia Act 1937 recognized that Muslims may adopt according to customary practice. Social activists have not been able to persuade the Government to enact a uniform secular law on adoption in the interests of children. Therefore existing procedures in the Guardianship Act 1890 continue to be used in inter-country adoption to appoint a guardian authorized to take the child abroad. The child's welfare may be used to deny guardianship. But once the order is issued, the child is taken overseas and adopted under the procedures of the foreign country.

Concern over abuses in this procedure resulted in the Supreme Court decision in the leading Indian Case *Lakshmi Kant Pandey v. Union of India*.25 The Supreme Court assumed fundamental rights jurisdiction by writ petition on a letter from a lawyer alleging malpractice by social
and voluntary organizations offering children for foreign adoption. The court referred to the primary objective of safeguarding the welfare of the child, and set the guidelines and standards which must now be followed in inter-country adoptions. India does not perceive inter-country adoption in an alien environment as contrary to the interests of children. As the court stated, 'if it is not possible to provide (children) in India a decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life, . . . there is no reason why such children should not be allowed to be given in adoption to foreign parents'. Guidelines developed by the court are meant to set regulatory procedures which can prevent trafficking and child exploitation.

The Sri Lankan policy on inter-country adoption is similar. Although restrictions on inter-country adoption have been introduced progressively with a view to prevent trafficking, Sri Lankan law permits foreign adoption under uniform legislation enacted in 1941. This statute is not part of Guardianship law, as in India, but is based on the first Adoption Act of 1926 in England. It requires the court to obtain the consent of a child over ten years old, and also consider the welfare of the child. Under recent amendments aimed at controlling child trafficking, new offences have been created. Also, adoption requires the consent of the Commissioner of Probation and Child Care, and is confined to children from State receiving homes. The 'open policy' on inter-country adoption fosters the sense of legitimacy for the practice. In two recent cases the trial court gave permission for inter-country adoption of a child who was not in a state home. The decision of the trial court was reversed in an appeal supported by the Attorney-General, on the ground that the constraints were mandatory and in the interests of children.

Bangladesh also permits adoption under the Guardianship Act 1890, and this procedure is used as in India for inter-country adoption. An 'Abandoned Children's Order' promulgated in 1972 permitted a child to be declared 'abandoned' by the Director of Social Welfare, so that a custody order could be made in this officer's favour. This was a response to the need to provide foster care for children born to victims of violence in war. Since the Director could delegate custody the regulation was subsequently used for inter-country adoption. However, the Government subsequently prohibited this procedure for foreign adoption in response to objections to a child's alienation from an Islamic environment.

None of these countries which regulate foreign adoption have addressed the need to safeguard the interests of the child in local adoptions. There are no procedures for home study reports and other devices to ensure adequate and proper placement. Though child abuse in adoptive situations is known to take place, courts, social welfare and probation authorities do not give sufficient attention to the issue of placement,
nor to its monitoring. This has much to do with the lack of adequate administrative services to link with judicial processes and the legislation regulating child abuse and children in conflict with the law.

The social welfare authorities in all countries perform a dual role in working both with children in conflict with the law as well as adopted children and child victims of neglect and abuse. The laws of the region on children in need of care originated in juvenile justice laws in England, or a colonial Children and Young Persons Ordinance. Several countries have also enacted specific legislation on juvenile justice after independence, and articulated the welfare concept. These laws have clearly been introduced with the intention of safeguarding children’s interests. The Sri Lankan statute on juvenile justice was perceived as a ‘children’s charter . . . to give them their right place in society . . . and to prevent them from being exploited in money making’. Indeed this legislation was introduced in 1939 as one of a series of child welfare enactments. Adoption was combined with registration of custodians, and seen as an intervention to prevent exploitation of children in domestic service.

The Juvenile Justice Act in India provides for decision-making in regard to neglected or abused children by Juvenile Welfare Boards in a non-adversarial and child-centred environment. The Act has several innovative features, such as limiting access to lawyers, and limiting the time for completing inquiries. Despite these efforts, adequate resources have not been allocated to ensure carefully considered child-centred placement in adoption, or child centred decisions on victims of abuse.

