



Custodial Challenges: Islamic and Pakistani Law in Child Custody Matters

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ABSTRACT

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This article explores the intricate issues of child custody disputes in Islamic and Pakistani law, emphasizing the deficiencies of the existing legal procedures and the resulting difficulties experienced by both children and parents. Courts persist in relying on antiquated statutes, despite the Guardians & Wards Act, of 1890, resulting in protracted legal disputes and emotional distress for all parties concerned. The absence of a comprehensive legal structure that specifically addresses the child's best interests worsens the problem, leading to conflicting rulings and extended distress. The paper advocates for immediate reforms, proposing a comprehensive legal framework that prioritizes the kid's well-being and simplifies custody procedures. The author advocates for revisions to current legislation or the creation of a new law to fill the gaps and promptly resolve custody disputes. This would help minimize the negative impact on children's psychological well-being and family connections. The failure to implement these reforms merely extends the duration of the distress experienced by children entangled in custody disputes, emphasizing the pressing necessity for legislative measures to safeguard their rights and welfare.



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1. Introduction

Child Custody has always been a hot topic of debate in developed and underdeveloped countries like Pakistan, where socio-economic factors tend to highlight this issue even more (Cheema, Riaz, & Khan, 2020). Every day, we hear about a new case of divorce in our surroundings, and such recurring incidents are affecting children more than their parents. This issue has become a subject of grave concern as the lives, as well as the mental health of innocent children, are being jeopardized. A large number of couples are seen heading toward the family courts to file for divorce, and the cases of not only divorce but also the guardianship and custody of children are also being piled up day by day. Therefore, the laws regarding the custody of children for the sake of their well-being have become essential to avoid harsh battles over child custody among the families involved. Children are frequently utilized as a means of obtaining revenge by the parties involved in a lawsuit who feel no hesitation in putting their children under the burden of emotional trauma or psychological abuse, and at the end of the day, it's only the children who suffer from the brunt of the entire process (Javed & Javaid, 2020). The parents, however, move on in their lives in due course, but the children remain intact with all the trauma faced by them, badly affecting their mental

stability and causing severe consequences in later life; therefore, the custody laws are formulated to compensate for the damage that occurred to the affected children.

Justice should be served to these innocent lives who suffer the most during the paradigm shift in matrimonial relationships (Razi, Zahoor, Anwar, & Jamshed, 2021). Family courts primarily focus on the welfare of children while deciding custody matters and safeguarding children's best interests (Semple, 2010). Being a Muslim, our prime focus should be to find solutions to our issues as per Islamic rulings and guidance. Islam has also laid down certain principles regarding the custody of children and provided us with specific rules to be followed under certain circumstances. Several verses in the Quran deal with this matter specifically and clarify the period for the custody of children according to their age and sex. For example, The Hanafi School of Muslim Law stipulates that the divorced mother's right to custody of her child outweighs the right to custody of the father until the girl reaches puberty and the boy reaches the age of seven (Farrukh, 2023). The Guardians & Wards Act of 1890 came into force during the period of British colonial rule in present-day Pakistan. The early British practice of implementing Islamic law for Muslims has been discontinued. The Pakistan Penal Code of 1860 and the Divorce Act of 1869 restricted the application of Muslim religion and customary law. Later, The Punjab Laws Act IV of 1872 reaffirmed the subordinate status of Muslim law. Equitable principles and legislation often superseded Muslim personal law in court disputes, preempting certain areas of Muslim law (Ishaque & Mustafa Khan, 2015). Hence, this matter has been subjected to reformation for ages, yet some deliberation is much needed in further devising or manipulating the existing laws regarding the custody and guardianship of children. This article aims to explore the complexities of child custody laws, specifically in Pakistan, with an emphasis on arguing for reforms that promote children's well-being. This paper aims to emphasize the importance of comprehensive and equitable strategies to safeguard children's rights and well-being during parental separation, drawing on both legal and Islamic perspectives. This study aims to provide insights into the challenges and opportunities for reforming the management of child custody disputes by analyzing existing legal frameworks such as the Guardians & Wards Act of 1890 and Islamic teachings.

2. Origin of Custody Laws in Pakistan

The history of custody laws in Pakistan, i.e., The Guardians and Wards Act 1890, dates back to when British India was ruled by the English (Noreen & Musarrat, 2014). The method of interpretation of this Act might have changed, but the concept is similar, i.e., assessing the child's welfare. The difference in understanding this Act in our country is due to the nature of being an Islamic State; therefore, the law is interpreted in harmony with Islamic principles.

The Act primarily focuses on resolving the disputes of custody and guardianship of children in Pakistan. While looking into the custody cases, the courts predominantly seek assistance from the above-mentioned Act and govern the cases likewise after interpreting the law at their discretion. The legal technique exercised for the incorporation of the "best interests of the child" in court decisions is the primitive postulation of "*ijtihad*," which means the reason or analogy exercised by humans (Muslims) in interpreting the (Muslim) law (Ishaque & Mustafa Khan, 2015).

Ijtihad, the right of individual reasoning, was under objection since A.D 900 and was superseded by *taqlid*, i.e., adherence to the established law until 1955 when the Pakistani Commission on Marriage and Family Law was established (Noreen & Musarrat, 2014). The Commission consisted of three men, three women, and one ulama assigned to review existing legislation and propose necessary changes, if any. The Commission came up with a report in 1956 recommending alterations in the laws relating to marriage, divorce, and family maintenance laws. This report halted the practice of exercising *taqlid* and reopened the doors of *ijtihad* until the *Muslim Family Law Ordinance 1961* came into being.

