

**Re-evaluating the Guardianship of Minors
Framework in Pakistan: Legal Reforms, Gender
Equity, and Policy Implications**



Submitted by

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2025

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Dedication

I dedicate this thesis to both of my sons, Mohammad Raza Ali and Muhammad Zohaib Ali, whose unconditional love and faith in my capabilities have been a constant source of my strength throughout this journey.

Zainab Rashid

Acknowledgements

All praise and gratitude are for Allah Almighty, the Most Merciful and the Most Compassionate, whose bountiful blessings, divine support, and grace enabled me to complete this research.

I would like to extend my earnest gratitude to my supervisor, Dr. Syed Aleem Gillani, for his willingness to supervise my research. I am extremely thankful for his invaluable guidance, professional insight, and unwavering support throughout the course of my research.

Sir, I remain deeply indebted to you for your meticulous supervision and constructive advice, which have been instrumental to the completion of this thesis.

I am also sincerely thankful to the respected faculty members for their academic counselling and unique coursework, which added significant value to my knowledge and expertise.

I would also like to extend my sincere appreciation to my peers and colleagues for their assistance with my professional responsibilities, which enabled me to devote adequate time to my research work.

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ABSTRACT

The study holistically examines gender equity and the best interests of the child by critically assessing the guardianship framework in Pakistan and its policy implications. The research is significant in highlighting the consequences of social injustice and gender prejudice within the three-tier interrelated subsystems in the guardianship framework that cannot be analysed in isolation from one another. Rather than growing into a coherent and just society, it has developed into an increasingly complex one. Therefore, through the lens of the Systems Theory, this study identifies the gaps within the existing framework. The Guardians and Wards Act, 1890, rooted in Colonial-era tradition, has outlived its functionality and no longer corresponds with the contemporary realities of the Muslim families or the broader cultural evolutions in Pakistan. The legal framework designates the father as the only natural guardian. Even when the father is deceased, absent, or negligent, the real mother cannot act as a guardian of the person of her child. Gender-biased policies and prevailing legal practices in guardianship matters continually reinforce this patriarchal ideology. The research aims to draw the urgent attention of policymakers to the need for gender-sensitive and child-centric reforms within family statutes, particularly guardianship laws. It addresses two central questions: why a mother must obtain a decree from the Guardian Court to act as a guardian of her own child in cases where the father is deceased, absent, or unfit; and how inequitable legal and substantive procedures preserve the theory of the child's welfare in a patriarchal society. A qualitative analysis and deductive approach are adopted to examine judicial inclinations and policy implications as reflected in the lived experiences of mothers, legal representatives in the Guardian Courts, and the relevant judicial precedents. Further, a comparison with the PSLs of Muslim-majority countries reveals that although Pakistan enjoys the redemptive freedom of judicial discretion, it appears to be the least responsive to shifts in the modern family setup. The results of the study demonstrate that judicial attitudes are influenced by patriarchal customs, the misuse of litigation, and inconsistent professional guidance. The thesis concludes by offering reforms and recommendations, accompanied by a broader discourse on the guardianship framework in Pakistan, illustrating how institutional inequities obstruct the realization of the best interest of the child and the right of a mother to act as a guardian of her own child.

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List of Abbreviations

| | |
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| CEDAW | Convention on Elimination of all kind of Discrimination against Women |
| CRC | Convention on the Rights of Children |
| GWA | Guardians and Wards Act |
| PSL | Personal Status Law |
| UN | United Nations |
| UNGA | United Nations General Assembly |

CHAPTER 1

Introduction

1.1 Background of the Study

In the Islamic Republic of Pakistan, Muslim personal laws are adjudicated under The Family Courts Act, 1964. The matters include guardianship of minors, custody of minors, and matters about the Return of Child under the Hague Convention on Civil Aspects of International Child Abduction, 1980. Although extensive scholarship is available on family laws and custody of minors, limited academic attention has been specifically paid to the gendered inequities embedded within the guardianship framework in Pakistan.

Guardianship encompasses the authority and responsibilities conferred upon an adult concerning the personal welfare and property of a minor. Custody, by comparison, is a more limited notion focused primarily on the child's upbringing and everyday care and supervision of the child (Bajpai, 2005). The legal difference between custody and natural guardianship can be clarified through this example: in Muslim personal law, the mother is preferred as a custodian for very young children, but the father continues to be recognised as the child's natural guardian (Bajpai, 2005). Determination of custody (hazanat) is usually the legal effect of a failed marriage, and early jurists laid much emphasis on the subject; however, the guardian (Wilaya) was not regulated in detail. The law governing custody of children is intertwined with that of guardianship (Moller, 2015).

The Guardians and Wards Act, 1890, is the only statute on the guardianship matters. This Anglo-Muhammadan law constitutes a distinctive adaptation of a formally developed law system, applied through a structured judicial hierarchy that follows the doctrine of binding precedents. Substantively, it is also unique for incorporating notable elements of English legal traditions, concepts especially rooted in equity. (Coulson, 1964, pp. 9-248) The continued reliance on the Colonial English Family Law, coupled with patriarchal practices rooted in the flawed culture, has disproportionately disadvantaged maternal claims to guardianship of their child. The guardianship law, although comprehensive, has significant legal gaps that perpetuate patriarchal domination. Further, disparities in procedural law and gender-biased legal practice in Pakistan are presumptuous towards maternal rights.

The scholarly work available on the subject acknowledges the patriarchal norms and gender disparities in family laws, but it lacks a special focus on the evaluation of guardianship regulations in Pakistan. A re-evaluation of the guardianship framework is essential to bridge the gap between statutory provisions, Shariah principles, judicial practice, and international child rights standards. The absence of substantive legal reforms perpetuates a system where women face systemic barriers to recognition as primary caregivers and legal guardians. It is a rising concern for both child welfare and women's rights. Women, often deemed dispensable, have frequently faced personal laws manipulated through patriarchal interpretations of Shariah principles (Barazangi, 2009). Questioning or challenging such principles is frequently viewed as taboo or even equated to a sin. In the evolving family dynamics concerning the welfare of minors, the existing legal framework lacks gender-sensitivity, clear criteria for guardianship reforms, and a defined policy in the judicial discourse. The most critical cases are the ones with failed marriages and lingering disputes involving custody and guardianship of minors.

Although not codified in Pakistan, the law of custody has evolved with modern legal practices under the banner of the 'Welfare of Minor' principle. But the law of guardianship remains inflexible.

Comparative Legal Analysis further highlights that other Muslim-majority countries, including the Arab countries, have begun to codify the custody laws and have begun reforming personal laws to develop standards of gender equity and child protection, a domain where Pakistan lags. Ranked among the lowest on the global justice indices, Pakistan cannot abdicate its responsibility to ensure that justice, particularly in family and guardianship matters, is accessible, equitable, and free from gender bias. In the context of Pakistan, very little scholarly work has focused specifically on the intersection of substantive legal gaps, patriarchal judicial interpretation, and guardianship outcomes. The research not only fills the academic void but also provides policy-relevant recommendations that can guide legislative and judicial reforms towards a more equitable guardianship governance that aligns with Pakistan's constitutional values and international human rights commitments.

1.2 Problem Statement

The guardianship framework in Pakistan functions as an imbalanced system where outdated legal provisions, gender-biased judicial practices, and patriarchal social norms collectively challenge a mother to secure guardianship of her own child, despite the recognized objective of serving the best interest of the child.

1.3 Research Objectives

1. To assess the gender equity implications of guardianship laws, focusing on disadvantaged maternal rights and paternal dominance.
2. To critically analyse the current legal framework, including judicial precedents and case laws concerning guardianship disputes of minors in Pakistan, in light of constitutional mandates and international human rights obligations.
3. To compare Pakistan's guardianship framework with international best practices (e.g., UDHR, CRC, UNCRC, models from other Muslim-majority countries) to identify contemporary practices and international standards for child protection and guardianship.
4. To recommend policy and legal reforms that provide actionable recommendations for policymakers, practitioners, and other stakeholders that align more closely with international principles of justice and equity.

1.4 Research Questions

1. Why does a mother require an award from the family court to act as a guardian of her own minor child in the case of a deceased, unfit, absent, or missing father of the child?
2. How do the ambiguous substantive law and judicial interpretations contribute to the inequity in recognizing guardianship rights of the real mother over her own minor child?
3. How do guardianship laws in other Muslim-majority societies reflect changing gender dynamics, and what insights do they offer for Pakistan in its policy reform agenda?
4. What are the socio-cultural and institutional barriers to gender-equitable guardianship reform in Pakistan, and how can these be addressed through policy and legal change?

1.5 Significance of the Study

The research has significant implications for advancing a gender-sensitive guardianship framework and social justice in Pakistan. A significant social shift in Pakistan has prompted an increase in the custody of minor disputes before its family courts. Regardless of the influx, the guardianship regime remains outdated, ambiguous, and inconsistent in its application. The inconsistent discretionary interpretation of the Welfare of Minor by the Guardian Courts leads to unpredictability and reinforcement of patriarchal biases. The research aims to enhance public awareness about the gendered dimensions of guardianship and to influence public understanding of how guardianship laws affect women and children in a society.

1.6 Limitations of the Study:

The study undergoes the following limitations in research:

1. The study is primarily confined to statutes, judicial interpretations, and legal practices in the context of Pakistan. Hence, it may not capture the full diversity of international legal practices on guardianship laws.
2. Due to time constraints in the thesis, the study narrows its focus to leading judicial precedents rather than an exhaustive review of all guardianship cases. Hence, only a qualitative approach is applied. Interviews with five legal practitioners and the case studies they shared were analysed. Additionally, four litigant mothers were interviewed, and their personal experiences formed a substantive basis for the study.
3. Due to recent restrictions imposed by the Supreme Court of Pakistan, the interview of judges of Family Courts/ Guardian Courts could not be conducted.

1.7 Research Methodology

The research employs a Qualitative methodology to critically examine the guardianship framework for minors under the Pakistan legal system. It utilizes Doctrinal, Comparative Legal, and Qualitative (Interview-based) methodologies, but forgoes quantitative analysis due to time

constraints. The research employs a descriptive design and applies a deductive approach to analyse the data. Through this approach, observations regarding legal practice, patriarchal norms, and judicial trends will contribute to the development of a hypothesis aligned with the research objectives. The research undertakes a detailed examination of statutory provisions, constitutional guarantees, and relevant case law to demonstrate how existing legal doctrines systematically marginalize women, particularly mothers, in guardianship matters.

1.7.1 Doctrinal Legal Review

- Review of statutory laws: The GWA, 1890, The Muslim Family Courts Ordinance (1964), Rules and Order Lahore High Court Vol II, Part B, Chapter 2.
- The research includes qualitative content analysis of Pakistani Family Courts and their expertise to interpret the welfare of child doctrine, judicial reasoning, prevailing policy and legal process, and its alignment with the Muslim Personal Law, navigating the guardianship system.
- Analysis of landmark judicial decisions from the Superior Courts in Pakistan.
- Review of guardianship petitions before family courts in Lahore, Rawalpindi, and Islamabad involving mothers seeking guardianship of their own children. These cases are shared by the legal counsels and mothers who are interviewed in the course of research.

1.7.2 Comparative International Analysis

- To support the doctrinal analysis, the study incorporates a comparative review of personal laws frameworks from selected Muslim-Majority countries, such as the Kingdom of Saudi Arabia, Egypt, Qatar, and Turkey. Such a comparison will allow the research to analyse the standpoint of Pakistan in its commitment towards gender justice and child welfare.
- Study of relevant international instruments, including UDHR, CRC, and CEDAW.

