

Kitabiyyah Mother and Ḥaḍanah of the Muslim Child: Religious and Legal Practices in Pakistan

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Abstract

The article attempts to analyze the religious and legal practices inside Pakistan regarding the issue of the kitabiyyah mother and ḥaḍanah of any Muslim child. The discussion primarily addresses the major issues emphasizing kitabiyyah mother and her relatives' right to retain the custody of the Muslim child, and duration of ḥaḍanah under the supervision of kitabiyyah mother in shari'ah and Pakistani Family Laws. Furthermore, it argues that kitabiyyah mother is permitted to raise the Muslim child according to her faith under both Islamic and Pakistani Family Laws. The article is delimited to the opinions of four Sunni schools of thoughts, Statute law, and Case laws. Nonetheless, in-depth comparative analysis has been carried out in most persuasive way to examine the rules related to kitabiyyah mother in custody of Muslim child after divorce under both Islamic Law, and Case Laws in Pakistan. Additionally, the existing similarities and differences consequent to religious differences have also been appropriately figured out to point out plausible way forward to address prevailing schism. Contradictions between the legal practices and Islamic law need keen attention Islamic and legal scholars to carefully craft to harmonize both in the best interest of child.

Keywords: *Kitabiyyah mother, Ḥaḍanah, Guardians and Wards Act 1890, Religion, Islamic Law, Pakistani Family Law*

Introduction

The Arabic term 'ḥaḍanah' is used for the custody of the minor child in Islamic Law, which means custody of the minor by the one who has right to care him. Thus, it means to protect the minor¹ from harmful things who cannot independently manage his/her affairs, additionally provide him/her lodging, maintenance (e.g. food, drink, dress, bed and other necessities of life) and grooming (washing hand, head, clothes) etc.²

Whereas, the term 'custody' is used for the upbringing of the minor child under the Guardians & Wards Act, 1890 in Pakistan, but this term is not

defined in the Guardians & Wards Act, 1890 except the term guardianship which is used for the person who can care the child and is also known as custodian. However, the term custody is defined in various Case Laws as in case of *Juma Khan v. Gul Ferosha*,³ the Peshawar High Court defined the term custody and held that it means actual or constructive possession of the minor for the purpose of protection and upbringing. Yet, custody for the purpose of jurisdiction means 'actual custody' and not the 'constructive custody'⁴ while "protection" denotes the meaning of preservation and "care" denotes the meaning of responsibility with the intention to promote the welfare of the child.⁵ Likewise, in *Sultana Begum v. Mir Afzal*,⁶ custody means 'upbringing of the minor child by the mother or someone legally entitled to it'.

In Pakistan, the term 'guardianship' and 'custody' have used interchangeably. Therefore, provisions of the guardianship over a person are being applied on the custody matters since Statute Law and Case Laws do not distinguish between the terms *ḥaḍānah* (custody) and *wilayah* (guardianship) whereas the Islamic law, elaborates it quite amply. For that reason, the Pakistani Courts have used these terms interchangeably and considers that custody is a kind of guardianship and consequently the distinction between custody and guardianship is blurred in the Case Law.⁷ In this regard, s. 4 of the Guardians and Wards Act, 1890 defines the term guardian as "a person having the care of the person of a minor or of his property or of both person and his/her property".⁸ The concept of the guardian in the Guardians Act has also been used in the sense, which includes the person who possesses the custody of the minor⁹, which can be enforced through the judicial proceedings.¹⁰

In Pakistan, the Guardians and Wards Act, 1890, regulate the custody disputes between Muslim parents. Contrarily, the Guardians and Wards Act, 1890 does not directly addresses the issue of *ḥaḍānah* of the Muslim child by *kitabiyah* mother in detail¹¹ except that the framework which has been set forth for the Guardian Court under the Guardians & Wards Act, 1890 to resolve the custody disputes between Muslim parents and same are also applied for the *ḥaḍānah* of the Muslim child by the *kitabiyah* mother in Pakistan. In this regard, s.7 empowers the Guardian Court to pronounce an order for guardianship of a person while s. 17 explains the important factors, which are essentially required to appoint a guardian keeping in view the welfare of the child. Whereas s. 25 explicitly addresses the custody issues e.g., s. 25(1) declares that if a child has been removed under the custody of the guardian and the Court considers that it will be for the welfare of the child then the child may be returned under the custody of the guardian. For the purpose of enforcement of order, the Court may arrest the child and deliver him back into the custody of the guardian.¹²

Interestingly due to lack of clear jurisdiction, the judges of Pakistani Courts have adopted different approaches to decide the *ḥaḍānah* of the Muslim child by awarding or rebutting custody to *kitabiyah* mother by

following or ignoring the rules of Islamic Law especially on the ground of religion. Therefore, it is essentially required to explain the rules of the ḥadānah of the Muslim child by *kitabiyyah* mother in detail under Pakistani Law, which may aid to setup a framework for judiciary to resolve the custody disputes on the ground of religion.

