# Parental Care and the Best Interests of the Child in Muslim Countries

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**Original citation:**
'Pakistan', in *Parental Care and the Best Interests of the Child in Muslim Countries*, ed. by Nadjma Yassari Lena-Maria Moller and Imen Gallala-Arndt, pub 2017 (ISBN 978-94-6265-173-9)

Publisher: Springer

# Chapter 7
# Pakistan

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**Abstract** A general view prevalent in Pakistan based on classical Hanafi principles is that in cases of marital breakup the father is to be given custody of a male child at the age of seven and custody of a female child on her attaining puberty. However the emphasis on the principle of the 'best interests of the child', as introduced in the Guardians and Wards Act 1890, remains a priority of the judges in Pakistan. This country report traces the evolution and development of the best interests of the child principle in Pakistani child law. By including a review of judicial cases from 1997 to 2014, the report evaluates the application of this principle by the superior judiciary in Pakistan.

**Keywords** Pakistan • Child Custody • Best interests of the child • Islamic law • Guardians and Wards Act 1890 • Superior Judiciary

## Contents



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## 7.1 Introduction

The independence of the Indian sub-continent from British colonial rule, and its subsequent partition into two independent states, led to the creation of Pakistan.[1] Pakistan was carved out of the Muslim majority areas of British India in 1947 as a result of the demand of the Muslim population of British India to be given their own separate homeland. The majority of the Pakistanis are Sunni Muslims and are followers of the Hanafi school of thought.[2] A general view prevalent in Pakistan based on classical Hanafi principles is that in cases of marital breakup the father is to be given custody of a male child at the age of seven and custody of a female child on her attaining puberty. However the courts in Pakistan have deviated from this classical Hanafi principle and have based their judgments on the 'Best Interests of the Child' principle. This country report aims (i) to trace the trajectory of this notion in Pakistan's legislation, (ii) to analyze the reasons for establishing it as a fundamental principle in child law in Pakistan and (iii) to detect the ways in which the superior judiciary in Pakistan perceives and interprets this notion. It addresses the question to what extent the courts in Pakistan have deviated from applying the classical Islamic law of *hadana* (custody) and *wilaya* (guardianship) in custody and guardianship cases by examining the judgments of the superior courts from 1997 to 2014.[3]

The first section examines the evolution and development of the 'Best Interests of the Child' principle in the Indian sub-continent within the wider frame of British colonial rule in the Indian sub-continent. It analyzes the concept of *hadana* (custody) and *wilaya* (guardianship) in the light of rules laid down in *Hedaya* and *Fatawa-i-Alamgiri*, the two classical commentaries on Islamic law. In the second section, post-

[1] Under the Constitution, Pakistan is a federal republic comprising five provinces: Baluchistan, Punjab, Sindh, Khyber Pukhtun Khawa and the Gilgit Biltistan province, which are ethnically, linguistically and culturally diverse regions. In addition to the provinces, Pakistan also consists of Federally Administered Tribal Areas, Provincially Administered Tribal Areas, the Federally Administered Northern Area, and the Islamabad Capital Territory. Also, the western part of the former princely state of Kashmir (Azad Jammu) is de facto controlled and administered by Pakistan. There are an estimated 177.1 million people in Pakistan. Of the total, around 91.59 million are male and 85.51 million are female. The population of children and adolescents, ages 0 to 19, is estimated to be around 82.05 million, which is projected to increase to 84 million in 2015 and 86 million in 2020. From 1998 to 2010, an additional 28 million children and adolescents were added to the total existing population (Bureau of Statistics).

[2] Nearly all Pakistanis are Muslims (97 per cent), with Sunnis the clear majority within this group (77 per cent) and Shiites the minority (20 per cent). Religious minority groups (3 per cent) include Christians, Hindus, and Parsees.

[3] For a comprehensive and thorough analysis of case law from 1947 to 1997 see Ali and Azam 1998.

colonial constitutional debates and legislative reforms in Pakistan are assessed. Pakistan's international and regional commitments to child rights are examined in this section with a particular focus on the UN Convention on the Rights of the Child, the SAARC Convention on the Promotion of Child Welfare in South Asia, and the UK-Pakistan Protocol. This section also highlights the institutional measures and recent legislative changes at the federal and provincial levels that have taken place in Pakistan under the 18th Constitutional Amendment. Section three provides a detailed analysis of various provisions of the Guardians and Wards Act 1890 (Act VIII of 1890) in relation to the welfare of the child principle. This section also analyzes custody and guardianship cases decided by the superior judiciary from 1997 to 2014 to assess the responses of the judiciary and the frames of reference used by the courts while interpreting the best interests of the child principle.

## 7.2 Historical Overview of Custody and Guardianship Law in Pakistan

The historical evolution of the custody and guardianship law followed in Pakistan can be traced back to the Anglo-Mohammadan law introduced by the British colonizers in the Indian sub-continent. Prior to the British rule, when the Indian subcontinent was governed by the Muslim Mughal dynasty, Islamic law generally held the field and remained the law of the land in settling civil and criminal disputes.[4] Courts were also established by the Mughal rulers at the central, provincial, district, and *tehsil* (Pargana) levels.[5] These courts had defined jurisdiction in civil, criminal, and revenue matters and operated under the authority of the ruler. Common customs and traditions, however, were also invoked in settling secular matters as these rulers were not particularly keen on applying Islamic law to each and every sphere of life and let the indigenous customs and institutions continue side by side with Islamic law and institutions.[6] *Qadis* and *Muftis* took local custom into consideration when applying the law. While interpreting the law, the *Qadis* primarily relied on using independent reasoning or *Ijtihad*. But when the British came to India they introduced a new system of courts for 'maintain[ing] effective political control with minimal military involvement'.[7]

When the British arrived in India in 1772 they were bewildered by the diversity of customary rules, norms and practices as well as the vastly different views on marriage, succession, contract, severance, property, and inheritance rights that governed a range of ethnic and religious communities. These communities had their own complex system of community-based, informal juridical hearing courts or *panchayats.* The British rulers contemplated that to achieve economic and political stability in

[4] Bilmoria n.d.
[5] Hussain 2011, p 5.
[6] Hussain 2011, p 6.
[7] Bilmoria n.d.

India, it was necessary to establish 'Rule of Law with the declared consistency, clarity, certainty, and finality of statutes or black letter law'.[8] To simplify and facilitate this task, the British moulded un-codified Islamic law into a fixed set of Islamic rules for ease of application by the colonial courts and the English judges who were unfamiliar with the customary and religious law. The then Governor-General, Warren Hastings, initiated a legislative reform process through the codification of laws. The result was a series of enactments which included the Code of Civil Procedure (1908), the Penal Code (1860), and the Code of Criminal Procedure (1898). In the area of personal law the British, in consultation with indigenous legal experts, *Hindu Pandits* and the *Ulemas,* devised the so-called Anglo-Hindu law for Hindus and Anglo-Mohammedan law for Muslims, along with separate personal laws for Indian Christians.[9] These laws remained operative even after the independence from British colonial rule. While framing laws for the Muslims in India, the British relied specifically on the commentaries of *Hedaya* and *Fatawa-i-Alamigiri*, which were based on the teachings of the *Hanafi* school of thought.[10] These commentaries were followed as a final and unquestionable authority by the judges and legal scholars of the Indian sub-continent in family matters. The area of child custody largely reflects this position, and even in recent cases courts have cited these two documents as the highest source of authority for *Hanafi* jurisprudence.

Following the principles of classical Islamic law, the two commentaries laid down rules for awarding guardianship and custody. The Arabic term '*hadana*' has been used commonly by South Asian writers for custody of a child, following its use in Hamilton's *Hedaya* and Baillie's Digest.[11] By contrast, the Arabic term *wilayat* is sometimes defined as a right[12] or power[13] and sometimes as a duty[14] 'incumbent on a person on the grounds of kinship, by testament or by court order towards another person of imperfect or no legal capacity',[15] e.g. for 'an infant, an idiot or a lunatic'.[16]

Guardianship was divided into three types. Guardianship for purposes of marriage, guardianship (*wilayah*) for purposes of management and preservation of property, and guardianship (custody or *hadana*) for purposes of bringing up children. It also laid down three ways of appointment (1) by natural right, (2) by testament, and (3) by appointment by a judge. Guardianship for the purpose of marriage is allowed

[8] Bilmoria n.d.
[9] Bilmoria n.d.
[10] The 12th century Central Asian lawyer Burhanuddin al-Marghinani was the author of *Hedaya. Hedaya* was the standard legal text book in Muslim India and it remained the basis of Muslim law for centuries. Commissioned by Warren Hastings, *Hedaya* was translated by Charles Hamilton in 1791. *Fatawa-i-Alamgiri* is a collection of authoritative *fatwas* compiled under the orders of Moghul Emperor Aurangzeb in the seventeenth century by a panel of *ulama* headed by Shaikh Nizam Buhanpuri. This was again translated under the orders of Warren Hastings, by N.B.E Baillie under the title of *A Digest of Moohummudan Law, Part I* in 1957.
[11] Hamilton 1982 and Baillie 1957.
[12] Rahim 1911, p 343.
[13] Mahdi and Malek 1998, p 156.
[14] Nasir 2009, p 186.
[15] Nasir 2009, p 186.
[16] Rahim 1911, p 344.

because of the necessity of a proper and suitable match, which may not always be available. It belongs to the father and grandfather or to the paternal uncle or a guardian appointed by the court in their absence. When a minor is given in marriage by a guardian other than the father or the grandfather, the minor may exercise the option of puberty to ask the court to annul the marriage. If it was the father or the grandfather who consented to the marriage, a legal presumption is raised that they acted in the best interests of the minor. The presumption is, however, not conclusive and such a marriage can also be set aside where it is plainly undesirable and injurious to the minor, for instance, where the father is not a man of proper judgment or is of reckless character and has married his minor daughter to an immoral man. Abu Yousuf and Imam Muhammad, the disciples of Imam Abu Hanifa, consider that an evidently unequal or undesirable marriage or a marriage for less than a proper dower of a minor female is not valid, but Imam Abu Hanifa does not share this view. According to the principles laid down in *Hedaya* the guardianship of a minor for the management and preservation of his/her property devolves (1) first on his/ her father, (2) then on the father's executor, (3) next on the paternal grandfather, (4) then on his executor, (5) then on the executors of such executors, and (6) finally on the ruling power or his representative – i.e. a *qazi* or judge. Ultimately it rests upon the *qazi* to appoint a guardian for an infant's property when there is no near guardian (i.e. the father, the father's father, and their executors). The other paternal kinsmen, who are termed 'remote kindred', and the mother succeed, according to proximity, to the guardianship of an infant for the purpose of education and marriage. They do not have the right to be guardians of the minor's property unless appointed to do so by the ruling authorities, or unless appointed to be a guardian in the original proprietor's will, which has been duly attested by competent witnesses. The general rule is that a guardian, executor, or anyone who has the care of the person and property of a minor can enter into a contract for the ward which is (or is likely to be) advantageous and not injurious to the ward. A guardian may sell or purchase moveable items on behalf of his/her ward, either for an equal rate or at such a rate that may leave a slight loss, but not at such a rate which would make the loss great and apparent.[17]

It is interesting to note that there is no clear distinction made between custody and guardianship at all times; as a result their relationship necessarily manifests 'a complex structure of rights and duties distributed between the entitled person(s)'.[18] Custody is often perceived only as a form of 'guardianship of person', as it rests with the mother only during the early years of the child; the natural guardianship being always entrusted with the father. Thus Jamal Nasir had described *hadana* as 'the earliest form of guardianship of person',[19] when the mother is needed to nurse an infant and to care for, bring up or raise a child.