1.7.3 Semi-Structured Interviews

- The study is supplemented by semi-structured interviews with four litigant mothers to gain insight into the lived realities of mothers who themselves have experienced ordeal in the legal course of their appointment as guardians of their own minor children. Their personal emotions, being a single mother or a sole earner in the house, provide in-depth facts on social and cultural barriers for women in Pakistani society. Each case provides a unique pattern for a broader understanding of the systemic barriers.
- Further, interview with five legal practitioners in the family court to incorporate valuable inputs in addressing empirical gaps in the literature. These advocates encounter first-hand experience in the Guardian Courts, and the richness of their knowledge shall add value to the research analysis. The case studies shared by them have contributed to the evidentiary foundation of the research. The interviews provide empirical grounding to legal arguments, strengthening the thesis through triangulation.
- Lastly, an interview with an academician to support the application of the System Theory on the research analysing the legal doctrine of guardianship in Pakistan as a single complex system.

1.7.4 Reflexivity and Positionality

As a researcher examining the guardianship framework in Pakistan, my positionality is informed by both my professional engagement with family law and my lived experience as a guardian mother. Although my personal experience is not treated as data in this study, it shapes my sensitivity to the issues faced by women navigating the guardianship system. Having interacted with the legal processes associated with securing custodial and parental rights, I am aware of the procedural obstacles, emotional burdens, and institutional barriers that many mothers encounter. At the same time, I remain committed to maintaining analytical neutrality by relying solely on documented cases, statutory provisions, judicial precedents, and participant interviews as the evidentiary foundation of this research.

My dual position, both as a policy researcher and as someone who has piloted aspects of the guardianship system, enables me to approach the subject with contextual understanding. However, I have taken care to bracket personal experiences from influencing the study's findings, ensuring

that the research maintains academic rigor, objectivity, and methodological integrity. This positionality is acknowledged here to promote transparency and reflexivity in understanding how my standpoint intersects with themes explored in this work.

1.8. Theoretical Framework

1.8.1 Application of The Systems Theory

The inquiry is framed within the theoretical lens of the Systems Theory, which interrogates the patriarchal structures and gendered assumptions embedded in legal institutions. In the 19th Century, Herbert Spencer and Emile Durkheim adopted the Systems Theory and argued unitary form of system. The theory is inspired by Darwin's theory of evolution, but here the society is not evolving into a perfect state, but a complex one. The theory implies that a system must be viewed as a whole. One part of a system cannot be analysed in isolation. The Systems Theory is selected over other socio-legal theories because it provides a holistic lens to observe the intersection of multiple dimensions of social actions and interactions. It provides a common language, coherent conceptual frameworks, and integration in contrast to extreme division among sociology and social sciences (Burns, 2006).

The Systems Theory is applied to the current study in analysing how a society can adapt to its environment through adjustments in its structures, with important implications for understanding the role of guardians in mother-led households. Under the lens of the Systems Theory, the guardianship framework is conceptualized as a network of interrelated subsystems: statutory laws, Islamic jurisprudence, judicial practices, cultural norms, and institutional capacity that shape the current guardianship framework in Pakistan. All components of the guardian legal system are interconnected. A system leads to the same path irrespective of the multiple approaches. The system receives inputs from the environment and produces outcomes. The Substantive Law, if rectified and amended solely, could not contribute to the regulation of the guardian framework. Policy reforms and judicial interpretations aligned with the substantive law could perfectly align with the Systems Theory.

1.8.2 Challenging the Welfare Theory

The study aims to challenge the Welfare Theory of the child, having its origin in 19th Century English Family Law, also known as the principle of ‘best interest of the child’. The theory laid the foundations for the social security system and child protection laws in the colonial era and was later adopted by Article 3 of the CRC. The Welfare Theory purports the best interests of a child. In application, the welfare theory is concerned with the monetary interests of a child. The word “Welfare” is defined in the Oxford Concise Dictionary as “well-being, happiness, health, and prosperity”. But what does “Welfare” mean for children in the context of Family Law (Birch, 2017). In re McGrath (1893, 1 Ch.143), Lord Justice Lindley observed: "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense."

Until the late 1960s, the concept of child welfare was largely confined to the issues affecting underprivileged and deprived children. The judicial approach has since evolved, requiring judges to assess the welfare of the child as a reasonable parent, having regard to the ever-changing nature of our world. In essence, the assessment must align with the standards of reasonable men and women, and not with the standards of the parents of the child in question. (Birch, 2017)

In interpreting the welfare of the child within the confines of an outdated guardianship framework, Guardian Courts often supersede the role of the mother in the child’s moral, emotional, and physical well-being. The best interests of the child are secured in terms of monetary surety bonds against the award of guardianship to the satisfaction of the court. By scrutinizing the interpretation of child welfare by the Pakistani Guardian Courts, the research exposes limitations, inconsistencies, and the subjective nature of the welfare standards in a culturally and legally misogynistic society.

1.9 Literature Review

1.9.1 Introduction

The literature review in the chapter provides the basis of theoretical and empirical analysis of the guardianship framework. The literature review contributes to the identification of gaps in the

statutory laws, judicial precedents, scholarly work available on the subject, and contemporary global practices.

1.9.2 Conceptualizing

In Pakistan, a three-tier legal guardianship framework is in place: codified substantive law, codified procedural law, and uncodified legal practice and customs. The GWA, 1890, is the sole codified substantive law on the subject, offering procedural guidelines while refraining from detailed regulatory provisions. Section 19 of the Act is the sole impediment in the guardianship framework, contributing to gender disparity and causing interpretive uncertainty in judicial proceedings. The GWA, 1890, neither mentions the role of the real mother of such a child as a guardian nor does it specify the welfare of the minor principle. Thus, leaving the fate of the minor to the discretion of the family courts.

Haroon Khalid, in his study under “Family Rights in Pakistan: Intersecting International Obligations and Plural National Legal Frameworks,” has pointed out substantial discrepancies in the GWA, 1890, being the governing instrument in guardianship matters. It has highlighted the laws disconnected from the realm of Pakistani society. Constitutional rights guaranteed under Articles 25 and 35, ensuring equality and protection of family life, could not be achieved due to complicated interpretations of norms (Khalid, 2025).

N.J. COULSON, in his renowned book ‘History of Islamic Law’, provided the evolution of Islamic jurisprudence in its existing form. The book delivers a detailed journey of Islamic law from the strict men of religion, jurists who lack pragmatism in the medieval age, where religious duties remained inviolate. Islamic jurisprudence remained rooted in opposition to norms being practiced in the Islamic courts rather than scientific analysis. In the 1800s, the Islamic doctrine and Western legal practices were merged, but to the extent of criminal and public law. In the Indian subcontinent, colonial governance-initiated reorganization of courts to the extent of presidencies. Likewise, at the time of French occupation in Tunisia and Morocco, the Family Courts continued to be run by Qazis. The family law, procedure, and substantive law were perpetuated by their own particular legal traditions. Meanwhile, reforms were introduced in the Muslim personal laws in the Middle East and African countries to harmonize the modern practices with the principles of Shariah. Ijma, Ijtehad, and Taqlid were adopted by Muslim jurists to keep the divine law in resonance with the diverging human nature. After 1947, Pakistan amended its family laws, which

were founded in the colonial era and were derived from the English Family Law. Strict theorists were of the view that the interpretation of the divine text must be objective, which agrees with the preconceived standards of subjective practice. However, a few conceptions were never altered. Predecessors of the traditional jurists contend that the traditional scholars have minimized the intended purpose of many Quranic provisions regarding the treatment of women by relegating them to mere moral exhortations. The conclusion drawn by Coulson is reflected in the current area of research regarding the interpretation of colonial law, the GWA, 1890, is undermining the maternal role under the theory of welfare of the child (Coulson, *A History of Islamic Law*, 1964).

Nimat Hafez Barazangi, in his study, explores the possibility of reforms in Islamic societies through rethinking the sources of Islam with the inclusion of Muslim Women scholars to reclaim their role from merely secondary caregivers in a household. The literature deciphers the historical concept of men being guardians of women under the umbrella of misreported Hadiths, as one of the sources of Islamic law (Barazangi, 2009).

Asha Bajpai, in her research on “Custody and Guardianship in India”, has provided an insight into the flexibility of Indian society on the subject of Guardianship and custody. She has differentiated the two norms, which are, although governed by the GWA, 1890, but are interpreted differently in each Hindu, Muslim, Parsi, or Christian personal law. The post-colonial Muslim community has been focused on the custody of a child based on Islamic jurisprudence and the conceptual derivatives in the background. The GWA, 1890, does not define the role of the mother, custody laws, and most importantly welfare of the minor principle. Bajpai has given judicial precedents leading to the contemporary legal reforms in the guardianship framework, including the gender sensitive and welfare of minor approach in India. In a landmark judgment of *Geeta Hariharan Vs Reserve Bank of India* (AIR 1999 SC 1149), the Supreme Court of India laid down the principles where the mother can be a guardian of her own minor child even if the father is alive and fit to be a guardian (Bajpai, 2005).

Ridwanul Hoque and Morshed Mahmud Khan, in “Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh”, deal with the codification of custody matters and how its ambiguous nature does not comply with interpretations of Islamic laws. Islam, being a dynamic and living religion, its principles of equality and justice could not outrun the challenges of modern times, tensions between traditional gender roles and gender equity in the best interests of a child (Hoque & Khan, 2007).

Madawi Al-Rashid, in a book “Gender, Governance and Islam”, in a chapter “Saudi Women: Between Family, Religion and State”, explained the struggle of adult women in Saudi Arabia, where the concept of guardian extends to not only the minors but also to adult women. The guardianship system is not legally codified but is enacted through a series of formal and informal bureaucratic practices. These arrangements grant male relatives, such as fathers, husbands, brothers, or even sons, decisive authority over approvals affecting major aspects of women’s everyday lives. Shifts in gender imbalance have primarily occurred through royal decrees underscoring the state’s main character in enforcing guardianship requirements in a selective and flexible way (Madawi, 2019).

Shannon Dunn and Rosemary B. Kellison, in the study “At the Intersection of Scripture and Law: Qur'an 4:34 and Violence against Women”, discussed the intersection of Quranic verses and their patriarchal interpretation. The research emphasized that the Quranic verse regarding men being guardians of women is purely due to financial reasons. It does not imply men dominating women or being the owners of women (Kellison, 2010).

Valentine M. Moghadam, in his literature on “Patriarchy in Transition: Women and the Changing Family in the Middle East”, expressed the complexity and rigidity in the guardianship laws in Arab countries through the guardianship cases. The concepts of Wasaya (appointment by the court) and Wali (default guardian) are interpreted by the Moghadam. Yet again, Wali has to be appointed by the court. The real question that arises is that no matter how lenient or rigid the guardianship framework is, the mother is awarded guardianship by the court process (Moghadam, 2004).

Lena-Maria Moller, in the article “An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya”, differentiates the concepts of guardianship and custody. In the study, the historical rigidity in the guardianship laws remains consistent in the Muslim family law regimes from a comparative perspective. Islamic laws on custody are codified in progressive Islamic societies where the parent-child relationship has encompassed the welfare of the minor rather than the spousal relationships. In Pakistan, the GWA, 1890, provides the codified procedural aspects of paternal care. The Act inherited from the colonial British India facilitated the reform-minded judicial approach to custody, guided by what appears to be the welfare of the minor (Moller, 2015).

Arun Kumar, in “The Guardianship and Custody of the Person of a Minor Child- Conflicting Claims”, stated that the only test in counterclaims between the father and mother is the determination of the welfare of the minor. The study further elaborates the GWA, 1890, section-wise in search for the welfare of the minor. The literature concludes that the welfare of a minor

child cannot be found in a broken family, but the child's safety, protection, and future must be safe while determining the disputes of custody and guardianship (Kumar, 1975).