Literature Review

The topic "*kitabiyyah* mother and ḥadānah of the Muslim child" has not drawn enough attention of the contemporary scholars and legal writers to address the very important issue in true perspective. In general, there is plenty of literature, which discusses the custody issue by Muslim parents in detail but these texts, do not discuss the perspective of ḥadānah of the Muslim child by *kitabiyyah* mother in Pakistan.

Although, all classical books discuss the rights of children especially upbringing (*ḥadānah*) of the Muslim child under the care of Muslim mother in detail, but rules about the ḥadānah of the Muslim child by *kitabiyyah* mother have been briefly explained in few books, such as *al-Khirshi 'ala Mukhtasar Sidi Khalil*,¹³ *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*,¹⁴ *Kashshaf al-Qina' 'an Matn al-Iqna'*,¹⁵ *Radd al-Muhtar 'ala al-Durr al-Mukhtar*,¹⁶ *Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj*,¹⁷ *Hashiyah 'ala al-Sharh al-Kabir li-abi al-Barakat Sidi Ahmad al-Dardir 'ala Khalil*,¹⁸ *al-Mughni*,¹⁹ *al-Mudawwanah tul-Kubra*,²⁰ and *Asna al-Mutalib Sharh Rawd al-Talib*²¹.

Whereas, legal writings on ḥadānah of the Muslim child by *kitabiyyah* mother in Pakistani Family Law are astonishingly almost non-existing, barring few writings on child custody disputes by Muslim parents under the provisions of the Guardians and Wards Act, 1890. Even under this Act, the issue has been dilated in general way such as "*A Handbook on Family Law in Pakistan*"²² explains the custody disputes in the light of contemporary writings, *fatawas* and only mentions a few issues by Case Law. Similarly, "*The Code of Muslim Family Laws*"²³ and "*Manual of Family Laws in Pakistan*"²⁴ provide information on the issue of custody disputes cursorily. Likewise, the book "*Principles of Mahomedan Law*"²⁵ "*The Muslim Marriage, Dower & Divorce*"²⁶ and "*Muslim Family Laws*"²⁷ discuss minimum aspects of child's custody though focusing on welfare of the child in comparatively and comprehensive way. Additionally, two other books on custody issues: "*A Code of Muslim Personal Law*"²⁸ and "*Outlines of Muhammadan Law*" discuss some issues or one may say few cases from the perspective of *kitabiyyah* mother under the title of custody by Muslim parents randomly.²⁹

Likewise, the contemporary writings, "*Family Law in Islam, Theory and Application*"³⁰ discover the legislation on the issues of child's custody in the context of classical law and Muslim countries in a comprehensive way. Another prominent writing "*Women and Islamic Law in a Non-Muslim State*"³¹ where the author analyzes the custody issue while focusing on by emphasizing the conflicting area. Although, it is an informative peace of work but the author does not holistically completely addresses the issue of the

Islamic Law, as he has merely cited few significant cases, Statute Law while wholly ignoring the provisions of Law and ignored to provide references from the Holy Qur'an and *Sunnah*. Nevertheless, it will be fair to say that mostly, the contemporary writings explore the custody disputes by Muslim parents in detail and quote some cases about the *ḥadānah* of the Muslim child by *kitabiyah* mother as without specifying any title.

Similarly, there are myriad of articles, which discuss the custody issue from the perspective of the Muslim parents. Among them the significant one is "*Child Custody in Pakistan: The Role of Ijtihad*",³² which briefly explains the custody rules under Islamic Law, Guardians and Wards Act, and Case Law. The article elaborates the role of Ijtihad and its effects on custody decision before and after 1964. Similarly, the article "*The Best Interests of the Child: A Prevailing Consideration within Islamic Principles and a Governing Principle in Child Custody Cases in Pakistan*",³³ covers the issue of parental child abduction and presents a brief review about the custody issue and critically evaluates the principle "*best interest of child*". Another article "*Law on the Custody of Children in Pakistan: Past, Present and Future*", the author only critically evaluates the Guardians and Wards Act, 1890 and provide the detail rules of custody between Muslim parents.³⁴

Nevertheless, one can hardly find any exposition on the issue of the *ḥadānah* of the Muslim child by *kitabiyah* mother whether she opted to reside in Pakistan or in any of the other country. Though, such issues are indirectly discussed in various classical books, legal and contemporary writings, articles, which cover some aspects of the above-mentioned matter. Therefore, it seems quite cogent to assemble and explore all Islamic and legal rules concerning this highly significant issue at one single place with a view to analyze the different aspects of legal theory in the light of Islamic Law to ascertain the similarities and differences between the two paradigms. This would afford legal and religious scholars to further explore whereby to find out the solution of conflicted areas. Thereby, to frame the theory for Courts to address lacunas, which exist in Statute Law is required to explore in the light of Islamic Law such as requirement for the appointment of *kitabiyah* mother as custodian, duration of custody, issue of child's religion, mother's right to raise the child according to her creed, decorum on welfare of the child, wishes of the child, visitation right, place of child custody, and rules of travelling with any parent, etc.

