

Family law relating to child custody in Pakistan

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Abstract

In Pakistan, family law concerning child custody is derived from the Holy Quran, which outlines detailed rights and obligations for minors. In divorce cases, guardian courts assess the child's welfare and resolve parental disputes. Surah Nisa in the Quran explicitly addresses the maintenance responsibilities of parents. If biological parents are deceased, maternal relatives are prioritized for custody. These laws are based on the Quran and Sunnah. Physical custody refers to the child's living arrangements, while legal custody involves adoption or when both parents are deceased. In Islam, single mothers have the right of Hizanat (custody) for both boys and girls and cannot be deprived of it. In Pakistani culture, extended families often mediate in disputes to maintain family harmony.

Keywords: consent, children's rights, guardianship, hizanat period, judicial precedent, mediation

Introduction

In Pakistan, child custody decisions are primarily governed by Islamic law, emphasizing the child's welfare. For younger children, particularly those under seven years old, mothers typically receive custody, reflecting the belief that young children benefit most from maternal care (Siddiqui, 2017). Fathers are usually granted custody of older boys, while custody of girls may remain with the mother until puberty. The courts prioritize the child's best interests, considering factors like parental competence and the child's preferences. Custody decisions can be contested in family courts, where the judge's ruling aims to ensure the child's wellbeing and stability (Goldstein, 2015).

Restating the law concerning child wellbeing, Bartlett and Scott's Columbia Law School article (2014) also elaborated on the criteria for determining child custody. Their research highlighted that the difficulties associated with home transitions are a significant mediating factor in the relationship between parental conflicts and children's adjustment.

In Pakistan, the available literature on children's rights, particularly their right to be heard and issues related to custody following parental divorce, could be more extensive (Sabrin, n.d.). Most of the existing literature centers on the rights of parents rather than those of children (Rafiq, 2014).

Respondents with sole custody perceived that their children were more involved in inter-parental conflicts and had a negative attitude toward the changes between homes compared to those with shared custody (Bartlett & Scott, 2014). The litigants must use

case law to ascertain custody norms because the legislation does not contain comprehensive guidelines in this area. This article identifies legal gaps by analyzing the pertinent Act clauses and case law. It also examines the suggested legislative changes about child custody. This article explores how uniform rules on child custody, consistent with Islamic teachings and current Muslim practices, can be developed for the entire Islamic community. Abro's research paper (2014) analyzed children's welfare by comparing British and Pakistani laws.

Research Justification

Research on child custody in Pakistan is essential due to the complex interplay of cultural, religious, and legal factors influencing custody decisions. This research aims to address several critical gaps:

1. **Legal Framework:** Examining the application of Islamic law and the Guardians and Wards Act of 1890 helps clarify how legal principles are interpreted and enforced in custody cases, highlighting potential areas for legal reform.
2. **Child Welfare:** Investigating the impact of current custody arrangements on children's wellbeing is crucial for developing policies that prioritize their emotional and psychological health.
3. **Policy Recommendations:** The research aims to provide evidence-based recommendations for policymakers, legal practitioners, and social workers to enhance the effectiveness and fairness of custody decisions.

By addressing these areas, this research can contribute to more informed, fair, and child-centered custody practices in Pakistan, ultimately supporting the best interests of children and families.

Research Objectives

1. To understand how custody decisions are made, examine the current legal framework governing child custody in Pakistan, including the relevant statutes, case law, and Islamic jurisprudence.
2. To identify gaps, challenges, and opportunities for reform in the Pakistani child custody system and to propose evidence-based recommendations for enhancing the fairness, effectiveness, and child-centeredness of custody decisions.

Research Methodology

This study employed a systematic review methodology, with research objectives established accordingly. A comprehensive literature review was conducted (Komba & Lwoga, 2020). Research findings were categorized based on their content (Hiver et al., 2021; Petticrew & Roberts, 2006), and classified information was incorporated into the study by organizing it into headings (Gan et al., 2021; Pawson et al., 2005). The evaluation of classified information and titles formed the basis of the study (Page, 2021; Rahi, 2017), ensuring the integrity of the research subject and its contents (Egger et al., 2022; Victor, 2008).