Atul Verma, in his study "Right of Mother on the Custody and Guardianship of Legitimate and Illegitimate Child Under Muslim Law", observed the lack of sensitivity of the guardianship of a minor in the mother-led households and the interchanging roles mothers play in the nuclear families or in the families acting adversely to the best interest of her child (Verma, 2022).

Zaheer Iqbal Cheema, Ali Nawaz Khan, and Jawwad Riaz critically analyse the GWA, 1890, in an article "Determining the Custody of a Child in Pakistan". According to the study, the law of custody is uncodified in Pakistan but is yet governed by the Act. The Act focuses on the custody of a minor and, in many instances, has intertwined the concepts. The welfare of the minor must be paramount in determining the fate of the minor. The lacunas in the Act contribute to the plight of the families, and the inconsistency in the application of the principles leads to miscarriage of justice (Zaheer Iqbal Cheema, 2020).

1.9.3 Research Gaps

A comprehensive literature is available on patriarchal dominance in the family laws in Pakistan. The scholars have highlighted the insensitivity of the system towards both women and children. However, a few gaps are found with respect to the instant study.

- **Substantive Gap in Legal Framework**

The guardian law is completely silent on the rights of the mother over her own child, even where the father is absent or unfit to serve as one. In the case of a deceased or unfit father, section 8 of the GWA, 1890, outlines the individuals who can be appointed as guardians, yet it does not refer to the role of the real mother of such a child. A mother who is desirous to act as the guardian of her own child must apply to the Court for formal guardianship, even after the father is deceased. When appointing a guardian for the property of a minor, the legislature invests significant attention on the welfare of a minor, with considerable focus on the administration and management of the property of a minor. "The Rules and Orders of Lahore High Court, Volume II, Chapter 2, Part B, Rule 5" provides procedural law for the execution of surety bonds for the appointment of a guardian of the property of a minor. This rule has been extended in application to the person of the minor. As a customary legal practice, mothers are also required to furnish surety bonds to act as a guardian to the person of the minor. Despite the gravity of this social injustice, the codified laws

and procedures remain notably silent on the scope of judicial discretion in this regard. This raises critical social questions as to why the father is recognised as a natural legal guardian, while a mother must seek a formal legal process before the Guardian Court to exercise guardianship over her own child. Why must a mother execute a surety bond to verify that she will not act adversely to the interest of her own child, while the father is presumed to be the natural guardian? When a mother is a natural custodian, why can she not be a natural guardian in the absence of the father? Is this parental bias rooted in stereotypical roles attributed to the parents in society, or in the minor's welfare? How can the child's well-being be ensured when a mother is excluded from making important decisions such as those concerning education and living conditions?

Among many other discrepancies in substantive law, the most common gap identified in the existing literature is the differentiation between custody and guardianship. The term 'custody' is not expressly defined in any statutory framework of Pakistani family law, whether secular or religious in nature (Siddiqi, 2017). The GWA, 1890, defines the term guardian as a person having the care of the person of a minor or the property or of both person and property. The 'GWA, 1890,' being the governing law, does not differentiate between a 'custodian and a 'guardian' (Zahir Iqbal Cheema, 2020)

Further, the Act has omitted to define the fitness of the father as a guardian. The law only provides the details of the persons who can be a guardian, but the fitness of a guardian is not determined under the law. Yet, there is little scholarly work that interrogates this gap from a legal reform perspective.

- **Gender-Focused Analysis Gap**

Existing literature on Pakistani family law highlights the influence of patriarchal norms and gender disparities in the matter of custody of a child. It also demonstrates how the legal network reinforces the dominance of fathers while placing mothers at a disadvantage. However, judicial discretion has, in some cases, favoured custodian mothers over fathers. But the focus of this research is the principle of rigidity regarding maternal rights within the guardianship framework. The guardianship framework in its entirety is silent on the role of mothers in the welfare of the minor. The definitions and characterization produced under the Guardians and Wards Act, 1890, are patriarchal interpretations of religion, customs, and legal practice from more than 150 years ago. Moreover, the prevailing legal practices and procedures against the rights of mothers are left unattended by the judiciary, legislature, and academia. With the emerging balance of power in a societal structure, discrimination against maternal guardianship is raising concerns. Reliance of

the Guardian Courts on androcentric readings of Islamic principles remains a largely unexamined area.

- **Empirical Research Gap in Literature**

The available scholarship is mostly theoretical or doctrinal in nature. Academia has given minimal attention to details on guardianship laws and their implementation and interpretations by the family courts in Pakistan. The existing literature has excluded opinions of affected mothers, legal counsels, and personal positioning to grasp the root cause of the social imbalance in the Pakistani society. The study aims to fill the gaps in empirical research and include case laws, interviews with legal counsels/practitioners and mothers who have lived the realities of the guardianship framework, and observations to highlight the mismatch between the books and practice.

- **Comparative Analysis Gap**

The existing literature has focused much on family laws with special attention to gender-biased laws in Arab countries or the Middle-East. Pakistan has not been adequately studied in the comparative context. In the American Journal of Comparative Law, Moller has compared the judicial interpretations of Pakistani family courts with the family courts in the Middle-East and has concluded that under the principle of welfare of minor, the courts have adopted a lenient view in custody cases in favour of women to the extent that it has deviated from the Islamic Principles (Moller, 2015). Legal reform in various Muslim-majority countries has introduced gender-sensitive guardianship frameworks. Many other Muslim Majority countries including Turkey, Tunisia, Egypt, Qatar, Malaysia and Saudi Arabia have introduced codified laws for the custody of the minor. Attempts have been made in the past to legislate upon the subject but have been turned down by the legislature.

- **Policy Gap**

Child's welfare is measured in the relationships of punitive punishments by the Family Court since surety bonds are required to the satisfaction of the Court against the guardianship awarded. Does satisfaction of the court amount to the welfare of the minor?

Such a policy gap in the framework contributes to gender bias and abuse of the discretionary authority. Much of the existing discourse focuses either on biased parental rights or custodial arrangements in failed marriages. Previous research has not addressed the lack of gender equity in the guardianship regime and how this disparity ultimately affects the welfare of minors, especially those in mother-led households. The research focuses on legal reforms, gender inclusion and policy

discourse in the guardianship laws and practices, particularly in cases where the father is unfit to be a guardian, or deceased, and the mother inevitably takes over the role of the father in the household.

1.10 Organization of the Research

The succeeding chapters will be in the following scheme:

Chapter 2: Substantive legal Provisions, Stakeholders Perspective and Judicial Discretion

Chapter 3: Global Legal Comparison Analysis

Chapter 4: Discussion and Findings

Chapter 5: Recommendations and Conclusion

CHAPTER 2

Substantive Legal Provisions, Stakeholders' Perspective and Judicial Discretion

2.1 Case Study

As discussed in the previous chapter, the guardianship laws cannot be studied independently from judicial interpretations and policy. The GWA, 1890, is the sole code for matters about custody, guardianship, and adoption laws in Pakistan (Zaheer Iqbal Cheema, 2020). The GWA, 1890, does not provide separate or comprehensive custody laws for minors. The Act uses the term 'guardianship of the person' to address matters pertaining to the custody, while simultaneously employing the term 'guardian' to refer to the custodian of the minor (Zaheer Iqbal Cheema, 2020). However, judicial interpretations have extended the scope of the law to custody. The GWA, 1890, only defines the term 'Guardian' (Wilaya) but does not define 'custody' (Hazanat).

In *Shazia Akbar Ghalzai V. Additional District Judge and others* (2021MLD 817), the Islamabad High Court provided differentiation between the terms 'Guardianship' and 'Custody'. Custody alludes to bringing up and nurturing a child and taking care of their personal and emotional needs on a day-to-day basis. 'Guardianship' refers to the obligation of maintaining a child and effecting legal transactions in a minor's name and retaining constructive custody over the minor's person or property of discharging the obligation as guardian.

The scheme of GWA, 1890, provides for the process of appointment of a guardian of both person and property, the criteria of appointment as a guardian, who can apply for guardianship, duties of a guardian, removal of a guardian, and provisions regarding dealing with the property of a minor. Rules and policies of the guardianship framework are formulated from time to time for appropriate adjudication. The sole impediment in the GWA, 1890, with respect to the problem identified in the study is section 19(b) of the GWA, 1890. Section 19 states that:

"Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.” (The Guardians and Wards Act, 1890)

Although, 19(a) is also ultra vires to welfare of minor theory and the laws on child marriage. But the research focuses on 19(b). The term ‘unfit’ is not defined in the GWA, 1890. Over a period of time, it is explained through various judicial citations and precedents of the superior courts.

In *Sarem Muhammad Mukhtar V. Sadia Aquil Ahmed*, the High Court of Sindh stated that when adjudicating matters pertaining to custody and guardianship, the court adopts Parental Jurisdiction. The court must assume the role of a parent when deciding the best interests of a minor.

“Welfare of minor is the sole consideration as they are not in a position to decide about their welfare and as such their welfare is decided by their parents and in their absence or in case of any dispute between them, it becomes the duty of the Court to decide their welfare by exercising parental jurisdiction.” (Civil Petition, 2024)

The courts interpret the fitness of the father by applying judicial discretion in the guise of parental jurisdiction. However, the parent court continues to deny a mother the role of guardian even in situations where the father is unfit or deceased. As a natural parent, the mother is effectively deprived of the role of natural guardian by operation under section 19(b) of the impugned law. A real mother, whose husband is either unfit or deceased, has to go through a long, strenuous process of law, which exhausts her financial resources at the expense of her physical and mental health. Judicial interpretations at many instances have interpreted the welfare of a minor theory. This raises a critical concern: how can the welfare of a minor be considered paramount when the court first subjects a mother to exhaustive scrutiny in multiple spheres of her social life before ultimately appointing her as a guardian? Observations indicate that Guardian Courts often appear focused primarily on fulfilling procedural requirements or adhering mechanically to the policies laid down by the superior courts. The exercise of Parental judicial discretion and a welfare-oriented approach is seldom witnessed.

In a case titled *Mst. Neelofar and others V. Muhammad Khan and another* (2025 CLC 145), the Peshawar High Court has itself observed the following:

“After due process of law, her petition was allowed in the following manner vide judgment/order dated 22.09.2023 by the learned Guardian Judge, Peshawar:

"Petitioner, being the mother of the minors, is a suitable person for the desired Certificate. No one can take better care of the children except their real mother. Hence, the application is allowed, and the petitioner is appointed as the guardian of the minor’s person and property under section 7 of

the GWA, 1890, provided that she must execute a bond with two sureties in the sum of Rs. 10,00,000/ (Rupees Ten Lacs) in the prescribed.”

The High Court, while disposing of the petition in the year 2025, gave the following remarks:

“Mother and father both are natural guardians. The Minors were enjoying the custody of their mother and father since birth, and after the murder of their father on 19.02.2023, they were living with their mother. The central idea is the welfare of the minor. The main consideration is what could be conducive to the child's welfare. Welfare means his worldly, moral, and spiritual well-being. In the presence of the mother, the welfare of minors does not lie elsewhere. It cannot be disputed that the child of that age would feel psychologically more secure in the company of the mother rather than anyone else. The amount of love and care which a child receives from the mother cannot be expected from any other relative, including the grandfather or uncle.”

The Honourable High Court, while observing that both the mother and father are natural guardians, failed to notice that it took the mother more than two years to be appointed as a guardian, as opposed to the paternal grandfather. In the same judgment, the Honourable High Court also remarked that the woman had to travel a long way to reach the Court, but the other party made a mockery of her misery. This inadvertent desolation is due to defective legislation, lack of policy reforms, and inconsistent judicial discretion.