The 1961 statute *The Muslim Family Law Ordinance 1961* was a reduced version of the Commission's report, i.e., a compromise between the recommendations of the Commission and the beliefs of conservative Muslims. Though *custody laws* were not within the purview of the Commission, this incentivized the judges to experiment with the reform. For example, in 1964, the Lahore High Court ruled that "if there is no clear rule of decision in Qur'anic and Traditional Text... a Court may resort to private reasoning and, in that, will undoubtedly be guided by the rules of justice, equity, and good conscience." [Khurshid Jan

v. Fazal Dad, 2 P.L.D. (W.P.) Lah. 558, 562 (1964)] (Davis, 1984). The decision was followed in the case of *Zohra Begum vs Latif Ahmed Munawwar* in 1965 (Davis, 1984). The decision in *Zohra Begum vs Latif Ahmed Munawwar* established a two-step analysis in custody cases. Firstly, the welfare rule and the child's best interests override all the other considerations in custody matters. Secondly, the role of *ijtihad* was used to decide which is more important for the child's welfare (Rana, 2022).

3. Custody, Guardianship, and Ward under Pakistani Law

The definition of the terminology "*custody*" can be extracted from the judgment of *Sultana Begum vs. Mir Afzal, 1988*, where the court defined it as the 'upbringing of a ward/child by the mother or by someone legally entitled to it Under Shariah Law, custody is defined as *Hadanah* which relates to the bringing up of a minor child by the mother or someone lawfully entitled to it (Farrukh, 2023).

3.1. Guardian and Guardianship (Waliyah)

However, on the other hand, a *guardian* includes a person empowered to look after the child, his property, or both. The definition of term "*guardian*" is defined in *section 4(2)* of the *Guardians and Wards Act 1890* as "a person having the care of the person of a minor or his property, or both, his person and property" (*Guardian and Wards Act 1890, n.d.*). Guardianship (*Wilayah*) implies supervising and exercising legal transactions or contracts on behalf of a minor/ward and bearing its consequences. Guardianship can be categorized as Guardianship of Person **and** Guardianship of Property (Zahraa & Malek, 1998).

The first type of guardianship relates to managing the ward's affairs, such as marriage, education, health, and career. The other kind of guardianship is the power to execute and administer contracts or any other legal affairs relating to the ward's property. The jurists unanimously agree that if the father is still living, he will naturally be the minor's or ward's guardian and his property. However, in his absence, the guardianship of the minor will be transferred either to the entrusted guardian or the male agnate (*'asabah*) as per the priority order. Similarly, the same view is supported by *section 19(b)* of *The Guardians and Wards Act 1890*, which says that if a minor's father is still living and deemed suitable to be the minor's guardian, the court is not permitted to step in to appoint a guardian (*Guardian and Wards Act 1890, n.d.*). The mother may petition for guardianship if the father is deemed unfit, and she is to be appointed only after the court's satisfaction regarding the welfare of the minor.

3.2. Relation between Custody and Guardianship

The interrelation between Custody (*Hadanah*) and Guardianship (*Waliyah*) is the distinction between the rights and duties conferred on the entitled person (Rana, 2022). The significant distinction lies in the fact that *hadanah* is more related to nursing and taking care of a child's emotional behavior while keeping the child in one's physical custody, whereas for *waliyah*, no physical custody is required, and it can take place from a distance by taking care of child's welfare and other legal affairs. Therefore, according to Islamic law, it may be concluded that *hadanah* is a female-oriented function and *waliyah* is a male-oriented one.

Section 4(3) of the *Guardians and Wards Act 1890* (Guardians and Wards Act 1890, n.d.) defines the meaning of this term as *a minor for whose person or property, or both, there is a guardian.*

4. Custody Evaluation and Types of Custody

Custody evaluation occurs in disputes where the parents fail to comply with the terms of custody or when there are serious concerns regarding the capacity of either parent to give their child a healthy and long-lasting environment (Emery, Otto, & O'donohue, 2019). The court may order custody evaluation in case of conflicts between the parties, or the parties may request the court for such assessment by mutual consent. Under such circumstances, the family court takes over the charge of evaluating and assigning custody to either parent after thoroughly examining the lifestyle and stability of the parents.

4.1. Legal Custody

It is a form of custody where the custodial right regarding the crucial decision of a child's life is granted to either parent (Charlow, 1986). The parent having *sole custody* has a say in determining the child's day-to-day matters, particularly those related to his education, health, religion, etc. Such a person is regarded as the owner and the guardian of the child and is solely accountable for the betterment of his child. However, in the case of *joint custody*, both parents mutually coordinate in determining the specific significant issues like education, health, and religion as they both share the same rights, except that autonomous decisions can be exercised regarding the everyday affairs of the child, by the one with whom the child is living.

4.2. Physical Custody

The parent's entitlement to spend time with the child is established in this type of custody. The parent to whom the custody is given gets to spend most of the time with the child (*custodial parent*), and the other parent usually receives the "visitation right" (*non-custodial parent*) as per specific terms and conditions. In the case of *joint custody*, both parents spend an equal amount of time with their child.

5. The Concept of Custody of Children in Islamic Law

At the time of British India, the matters of child custody were governed according to common law principles, keeping the best interest and the child's welfare under prior consideration. However, the intentions and the principles followed while deciding such cases are the same, but the interpretation of these principles has been done in context with the Islamic laws. Islam is the State religion of our country as incorporated in *Article 2 of The Constitution of Pakistan 1973 (The Constitution of Pakistan 1973, n.d.)*, and therefore, anything in contravention of the Quran and Islam will be declared null and void and will have no legal existence; thus all the laws are formulated within the parameters of Islamic rulings (Adil & Saidon, 2017).