Literature Review

In Pakistan, the available literature on children's rights, particularly their right to be heard and issues related to custody following parental divorce, could be more

extensive (Sabrin, n.d.). Most of the existing literature centers on the rights of parents rather than those of children. It also highlights judges' broad discretion in determining what is in the child's best interest and deciding whether the father or mother should be granted custody (Rafiq, 2014). This article explores how uniform rules on child custody, consistent with Islamic teachings and current Muslim practices, can be developed for the entire Islamic community.

Abro's research paper (2014) analyzed children's welfare by comparing British and Pakistani laws. Both British common law and existing Pakistani laws share a similar approach to assessing children's welfare, although there are differences in their interpretations. The report explains the connection between custody, guardianship, and a child's wellbeing, tracing the development of the Islamic child welfare concept. This concept aligns with the Euro-American idea of children's best interests as established in the United Nations Convention on the Rights of the Child, 1989 (UNCRC) (Fekry, 2018).

When divorcing couples have children, extensive litigation often ensues, as both parents typically seek custody. However, due to Pakistan's legal system and societal structure, children cannot reside with both parents following a divorce. Since one parent is deemed more suitable for raising the children, the courts must award custody to that parent. In making this decision, the courts evaluate specific criteria and circumstances to determine what will best serve the child's welfare and interests (Khan, 2020). Notably, in accordance with Islamic teachings, the father is expected to provide for the family's financial needs and maintain the children. Custody principles can vary based on several conditions, although the child's best interests always justify any deviations.

Child custody is also influenced by the Guardians and Wards Act of 1890. This legislation provides a legal framework for guardianship and custody matters, ensuring the child's best interests are paramount. In contested cases, both parents may present evidence to support their capability to provide a nurturing environment. Financial stability, moral character, and the child's emotional needs are assessed. Joint custody is uncommon, as the court usually awards physical custody to one parent, with the other granted visitation rights. Kanairara and Corrin (2019) explain that within the U.S. legal system, parents possess substantial rights, based on the Constitution, to make decisions regarding their children's health and medical care (Boyd, 2003). Reflecting its dedication to parental rights, the system generally presumes that the interests of parents and children coincide, even when this assumption may be questionable (Bessner, 2002; Elizabeth et al., 2024).

Legal Loopholes in Pakistan Concerning Child Custody

1. Outdated Legislation:

- i. **Guardian and Wards Act of 1890:** The primary legislation governing child custody is over a century old and does not reflect contemporary understandings of child welfare, family dynamics, or psychological needs.
- ii. **Need for modernization:** This act must be updated to incorporate current best practices and legal standards in child custody.