Under classic Hanafi law, as followed in the commentaries mentioned above, custody (*hadana)* belongs to the mother for a girl up to the age of puberty and for a boy up to the age of seven, while *wilayah* belongs to the father. The father's custody

[17] Hamilton 1982, vol. 4, p 553.
[18] Mahdi and Malek 1998, p 157.
[19] Nasir 2009, p 186.

continues until puberty for a boy and not just until puberty for a girl, but rather until she can safely be left to herself and trusted to take care of herself. The mother's right to the custody of her infant child is subject to certain other limitations; for example, she loses her right if she has become an apostate, leads an immoral life, is wicked, or is unworthy to be trusted and neglects to take proper care of the child.[20] If a mother is disqualified from exercising custody, then the custody of a female child is awarded to the child's maternal or paternal grandmother how high soever.[21]

Detailed rules were also laid down to determine the place or location where the child could remain in the custody of the mother.[22] A boy or a girl having passed the period of *hadana* has no option to be with one parent in preference to the other; instead he or she must necessarily remain in the charge of the father.

Bearing in mind the classical rules as laid down in the various commentaries based on classical Sunni Hanafi jurisprudence, the British enacted the Guardians and Wards Act in 1890. The major part of this Anglo-Muhammadan law was assimilated into Pakistani law through art. 224 of the 1956 Pakistan Constitution, which provided for the incorporation of pre-existing law 'save as is otherwise expressly provided in the Constitution' and 'so far as is applicable and with necessary modifications.'[23]

[20] Baillie 1957, p 728.

[21] If the grandmother has died or is married to a stranger, then the full sister is entitled. If the sister has died or is married to a stranger, then the half-sister of the mother (uterine and consanguine sister) is entitled to custody of the child. In the absence of a sister, the daughter of the full sister and then the daughter of the half-sister (consanguine and uterine) can have the custody of the girl child. In the same way the maternal aunt and then the paternal aunts how high soever can have the custody. In the absence of the mother and other female relations, custody belongs to the father and other male relations in the same order as that of maternal relations. If the mother remarries, she forfeits her right to custody. A mother is disqualified if she marries a man not related to the child within the prohibited degrees. This rule is strictly applied in cases that involve custody of a female child, but if the subsequent marriage is dissolved by death or divorce then the right to custody will revive.

[22] According to the rules laid down in *Hedaya*, before the completion of *iddah* the proper location to exercise *hadana* is the domicile of the parents. None of the parents can take the child out of the custody of the latter. After completion of her *iddah*, a mother may take her child to her own birthplace provided that the marriage had been contracted there, and that it is so close to the husband's residence that the husband can visit the child and return to his residence before nightfall. There is also no objection to her moving with the child from a village to the city or chief town of the district if this is advantageous to the child and in no way injurious to the father. If the child's mother is dead and *hadana* has passed to the maternal grandmother, the child cannot be taken to the grandmother's own city, even though the marriage had taken place there.

[23] Davis 1985, p 119.

## 7.3 Constitutional and Legislative Reform in Pakistan

### *7.3.1 The Creation of Pakistan: Constitutional Framework and the Quest for Muslim Identity*

At the time of its creation, the founder and first Governor-General of Pakistan, Mohammad Ali Jinnah, envisaged Pakistan as a secular state and not a theocratic state. He elaborated on this idea in his presidential address to the Constituent Assembly on 11 August 1947, in which he clearly stated:

> You may belong to any religion or caste or creed that has nothing to do with the business of the state … there is no discrimination, no distinction between one caste or creed and another … [The] fundamental principle [is] that we are all citizens and equal citizens of one state … in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.

While outlining the contours of a secular state, he also stated that the members of each religious community would be free to go to their respective places of worship. In his presidential address he laid the foundations of a modern and democratic Pakistan where everyone was equal before and afforded the protection of the law. However, soon after his death the advocates of religious nationalism started asserting their position in the Constituent Assembly. Since then major debates have focused on the appropriate role of Islam in the state, the implementation of Islamic law, and the Islamization of society. Thus religion has been manipulated and used for political purposes and imposed in a selective and narrowly defined manner, often serving to bolster insecure regimes since the early days of independence.[24] Both religious and liberal groups have played the 'Islamic card' as soon as they realized that religion was the only binding force to bring together an otherwise multi-ethnic and culturally diverse community.[25] The religious and conservative forces also demanded a clear manifestation of Islamic identity. This was clearly reflected when in 1949, soon after independence, the First Constituent Assembly of Pakistan passed the Objectives Resolution to maintain its Islamic identity. The Objectives Resolution reiterates that 'sovereignty over the entire universe belongs to Almighty God alone and efforts shall be made to enable Muslims to order their lives in accordance with the teaching and requirements of Islam'. The Objectives Resolution privileged one religion over all others but was still passed, overriding the serious concerns of the minority members of the Constituent Assembly.

Later Pakistan was declared an Islamic Republic under the 1956 Constitution. Art. 198 of the Constitution provided that the legislature would bring all laws into conformity with the 'Injunctions of Islam'. It also prohibited the enactment of any law repugnant to Islam. As compared to the 1956 Constitution, any reference to the

[24] Critelli 2012, p 676.
[25] Ali 2012, p 45.

injunctions of Islam was initially excluded in the 1962 Constitution. Following protests from the National Assembly, however, the Islamic provisions of the 1956 Constitution were reinserted, and the word 'Islamic' was also reinserted into the official name of the state.

The 1973 Constitution of Pakistan, clearly states in its preamble that 'all laws have to be in conformity with the *Qur'an* and *Sunnah*'. Islam was officially declared as the state religion in the 1973 Constitution. The Islamic character of the Constitution was further strengthened when, in 1985, art. 2-A was incorporated into the 1973 Constitution so as to require that all laws be consistent with the injunctions of Islam as laid down in the *Qur'an* and *Sunnah*. The effect of this move was to render Islamic law the constitutional basis of all state law.[26] One can thus argue that religion and Muslim identity have played a dominant role in framing the constitutional history of Pakistan. The constitutional history of Pakistan laid down the ideological parameters of the state and defined its duties and obligations towards Islam.[27]

In addition to Islamic provisions, the protection of marriage, family, mother, and child is an acknowledged policy principle under art. 35 of the 1973 Constitution. Pakistan's commitment to children is enshrined in the Constitution as art. 35 binds the state to 'protect … the mother and the child'. Art. 37 of the 1973 Constitution lays down commitments for promoting social justice and eradication of social evils. This includes the state's obligation 'to remove illiteracy and provide free and compulsory secondary education within minimum possible period' and to 'make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment'.[28] This is further strengthened by the inviolability of the privacy of the home, which is a fundamental right under art. 14 of the 1973 Constitution. These provisions support parental guidance through the institution of marriage and the strengthening of the family as the primary unit of the social system, within the inviolable right of privacy of the home. Respect for the responsibility, rights, and authority of parents flows naturally from these provisions, which are also considerably supported by Islamic traditions and norms. The family system in Pakistan provides a traditional safety net to all the family members in which women and children enjoy emotional, social, and economic security. Joint family systems and extended family systems are prevalent. Even people living in nuclear families have close links with their extended families.

### *7.3.2 Pakistan's Commitment to International and Regional Human Rights and Child Rights Instruments*

Pakistan is a party to several UN human rights instruments that deal with child rights, including the international Bill of Rights and the UN Convention on the Rights of the Child 1990 to name a few. The Universal Declaration of Human Rights, 1948,

[26] Yefet 2009, p 349.
[27] Ahmad 1993, p 40.
[28] Art. 37(b) and art. 37(e) of the Constitution of Islamic Republic of Pakistan.

stressed that 'motherhood and childhood are entitled to special care and protection' and referred to the family as the natural and fundamental group unit of society. The foundation of the rights and principles in the Universal Declaration of Human Rights provides a legal as well as a moral obligation for countries to respect the human rights of each individual, including children. Pakistan has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR, 2008) and the International Covenant on Civil and Political Rights (ICCPR, 2010). Ratification of these international treaties imposes further obligations on Pakistan to take measures for providing a conducive environment for the protection of children's rights in the country. The Government of Pakistan ratified the United Nations Convention on the Rights of the Child (UNCRC) on 12 December 1990. At the time of ratification, Pakistan made a general reservation that the provisions of the UNCRC shall be interpreted according to the principles of Islamic principles and values. The reservation was withdrawn on 23 July 1997. The UNCRC has not been incorporated into the national law in Pakistan and is therefore not directly enforceable in national courts. International conventions are not enforceable in Pakistan until there is enabling legislation making them the law of the land. Pakistan has not introduced any such law in regard to the UNCRC, and therefore the Convention cannot be invoked in the courts. In addition, in 2001 the Government of Pakistan signed the Optional Protocol to the UNCRC on the sale of children, child prostitution, and child pornography which was ratified in 2011. The Government of Pakistan has also signed the Optional Protocol to the UNCRC on the involvement of children in armed conflict in 2001, but it has not been ratified.