Quran is the principal source of rulings for the Muslims laid down by Allah Almighty, and therefore, the instructions laid therein must be followed. Apart from the Quran, several Ahadiths and traditions of the Prophet Muhammad (P.B.U.H) serve as guidelines in deciding disputes related to custody. In the light of Shariah law, both the Quran and hadiths have a significant say in formulating the law. Among these divine rulings are those concerning children's issues, their rights, and as well as the duties of the parents towards their children.

Hadanah, the legal term for custody in Shariah, describes a child's upbringing by his mother or another person legally entitled to it. Since small children are usually weak and need proper care and protection, *hadanah* must maintain them (Zahraa & Malek, 1998). Islamic jurists treat *hadanah (fardh kifaya)* as a collective obligation in all Muslim communities; however, if no one else takes care of *hadanah*, Malikis claim that it becomes a personal duty (*fardh'ain*) on the father. Furthermore, the mother also has a personal responsibility to have the child's *hadanah* during the first two years of suckling if the father of the child is not alive or if the father fails to pay for the wet nurse for the child or in case the child refuses to accept the milk other than his mother's, then the mother can be forced to be the custodian of his child. Once the *hadanah* is entrusted to a particular person, they must look after and nurture that child well (Zahraa & Malek, 1998).

The Quran contains no particular passage that lays down a clear framework for the right of custody, but the jurists have deduced it by analogy from the Quranic verses related to fosterage. *Verse 233 of Surah AlBaqarah* narrates that:

The mothers shall give such to their offspring for two years if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms...."

Islamic jurists held that since a child depends on his mother for foster care, the child will remain under the mother's custody until he turns seven years old. Moreover, law related to custody can also be deduced from the events that occurred at the time of Prophet

Muhammad's (P.B.U.H), and the preference was given to the minors' mothers while deciding the custody disputes. "Truly my belly served as a container for my son here, and my breast served as a skin bag for him (to drink out of), and my bosom served as a refuge for him, and now his father has divorced me, and he (also) desires to take him away from me.", a woman reportedly told the Prophet (PBUH) in the presence of 'amr Ibn Shu'aib. The Prophet (PBUH) said: 'You have a better right to have him, as long as you do not. Marry again' (Abro, 2014).

It has been deduced from the above traditions that when a child is young, the mother gets the preference for custody. Both the jurists of Sunni and Shia law unanimously agree that a mother is the fittest person to be the custodian for a child and has the first claim to custody regardless of the fact whether she lives with her husband or not. Nevertheless, she will lose her custody rights if she gets married again.

6. Minor's Choice Regarding Custody in Islamic Law

As has been seen above, the custody of a child is allocated to the mother if the child is under seven years old. However, the views of the jurists differ after the minor reaches the age of seven, which is regarded as the age of discernment.

In Islamic laws, different jurists have different opinions on the issue of the choice of a minor (*mumayyiz*) or adult child (*ghayr mumayyiz*). *Mumayyiz* is a vital phase indeed. In Islam, it is an age of discernment or when a child can discriminate between right and wrong (Firdausia, 2020). For *Shafi*, the age exists till the child becomes capable of taking care of himself physically, whereas, for *Hanafi* jurists, the age is determined as seven years for boys and nine years for girls (Bibi et al., 2023).

According to the *Shafi*, both the male and female children are asked about their preference to live with once they reach the age above seven years, but the *Hanafi* jurists confirmed that no such choice of preference is given to the *minor child (mamayyiz)* whether the child is male or female until they reach the age of adulthood (*ghayr mumayyiz*) (Alnefaie, 2023). According to *Hanafi* jurists, a minor shall live with his mother until he reaches the age of discernment, and they have derived this concept from the following *Hadith*:

"You have more right to him as long as you do not marry" (Abu Dāwūd, Ḥadīth No., 2276)

The *Hanafis* and *Imam Malik* do not support such a right of choice to be exercised by the minor, either male or female. According to *Imam Malik*, up until the boy reaches the age of maturity, a mother is better qualified to have custody of him. The *Hanafis*, however, believe that a boy's father has a more extraordinary claim to custody of him than his mother after he reaches a level of independence where he can pay to take care of his food, clothing, and personal hygiene. According to *Hanafis* and *Malikis*, the reason why a child should not be given the option to choose either of his parents is that a child will choose the one with whom he is under less restraint and feels more free to enjoy despite considering his welfare, which is the prime objective of granting custody (Bibi et al., 2023).

However, *Hanbali* jurists only stick this right of preference to male children. The *Hanbali* jurists argue that a girl is not given a right to choose because *Shariah* failed to explicitly mention it, as seen in the traditions and sayings of the Muslim rulers, all the parties regarding the right to determine in custody matters were the boys and not the girls (Zahraa & Malek, 1998). However, the two prerequisites of offering such a right of choice to the male child under *Hanbali* jurists are the following: one of the conditions is that the authorized parent must be worthy of custody (*hadanah*) and the second one is that the male child must be sane, but in case of the contrary, an insane male, without any choice, the mother will be in charge of the child (whether minor or adult) (*Child's Preference of the Parental Custody*, n.d.). Therefore, when a sane ward of seven years, who chose to live with his father, becomes insane and is placed in the custody of his mother, no matter what his preference was, his choice will become void (Alnefaie, 2023).

Abu Hurairah said *Ibn Qudamah* described the Prophet (P.B.U.H.) as "A boy is given a right to choose between his father and his mother." According to *Abu Hurairah*, a woman

approached the Prophet (PBUH) and asked: "O Allah's Messenger! My son serves me well by giving me water from Abi 'Utbah's well, but my husband wants to take him away from me. The Prophet (P.BU.H) told the boy: "This is your mother and father; please take whichever hand you choose." The youngster grabbed his mother's hand and turned to go. (*Abu Dāwūd, Ḥadith No., 2277*) From this incident, the Hanbali jurists derived that only the male children are offered the right of preference for custody while the female child has no such right and shall remain in her mother's custody until she reaches the age of marriage.