The criminal overtones of the legislation encourage the perception that victims of abuse or ‘neglected juveniles’ who are placed in ‘state receiving homes’ ‘observation homes’ or in foster care are detainees whose liberty has been restrained. The criminal approach is strengthened by the absence of an adequate cadre of trained probation officers or social workers who can perform their roles in representing the child’s interests and assist the court to make a decision in the interests of the child.

It has been found in Sri Lanka that victims of abuse are transported to and from court in prison vehicles, while all those involved in court proceedings refer to an order on the child victim as an order for ‘remand’. There is no facility for independent representation for a child, unless a parent is able to obtain representation or a legal aid organization or lawyer offers these services voluntarily. Intervention into family privacy and decisions on adoption are made in an environment which does not reflect an appropriate combination of judicial and administrative procedures. The fact that Family Courts and special Juvenile Justice tribunals have been established has not altered the adversarial overtones.

Besides, even in Sri Lanka, where courts have an overriding jurisdiction to act as upper guardian, it is not clear whether they can act in
that capacity outside the traditional types of custody, guardianship or adoption litigation. Thus 'in care' legislation can be used insensitively by judicial authorities, law enforcement agencies and even social service or probation officials without realizing that they are making vital decisions denying a 'neglected' or 'abused' child's right to personal liberty. The emphasis on 'protection' and safeguarding the child's welfare in that regard leads to a denial of the participatory concepts recognized in other areas of law, where the child's wishes and preferences are consulted.

Uniformly applicable adoption and juvenile justice laws articulate a general concern with the child rather than the adult. With effective resources for training judicial and administrative personnel, they can be used to achieve their articulated policy. They are in that sense different from guardianship laws which are used for adoption, and maintenance laws. These are areas where concern with an adult family member's rights or values on legitimacy colour a court's decisions on what in best for the child.

VI. THE NATIONAL CONSTITUTIONS

The Constitution of India has inspired national constitutions in South Asia. Created from a populist political movement, this constitution articulates a vision of social, economic and political justice for 'the people' based on democratic and egalitarian values. It recognizes international norms on human rights and individual dignity. This constitution's perceptions on children are contained in several provisions, which link with the general human rights standards in the document.

These standards have been absorbed into or have influenced other constitutions in the region. Thus the right to equality and freedom from discrimination is articulated in all constitutions as a fundamental right which is only qualified by the right of the State to take affirmative action or make 'special' provision for women and children. The Bangladesh and Pakistan Constitutions refer to 'protection' while the Sri Lanka Constitution refers to the 'advancement' of women and children. Though the scope of affirmative action may vary because of the difference, there is a consensus on the need for policy intervention on behalf of children in order to realize equality and redress historical injustices. The Constitutions of India and Pakistan also state a fundamental right to protection from trafficking, bonded labour and (in the case of children under fourteen years) hazardous employment. The Bangladesh Constitution refers to a right to protection from 'all forms of forced labour'. These provisions clearly confer special rights on children.

All countries have provisions on Directive Principles of State Policy which are not enforceable but have been used by the Courts in interpreting fundamental rights. The Indian Constitution refers to the States'
duty to 'endeavour to provide within a period of ten years (from 1949, the date of the Constitution) free and compulsory education for all children up to the age of fourteen years'. Similar but more general provisions are found in some other countries. General provisions in the Indian Constitution refer to the obligation of the State to provide children with opportunities for growth and development 'in conditions of freedom and dignity' and receive protection from exploitation.

Provisions of this kind have not been articulated in other countries. However, Sri Lanka's Constitution has a Directive Principle of State Policy which refers to the duty to 'promote with special care the interests of children and youth, so as to ensure their full development...and to protect them from exploitation and discrimination'. Though education is dealt with under unenforceable Directive Principles, Nepal's recent independence Constitution identifies education as a fundamental right. Interestingly this is stated as a group right – the right of 'a community...to establish schools for imparting education in the mother tongue'. The Indian Constitution has a similar fundamental right in regard to minorities. These provisions appear to impose on the state of duty not to prevent (and at most to facilitate) education rather than a duty to realize the right by positive policies.