The provisions of art. 12 of the UNCRC do not have specific comparable provisions in Pakistani law. Pakistan is a federal state in which every province has separate legislation on issues of family law and child welfare. There is no mechanism to unify the legislation, and thus different provisions apply in the different provinces.[29] The UN Committee on the Rights of the Child, in its Concluding Observations to the Pakistan's Country Report, has urged Pakistan to ensure that the principle of the best interests of the child is formally incorporated into the legislative, executive, and judicial branches of power by, inter alia, including reference to the best interests of the child in legislation as well as in other settings such as cases of divorce involving children, *kafalah* of Islamic law, child protection, guardianship, and juvenile justice.[30] The Committee also recommended that the state party must ensure in practice the implementation of this principle in all judicial and administrative decisions and in programmes, projects, and services having an impact on children.

Civil society organizations in Pakistan have been criticizing the pace of implementation of the UNCRC in domestic legislation. They have also emphasized the

[29] Ali and Jamil 1994, p 24.

[30] UNCRC Convention on the Rights of the Child, Distr. General, CRC/C/PAK/CO/3-42 October 2009, Advance unedited version, Original: English, Committee on the Rights of the Child, Fifty-second session, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Pakistan.

need for taking capacity building initiatives required for child protection and juvenile justice. At various civil society forums,[31] Pakistan has been urged to undertake measures to the maximum extent of their available resources, including establishing independent monitoring mechanisms; enacting efficient legislation to prohibit and prevent the employment of children as domestic workers; ratifying the Optional Protocol to UNCRC on the involvement of children in armed conflicts; expediting the adoption of the Charter of Child Rights Bill which has been pending for many years at the national level; strengthening measures aimed at providing protection and assistance to vulnerable segments of society, including those children affected by natural disasters to protect them from trafficking and exploitation at work; taking steps to implement laws and policies with a view to eliminating under-age and forced marriage; continuing its efforts for a systematic and sustained training process of children as well as developing the Child Protection Management Information System (CPMIS) and advancement in child immunization; and ensuring and allocating sufficient resources for girls' education in all provinces.

In 2002, during the South Asian Association for Regional Countries' (SAARC) Decade of the Rights of the Child, the Convention on Promotion of Child Welfare in South Asia was adopted. The purpose of the Convention is to solidify the commitments that the South Asian countries have made at the world summit and to other international bodies by encouraging mutual cooperation and assistance. The aim is to protect the rights of the child while realising the full potential of each child and the responsibilities and duties of the signatory states. The Convention also provides for setting up regional arrangements to assist Member States. The Convention states that countries should recognize the rights of a child as laid out in the UNCRC, uphold the rights of the family as primary caregivers, and recognize the best interests of the child. To achieve their goals, the states' regional priorities should be recognizing the need for essential services such as education and health, both preventive and curative, and providing appropriate legal and administrative safety nets such as national laws that protect the child from abuse, exploitation, neglect, violence, discrimination, trafficking, and child labor.

### *7.3.3 The UK/Pakistan Judicial Protocol and Child Abduction*

Child abduction is an issue that involves disputes of custody and guardianship and that gives rise to the question of transnational jurisdiction. In such cases, a parent may need to take legal action to secure return of the children. Pakistan has not signed or ratified the Hague Convention on the Civil Aspects of Child Abduction 1980; however, as a party to the UNCRC, Pakistan is under an obligation to 'take measures to combat the illicit transfer and non-return of children abroad' and to that end must 'promote the conclusion of bilateral or multilateral agreement or accession to existing agreements.' Under art. 35, the Contracting States must 'take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or

[31] www.thenews.com.pk/Todays-News-5-258379-Enforce-child-rights-laws (accessed 1 October 2015).

traffic in children for any purpose or in any form.' Other relevant obligations are set forth in articles 9 and 10, which include the child's 'right to maintain contact with both parents if separated from one or both' and the 'right of children and their parents to leave any country and to enter their own in order to be reunited or to maintain the child-parent relationship'. Art. 18 embodies the principle that 'both parents have joint primary responsibility for bringing up their children and the State should support them in this task.'

A recent development in relation to child abduction has been that in January 2003 judges from Pakistan and the UK signed the UK-Pakistan Protocol on Children Matters. This is a judicial understanding which aims to secure the return of abducted children to the country where they normally live, without regard to the nationality, culture, or religion of the parents.[32] The judges agreed that the child's welfare is a priority and that the courts of the country where the child normally lives are usually in the best position to decide on matters of custody and where a child should live. The Protocol asks judges to consider any existing court orders made by the courts in the child's 'home' country.[33] The judge may then order the child to be returned to the country where he or she normally lives. Liaison judges have been appointed in both the UK and Pakistan to communicate with each other on individual cases to ensure that each is aware of court orders from the other's country. It is important to note, however, that the Protocol has not been incorporated into the law of both countries, and judges are not legally bound to abide by its provisions. Notwithstanding, as its provisions are in line with the usual practices of the courts, judges can and do make orders referring to the Protocol.

Pursuant to Sec. 361 of the Pakistan Penal Code it is an offense to remove a male child under the age of fourteen or a female child under the age of sixteen from the lawful guardian. The case law as to whether this provision can be invoked in cases of parental child abduction is conflicting. Although this section has been used against a parent who has removed a child from the other parent, case law is more in favor of the non-applicability of this section in parental child abduction. The term lawful guardian has been interpreted to mean 'any person lawfully entrusted with the care or custody of such minor'. If the removing parent believes themselves to be entitled to lawful custody, then this section would not apply to them unless they removed the child for an unlawful reason. The superior courts of Pakistan have consistently interpreted the relevant provisions as excluding abduction by a parent, particularly when the abducting parent is the father, because in their view the '... father of a child[,] being always a natural guardian along with the mother, can never be ascribed or attributed the offence of kidnapping of his own child ....'. The Lahore High Court in *Muhammad Ashraf v. SHO and others*[34] decided in this judgment that the

[32] The Protocol can also be used when parents are seeking permission to take a child temporarily to Pakistan for a holiday.

[33] For instance, if a child is taken to Pakistan, or does not return from a holiday there, and the parent has an existing residence order or a prohibitive order against the person who has taken the child, the Protocol can be used to help return the child to the UK.

[34] *Muhammad Ashraf v. SHO and others*, 2001 P Cr. L J 31.

> [f]ather of a child is always a natural guardian along with the mother. He can never be ascribed or attributed the offence of kidnapping of his own child … The only fetter placed upon the right of a father to the custody of the child is that when he takes the child from the custody of his wife for a purpose recognized in law as immoral or unlawful, in such a circumstance removal of the child, would amount to an offence.

While this view may exonerate the father from penal consequences, it cannot protect him from actions for the production and custody of the child.

In Pakistani law, various provisions can be used regarding a case of trans-national parental abduction perpetrated by a foreign parent. For example, the case may be lodged under Sec. 491 of the Criminal Procedure Code (Cr.PC) for the production of the child (Power to issue directions of the nature of habeas corpus) and under Secs 7 or 25 of the Guardians and Wards Act for the custody of the child (respectively, Power of the Court to make an order as to guardianship and Title of guardian to custody of ward). If it is established that the father or the mother removed the child for *mala-fide* intentions, then he/she is a criminal. Still, the parents are expected to produce the child in court and to hand him/her over to the parent to whom the court has temporarily granted custody. Violation of the court's orders would then lead to the detention or punishment of the offending parent, even though that parent may be the primary caregiver, a situation that is arguably not in the child's best interests.

According to the Pakistan Penal Code (PPC), child abductions by a non-parent are of a criminal nature and are tried before the criminal court. Removal of a child by a parent is not criminal and is dealt with by the family or civil court. Consequently, the trans-national movement of a child without the consent of the foreign parent would not lead to the detention of the alleged abductor, nor would that parent be punished under any section of the PPC for bringing the child to Pakistan. Under Sec. 361 of the Pakistan Penal Code, it is an offense to remove a male child under the age of fourteen or a female child under the age of sixteen from the lawful guardian. This section lays down that 'whoever takes or induces any minor under fourteen years of age, if a male, or under sixteen years of age if a female, out of the keeping of the lawful guardian, is said to kidnap such minor from lawful custody'. The offense of abduction has also been defined under Sec. 362 of the Code, under which 'whoever by force compels or by other deceitful means induces any person to go from any place is said to have abducted that person.'

The matters of custody, wrongful removal, and guardianship of children in Pakistan are normally dealt with under the provisions of the Family Courts Act, 1964, and the Guardians and Wards Act, 1890. Sec. 9 of the Act of 1890 requires that application in such cases be made to the Family Court having jurisdiction at a place where a minor ordinarily resides. However, one remedy for child abduction that has been used with some success in Pakistan is the writ of habeas corpus.[35] A writ of habeas corpus can also be used in family law, for example a parent who has been denied custody of his other children by a trial court or whose child has been illegally removed may file a habeas corpus petition.

[35] The Extradition Treaty of 1931 was signed under the British mandate and could be used as a basis of cooperation in child custody cases.

This petition would have previously been made directly to the High Court under Sec. 491 of the Criminal Procedures Code or art. 199 of the Constitution of Pakistan. However a habeas corpus petition is now normally made to a Court of District or Sessions Judges. A petition could still be heard by a High Court, and this depends on the discretion of the judge. An application for habeas corpus does not determine who should have the ultimate custody of the child, and the application must be attached to a substantive application.

In the last few years, High Courts throughout Pakistan have dealt with cases involving child abduction in connection with mixed marriages between Pakistanis and British, Canadian and French nationals. These cases appear to have been resolved judiciously.

The UK-Pakistan Protocol has been enforced by Pakistani courts, and mothers are allowed to take their children back to the United Kingdom. Recently, the High Court of Azad Kashmir-Pakistan had a child who had been recovered from the custody of the father and handed over to the British mother, Najma Begum, following her application. The Court stated that, in light of the Protocol, the relevant court in the United Kingdom would have to decide about the future and custody of the child. The mother of the child had filed a habeas corpus application with the High Court under Sec. 491 of the Cr.PC.