7. Custody of a Female Child Its Duration According to Various Jurists in Islam

Jurists are of different opinions regarding the custody of females and the duration of their custody. The Shafi jurists, however, lay no such discrimination between male or female children. Imam Malik also believes that a daughter should remain under her mother's care until she is married. The Hanafis highlight that the mother is entitled to custody of the girl in preference till puberty. After attaining puberty, until the girl reaches marriage, her father will have custody of her because the father acts as a guardian in marriage, and therefore, the female child will need her father more than her mother in the case of marriage. However, the mother can contribute to her *hadanah* because the primary purpose is to protect the female from haram, and the father is seen as more capable of exercising his power and securing her from all the haram around her (Bibi et al., 2023). In Shariah law, although a mother has been granted the right of *Hizanat*, such as custody of a minor, she is not regarded as a child's natural guardian. Following the *Hizanat*, a father may file for the custody of his children in the guardian court (Ebrahimi, 2005). The Hanbalis differ from all these jurists, as mentioned earlier, and believe that a female child's best interests should come first when she attains the age of seven, when she is in the custody of her father, as she could be better protected. Furthermore, the importance of a father at the time of contracting her marriage and other aspects of life can override the importance of a mother, and therefore, the need for a father as her custodian and guardian is greater (Zahraa & Malek, 1998).

The right of choice is based on the prevailing conditions. If the child is of tender age, then the custodial right will be referred to the mother because no one other than his mother will be able to take proper care of him until he reaches the age of seven. On attaining the required age, the child would be given a choice to choose either of his parents as his custodian and guardian. Furthermore, if the child is worthy of trust, whether it be male or female, they can live with either parent they choose, but if the child is untrustworthy, whether it be male or female, then there's no such choice to offer, and the child must live with his father.

8. Balance between Child's Interests and Welfare

Nevertheless, the right to choose must be impartial between the child's interests and welfare. A child is not well aware of his best interests and is not able to exercise his full conscience in assessing the best results in his favor; therefore, this is where the courts intervene in deciding the cases of children's custody and prefer the child's best interests over his personal preference (Emery et al., 2019). In one case, where Ibn Taimiyyah was the judge, a child was asked to choose between either of his parents as his custodian, and he chose his father. The reason for making such a choice was that his mother used to send him to school every day, where his teachers used to apply disciplinary measures; on the contrary, his father used to allow him to play with his friends all day rather than focusing on the welfare of his child. The child was, therefore, given custody to his mother despite his preference to stay with his father. This incident demonstrates that a child's preferences are subject to safeguarding his best interests and are not always absolute and welfare and with which of his parents he will feel more comfortable and protected. However, the former prevails in case of conflict between the child's interests and his choice (Zahraa & Malek, 1998).

Once the child chooses, he will be handed over to the selected parent. If his mind changes after some time, he will be permitted to live with the other parent if that is his preference because the child's comfort is the priority. However, if the child wishes to return to the former parent again, he will be handed over to them as often as the child pleases. The emotional feelings of the child are of prior concern, complying with his interests.

9. Minor's Choice Regarding Custody in Pakistani Law

In Pakistan, the most prominent statute dealing with the custody laws is the *Guardians & Wards Act 1890*. However, the dependence on judicial precedents for help is due to the lack of clear and expressed provisions in this act regarding custody cases. Mostly, no strict rules are followed in deciding custody matters in Pakistan, and only the child's well-being is solely considered while deciding the case, along with a bit of weightage being paid to the child's willingness and preference unless it conflicts with his best interests. The main principle governing custody cases is the discretion of the courts, which is exercised in various ways up to varying parameters. Keeping in view the Shariah and Pakistani laws, coordination is drawn between the two while deciding such cases (Rana, 2022).

Under Islamic law, the preferential right to choose either of the parents can be exercised above the age of seven. In contrast, under Pakistani law, the age of the majority under the provisions of *section 3 of The Majority Act 1875* is defined as eighteen years except when a court appoints someone to be a guardian for a minor's property, the age of majority is twenty-one years (*The Majority Act, 1875, n.d.*). However, the courts, keeping in view the Shariah Law while deciding the custody cases, interrogate minors below the age of eighteen years and give weightage to their preference if the minor is capable of exercising his intelligence in making the right decision no matter what age limit the statute prescribes. Here, coordination is drawn between the Shariah and Pakistani Law to decide the matter per Islamic injunctions, keeping the child's preference and welfare under prime consideration (Ali, 2006).

As far as the will of a minor is concerned, under Pakistani law, *section 17 of The Guardians & Wards Act, 1890*, gives the right of choice to the minor if he is sane enough to make the right preference. *Section 17(3)* of the statute states that the welfare of minors is of paramount consideration while assigning the guardian, and the wishes and preferences of a minor are given weightage while deciding the matters of custody and guardianship (*1981 CLC 78*) (Sabreen, 2017).

In *Riasat vs Nadia, 2014* Cheema et al. (2020), the child's welfare was the primary question while determining his custody and granting the preferential right of custody to either of his parents. When a minor can make a thoughtful decision, then both the court should equally consider his preference and welfare, and the court must render a decision based on the established parameters in *sections 17 and 25 of The Guardians and Wards Act 1890* (*Guardian and Wards Act 1890, n.d.*). However, before granting the minor's inclination, the court must be convinced that the choice of a minor is an intelligent preference and is in his best interests. Therefore, before considering a minor's preference, the courts question the minors in each case.