The constitutions of the region therefore clearly reflect a perception of 'best interests' which conforms with the UN Convention's standards on child development, protection, and participation. Although development and protection are more clearly defined values, there is a general assumption that a child has a right to identity and dignity. Some constitutions recognize a right to life. However, even when a right to life is not generally recognized, the rights to personal liberty, freedom from torture and freedom of expression may be construed as carrying an implication of a right to life, development and participation.

The legislative record of realizing the fundamental rights in regard to child labour, the Directive Principles of State Policy in general and on compulsory education indicates that these perceptions of 'best interests' have not been translated into policy interventions. Recent statutes on child labour in Pakistan and India are almost copies, and they legitimize use of child labour in areas other than those specified as 'hazardous' occupations under these Acts. This means that even a child under ten years old can be legally employed as a worker in industrial production.

The perception that child labour is a logical outcome of poverty, and a necessary survival strategy for the child and the family, has perpetuated over the years a policy view that child labour is in the best interests of low-income children. Even the Supreme Court of India in 1991 considered it permissible for low-income children to work because 'although (under the Constitution's Directive Principles) all children up to the age of fourteen are supposed to be in school, economic necessity forces
... children to seek employment ... and children can therefore be employed'. This argument of the child's 'interest' in working has masked the reluctance to move children out of the labour force, allocate more resources for primary education, and replace children with adult male and female labour. One advocate of the 1986 child labour legislation publicly referred to the conflict of interest. 'One has to see this child first of all as a child requiring all those things that a child needs for growth and development and a complete childhood', she said, and added: 'But this child is also part of the labour force, and has to be seen as a worker contributing to the economy of the country'.

Antislavery child rights activists in India and international lobbying groups inspired the Harkin Bill in the USA which bans the import of products made by child workers. These activists have lobbied for realization of constitutional values and human rights standards in South Asia which recognize every child's right to a childhood. They argue that other interests can never compete against the fundamental right of every child to grow and develop and experience childhood. Recent initiatives to revise the child labour laws in India are as much a response to these pressures as the critique from within the system in regard to enforcing the new laws. Neither India nor Pakistan has enacted and enforced compulsory education laws nationally, and the argument of lack of resources has been used to postpone indefinitely the introduction of such policies. However Bangladesh has recently introduced an affirmative action policy, and made education free and compulsory for girls in rural areas, up to Grade eight.

The development in India of public interest litigation, sometimes described as social action litigation, has been a response to executive and legislative apathy in realizing fundamental rights and the rights and interests of children in particular, guaranteed by the Constitution. This effort to 'take suffering seriously' has resulted in radical judicial activism. The Supreme Court has dispensed with usual formalities of writ procedures and initiated action to consider violation of fundamental rights on the basis of a letter addressed to the court by concerned members of the public, organizations, or victims of violations. Traditional concepts of locus standi have been modified to permit non-governmental organizations or concerned individuals such as journalists, social workers and professionals to petition for redress, even without identifying an individual affected by the violation. The court has appointed commissions of inquiry to report on the allegations, and assumed a continuing monitoring role. There are many cases involving children in which the Supreme Court of India has mandated State action to realize constitutionally guaranteed rights. These include cases of child labour where the court has directed that the right to protection requires state action to provide facilities for education. Other cases have directed that conditions in State homes for children and juvenile offenders be
improved. The Court has intervened to prevent establishment of separate schools and hostels for children born to prostitutes on the ground that it is not in their interest to be isolated from the community.

Justice Ranganath Mishra's judgment in *Mehta v. State of Tamil Nadu* (1990) conflicts with this concern with the child's need for growth and development. The court considered that the employment of children in the match industry in Sivakasi was not in violation of the constitution because 'the tender hands of children are more suited to the sorting out of the manufactured product, and processing it for purposes of packing'. The need for child labour for these tasks seems to have outweighed the court's concern for children working in the 'hazardous' match-manufacturing industry. However, two recent cases in the Indian Supreme Court have interpreted the 'right to life' in the constitution in the context of the non-enforceable Directive Principles of (social and economic) State Policy, so as to recognize a fundamental right to education.