### *7.3.4 Foreign Orders*

Although foreign orders are not automatically enforceable, they can be considered by Pakistani courts, and the higher the level of the foreign court that issued the order the more weight it is accorded in Pakistan. The Civil Procedures Code of 1908 contains provisions for the enforcement of certain foreign decrees, but although custody orders can be used as supporting documents, they are not directly enforceable. The case of Misbah Rana – a twelve-year-old, Scottish-Pakistani girl – is also quite a significant case. In this case Misbah's mother, Louise Campbell, approached the High Court of Lahore and filed a habeas corpus petition against her ex-husband and Misbah's elder sister, both of whom had illegally taken Misbah to Pakistan. The mother in this case claimed that Misbah should be sent back to Scotland and the custody matter decided by the relevant court in Scotland, as per the Protocol. Louise Rana was worried that Misbah would be forced to marry at her early age, whereas Misbah consistently denied, through a news conference, that her Pakistani family was trying to force her into such a union. After listening to both parties' arguments, the Court ordered that Misbah should be handed over to the British High Commission within seven days so that the case could be decided as per the Protocol and the custody issue heard in Scotland's relevant court. Upon hearing that she would be handed over to her mother, Misbah protested against the Court's decision and expressed the desire not to go back to Scotland. Owing to Misbah's wish to stay with her father, both parties decided to settle the issue outside the court. The court allowed Misbah to stay with her father and granted access to her mother so that she could visit her daughter under certain measures. In this case the High Court violated the

UK-Pakistan Protocol, and the child's custody was decided by mutual agreement. However, the court respected Misbah's point of view, which is central in the field of child rights as envisaged in art. 9(2) of the UNCRC: 'In any proceedings …, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.' Art. 12 of the UNCRC also states that the child's point of view should be taken into consideration by the courts.

### *7.3.5 Institutional and Legislative Measures at Federal and Provincial Levels under the 18th Constitutional Amendment*

In December 1980 the Government of Pakistan established the National Commission for Child Welfare and Development (NCCWD) in order to promote child welfare and planning and development. The NCCWD, positioned under the Human Rights Division (erstwhile Ministry of Human Rights of Ministry of Law, Justice and Human Rights), has the mandate to monitor, review, and coordinate the implementation of the UNCRC. The Commission consists of several national expert committees, one of them being for the protection of rights of children (including juvenile justice, family environment, abuse, neglect, exploitation, and child labor).[36] At the provincial level, the Provincial Commission for Child Welfare and Developments as well as the provincial Social Welfare Departments (SWDs) are the main actors which have the mandate to monitor progress on the implementation of the UNCRC and its Optional Protocols.

In the Parliament there are Standing Committees on Human Rights in the National Assembly and the Senate that provide oversight on public policy, monitor the human and child rights situation in the country, receive complaints on child rights violations, conduct inquiries, hold hearings, and make recommendations.

After the 18th Constitutional Amendment, the NCCWD has been consulting with and advocating for the establishment of an independent National Commission on the Rights of the Child (NCRC) for the effective monitoring of all national and provincial programmes. With an independent status, the NCRC will ensure effective monitoring of national programmes which are designed to directly or indirectly benefit children. In this regard, the establishment of the NCRC was announced by the Prime Minister of Pakistan in 2012. Pursuant to this announcement, a series of provincial and national consultations were held, and a draft bill was finalized for legislation.

Some other measures taken by the Government of Pakistan include the adoption of several programmes in the area of basic health and welfare, including the National Hepatitis Control Program (2005-2010), the National Maternal, Newborn and Child

[36] Government of Pakistan, Women Development Division, National Commission for Child Welfare and Development. www.pakistan.gov.pk/divisions/ContentListing.jsp?DivID=20&cPath=185_191_399_404 (accessed 1 October 2015).

Health Program (2006-2012), the National Nutrition Program, and the expansion of the Lady Health Workers Program.[37]

### *7.3.6 Legislative Measures at Federal and Provincial Levels*

The most significant development with respect to law-making has been the passage of the 18th Constitutional Amendment to the Constitution of Pakistan in 2010. Consequent to the 18th Amendment, the subject of the child in terms of legislative and administrative competence as well as financial authority has been devolved to the provinces. The Federal Government, therefore, can now legislate on child related issues only in relation to Federal territories and those areas not forming part of a province. For instance, the Federal government has adopted legislation in the area of education and protection of the child such as the Islamabad Capital Territory (ICT) Free and Compulsory Education Act 2012. Thus child welfare has become a provincial matter. This in turn has brought many challenges for the government, and it has, in particular, taken time for provinces to understand their newly assigned roles and responsibilities. However, provinces soon realized the mechanics and implications of the 18th Amendment, and as a result a number of legislative and administrative measures have been taken by the provincial assemblies and provincial governments. In the Khyber Pakhtunkhwa (KP) province, the Child Protection and Welfare Act (KPCPWA), 2010, has been enacted, which provides mechanisms at local and provincial levels for the welfare and protection of children at risk. It is based on the principle of the best interests of the child. Under the KPCPWA, the Child Protection and Welfare Commission (CPWC) has been established to review provincial laws and regulations affecting the status and rights of children and to propose new laws; to implement policies for the protection, rehabilitation, and reintegration of children at risk; and to monitor the implementation and violation of laws. In KP, CPWC has launched an awareness campaign on child rights through print and electronic media and has arranged a number of seminars, consultations, and workshops.[38] In 2011, the KP Government also promulgated the KP Borstal Institutions Act (BIA), under which separate detention places will be established for juvenile convicts for their basic education and for training regarding their mental, moral, and psychological development. In the province of Sindh, the Sindh Child Protection Authority Act (SCPAA), 2011, has been promulgated, through which an authority has been constituted which will monitor and ensure implementation of the child-protection related provisions under the UNCRC in the province. The law seeks to establish district level child protection institutions. In 2011, the Remand Home Rules were also notified by the Government of Sindh. The Remand Home is a temporary place of custody

[37] Pakistan's Fifth Periodic Report to the UN Committee on the Rights of the Child on implementation of the Convention on the Rights of the Child, National Commission for Child Welfare and Development, Ministry of Law, Justice and Human Rights Government of Pakistan.

[38] The Commission, through its Child Protection Units (CPUs) located in relevant districts, is raising awareness on child protection issues. By 2012, a total of 459 (235 male and 224 female) awareness sessions were conducted with 335 Child Protection Centres (CPCs).

for child inmates where they are being provided care, protection, and treatment. Under the SCPAA, an eleven member Sindh Child Protection Authority (SCPA) has been set up to coordinate and monitor child protection issues at provincial and district levels. The Authority is working to establish an institutional mechanism for child protection and for the setting of minimum protection and standards for all institutions relating to children, including educational institutions, orphanages, shelter homes, child parks, and hospitals; ensuring implementation is an additional aim.

KPCPWA and the SCPAA are in conformity with the CRC, in which a child is defined as a person below eighteen years of age in accordance with the CRC definition given in art. 1. These laws use 'the best interests of child' as a basic principle in taking actions for and against children. In CPWA 2010 the best interests of the child is defined as a 'primary consideration, in all actions either by public or private bodies, for protection, survival, development and participation of children'.

The next section discusses in detail the family law in Pakistan and provides an in-depth analysis of the Guardians and Wards Act 1890.

## 7.4 Parental Care and the Principle of the Best Interests of the Child in Pakistani Law

### *7.4.1 Features/Characteristics/Duality of the Pakistani Family Law System*

The legal system in Pakistan is based on English Common Law and Islamic law. The former is more influential in the area of commercial law while Islamic law principles are followed in family law. The key laws governing marital and family relationships are based on Islamic principles and derive inspiration from the two primary sources of Islamic Law, the *Qur'an* and *Sunnah*. The principle of *Ijtihad* and other accompanying juristic techniques have also been used by the framers of law to formulate family law in Pakistan. At independence, Pakistan inherited four pieces of legislation regarding women's and children's rights: the Child Marriage Restraint

Act 1929,[39] the Shariat Application Act 1937,[40] the Dissolution of Muslim Marriages Act 1939,[41] and the Guardians and Ward Act 1890.[42] All personal laws enforced in pre-partitioned India are still valid and operative in Pakistan. After independence from the British Colonial rule in 1947, no reforms were made to family law in the first fourteen years of Pakistan's history. To review family laws for the first time in 1951, a seven-member Commission on Marriage and Family Laws, also known as the 'Rashid Commission', was setup by the government.[43] The Commission was established with the ostensible aim of identifying areas of reform in family law. The Commission submitted its final report along with a dissenting note by a member of the Commission. The report stated that Islam is a very progressive religion, and not

[39] The framers of the Act, bearing in mind the societal norms, did not invalidate the child marriage. However, under the Act the father or the guardian may be punished for contracting their children into such marriages. In 2009 a private member bill to amend the CMRA was tabled in the National Assembly, the Child Marriage Restraint (Amendment) Bill, 2009. Among other provisions, it seeks to 'remove the gender disparity in age' of marriage for males and females and to set eighteen years as the minimum age of marriage for both. It also proposes to raise the punishment for violations from one month to two years and the fine from one thousand to one hundred thousand rupees. Once the age of marriage for females is raised to eighteen years under the CMR (Amendment) Bill, amendments will be required in the option of puberty provision in the Dissolution of Muslim Marriage Act 1939 to provide effective relief to victims of under-age marriages.

[40] The second piece of legislation that Pakistan inherited from Pre-Partition India was the Shariat Application Act 1937. This act laid down that in family matters regarding Muslims, Muslim personal law had to be applied. A substantial portion of personal law, therefore, remained un-codified and subject to interpretation by the courts. After the creation of Pakistan, the first legislative attempt made by the Punjab Legislative Assembly was the New West Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948) that enlarged the scope of personal law to questions relating to succession, including succession to agricultural land (whereas the previous Act applied only to intestate succession). However these changes were not welcomed in all parts of the country as men were still not willing to give women their share in property. As a result, to deprive women of their inheritance rights, amendments were made to the same Act in the Province of Sindh and the passage 'save questions relating to agricultural land and other than charitable institutions and charitable and religious endowments' was deleted from Sec. 2 of the Shariat Application Act.

[41] The Dissolution of Muslim Marriages Act 1939 came as a relief for Muslim women who were given some protection against the wrongly interpreted and misapplied Islamic divorce laws. Before this Act, Muslim women hardly had a basis to get a divorce, and due to the pressure of customary practices they were also denied access to the right to divorce by *khula*. Only men's right to unilateral divorce was accepted. The Act laid down eight grounds for divorce: where the husband's whereabouts were unknown for four years; the failure to provide maintenance for two years; the failure to perform marital obligations for three years; the husband's impotence, cruelty, and incompatibility of temperament; hatred and adultery; insanity or suffering from leprosy or venereal disease; the husband's interference in the wife's management of her property; and the husband's interference with the performance of the wife's religious beliefs or practice. On these bases a woman could obtain a judicial decree for the dissolution of her marriage (*Tanseekh-i- Nikah*), this dissolution being called *Faskh*. One important aspect of the Act is that dissolution of marriage does not affect a woman's right to dower or the option of puberty. Moreover, the husband's consent to the dissolution is not needed. These grounds were included by adopting the juristic technique of *Talfiq*.