Research Questions

The research is based on significant questions such as what are the religious and legal rulings in Pakistan to address the issue of the *kitabiyah* mother and *ḥadānah* of the Muslim child? How such custody disputes are settled under the Guardians and Wards Act, 1890? Whether the *kitabiyah* mother and her relatives have right to hold the custody of the Muslim child under Islamic and Pakistani Family Law? What is the duration of the *ḥadānah* of the Muslim child under the supervision of *kitabiyah* mother in Islamic and

Pakistani Family Law? Whether the child has right to choose the *kitabiyyah* mother as a guardian? And whether *kitabiyyah* mother is permitted to raise the Muslim child according to her faith under Islamic and Pakistani Family Law?

Research Methodology

The research analyzes the theoretical rules of the custody disputes in the light of Islamic Law. For this purpose, the comparative method has been applied to determine the similarity and differences, which exist in legal and religious practices arising as a result of religious differences. The study is based on cases between Muslim father and *kitabiyyah* mother. These cases have been critically evaluated to examine the approach of the Guardian Court to resolve the issue of custody disputes under the Guardians and Wards Act, 1890 and Islamic Law.

Religious Rulings regarding Kitabiyyah Mother and Ḥaḍanah of the Muslim Child

In Islamic Law, it is the obligatory duty of both parents to care the child befittingly but after separation between them; the jurists deal the issue of custody differently by giving the preferential right to one parent having different faith. With regard to the *ḥaḍanah* of the Muslim child by *kitabiyyah* mother, Hanafi and Maliki jurists preferred the *kitabiyyah* mother and said the *kitabiyyah* (Christian or Jewish or Magians or disbeliever) mother could retain the custody of the Muslim child. The simple reason is that she is just like the Muslim mother for the custody of the minor as *ḥaḍanah* based on kindness, therefore, the Muslim child to be placed under the custody of the *kitabiyyah* mother. However, Imam Malik added that Jewish, Christians and Magians mothers could not retain the custody of adult female child.³⁵ Contrarily, Imam Shafi'i and Hanbali jurists stressed the importance of religion, therefore, their fundamental consideration with regard to custody had been professing of religion. To that end, professing the religion of Islam is an essential condition to become the custodian of the Muslim minor; otherwise, she loses the *ḥaḍanah* of a Muslim child. Imam Shafi'i relies on the *hadith* as it is quoted that "Holy Prophet gave a boy the choice between his Muslim father and polytheistic mother and he inclined towards his mother" then Holy Prophet prayed:

"اللَّهُمَّ اهْدِهِ، فَتَوَجَّهَ إِلَى الْمُسْلِمِ، فَقَضَى لَهُ بِهِ"³⁶

"O Allah! Guide him and he turned towards the Muslim and he ruled that he should go with that parent".³⁷

Similarly, Hanbali jurists depend on the following tradition of Prophet as it is reported that:

"أَنَّهُ أَسْلَمَ، وَأَبَتْ امْرَأَتُهُ أَنْ تُسْلِمَ، فَأَتَتْ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ: ابْنِي وَهِيَ فَطِيمٌ أَوْ شِبْهُهُ، وَقَالَ زَانِعٌ: ابْنِي، فَقَالَ لَهُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: ائْعُدِّي نَاحِيَةً، وَقَالَ لَهَا: ائْعُدِّي نَاحِيَةً، قَالَ وَأَقْعَدِ الصَّبِيَّةَ بَيْنَهُمَا، ثُمَّ قَالَ: ائْدْعُواهَا فَمَالَتْ الصَّبِيَّةُ إِلَى أُمِّهَا، فَقَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: اللَّهُمَّ اهْدِهَا فَمَالَتْ إِلَى أَبِيهَا، فَأَخَذَهَا"³⁸.

"Rafi' embraced Islam and his wife refused to embrace Islam. She

came to the Prophet and said: My daughter, she is weaned or about to wean. Rafi'said: My daughter. The Prophet said to him: Be seated on a side. And he said to her: Be seated on a side. He then seated the girl between them and said to them: Call her. The girl inclined to her mother. The Prophet said: O Allah! Guide her. The daughter then inclined to her father and he took her".

The Hanafi and Maliki jurists do not distinguish between the Muslim and *kitabiyah* mother, as per them she is just like Muslim mother in this context. Therefore, they adopted the flexible decorum on the issue of religion and declared that religion of Islam is not an essential condition to become the custodian of the Muslim child by *kitabiyah* mother; therefore, they give the preferential right to *kitabiyah* mother. Contrary to it, Shafi'i and Hanbali jurists adopted the strict position on the issue of religion and said religion is the essential precondition to become the custodian of the Muslim child even for *kitabiyah* mother. They do not give the preferential right to *kitabiyah* mother in the presence of Muslim father due to fear that mother would influence the child's belief and the child would not be brought up according to the religion of Islam while the primary objective of the Maqasid al-Shari'ah is to protect and preserve the religion. The opinion of Hanafi and Maliki jurists seemed preferable in this issue.

