

# Law on the Custody of Children in Pakistan: Past, Present and Future

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This article highlights the deficiencies in the laws relating to the custody of children in Pakistan. It argues that deficiencies in the Guardians and Wards Act 1890 allow the courts to exercise wide discretion, thereby leading to contradictory judgments. After separation between parents, custody is the major issue affecting the children's wellbeing. Pakistan, however, lacks detailed laws about issues relating to custody of children. The Guardians and Wards Act 1890 gives a few rules regarding custody and the rest is left to the discretion of the courts which occasionally results in contradictory judgments. Due to the lack of detailed rules in the statutes, the litigants have to resort to case law to find out rules regarding custody. This article analyses the relevant provisions of the Act along with the case law to point out legal lacunas. It also analyses the proposed legal reforms regarding custody of children.

## **Introduction**

The lacunas present in Pakistan's child custody laws necessitate legislative and judicial intervention. This paper relies on both statutory provisions and judicial precedents to highlight the approach employed to address the issue of custody. The Guardian and Wards Act 1890 governs disputes relating to child custody.<sup>1</sup> The Act, however, is marked by several deficiencies. These include the Act's failure to distinguish between custody and guardianship.<sup>2</sup> Custody and guardianship can be distinguished as following: custody is the bringing up, nursing or fostering of the child and taking care of the child's emotional and personal affairs on a day to day basis whereas guardianship

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<sup>1</sup> There are some other laws which affect custody and guardianship: The Majority Act 1875, the Punjab Court of Wards Act 1903, and the High Court Rules and orders and the Civil Procedure Code 1908. The most important among the laws related to custody is the Guardians and Wards Act 1890; therefore, the analysis will be restricted to this Act.

<sup>2</sup> For distinction between custody and guardianship in Islamic law see Muhammad Mustafā Shalabī, *Ahkām-al-Usra fil Islām* (Dār-al-Nahdah Al-'Arabīyah 1973) 736; Mahdi Zahraa and Normi A. Malik, 'The Concept of Custody in Islamic Law' (1998) 13(2) *Arab Law Quarterly* 156, 157.

means the power to effect legal transactions and contracts with responsibility for the legal consequences. Unlike guardianship, in custody, the child must live with the custodian.<sup>3</sup> In cases regarding custody, the best interests of the minor are given primary consideration. While courts often rely on the Act when adjudicating upon matters pertaining to custody of Children, the Act does not explicitly address the issue of custody. As a result, the courts have often applied provisions pertaining to guardianship to matters of custody too, thereby diluting the distinction between the two. Custody is, therefore, considered a kind of guardianship by Pakistani courts.<sup>4</sup> A guardian is defined by section 4 of the Act as ‘a person having the care of the person of a minor, or of both his person and property’. Therefore, even within the Act guardianship is considered to include the concept of custody as well. Traditionally, however, custody belongs to the mother whereas guardianship of property and marriage belong to the father.<sup>5</sup> In Pakistan, there have been cases where guardianship of marriage and property is awarded to the mother if the welfare of the child demands so.<sup>6</sup> According to the Act, custody is a personal right which can be enforced through judicial proceedings.<sup>7</sup> The distinction between custody and guardianship is pertinent since the two attract the application of different rules and principles. Furthermore, the qualifications and concomitant duties associated with custody and guardianship also differ.

The rest of this paper is divided into three parts. First, I analyze the case law relating to child custody and identify the inconsistencies in judicial precedents. Second, I discuss the provisions of the Convention on Rights of the Child (1989). Third, I analyze the Child Protection Bill (2009) along with proposed reforms in the Guardians and Wards Act 1890. Finally, I conclude this paper.

### **The Law related to Custody**

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<sup>4</sup> Shaheen Sardar ‘Alī and M. Nadeem A‘zam, ‘Trends of the Superior Courts of Pakistan in Guardianship and Custody Cases (1947-92)’ in Cassandra Balchin (ed), *A Handbook on Family Law* (Shirkatgah 1994) 149, 156; *Farooq Azam v Additional District Judge Gujrat* 1993 CLC 1204; *Mst. Sultana Begum v Muhammad Shafi* PLD 1965 Kar 416.

<sup>5</sup> *Muhammad Hanif v Abdul Samad and others* PLD 2009 SC 751 M. A. Mannan, *D. F. Mulla’s Principles of Muhammadan Law* (PLD Publishers, 1991) 482.

<sup>6</sup> *Muhammad Rasool Khan v Mst. Masroon Bibi* 2010 CLC 1078; *Mst. Ayesha Naseer v District and Sessions Judge Pakpatan Sharif* 2011 YLR 78.

<sup>7</sup> Arif Ali Khan (ed), *Family Law in Islam* (Pentagon Press 2007) 247.

The Guardians and Wards Act 1890 uses the term ‘guardianship of person’ for custody and the term ‘guardian’ for custodian.<sup>8</sup> Given the absence of express provisions that stipulates rules for custody, reliance is placed on judicial precedents in this regard. In 1972 in *Juma Khan v Gul Ferosha*, the Peshawar High Court defined custody as actual or constructive possession for the purpose of protection.<sup>9</sup> In 1988 in *Sultana Begum v Mir Afzal*, the Karachi High Court defined custody as the ‘upbringing of a minor child by the mother or by someone legally entitled to it’.<sup>10</sup> The custody of a child generally rests with the mother in tender age; afterwards it goes to the father. It is considered in the welfare of the child that the child should be with the mother in his/her tender years so the mother will get preference over other relatives including the father.<sup>11</sup> The presumption is that to live with the person entitled to custody according to Islamic law is in the welfare of the child but this presumption is refutable. Flaws in the custodian’s character, for instance, are grounds to displace him/her of their right to custody.<sup>12</sup>

Additionally, the mother may lose her right to custody in peculiar circumstances. In *Mst. Imtiaz Begum v Tariq Mehmood*,<sup>13</sup> the court held that during the period of breastfeeding the mother has a preferential right of custody and if the mother refuses to breast-feed the child she will lose her right to custody. To this end, the court resorted to the following verses of the Qur’an: ‘No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child’<sup>14</sup> and ‘Let the woman live (in ‘iddah) in the same style as ye live, according to your means: annoy them not, so as to restrict them...’.<sup>15</sup> The court interpreted these verses as meaning that neither parent should be burdened or treated unfairly on account of the child. This means that the mother cannot abandon the child or refuse to suckle the child as it would amount to a burden on the father to hire a wet nurse for his child. Likewise, a father is prohibited from stopping a willing mother from breast feeding the child.<sup>16</sup> In this case, the court seems to construe breastfeeding as a reason for awarding custody to the mother. However, this dictum is

<sup>8</sup> Guardians and Wards Act 1890, s. 4.

<sup>9</sup> PLD 1972 Pesh 1.

<sup>10</sup> PLD 1988 Kar 252.

<sup>11</sup> *Mst. Khushboo v Station House Officer* 2016 YLR 1364; *Mst. Maryam Muhammad Ali v Govt. of Sindh* 2016 YLR 40; *Kushi Muhammad v Bashiran* 1981 CLC 84; *Ms. Hina Jillani, Director of A. G. H. S. Legal Aid Cell v Sohail Butt* PLD 1995 Lahore 151.

<sup>12</sup> *Munawar Jan v Muhammad Afsar Khan* PLD 1962 Lah 142.

<sup>13</sup> 1995 CLC 800.

<sup>14</sup> Qur’an 2:233.

<sup>15</sup> Qur’an 65:6.