Since guardianship legally means constructive custody for providing maintenance to one’s minor child, the father who is incapable of doing so is still considered fit to be a guardian on the basis of love and affection for his real children. This can be witnessed in *Ahmed Bilal V. Khurram Javed* (2023 PLD 83 Islamabad), the petitioner was the father of a minor girl who was denied custody and guardianship of her real minor daughter on the plea that the respondent, who was the minor’s maternal grandmother, had better economic conditions than him. The Islamabad High Court ruled that the father could not be declared unfit to be a guardian of his own child merely because he is poor or uneducated, or his in-laws were more educated or had better financial conditions and accommodation. Only relevant consideration was love and affection, and the willingness of the father to be a guardian.

In *Gul Sadem Khan V. Mst. Halima and others* (PLD 2025 SC 47), the petitioner/ father of two minor sons remained unsuccessful in getting their custody on the grounds of lack of affection, love, and care of the minors. The Supreme Court awarded custody to the mother but declined her guardianship claim, holding that the welfare of the minor was best served by appointing the father as a guardian. This creates doctrinal inconsistency. On one hand, the fitness of a guardian is often assessed by the presence of love and affection between the parent and the minor. Yet on the other hand, even in the absence of such a relationship, the father is frequently retained as a guardian.

This tension reflects contradictory judicial approaches that contribute to confusion within guardianship jurisprudence.

It has become evidently clear, relying on the precedents set by the superior courts, that the father is a natural guardian of the person and property of a minor. It can safely be resolved that the existence of a 'fit' father debars the court from appointing any other person, even the real mother, as a guardian (Kumar, 1975). However, when the contest is between a deceased father and a living mother, or an unfit father or a fit mother, or an absent father or a responsible mother, it is unclear why the mother must bear the burden of appointment as a guardian through the court and furnishing a surety bond. As the natural guardian of person of her own child, she should not be compelled to demonstrate, through a surety bond, that she will not misuse her authority or act adversely to the interest of the minor.

2.2 Stakeholders Perspective

Jamila Aslam, one of the most respected legal practitioners with over 30 years of practice in the Guardian Courts, shared her exclusive experience during an interactive interview for the research¹. In her opinion, a major systemic flaw emerges when the father, though alive and legally deemed fit, fails to perform his responsibilities as a guardian. In such circumstances, the primary legal remedy available to the mother is to recover monthly maintenance on behalf of her minor children, a process that is neither efficient nor conducive to ensuring the sustainable financial support of her minor children. The most strenuous situation for a mother is to prove that the father is incompetent or is unfit to be a guardian. The law effectively places the entire burden of proof on the mother as the applicant for guardianship of her own minor child.

Jamila Aslam elaborated on the subject that in Pakistan, under Muslim Personal Law, guardianship remains a particularly sensitive issue. While hazanat (Custody) is generally presumed to be in favour of the mother, wilayat (guardianship) customarily vests in the father. The second preferential right is that of the paternal grandfather. This principle of Islamic jurisprudence is rooted in the wisdom that the father or the paternal grandfather provides for the minor, and it does not burden the mother.

The procedural law for execution of surety bonds for the appointment of guardian of property of a minor.

¹ Jamila Jahanoor Aslam, Advocate Supreme Court of Pakistan is a valued legal counsel with more than 30 years of experience in Islamabad. She was interviewed at her office in F-8 Markaz, Islamabad on 06-11-2025.

“ Except in cases in which, for reasons to be recorded in writing, the Court directs otherwise, every guardian of property appointed by the Court (other than the Collector of the District) shall be required to execute a bond, with or without a surety or sureties as the Court may think fit to direct, in a sum not less than the total estimated value of the movable property and three years' profits of the entire estate.”

The Holy Quran, the Shariah, and classical juristic authorities on Muslim law categorically address the guardianship of the property of the minor. The concept of guardianship of person of a minor is largely derived by inference (Srivastava, 2012). The rule of executing surety bonds by custodian parents, either mother or father in a contested suit for custody, is often justified on the grounds of preventing either parent from using a minor as a tool to hurt the other. Jamila Aslam, in the course of communication, shared her experience with custodian parents that they tend to misuse their position by obstructing the child's visitation with the non-custodian parent, and in some cases, by influencing the child's perception consistent with Parenting Alienation Syndrome. She further shared that the Guardian Courts are vigilant in the custody matters and take strict reprimand of the matter if a non-custodian parent is deprived of visitation. She shared an example of a bold initiative taken by a Guardian Judge in Islamabad, where a custodial mother deliberately violated the visitation schedule with the father on two occasions. The Guardian Judge ordered the Station House Officer (SHO) of the concerned police station to produce the child before the Court and subsequently handed over his custody to the father for one month. This discretionary power of the Guardian Court provided immediate redressal of the father's grievance.

In a response to the question about her most memorable case, Jamila Aslam recounted her experience as a member of the Bench at the Islamabad High Court in guardianship matters. In that case, two minor children were caught in the midst of a broken marriage. The Guardian Court of First Instance handed over the daughter to her mother, while the son was placed with the father. The children were produced before the Appellate Court, where it was observed that the minor son, who had been placed in the custody of the father, refused to greet his real mother and would not even allow her to touch him. Witnessing the extent of hatred instilled in the child for his real mother, the Appellate Court granted the mother custody of her son for the weekend. While leaving the court with the mother, the child was crying and screaming at the top of his voice. However, after the weekend, the child looked happy and relaxed. In response to the question about his stay with his mother, the child stated that he wishes to go back to her again.

The foregoing examples pertain to custody, and not guardianship. In such circumstances, Guardian Courts typically require surety bonds to ensure that custody is not exercised in a manner detrimental to the welfare of the minor.

Jamila Aslam, in a response to the question of whether she has ever witnessed a mother misusing her guardianship status or acting detrimentally to the welfare of the minor being a guardian, stated that she has never experienced a mother who, being a guardian, has misappropriated the person or property of her own minor child. Although she has witnessed fathers, being the natural guardian, selling the property of their children or sending them abroad without permission from the court. Sheikh Azfar Amin, Advocate High Court, shared his experience in Guardian Courts through an interpersonal interview for this research.² Azfar Amin shared his varied experience in the family courts in both Rawalpindi and Islamabad. He shared three case studies where the role of the Guardian Court, litigants, and legal fraternity could demonstrate the impact of inconsistent application of the policy and procedures.

In the first case, the mother, being financially incapacitated, surrendered the custody of her two minor sons to their father within the courtroom without any due diligence undertaken by the Guardian Court. The Guardian Court, despite assuming its role as *loco parentis*, failed to inquire into the welfare of the minor before permitting such a transfer of custody.

In the second case, the mother, who applied for the guardian certificate for her two minor sons, was demeaned by the Guardian Judge on account of her professional status as an advocate. Despite the undisputed fact that the minor's father had passed away, the Guardian Court directed her to furnish a surety bond of twenty lac Pakistani rupees. This order was issued in excess of the Court's discretionary authority and was accompanied by unwarranted restrictions on travel and movement of the minors without the permission of the Court. Furthermore, when the mother subsequently sought permission for travel, the Guardian Court imposed an additional requirement of a surety bond amounting to another twenty lac Pakistani rupees.

In the third case, a property was purchased by the real father in the name of his minor daughter, and the real mother of the daughter was appointed as a guardian of the property of the minor. The mother sought permission to sell the property of daughter, and the father, through personal appearance in the Court, submitted no objection statement on the sale. Despite the father's statement, the Guardian Court transgressed its discretionary authority and imposed restrictions on the sale, submission of sale proceeds in the Court, and its disbursement details.

Through these cases, Azfar Amin advanced the argument that the Guardian Courts consistently failed to inquire into the exceptional circumstances of each matter. The prevailing 'practice' is occasionally prejudiced to the rights of mothers, particularly in cases where appointing a mother is treated merely as a formality following the death of the father. In contrast, the substantive and

² Sheikh Azfar Amin, Advocate High Court has 22 years of experience as legal counsel. He was interviewed at his office in G-8, Islamabad on 17-11-2025.

procedural laws continue to exhibit gender bias in favour of fathers. Appointment of the mother as a guardian in case of an absent or unfit father by the Guardian Court effectively relieves an already negligent father from his responsibilities. In such cases, the Guardian Court appoints the mother as a guardian by following a formal process involving proclamation and recording the mother's statement. Such fathers do not even bother to attend the proceedings. In the above-mentioned cases, the welfare of the child or the best interest of the child is disregarded by the Guardian Court. Azfar Amin added that this pattern of judicial conduct is manoeuvred by the nature of majority litigation before these courts. The litigants misuse the family law proceedings to pursue a personal vendetta. The Patriarchal attitudes embedded in society, coupled with the systemic undermining of the mother's role in the welfare of the minor is frequently overlooked. Further, the role of the legal fraternity in misguiding or manipulating both litigants and the Guardian Courts exacerbates the problem. Furthermore, the mindset of the presiding judge plays a determinative role. A judge adjudicating guardianship matters is expected to possess the sensitivity and competence required to be a parent of the minor. But mostly, the policy-oriented or misogynist approaches often overshadow this responsibility. Such judicial behaviours of Guardian Courts contribute significantly to gender bias within guardianship adjudication.

Azfar Amin termed furnishing of surety bond by real mothers when appointed a guardian of their own child, as a justified procedure. According to his understanding of the process, the Guardian Court exercises parental jurisdiction while presiding over guardianship matters. Being a parent of a ward/ minor, the Guardian Court requires the secure the well-being of the minor. However, requiring a tangible surety to safeguard the best interest of minor is in excess of the authority of the Guardian Court. The misuse of guardianship authority is witnessed, as it has become increasingly common for court to observe minors displaying unusual or resistant behaviour towards the non-custodial fathers. In many cases, the personal dispute between parents negatively affects the welfare of their children, and such conduct is not limited to fathers; mothers also contribute to this adverse impact. A similar point of view was shared by Jamila Aslam that only victim in the family disputes are the children.

Choudhry Tanveer Akhtar³, Advocate Supreme Court of Pakistan in an interpersonal interview for the study, shared his experience in the Guardian Court as directionless and drifting. He commented that the Family Court or the Guardian Courts exercise discretion without the application of any uniform principles. Although the policy has shifted in favour of women but application of such a policy has no substantial grounds. The judicial officers are stating the orders without any reasoning

³ Chaudhry Tanveer Akhtar, Advocate Supreme Court of Pakistan is a legal counsel since the year 2000. He was interviewed at his office in F-5 on 11-11-2015.

or judiciousness. The prevailing policy presumes that custody of the infant should remain with the mother while guardianship should vest in the father. However, Courts often fail to exercise proper judicial scrutiny in applying this principle, thereby undermining the welfare of the minor.

It is empirically verified through discussion with the professional advocates in the Guardian Courts that the Courts, while using discretionary authority, drift from the parental role and bypass the welfare of the child. The randomness in the Court proceedings depicts the lack of a formal policy and framework to safeguard the interests of the mother and the child. Mothers seeking permission from the Court to act as a guardian of her child is degraded and humiliated in the unnecessary and unwarranted legal process. And such a child suffers along with her mother. Either the child is wandering in the Courts with the mother or in the wrongful custody of the unnatural guardian. The legal practitioners were all of the view that mothers must be given the status of natural guardian of the person of the minor at least. Both parents can be the natural guardian and one can succeed after the other. Moreover, the legal counsels could not justify the furnishing of a surety bond by a real mother to act as a guardian of the person of her own child. The unresolved question remained as to the requirement of a surety bond “to the satisfaction of the court.” Specifically, what amount of money can be deemed sufficient by the court in the name of the child’s welfare.