Sequentially after mother, this right transmits to female relatives and in the absence or disqualification of female relatives, this right passes on to male relatives who stand within prohibited degree of relation with child. In this regard, Hanafi jurists gave preference to the maternal grandmother after the mother to raise the Muslim child and declared that she is entitled to take care of the child either she is Muslim or *kitabiyah* or *dhimmiyah*. However, in case of disbelieving mother, the paternal grandmother has given priority and considered most suitable to take care of the child.

Moreover, Imam Muhammad and Imam Abu Hanifah said *kitabiyah* mother's relatives have no right to hold the custody of the Muslim child because it is essentially required that blood relatives must be Muslims, otherwise close relatives have no right to hold the custody of the Muslim child, since this right is not approved in favour of any person except the mother.³⁹

Likewise, Imam Shafi'i said "guardian must be Muslim because disbeliever has no *wilayah* on him, thereby; it may corrupt (*fitnah*) the religion of the minor". Similarly, Hanbali jurists said there is an immense harm in it as she (disbeliever mother) would not only corrupt the child's religion but may move away the child from the ambit of Islam by imparting education inclining him/her to disbelief and grooming him/her against his/her religion. It is established that *kafalah* and *hadanah* is necessary to protect the interest of the child, thus, if child is left alone under her custody then she will harm the child's religious identity, therefore, it is necessary to protect the child from that harm.⁴⁰

Consequently, the opinion of Hanafi jurists seemed more correct as

kitabiyyah maternal grandmother is entitled to keep the custody of the Muslim child. Thus, there is consensus of the jurists that *kitabiyyah* mother's relatives (either female or male blood relatives) are not entitled to become the custodian of the Muslim child as all jurists strictly affirmed that it is essentially required that blood relatives must be Muslims since this right is not approved in favour of any person except the *kitabiyyah* mother's mother.

However, with regard to the issue 'duration of the *ḥaḍanah*' of the Muslim child by *kitabiyyah* mother, the jurists have different opinions regarding it. In this regard, Hanafi jurists is of the view that the *kitabiyyah* mother could hold the custody of the minor child until he or she has acquired the religious discretion, after which the child would be removed from her custody due to the possibility of harm. Likewise, if the mother is a disbeliever even then the child (either a boy or girl) would be removed when he or she has attained the discriminating age as there is a fear that she might teach the child her own creed if the child remain under her care after discriminating age.

In this regard, Abu Bakr Ahmad bin 'Ali al-Razi stated that she is entitled for the custody of the minor girl and boy until they acquire the age of religious discretion, subsequently her right would become forfeited because of the concern of educating him/her of her own religion. Another opinion about the concern that, if there is fear that she may feed him/her pork or wine, then do not remove the child from her custody but confine her (woman) with Muslim vicinity.⁴¹

Contrary to it, Imam Malik is of the view that there is no need to remove the child from her custody as Christian or Jewish mother deserves more for the custody of her minor child except the adult female child because of fear that place is unsafe (*hirz*) for her. Furthermore, Imam Malik said if there is a fear that she may feed pork or wine to the child then it is essential first to observe the circumstances before removing the child from her custody, nonetheless, if she intends to do so then prevent her first from doing so and do not remove the child. However, if fear persists that she will do so then confine her with the Muslim vicinity so that she cannot feed the prohibited food to her child.⁴²

The Maliki and Hanafi jurists have adopted the constructive approach on this issue by approving the custody of minor child to *kitabiyyah* mother but disapproving the custody of adult child. The Hanafi jurists distinguish between the minor (male or female) and the adult (male or female) child. The Hanafi jurists permitted the custody of minor child to *kitabiyyah* mother and have adopted two opinions on this issue, one is that when child has acquired the age of seven year then remove the child from her custody and second opinion is that to confine the *kitabiyyah* mother with Muslim community. Contrary to it, Imam Malik permitted the *kitabiyyah* mother to hold the custody of the minor child (either male or female) and the adult child (only male). In this regard, Imam Malik has two opinions, one is that if there is a fear that she intends to feed the prohibited food then warn her but if there is a

fear that she will do so then confine her with Muslim community. Thus, *kitabiyah* mother could hold the custody of male and female child up till seven years of age according to Hanafi and Maliki jurists and afterward it would be shifted to Muslim father except the male child according to Imam Malik. The opinion of Hanafi jurists seemed correct in this issue e.g., removes the child from the custody of *kitabiyah* mother when he or she has attained the age of seven years. However, if the interest of the child demands contrary to it, in this regard, approach of both schools are alike by suggesting to confine the *kitabiyah* mother with Muslim community when the child have attained the age of seven years in order to secure the interest of the child including religious identity, physical and moral well-being.

With regard to child's religion, there is consensus among the jurists that child presumably has to follow the religion of his father as child inherits his/her father's religion and is therefore Muslim.

In addition to it, there is consensus of the jurists that *kitabiyah* mother is not permitted to raise the Muslim child according to her faith. Moreover, mother is even not permitted to remove the child to non-Muslim state even though mother is inhabitant of that particular non-Muslim state as per according to Shafi'i jurists.⁴³ Thus, it offers provide an opportunity to *kitabiyah* mother to gain the *hadanah* of the Muslim child conditionally, i.e. by imposing certain restrictions which includes prohibition from taking the child to non-Muslim places of worship or non-Muslim state, abstaining teaching them religion other than Islam and from asking them to eat pork or to consume alcohol.