<sup>16</sup> (n 13).

inconsistent with the traditional principles of Islamic law.<sup>17</sup> Herein, if a mother, after divorce, refuses to suckle the child the father is obliged to engage a wet nurse and the mother cannot be deprived from custody on the basis of her refusal to suckle the child.<sup>18</sup>

Generally, a mother has a right to the custody of her son till the age of seven, while she retains the daughter's custody till her puberty.<sup>19</sup> In *Mst. Imtiaz Begum v Tariq Mehmood*, the Lahore High Court allowed the mother to keep the child till it had attained the age to receive formal education. According to the court, this age would be determined according to the custom of the area of parent's residence. The court stated that to set the age at seven or nine is not a requirement of Islamic law.<sup>20</sup> If the age at which a child starts its school is made the standard for termination of custody, a mother will be allowed to keep the child till the child becomes three and a half years old as that is the age at which a child starts going to school in most of the Pakistani cities. In a village, probably this age will be around five years which is far less than the age fixed by the jurists. However, most courts have not followed this approach and consider the mother entitled to custody of a boy till seven years and a girl till puberty.<sup>21</sup> The aforesaid case is an example where the judge deviated from Islamic law and such decisions affect rights of custodian as well. However, had laws relating to the period of custody been laid down, judges would not have been able to exercise their discretion.

### ***Welfare of the Minor***

Welfare of the minor is given paramount importance within our domestic jurisprudence. Welfare is determined by taking into account the minor's age, sex and religion. Weight is also given to the character and capacity of the guardian and his/her nearness of kin to the minor. Preference of the minor is

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<sup>17</sup> The term 'Islamic law' here means four Sunni schools which are Hanafis, Malikis, Shafi'is and Hanbalis; these schools are named after their founders respectively Abu Hanifah (d. 767 C.E.), Malik bin Anas (d. 801 C.E.), Muhammad bin Idris Al-Shafi'i (d. 820 C.E.), and Ahmad bin Hanbal (d. 855 C.E.).

<sup>18</sup> Moulvi Muhammad Yousaf Khan Bahadur and Moulvi Wilayat Hussain (trs), *Fatāwa-i-Kāzee Khān* (Kitāb Bhavan 1986) 323.

<sup>19</sup> *Maryam Tariq v SHO of Police Station Defence* PLD 2015 Kar 382; *Ali Akbar v Mst. Kaniz Maryam* PLD 1956 Lah 484; *Sardar Hussain v Mst. Parveen Umer* PLD 2004 SC 357; *Mian Muhammad Sabir v Mst. Uzma Parveen* PLD 2012 Lah 154; *Muhammad Faraz v Mehfeez* PLD 2012 Isl 61; (n 11) .

<sup>20</sup> (n 13).

<sup>21</sup> (n 19).

taken into account, if the minor is capable of forming such preference.<sup>22</sup> However, ‘religion’, in this regard has been construed inconsistently. In 2010 in *Mst. Shahnaz Ghulam Rasool v Muhammad Shakeel Ahmad Siddiqui*, the Karachi High Court held that the word ‘religion’ does not include sect. While differences in religion would be considered while awarding custody, sectarian differences would be disregarded.<sup>23</sup> In *Imran Ali v Mst. Iffat Siddiqui*, however, the Karachi High Court while giving custody of the minors to the father considered the fact that he was an *Isma’ili Shi’a* and would be in a better position to raise his children in accordance with his sect. The court opined that the child follows his/her father’s religion. In the case of *sunnī-shī’a* marriages the child is supposed to follow the sect of the father.<sup>24</sup>

A person who has custody of a minor is responsible to look after the minor with regards to its health, education and support him/her in all respects.<sup>25</sup>

In every matter related to a minor, the court will give preference to child’s welfare and interest over that of parents’ rights. Section 17 of the Guardians and Wards Act 1890 declares the ‘welfare of a minor’ a paramount consideration. The approach of the Pakistani courts is that the welfare is not proved by presumption but by evidence since it is a question of fact.<sup>26</sup> According to the courts the welfare of a child means a child’s health, education, physical, mental, and psychological development. The minor’s comfort and spiritual and moral wellbeing along with his/her religion is also considered.<sup>27</sup> Considerable attention is given to the minor’s happiness and emotional attachment with a custodian. It is considered in the interests of the child to live with his/her siblings.<sup>28</sup>

The presumption is that to award custody according to the rules of personal law is in the minor’s welfare but this presumption is debatable. If it is evident from the circumstances of a case that following personal law is not

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<sup>22</sup> Guardians and Wards Act 1890, s. 17.

<sup>23</sup> PLD 2010 Kar 50.

<sup>24</sup> PLD 2008 Kar 198.

<sup>25</sup> Guardians and Wards Act 1890, s. 24.

<sup>26</sup> *Rahimullah v Hilali begum* 1974 SCMR 305.

<sup>27</sup> *Feroze Begum v Muhammad Hussain* 1978 SCMR 299; *Ms. Christine Brass v Javed Iqbal* PLD 1981 Pesh 110; *Mrs. Marina Pushong v Derick Noel Pushong* PLD 1975 Lah 793; *Maryam Zohra v Younas Jamal* 1986 CLC 1857; *Mehtab Mirza v Mst. Shazia Mansoor* 2005 MLD Lah 256 can also be written as PLJ 2005 Lah 1562; *Abdul Razzaque v Dr. Rehana Shaheen* PLD 2005 Kar 610; *Mst. Nazli v Muhammad Ilyas* 2010 MLD Lah 477.

<sup>28</sup> *Muhammad Ishfaq Qureshi v Mst. Surayya Bibi* 2010 YLR 556; (n 13); (n 27) 793

in the interest of the child, the decision will be in accordance with his/her interest.<sup>29</sup> The courts while applying the welfare principle quite often deviate from the principles set down by the majority of jurists in Islamic law. If there is a contradiction between the interests of the minor and the rules of Islamic law preference is given to the interests of the minor. In *Mohammad Bashir v Ghulam Fatima*, the Lahore High Court awarded custody of a child to her mother who had remarried. The court justified its deviation from the rules of Islamic Personal law by stating that in Islam consideration of the welfare of a minor is paramount and all rules of personal law are the application of welfare of the minor. If in any case there is contradiction between welfare and the rules of personal law the former prevails.<sup>30</sup>

The courts while deciding about custody consider the opinions of the majority of Muslim jurists that after seven years of age custody of a boy goes to the father<sup>31</sup> and custody of a girl goes to the father after attaining puberty. But the main consideration in such cases again is the welfare of the minor. In such a case if the court considers that living with the mother is in the child's welfare, the father will not be entitled to custody even after the attainment of the ages mentioned above. If the court thinks that to live with the mother in the child's tender years is not in the child's welfare the court may deprive her from custody.<sup>32</sup> If there is a clash between the rights of the parents and the welfare of the minor the latter prevails.<sup>33</sup> Even if the parents agree on custody arrangements, the court can decide against such an agreement if the situation requires it.<sup>34</sup> This is done after carefully analyzing every possible consideration relating to the child's best interests.<sup>35</sup> In *Bulan v Rahiman* the father applied for custody of the child aged between ten to twelve years who was in the mother's custody. The judge held that the father would get custody if he returned all expenses incurred by the mother for the minor's maintenance. The judge awarded this sum as compensation to the mother. However, the Karachi High Court decided that imposition of such a condition was illegal. The decisive factor in cases of custody should be the

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<sup>29</sup> *Atia Waris v Sultan Ahmad Khan* PLD 1959 Lah 205; (n 12).