In *Naseem Kausar vs Muhammad Saleem (Child's Preference of the Parental Custody, n.d.)*, a boy of 10 years of age was handed over to his mother, who had been remarried and had children for custody because he desired so. The court could not neglect that the boy was a sane person above seven and capable of exercising his intelligence for his welfare and interests. Therefore, his custody was granted to his mother according to his will (Begum, Batool, & Riaz, 2022).

In a case law *PLD 2000 Peshawar 23 (Child's Preference of the Parental Custody, n.d.)*, it was laid down that the minor's wellbeing takes precedence over the father's claim to be the natural guardian of his children. Parents should only use their parental rights regarding their children's interests, protection, and welfare when it comes to their child's well-being rather than the parents' interests and benefits and as per their ease. In this case, the mother of the children had contracted a second marriage, and the children, despite their willingness to go with their mother, were given custody to the father by the District Judge. When assigning custody, the District Judge did not get the youngsters' consent; nonetheless, the High Court granted weightage to the opinion of minors who preferred living with their mother and were sane enough to decide for themselves thoughtfully. It was held that if a woman were married again to someone who wasn't in the forbidden degree of relationship, she wouldn't be barred from receiving her children's custody rights. The court preserved the custody of minors in the mother's favor, and the father was granted the right to see his children once a month.

In the case of *Mst Mehmooda Begum vs. Taj Din (Mst Mehmooda Begum vs. Taj Din (1992 SCMR 809)*, n.d.), it was decided that the rulings issued by the lower courts were impugned as the minor's intelligent preference and welfare were not taken into account and it was ruled that though the father being the natural guardian cannot take care of the minor better than their mother therefore the custody was given to the mother for the welfare of the minors.

In another case reported as *1998 MLD 1697 (Child's Preference of the Parental Custody)*, n.d.), the minors remained in the custody of their stepmother. The paternal uncle requested and was given custody of the minors following the death of their father. The stepmother, also the petitioner, applied for the custody of the minors, stating that the minors had been in her custody for the past eight years after the demise of their actual mother. The minors were examined thrice by the trial courts, and they preferred staying with their stepmother rather than their paternal uncle. The court, therefore, held that minors should remain with a female (stepmother) rather than a male (paternal uncle), keeping in view the preference and will of the minors.

However, contrary to the minor's preference, their welfare is also the main subject in awarding custody. In *Abdul Razzaque vs Dr. Rehana Shaheen (PLD 2005 Karachi 610) (Abdul Razzaque vs Dr. Rehana Shaheen (PLD 2005 Karachi 610)*, n.d.) The Karachi High Court ruled that a minor's preference cannot be the deciding element in custody disputes. In this instance, the children's father passed away, and the mother worked as a doctor. The grandparents contested a custody case against the mother of children aged twelve and eleven years. The grandparents challenged that the mother was a working woman and would not be able to look after the minors properly.

Along with the other facts, it was observed by the court that the mother would do a better job of raising the children because she was a working woman and financially independent than the aged grandparents, plus the children were seen as under the influence of the grandparents that's why they expressed their unwillingness to go with their mother. The mother was granted custody of the children by the court, even though the kids refused to accompany her, holding that in the case of conflict between the minor's preference and their welfare, the latter shall prevail because the primary purpose of granting custody is the protection and wellbeing of the child and no one other than a mother can offer best services for the protection of her child's interests. If the child fails to make the right choice, the courts intervene to secure his best interests. Due to their advanced age, the grandparents in the instance mentioned above were deemed unfit for the children's care and wellbeing, and the court cannot forfeit the right of a mother to her children's custody merely on the ground that she is a working woman, neglecting the fact that she is financially independent too.

In the case of *Shaukat Khalid vs. ADJ Rawalpindi (Shaukat Khalid vs ADJ Rawalpindi (1989 CLC 1377)*, n.d.), the father granted his childless brother care of a minor daughter. Consequently, upon the passing of the minor's brother, the uncle and his spouse applied for custody of the minor, and the child expressed a preference to remain with her uncle's wife, who had raised her since childhood and had a great affection for her. Since the minor's preference is not binding on the courts, and the minor was deemed to be practically living in a household whose head had become a Christian, therefore the minor shouldn't have lived in such a family where the shadow of other religions was cast. According to Pakistani courts, the religion of the custodian and the minor should be the same, and therefore, the petition of her uncle's wife for the custody of the daughter was turned down. Furthermore, according to the provisions of *The Guardians & Wards Act 1890*, the father, if alive, is the natural guardian of the ward unless he seems to be unfit for guardianship and has more right to custody than any other person, in this case, his brother's wife, therefore the custody of daughter was granted to the father.

In *Mst Hamida Bibi vs Station House Officer (Child's Preference of the Parental Custody)*, n.d.), the Lahore High Court ruled that if a child is under the age of majority, the court will inquire about their preferences; if not, the guardian will be granted custody of the child.

It can be true to say that the higher courts in Pakistan still give weightage to the child's preference in custody cases. The major problem lies with the lower courts, who,

without considering the child's preference, are influenced by a father's social and economic status. In another case of *PLD LHC 154 (Mst Karisma Bibi (PLD LHC 154), n.d.)*, the Lahore High Court vehemently disapproved of the lower court's actions, stating that their influence should be limited to safeguarding the child's interests.

In the case of *PLD 2015 Lahore 6 (Child's Preference of the Parental Custody, n.d.)*, the 17-year-old child was residing with his mother. The child admitted before the court that he was being well-looked and nurtured under his mother's supervision and desired to stay with his mother. The court said the mother's custody is lawful and appropriate in the current situation, considering the child's age and preference. It's ironic that if the courts fail to consider the minor's preference, particularly after puberty, in custody matters under *section 17 of the Guardians & Wards Act, 1890*, the courts will fail to exercise their parental jurisdiction in a true sense.