The social action litigation developed by the Indian Supreme Court has influenced judicial activism in the region. There are instances of such litigation in Pakistan in relation to child workers and children in prison. In his inaugural address as President of SAARC LAW, a regional organization of judges and lawyers, the present Chief Justice of Pakistan referred to the judgment of the Supreme Court in the *Nawaz Sharif case*, and stated that the scope of social action litigation must be expanded in South Asia to realize fundamental rights, and provide access to justice for the people. 'The judiciary in Pakistan' he said 'has in response to the demands of society begun to play a positive role to undo the injustice done to the people. This is being attempted through the technique of Public Interest Litigation . . . this is an effort to eradicate social evils and undo injustice through the agency of law . . . consistently with the provisions of the Constitutions . . . There is no limit or condition imposed on the Supreme Court (in Pakistan) except that the appropriate order which is made should be for the enforcement of fundamental rights'. Such judicial activism can be perceived as a response to the need for a 'new equity' to realize constitutional guarantees and values on justice. The courts of the subcontinent used the concept of 'equity and good conscience' in the colonial era to introduce uniform legal values and undermine legal pluralism between different systems of personal law. The activist role of the to-day's judiciary can be seen as a continuation of that legal tradition. This is related to the wide power of judicial review under the constitutions of India, Pakistan and Bangladesh.

The situation is different in Sri Lanka where the courts do not have the power to challenge past laws. The Supreme Court exercising fundamental rights jurisdiction reviews state action rather than inaction, and has not accepted the expanded doctrine of locus standi. The recent
decision in the adoption case also shows how religious and cultural rights guaranteed under the constitution can be used to undermine perceptions of 'best interests' in terms of the other fundamental rights, such as equality before the law and gender equity, guaranteed by the constitution.

If the subcontinent has a tradition of judicial activism and legislative and administrative apathy in realizing constitutional guarantees, Sri Lanka's impressive social indicators for children are the product of legislative and executive action. A strong social welfarism which originated in the British colonial administration, linked with egalitarian Buddhist values and a populist political and trade union movement, introduced important child-oriented measures in health and education. The link between child marriage, child labour and education was perceived very early. A developed system of registration of marriage and accessible free state health and education services focused on the low-income child and the community. The education reforms of the middle of this century were based on the right of every child, rural or urban, to receive a good education: Consequently, education policies were aimed at establishing rural schools and good, state-managed provincial Central Schools. These schools succeeded in providing upward mobility for rural low-income children, and catalyzed parental and adult interest in using educational opportunities for children. The failure to persist with those policies, combined with policies on language and a regulated economy, has contributed to ethnic and political violence. Sri Lanka's dissatisfied and 'educated' rural youth population is as much a product of its successes as its failures in the area of education.

National Policies on Children of this decade (particularly in the post-UN Convention period) have created a new interest in child-centered policy planning in South Asia. Sri Lanka has recently promulgated a Charter on Children's Rights, although this is not a law but a policy document. There are some provisions in the Charter which dilute the international standards that Sri Lanka has ratified. On the other hand the Charter prohibits recruitment of children under eighteen years old into the armed forces, setting a higher standard than the Convention and already confining recruitment into the armed services to adult citizens. The Cabinet has also approved new uniform legislation on child abuse and prostitution. In order to strengthen enforcement, the law will be enacted as amendments to the Penal Code. It has yet to be seen whether these child abuse laws will evoke a negative response in Parliament.

VII. CONCLUSION

The colonization of countries in South Asia is part of their historical experience. This period saw the significant modification of personal law.
The entrenchment of new values makes it difficult to justify an interpretation of ‘the best interests of the child’ in terms of ‘traditional’ or ‘cultural values.’ It is necessary to recognize that the colonial experience contributed to secularism and uniformity in important areas of child law and policy in these countries. That tradition has been child-centred, to some extent, and placed a value on internationally recognized human rights standards of individual dignity and gender equity.