<sup>30</sup> PLD 1953 Lah 73.

<sup>31</sup> (n 21). In (n 19), the custody of a seven-year-old boy was given to the mother despite of her remarriage as to living with the mother was considered by the court in welfare of the minor.

<sup>32</sup> *Hamida Begum v Ubedullah* 1989 CLC 604.

<sup>33</sup> (n 12).

<sup>34</sup> *Taj Bibi v Khuda Bakhsh* PLD 1988 Pesh 57; *Tahira v A. D. J. Rawalpindi* 1990 SCMR 852.

<sup>35</sup> *Mst. Zebu v Mize Gull* PLD 1952 Peshawar 77; *Chiragh Bibi v Khadim Hussain* PLD 1967 Lah 382; *Mst. Tahera Begum v Saleem Ahmed Siddiqui* PLD 1970 Kar 619.

welfare of the child and not the welfare of the parents.<sup>36</sup> Custody is a right of the child and not of either of the parents.<sup>37</sup>

### ***Qualifications of a Custodian***

According to the case law there are certain qualifications for the custodian of the child. In *Imtiaz Begum v Tariq Mehmood*, the Lahore High Court while discussing qualifications of the custodian declared that the custodian should not be *fāsiq* (sinner) and *Khā'in* (dishonest). The court defined *fāsiq* (sinner) as the reverse of *ādil* (just) and *khā'in* (dishonest) as reverse of *amīn* (honest). A person would be disqualified if the court has reason to believe that they were a sinner or dishonest. There is no need for conviction of the court. The character of the custodian is important to determine custody issues.<sup>38</sup>

Another condition for a custodian is that s/he should be *mahram* to the child. If the custodian is the mother she should not be married to a person who is a stranger to the child especially where she has custody of a female child.<sup>39</sup> It cannot be said that the second husband comes within the prohibited degrees by affinity as soon as marriage between him and the mother is consummated. The second husband must be related to the minor within the prohibited degree by consanguinity.<sup>40</sup> The reason behind the principle of disqualification of the mother on remarriage is that after remarriage her attention will be diverted to her new household and children from the second marriage. Although this is a general rule, the welfare of the child is still paramount. In some cases, Pakistani courts have shown this approach that the child should not be taken away from the mother if it is in its welfare to be with the mother simply because the mother has remarried a person not related to the minor within the prohibited degrees. In *Muhammad Bashir v Ghulam Fatima*<sup>41</sup> and *Amar Elahi v Rashida Akhtar*,<sup>42</sup> the Lahore High Court observed that the principle of the mother's disqualification upon remarriage is not based on the Qur'an. However, remarriage only causes the mother to lose her preferential right to custody. If there is no other qualified person for custody or the welfare of the child demands it, the mother will be

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<sup>36</sup> PLD 1963 Kar 839.

<sup>37</sup>(n 13).

<sup>38</sup> Ibid.

<sup>39</sup> *Ruqayya Yasmin v Muhammad Riaz* 1991 MLD 166; *Mst. Yasmin Bibi v Mehmood Akhtar* PLJ 2004 Lah 6.

<sup>40</sup> *Muhammad Bashir v Ghulam Fatima* PLD 1953 Lah 73.

<sup>41</sup> Ibid.

<sup>42</sup> PLD 1955 Lah 412.

given custody.<sup>43</sup> In this case, although the court was right in preferring the interests of the minor over the rule of forfeiture of the mother's right to custody upon her remarriage to a stranger, it did not consider the fact that this rule is based on a *hadith*.<sup>44</sup> In *Mst. Hifsa Naseer v ADJ Gujar Khan*,<sup>45</sup> the Lahore High Court observed that disentitlement from custody due to second marriage is not an absolute rule. In this case, the father of the child was not interested in taking custody. The paternal grandmother had filed a case for custody of the child. The court while awarding custody to the mother despite her remarriage held that it will be against welfare of the child to award custody to paternal grandmother in the presence of the real mother. There have been cases where even a female child is given to the mother despite her remarriage.<sup>46</sup> But generally the residence of the female child with non-*mahram* is taken into consideration by the courts. To live with the step father's brothers and sons was in one case considered against the interests of a female child as these people are non-*mahram* for her.<sup>47</sup> Sometimes remarriage of the father and his having children from such marriage is considered as an impediment to custody and courts consider it against the welfare of the child to award custody to the mother.<sup>48</sup> The father may lose custody as living with a step mother is considered against the welfare of the minor.<sup>49</sup> In *Uzma Wahid v Guardian Judge*,<sup>50</sup> the Lahore High Court gave custody of two minor daughters to the father due to children's emotional attachment with him despite his second marriage. The court declared welfare of the child first priority. The rule of forfeiture of the right of custody of the mother upon remarriage is an Islamic law rule but Pakistani courts have extended this rule to the remarriage of the father. The courts decide each case according to its facts and all rules regarding custody including disqualification due to remarriage are considered subordinate to the welfare

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<sup>43</sup> *Rahela Khatun v Ramela Khatun* PLD 1971 Dac 24; (n 43).

<sup>44</sup> According to a tradition, the Prophet said to a woman who was demanding custody of her child: 'thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger. It means that the mother will be given priority for custody unless she has remarried'. Charles Hamilton (trs), *The Hedāya: A Commentary on the Islamic Laws* (Kitab Bhavan 1870) 138; Abī Dā'ud Sulaimān b. Al-Ash'ath b. Ishāq Al-Uzrī Al-Sajistānī, *Mukhtasar Sunan Abī Da'ud* (Dar-al-Ma'rafah 1980) 3:185.

<sup>45</sup> PLD 2017 Lah 153.

<sup>46</sup> *Rashida Begum v Shahabuddin* PLD 1960 Lah 1142; *Mst. Nazeer Begum v Abdul Satta* PLD 1963 Kar 465; *Jannat Bibi v District Judge* 1989 MLD 2231.

<sup>47</sup> (n 28) 556.

<sup>48</sup> *Feroze Begum v Muhammad Hussain* 1978 SCMR 299.

<sup>49</sup> *Muhammad Jameel v Azmat Naveed* 2010 MLD 1388; *Humayun Gohar Khan v Guardian Judge, Okara* 2010 MLD 1313; *Muhammad Zulqarnain Satti v Mst. Ismat Farooq* 2010 CLC 1281; *Abdul Razzaque v Dr. Rehana Shaheen* PLD 2005 Kar 1285; *Masroor Hussain v Additional District Judge Isl* 2011 CLC 851.

<sup>50</sup> 1989 MLD 3064.

of the child.<sup>51</sup> In *Rafiqan v Jalal Din*, the Supreme Court of Pakistan decided that after termination of a second marriage the bar to custody is removed and the parent may become qualified for custody again.<sup>52</sup> In the case of remarriage of both parents the courts consider the circumstances of both parents and decide accordingly.

Education and financial status of the parties are considered and custody is given to the parent who is more educated and is financially stable.<sup>53</sup> The courts also give due importance to the factor that the minor is emotionally attached to one parent as compared to the other. In 2004 in *Sardar Hussain and others v Mst. Parveen Umar*, the Supreme Court gave custody of the minor of seven years to the mother despite her remarriage due to the fact that the minor was emotionally attached to her and regarded his father as a stranger despite living with him for fifteen days.<sup>54</sup> In *Amar Ilahi v Rashida Akhtar*, the Lahore High Court decided that if the father failed to maintain the child he will lose his right to custody and guardianship. In this case the father did not take any interest in the daughter until the time of her mother's remarriage. He failed to maintain the child but at the marriage of the mother claimed guardianship of the child. The court gave the right of custody and guardianship to the mother despite her remarriage.<sup>55</sup>

According to Pakistani courts the custodian should be of the same religion as of the minor. A child follows the religion and social status of her father.<sup>56</sup> Apostasy and slavery are disqualifications for the mother to have custody of the minor but a *kitābiyah* (Christian or Jewish) mother can have custody of her child. Being sane and free from mental or bodily diseases and being of good moral character and reputation are essential requisites for a custodian.<sup>57</sup> A person not fulfilling any of the above-mentioned conditions could not be a custodian.