According to Islamic injunctions, the male or female custodian falls under certain obligations that need to be fulfilled before being eligible for custody (*hadanah*) of a child (Rana, 2022). These conditions are as follows:

9.1. Trustworthy & Muslim

The custodian must be a Muslim and must be trustworthy. A person who consistently commits one or more significant sins or engages in such behavior shall not qualify as the custodian. In *Imtiaz Begum vs Tariq Mehmood Sabreen (2017)*, a custodian should not be a sinner (*fasiq*) or dishonest (*kha'in*), according to the ruling of the Lahore High Court. If the court has enough reasons to believe that the person applying for the minor's custody is either a sinner or untrustworthy, he shall be disqualified from getting the custody.

9.2. Ability to Bring Up a Child and Good Moral Character

The custodian must be physically fit for the child's upbringing and have enough strength to bear all the custodial duties and liabilities (Khan, 2020). No person who is either blind, suffering from a communicable disease, or aged enough to look after a child shall be qualified as a custodian. Moreover, a person who is so preoccupied with workload that he can neglect the welfare of the child shall also not be eligible for custody unless he appoints somebody else to carry out the duties of the child on his behalf.

The central aspect that is considered is the child's welfare. It is proposed by the courts that a custodian should be well-settled, financially stable, and educated enough to give the best life to the child, whether it be the mother or the father.

Regarding the custodian's character, the Pakistani courts do not disqualify a mother from attaining custody merely on allegations of lousy character unless proven. In *Munawwar Bibi vs. Muhammad Amin (Munawwar Bibi vs Muhammad Amin [1995 SCMR 1206], n.d.)*, when the mother petitioned for custody, the children's father barred her from having custody because she had poor moral character. The husband brought a zina lawsuit against his spouse. The trial court did not grant the wife custody of the children because of her questionable character, though nothing was proved. The wife contended that her husband had filed such a case to deprive her of custody. Although the trial court found the wife not guilty, the husband appealed the court's ruling. Keeping the wife's contention under consideration, the appellate court gave her custody. On appeal, the High Court awarded the custody back to the father based on lousy character as well as the inability of the mother to maintain her children. The Supreme Court ruled that the mother's acquittal demonstrates her innocence and removes her ineligibility for child custody when determining the children's custody. Regarding maintenance, it was decided that the father had an obligation to provide for his children and that the mother could not lose custody of her children due to her incapacity to do so (Sabreen, 2017).

9.3. Residence

The father is ultimately responsible for the child's care, even though the mother or any other female custodian is typically granted custody (*hadanah*). Due to this reason, the

mother and the child are supposed to live near the father so that the father can supervise the child. However, if the mother wishes to travel afar or move to another place, her right to custody can be compromised. According to the Malikis, Hanbalis, and Shafis, if one of the parents wishes to travel to a far safer place, the child remains with the father whether he is traveling (Zahraa & Malek, 1998).

The Pakistani courts, however, apply their discretion in awarding custody under such circumstances, and the primary focus is on the welfare of the child. In situations where the father resides overseas, courts have been reluctant to grant him custody (Sabreen, 2017).

In *Habib your Rehman vs. Mst Hina Saeed (Habib Ur Rehman vs. Mst Hina Saeed [2010 MLD 544]*, n.d.), the father was living in France, and therefore the courts refused to grant him custody on the ground that it would deprive the mother from seeing her children (Sabreen, 2017).

In *Mst. Fauzia Begum v Amin Saddruddin Jamal Gonji (Mst. Fauzia Begum v Amin Saddruddin Jamal Gonji 2007 CLC Peshawar*, n.d.), the infant was safer with the mother, who lived in Gilgit Baltistan. Thus, the father, a Canadian national, was denied custody because it was not in the child's best interests. The father disagreed that Gilgit is a developing region and that the child would have a better environment and living conditions in Canada, but the courts refused to grant him custody. However, the father was required to provide for his child's maintenance and education and have one monthly visitation at his wife's home (Sabreen, 2017).

10. Remarriage of Either Parent

Remarriage of either parent would lead them to forfeit their right to custody if it's in the minor's best interests (Schlam, 1999). Remarriage of a father also disqualifies him from the custody of the minor because it is supposed by the courts that the step-mother would not be a suitable person to protect the rights and interests of a minor, further posing a threat to his welfare and bringing up in a harmonious environment (Khan, 2020). In *Iftikhar Ahmad Chishti vs District Judge Chakwal*, the father remarried; therefore, he was denied custody of the children on the grounds of remarriage and failure to pay the maintenance to the children.

The fathers usually have been refused custody of their children, and the courts tend to save the child from the stepmothers who have proven to be more cruel than the stepfathers. Similarly, in the case of *Zahid Hussain vs. Tahira Perveen*, the court held that neither a stepmother nor a grandmother could substitute for the biological mother, especially when they have their children to look after (Khan, 2020).

On the other hand, according to a majority of jurists, one condition that a female custodian must fulfill is that she should not remarry after getting custody of a child. Once she is married, her right to custody of a child, whether a boy or a girl, ceases to exist (Khan, 2020). This view of jurists is based on the tradition of the Holy Prophet (P.B.U.H), which is stated (Zahraa & Malek, 1998):

"You have more right to him if you do not marry."