2. Lack of Specificity and Clarity:

- i. **Broad guidelines:** The existing laws provide broad guidelines without specific criteria for determining the child's best interests, leading to inconsistent judicial decisions.
 - ii. **Detailed criteria:** Clear, detailed criteria that consider factors such as emotional bonds, educational needs, and the child's preferences are necessary.
- 3. Integration of Sharia and Secular Principles:**
- i. **Balancing act:** Integrating Sharia principles with secular laws is often unclear, leading to varying interpretations and applications in custody cases.
 - ii. **Unified framework:** Developing a unified legal framework that balances religious principles with modern child welfare standards is crucial.
- 4. Consideration of Child's Voice:**
- i. **Lack of mechanisms:** More mechanisms are needed to consider the child's preferences and views in custody decisions, especially for children old enough to express informed opinions.
 - ii. **Child advocacy:** Implementing systems for child advocates or guardians ad litem to represent the child's interests independently could address this gap.
- 5. Gender Biases and Societal Norms:**
- i. **Traditional roles:** The traditional emphasis on maternal custody for young children and paternal custody for older children reflects gender biases that may not always serve the best interests of the child.
 - ii. **Equitable approach:** Promoting a more equitable approach that considers the capabilities and involvement of both parents is essential.
- 6. Enforcement of Custody Orders:**
- i. **Weak enforcement mechanisms:** The enforcement of custody orders could be more robust, leading to non-compliance and further disputes.
 - ii. **Strengthening enforcement:** Strengthening legal mechanisms to ensure compliance with custody orders is necessary to protect the child's welfare.
- 7. Access to Support Services:**
- i. **Limited support:** Families undergoing custody disputes have limited access to support services such as counseling, mediation, and legal aid.
 - ii. **Comprehensive support:** Establishing comprehensive support systems, including counseling and mediation services, can help families navigate custody disputes more effectively.
- 8. Judicial Training and Awareness:**
- i. **Inconsistent decisions:** The lack of specialized training for child psychology and welfare judges leads to inconsistent custody decisions.
 - ii. **Specialized training programs:** It is crucial to implement specialized training programs for judges and legal practitioners on child welfare and contemporary custody issues.
- 9. Alternative Dispute Resolution (ADR):**

- i. **Underutilization:** ADR methods such as mediation should be utilized in resolving custody disputes, often leading to adversarial court battles.
- ii. **Promoting ADR:** Encouraging ADR methods can help resolve custody disputes more amicably and swiftly, focusing on the child's best interests.

10. Impact of Domestic Violence:

- i. **Insufficient consideration:** Current laws do not adequately address the impact of domestic violence on child custody decisions.
- ii. **Protective measures:** It is critical to implement protective measures and ensure that the child's and non-abusive parent's safety and welfare are prioritized in custody decisions.

Welfare of a Child in Pakistani Laws Regarding Child Custody

The concept of the welfare of a child is central to Pakistani laws regarding child custody, reflecting both statutory requirements and judicial interpretations. Child welfare is considered the paramount concern, guiding courts in custody decisions.

1. Statutory Framework:

- i. **Guardian and Wards Act of 1890** is Pakistan's primary legal framework for child custody cases. It emphasizes the child's welfare as the foremost consideration when appointing guardians. Section 17 of the Act explicitly states that the court must regard the welfare of the minor in determining guardianship.
- ii. **Muslim Family Laws Ordinance of 1961:** This ordinance complements the Guardian and Wards Act by incorporating Islamic law (Sharia) principles, prioritizing the child's welfare, though often within traditional gender roles.

2. Judicial Interpretations:

- i. **Best interests principle:** Pakistani courts consistently interpret the child's welfare to mean the child's best interests. It includes physical, emotional, educational, and moral development.
- ii. **Case-by-case analysis:** Courts evaluate each custody case individually, considering various factors that impact the child's wellbeing, such as the child's age and gender, the parents' financial stability, and the emotional bonds between the child and each parent.

3. Factors Considered in Determining Welfare:

- i. **Age and gender of the child:** Traditionally, young children, especially those of tender years, benefit more from maternal care. Boys are generally under maternal custody until age seven and girls until puberty, after which fathers typically gain custody.
- ii. **Parental capability:** Each parent must provide a stable, loving, and supportive environment. It includes financial stability, moral character, and the capacity to meet the child's educational and health needs.
- iii. **Child's preference:** Their preferences may be considered if the child is of sufficient age and maturity. Courts may interview the child to ascertain their wishes, provided this is deemed in their best interests.

4. Legal Challenges and Reforms:

- i. **Outdated legal provisions:** Over a century ago, the Guardian and Wards Act does not always align with modern understandings of child welfare and family dynamics. There is a need for updated legislation that explicitly outlines comprehensive criteria for determining a child's best interests.
- ii. **Judicial Training:** Enhancing the training of judges and legal practitioners on child psychology, welfare considerations, and non-adversarial dispute resolution can improve custody outcomes.
- iii. **Support services:** Families in custody disputes have limited access to support services such as counseling, mediation, and legal aid. Expanding these services can significantly help address the child's welfare comprehensively.