The recent judicial initiatives and activism as represented by social action or public interest litigation has potential for creating a new environment of access to justice and community participation in the realization of rights. These developments have in general been beneficial to disadvantaged sections of the child population, and can be used creatively to ensure that all children benefit from uniformly applicable policy approaches. It seems important for children that rights associated with the practice of religion or culture should not be used to resist reform and reverse the trend towards uniformity and setting human rights standards in policy making.

The national constitutions represent a powerful value framework that should be used to link with international standards on child rights that have been accepted by all countries through ratification of the UN Convention. Rather than using the ‘best interests’ as a relative concept for interpreting child rights, these rights can be used to provide the framework for laws and policies on children. In a recent decision in the Supreme Court of India, the constitutional guarantee on the right to life was used to apply the child’s welfare and resist and application for custody based exclusively on parental rights. We have noted how this right has been used to imply a right to education. If the Constitutional and International standards could be used to set the guidelines for determining what is in the best interests of the child, it will be possible to reduce the current subjectivity in decision making both by judges and policy makers.

While there appears to be awareness of the child’s right to provision and protection, South Asian countries will find it difficult to develop participatory rights. Although the child’s wishes and preferences are relevant in guardianship litigation, legal procedures do not in general provide that access. The lack of interest in participation is reflected in policy statements and SAARC resolutions which do not refer to these rights. It is not unusual for official statements to declare that ‘children are a valuable asset and all development activities should be focused on recognizing their worth’, and to proceed to observe that children are not adults, and should take ‘an oath of obedience to their elders’ on children’s day. Sri Lanka’s Children’s Charter replaces the ‘evolving capacities of the child’ with a reference to parental guidance. Yet adolescent and youth unrest particularly in schools and Universities in South Asia over the last decade indicate that children have not learned
to handle adult life and responsibility. Unless children are afforded participation rights, the perception that children suddenly move from childhood to majority will continue to pervade parenting in the family, and policy planning.

Indigenous laws and tradition in many areas such as adoption and family support reflect values which are more consistent with international child rights standards than those of the received English or Roman-Dutch law. Consequently the rights perceptions of the UN Convention can be used to revive those traditional values which will conform with the framework accepted as an international standard for all countries in South Asia. It is, however, important for the children of South Asia that countries in the region do not obscure the realities of ignorance, and social and economic deprivation and resurrect questionable 'indigenous' values, so as to undermine basic standards already accepted and developed further by the UN Convention. Their cause will not be promoted unless the national constitutions which link to international standards are used to address the inherent inadequacies in both the colonial and indigenous laws. The *Shah Bano Case* in India and the case of *Tennekoon v. Tennekoon* (1986) in Sri Lanka indicate how values of the personal laws can be distorted and misrepresented as basic religious or customary norms. The words of the late Muhammad Ali Jinnah in the debate on the Child Marriage Restraint Act 1929 have relevance for South Asia today. Supporting the legislation, he said:

I cannot believe that there can be a divine sanction for such evil practices as are prevailing and that we should give our sanction to the continuance of those evil practices. . . . If we are going to allow ourselves to be influenced by the public opinion that can be created in the name of religion when we know that religion has nothing whatever to do with the matter, I think we must have the courage to say 'No we are not going to be frightened by that'.

**NOTES**


1 J v C [1970] AC 668 at 710


1 Ibid at 318, citing Maidment *Child Custody and Divorce*, 149.


1 Talfoard's Act 1839, Custody of Infants Act 1873, and Guardianship of Infants Act 1925, cited Bromley op cit 312.


Roche, op cit 93 note 3; Paras Diwan, op cit 27.

B. Mathew and others, *Cases and Materials on Family Law I* (Bangalore: National Law School of India, 1990), 0.1.5.


Goonesekere, op cit 200–3; Niti-Nighanduve (Colombo: Government Printer Ceylon 1880), 44, 46, 25.


Anwer, n 9 above.


Guardianship and Wards Act 1890 s 19 (b), ss 7, 17.

(1871) 14 MIA 309, 323.

(1914) ICR 39 Mad 807 at 819.

s 6, 19(1)(2).