However, if the female custodian marries any relative of the child who is mahram to the child, then the custodian's right will not lapse. The rationale for such an exception is that the relative of the child shares some affection and kindness towards the child even before the marriage with the female custodian. Furthermore, it is presumed that such a husband of the female custodian will be kinder and more merciful towards the child with whom he shares any bond than the one who is stranger to the child. The child's well-being and protection are the primary considerations while determining custody, and when the female marries a stranger, the child may likely suffer from unkind behavior. Moreover, the attention of the female custodian will be diverted from the child towards the new household and the children from her second marriage; therefore, the custodian's right is forfeited upon her marriage to a stranger (Zahraa & Malek, 1998).

On the contrary, in some cases, Pakistani courts have adopted the stance that if it's in the child's best interests and wellbeing, the mother and child shouldn't be separated. In

Muhammad Bashir v Ghulam Fatima and Amar Elahi v Rashida Akhtar, the Lahore High Court ruled that since a mother's disqualification from custody upon a subsequent marriage is not explicitly stated in the Quran, it does not result in the loss of her privileged claim to custody (Sabreen, 2017).

The minor's emotional attachment to one of his parents is another factor taken into account by the courts. In 2004, in the case of *Sardar Hussain and others v Mst. Parveen Umar (Sardar Hussain and Others v Mst. Parveen Umar (PLD 2004 SC. 357), n.d.)*, the child was more emotionally tied to her mother than to her father. Therefore, the father was labeled a stranger to the child. As a result, the Supreme Court granted the mother custody of the seven-year-old minor despite her second marriage.

In *Amar Ilahi v Rashida Akhtar (Child Custody under Shariah Law and Its Practice in Pakistan, n.d.)*, the Lahore High Court held that the father would lose his right to custody of his children in case of failure to provide maintenance and protection of children's interests. In this case, the father of a daughter did not take an interest in the welfare and maintenance of her daughter until the mother remarried. After the contraction of the second marriage of the mother, the father came to claim the guardianship of his daughter, which the court refused on the grounds of his inability to provide maintenance to his daughter; thus, despite her second marriage, the mother was granted guardianship and custody of the girl (Sabreen, 2017).

Regarding custody matters, preference is usually given to the mothers for having custody of the minor, while the father is entitled to his maintenance. In *Muhammad Tahir vs Raees Fatima*, the father's petition for the custody of his children was disapproved on the grounds of his contention that the mother of his children was illiterate, with no proper source of income, and was involved in an illicit relationship. The court held that since the mother had not entered a second marriage after the divorce, she was the fittest person to be the custodian of the children (Javed & Javaid, 2020).

11. Custody on the Death of either Parent

In case a mother dies while the child is under her custody (till the age of seven) until the child becomes seven years old, the maternal grandmother will have custody of the child, and later, it will be transferred to his father. A child's father is their natural protector and custodian in case there's no conflict between spouses; however, upon conflict, the custody is given to the mother if she so desires, but only till the age of seven years of age of the child. The idea of transferring custody to the child's maternal grandmother is less likely to be followed because the father has a privilege under such conditions.

In *Fatima Bibi v District and Sessions Judge Mandi Baha-ud-Din Sabreen (2017)*, the High Court of Lahore granted the custody of the child to the father because the maternal grandmother of the child has six children to look after and therefore, the welfare of the child was going to be compromised.

If the child's father passes away, the mother will be given custody of the child because she has a preferential right over all other blood relatives of the father, including grandparents. Grandparents do not have the right to custody of the child when the mother is present unless the child's wellbeing requires it or the mother is disqualified from falling into the parameters of eligible custodian. However, some jurists argue that the mother shall retain custody of her child till the child reaches seven years of age, and after that, the custody shall be given to the paternal grandfather or grandmother. In comparison, some jurists are of the view that the child shall remain in the custody of her mother even after attaining seven years of age because of the mother's emotional attachment and conditions. The Pakistani courts have not derived any strict rules to be followed in such a case, and custody matters are decided per the child's welfare and interests (Abro, 2014).

In terms of foreign non-Muslim mothers, they typically do not receive custody as the upbringing of the child will become contradictory to Islamic rulings. In *Christine Brass v Dr. Javed Iqbal (Christine Brass v Dr. Javed Iqbal PLD 1981 Peshawar 110, n.d.)*, the mother of the child was Canadian, and thus the mother was not granted custody of the child by the

court because the child's welfare and upbringing would be jeopardized in a foreign country. In *Mrs. Mosselle Gubbay v Khawaja Ahmad Said (Mrs. Mosselle Gubbay v Khawaja Ahmad Said (PLD 1957 (W.P.) Kar 50)*, n.d.), since the mother was Jewish Indian and it was not in the child's best interests to give custody to a non-Muslim mother, the court declined to allow the mother custody (Sabreen, 2017).

Therefore, it follows that in the event of a father's death, the grandfather will be granted custody of the child if the child's mother is not a Muslim, and the mother would be deprived of her preferential rights due to the difference in religion as the primary eligibility of a custodian is that they should be a Muslim.

12. Custody if none of the Parents is Alive

Another essential aspect that drew the attention of the jurists was who would get custody of the child if both of his parents passed away before the child reached adulthood. As stated before, after the death of the father, the grandfather is also entitled to the guardianship and custody of the child, empowered to take over the properties of the child and make decisions about his life, including his marriage, till he enters adulthood age which is defined as twenty-one years in section 3 of *The Majority Act 1875 (The Majority Act, 1875, n.d.)*. Thus, it is derived that when both parents die, the custody of the child shall be given to the paternal grandparents and not to the maternal grandparents. Furthermore, in case of the grandfather's death, this responsibility will be transferred to the father's and grandfather's executor. This is because the latter will be authorized to perform all the duties and liabilities on behalf of the grandfather, including the care and custody of a minor child (Tawakullī, 2021).