The jurists have succinctly explained the detail rules about the visitation right to non-custodian parents, place of residence for child custody, travelling of child with parent, welfare of the child, and wishes of the child to choose a parent as custodian in detail from the perspective of Muslim parents.

Finally, with regard to child's wishes, the Hanafi jurists permitted the adult child (either male or female) to exercise his/her option with the restriction of trustworthiness. Contrary to it, majority jurists acknowledge the choice of the *mumayyiz* (either male or female above seven years) but do not acknowledge the choice of the *sabi ghayr mumayyiz* (who is under the age of seven years) except the Hanbali jurists who only awarded the choice to male child under two conditions, which states that firstly selected parent must be eligible and secondly male child must be sane.⁴⁴ The Hanafi jurists acknowledge the choice of the adult child (either male or female) with the restriction of trustworthiness. Contrary to it, majority jurists acknowledge the choice of the *mumayyiz* (either male or female above seven years) and do not acknowledge the choice of the *sabi ghayr mumayyiz* (who is under the age of seven years) except the Hanbali jurists who only acknowledge the choice of male child with restrictions. The opinions of majority jurists seemed strong in this issue keeping in view the interest of the child with the restriction of eligibility of parent.

Kitabiyyah Mother and Ḥaḍanah of the Muslim Child: Legal Practices in Pakistan

In Pakistan, custody disputes between Muslim parents are being regulated under the Guardians and Wards Act, 1890, but there has been no separate law, which deals with the issue of the *ḥaḍanah* of the Muslim child by *kitabiyyah* mother. However, disputes of the *ḥaḍanah* of the Muslim child by *kitabiyyah* mother are being decided under the Guardians and Wards Act, 1890. Although, the Guardians and Wards Act, 1890 is silent to describe the position of *kitabiyyah* mother concerning the custody of Muslim child but Case Law concludes that practices of the Courts have two different approaches on this issue whereby in certain cases admitting the custody of Muslim child in favour of *kitabiyyah* mother or rebutting by not awarding the custody of Muslim child to *kitabiyyah* mother.⁴⁵ As in *Mrs. Mosselle Gubbay v. Khawaja Ahmed case*,⁴⁶ where the mother was a Jew and an Indian national, the Karachi High Court considered it improper to award the custody of the Muslim children to the Jewish mother.⁴⁷ Likewise, custody had not been awarded to Christian mother in the case of *Christine Brass v. Dr. Javed Iqbal*⁴⁸ and in *Sara Palmer v. Muhammad Aslam* cases.

The Courts' stance on child's religion is in harmony with Islamic Law that the child must be brought up in accordance with the father's religion because a minor is presumed to have inherited the father's religion under the law. Therefore, it is binding on the guardian to groom and bring up the child according to the father's religion and same has been manifested by the Court in the case of *Nadir Mirza v. Munni begum*.⁴⁹ Likewise, in *Mst. Atia Waris v. Sultan Ahmad Khan*,⁵⁰ it was held that "the minor must be presumed to have the father's religion and corresponding civil and social status" while in *Grace Abdul Hadi Haqani v. Abdul Hadi Haqani*,⁵¹ the Court held that "the child always follows the religion of the father". Yet, in present, those cases where custody of the Muslim child is awarded to *kitabiyyah* mother, however, the Court did not ensure implementation of these rules where custody of the Muslim child has been awarded to *kitabiyyah* mother.

Moreover, the statute law is silent to provide the detailed list of the entitled person having right to keep the custody of the Muslim child albeit, the Case Law, which explains that *kitabiyyah* mother is entitled to keep the custody of the Muslim child because she is being like Muslim mother.⁵²

Furthermore, there are certain stipulations for those people who are desirous to become custodian in Islamic Law. Although, the Statute Law did not describe the criteria for the appointment of the custodian but these stipulations have been extracted from various Case Laws, which also uphold the position of Islamic Law where both parents are Muslim. While as concerned to the custody of the Muslim child by *kitabiyyah* mother, the Case Law endorses that custodian must be Muslim and should have the same religion as of the minor.⁵³ Hence, an apostate person is devoid of all rights including custody; therefore, an apostate mother cannot hold the custody of

the minor except the *kitabiyah* (Christian or Jewish) mother.⁵⁴

Likewise, the Guardians and Wards Act, 1890 is silent about the duration of the custody of the Muslim child under the supervision of the *kitabiyah* mother, however, the Case Law provides brief guidelines about the duration of custody that too only in those cases where both parents are Muslim. On the contrary, where both parents profess divergent religion, the Statute Law and Case Law do not laydown any rule or guidelines. This is presumably because in Pakistan, custody orders are being awarded on permanent basis without regard to the age and gender of the minor except where non-custodian parent demand it on the basis of solid evidence. Above it, practice of the Courts have not remained uniform in this regard in the past; for instance, the Courts refused to award the custody to the non-Muslim mother⁵⁵ but, at present, the Guardian Courts have acknowledged the non-Muslim women right to hold the custody of the Muslim child permanently without precondition of securing the religion of the child, access to father and taking certain other major decision about child in numerous cases.⁵⁶