[42] To be discussed in detail in the next section.

[43] The Commission was composed of six Modernists (three men and three women) and one Traditionalist religious scholar, Maulana Ihteshamul Haq.

a clergy-dominated religion, and that changes in the law must be brought by exercising the right to *Ijtihad*. The Commission's report recommended wide-ranging reforms in Muslim family law (divorce, inheritance, and marriage) aimed at enhancing the legal status of women. While making its recommendations the Commission gave careful consideration to the opinions of learned, liberal, and enlightened persons that were obtained from the circulation of a questionnaire. The report of the Commission was considered to be a significant document but at the same time a challenge to contemporary Muslim thought. The report received severe criticism from different religious groups and generated heated debate, with members of the religious community denouncing its recommendations as 'distorting the religion of God and [being] the worst type of heresy.' The report and the dissent highlighted the conflicting views that dominate the politics of family law.

The question of custody of the child was also raised in the questionnaire drafted by the Marriage and Family Laws Commission. The question was as follows:

> At present the mother is entitled to the custody of her minor child only up to [a] certain age i.e. the male child up to seven years and [the] female child till she attains puberty. These limits have no authority either in Qur'an or Hadith but have been fixed as a result of opinions of some Muslim Jurists. Do you consider it admissible to propose some modifications?[44]

In answer to this question, the Commission stated in its report as follows:

> In the opinion of the Commission it is admissible to propose changes in [a] matter of custody of minor children as the Qur'an and Sunnah have not fixed any age limit and some of [the] great Mujtahid Imams have expressed the view that the [matter] of age limit in this respect is an open question.[45]

Maulana Maududi (1903-1979), an eminent Pakistani religious scholar, while expressing his views on the issue of custody stated:

> The right thing in this regard is that the interest of the child should be kept above everything else. In every particular case preference should be given either to the father or mother after giving full consideration to the prospects of education and training in their respective custodies … also under [whomsoever's] custody they might be, no restrictions should be placed on children meeting the other party.[46]

Justice Tanzil ur Rehman a senior Supreme Court judge stated:

> In granting the right of upbringing, the child's security and betterment should be kept in mind, and as long as there is no ma'ani *(*hindrance/hurdle) the mother's custody will be preferred. In certain situations, [the] child has to be given the option to choose between the two. Sometimes such circumstances may arise in which it would be appropriate to give the child to [the] maternal grandmother or maternal uncle even in the presence of the parents.

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[44] Report of the Commission on Marriages and Family Laws, The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1956, 1210.
[45] Ahmad 1959, p 218.
[46] Ahmad 1959, p 220.

> If it is not appropriate to hand over the child to the mother due to her religion or profession then the court will decide by itself to whom the custody may be granted.[47]

However Maulana Amin Ahsan Islahi (1904-1997) commenting on the reply of the Commission responded:

> It is correct that there is no explicit implication of Qur'an and Sunnah which prescribe[s] the age limit. But it does not mean that legists have fixed the limit just out of fancy and had no sound reasons for these deductions … a careful study of the verdicts of Prophet Mohammad (PBUH) in the cases that were brought before him reveal that a very basic consideration has been the welfare and wellbeing, education and training, protection and interests of the minor.[48]

The questionnaire responses reflected the tensions that exist between the Modernists and the Traditionalists particularly in the context of the interpretation and application of family law reform in Pakistan.[49] Traditionalists viewed legislation based on the *Qur'anic* precepts of law as the textual and immutable boundaries of Islamic family law jurisprudence. They viewed legislation as divinely ordained and capable of interpretation only by *Mujtahids*, through the process of *Ijtihad.* Modernists on the other hand were of the view that law is something changeable, vibrant, and subject to interpretation.[50] In the process of broadening the scope of *ljtihad,* the modernists envisioned a separation of legislative and judicial functions.[51] In addition, the Modernists advocated that the judiciary should not be limited to scholars trained in Islamic law who would apply the code mechanically. Instead, the judiciary should include secularly trained judges who could and would interpret and apply the code and Common Law in tandem and on a case-by-case basis.[52] The Modernists' agenda was social justice whereas the Traditionalists' agenda was to protect Islamic law from Western imperialist influences as well as to exert their own positions of power and authority in the community.[53]

The clash between the Modernists and Traditionalists clearly surfaced in the discussions of the members of the Commission who used *Ijtihad* as a vehicle for bringing change and reforming family law in Pakistan. The Commission specifically claimed in its report that independent legal reasoning, or *Ijtihad,* and the subsequent interpretation and application of family laws (both in the *Qur'an* and *Sunnah* and, later, in the Muslim Family Law Ordinance) was not limited to the *Mujtahid*, but

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[47] Rehman 1991, p 886-7.

[48] Pakistani Muslim scholar famous for his Quranic commentary '*Tadabbur ul Qur'an*'. He also served as a member of the Marriage and Family Law Commission set up by the Government of Pakistan in 1956. He was one of the founding members of Jamaat-e-Islami but abandoned the party in 1958.

[49] The Traditionalists and the Modernists stand between the two extreme groups, the *Ulema* and the Secularists. The *Ulema,* or the orthodox religious leaders, hold the extreme right-wing point of view while Secularists advocate a complete separation between religion and state.

[50] Pearl 1969, p 168.

[51] Haider 2000, p 292.

[52] Haider 2000, p 292.

[53] Haider 2000, p 293.

that even a secular judge could exercise *Ijtihad*.[54] Coulson has very aptly depicted the difference of opinion between the Modernists and the Traditionalists' approach by stating that the clash between the two was on:

> A single, determinative issue: the judicial power of interpretation versus traditional Islamic law as already interpreted by centuries of jurists... In other words, which was to prevail: the codified Islamic law or the common law function of judges to interpret and modify that law through their decisions?[55]

Despite the fact that the recommendations of the Commission provided a road map for legislative reform, no action was taken on them. It was five years later in March 1961 that the Muslim Family Laws Ordinance 1961 (hereafter MFLO) was promulgated which incorporated some of the recommendations of the Commission.[56] Under the MFLO, registration of marriage and divorce was made mandatory, a procedure was laid down for pronouncing divorce, and restrictions were imposed on polygamy. The MFLO was a significant step towards giving women and men equal rights, yet the MFLO failed in the sense that its reforms were weak and watered-down versions of the recommendations of the Commission on Marriage and Family Laws. Specifically, its reforms were prescriptions for procedural safeguards rather than clear prohibitions of certain acts. Additionally, it also remained silent on the issue of custody of minors. In sum, the MFLO reflected a compromise between the Traditionalists and Modernists. This compromise weakened the effect of the reforms. In 2000 the Federal Sharia Court held in *Allah Rakha v. Federation of Pakistan* PLD 2000 FSCI that it had jurisdiction to examine whether the MFLO is consistent with Islam because the codified laws applicable to Muslims do not come under the category of Muslim personal laws as mentioned in art. 203(c) of the Constitution. However, this judgment has been assailed before the Supreme Court, and there has been no alteration of the law to date.[57]

The main law that deals with custody and guardianship cases therefore remains the same, i.e. the Guardians and Wards Act 1890.

### *7.4.2 The Guardians and Wards Act, 1890 (Act VIII of 1890)*

The Guardians and Wards Act (hereafter GWA) is the main piece of legislation that governs custody and guardianship cases in Pakistan. The GWA consolidated the earlier, sketchy legislation on the subject which included Act 40 of 1858, which was for

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[54] Report of the Commission on Marriage and Family Laws, Gazette of Pakistan, Extraordinary, 20 June 1956.

[55] Coulson 1957, p 137.

[56] Some of the Commission's recommendations were incorporated in the Muslim Family Law Ordinance (MFLO) promulgated by Pakistan's first military ruler, General Ayub Khan (1958-1969), in 1961.

[57] The Federal Sharia Court established in the Constitution by art. 203B(c) has jurisdiction to examine certain laws to ensure they are not repugnant to Islamic principles. The Court has original and appellate jurisdiction, but it does not have jurisdiction over the Constitution, Muslim personal law, or any laws relating to the procedure of any court or tribunal.

minors in the Presidency of Bengal and Madras, Act 20 of 1864 for the Presidency of Bombay, Act 9 of 1861, and Act 1874 for minors in territories beyond the jurisdiction of chartered High Courts. With the passage of time and after independence from the British colonial rule, some provisions of GWA lost their relevance and became obsolete and redundant; for instance in Sec. 5 the power of parents to appoint a guardian where one of them is a European British subject has been omitted under the Federal Laws (Revision and Declaration) Ordinance 1981. The other legislative instrument was the West Pakistan Family Court Act, 1964 (hereafter WPFCA). Sec. 5 WPFCA confers exclusive jurisdiction on the Family Courts to adjudicate upon matters specified in the Schedule, of which item No. 5 refers to the custody of children. This provision has been made subject to the provisions contained in the MFLO and the Conciliation of Courts Ordinance of 1961. Sec. 25 WPFCA confers on the Family Court the status of a District Court for the purpose of the GWA and further provides that while dealing with these matters the same procedure as prescribed under the GWA shall be followed. Sec. 47 GWA catalogues orders made by a Court, which are all appealable to the High Court, of which clause; (c) refers to an order made under Sec. 25. The Family Court as constituted under the WPFCA, having exclusive jurisdiction to deal, inter alia, with custody of children, is not a District Court in terms of the definition as laid down in Sec. 4(4) GWA and Sec. 2(4) Civil Procedure Code 1908. This with the exception that the deeming provision contained in Sec. 25 WPFCA has conferred that status on it while dealing with cases under the GWA. There is a separate law for Family Courts in Azad Jammu and Kashmir, which is The Azad Jammu and Kashmir Family Courts Act, 1993. These courts have exclusive jurisdiction to hear cases in the region concerning divorce, maintenance, custody, dower, restitution of conjugal rights, and guardianship.

The objectives of the GWA are to promote the interests of children to make sure that a child may not suffer any discrimination or disadvantage because of the marital status of his or her parents.