The custodian should be of good moral character. The approach of the Pakistani courts regarding character of the custodian is that mere allegations of un-chastity or bad character are not sufficient to disqualify the

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<sup>51</sup> (n 40) .

<sup>52</sup> 1983 SCMR 481; *Muhammad Naeem Ahmed v Asgeeri* 2002 YLR 2854.

<sup>53</sup> *Mst. Zahida Parveen v Muhammad Nawaz* 2010 MLD 340.

<sup>54</sup> (n 19) 357.

<sup>55</sup> (n 42); (n 40) 2011 CLC 851.

<sup>56</sup> (n 29) 205; (n 27) 110.

<sup>57</sup> (n 16) 800; *Muhammad Shafi v Maqbool Afzal* 1986 SCMR 1634; Werner Menski and David Pearl, *Muslim Family Law* (Sweet and Maxwell 1998) 416.

mother from custody.<sup>58</sup> In *Munawwar Bibi v Muhammad Amin*<sup>59</sup> the mother applied for custody of her children and the father accused her of being bad character and argued that she was not entitled to custody. The husband filed a case of *zina* (unlawful sexual intercourse) against the wife with her brother-in-law. The mother was acquitted by the trial court and the husband filed an appeal against that acquittal. The contention of the mother was that the father of her children filed the case of *zina* against her to deprive her of custody. While deciding custody of children the trial court did not give custody to the mother because of her bad character although nothing was proved yet. The appellate court while accepting mother's contention gave her custody. On appeal, the High Court restored the order of the trial court and gave custody to the father on the basis of bad character and inability of the mother to maintain the children. While deciding the custody of children the Supreme Court held that the acquittal of the mother proves her innocence and the fact of filing an appeal does not destroy presumption of her innocence. As far as maintenance was concerned the Supreme Court declared it a duty of the father so the mother could not be deprived of custody because of her inability to maintain her children.<sup>60</sup>

As far as the financial position of the mother is concerned Pakistani courts have not been consistent regarding the relevance of the sound financial position of the mother to her right of custody. Maintenance is a duty of the father but in *Imtiaz Begum v Tariq Mehmood* the Lahore High Court while giving custody to the father took into consideration the financial position of the mother.<sup>61</sup> This judgment was against the Supreme Court's judgment in *Mst. Feroze Begum v Lt-Col. Muhammad Hussain*<sup>62</sup> and *Munawwar Bibi v Muhammad Amin*<sup>63</sup> in which the Supreme Court of Pakistan decided that as maintenance is a duty of the father, a mother cannot be deprived of custody just because she cannot maintain the child. Although a mother cannot be deprived of custody because of her poor financial position but if the mother is earning and is financially independent it goes in her favor as the courts consider her capable to fulfill her child's needs. In *Abdul Razzaque v Dr. Rehana Shaheen* the mother was a doctor and the father of the children died. The grandparents contested custody but the

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<sup>58</sup> *Muhammad Tahir v Mst. Raeesa Fatima* 2003 SCMR 1344; *Ghulam Sakina v Ghulam Abbas* PLD 1978 Lah 1389.

<sup>59</sup> 1995 SCMR 1206.

<sup>60</sup> *Ibid.*

<sup>61</sup> (n 13).

<sup>62</sup> 1983 SCMR 606.

<sup>63</sup> 1995 SCMR 1206; (n 11) 40; *Najma Parveen v Ihsan-ur-Rehman* 1988 CLC 2196; *Niaz Bibi v Fazal Elahi* PLD 1953 Lah 442; *Ramzan v Fazal Nishan* 1968 SCMR 1435.

Karachi High Court gave custody of the four minor children to the mother. Along with other facts, the court took into consideration the fact that the mother was working and was financially independent. The grandparents of the child argued that as she will be working she will not be able to give time to the minors. The court did not accept this contention and gave custody to the mother.<sup>64</sup> In *Mst. Abida Bibi v Abdul Latif* the Peshawar High Court while stating that the mother could not be deprived of custody on the basis of her poor financial position took into consideration the fact that the mother was working. The court gave Custody to the mother stating that she could provide the child with good education and other facilities of life.<sup>65</sup>

It is evident from the analysis of the above cases that judges use their discretion while deciding custody disputes. This use of huge discretion occasionally results in contradictory decisions. A law stating detailed rules of custody will curtail the discretion of the courts and will bring certainty and stability to the legal system of Pakistan.

### ***Persons entitled to Custody***

The mother is entitled to the custody of her child. However, in the case of her death or disqualification the maternal grandmother maintains the right to custody<sup>66</sup> till the child becomes seven years old.<sup>67</sup> In the case of death of the mother custody of the child may be given to the father if welfare of the child demands that. In *Fatima Bibi v District and Sessions Judge, Mandi Baha-ud-Din*, the Lahore High Court gave custody of the child to the father because the maternal grandmother had six children to look after and the court considered it in the welfare of the child to be with the father.<sup>68</sup> If the father of the child dies custody goes to the mother. Paternal grandparents are not entitled to custody in the presence of the mother.<sup>69</sup> If the court considers it in the welfare of the child it may give custody to grandparents in the case of disqualification of the mother.<sup>70</sup>

As far as foreign non-Muslim mothers are concerned custody is not usually awarded to them. The environment and culture of a foreign country

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<sup>64</sup> (n 27) 610.

<sup>65</sup> 2002 CLC Pesh 1416.

<sup>66</sup> *Nadeem Iqbal v Muhammad Kabir Khan* 2011 YLR 348; *Zahoor Ahmed v Rukhsana Kausar* 2000 SCMR 707; *Mst. Saddam v Muhammad Nawaz* 1991 CLC 1238.

<sup>67</sup> (n 36)

<sup>68</sup> 2004 YLR 652.

<sup>69</sup> (n 27) 610.