Additionally, in Pakistani Family's Law, the minor's choice is considered only when minor has attained an age of forming an intelligent preference along with the welfare of child. However, approach of the Guardian Court is somewhat different and more according to the facts and circumstances of the each case. In some cases, Courts have asked the minor's choice and considered it only when they feel that it has been in his/her interest. But where Court felt that his/her choice contradicted with the 'welfare principle' then preference had been given to welfare as the minor is not considered the best judge to determine his/her welfare such as in case of *Ms. Louise Anne Fairley v. Sajjad Ahmed Rana*, the wishes of the discriminating child had not been acknowledged by the Guardian Court and the child was returned to the French Christian mother.⁵⁷ Besides, the Statute and Case Law do not provide the detailed rules about the visitation right to non-custodian parents, place of residence, travelling of child with parent, and welfare of the child from such perspectives.

Interestingly, the Courts of Pakistan have adopted different positions in deciding the custody disputes on the grounds of religion especially in those cases where the parents have different faith.

In the past cases, where the non-Muslim foreign mothers claimed the custody of her children born from Pakistani Muslim father, the Courts had tended to favour the fathers on the ground of religion and refused to award the custody to the non-Muslim mother.⁵⁸ Similarly, in a landmark case *Mst. Atia Waris v. Sultan Ahmad Khan*,⁵⁹ where the minor girl born of a Muslim father and a Christian mother, the Court disqualified the mother on the basis of her religion and held that the mother was not likely to bring up the child as per the Muslim religion. Consequently, the custody was granting to the paternal aunt to ensure that the child was nurtured in the religion of his father. For instance, in *Mrs. Mosselle Gubbay v. Khwaja Ahmad Said*,⁶⁰ the Jewish

mother married a Muslim man according to the Muslim Law in India and had two children (a son and a daughter). After dissolution of marriage, the custody of the children was given to the mother. Thereafter, the said father brought the children to Karachi. The Contempt proceedings were initiated in Calcutta High Court against him while the mother filed a criminal case for kidnapping of the two children under s. 368 PPC in Pakistan and later filed a *habeas corpus* petition. The High Court in this case held that:

“It would be improper to award the custody of two Muslim children to a Jewish mother who is an Indian national and actually residing there. With regards to concerns of committing the contempt of the High Court of Calcutta, Court maintained that it was not the real issue as real issue had been related to the custody of the children”.

In another interesting case, *Mrs. Grace Abdul Hadi Haqani v. Abdul Hadi Haqani*, even though the Muslim father had declared that his daughter to follow her Christian mother’s religion but it didn’t amount to abandonment of the custody right of the child. It was so held by the Court that “the father has right of the custody of his daughter”.⁶¹ In *Miss Christine Brass v. Dr. Javed Iqbal*,⁶² the custody of the abducted minor was refused to the Canadian Christian mother on the grounds of religion even though she had custody order from the Court of the minor’s habitual place of residence. The Muslim father has a legal right under domestic as well as International Law to see that his children are being brought up in the Muslim faith even mother has different faith. Therefore, if the custody of the children with mother takes them to such a position that father cannot exercise his supervision in that regard then the mother may forfeit her right of custody. The Peshawar High Court held that:

“Under Personal Law, father alone is the natural and legal guardian of his minor children even during the period of *ḥaḍanah*, the constructive custody of the children remains with father”.

In the recent years, under s. 491, the Court tended to favour the non-Muslim mother to decide the custody on the ground of physical well-being by neglecting the religion in which the foreign mothers have been able to at least gain temporary custody of their children pending the decision of the Guardian Courts.⁶³ As in *Peggy Collin v. Muhammad Ishfaq Malik*,⁶⁴ the Lahore High Court granted the custody of the minor son to his Christian mother who had a custody order from the French Court while the minor had been abducted and brought to Pakistan by his father. The Court held that:

“The father against whom International warrant for arrest stands issued and he being already under arrest in his country facing a criminal charge of abduction. Therefore, mere professing of Muslim faith and child’s mere birth in Pakistan is not sufficient to conclude that welfare of the minor would lie in living with father rather than with a French Christian mother whose credentials seem blotless. Thus, her courage and character may be better to put good moral, social and human values in the minor’s personality”.

In *Ms. Louise Anne Fairley v. Sajjad Ahmed Rana*,⁶⁵ again the custody of twelve year old daughter was given to the Christian mother irrespective of the father's religion although the child professed the Islamic faith.