Recently, the Law and Justice Commission of Pakistan in its meeting in 2007 considered some further sections of the GWA and proposed to amend Sec. 6 of the Act by deleting the expression 'who is not a European British Subject'.[58] The Commission also considered the discriminatory provisions contained in Sec. 19(b) of the Act, prescribing that the court is not to appoint a guardian for a minor whose father, in the opinion of the court, is not unfit to be guardian of the person of the minor. This proviso potentially excludes the mother even if she herself has a right to custody of the minor. Two honourable female members of the Commission stated that in the presence of the mother having custody, no guardian of the person of the child may be appointed if the mother is not, in the opinion of the court, unfit to be guardian of

[58] The Law and Justice Commission of Pakistan is a Federal Government institution, established under an Ordinance (XIV) of 1979. The Commission is headed by the Chief Justice of Pakistan and comprises twelve other members, including the Chief Justice of the Federal Shariat Court, Chief Justices of the High Courts, the Attorney General for Pakistan, the Secretary of the Ministry of Law & Justice, the Chairperson of the National Commission on the Status of Women, and four other members, one from each Province.

the person of the minor. This proposed amendment was approved by the Commission along with consequential amendment in Sec. 41(e) of the Act with regard to reference to the mother of the minor therein.

Another legislative provision relevant in custody cases is Sec. 491 of the Criminal Procedure Code 1898, under which if a minor is held forcibly, interim custody is immediately restored to the mother. The WPFCA and the West Pakistan Family Court Rules are also invoked in such cases. Certain constitutional provisions may also be invoked in such disputes, such as the writ jurisdiction of the High Courts under art. 199 of the Constitution.

In Pakistan, the GWA is applicable to custody and guardianship cases while keeping in view the personal law to which the minor/ward is subject.[59] Under the Majority Act 1875 (No IX), minority ceases upon the completion of eighteen years, unless a guardian of the person, or property, or both, of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a court of wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years. Accordingly, notwithstanding classical Islamic law, a child remains a minor until the completion of eighteen years. Until then, the court has the power to appoint a guardian for the child and her or his property or both under the provisions of the GWA.

A minor is subject to the same personal law as his/her father. This law applies to Muslim and non-Muslim citizens of Pakistan. The established view is that 'where the provisions of the personal law are in conflict with the provisions of the GWA, the latter will prevail over the former'.[60] Sec. 25(1) explicitly concerns custody. It states that:

> If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return.

This proviso allows the court to intervene and to re-establish the original arrangement of child custody in cases of divorce or separation between the husband and wife. But since both divorced parents may retain a form of custody, the mother exercises actual custody while the father relies on legal custody. The provision has been applied to transfer custody from one parent to the other, bearing in mind the

[59] The relevant provision in this respect is Sec. 3 of the Majority Act 1875, which reads as follows: 'Subject as aforesaid, every minor, of whose person or property or both a guardian, other than for a suit within the meaning of Order XXXII of the First Schedule to the Code of Civil Procedure 1908 (No V), has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall, notwithstanding anything contained in the Succession Act 1925 (No XXXIX) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before. Subject as aforesaid, every other person domiciled in Pakistan shall be deemed to have attained his majority when he shall complete his age of 18 years and not before.'

[60] Mulla 1938, p 45.

welfare of the ward.[61] In other words, the Act provides room to the courts to disregard classical Hanafi custodial hierarchy and empowers them to decide simple custody disputes between parents according to the minor's welfare. If one of the parents has been declared unfit or has lost custodial rights for some other reason, Sec. 19(b) enables a court order in the child's welfare. The court shall be guided by the law to which the minor is subject and shall consider the statutory factors listed above. When the minor's father is living and has not been declared unfit, the court may not appoint a guardian but may apparently give mere custody to another person.

The GWA empowers the court to hear the child's opinion in guardianship and custody cases if the child is capable of articulating his preferences. The court, however, is not obliged to ascertain from the minor his wishes. What is required is to keep the best interests of the child in view and to reconcile the child's opinion and the welfare rule if there is a conflict in these two requirements. The GWA does not state a specific age limit for the age of the child to be capable of expressing his preferences, and there is case law available in custody and guardianship cases where children have been heard in court. Ali, in her review of judicial cases from 1947-1997, argues that neither the GWA nor the case law makes a clear distinction between the words 'guardianship' and 'custody'; the terms are often used interchangeably, and no clearly defined parameters have been drawn to determine the nature and extent of the privileges inherent in the persons awarded either custody or guardianship of a minor.[62] Ali is of the view that the only inference that can be drawn from the case law analysis is that the word guardian is mostly used to refer to the legal guardian while custody is taken to refer to the mother or any female relative having physical possession of the minor.[63]

### *7.4.3 Law of Guardianship in Pakistan*

#### *7.4.3.1 Jurisdiction*

The application for guardianship should be made under the provisions of the GWA to the court having jurisdiction in the place where the minor ordinarily resides. If the application is with respect to the guardianship over the property of the minor, then it may be made either to the court having jurisdiction in the place where the minor ordinarily resides or to a court having jurisdiction in a place where the minor has property.

[61] Sec. 25(1) Guardians and Wards Act, 1870.
[62] Ali and Azam 1998, p 151.
[63] Ali and Azam 1998, p 151.

### *7.4.3.2 Who May Be a Guardian?*

According to Sec. 4(2) GWA, a guardian is 'a person having the care of the person of a minor, or of his property, or of both his person and property'. A guardian can be a *de facto* or a *de jure* guardian. Pursuant to the GWA, a father is the natural guardian of a child under the age of eighteen years. A *de jure* guardian is appointed by the court. A *de facto* guardian is a related person other than the father or grandfather, e.g. the mother, a brother or an uncle. Other persons – such as the mother, other relatives (except the father and father's father), or an institution like an orphanage – may voluntarily choose to take in charge the person or the property of a minor; a mother, however, is the next possible guardian after a father, unless the latter, by his will, has appointed another person as the guardian of the child. While appointing a *de jure* guardian, the character, the capacity, and the fitness of the individual should be taken into consideration.[64]

### *7.4.3.3 Court Proceedings*

A person, including a relative or friend, who is interested in becoming a *de jure* guardian must apply to the court under the provisions of the GWA in order to be appointed as a guardian; he is not bound to wait until his legal title or fitness to act as guardian is disputed by another person. The procedure for such an application is stated in Sec. 10 of the GWA, and no order should be made unless notice of the application is given to persons interested in the minor.

During the court proceedings, the court exercises parental jurisdiction over the child. The court is also empowered to give temporary custody and order protection of the person and property of the minor during the maintenance of the case.

While appointing a guardian, the court must have regard to the welfare of the minor, which covers factors such as the age, sex, and religion of the child; the character and capacity of the proposed guardian and his nearness to the child; the wishes, if any, of the deceased parents as well as any existing or previous relations of the proposed guardian with regards to the minor or his or her property; and if the child is old enough to form an intelligent preference, then such preference should also be considered.

[64] A charitable society is not a person within the meaning of Sec. 4(2) of the GWA and thus cannot be appointed as the guardian of the person, or property, of the minor. It is due to the fact that anyone having an interest adverse to that of a minor cannot be appointed as a guardian. However, it has been held by courts that a manager of a registered society can be appointed as the guardian of a child. In the latter context, it has also been stated that the meaning of person in the context of being appointed a guardian should not be confined to an individual, despite Sec. 3(39) of the General Clauses Act as it would then conflict with GWA Secs 43(4) and 45.

### *7.4.3.4 Effects of Being Appointed as de jure Guardian*

A guardian is responsible for ensuring that the minor is supported, fed, housed, clothed, and educated in a manner suitable to his or her position in life, and to the fortune which he or she is likely to enjoy upon attaining the age of majority. The *de jure* guardian appointed by the court is entitled to such allowance as the court thinks fit for the minor's care and for the effort that he or she goes through while undertaking the duties. The allowance can be paid out of the property of the ward.

A guardian appointed by the court without the court's permission cannot remove the ward from the limits of the court's jurisdiction. The permission can be special or general and can be specified in the court order. Illegal removal of a ward from the court's jurisdiction is punishable with a fine not exceeding Rs 1000[65] or a jail term extending to six months.

### *7.4.3.5 Cessation and Revocation of Guardianship*

A court, on the application of any interested person or on its own motion, may remove a guardian appointed or declared by it, or even a guardian appointed by will, for the following reasons (amongst others):

- For abuse of trust;
- For continued failure to perform the duties of his trust;
- For incapacity to perform the duties of his trust;
- For ill-treatment or neglect in taking proper care of the ward;
- For contumacious disregard of any of the GWA's provisions or of any of the court orders;
- For conviction of an offense implying a defect of character;
- For having an interest adverse to the faithful performance of his duties;
- For ceasing to reside within the local limits of the court's jurisdiction;
- For bankruptcy or insolvency in the case of a guardian of property.

A guardian may also apply to the court for discharge from the responsibility of being a guardian. A person also ceases to be a guardian in the case of his or her death, removal; upon the ward ceasing to be a minor; upon the female ward's marriage to a husband who is not unfit to be her guardian; or upon the court itself assuming superintendence of the minor.

[65] Approximately 10 to 12 Euros.

### *7.4.4 Judicial Decisions in Custody and Guardianship Cases in Pakistan*

As discussed earlier in this report, a general view prevalent in Pakistan based on classical Hanafi principle is that in cases of marital breakup the father is to be given custody of a male child at the age of seven and custody of a female child on her attaining puberty. The courts in Pakistan, however, have deviated from this classical Hanafi principle and have based their judgments on the 'Best Interests of the Child' principle. This section provides a review of cases from 1997 to 2013 in which the courts have upheld the principle of the best interests of the child and given custody to the best-suited person. Pakistani courts have demonstrated considerable sensitivity for the child's emotional and financial well-being in interpreting the concept of 'welfare', and while upholding the principle courts have at times granted custody even to a grandparent if such grandparent appears better placed to ensure the child's welfare than, for example, the mother of the child. At the same time, as shall be shown below, parenting agreements have been taken into consideration by the courts when deciding child custody disputes.

#### *7.4.4.1 Case Law*

##### *Visitation Rights and Violation of a Parental Agreement*

In *Ali Hayat v. Khalid Shafi and 2 others*,[66] the contention of the father/applicant was that the children's mother had moved them to a new house and denied him his visitation rights in violation of the parenting agreement at the time of divorce. The contentions of the mother were that the present application under Sec. 491 Cr.PC was ineffectual as the children were allowed to remain in her custody in pursuance of the parenting agreement and that according to the this agreement all disputes had to be first referred to a mediator. The High Court directed that both parties should follow the parenting agreement and might sit together to renegotiate the agreement, keeping in view the best interests and welfare of their children; that as an interim measure the mother would allow the father to meet the children three times a week for two hours each, and such interim measure would be valid for up to thirty days; that both parties would not remove the minors from the city without an order of the competent court; that the father would continue to deposit monthly expenses; and that in the event of a failure to reach an amicable settlement outside court within thirty days, the parties would be at liberty to approach the Guardian Judge for redressal of their grievance. The court further held that in matters pertaining to children the courts should not go into legal technicalities and should decide the case keeping in view the facts and circumstances of each case, mainly taking into consideration the welfare of the child.