<sup>70</sup> *Bashir Ahmad v Rehana Umar* 1976 SCMR 28.

are not considered conducive to an Islamic upbringing. In *Christine Brass v Dr. Javed Iqbal*, the Peshawar High Court refused to give custody to a Canadian mother on the ground that Canada is a non-Muslim country and it is not in the interests of the child to live in an un-Islamic environment.<sup>71</sup> The courts consider the fact that not only the mother should be a Muslim but the environment where a Muslim child has to live should also be Islamic.<sup>72</sup> In *Mrs. Mosselle Gubbay v Khawaja Ahmad Said*, the mother of the child was Jewish Indian. The Karachi High Court considered it improper and against the interests of the child to give custody to the mother.<sup>73</sup> But in few cases custody has been given to a foreign non-Muslim mother if it is in the interests of the child. In *Peggy Collin v Muhammad Ishfaque Malik*, the Lahore High Court gave custody to a French Christian mother following the principle of the welfare of the child. The Muslim father of the child was a convict and was already under arrest facing criminal charges. The court decided that the Muslim faith of the father is not enough to establish that to give custody to the father is in the welfare of the child.<sup>74</sup> As far as religion of the child is concerned, the rule is that the child follows the religion of the father until s/he changes her religion after majority.<sup>75</sup> In *Ms. Hina Jillani, Director of A. G. H. S. Legal Aid Cell v Sohail Butt*, the Lahore High Court gave custody of a female child to an Uzbek Muslim mother and allowed her to take the child to Tashkent. The court considered the fact that the child was very young and the father had financial means to visit his child in Tashkent.<sup>76</sup>

If the child is illegitimate, custody goes to the mother irrespective of the mother's religion. According to Islamic as well as Pakistani law, an illegitimate child only belongs to her mother and the father has no right to claim custody. In *Roshni Desai v Jahanzeb Niazi*, the court awarded the custody of an illegitimate child to the mother. The father of the child was a Muslim whereas the mother was a Hindu. They were living in Canada and had a son without marriage. The mother claimed custody of the minor when the father took her son to Pakistan. The Lahore High Court decided that Islamic law did not recognize such a relationship. And the child was declared illegitimate. The court noticed that in Islamic law and in Pakistani law, the father has no relation with his illegitimate child and an illegitimate child

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<sup>71</sup> *Christine* (n 27) 110; *Sara Palmer v Muhammad Aslam* 1992 MLD 520.

<sup>72</sup> (n 29) 205.

<sup>73</sup> PLD 1957 Kar 50; *Mst. Maria Khan v Muhammad Zubair Khan* 1993 PCr.LJ 1097.

<sup>74</sup> PLD 2010 Lah 48; *Sajjad Ahmad Rana and others v Ms. Louise Anne Fairley* PLD 2007 SC 292 SC.

<sup>75</sup> *Grace Abdul Hadi Haqani v Abdul Hadi Haqani* PLD 1961 (W. P.) Kar 296; (n 29) 205.

<sup>76</sup> (n 11) 151.

belongs to her mother. The court gave custody of the minor to the mother and held that in case of absence or disqualification of the mother only maternal relatives are entitled to claim custody of an illegitimate child. The father could not claim custody on the ground of the mother being non-Muslim.<sup>77</sup>

In cases where the father resides in a foreign country, the courts have shown reluctance in awarding custody to the father. In *Habib-ur-Rehman v Mst. Hina Saeed*, the father, who was living in France, was refused custody on the basis that if he would take the children to France the mother would not be able to see them. The Karachi High Court held, that as Muslims, the children could have a better upbringing in Pakistan. However, the father was held responsible for paying maintenance to children.<sup>78</sup> In *Mst. Fauzia Begum v Amin Saddruddin Jamal Gonji*, the father, who had Canadian nationality, was refused custody on the ground that it was in the welfare of the child to be with the mother. The mother was residing in Gilgit in the North West of Pakistan. The father argued that Gilgit was a backward area and the child could have better facilities in Canada but the court refused the father's contention and gave custody to the mother. However, he was held responsible for education and maintenance of the child and was allowed to visit the child once a month at the mother's residence.<sup>79</sup>

If a child is adopted and the adoptive parents separated afterwards the court will decide custody issues after considering the best interests of the child. In *Irfana Shaheen v Abid Waheed*, the Lahore High Court gave custody of a minor girl to the adoptive mother by considering the fact that the father in this case is not a real father so he has no preferential right of custody. The court held that the adoptive mother's right to custody cannot be challenged by anyone except the child's real parents.<sup>80</sup> In *Shaukat Khalid v Additional District Judge*, a girl was adopted by her paternal uncle and his wife. When the girl was fifteen years old her paternal uncle (the adoptive father) died. The biological parents demanded custody of the girl. The Supreme Court awarded custody of the girl to her biological parents. The court noticed that the girl was estranged from her biological parents and siblings but found it in the interests of the minor to be with real parents.<sup>81</sup>

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<sup>77</sup> PLD 2011 Lah 423.

<sup>78</sup> 2010 MLD 544.

<sup>79</sup> 2007 CLC 1403.

<sup>80</sup> PLD 2002 Lah 283.

<sup>81</sup> 1991 SCMR 19.

Adopted children cannot inherit from adoptive parents but have a right to inherit from their biological parents.<sup>82</sup>

The parent who does not have custody has visitation rights. However, the Guardians and Wards Act 1890 is silent about this issue. According to section 7 of the Family Courts Act 1964, the non-custodial parent has a right to file a suit for visitation rights. This law lacks any guidelines about the duration or frequency of visits. If custody is with the mother, the father has a right to file a suit to demand his right to visit the child on regular basis and vice versa.<sup>83</sup>

In *Imran Butt v Mehreen Imran*, custody of an eight years old daughter was given to the mother. The father demanded temporary custody of the child during the summer vacation. The court granted temporary custody to the father but restrained him from removing the child from the territorial jurisdiction of the court. While granting temporary custody the court considered the fact that the father was constantly giving maintenance to the child and his second wife had filed an affidavit stating she had loved and cared for the child and would not harm her.<sup>84</sup>

The father is the natural guardian and has the right to supervise the child. He remains the guardian even when the child is in the custody of the mother as custody is not a condition for exercising guardianship.<sup>85</sup> This is due to his responsibility for providing maintenance for the child. Because of his right of supervision, when the actual custody is with the mother the father is still considered as having constructive custody of the child.<sup>86</sup> The mother is not allowed to keep the child at a distance from the father's residence. The distance is not defined in the law<sup>87</sup> and the court decides it according to the facts of each case. In *Ms. Hina Jilani, Director of A. G. H. S. Legal Aid Cell v Sohail Butt*, the Lahore High Court decided that the mother would be entitled to retain her infant child with her and to return to her native city provided the marriage had taken place there and the father is financially and physically capable to visit that place.<sup>88</sup> Generally, when the mother takes the

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<sup>82</sup> *Abdus Salam v A. D. J. Jhang* 1988 SCMR 608.

<sup>83</sup> *Asma v D. J. Sialkot* 1988 SCMR 1430; *Najma Parveen v Ihsan-ur-Rehman* 1988 CLC 2196.

<sup>84</sup> 2015 CLC 1209.

<sup>85</sup> *Ghulam Fatima Alias Shammi Bai v Chanoomal and another* PLD 1967 Kar 569; *Fahimuddin v Zaibunnisa* PLD 1968 Kar 774; *Muhammad Sadiq v Mrs. Sadiq Safoora* PLD 1963 Lah 534.

<sup>86</sup> (n 85) 534.

<sup>87</sup> *Bivi v Shah Nawaz Khan* PLD 1961 Lah 509.