Analysis of Religious & Legal Practices on Ḥaḍānah of Muslim Child by Kitabiyyah Mother

The *kitabiyyah* mother has right to retain the custody of the Muslim child, but the non-believer or apostate mother cannot retain the custody of the child. Likewise, *kitabiyyah* or non-Muslim relatives are ineligible to keep the custody of the Muslim child both in Islamic and Pakistani Family Law. For this purpose, it is required that blood relatives must possess the same religion as of the child for the purpose of the custody. On this particular point, legal practices in Pakistan have been in accordance with Islamic law. However, religious and legal practices concerning the duration of the *ḥaḍānah* of the minor child under the supervision of the *kitabiyyah* mother have been observed contradictory as in Islamic Law, it is continued till the child acquires the religious discretion that is deemed as seven-years. Afterward, child has either removed from mother's custody or confined with Muslim community so that she may not feed the prohibited food to her child or corrupt the minor's religious identity. However, in Pakistan, the custody is being awarded on permanent basis whether *kitabiyyah* mother reside in Pakistan or in a foreign state without ensuring the religion and regard to age limit of the child.

Although, the *kitabiyyah* mother is not permitted to raise the Muslim child according to her faith under Islamic and Pakistani Family Law, but practice of the Courts are observed contradictory to the Islamic rule while determining the custody disputes by favoring or rebutting to award the custody to the *kitabiyyah* mother without securing the religion of the child and giving undue preference to materialistic wellbeing. In this regard, the Court has adopted two contradictory approaches whereby at times not placing the child under the care of the Christian mother. The reason is that the Christian mother has no right to become the custodian, as she should be Muslim and environment where a Muslim child has to be raised should also be in conformity with Islamic values. On other side, they have also pronounced judgements to place the child under the custody of the Christian mother by giving more preference to materialistic wellbeing along with the principle of the welfare of the child.

The child has to be brought up according to the father's religion in Islamic and Pakistani Family Law, but approaches of the Court to decide the custody dispute on the ground of religion too is not uniform, as they have exhibited varying approaches to settle such disputes. In some cases, they denied to give the custody of the Muslim child to the non-Muslim mother by following Islamic rules and in some cases, admitted the custody by deviating from the Islamic rules.

At the end, legal practices related to the issue of *ḥaḍānah* of the Muslim child by *kitabiyyah* mother is similar to Islamic Law somehow but there still

exists certain differences between the legal practices, which need to be refined as per the principle of Islamic Law making due cognizance to religious differences. e.g., awarding custody of Muslim child to non-Muslim mother by ignoring religious wellbeing, which infact does not ensure the child's religion under the supervision of *kitabiyyah* mother, similarly awarding custody on permanent basis without considering the rule regarding duration to keep the custody of minor, additionally no criteria for the eligibility of mother to become custodian has been taken into account, permitting the child to live with non-*mahram* relatives under the supervision of *kitabiyyah* mother, not removing the child in case of danger to child's religion, permitting the *kitabiyyah* mother to teach the non-Muslim creed, not providing access right to father and taking major decision of child's life etc. are other aspects, which need appropriate address to explore according to Islamic Law. Thus, factors that are taken into consideration in determining the custody of the Muslim child to *kitabiyyah* mother, to a certain extent, are in conformity to each other both in Islamic Law and in Pakistani Family Law e.g., preference is given to *kitabiyyah* mother, prevent the mother's relative to become custodian, condition of religion, stance on child's religion and minor's wish etc.

Summary

The jurists has given the preferential right to *kitabiyyah* mother as Hanafi and Maliki jurists do not distinguish between the Muslim and *kitabiyyah* mother. Therefore, they declared that religion of Islam is not an essential precondition to become the custodian of the Muslim child by *kitabiyyah* mother. Contrary to it, Shafi'i and Hanbali jurists consider religion as the essential precondition to become the custodian of the Muslim child even for *kitabiyyah* mother. After mother, female and male relatives (who stand within prohibited degree of relation) deserve more right of custody and care of the child, provided, jurists unanimously declared that blood relatives must profess the religion of Islam to qualify the custodian of the Muslim child.

Moreover, about the duration of the *ḥadānah* of the Muslim child by *kitabiyyah* mother, Hanafi jurists permitted the *kitabiyyah* mother to keep the custody of the minor child up till the religious discretion, while in case of disbelieving mother up till the child has attained the discriminating age. Thereafter, jurist's opinion is split, one is that child would be removed from mother's custody and other is that, mother would confine within Muslim vicinity to safeguard the child's religion. Contrary to it, Imam Malik permitted the custody of minor child while abstaining the custody of adult female child. According to him, it is essentially required to first observe the environment of mother's residence, and under unfavourable circumstances where fear of harm to child's religion and use of prohibited food items persist, confining the mother within the Muslim community so that she is abstained to feed the prohibited food to the child. With regard to child's wishes, the jurists permitted the child to exercise his/her option to choose any parent as

guardian but if the child's wishes are against his/her welfare then judge can decide the issue giving preference to the welfare of the child.

Insofar as the issue of child's religion, all jurists agree that child presumably has to follow the religion of his father. Likewise, *kitabiyah* mother is not permitted to raise the Muslim child according to her creed; similarly, she is abstained to remove the child to non-Muslim state. Besides, the jurists have explained the detailed rules about the visitation right to non-custodian parents, place of residence for child custody, travelling of child with parent, welfare of the child, and wishes of the child to choose a parent as custodian elaborately from the perspective of Muslim parents.