Paras Diwan, op cit 319 ff; Jilani, op cit 25–7; Bhat v Bhat, AIR 1961 Jam & Kash 5.

Resact v Narsinghek; Paras Diwan, op cit 322, citing *Kamarrasami v Rajamal*. AIR 1957 Mad 563 per J. Ayer; Ansari Sejoda, AIR 1983 AP 106 (Muslim Father).


Bai Tara v Madan Lal, AIR 1932 Bom 405; Raman v Ayappan, AIR 1939 Ker 396.

AIR 1941 Bom 103, cited Paras Diwan, op cit. 203.

Re Kamal Rudra ILR (1949) 2 Cal 374; *Begum v Begum*, AIR (1948) All 498; Kadioppa v Veeramal, AIR 1949 Mad 698; Snacek Bohra v Madhu, AIR 1964 Mad 186.

Sahabji v Muhammad, AIR 1988 Ker 36; Sona v Canna, AIR 1950 Mad 306, and other cases.


S 17.

Paras Diwan, op cit, 433, 440, 443.

*Begum v Begum*, AIR 1939 All 15.

Sukha v Akhtar, AIR 1919 All 49, and cases cited Paras Diwan op cit 439–9.

Ramzan v Tane, AIR 1983 J & K 70, cited Paras Diwan, ibid, 439.

Rashida Begum v Shabaz Din, 1960 3 PLD Lah 1142, cited Pearl op cit 93.


Ibid 93.


Jilani, op cit, 26–7.

Paras Diwan, op cit 477–8; *Sant Dher v Gian Chand*, AIR 1936 Punj 234; *Mohini v Virendra Kumar*, 1977 3 SCC 313.
46 Hindu Guardianship Act s 6; Paras Diwan, op cit 191; Latif v Swaroop Prasad, AIR 1940 All 329 (mother denied custody for prostitution), Gajri Singh v Desh Puri, AIR 1952 All 331 (immorality insufficient).

47 Schild v Ram Chandra, AIR 1924 All 622.
48 S 17 (2) ["age"]; s 17 (3) ["intelligent preference"].
49 Re Agar Ellis (1883) 24 Ch D 317 followed in cases cited Paras Diwan op cit 429 and also not followed in cases cited 427-30.

50 Paras Diwan, op cit, 146. Islamic law, see Atia Waris Sultan Khan 1959 PLD (WP) Lah 205 at 215; Hindu law & generally for Indian law, Skinner v Orde (1871) 14 MIA 379 at 383; Queen v Veredu LLR 18 Mad 230 at 232.
51 Convention on the Rights of the Child, Art 14; Constitution (India) Art 25 (freedom of conscience and religion); Bangladesh Constitution Art 41 (religion); Pakistan Constitution Art 20 (religion).