<sup>88</sup> (n 11) 151.

minor to a place where it would be impossible for the father to exercise control over the child she will lose her right to custody.<sup>89</sup> In *Mst. Chiragh Bibi v Khadim Hussain*, the Lahore High Court held that the father has constructive custody over the child. If the custodian is precluding the father from accessing the child it will be considered as removing the child from the constructive custody of the father. Such an act is considered detrimental for the mental and emotional welfare of the child. The court decided that in such a situation custody shall be given to the father.<sup>90</sup>

The courts consider the father's financial status before awarding him custody. It is a requirement that he should be able to provide for the child's necessities. If the mother is financially stronger the court may consider this fact to award custody to the mother as she will be able to provide good education and other facilities to the child.<sup>91</sup> Pakistani courts follow the English doctrine of laches or unreasonable delay. An unreasonable delay on the part of the father in claiming custody amounts to waiving his right. In *Nazeer Begum v Abdul Sattar*, the mother had custody of her two daughters. After divorce from her first husband she remarried and the father of the children filed a suit for custody after five years from her remarriage. The Karachi High Court considered a five year delay in filing an application for custody as unreasonable and while giving custody to the mother held that if the father was interested in the custody of his daughters he should have filed application for custody within one year of the mother's remarriage.<sup>92</sup>

After the termination of the period of custody the father has to file a case to get custody and custody does not revert to the father automatically.<sup>93</sup> In *Nazeer Begum v Abdul Sattar*, the Karachi High Court held that despite his status as a legal guardian the father has to file a case to take custody of the child after termination of the period of custody with the mother. He would not get custody automatically.<sup>94</sup> The father's right to custody is not absolute<sup>95</sup> and the court will decide custody matters according to the welfare of the minor.<sup>96</sup> In *Yaqoob Ahmed v Mst. Shaista*, the Karachi High Court considered the fact that the father was residing with two married brothers

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<sup>89</sup> (n 46) 1142; *Mst. Nazeer Begum v Abdul Sattar* PLD 1963 Kar 465.

<sup>90</sup> (n 36) 382.

<sup>91</sup> (n 27) 385; *Muhammad Zaman Khan v District Judge* 1983 CLC 3165.

<sup>92</sup> (n 46) 465.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Zainab Bibi v Ferozuddin* PLD 1954 Lah 704.

<sup>96</sup> *Feroz Begum v Muhammad Hussain* 1983 SCMR 606; *Yaqoob Ahmed v Mst. Shaista* 2008 CLC Kar 654.

and his parents had died. During the father's absence, there would be no one at his house to look after the child thus custody was given to the mother.<sup>97</sup> If the court decides that being with the father is against the interests of the minor or the father is disqualified, then the mother is declared custodian.<sup>98</sup> If there is a private agreement between the parents about custody of the child and it goes against the welfare of the child it will not be considered valid and enforceable.<sup>99</sup>

As far as the minor's choice is concerned, the approach of the courts is not consistent. In some cases, the courts have asked for the minor's preference if it is old enough to make a choice.<sup>100</sup> In the Hanafi school, a minor has no right of choice but in some cases the courts deviate from this principle by considering the minor's choice. Although under Islamic law, according to some opinions, a minor female has no right of choice, the courts have made no distinction in this respect and have asked minor girls for their choice as well.<sup>101</sup> In some other cases, the courts have not asked for the minor's choice by not considering it important.<sup>102</sup> In *Abdul Razzaque v Dr. Rehana Shaheen*, the Karachi High Court decided that choice of the minor is a factor to be taken into consideration but it cannot be a decisive factor in matters related to custody. In this case, the custody was contested by the grandparents against the mother. Two children aged twelve and eleven showed their unwillingness to accompany their mother. The Karachi High Court awarded custody to the mother by stating that if choice of a child contradicts its welfare the latter prevails. The court also noticed that children can be influenced by older people to make a particular choice.<sup>103</sup> In *Mst. Aisha v Manzoor Hussain*, the Supreme Court held that a minor is not the best judge of his/her interests. Thus, their choice will be considered only if it is in their interest.<sup>104</sup>

In *Zohra Begum v Latif Ahmad Munawwar*,<sup>105</sup> the Lahore High Court gave custody of a minor son aged seven years to the mother and held that as

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<sup>97</sup> 2008 CLC Kar 654.

<sup>98</sup> (n 63) 442.

<sup>99</sup> *Dr. Fauzia Haneef v Dr. Raashid Javaid* PLD 2010 Lah 206; *Muhammad Zulqarnain Satti v Mst. Ismat Farooq* 2010 CLC 1281.

<sup>100</sup> (n 19) 357; *Akbar Bibi v Shaukat Ali* 1981 CLC 78.

<sup>101</sup> *Nazir Ahmad v A. D. J. III Sahiwal* 1988 SCMR 1359; *Fehmida Begum v Habib Ahmed* PLD 1968 Lah 1112; *Rafiqan v Jalal Din* 1983 SCMR 481.

<sup>102</sup> *Safia Bibi v Ghulam Hussain Shah* PLD 1970 AJK 13; *Shaukat Khalid v A. D. J. Rawalpindi* 1989 CLC 1377; (n 27) 610.

<sup>103</sup> (n 27) 610.

<sup>104</sup> PLD 1985 SC 436.

<sup>105</sup> PLD 1965 Lah 695.

the rules of custody are not given by the Qur'an or the *Sunnah*, it is permissible for the courts to differ from the text books on Muslim law. The courts can come to their own conclusions by way of *ijtihad*. The rules given by the books are not uniform so the courts may depart from the rules stated therein if their application is against the welfare of the minor. This approach of the court was criticized on the ground that the courts are incapable to perform *ijtihad*.<sup>106</sup> Tanzil-ur-Rahman, while criticizing this approach of the Lahore High Court, suggested that although the courts are incapable to perform *ijtihad*, where there is a very strong ground the court may substitute one rule of Islamic law by adopting another rule, for instance, the rule 'the mother shall lose her right if she remarries with a stranger' can be substituted by the rule 'the paramount consideration is welfare of the child'. In the case of contradiction between these two rules, Pakistani courts follow the second rule.<sup>107</sup>

The reason for the claim to perform *ijtihad* is the extensive discretion on the part of the courts in the child law. Due to lack of detailed legislation, the courts either have to rely on case law or use their own discretion. Ali and Azam rightly observed that 'the lack of clarity and uniformity of rules relating to custody and guardianship is perhaps the single most important factor used to justify deviation from the general principles of personal law regulating this area'.<sup>108</sup> Although the Guardians and Wards Act 1890 is based on English law the courts interpret sections of this Act in the light of Islamic law. There are conflicting decisions of courts in the matters relating to custody. In some decisions, Islamic principles and jurisprudence have been adopted by the courts while interpreting statutory provisions.<sup>109</sup> In others, the courts referred to the Anglo-Indian concept of justice, equity and good conscience. The welfare of the child is a paramount consideration and is given preference in case of a clash with personal law.<sup>110</sup>

It has been discussed before that due to lack of a consolidated statute, courts occasionally give contradicting decisions. For instance, when there is a clash between the child's personal law and its best interests or between the child's autonomy and its best interests, there are no rules to guide the courts

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<sup>106</sup> Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Hamdard Academy 1978) 744-745; Abdul Ghafur Muslim, 'Islamisation of Laws in Pakistan: Problems and Prospects' in H. S. Bhatia (ed), *Studies in Islamic Law, Religion and Society* (Deep and Deep Publications 1996) 146.

<sup>107</sup> (n 105) 744-745.

<sup>108</sup> (n 4) 158.

<sup>109</sup> (n 13).

<sup>110</sup> (n 4) 161.

so resultantly courts show inconsistent approach towards such issues. Pakistan needs a consolidated child rights statute to resolve such issues.

In the following section, I discuss the Convention on the Rights of the Child 1989 ('CRC'). Pakistan signed and ratified the CRC in 1990. Efforts have been made to incorporate the provisions of the CRC in Pakistan's domestic law and to reform the Guardians and Wards Act 1890. In the following section, first I discuss the relevant provisions of the Convention on the Rights of the Child and then analyze the proposed reforms in the law relating to custody.

### **The Convention on the Rights of the Child 1989**

The Convention on the Rights of the Child 1989 is the most significant instrument on children's rights. The Convention has contributed tremendously in recognition and protection of the rights of the child. It was adopted by the United Nations General Assembly in 1989 and entered into force in 1990. Pakistan signed and ratified the CRC in 1990. Initially, Pakistan entered a reservation that the provisions of the Convention shall be interpreted according to Islamic laws and values but in 1997 the reservation was withdrawn.