13. Custody Laws in Pakistan

The custody laws derive from *The Guardians & Wards Act of 1890*, which is centuries old and requires amendments per modern evolution (Pakeeza & Chishti, 2012). Despite several initiatives to amend the custody laws, nothing could be done, and all such proposals and amendments could not go beyond the paperwork.

Starting from the proposed amendments in the *Act*, the Law and Justice Commission published its report in 2007-2008, declaring provisions 19 41 of the *Act* as discriminatory on a gender basis regarding mothers (Cheema et al., 2020). *Section 19* states that the mother shall not be included in the child's guardianship if the father is still living and deemed suitable to be the child's guardian. This is one of the circumstances under which the Court is not permitted to name a guardian. It was suggested that the term "mother" be added to this clause as well and that if the ward's mother or father is deemed suitable to serve as his guardian, the court should not have the authority to name another guardian.

Likewise, *Section 41(e)* of the *Act* states the grounds under which the authority of a guardian ceases to exist, and one of the conditions includes that if the father is unfit to be the guardian of the ward, then the court shall appoint another guardian of the person or property or both. The Commission reported this provision as discriminatory because mothers were denied the preferential rights to custody over all other relations of the ward, and instead of awarding custody to mothers, the courts were to look for another person as the ward's guardian. An amendment was proposed to include the word 'mother' in this section, too, but all these propositions were ignored, and the gender disparity still prevails in custody laws.

In 2008, *The Guardians & Wards Act Amendment Bill 2008* was proposed in the National Assembly, containing significant amendments to be made to the custody laws, but unfortunately, this *Bill* was never passed. The *Bill* prioritized the child's well-being over other factors and safeguarded the mother's parental rights. The *Bill* also suggested facilitating visitation rights granted to the father and resolving custody disputes discussed under *Section 12* of the *Act*. Furthermore, it was recommended to amend *Section 12(1)* to add a proviso stating that in custody disputes, the mother will receive custody of the ward if the boy is younger than seven years old and the minor girl is younger than sixteen. The court would pass this interim order at the first hearing (Pakeeza & Chishti, 2012).

A bill to improve Child Protection System in Islamabad was introduced in the National Assembly in 2014. The *Bill* generally protected the children's rights, including custody rights, and proposed enforcing their rights, which are protected under the Constitution of Pakistan. The child's age limit was defined as eighteen years, and the children whose parents were unfit to act as their guardians were placed under the definition of '*child at risk*.' The children who fit into this category were sent to child protection agencies or any other individual designated by the appropriate courts, augmenting the courts' authority. The most significant features of this bill were the periodic submission of reports concerning the child's custody and the physical presence of the child in the courts. Furthermore, to ensure the implementation of these laws and prevent unauthorized custody, the Bill further provided the punishment of imprisonment, extending to two years, or a fine of Rs.50,000 or both (Cheema et al., 2020).

Another significant amendment that needs to be addressed is the prolonged litigation of custody cases that usually extends up to three to five years. Such lengthy litigation is detrimental to the ward's emotional health, and therefore, an amendment regarding the period of custody cases should be strictly observed to relieve the child of this chaos. Even with multiple laws passed, the legal framework of custody is still insufficiently defined or precise, and Pakistani courts occasionally settle custody disputes following Muslim personal law and other times in the best interests of the child. However, the ambiguity still prevails as the matters are left to be decided at the court's discretion.

14. Conclusion

The matter of children custody disputes remains undecided due to the dearth of a well-defined and comprehensive statutory provision, which still rests on the courts' discretion. *The Guardians & Wards Act 1890* is the only Act that is mainly followed by the courts in custody disputes, neglecting the fact that this Act is centuries old and requires amendments that are directed more toward the child's welfare and interest rather than focusing on which parent is more eligible for custody, etc. The parents of the ward, especially the non-custodial parents, have to drag themselves into the court repeatedly to seek custody of their child, which is a time-consuming process and takes almost three to five years. Throughout this period, the child suffers the most as there is a constant tug between his emotional attachment to either of his parents. Moreover, a smooth, amicable relationship between the child and his parents is hampered by the irrational limitations and obstacles in visiting privileges imposed on the non-custodial parents, which thus affects the mental health of the ward.

Despite the proposition of several amendments in *The Guardians & Wards Act 1890*, the ambiguities and lacunas still prevail and are the reason behind inconsistent judgments given by the courts. Due to the lack of a comprehensive legal framework regarding custody cases, several questions arising in custody disputes remain unattended. The courts tend to establish a correlation between Shariah law and Pakistani law by exercising their wide discretionary powers to ascertain the protection and welfare of the child's best interests. The exercise of broad discretionary powers by the courts is also a reason for the multidimensional approaches in custody cases, which later act as judicial precedents.

To tackle these difficulties effectively, a comprehensive law designed to meet present requirements should be created to speed up custody battles, prioritize the child's welfare, and avert additional mental health decline. The statute should restrict the courts' ability to use discretion, set precise custody rules, and enforce deadlines for resolving cases. The author suggests that adjustments to current laws should be in accordance with the child's best interests. In conclusion, immediate action is required to revise custody rules and prioritize the well-being of children involved in custody disputes. Policymakers and practitioners need to recognize the need of revising laws to reduce the hardship experienced by innocent children. Delaying action will simply extend the suffering of those affected.

Authors Contribution:

Muhammad Adnan Aziz: introduction section, and original draft

Muhammad Shahid: Justification of objectives, incorporate the comments and finalize the paper.

Aas Muhammad: Complete the Initial draft preparation and incorporate the comments

Muhammad Kashan Jamshaid: Proofread and comments incorporation

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