A mother ‘N’ who pursued a guardianship certificate for her two minor daughters shared her legal journey in an interview for this research. Her identity remains undisclosed in compliance with the anonymity promise. Her daughter’s real father had abandoned them ten years ago when he divorced ‘N’. She required the guardianship certificate from the Guardian Court for educational purposes.⁴

While sharing her experience, N stated that when she appeared before a Guardian Judge in Rawalpindi, she felt both embarrassed and guilty, as though she had committed an offence by merely applying for guardianship of a person of her minor daughters. She commented and quoted:

”اُسے چھٹی نہ ملی جس نے سبق یاد کیا“

“The student who learned the lesson was not granted leave”. She felt that the Judge regarded her with suspicion, as though she had an ulterior motive. She found herself subjected to undue scrutiny. The minor’s father had never provided maintenance for his daughters and had never contributed to any of their educational, boarding, lodging, or clothing expenses. In her case, the father appeared upon summoning before the Guardian Court and gave a statement that he had no concern with his minor daughters and he had no objection to ‘N’ being appointed as their guardian. Despite

⁴ A mother was interviewed who had received the guardianship certificate from the Guardian Court in 2023. She was interviewed at District Courts, Rawalpindi at 11:00 am on 12-11-2025. Her identity is kept anonymous in compliance with the non-disclosure agreement.

recording the unequivocal statement of the father, the Guardian Judge still ordered her furnishing of surety bond of twenty lac Pakistani rupees.

In a response to the question regarding the furnishing of a surety bond, 'N' stated that she could not understand the concept of a surety bond. Her brother furnished a surety for her by pledging his property. 'N' said that even today, she does not understand why the Guardian Court required her to submit a surety bond for being a guardian of her own minor daughters. She explained that caring for children in all aspects of life is an arduous responsibility. For the last ten years, she had to manage multiple jobs while simultaneously running the household and attending to her daughters. The Court was unable to provide any remuneration for the mother to fulfil the dual role of both custodian and guardian. Instead, the Court directed the mother to guarantee that she will continue performing her responsibilities. It remains unclear why the Guardian Court, where the father voluntarily relinquished his position as the natural guardian, instead of holding him accountable, directed the mother to furnish a surety bond.

A mother named Ishrat was interviewed for the research. She contested a guardianship claim for her two minor children, a daughter and a son, aged five and four, respectively.⁵ She required the guardianship certificate for the purpose of admission in school. Ishrat shared that she works as a house-help and is the sole caretaker of her children. Her husband abandoned them two years ago, and his whereabouts remain unknown. Her case was decreed ex-parte and a guardianship certificate was issued to her upon furnishing a surety bond of ten lac rupees. She admitted that she was unfamiliar with the legal process and did not fully understand why the school required the guardianship certificate, as she considered herself, being the mother, inherently capable of making decisions for her children.

A mother, Hajra Batool, is currently steering through the strenuous legal process of seeking maintenance from the father of her three minor children. Hajra shared her personal experience in the family courts in the interview for the research.⁶ Hajra's husband divorced her two years ago via notice and fled the country. She had been married for ten years and was 16 years old at the time of marriage. She has no formal education, no source of income, and is completely dependent on her old father. Hajra stated that her family has been very supportive of her decision to file a suit for recovery of maintenance for her children. However, despite two years having passed, her children have yet to receive maintenance. Her husband is contesting the case through a special power of attorney, and the court is unable to hold the attorney personally accountable for non-payment. Although her case has been decreed on three occasions, it has been repeatedly restored

⁵ Ishrat Bibi, a litigant contesting guardianship certificate was interviewed at Islamabad Family Courts on 10-11-2025.

⁶ Hajra Batool, a mother litigant was interviewed at Rawalpindi on 15-11-2025

in favour of the father. While the legal process of recovery of maintenance is swift, significant gaps in the law allow fathers to escape their obligations.

Neena Waqar, a mother from Lahore, participated in the research through an interview.⁷ Neena pursued the guardianship certificate for her two daughters following the death of their father in 2022. Her case was particularly complicated, as her daughters are twins, aged 37 years, with mental disabilities. After her husband's passing, a legal guardian was required to provide consent for their medical treatments abroad. Additionally, the daughters had inherited property and accounts from their deceased father, necessitating the appointment of a legal guardian of property. Neena shared that she is 62 years old and has been a housewife for over forty years. Initially, she was uncertain about how to proceed, but then she was guided by a learned legal counsel, and the process ran smoothly. Nonetheless, the proceedings were lengthy, costly, and exhausting. The most arduous task was bringing her daughters to the court, an experience she described as both humiliating and embarrassing. She felt particularly uncomfortable when the Guardian Judge made personal remarks about her and her daughters. Neena remarked that it felt as though the judge had undermined her 37 years of hard work and was suspicious of her commitment to them.

On a question regarding a surety bond, Neena replied that she was unable to pay cash or furnish the surety of sixty lac rupees. The assets were yet to be liquidated and there were other shareholders in the property. It took her two weeks to arrange for the surety, and even then, it was furnished by an agent arranged by the lawyer.

On the basis of the discussion with participant mothers, it can be safely ascertained that the mothers were oblivious to the furnishing of surety bonds to establish love and affection for their children. In actuality, the mothers who seek legal assistance from the Guardian Courts are the ones who are dutiful and responsible, amongst the two parents, towards their children. It is a common phrase that law is shaped by the realities of the majority, just like a mother's love for her children is universally acknowledged. Suspecting a mother of mistrust and dishonesty towards her own children as part of the process and procedure reflects systemic failure. Such institutional role contributes in Pakistan's lack of gender-inclusive policies. Existing reforms and policy initiatives remain insufficient to bring meaningful improvement to guardianship laws.

⁷ Neena Waqar, a mother litigant from Lahore was interviewed via WhatsApp call on 17-11-2025

CHAPTER 3

Comparative Analysis in the Muslim Majority Jurisdiction Context

3.1 Introduction

The research question addressed in the chapter is how guardianship laws in other Muslim-majority societies reflect changing gender dynamics, and what insights do they offer for Pakistan's policy reform agenda?

According to the traditional Islamic jurisprudence, law is understood as the expression of God. A Muslim state is bound by the divine law. But no notion of the law itself evolves with the progress of the society (Coulson, 1964). It is most commonly perceived that all Muslim-majority countries are administered under the classical Islamic law. However, most Muslim-majority countries have assorted systems of law, incorporating elements of Islamic law into common law or civil law frameworks, and several others have entirely secular legal regimes. The standards of the religious law and the demands of the political pragmatism often do not coincide in a Muslim jurisdiction; however, the influential governing powers guided jurists towards a pragmatic approach of overlooking certain matters instead of formally dismissing them. From the nineteenth century forward, closer and more sustained interaction developed between Islamic and Western societies. Since family law has always been the stronghold of Shariah law, the incorporation of Western and secular law produced a pronounced divide between the two legal frameworks. However, Western standards and institutions had created an impetus for reform in family law. The Western institutions introduced human rights declarations, most notably the UDHR, a landmark document in the history of International Law. In 1948, the UNGA adopted the declaration by a unanimous vote of its member states. The concept of universal declaration transformed the legal and social standing of individuals worldwide, with a particular impact on women and children. This momentum later led to the adoption and ratification of key international instruments, including the CRC and CEDAW, by UN member states.

Contemporary interpretations and applications of Shariah remain a subject of continuous debate, as Muslim-majority states worldwide are engaged in aligning the Islamic principles with modern conception, social transformation, and reformatory international legal framework.

In this chapter, Pakistan's policy reform agenda in response to commitments made with the international community under UDHR, CEDAW, and CRC has been discussed. This study will help understand the position of Pakistan in the international arena. Further, Muslim Personal laws of various Islamic countries, ranging from the most rigid to the most flexible, are examined to understand the extent to which their legal institutions have adapted to the evolving dynamics of the contemporary Muslim family. Since India and Pakistan share a common legal history in the guardianship framework, the Muslim personal law in India is explored in the study. As the GWA, 1890, was initially enacted for British India before the partition, analysis of India, now a secular state, is relevant for a comprehensive and comparative understanding of its contemporary application and evolution.

3.2 Conceptualizing the Research Problem

With evolving roles of parents in family life, personal laws must also adapt in their application. The progression of human rights, coupled with the social interconnectedness of the global village, has prompted many Muslim-majority countries to align their personal legal framework with international human rights standards. By rectifying conventions and treaties on child rights, women's empowerment, gender inclusion, and broader human rights protection, these countries are reforming their legal structures to project a progressive and contemporary image of themselves.

3.3 Comparative Analysis

A common pattern in the personal laws may be observed across the Muslim-majority countries. Everywhere except for Turkey, religious law is elevated to the civil status, and religious affiliation (Moghadam, 2004).

3.3.1 Kingdom of Saudi Arabia and PSL

The Kingdom of Saudi Arabia codified PSLs in 2022 as a part of legislative reforms announced by King Muhammad bin Salman in 2021. These reforms aimed at preserving and protecting human rights, family stability, women's empowerment, and promotion of rights (International, 2023). Before this, Saudi Arabia did not have a codified PSL. All the laws related to family life were subjected to discretionary authority exercised in the name of Shariah Laws by a male-dominated judiciary.

Saudi Arabia's long-standing male guardianship system (Nizam-e- Wilaya) has traditionally constrained women's legal autonomy. Rooted in conservative socio-cultural norms, this system granted unlimited authority to male guardians over the personal decisions of women within their families. Although the codification of the PSL 2022, introduced significant limits on discretionary and inconsistent judicial rulings, male domination over women's rights remains consistent (Al Orainan, 2025).

Saudi Arabia has ratified the UN Convention on the Elimination of Discrimination Against Women (CEDAW), albeit with reservations to certain articles in contradiction to Islamic laws. Kingdom made a special objection to the provisions granting equal rights to father and mother with respect to the nationality of their child. In 2018, the committee on CEDAW "incompatible with the object and purpose of the Convention" and recommended that Saudi Arabia withdraw it. With respect to guardianship of the minor (Wilaya), the father remains the only guardian, irrespective of his fitness to be a guardian of the minor. It can be safely concluded that the Kingdom of Saudi Arabia has the most rigid legal framework regarding guardianship. In Saudi Arabia, women themselves are subjected to guardianship; they are barred from being a guardian of their own minor child (UN Committee on the Elimination of Discrimination against Women (CEDAW), 2018).

3.3.2 Egypt and PSL

In the Muslim Middle East, Bahrain, Egypt, Qatar, and Iraq have regulated guardianship through individual legislative enactments. Egyptian PSL is considered unalterable, as it has remained unchanged for more than half a century. The PSL has reposed resilience and remained intact despite repeated calls for change and various attempts to put forward proposals that reflect the conflicting interests of various stakeholders and the antagonism between liberal and conservative forces. Egypt partially codified its personal laws for the first time in the beginning of the 20th century. The individual statutory provisions on guardianship (Wilaya) remain significantly limited when compared with the legislative enactments regarding marriage, divorce, custody, and inheritance. The proposed reforms in the personal laws suggest a model that denies a mother the right to assume guardianship of her minor children. Following the father's role as the natural guardian, authority over the child's financial and administrative affairs traditionally devolves upon the grandfather. A feminist movement in Egypt termed such reforms as regression and admonition of the rights of a mother to make educational and financial decisions for their own children (Moussa, 2024). A hashtag was made "# Guardianship is my right." This indicates the continuation of the philosophy

that has long reinforced PSL, which regards women as incapable of managing their personal affairs and those of their children, regardless of their age, education, and life experience (Al-Sadda, 2021)

3.3.3 Qatar and Family Code

Qatar is one of the few Muslim-majority countries that has placed a greater focus on the judicial discretion to navigate the eccentricity between the Islamic doctrine and the best interest of the child principle. Thus, empowering the judge to disregard the traditional general laws in the interest of an individual child and the facts of the particular case. In Qatar, these reforms have significantly transformed the gendered and patriarchal interpretation of parental care. The codification of family law in 2006 was based on the concept of the best interests of the child. Family code in Qatar provides the criteria for the judiciary to adjudicate matters involving a child, considering the best interests of the child. It represents something of a novelty among Muslim family law regimes. The guidelines for criteria include love and affection for the child; their ability to raise the child and provide a suitable environment; their ability to provide education and medical care; and also “other features that are of unquestionable benefit for the child.” However, these rules do not influence the law governing the guardianship of the property of the minor. The law of guardianship of property was codified separately in 2004. The Qatari Family Code does not provide explicit provisions involving the principle of the child’s best interest for appointing the guardian for the property of the child or safeguarding the interests of the mother to assume guardianship. On the other hand, if such a guardian is appointed in the best interest of the child, the legal safeguards either result in revision of the transaction or revocation of the guardianship (Moller, 2015).