The CRC accords children a special status. In its preamble, it recognizes that due to their immaturity and vulnerability children are in need of special care and legal protection. It recognizes and protects the basic human rights of the child which includes the right to a name; the right to know and be cared for by his or her parents; the preservation of child's identity; freedom from sexual abuse and exploitation, narcotic drugs and trafficking; the right to survival; to develop to the fullest in terms of physical and mental capacities; to protection from harmful influences and to participate in family; cultural and social life; the right to respect; the right to have and express views and right to be heard; the right to make decisions and the right to protection and establishment of the best interests of the child.<sup>111</sup> Articles 2, 3, 6 and 12 govern the interpretation and implementation of the CRC and are considered basic principles.<sup>112</sup> These are the following:

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<sup>111</sup> Natalie Hevener Kaufman and Malfrid Grude Flekkoy, 'Participation Rights of the Child : Psychological and Legal Considerations' (1998) 18 (1) *Children's Legal Rights Journal* 16.

<sup>112</sup> Imran Ahsan Khan Nyazee, 'Islamic Law and the CRC' (2003) *Islamabad Law Review* 75.

1. Non-Discrimination: the CRC applies to every child irrespective of the child's race, color, sex, language, religion, ethnic or social origin, property, disability, birth or status etc. Every child without discrimination should enjoy the rights enunciated in the CRC.<sup>113</sup>
2. The Best Interests of the Child: In every law or decision affecting children the interests of the child should be the primary consideration.<sup>114</sup> In this article state parties are asked to consider the best interests of the child as a primary consideration. Pakistani law went a step further and declared the welfare of the child not a primary but a paramount consideration.
3. The Right to Life, Survival, and Development: According to Article 6 every child has a right to life, survival and development which includes physical, mental, emotional, cognitive, social and cultural development.<sup>115</sup>
4. The Right to be heard: Children have a right to be heard in all matters affecting them and their views should be given due weight in accordance with their age and maturity.<sup>116</sup>

In some situations, Article 3 of the CRC, which provides for the best interests of the child, might clash with Article 12 which discusses the importance of a child's views in all matters affecting him/her. In some cases, it may happen that to decide in favor of the child's wishes is not in its best interests. In such a situation, the principle of protection of the best interests shall prevail. Again, there might be disagreement among cultures about interpretation of the principle of best interests. The conception of morality in a society has a lot to do with the interpretation of the best interests of the child. The rights given by the CRC are said to be given to all children irrespective of any difference but some of these rights are definitely for older children having enough maturity and understanding. The right to form and express views and the right to be heard cannot be exercised by a child who is not capable of understanding the issue in question. The older the child is the more important its views are.

Article 2 enumerates the principle of non-discrimination. It states that 'no child should be discriminated on the basis of race, color, sex, language, religion, ethnic or social origin, property, disability, birth or status etc'. The

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<sup>113</sup> The CRC, art. 2.

<sup>114</sup> Ibid, art. 3.

<sup>115</sup> Ibid, art. 6.

<sup>116</sup> Ibid, art. 12.

rules regarding custody in Islamic law and Pakistani law are not the same for girls and boys. This is a violation of Article 2 of the CRC; there is discrimination between the mother and the father regarding rules of custody and guardianship.<sup>117</sup> Another objection against these rules is that the rules of custody are based on the age of the child and not on its best interests as enunciated in Article 3 of the CRC.<sup>118</sup> The difference between the rules of custody for male and female children is based on cultural and social values and requirements. The father is viewed as a protector for the child. The rules of custody regarding the age of the child are not absolute and are subject to his/her welfare. If there is contradiction between a rule of custody and the interests of the child the latter prevails.

### **Efforts to Amend the Law Relating to Custody**

Efforts have been made to amend the law relating to custody but so far have not been proved successful. Following is a brief overview of the proposed reforms.

The Law and Justice Commission in its report in 2007-2008 proposed amendments in the Guardians and Wards Act 1890. The Commission considered sections 19(b)<sup>119</sup> and 41(e)<sup>120</sup> discriminatory against the mother. Section 19(b) of the Act states that no guardian should be appointed by the court if the father of the minor is not unfit to be his guardian. It was proposed that the word ‘mother’ should also be included in this section which would mean that the court will not be able to appoint a guardian if the child’s mother or father are not unfit for this job. An amendment was also proposed in section 41(e) of the Act. This pertains to the cessation of authority of a guardian. This section states that power of a guardian ceases when the court

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<sup>117</sup> Kamran Hashemi, ‘Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation’ (2007) 29 (1) *Human Rights Quarterly* 212-213.

<sup>118</sup> Ibid, 213.

<sup>119</sup> Section 19 is about the cases in which the court has no authority to appoint a guardian. It includes following cases: a minor who is a married female and whose husband is not unfit to be guardian of her person; a minor whose father is living and is not unfit to be guardian of the person of the minor; of a minor whose property is under the superintendence of a court of wards competent to appoint a guardian of the person of the minor.

<sup>120</sup> Section 41 is about cessation of authority of a guardian. This section states that powers of a guardian of a person cease in following cases: by his death, removal or discharge; by the minor obtaining the age of majority; in the case of a female ward by her marriage to a person who is not unfit to be a guardian; in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the court to be so unfit, by his ceasing to be so in the opinion of the court.

considers the father unfit to be the guardian of the person.<sup>121</sup> The Commission proposes to include the word ‘mother’ in this proviso as well. These recommendations are ignored by the legislature but should be incorporated in the Guardians and Wards Act 1890 as it removes gender disparity in the said law.

In 2008 an effort was made by the Pakistan Peoples Party’s government to amend the Guardians and Wards Act 1890. The Guardians and Wards Act Amendment Bill 2008 was tabled in the National Assembly but it was never passed. Through this bill, amendment was proposed in section 12(1) to include the proviso that in a custody dispute the court shall on the first date of hearing pass an interim order to handover custody of a minor boy if he has not attained the age of seven years and a minor girl if she has not attained the age of sixteen years to the mother. Visitation rights will be granted to the father. According to this Bill, this amendment will protect custody rights of the mother and is in welfare of the child.<sup>122</sup>

In 2014 the Child Protection System Bill was tabled in the parliament. This Bill, if passed, will be applicable in Islamabad. The preamble while making reference to Islam, the Constitution of Pakistan 1973 and the CRC emphasizes implementation of child rights. According to the provisions of this Bill a Child Protection Commission will be set up by the government.<sup>123</sup> The Secretary, Law Justice and Human Rights shall be the chairperson of the Commission. The Commission shall consist of 11 members. Its function is to examine the policy, programs and other measures taken by the government for implementation of the CRC. The Commission shall appoint child protection officers to carryout purposes of this Bill.<sup>124</sup> In local areas Child Protection Units will be set up which will function under supervision of the Commission.<sup>125</sup> The Bill defines a child as every human being under the age of eighteen years.<sup>126</sup> According to section 2(b) in all matters related to a child his/her best interests are a primary consideration. This Bill is related to protection of children’s rights in general but includes few provisions related to custody as well. Section 2(e)(iv) defines ‘child at

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<sup>121</sup> Law and Justice Commission of Pakistan Reports No. 90 – 102, 2007 – 2008 available at <<http://www.pja.govpk/system/files/Majority.pdf>> last accessed 8 September 2017.