5. Balancing Sharia and Secular Principles: While Sharia principles influence custody decisions, emphasizing paternal financial guardianship and maternal caregiving roles, the integration with secular legal principles ensures that the child's welfare remains the focal point. Developing a cohesive legal framework harmonizing these aspects can enhance consistency and fairness in custody decisions.

6. Domestic Violence and Child Safety: Current laws need to better address the impact of domestic violence on custody decisions. Ensuring that custody arrangements prioritize the safety and emotional wellbeing of the child and the non-abusive parent is critical.

Discussion

In Pakistan, family law concerning child custody is primarily governed by the Guardian and Wards Act of 1890, the Muslim Family Laws Ordinance of 1961, and Sharia (Islamic law) interpretations. The fundamental principle in Pakistani child custody cases is the welfare of the child, a concept deeply embedded in both statutory and religious legal frameworks.

Under the Guardian and Wards Act, courts determine custody based on the child's best interests, considering age, gender, and overall welfare. Traditionally, under Islamic law, mothers are granted custody (*hizanat*) of young children: boys until the age of seven and girls until puberty. After these ages, fathers typically receive custody, as they are seen as the financial guardians (*wilayah*). However, these norms are not absolute, and courts may deviate from them if the mother's custody is deemed more beneficial for the child's welfare.

The Muslim Family Laws Ordinance significantly modernizes these practices, emphasizing equitable and just treatment in family matters. It has empowered courts to make more nuanced decisions rather than adhering strictly to traditional interpretations. For example, courts have increasingly recognized the importance of emotional bonds, the mother's capability to provide a nurturing environment, and the child's preferences, especially if they are of an age to express reasoned opinions.

Despite these frameworks, the practical application of child custody laws in Pakistan can be complex and influenced by societal norms and pressures. Issues like parental alienation, domestic violence, and financial stability are critical considerations. Furthermore, the judicial system's efficiency and the enforcement of custody orders remain challenging, often requiring additional reforms to ensure the child's welfare is consistently prioritized.

Child custody laws in Pakistan blend statutory regulations with Islamic principles, emphasizing the welfare of the child as the central tenet. While traditional norms grant mothers custody of younger children and fathers of older ones, modern legal interpretations allow for more flexible, welfare-oriented decisions. Courts increasingly consider emotional bonds, nurturing environments, and the child's preferences, reflecting a progressive approach within the framework of the Guardian and Wards Act of 1890 and the Muslim Family Laws Ordinance of 1961. Nonetheless, societal pressures and judicial inefficiencies pose challenges, indicating a need for continued reforms to ensure that custody decisions consistently serve the child's best interests. This evolving legal landscape aims to balance religious traditions with contemporary understandings of child welfare.

Recommendations

1. Enhancing Legal Frameworks:

- i. **Update legislation:** Modernize the Guardian and Wards Act of 1890 to reflect contemporary understandings of child welfare, explicitly incorporating considerations like psychological wellbeing and emotional bonds.
- ii. **Uniform application:** Ensure consistent application of laws across different regions and courts to avoid discrepancies in custody decisions.

2. Judicial Training and Awareness:

- i. **Specialized training:** Provide judges and legal practitioners with specialized training in child psychology and welfare so that they can make informed custody decisions.
- ii. **Awareness programs:** Conduct awareness programs for parents and guardians about the legal processes and the importance of child welfare in custody matters.

3. Support Systems for Children and Families:

- i. **Counseling services:** Establish counseling services for children and parents undergoing custody disputes to mitigate emotional stress and provide support.
- ii. **Child advocacy:** Implement systems for child advocates or guardians ad litem to represent the child's interests independently in court proceedings.