[66] *Ali Hayat v. Khalid Shafi and 2 others*, YLR 2013 954.

### *Failure to Provide Maintenance*

In *Iftikhar Ahmad Chisti v. District Judge, Chakwal and others*,[67] the failure to provide maintenance to the children, a second marriage, and children from the second marriage were reasons for not granting custody to the father despite his claims that he could provide a better education to the children. In this case a constitutional petition for custody of the minors was filed by the father (as a suit of petitioner (father) for the custody of minors was dismissed concurrently by the Guardian Court and Appellate Court). The petitioner admitted that he had failed to pay the maintenance under the decree of the Family Court and that he had been detained in civil prison. The Court held that if a father failed to make maintenance payments and then litigated against the custody of minors and finally did not pay the maintenance even after the decree of the court and preferred to go to civil prison, it could be safely presumed that he was not interested in the welfare and well-being of the minors. The petitioner was also living with his second wife, and he had children from his second wife. The court further held that the step-mother could not bestow the love and affection which would be given by the real mother. In such circumstances it was not in the welfare of the minors to be given to the petitioner. The court further held that the petitioner's contentions that better education facilities were available at the place where the petitioner was residing and that the petitioner had better financial means than the respondent were not valid grounds for putting the minors in his custody.

Failure to provide maintenance by the father was also a ground for not awarding custody to the father in *Karim Bakhsh v. Muhammad Bakhsh*;[68] instead the custody of the child was given back to the maternal uncle as he and the maternal grandmother were looking after the child, and the minor had also expressed his willingness to live with his maternal relatives.

Although the courts have held that providing maintenance is the responsibility of the father, his wealth and financial status cannot be the grounds for giving him the custody of the child. In *Mst. Iram Shahzad and 2 others v. Additional District Judge, Lahore*,[69] the Court held that the ostensible wealth of father can never be a ground entitling him to custody of his minor whereas age, gender, and the marital status of the parties are factors which are to be taken into consideration for arriving at a conclusion as to how the interests and welfare of the minor can be best protected; moreover, such factors are not to be considered in contradistinction to the welfare of minor. The court held that the welfare of the minor is of paramount importance and the sole determining feature/factor. Referring to Islamic law, the court held that it is the responsibility of the father to provide maintenance to the child, but the court also categorically dismissed the option of sending the child abroad and to be looked after by a maid. The Court further held that '[n]o mother deserves to be put through the agony of permanently parting with her offspring or forced yet again to invoke the

[67] *Iftikhar Ahmad Chisti v. District Judge Chakwal and others*, PLD 2012 Lah 670.
[68] *Karim Bakhsh v. Muhammad Bakhsh*, CLC 1997 316.
[69] *Mst. Iram Shahzad and 2 others v. Additional District Judge Lahore*, PLD 2011 Lah 362.

jurisdiction of a foreign court'; therefore the custody was awarded to the mother of the minor.

### *Custody and Prohibited Degree of Relationship*

The courts have also taken into consideration prohibited degrees of relation while awarding custody of the child. In *Mst. Aziza v. SSP, District Tando Muhammad Khan and 3 others*,[70] the court allowed the application for recovery of a minor who was living with grandparents and a cousin who came under a prohibited degree of relationship. The court held that as the relationship between the minor and her cousin fell within the prohibited degree, it was therefore in the best interests of the child that she should live with her real mother instead of her cousin and grandparents, who could hardly walk and hence could not contribute towards the welfare of the minor. The court also held that under Islamic law the mother was most entitled to the custody of the minor girl.

### *Age of the Child and Recognition of Motherhood*

In *Mst. Gulnaz v. Mst. Amina and others*[71] the court held that 'as [the] mother of minors was alive and able to take care of her minors and there could be no better cradle for the minors than their mother's lap, denying such natural right would be utter cruelty and grave injustice'. The Court further held that it would be best and in the interests and welfare of the minors that they were reunited with their mother. In this case, the Court very clearly emphasized the significance of the mother's role and how it is linked to the welfare of the child as there could be no better substitute for the minors than the mother herself.

### *Second Marriage and Awarding Custody to Grandparents*

The second marriage of the mother has in some cases resulted in her not being awarded the custody of the child. In *Mst. Aneeta Tanveer v. Muhammad Younas*,[72] the Family Court refused to give custody of the minor child to the petitioner (mother) who had entered a second marriage after a mutually agreed divorce from her first husband. The facts of the case were that after the mother's second marriage the child was living with the maternal grandfather and was being well looked after by him. The court held that: (i) the petitioner mother of the minor had no source of income; (ii) she had remarried, and she had been blessed with three children after her remarriage; (iii) her second husband was a stranger as far as the minor was concerned; (iv) her second husband had declined to testify about his income and whether he was

[70] *Mst. Aziza v. SSP, District Tando Muhammad Khan and 3 others*, YLR 2012 2881.
[71] *Mst. Gulnaz v. Mst. Amina and others*, CLC 2012 761.
[72] *Mst. Aneeta Tanveer v. Muhammad Younas*, YLR 2010 513.

willing to shoulder responsibilities in connection with the minor; (v) the maternal grandfather was a retired servant and was receiving a pension; (vi) the maternal grandfather had his own house, whereas the mother and step-father of the minor lived in a rented house; (vii) the real father of the minor had no objection to the child's remaining with his maternal grandfather; and finally (viii) the child had been receiving education while living with the maternal grandfather. Taking into consideration these grounds, the court decided that it was in the best interests of the child to remain with the maternal grandfather.

*Josip Stimac and others v. Melitta Syed Shah and others*[73] was a case of an Austrian drug trafficker travelling with her children who was arrested at the airport. A case under Sec. 9(c) and Sec. 15, Control of Narcotic Substances Act, 1997 was registered against her, and she was subsequently confined in jail as an under trial prisoner; the minors were also confined with their mother, especially for the reason that at the time of her remand before the magistrate she requested to keep them as she was a foreigner and had no relation or friend in Pakistan to take care of them. The mother of minors wrote a letter to the Austrian embassy seeking to have the minors sent to Austria so that they could live with her parents (the petitioners). The Austrian embassy could not succeed in getting the minors released without the court's order for custody. Making reference to art. 199(1)(b)(i) of the Constitution and Sec. 491 Cr.PC, the maternal grandparents of the minors (through their counsel) moved the High Court for release of the minors and their transfer to the custody of the grandparents, contending that they were in custody improperly and illegally. The request further alleged that with their mother herself having made a request that the minors be sent to her parents abroad, it was in the welfare of the minors to live with their grandparents and elder brother and to have a proper education as the parents of minors were involved in drug trafficking and had a blatant track record. The grandparents had obtained a custody order from the Austrian courts for the minors. The court held that '*prima facie* it seemed in the welfare of the minors that they should be sent back to their home country, which, undoubtedly, was a welfare state and capable of taking care of even those children whose parents were not there'. The High Court observed that

> there was apprehension that the minors may not be used as a shield or carrier for any sordid business and if it so happened, the life of the minors shall be ruined, therefore, it was in the best interest of the minors that their custody be given to the grandparents as requested, particularly when [the] elder brother of the minors, was there and was old enough to look after them.

In two other cases custody was given to the maternal aunt and the uncle, respectively.[74] In the former case the father had filed a petition for custody of his son, who was living with his maternal aunt since he was only fifteen days old following the death of his mother. The court held that the mere fact that minor had attained the age of seven years would not ipso facto entitle his father to his custody as a matter of

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[73] *Josip Stimac and others v. Melitta Syed Shah and others*, PLD 2009 Lah 393.
[74] *Mst. Nighat Firdous v. Khadim Hussain*, SCMR 1998 1593, and *Karim Bakhsh v. Muhammad Bakhsh*, CLC 1997 316.

right. The court, emphasising the best interests of the child principle, stated that 'the right of father to claim custody of minor was not an absolute right and the father being lawful guardian of his minor child would be entitled to his custody, provided it was for the welfare of minor'. In the latter case the minor was not happy living with his father, who, on receiving his custody, had engaged him to earn a livelihood for his family members by working as laborer despite the main ground in his application for custody of the minor having been that he was not receiving an education. The Court held that the minor's welfare was not being served by living with his father and that his interest was instead best served while in the custody of his maternal uncle, where his grandmother was there to look after him; the minor had also expressed his willingness to live with his maternal relatives. Taking into consideration the child's wishes and his welfare, the High Court set aside the orders of the lower courts that granted custody of the minor to his father, and the minor child was allowed to live with his maternal uncle.

### *Habeas Corpus Petitions and Jurisdiction of the Court*

In *Mst. Zohra Hilal v. Noor Sakht Shah*[75] the petitioner claimed that her minor daughter had been detained by the respondent/father of the minor improperly and illegally. The court dismissed the petition on two grounds: firstly, in the trial court the minor, when given the choice, opted for living with her father; and secondly, the court held that as it was a case of child custody arising out of a marital dispute, it should be decided in the court of the Guardian Judge or Family Court and not as a habeas corpus petition under Sec. 491 of the Cr.PC. In a similar case in 2005, the court refused to decide the case under Sec. 491 Cr.PC (*habeas corpus*) and held that 'this power being extraordinary in nature, should be sparingly used because paternal jurisdiction in the matter rested under Guardians and Wards Act, 1890'.[76] The court further held that the Superior Courts had exercised jurisdiction under Sec. 491 Cr.PC only in cases of real urgency, and such powers were exercised when the minor was of tender age. The court further held that 'the interest of suckling baby would be best served if he/she was handed over to mother as the life, health, or upbringing of the minor was in serious jeopardy'. The court refused to give custody to the mother on the grounds that the minors were well-settled; they attended their school regularly; the school fees, which were approximately Rs. 5,000 for two months for three minors, were being paid by the father of the minors without any default; the academic results of the minors were exceptional, and their attendance was maximum; and if the minors were removed from the school, their education was likely to suffer adversely. Keeping in view the age, welfare, education, and prevailing circumstances of the case, no justification existed to interfere in the custody of the minors.