3.3.4 Turkey and The Civil Code

In Turkey, both father and mother are natural guardians. The Turkish Civil Code provides the most relaxed guardianship framework. In the lifetime of parents, a guardian is not appointed for the minor children, unless there is a legal reason. If the parents are separated or not married, the custody of the minor shall remain with the mother unless she is dead, disabled, a minor, or for any other legal reason (Turkish civil Code, A 335 – 351, Sec 6).

3.3.5. India and Secular Family Laws

In India, its people adhere to different religions, and there exists no set of uniform personal laws regarding marriage, divorce, succession, and guardianship matters. Consequently, the guardianship is governed by three distinct prevailing legal systems: Hindu law, the Muslim Law, and the GWA, 1890 (Srivastava, 2012). At present, the guardianship of minors in India is governed by: 1) the Guardians and Wards Act, 1890, 2) the Hindu Majority and Guardianship Act, 1956, and 3) any other principles laid down in matrimonial proceedings. All personal laws account the father as a natural guardian with tweaks in the codes. The inherently abstract concept of a child's welfare is of paramount consideration. The Hindu Majority and Guardianship Act, 1956, was enacted to safeguard the interests of a Hindu child. The Act delegates the prior right of being the guardian of the person and property of the minor to the father, and after the father, to the mother. Where a father appoints a guardian by will, the child's surviving mother nonetheless enjoys a preferential claim to guardianship over the non-nominated testamentary guardian. The Supreme Court of India in *Gita Hariharan V. Reserve Bank of India* held that in certain circumstances, a mother may also be recognised as the minor's natural guardian. The Supreme Court interpreted the word 'after', as 'in the absence of' and not 'after the lifetime' of the father, thereby expanding the scope of the guardian. In *Vandana Shiva V. Jayanta Bandhopadhaya* the Supreme Court held that both father and mother can act as natural guardians of their minor child. It is not necessary that first the father and then the mother precede as a natural guardian (Srivastava, 2012).

Muslim guardianship framework in India is regulated under the GWA, 1890, which is interpreted through the basic principles of the Quran and Sunnah. In India, there are three types of guardians: 1) Natural guardian, 2) Testamentary guardian, and 3) Guardian appointed by the court. In all Muslim schools of thought, the father is recognized as a natural guardian, and the mother is not given the same status. The Quran, the de facto principle under Islam and Islamic jurisprudence, insistently express the guardian of the property of a minor. The guardianship of person of minor is just an inference (Srivastava, 2012). The Supreme Court of India in *Mst. Rasulan V, Dilawar*, and others held that the father appointed by the court, or not, is the natural guardian, and no other person shall be appointed as a guardian unless he is unfit (Kumar, 1975).

In *Mumtaz Begum v. Mubarak Hussain*, the wife pleaded that she was maltreated and thrown out of her home, while the husband retained her few-month-old minor son. The High Court of Madhya Pradesh, in a detailed judgment, highlighted the importance of the principle of the child's welfare. The High Court relied upon the Declaration of the Rights of the Child, 1959, adopted unanimously by the United Nations General Assembly. The court explained that Principle 2 of the Declaration

mandated that states enact laws for the "special protection" of the child to enable him to "develop physically, mentally, morally, spiritually and socially in a healthy and normal manner" and that "the best interest of the child shall be the paramount consideration." The court stressed in its comments that "When personal laws are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints, and prophets found faith, they act as benevolent factors of mankind as a whole. No personal law claiming divine sanction can afford to deny paramount consideration to the welfare of the child. It is not difficult, therefore, to see why the Declaration was unanimously adopted by the United Nations General Assembly in 1959". The custody and guardian petition of the wife was accepted by the High Court (BAJPAI, 2005). As India has ratified the United Nations Convention on the Rights of the Child (CRC), the superior courts are under an obligation to ensure the rights protected under the treaty are safeguarded in the country as well.

3.3.6 Universal Declaration of Human Rights (UDHR), 1948, and Pakistan's Commitment

On December 10, 1948, in the aftermath of the devastation caused by World War II, and three years after the adoption of the United Nations (UN) Charter, states came together to unanimously adopt a declaration promising future generations a world free from the horrors of war and the injustices that had plagued humanity. Drawing inspiration from the opening lines of the UN Charter:

"...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...to practice tolerance and live in peace with one another as good neighbours...",

The UDHR sets out a comprehensive framework of fundamental rights that form the foundation of human dignity and freedom (UDHR, 1948).

The fundamental rights included in the UDHR are neither contingent upon reciprocity nor treated as privileges. They are inherent to every human being from birth, irrespective of nationality or allegiance.

The UDHR has established the foundational framework for Pakistan's progressive human rights system, particularly emphasising the protection of vulnerable groups such as women, children, and individuals with disabilities. As an original signatory to the UDHR in 1948, a ratifier of seven core international human rights treaties, Pakistan has consistently demonstrated a clear political commitment to these universal norms. Additionally, its current membership in the Human Rights Council underscores this dedication. These legally binding treaties impose critical obligations on the state to ensure the protection of the rights enshrined therein and to implement effective mechanisms for addressing any violations that may occur (Dr. Samuel Rizk, 2023). Recent legislative reforms, including the Zainab Alert and Recovery Act, the ICT Child Protection Act of

2018, and the Juvenile Justice System Act, 2018, reflect Pakistan's ongoing policy-oriented efforts to fulfil its commitment towards vulnerable populations. This evolving framework calls for sustained policy attention and action to uphold human rights as a living document guiding the country's sustainable development agenda.

3.3.7 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, And Pakistan's Commitment

The CEDAW is the bill of rights for women, rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. The preamble of the Convention acknowledges the discrimination against women in all spheres of life and "violates the principles of equality of rights and respect for human dignity". The Convention establishes an agenda for the state parties to guarantee the enjoyment of these rights by women. Article 2 of the Convention directs the countries ratifying it to condemn discrimination and make policies to ensure recognition of the working equality of men and women. To embody the principle in the constitution, the legislation, local laws, institutions, organisations, and enterprises, and to abolish customary laws, regulations, and practices that discriminate against women.

Article 3 of the Convention urges state parties to adopt all appropriate measures, including legislation, particularly in political, social, cultural, and economic fields. These measures aim to ensure the progress and comprehensive growth of women, thereby promising their equal enjoyment and exercise of freedom based on equality with men.

Other than Iran, Somalia, and Sudan, all Muslim-majority countries have ratified the CEDAW. Pakistan ratified CEDAW in 1996 and committed to implementing all 16 articles of the Convention aimed at eliminating discrimination against women. Pakistan established a statutory body called the National Commission on the Status of Women (NCSW) in 2000. The NCSW examines policies, programs and other measures taken by the Government for women's development and gender equality; Review laws, rules and regulations affecting the status of women; Monitor mechanisms and institutional procedures for redress of violations of women's rights and individual grievances; Encourage and sponsor research to generate information, analysis and studies relating to women and gender issues; Develop and maintain interaction and dialogue with NGOs, experts and individuals in society at the national, regional and international level; any other function assigned to it by the Federal Government.

3.3.8 United Nations Convention on the Rights of the Child (CRC), 1989, and Pakistan's Commitment

The CRC is the most widely ratified convention in the history of the world that has helped transform children's lives around the world. Pakistan remains committed to implementing its obligations under the CRC. The Government is pursuing measures to further align its policies with the Convention and ensure its commitment to operationalising the rights of the child as enshrined in the Convention. The Government of Pakistan has taken various necessary measures to address the Committee's previous recommendations. In this regard, the National Commission on the Rights of the Child (NCRC) has been established, which monitors the child rights situation in the country (Child, 2024).

Guardianship over a child's property and personal affairs has become an enduring relic in the family law administrations of contemporary Muslim dominions. Over the course of several reform projects that family law has witnessed, guardianship has developed into an eccentric component among other, more dynamic legal concepts. The asymmetrical shift in gender roles and everyday sufferings of women must therefore be reflected in the new family pattern, and thus regulated fairly by law. This alteration in the Muslim family must be brought to the attention of influential community members and policymakers. Codification involves the systematic compilation and restatement of all rules governing family laws. Modern legislation increasingly emphasises the structure of the nuclear family and gives predominance to the principle of the best interests of the child (Moller, 2015). Religion as an institution meets the needs of its communities depending upon cultural, regional, ideological, and economic factors. Contemporary realities necessitate that Muslim jurists must revisit the principle of guardianship (Wilaya), with or at the very least allow exceptions in circumstances where the mother serves as the sole breadwinner for her minor child.

CHAPTER 4

Analysis And Findings

The thesis focused on the role of the mother in the welfare of her own child and recognition of her existence across society, institutions, legislature, and Jurists. The scope of this research was limited to examining the restrictions imposed on the mother to act as a guardian of her own minor child in Pakistan and to furnish a monetary surety bond as a prerequisite. It has reasonably depicted challenges a mother encounters, trauma she embraces, and the exhaustion of the crippled legal process to assume guardianship. The study minutely discussed the rationale behind the father being a natural guardian under the umbrella of patriarchal interpretation of Islamic laws, while ignoring the mother altogether. The research is important in addressing two queries: how the inequitable legal and substantive procedures supplement patriarchal supremacy in the contemporary Muslim family, and how the principle of the best interest of the child is preserved in such a society. The Systems Theory is applied to the study, as the guardianship framework in Pakistan is the combination of statutes, policy, rules and regulations, and religious customs and practices.

Dr. Nabeel Hussain, an academician in an interpersonal interview, opined about the application of the Systems Theory to the guardianship framework in Pakistan.⁸ According to him, the system theory bejewels the society into a unitary form of system, where the religious and cultural values are integrated to develop a better guardianship legal framework in general and in Pakistan in particular. As the theory suggests, all legal systems, law, judiciary, and society are interconnected; this interconnectedness could further pave the way for a better understanding of the matter and play a hand in shaping robust guardianship laws in Pakistan. As there is a huge gap when it comes to the transfer of guardianship to the mother in Pakistan, this lacuna in the legal system of Pakistan remains a stumbling block for the better progress and prowess of Pakistan. The disorder in the legal framework and severe lack of progressive thought within Pakistan's judicial system make the granting of guardianship to the mother a complex ordeal, treated with indifference. Judicial discretion and policy reforms cannot be viewed in isolation, as both of them are shaped by the common ideology of custom and religious practices. Together, they interact to form a complex guardian framework in Pakistan.