4. Efficient Judicial Processes:

- i. **Timely resolution:** Expedite custody cases to reduce the emotional and psychological strain on children caused by prolonged legal battles.
- ii. **Effective enforcement:** Strengthen mechanisms to ensure custody order enforcement and swiftly address non-compliance.

5. Promoting Mediation and Alternative Dispute Resolution:

- i. **Mediation centers:** Establish mediation centers to facilitate amicable resolutions of custody disputes outside the court system.
- ii. **Parental cooperation:** Encourage cooperative parenting agreements that prioritize the child's best interests and reduce adversarial conflicts.

6. Addressing Societal Norms and Pressures:

- i. **Public education:** Launch public education campaigns to challenge outdated

societal norms and promote the importance of both parents' involvement in a child's upbringing.

- ii. **Gender sensitivity:** Advocate for gender-sensitive approaches in custody decisions, recognizing the evolving roles of both mothers and fathers.

Research Limitations

- 1. Data Availability:** Similar to child marriage, one fundamental limitation in researching family law relating to child custody is the availability and reliability of data. Access to comprehensive and up-to-date data on child custody cases, arrangements, and outcomes may be restricted due to privacy concerns, legal constraints, or limited transparency within the family court system.
- 2. Participant Access:** Researching child custody may involve engaging with parents, children, legal professionals, and other stakeholders involved in custody disputes. Accessing these participants for interviews, surveys, or observations may be challenging due to confidentiality issues, emotional sensitivities, or legal restrictions imposed by court orders.
- 3. Ethical Considerations:** Researching child custody cases raises ethical considerations around ensuring the wellbeing and privacy of involved parties, especially as custody disputes can be emotionally charged and contentious. Researchers must navigate ethical dilemmas related to consent, confidentiality, and potential harm to participants.
- 4. Complexity of Legal Frameworks:** Family law relating to child Custody can be highly complex, varying significantly across jurisdictions and influenced by legal precedents, statutes, and judicial discretion. Understanding and interpreting these legal frameworks accurately in research can be challenging and require specialized legal expertise.
- 5. Bias and Subjectivity:** Research on child custody may be subject to bias and subjectivity, as societal norms, gender stereotypes, or cultural beliefs can influence perceptions of parental fitness, child well being, and custody arrangements. Researchers must be vigilant in minimizing bias and ensuring objectivity in their research approach.
- 6. Sampling Challenges:** Selecting a representative sample of child custody cases for research purposes may be difficult due to the heterogeneity of custody arrangements, family dynamics, and legal outcomes. Researchers must consider sampling strategies that account for these complexities while maintaining the integrity and validity of their study.

Research Implications

- 2. Judicial Practices and Training:**

- i. **Best practices:** Research can identify best practices in custody decisions, enabling the judiciary to adopt more consistent and child-centric approaches.
- ii. **Training programs:** Findings can inform the design of judicial training programs focused on child psychology, welfare considerations, and non-adversarial dispute resolution methods.

3. Child Welfare and Development:

- i. **Impact studies:** Research can investigate the long-term effects of different custody arrangements on children's emotional and psychological development, helping to refine criteria for custody decisions.
- ii. **Child perspectives:** Studies that include children's voices and experiences can better understand their needs and preferences, influencing more empathetic and effective custody rulings.

4. Socio cultural Dynamics:

- i. **Cultural sensitivity:** Research on the cultural dynamics affecting family structures and custody decisions can guide the development of culturally sensitive legal practices.
- ii. **Challenging norms:** Academic studies can challenge and reshape societal norms and stereotypes about gender roles in parenting, promoting more balanced and equitable custody decisions.

5. Implementation and Enforcement:

- i. **Effectiveness analysis:** Research can assess the effectiveness of existing custody laws and enforcement mechanisms, identifying gaps and areas for improvement.
- ii. **Policy implementation:** Studies on implementing custody orders can highlight challenges and propose solutions to ensure better compliance and support for affected families.

