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Parental Responsibility, Custody, Guardianship and the Principle of Best Interest of Child under 1980 Child Abduction Convention in Pakistan



Manaan Omar, Focal Person on the 1980 Hague Convention



The Legal Framework

- ❖ Pakistan's legal system is largely based on the Common law English legal system, since many of the Pre-Partition laws were adopted after independence.
- ❖ The Guardian and Wards Act, of 1890 governs the issues of custody and guardianship in Pakistan.
- ❖ The Act does not distinguish between Custody and Guardianship.
- ❖ The Courts in Pakistan though have taken care of this aspect and to do so through precedents.





How Custody is understood if the law is silent

- ❖ The Guardian and Wards Act 1890, has provided the concept of guardian of person and property.
- ❖ The Courts have applied the concept of Guardian of Person for deciding custody matters.
- ❖ By relying on this concept, the bringing up, nursing or fostering of the child and taking care of the child's emotional and personal affairs on a day to day basis is ensured.
- ❖ The Courts thus have a greater role in matters relating to the Custody of a Child, seeking guidance either from precedents or relying on discretion.





The Application of Shariah (Islamic) Law

- ❖ The Shariah (Islamic) Law relating to Custody, and guardianship is not codified in Pakistan and thus is considered as a personal law.
- ❖ Though the Guardian and Wards Act is an English law, yet the Courts do interpret its different provisions by applying the principles of Islamic law.
- ❖ The principles of Islamic law are applied, in consonance with the provisions of Act.
- ❖ The Court have interpreted that in Islam, the consideration of the welfare of a minor is a fundamental principle and all the rules of personal law would be applied for the welfare of the minor





Principles Governing the Custody and Guardianship

- ❖ The Fundamental Principle applied by the Courts consistently in the cases of custody and Guardianship is the “Welfare and Best interests” of Minor. In Islamabad Capital Territory and in some Provinces, the Child Protection Acts have been promulgated which also laid down the criteria of best interests of child.
- ❖ The Supreme Court which is the highest court of Pakistan has ruled that the “Welfare of minor is not a primary but a paramount consideration”.
- ❖ In a recent decision, the Supreme Court of Pakistan has ruled that “The decision regarding custody of a child is governed on the fundamental principle of the paramount and overarching consideration is the welfare of the child i.e. to ascertain the course which is in the latter's best interest.” (Shaista Habib Versus Muhammad Arif Habib reported as PLD 2024 Supreme Court).





Principles Governing the Custody and Guardianship...Continue

- ❖ In this case the Supreme Court of Pakistan, overruled the objections of the father based on ground of remarriage in favor of the mother upon the principle of best interests and welfare of the minor.
- ❖ The decisions of the Supreme Court of Pakistan are binding on all Courts in Pakistan in similar cases like a law.
- ❖ The crucial criterion according to the Supreme Court of Pakistan is, therefore, the best interest and welfare of a child while determining the question of custody. The rights or aspirations of the parents or some other person are subservient to this principle and each case of custody is decided on the basis of ascertaining a course which is in the 'best interest of the child'.





What factors are considered for the welfare of minor

- ❖ The guiding principle for the Courts in Pakistan in custody matters is to ensure that the determination of custody promotes the rights of the child as well as the latter's wellbeing.
- ❖ The overriding consideration for the courts in Pakistan is to protect the child from any physical, mental or emotional injury, neglect or negligent treatment.
- ❖ The factors or variables that are taken into consideration for the welfare are the child's health, education, physical, mental, and psychological development. The minor's comfort and spiritual and moral well being along with his/her religion is also considered.
- ❖ The Courts also give considerable attention to the minor's happiness and emotional attachment with a custodian. It is considered in the interests of the child to live with his/her siblings.





Parental Responsibility in the Context of Pakistan

- ❖ The Guardian and Wards act 1890, the primary law on Custody and Guardianship does not detail in clear terms the parental responsibility of a Custodial parent or any other person to whom custody or the guardianship of a minor is entrusted.
- ❖ The Courts though have applied certain principles of parental responsibility while adjudicating on custody related issues. In a case, the court did not award the custody of minor to a parent due to the failure of his parental responsibility in maintaining personal relationship with minor and provide for the care and maintenance.
- ❖ The Courts in Pakistan have withdrawn the custody of a minor from a custodial parent or from any other person where it found that the child is ill-treated or the proper care is not ensured.





Application of Best Interests of Child under 1980 Hague Convention

- ❖ The 1980 Hague Convention on the Civil Aspects of International Child Abduction is enforceable in Pakistan since 2017.
- ❖ The International Convention and treaties are not enforceable upon accession rather than enabling legislation is required to enforce it.
- ❖ The Hague Convention has been made enforceable by addition to an already existing legislation which is a procedural law regulating the procedure of Family Courts.
- ❖ Since the law as well as the courts through precedents, had been consistent in according of paramount consideration to the welfare and best interests of a Child, therefore, the concept of best interests of a child, that the Courts at his habitual place of residence, are in best position to adjudicate on custody is not something novel to our jurisprudence on the subject.





Application of Best Interests of Child under 1980 Hague Convention

- ❖ The Courts in Pakistan had started taking guidance from the Convention since 2020. In a case of alleged wrongful removal, a high court in Pakistan, significantly relied upon the legal principles of the Conventions.
- ❖ In this case the high court relied upon a judgment of the Court of appeal of the United Kingdom, and quoted the Court of Appeal that “Removal of the child from his country, society and culture impacts him so immediate steps should be taken to relieve his pain. To this end, his prompt return to the native country would serve his best interests.”
- ❖ In that case in 2020, the High Court while discussing the objects and purposes of the convention noted that under “Article 38 of the Hague Convention Countries must accept another country’s accession to the Convention under the terms described in the Convention before a treaty is created”. Hence convention, on the day of wrongful was not bilaterally enforceable in that particular case. Yet the High Court discussed in detail the principles of Convention.





Thank You.



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