⁸ Dr. Nabeel Hussain is Assistant Professor in the Department of International Relations at the National Defence University, Islamabad. His interview was conducted on

The principle of welfare of the minor or the best interest of the child is undoubtedly the core foundation of decision-making by the Guardian Courts. But the incontestable role of the father as a natural guardian under the GWA, 1890, subserves the child's best interest. The father is mounted as the epitome of the Muslim family for his capacity to earn, provide sustenance, and safeguard the interests of his family. Where the father is alive, present, responsible, and fit to be a guardian, there is no dispute between the parents on assuming the guardianship of minor children. The dispute usually occurs in a broken marriage or where the father is absent, irresponsible, or deceased. In such circumstances, the best interest of the child is the stability and well-being of the mother who remained present, responsible, or is living with her children. However, in Pakistan, this is not the case. A mother has to apply to the Guardian Court for her appointment as a legal guardian (de jure) of her own children. Under Islamic jurisprudence, after the father, the paternal grandfather succeeds the guardianship of the property of a minor due to family lineage and inheritance of property disputes. But this principle is stretched to the person of a minor for the satisfaction of the patriarchal society. A policy without any formal legislation is prevailing in the country. To balance the religious traditions, custody is granted to the mother, while guardianship rests with the father. The application of the judicial mind, balancing the parents, often compromises the welfare of the minor. In *Gul Sadem Khan V. Mst. Halima* (PLD 2025 SC 47), custody was denied to the father because he lacked love and affection for his two minor sons. But the mother was denied assuming guardianship as the father was alive. In *Ahmed Bilal V. Khurram Javed* (2023 PLD 83 Islamabad), the father was granted the custody of the minor daughter and taken from her maternal grandmother, who was financially stable and could provide better living conditions to the child. The sole ground was the love and affection of the father for his daughter. The inconsistent rulings of the superior courts in Pakistan could not clarify whether the welfare of a minor resides in love and affection or the financial stability of a parent. If the principle of best interest of the child relies on love and affection, it is unclear from the policy of the Guardian Courts why a mother is required to furnish a surety bond (money guarantee) before the Court that she will not act detrimentally to the interest of her own child, or whether a money guarantee is sufficient to ensure the child's wellbeing.

To obtain in-depth insight into the legal processes employed by the Guardian Courts, four mothers shared their lived experiences. The common observation was their unfamiliarity with the concept of furnishing surety bonds. They could not understand why a mother who has been taking care of her children all along has come to the Court for redressal of a procedural glitch in the system, and is rather held accountable for her being dutiful. Similar nuances were observed during my personal engagement with the system for appointment as a surviving guardian parent.

Interviews with the esteemed colleagues practicing in the Family Courts could not justify the discrimination against mothers in guardianship petitions. They explained the rationale behind the surety bonds for custody matters, and how the custodial parents use the children as a tool to hurt the non-custodial one. Shaheen Akhtar, Advocate High Court, shared her stance in the discussion in the research interview⁹. Sharing an instance where a mother, the custodian parent, fled with her minor daughter to America without the knowledge of the father. She had furnished a personal surety bond of ten lac rupees against the custody of her daughter. The father, after pursuing for some time, conceded out of court. In this scenario, the best interest of the child amounted to ten lac rupees.

The principle of the best interest of the child is inherently abstract, and so is the idea that the welfare of a minor is of paramount consideration. The application of the principle requires weighing competing and intricate interests, along with legal, social, and ethical considerations. As each case presents its own circumstances, all of them cannot be adjudged with the same yardstick (BAJPAI, 2005). It is observed that the Guardian Courts usually attribute the financial status of the father or the father as a breadwinner, a contributing factor for being a natural guardian. In the evolving family aspects, where a household is led by a mother, or in case of a deceased or absent father, the mother being the natural guardian is paramount to the welfare of the minor. Uncertainty in the welfare of the child is observed when the mother is doubted by the Court and is unduly burdened with the onus to prove her love for her children. In a response to a question regarding the welfare of minors, Nabeel Hussain shared that one cannot altogether negate the value of money and finances in bringing up the children and, better prosperity of their lives. However, a mother carries emotional attachment with her children, and if the mother is not financially stable, one cannot say that she is not a capable mother. I entirely disagree with this notion that children's welfare is dependent only on financial provisions; rather, it is more dependent on a healthy and balanced mental health. Furthermore, for a child, it is extremely important to have a mother during the early formative ages.

The role of family courts exercising the parental jurisdiction of the child in question has no standard guidelines/ procedures to be followed for dealing with children present in the Court. Some Judges interview the children themselves, while others rely on the legal representative of the custodian parent. There are no uniform rules for judges to be acquainted with the 'child-centric approach'. Individual judges interpret the welfare of minors according to their own perception of the term. Most of the orders for custody or guardianship, or their refusal, do not provide their reasons or factors considered for such an order. It is seldom mentioned that the order is announced

⁹ Shaheen Akhtar, Advocate High Court participated in a discussion on the research topic at Islamabad.

in the best interest of the child, but the minutiae under which best interest is considered are not mentioned.

The gaps within the guardianship framework in Pakistan have created a complex and often uncertain legal landscape for the minors. Jamila Aslam raised her concern over the Guardian Courts and their presiding officers. Originally, the GWA, 1890, delegates the power of the Guardian Court to the District Court, but under the Family Courts Act, 1964, the Family Courts/ Civil Courts were transferred the powers of the Guardian Court. Initially, the Civil Judge, Class I, had jurisdiction to adjudicate upon the guardian matters, which is now entrusted to the Civil Judge, Class II and III. Civil Judges Class II and III typically have only two years of practice and do not necessarily possess experience in family court matters. Such incompetence and inexperience among judicial officers often render them susceptible to influences from the prevailing cultural norms beyond the courtroom. Their insensitivity towards the mother and the child leads to prolonged litigation, adding to the inconvenience and exposure of mothers to unwarranted social and cultural criticism. The protracted policy-oriented procedure drains the resources of the mothers, adversely impacting the child in the process. Further, repeated exposure to the courtroom environment is neither suitable nor conducive to a child's well-being. As a long-term measure, Guardian Courts may adopt a child-centric approach similar to that applied in custody disputes involving minors. Interim guardianship may be granted to the mother who applies for a guardianship certificate until the final adjudication of the case. Such a measure should be limited to cases where the guardianship claim is contested by other interested parties. This approach would spare the child from repeated courtroom appearances unless strictly necessary. Additionally, any matters requiring a guardian's presence would not be delayed and could be completed without interruption.

Nabeel Hussain remarked that Culture is one of the strongest elements of any society. In international law, customs and cultures are also considered as one of the most important sources upon which international law is bound. All this to emphasise the huge impact culture has on the broader judicial and legislative attitudes.

For being a Guardian Court, the presiding officer must have the experience and capability of a District Judge. The inconsistent and incompetent decisions are a product of amateur judicial discretion.

It can be safely assumed that the requirement of furnishing a surety bond by a mother to obtain the right to act as the guardian of her own minor child does not necessarily secure the best interest of the child or is in the service of the welfare of the minor. Hence, the policymakers and the

institutions must reconsider the rules and regulations according to the evolving dynamics of a mother-led household.

Nabeel Hussain suggested that Pakistan can seek guidance and take precedents from advanced states and their legal systems for the actual implementation of the system theory in its society. Turkey has no such restrictions or requirements for mothers. Both father and mother are natural guardians, and no other guardian shall be appointed if any of the two parents are alive unless there is a legal precedent to do so.

Turkey, being an Islamic state and a representative of Khilafat e Muslama (Caliphate), has abolished all restrictions on mothers being the custodian or guardian of their own child. Islamic Jurists and the legislature in Pakistan must learn from the personal laws of progressive states to remain relevant in the contemporary world. Other states like Egypt, Qatar, Morocco, that look up to Pakistani judicial discretion extensively interpreted the 'welfare of minor' principle, deviating substantially from the traditional Islamic rules governing parental care. As a result, a positive and sympathetic approach in custody matters has emerged for both women and children (Moller, 2015). Pakistan, being a responsible state and a member of CEDAW and CRC, must bring its policies and procedures up to standard, benefiting women equitably and for the betterment of children. Mere legislation on crimes against women and children is not sufficient to fulfill its international commitment. Inclusion of women in the decision-making process must start in their homes. Pakistan should bring reforms in its existing guardianship laws, keeping in view the sensitivity and nature of the case. Instead of having a universalist approach towards such sensitive issues, Pakistan should adopt a relative approach for dealing with such problems of parenting and guardianship. Ambiguities within the statutory provisions frequently compel courts to resort to the personal law of the ward or to rely on the broader principle of the child's best interests. Undoubtedly, the welfare of the child is the paramount consideration for determining the guardianship or custody of a minor (Kumar, 1975).

Further, the GWA, 1890, now more than a century-old statute, no longer adequately responds to the challenges and realities of contemporary society. This gap can be filled with the digital synchronization of the legal process with the National Database. This short-term policy shift could achieve harmonization of judicial and gender reforms in Pakistan.

CHAPTER 5

Recommendations And Conclusion

The research underscores the urgent need to address the patriarchal biases entrenched in Pakistan's guardianship laws, particularly in the GWA, 1890. The three-tier “guardianship framework” is critically evaluated to highlight the absence of legal prudence in determining the child's well-being, which consequently leads to injustice in proceedings before the Guardian Courts. By critically analysing the laws through the lens of Islamic principles of justice and contemporary gender equity, the study challenged outdated interpretations that undermine maternal authority and perpetuate systemic inequities. The research aspires to contribute meaningfully to legal and societal reform, fostering a more equitable framework that balances traditional values with modern imperatives. Ultimately, this study seeks to pave the way for a just and inclusive legal system that safeguards the rights of all stakeholders, particularly mothers and children, in accordance with both Islamic teachings and global human rights standards.

“Though interpretations may vary, there is no question that all the world’s religions are committed to the pursuit of equality and human rights. However, certain man-made practices performed in the name of religion not only denigrate individual religions but violate internationally accepted norms of human rights, including women’s rights.”

(Coomaraswamy, 1994)

5.1 Proposed Reforms

The paper aims to assist the legislature in bringing legal reforms in the guardianship framework of minors, making it less stressful, convenient, and efficient for the applicant, particularly the mother of the minor. These recommendations can be classified into long-term and short-term outcomes.

i. Application of National Database Registration Authority (NADRA)

NADRA could serve as the most efficient mechanism for issuing guardianship certificates to the real mothers of minors. Upon the father's death, the mother could be granted de jure guardianship, as verified through NADRA records. The appointment of de jure guardian upon the father’s death could bring the Pakistani legal system in resonance with the international commitment under CRC

and CEDAW. This approach would not only facilitate government data collection but also lessen the burden on the judiciary.

ii. Addition of Role of the Mother in the Guardian and Wards Act, 1890

1. Under Section 7 of the GWA, 1890, the role of the mother could be added in the array of individuals who could apply to be a guardian.
2. Under Section 19-A, the word ‘mother’ could be added along with ‘father’ in the GWA,1890

iii. Codification of Law of Custody

The law relating to custody must be codified to address the lacunae within the existing guardianship laws. The GWA, 1890, does not prescribe any clear provisions governing custody arrangements of minors for the non-custodial parent. Consequently, a custody petition under Section 25 of the GWA, 1890, is not justifiable in terms of the letter and spirit of the law, as the Guardian Court lacks jurisdiction to adjudicate custody matters. Nevertheless, Guardian Courts continue to exercise judicial discretion to bridge these legal gaps. With such codification, the discretion of the family courts shall be curtailed to principles of law only.

iv. Define Ambiguous Terms in the Act

Amendments to the GWA, 1890, are proposed to address the gaps identified in this research. These amendments should clearly define and differentiate between custody and guardianship, provide a definition of ‘unfit’, incorporate visitation rights, include penal provisions for non-compliance, and repeal laws that are redundant or inconsistent with the recent legal framework of Pakistan.