6. Alternative Dispute Resolution:

- i. **Mediation success:** Research can evaluate the success of mediation and alternative dispute resolution (ADR) methods in custody cases, providing evidence for their broader implementation.
- ii. **Parental cooperation:** Studies can explore the factors that promote or hinder parental cooperation in custody arrangements, leading to strategies that facilitate amicable settlements.

7. Legal and Social Support Systems:

- i. **Support services:** Research can identify the need for and impact of support services such as counseling and child advocacy, advocating for their integration into the legal process.
- ii. **Community programs:** Evaluations of community-based programs can demonstrate their effectiveness in supporting families through custody disputes and guiding policy and funding decisions.

Future Research Directions

1. Comparative Legal Analysis:

- i. **International best practices:** Conduct comparative studies of child custody laws and practices in different jurisdictions to identify international best practices that could be adapted to the Pakistani context.
- ii. **Sharia and secular law integration:** Explore how other countries with Islamic legal frameworks integrate Sharia with secular child custody laws, providing insights for legal reforms in Pakistan.

2. Impact of Custody Arrangements on Child Development:

- i. **Longitudinal studies:** Undertake longitudinal research to track the long-term impact of various custody arrangements on children's psychological, emotional, and social development.
- ii. **Child wellbeing metrics:** Develop and utilize comprehensive metrics to evaluate the wellbeing of children in different custody situations, providing data to inform judicial decisions.

3. Sociocultural Influences:

- i. **Cultural attitudes:** Investigate how cultural attitudes towards gender roles and parenting influence custody decisions and outcomes, offering strategies to address biases.
- ii. **Community perceptions:** Study community perceptions of custody laws and the judicial system to identify barriers to fair and effective custody resolutions.

4. Effectiveness of Legal Reforms:

- i. **Policy evaluation:** Assess the impact of recent and ongoing legal reforms on child custody outcomes, identifying strengths and areas for improvement.
- ii. **Judicial training impact:** Evaluate the effectiveness of training programs for judges and legal practitioners in improving custody case outcomes.

5. Alternative Dispute Resolution (ADR) Mechanisms:

- i. **Mediation efficacy:** Research the effectiveness of mediation and other ADR methods in resolving custody disputes, focusing on their impact on child welfare and parental satisfaction.
- ii. **Barriers to ADR:** Identify barriers to adopting and succeeding ADR methods in custody cases and propose solutions to increase their use and effectiveness.

6. Child Participation in Custody Decisions:

- i. **Voice of the child:** Explore methods to effectively incorporate children's voices and preferences in custody decisions, ensuring their rights and interests are adequately represented.
- ii. **Age-appropriate mechanisms:** Develop age-appropriate mechanisms for eliciting and considering children's views in judicial processes.

7. Support Systems for Families:

- i. **Role of counseling:** Investigate the role and effectiveness of counseling services

for children and parents involved in custody disputes.

- ii. **Community support networks:** Study the impact of community support networks and programs on families undergoing custody disputes, highlighting successful models that could be expanded.

8. Legal Enforcement and Compliance:

- i. **Enforcement challenges:** Examine challenges in enforcing custody orders, identify factors that hinder compliance, and propose solutions to ensure better adherence.
- ii. **Innovative enforcement mechanisms:** Research innovative mechanisms for enforcing custody arrangements, focusing on approaches prioritizing the child's welfare.

9. Gender Dynamics in Custody Cases:

- i. **Father's involvement:** Investigate the evolving role of fathers in custody cases, examining societal and legal factors that influence their involvement and outcomes.
- ii. **Gender bias:** Analyze potential gender biases in custody decisions and their impact on children and parents, offering recommendations to promote gender equity.

10. Technology and Custody Arrangements:

- i. **Virtual visitation:** Explore the use of technology in facilitating virtual visitation and maintaining parent-child relationships in custody arrangements.
- ii. **Digital tools for co-parenting:** Study the effectiveness of digital tools and platforms designed to assist co-parenting and manage custody arrangements.

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