In Pakistan, disputes of the *hadanah* of the Muslim child by *kitabiyah* mother are being decided under the Guardians and Wards Act, 1890. Although, the Guardians and Wards Act, 1890 is silent with regard to describing the position of *kitabiyah* mother concerning the custody of Muslim child but Case Laws conclude that practices of the Courts have exhibited two different approaches on this simmering issue at times, by admitting the custody of Muslim child in favour of *kitabiyah* mother and other time rebutting by awarding the custody of Muslim child to *kitabiyah* mother. Whereas the stance of Pakistani Family Law on child's religion is that the child must be brought up according to the father's religion because a minor is presumed to have inherit the father's religion and corresponding civil and social status. Moreover, Pakistani Family Law did not provide the detailed list of the entitled persons and criteria to become the custodian of the Muslim child except that Case Law cursorily explains *kitabiyah* mother's entitlement to keep the custody of the Muslim child with condition that custodian must be Muslim and have the same religion as of the minor. Hence, apostate person is devoid of all rights including custody in any form or shape.

Likewise, the Guardians and Wards Act, 1890 and Case Law are found silent about the duration of the custody of the Muslim child under the supervision of the *kitabiyah* mother as in Pakistan, custody is awarded permanently without affording due consideration to age, gender, and religion of the minor. Similarly, the minor's choice is given due consideration when minor has attained enough age to form an intelligent preference coupled with the aspect of welfare of the child. However, approach of the Guardian Court has been observed different according to the facts and circumstances of the each case but in most cases, the Courts did not consider above aspects while passing judgements. Moreover, it do not provide the detailed rules about the visitation right to non-custodian parents, place of residence, travelling of child with parent, and welfare of the child.

Lastly, the Courts of Pakistan have adopted two approaches in deciding the custody disputes on the grounds of religion especially in those cases where the parents have different faith. In the past cases, the Courts tended to favour the fathers on the ground of religion and refused to give the custody to the non-Muslim mother. However, in the recent years, under s.

491, the Court tended to favour the non-Muslim mother on the ground of physical well-being and refused to afford the custody to the Muslim father by neglecting the significant factor of religion.

Conclusion

The *kitabiyyah* mother is given the preferential right to raise the Muslim child because religion of Islam is not an essential condition to become the custodian of the Muslim child by *kitabiyyah* mother. Sequentially after mother, this right transmits to maternal grandmother. However, *kitabiyyah* mother's relatives (female or male relatives) have no right to retain the custody of the Muslim child because it is essentially required that blood relatives must be Muslim. Furthermore, the *kitabiyyah* mother could hold the custody of the minor child (either a boy or a girl) until he or she has acquired the age of seven years, after which the child would be removed from her custody due to the possibility of harm.

However, if the interest of the child demands contrary to it, then the *kitabiyyah* mother could hold the custody of the child with the restriction to confine her with Muslim community in order to secure his or her interest including religious identity. The *kitabiyyah* mother must qualify the criteria to keep the custody of the Muslim child e.g., prohibition from taking the children to ritual ceremonies, teaching other than Islam, asking them to eat pork or to consume alcohol, free from infectious disease, must be trustworthy, and wise. Besides, if she remarriage with non-Believer or *kitabi* then she may forfeited her right of *ḥaḍanah*. With regard to child's wishes, the *mumayyiz* (either male or female above seven years) is permitted to exercise his option with the condition that selected parent must be eligible.

Moreover, the child presumably has to follow the religion of his father and *kitabiyyah* mother is not permitted to raise the Muslim child according to her faith. Additionally, father has right to take major decisions of child's life and visit him. The custodian and non-Custodian parent could travel with child but with the permission of the Court by providing the purpose, duration and address of said place. Lastly, the place of travelling or place of custody should be safe to hold the *ḥaḍanah* of the Muslim child.

Suggestions

There are few suggestions, which may be incorporated in the Guardians and Wards Act, 1890, in order to deal the question of the *ḥaḍanah* of the Muslim child by *kitabiyyah* mother:

1. The Court may decide the merits of the custody disputes by giving the preference to religion along with moral and physical well-being, which constitutes the phrase welfare of the child. However, if custody is awarded to *kitabiyyah* mother by the Courts of Pakistan, then it may be ensured that child should be facilitated to follow the Muslim religion, by explicitly instructing mother to reside within Muslim community.
2. The restrictions may be imposed on *kitabiyyah* mother to keep the custody of the Muslim child including prohibition from taking the

children to non-Muslim places of worship or ritual ceremonies, from teaching them religion other than Islam and from asking them to eat pork or to consume alcohol.

3. There may be set forth certain conditions for *kitabiyah* mother to acquire the custody of the Muslim child e.g., free from infectious disease, trustworthy, wise, and did not remarry a non-Believer or *kitabiyah*.

4. The Court may secure the visitation right of father and admitted the father's right to take major decision of child's life including education, religion and marriage.

5. The Court may design the criterion for parents (custodian or non-custodian) to travel with child with the restriction to take permission from Guardian Court by providing detail e.g., purpose of travelling, duration and address of said place and assuring the safety of place. The mother should be bound to present the report about the child's educational activities to his/her father.



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