53 Guardianship Act 1890 s 19(a); Hindu Guardianship Act 1956 s 6(c).
54 Sahasamani Gounden v Kamatchi Anmari, AIR 1929 Mad 834; Chetty v Pehammah, AIR 1948 Mad 103; Paras Diwan, op cit 190; Undli Kato v P. S. Santos, AIR 1967 AP 294; Rai Chand v Bai, AIR (1966) Mad 173.
55 AIR 1960 All 479, Paras Diwan, op cit, 201.
56 Jharni, op cit; Pandiker, op cit; Bujjai, op cit.
57 Koonathipillai v Sinelalakshmi, (1911) 17 NLR 484, and Annamalai v Seraveenamuttu (1938) 40 NLR 1 (Tamil Customary law); Kalu v T H Silva (1947) 48 NLR 216 (Kandyan Sinhala law); Goonsekere, op cit, 213, note 78; Children and Young Persons Ordinance (1939), Education Ordinance (1939) Civil Procedure Code (1889), General Marriages Ordinance (1907).
58 1939 AD 56.
59 Shoddy v Iravdy (1956) 57 NLR 568 at 571.
60 See above 125.
61 Fernado v Fernando (1968) 70 NLR 534 per J. Weeramantry, 538; Wrenagoda v Wrenagoda (1961) 68 NLR 83; Kalamawatha v de Silva (1961) 64 NLR 232.
63 Goonsekere, op cit, 225, 232.
64 Meghakshi v Thasin (1963) 65 NLR 547 at 548.
65 Wrenagoda v Wrenagoda, at 86.
66 Blanche anley v Herbert Bois (1945) 46 NLR 466-7; Goonsekere, op cit, 236-7.
68 Goonsekere, op cit, 233-4; In Re Evelyn Warna Kaujaraya (1955) 36 NLR 525; Wrenagoda v Wrenagoda (1961) 68 NLR 83.
69 Re Ayesia Matchia (1860-1862) 130.
70 Hemens v Mollia Baby (1967) 70 NLR 405 at 406 (best interests) followed in Saha v Ishika (1974) 77 NLR 397 at 402; Meghakshi v Thasin (1963) 65 NLR 541 at 548 (parental rights framework); Hanley v Bezak (1958) 60 NLR 287 (age of discretion).
71 General Marriages Ordinance (1907) ss 15, 20, 72; Kandyan Marriage and Divorce Act (1952) ss 4, 8, 66. de Silva v Juan Ajpa (1928) 29 NLR 417; J. Garvin at 120; Goonsekere, op cit, 307-10.
73 54 NLR 201 (PC).
74 de Silva v de Silva (1947) 49 NLR 73; Education Ordinance (1939) s 33(1)(4).
75 Article 10.
76 1 Sri LR 25.
77 Hindu Adoption and Maintenance Act (1956), ss 8, 9, 9(5), 10.
78 1967 SC 232; the guidelines were originally set out in this case in an application reported in 1984 SC 469 and later amended in AIR 1986 SC 276.
79 Adoption Ordinance (1940), ss 3(3) and (4) as amended, in regard to foreign adoption in 1964, 1979 and 1992; unreported cases referred to the writer by the Commissioner of Probation and Child Care.
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87 Amir U1 Islam, op cit at 19; Bangladesh Abandoned Children’s Order 1972. Education Ordinance 1959, Children and Young Persons Ordinance 1959, Adoption of Children Ordinance 1941.
90 India Art 14, 15(3); Sri Lanka Art 12(1)(4); Pakistan Art 25(3); Bangladesh Art 28(1)(4);
Nepal Art 11(1) and proviso.
91 India Art 24; Pakistan Art 11; Nepal Art 20; Bangladesh Art 34(1).
92 India Art 45, Bangladesh Art 17(a); cf Sri Lanka Art 27 (2)(b) [no specific reference to children].
93 India Art 39(i).
94 Art 27(2)(i3).
95 Art 18, India Art 30.
96 India Art 21; Bangladesh Art 21, 32 (life, liberty); Sri Lanka Art 11 (freedom from torture); Nepal Art 12 (personal liberty); freedom of expression, India Art 19, Bangladesh Art 39, Sri Lanka Art 14, Nepal Art 12(2)(a).
98 Mehta v State of Tamil Nadu (1991) SC 283, per Ranganath Mishra and M. H. Kania JJ.
102 Meid and Setal Hydro Project Case, 1984 SC 177.
103 Sheila Barse v Union of India, AIR 1986 SC 1773; Sheila Barse v Children Aid Society, AIR 1987 SC 656.
104 Jain v Union of India, AIR 1990 SC 292.
105 JT 1990 SC 293.
109 Art 16.
110 Ghose v Ghose, above n 78.
113 Children’s Charter (1992), Art 2 {reference only to parent}, Art 14 {no reference to evolving capacities of the child}.
114 Arts 1 and 37(b) (eighteen years); Convention (fifteen years).
116 Summit Declarations of SAARC (South Asian Association for Regional Co-operation) on children.
117 Art 14 (freedom of religion and conscience); Minister of Education as reported in Daily News 23 September 1993.
118 Shah Bano (contrary to Koranic injunctions); Translom v Transkom (1986) 1 Sri LR 90 (ignoring that indigenous norms recognized marriage breakdown as a basis for divorce).
119 Jilani, op cit, 29.