Conversely, in *Mst. Moomal v. Jumo Salaro Mir Khan and another*[77] the habeas corpus petition of the mother of the minors under Sec. 491 was allowed, and the

[75] *Mst. Zohra Hilal v. Noor Sakht Shah*, PLD 2009 258.
[76] *Mst. Tasneem Fatima v. Arshad Mehmood and another*, YLR 2005 883.
[77] *Mst. Moomal v. Jumo Salaro Mir Khan and another*, PCr.LJ 1998 1535.

High Court permitted petitioner/mother to take the minors with her in order to ensure their welfare. In this case the children stated before the court that their father was being abusive to them. He had been extending threats to them, and on a number of occasions had also frightened them by pointing a gun towards them. In view of the statements of the minors the Court concluded that

> even if respondent/father of minors was not detaining them illegally … he was keeping them in his house improperly and restraint on two minors was patently unjust, cruel and not in the best interest of two minors and their welfare and proper upbringing would be adversely affected[;] therefore custody must be awarded to the mother.

### *Custody Issues in Polygamous Marriages*

In *Mst. Jamila Begum v. Mirza Muhammad and 2 others*,[78] where the father had contracted polygamous marriages the court awarded the custody of children back to the mother, who had been deprived of her children by concurrent orders of two courts on the sole ground of poverty. The High Court held that the courts misread the evidence, wherein it was categorically stated that the children in custody of the mother were happy and were receiving proper education. Evidence also showed that the father of the minor children was a crane operator who had contracted two other marriages, and in his meagre pay he could not be expected to send his children to a high standard educational institution. The Court further held that due to his polygamous marriages,

> the welfare of the minors in the presence of two step-mothers in the same house could not be stated to be more safe than in the custody of their real mother who after divorce neither had contracted [a] second marriage nor her character and occupation was such that custody of minors could be refused to her.

### *Child Abduction Cases*

In the recent past, two French mothers (Ingrid Brandun Berger in 2012 and Peggy Collins in 2009) were allowed to take their children back to France after a struggle in the Pakistani higher courts. Their battle to secure the custody of their children was an onerous task but a successful one.[79] In both cases the grounds advanced by the fathers for retaining their children were based on religious and moral concerns.

In Berger's case, the father of the child claimed that he was his daughter's rightful custodian based on his religious beliefs. He argued that he brought his daughter to Pakistan and kept her there because both father and daughter are Muslims, and he wanted his daughter to live in Pakistan. The girl's grandfather also wished not to see his granddaughter 'growing up as an infidel' in a Western liberal culture. The case of Peggy Collins was similar, in which the father retained his nine-year-old son in

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[78] *Mst. Jamila Begum v. Mirza Muhammad and 2 others*, YLR 2003 1337

[79] Ingrid Brandun Berger is an unreported case, but some information on this case is available in Childabductionrecoveryinternational 2014.

Pakistan, and he argued – referring to several judgments given by the Supreme Court, the Mohammadan law, and *Hedaya* – that the custody of the child should not be given to an alienated non-Muslim mother who would encourage the boy to deviate from his father's religion. Such arguments, based on the mother's religion or culture, were not taken into account by the Pakistani courts.[80] In both cases, the judges made their decision according to logic, justice, good conscience, and the child's best interests. In Berger's case especially, the court observed that the father did not give any consideration to the mother's religion when he married her. His ex-wife's religion, culture, or nationality obviously did not matter when he fell in love and married her. According to the court, accepting arguments such as faith, nationality, and culture would have been adverse to justice, equity, and good conscience. In both cases, the child's best interests were the courts' primary consideration in granting custody of these minors to their mothers. Moreover, the Pakistani judges respected foreign court orders. Those stated that the fathers had broken some foreign laws, resulting in a deprivation of education and proper welfare for their children.

In another unique case, Roshni Desai, a Canadian national of Indian origin, came to reclaim the custody of her three-and-half-year-old son and filed a habeas corpus application under Sec. 491 of the Cr.PC before the Lahore High Court.[81] The father argued that, according to the Islamic laws, a Muslim child could not be entrusted to a non-Muslim mother. Since the child was born out of wedlock, the court drew attention to the fact that not only was it difficult to determine which parent should be granted custody of the child, but that living in the Pakistani culture would also prove troublesome for the child due to his illegitimate status. The court allowed the mother to take the child back to Canada and stated that Islamic law does not allow a father to keep custody of his illegitimate child. In such situations, the custody can only be given to the mother. The court further observed that: 'Under Islamic laws, the bond between a mother and her illegitimate child is stronger than the bond between this child and his/her father. And a father cannot become guardian of his illegitimate child.' The judge ruled that, as a single mother, she had the exclusive right of custody.

In the case of twelve-year-old Scottish-Pakistani girl Misbah Rana, the girl's mother, Louise Campbell, approached the High Court of Lahore and filed a lawsuit against her ex-husband and Misbah's elder sister, both of whom had illegally taken Misbah to Pakistan.[82] She claimed that Misbah should be sent back to Scotland and the custody matter decided by the relevant court in Scotland, as per the UK-Pakistan Protocol. Louise Rana was worried that Misbah would be forced to marry at her early age, whereas Misbah consistently denied, through a news conference, that her Pakistani family was trying to force her into such a union. After listening to both parties' arguments, the Court ordered that Misbah should be handed over to the British High Commission within seven days so that the case could be decided as per the Protocol and the custody issue heard in Scotland's relevant court. Upon hearing that

[80] *Peggy Collins v. Muhammad Ishfaque Malik* (2009) PLD 48 Lahore High Court, para 4.
[81] *Roshan Desai v. Jahanzeb Niaz* (2011) PLD 423 Lahore High Court.
[82] *Louise Ann Fairley v. Sajjad Ahmad Rana* (2007) PLD 300 Lahore High Court.

she would be handed over to her mother, Misbah protested against the Court's decision and expressed her desire not to go back to Scotland. On appeal, the Supreme Court of Pakistan set aside the judgment of the High Court of Lahore and mediated a settlement between the parties. Misbah herself stated that she did not want to reside with her mother because she forbade her from practicing her faith, gave her *haram* food, and was living with a man outside of marriage. Owing to Misbah's wish to stay with her father, the court allowed Misbah to stay with her father and granted access to her mother so that she could visit her daughter under certain conditions.

In Misbah's case, the court respected Misbah's point of view, as envisaged in art. 12 and art. 9(2) of the UNCRC: 'In any proceedings …, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.'

#### *7.4.4.2 Evaluation*

The review of these cases shows that by taking a proactive approach the superior judiciary in Pakistan has moved away from the traditional Islamic classical law on custody and guardianship and has applied the 'best interests of the child' principle by using judicial discretion. One example of exercising judicial discretion is the Lahore High Court decision in *Munawar Jan v. M Afsar Khan* case,[83] in which the court declared that the welfare of the child should take precedence over the personal law. The court held that: 'If there is a conflict between the personal law to which the minor is subject and considerations of his or her welfare the latter must prevail'. This shows that even in the presence of classical Hanafi Muslim personal law, the courts have given preference to the best interests of the child and on that basis have given custody to the mother. Additionally, the Courts have also used various frames of reference to ascertain this principle; for instance, a failure to provide maintenance has been a ground for not giving custody to the father, and wealth of the father was also not considered as a ground to give him the custody of children. Similarly, maternal relations have been given preference over the father in the absence of a natural mother of the minor if the father has failed to provide maintenance to the minors. The court has also considered the views of the child in deciding custody matters. At the same time, remarriage and the weak financial position of the mother were grounds for not awarding custody to the mother as this would have an impact on the best interests of the child. It has also been observed in the review of the cases that the personal situation of the parents matter, as a mother was awarded custody of male child because she was well-educated and in a financially stable position to support the male child. From the cases discussed above it has also become clear that the courts can decide against a parental agreement on custody if, according to the court, the agreement contradicts the interests of the child.

It is also interesting to note that the judgments given by the lower courts reflect a more conservative approach. The decisions of the lower courts show that classical

[83] *Munawar Jan v. M Afsar Khan*, PLD 1962 Lah 142.

Hanafi law as interpreted in *Hedaya*, societal norms, and the patriarchal structure of the society are some of the influential factors that have an impact on the decisions. By contrast, the decisions of the superior judiciary are more enlightened and reflect that the superior judiciary has made decisions on the basis of the principles of equity, justice, and good conscience. The review of judgments from Pakistani courts reveals, however, that there do not appear to be readily available examples of court cases where the judges have used or applied the CRC or other relevant international instruments. At the same time, in a few cases of child abduction we find references to the UK/Pakistan Judicial Protocol. One obvious reason for this could be that under Pakistani law courts are not bound to apply international law principles.

In Child abduction cases, Pakistani parents who abduct their child (usually the fathers) often base their decision on moral grounds, as they fear that the religion of the mother and the immorality of Western cultures may taint their children and render them immoral. Such claims or arguments based on religion or culture have been rejected by Pakistani courts; instead, the best interests of the child principle has been upheld and non-Muslim mothers have been given the custody of their children.

## 7.5 Conclusion

This study has shown that centuries of Muslim rule and British colonial domination in the Indian sub-continent has resulted in a cross-fertilization of religious and Common Law principles. This is reflected in the constitutional and legislative frameworks adopted in Pakistan. Further, by ratifying the UNCRC, Pakistan has undertaken the international obligation of bringing its laws in consonance with international human rights standards. However, ratified international instruments do not automatically have the force of law in Pakistan and must be incorporated through implementing legislation. In the absence of implementing legislation, provisions of international treaties, including the UNCRC, are addressed throughout national legislation in a piecemeal, subject-by-subject manner.

From the review of case law it has become evident that in its decisions the superior judiciary has avoided the rigid application of the principles of established Muslim jurisprudence and shifted family law from the realm of the civil to that of the Common Law. The ‘welfare or best interests of the child’ has been the guiding factor in deciding on the custody of children, and personal law based on classical Islamic principles has remained subordinate to such consideration before the courts. Thus, the sole criteria which must prevail is always the welfare of child, and overall custody is perceived foremost as a right of the child. To conclude in the words of Cassandra Balchin, ‘Courts in Pakistan have succeeded in making inroads into established Muslim Jurisprudence and have at times over ridden [sic] express provisions of law to safeguard the best interest of the child.’[84]

[84] Balchin 1994, p 164.

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