<sup>122</sup> The Guardians and Wards (Amendment) Act 2008 <<http://eus.thedeviser.com/eus/wp-content/uploads/2012/03/Guardian-Wards-Amdt-Act-2009-Bill.pdf>> last accessed 8 September 2017.

<sup>123</sup> The Child Protection System Bill 2014, s. 5.

<sup>124</sup> Ibid, s. 15.

<sup>125</sup> Ibid, s. 16.

<sup>126</sup> Ibid, s. 5.

risk' and includes in it a child who has a parent or guardian who is unfit or incapacitated to exercise control over the child. Such a child can be given in custody of a suitable person or may be admitted to a child protection institution.<sup>127</sup> A child protection institution is an institution or organization for the care, protection and rehabilitation of a child at risk.<sup>128</sup> Whether a particular person is suitable to take custody of the child will be determined by the court. The federal government may establish Child Protection Courts in any local area and this court will be bound to give decision within one month from the date of institution of the case.<sup>129</sup> The Child Protection Officer will make a report regarding misconduct of a custodian of the child at risk.<sup>130</sup> The court to which a report is made by the child protection officer may call upon the parent/guardian to produce the child in the court and ask him/her to prove why such child should not be removed from his/her custody. In such a situation, the court may admit the child in a child protection institution or on suitable surety allow the child to remain in custody of the parent/guardian.<sup>131</sup> The child at risk will remain in custody of a child protection institution or a suitable person until the child attains the age of eighteen years and in exceptional cases for a shorter period. The court may impose conditions regarding such custody as it deems fit. The court has authority to demand periodical reports regarding custody of the child and may also demand production of child from time to time to check conditions of child custody. In case of breach of any condition custody can be revoked.<sup>132</sup> If a person takes custody of a child in contravention of the provisions of this law, s/he shall be punished with imprisonment for a term which may extend to two years or with fine up to Rs. 50,000 or both.<sup>133</sup> The commission and the court may at any time order discharge of a child from a child protection institution or custody of any person.<sup>134</sup>

The Khyber Pakhtunkhwa Child Protection and Welfare Act 2010 is related to the protection of rights of children and has few sections on custody. Most of the provisions of this Act are similar to the Child Protection System Bill 2014 and the Punjab Destitute and Neglected Children Act 2007. According to this Act a child is a person under the age of eighteen years.<sup>135</sup>

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<sup>127</sup> Ibid, s. 2(g) and 2(z).

<sup>128</sup> Ibid, s. 2(g).

<sup>129</sup> Ibid, s. 26, 27.

<sup>130</sup> Ibid, s. 28.

<sup>131</sup> Ibid, s. 30.

<sup>132</sup> Ibid, s. 32.

<sup>133</sup> Ibid, s. 47.

<sup>134</sup> Ibid, s. 61.

<sup>135</sup> The Khyber Pakhtunkhwa Child Protection and Welfare Act 2010, s. 2(d).

In all matters regarding a child his/her best interests will be a primary consideration.<sup>136</sup> The Act defines ‘the child at risk’ and includes in it a child whose parent or guardian is unfit or incapacitated to exercise control over the child.<sup>137</sup> The Provincial Government shall set up a Khyber Pakhtunkhwa Child Protection and Welfare Commission will be set up. It shall comprise of nine members. Chairperson will be Minister for Social Welfare and Women Development Department.<sup>138</sup> The Commission will supervise matters related to child rights at local level including developing programs and policies for development and wellbeing of children and review of existing law.<sup>139</sup> Under the supervision of this Commission child protection institutions will be set up.<sup>140</sup> Authority is given to the Peshawar High Court to notify different courts of sessions as child protection courts.<sup>141</sup> Child Protection Courts will have authority to hand over custody of a child to parents, suitable person or child protection institution as the case may be but preference will be given to parents and extended families. The court shall inform the child of the situation and will take its views before making decision. Continuity in upbringing, child’s ethnic, religious, cultural, linguistic background and all other relevant factors in the best interests of the child will be considered. Progress will be monitored by child protection officer’s report.<sup>142</sup> The time period to decide a case is fixed at two months after which the court shall communicate reasons for delay in deciding the case. In that case the time period can be extended up to four months.<sup>143</sup> Appeal shall lie to the High Court within thirty days of the judgment.<sup>144</sup> Under this Act proceedings for a child at risk can be initiated if s/he is not yet eighteen years old. In case of any dispute regarding age of the child the court shall decide it on the basis of a medical report of the medical superintendent of the district concerned whose advice regarding age of the child shall be final.<sup>145</sup> If a negative report is received regarding conditions of custody of a child, the court may ask the parent/guardian to produce the child in front of the court and show cause why such child should not be removed from his/her custody. The court may order to admit the child in a child protection unit or on suitable surety being offered for safety of the child and for his being brought before it, permit the child to remain in the protection of his parents or guardian. The court may

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<sup>136</sup> Ibid, s. 2(b).

<sup>137</sup> Ibid, s. 2(e)(iv).

<sup>138</sup> Ibid, s. 3.

<sup>139</sup> Ibid, s. 4.

<sup>140</sup> Ibid, s. 2(g).

<sup>141</sup> Ibid, s. 15.

<sup>142</sup> Ibid, s. 16.

<sup>143</sup> Ibid, s. 16(6).

<sup>144</sup> Ibid, s. 16(7).

<sup>145</sup> Ibid, s. 18.

also bar the custodian from removing child from territorial jurisdiction of the court.<sup>146</sup> Identity of the child at risk will not be disclosed or published in media except with prior approval of the concerned authority.<sup>147</sup> Where the child is in custody of parents or any other person, the court may ask the parent to pay certain amount of maintenance keeping in view parent's financial position. If maintenance is not paid the court may recover this amount as arrears of land revenue.<sup>148</sup> The punishment of taking unauthorized custody in contravention of the terms of this Act will be punishable with two years' imprisonment or with fine up to Rs. 50,000 or both.<sup>149</sup> This offence is cognizable, non-bailable and non-compoundable.<sup>150</sup>

These reforms bring few positive changes in the current law of custody. To impose a time limit for deciding custody disputes is a much-needed provision as litigants suffer due to prolonged litigation. But the above-mentioned proposals/laws are mostly of general nature which emphasize implementation of child rights and do not give detailed rules regarding custody. It is also not clear whether personal law of the minor will be relevant or not. Currently in Pakistan, as the law is not detailed, the courts in some cases follow the personal law of the minor whereas in other cases decide in the child's best interests. Ambiguity is still there. This void can only be filled a making a law which specifically deals with custody issues.

## **Conclusion**

The dearth of statutory provisions relating to custody gives wide discretion to courts in matters relating to child custody. As a result, the courts often render inconsistent judgments, ensuing in ambiguity in custody disputes. The Guardian and Wards Act 1890 was promulgated during the colonial period, whereas courts in contemporary Pakistan rely on the principles of Islamic Family Law (Muslim Personal Law). It is, therefore, imperative to consolidate the myriad of laws relating to the rights of children and ensure that 'the best interests' of the minor are afforded precedence over personal law. Efforts have been made to reform the law related to custody in Pakistan but no consolidated statute has been made which gives detailed rules regarding custody of the child. Such a statute will stifle the wide discretion exercised by the courts, thus, resulting in consistent decision making which is the very objective of any legal system.

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<sup>146</sup> Ibid, s. 21.

<sup>147</sup> Ibid, s. 24.

<sup>148</sup> Ibid, s. 29.

<sup>149</sup> Ibid, s. 42.

<sup>150</sup> Ibid, s. 54.