v. Review Safeguard Standards for Welfare of the Minor

The procedure followed by the Guardian Courts to ensure the welfare of the minor, furnishing of a surety bond, must be replaced with a tangible surety by the Guardian. Or a mode of monitoring and reporting must be introduced to keep checks on the minor. Meanwhile, the real mother must not be compelled to furnish a surety bond to act as a guardian of her own child, in cases where the father is deceased, absent, or deemed unfit by the Guardian Court.

vi. Simplified Digital Submission of Documents

It has been observed that the procedure, whether codified or not, has more power to create patriarchal dominance over maternal rights. Simplifying the process and avoiding nuanced practices, the online document submission for verification could be applied.

vii. Guardianship Matter to be Adjudicated Before a District Judge

As per the GWA, 1890, the guardianship matter must be the domain of a District judge and not that of the civil judge. However, under the Civil Courts Ordinance, 1961, and Rules and Orders of the Lahore High Court, guardianship matters are entrusted to judges equivalent to civil judges. In the beginning, the guardianship matters were entrusted to a Civil Judge, Class I. But, later, due to the influx of cases registered under family courts, Civil Judge, Class-II and III are entrusted with the powers of guardian courts. As discussed during an interview with Jamila Aslam, the lack of relevant experience, peer-influence, and conventional practice norms hinders the perception of judges at lower trial courts. It is unanimously agreed by the interviewed legal practitioners that only a district judge must adjudicate upon the matters of guardianship.

viii. Training of the Guardian Courts

It is recommended that in the Guardian Courts, not only the judges, but the support staff must be provided with regular training with the child-sensitive and gender diversity approach.

ix. Bring Legal Framework in Resonance with International Standards on Child Welfare

Pakistan, being a signatory to the Hague Convention on Civil Aspects of International Child Abduction, 1980, has to update its personal laws relating to custody and guardianship matters, particularly in the case of adoption of a minor child. In Pakistan, adoption is not recognized as a legal concept; all adoption-related matters are treated as guardianship cases. The Guardian Court appoints a guardian for the person of the minor upon furnishing of a surety bond. However, the surge in child-trafficking cases demonstrates that monetary surety is an insufficient and ineffective

safeguard in matters relating to adoption. It is recommended to provide standard guidelines to be considered under the principle of the welfare of the minor or the best interest of the child for the adoption of minor children.

5.2 Conclusion

The issue of gender inclusion in personal laws in Pakistan has emerged as an important impediment to ensuring social justice in the country. In a report by UN Women, Pakistan is a host of structural and socio-cultural barriers that continue to curtail women and girls' mobility. It has declared Pakistan a highly patriarchal society with regressive social norms and gender stereotypes, giving rise to discrimination and violence against women.

In pursuance of its commitment to CEDAW, CRC, and SDGs, Pakistan is reevaluating its policy implications on the personal laws to ensure a gender-sensitive approach in the legal regime. Despite an excessive number of national and international scholarships available on the gender-disparity and social injustices in marriage and domestic disputes, diminutive research is led on the curtailed rights of a mother under guardianship laws in Pakistan. Existing legal analysis often treats guardianship and custody interchangeably or focuses primarily on custody disputes without interrogating the underlying power structures that marginalize mothers as guardians.

The research has criticised gender-disparity in disregarding a mother as the natural guardian under the GWA, 1890. A mother is required to seek permission from the court to act as the guardian of her own child. Analysis of the empirical data obtained from interviews with legal practitioners and the lived experiences of aggrieved mothers reveals that a mother is required to furnish a surety bond before the Guardian Court to demonstrate her sincerity and commitment toward her own child. On the other hand, the father is exempt from providing any such evidence. This requirement that a mother submit security to act as the guardian of the person of her own child is not supported by any provision of law. Islamic jurisprudence recognizes the father as a *de jure* guardian only in criminal and fiscal matters. The Guardian Court's requirement that a mother furnish a security bond is a consequence of policy rather than a statutory mandate. It is further observed that such policy implications undermine and worsen the effectiveness of legislation.

The whole guardianship law is based on the "Welfare of the child" principle. But it can be safely concluded that the child is the only victim in a family dispute. The determination of the best interest of the child is a specialised function that not all courts are equipped to perform. Inconsistent application of judicial discretion has derailed the guardianship system. The lower trial courts often assess the welfare of the minor through the lens of prevailing legal practices, patriarchal or cultural

norms, or their own extraneous personal experiences. When the welfare of the child principle is not properly applied or is overlooked by the incompetent trial courts, higher courts have to be approached. This compromises resources, time, and the child has to go through unnecessary trauma and further litigation. Moreover, the absence of a prescribed timeline for adjudicating custody disputes leads to prolonged and protracted litigation, ultimately undermining the welfare of the minor.

The only question that remains unanswered in this research is whether the satisfaction of the court equates to the welfare of the minor. The Guardian Courts, when appointing a guardian for the person of the minor, require the furnishing of a surety bond in monetary terms. How, then, can the court's monetary satisfaction be considered equivalent to ensuring the well-being of the minor? The theory of welfare of the minor conceptualises the well-being of the minor in terms of their health, happiness, and overall prosperity. However, the current guardianship framework is inadequate in ensuring the welfare in its true spirit. Depriving a mother of the right to participate in crucial decisions concerning her own child's life cannot be regarded as serving the welfare of the child. Likewise, equating the welfare of a child with monetary considerations is no longer acceptable in contemporary society.

The research contributes to the reconsideration of the guardianship framework to bring it in conformity with contemporary family dynamics. While doing so, tangible reforms are suggested for promoting gender-equitable social justice in Pakistan with a child-centric approach; 1) Policy-makers must eliminate unnecessary engagement of a mother in the litigation, 2) the GWA, 1890 needs considerable amendments competing the trends of the contemporary family dynamics, 3) introduce strict timelines for disposal of cases involving children, 4) apply uniform principles in application judicial discretion, and 5) entrusting the guardianship and custody matters to experienced or specifically trained judges. The findings in the study can further assist policy-makers in reforming the guardianship laws and assist the legal counsels in better understanding and representation of the matter, and navigate the mothers seeking legal assistance in guardianship claims.

The study provides an area for further research on comparative studies with other Muslim-majority states, child empirical outcomes, and the economic viability of the mother post-reforms in family laws.

It is the responsibility of a welfare state to safeguard the interests of the weaker elements of society. For a sustainable and equitable future, Pakistan requires a thorough re-evaluation of its legal framework, one that embeds gender equity not only in cases of physical violence, but also in the realms of emotional, mental, and psychological harms. The experiences of the mothers navigating

the guardianship system reveal that injustice does not always manifest as overt violence. Erosion of dignity, mistrust of the institutions, and procedural burden may also take the form of hurt. Meaningful reforms demand a shift from patriarchal assumptions to a rights-based, child-centred approach where mothers are recognized as equal, capable, and trustworthy guardians. Only when the law reflects this reality can Pakistan claim progress towards a reasonable and humane society for its families and future generations.

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ANNEXUXE- I

CREDITS TO THE PARTICIPANTS IN INTERVIEW

1. Jamila Aslam, Advocate Supreme Court of Pakistan
2. Chaudhry Tanveer Akhtar, Advocate Supreme Court of Pakistan
3. Sheikh Azfar Amin, Advocate High Court
4. Raja Umair, Advocate High Court
5. Shaheen Akhtar, Advocate High Court
6. Dr. Nabeel Hussain
7. N (a mother)
8. Ishrat Bibi
9. Neena Waqar
10. Hajra Batool

ANNEXURE-II

Questionnaire for Interviews

A. Interview with Legal Practitioner in Family Courts

Q1. Introduce your area of practice, experience in litigation and your most memorable work in the family courts and why?

Q2. Do you find any lacunas in the Guardians and Wards Act, 1890? If yes, could you elaborate?

Q3. In your opinion, what part of the guardianship framework (Substantive law, procedural law or practice) is gender biased and adversely affects the rights of mothers in guardianship claims?

Q4. Have you ever witnessed a mother adversely using the authority of guardian of person of her own child?

Q5. How do courts typically respond when a mother applies for guardianship while the father is alive but absent or negligent?

Q6. How do you justify the practice of executing a surety bond by real mother to be awarded guardianship of her own child?

Q7. What to what extent Islamic beliefs, customs and culture in a society or background impacts the discretionary powers of the Court?

Q8. What is taken into account by the Court while adjudicating welfare of the minor?

Q9. What suggestions do you have for the policy makers to make guardianship framework gender-neutral in Pakistan?

B. Questionnaire for Academician

Q1. From a systems theory perspective, how do you view the interaction between law, judiciary, and society in shaping guardianship outcomes?

Q2. In your opinion, could the welfare of child be adjudged only on the basis of financial provision?

Q3. How do you think societal perceptions of gender roles influence judicial or legislative attitudes toward guardianship? Can cultural change alone improve outcomes, or must legal reform accompany it?

Q4. How can policymakers ensure that reform is both gender-sensitive and child-centered?

C. Interview with the Litigants (Real Mothers with guardianship claims)

Q1. Can you brief you family situation and your marital status? Who is the primary care-giver in the family? What are the social issues due to which you applied for the guardianship of your child?

Q2. How did you learn about the guardianship laws and how to apply for it? What part of the guardianship framework you did not understand during the process? Did you hire a lawyer and did your lawyer guide you through the whole process for you to understand?

Q3. What social pressures or barriers you faced after a failed marriage with respect to your children's custody or right to maintenance from their real father? What obstacles were created by the paternal relatives of your child.

Q4. What part of the process of claiming guardianship before a Family was the most challenging, strenuous, disrespectful or disgraceful? How long did the process take? Do you feel that the court treated you justly and fairly?

Q5. How did you manage to arrange a surety for execution of the surety bond against the guardianship awarded?

Q6. What do you think you should have known before the initiation of the process? What suggestions you have for the policy makers?

ANNEXURE -III

Consent Form for Research Participation

Title of Research:

Re-evaluating the Guardianship of Minors Framework in Pakistan: Legal Reforms, Gender Equity, and Policy Implications

Researcher:

Zainab Rashid

MS GPP Researcher, Bahria University

Email: Zainab.baluch83@gmail.com

Phone: +92-331-5200991

Supervisor:

Dr. Syed Muhammad Aleem Gillani

GPP, Bahria University E-8

Email:

Purpose of the Research:

This research aims to explore the legal framework governing the guardianship of minors in Pakistan, with a specific focus on how it affects mothers seeking guardianship. The interview is intended to understand judicial perspectives, practices, and potential areas for reform.

Participation Details:

- You are invited to participate in a confidential interview that will last approximately **30–60 minutes**.
 - Your participation is entirely **voluntary**, and you may **withdraw at any time** without any consequences.
 - You may decline to answer any question you do not feel comfortable with.
 - With your consent, the interview will be **audio recorded** to ensure accuracy in transcription and analysis.
 - Your identity will be kept **anonymous**, and any identifying details will be removed from transcripts and publications unless you explicitly authorize otherwise.
-

Confidentiality and Data Protection:

- All data will be securely stored in password-protected digital files.
 - Only the researcher and the academic supervisor will have access to raw interview data.
 - Findings may be used in the thesis, academic publications, or presentations but will not disclose your identity unless express permission is granted.
-

Consent Declaration:

Please tick (✓) the appropriate boxes:

- I have read and understood the information provided above.
- I voluntarily agree to participate in this research interview.
- I consent to the audio recording of the interview.

- I understand that I may withdraw from the study at any time.
- I consent to anonymized quotations from my interview being used in academic outputs.
- I agree to be identified by name and position in the research (Optional).

Participant Name: _____

Signature: _____

Date: _____

Researcher's Name: _____

Signature: _____

Date: _____