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PAKISTAN

Overview

As a result of British influence in the region the Pakistani legal system has been shaped by both Islamic law and the common law tradition. The Pakistani Constitution establishes Islam as the religion of the State and Article 227 states that all legislation should conform to Islamic principles. Clearly Islamic principles have played a key role in the development of Pakistani law, including family law. The Muslim Family Laws Ordinance was promulgated in 1961.

The majority of the population of Pakistan are Sunni Muslims following Hanafi law. There are also significant numbers of Shia Muslims and communities of Christians, Hindus, as well as a small percentage of followers of other religions such as the Baha'is.

Foreign Orders

Although foreign orders are not automatically enforceable, they can be considered by Pakistani courts and the higher the level of the foreign court that issued the order the more weight it is accorded in Pakistan. The Civil Procedures Code of 1908 contains provisions for the enforcement of certain foreign decrees but although custody orders can be used as supporting documents they are not directly enforceable.

Court Structure

At the apex of the Pakistani court system is the Supreme Court, which has original, appellate and advisory jurisdiction. The Supreme Court is presided over by the Chief Justice of Pakistan. There is a High Court in each of the four provinces of Pakistan. These regulate and supervise the subordinate

judiciary in each province. The High Courts have original and appellate jurisdiction and are headed by the Chief Justice of the respective province. The High Court can direct a person in custody to be brought before it.

The lower courts are divided into two levels. At the first level is the Court of the Civil Judge. Civil Judges function under the superintendence of the District Judges, who form the second level. District Judges hear appeals from the Courts of the Civil Judge. Criminal matters come under the jurisdiction of the Court of a Sessions Judge and in the first instance family law matters come under the jurisdiction of the Family Courts. The Family Court can consolidate all disputes related to divorce, custody and maintenance, however in practice custody issues are dealt with separately by the Guardian Courts because custody cases usually take a longer time to conclude.

A Federal Sharia Court was established in the Constitution by Article 203B (c), which has jurisdiction to examine certain laws to ensure they are not repugnant to Islamic principles. The Court has original and appellate jurisdiction, but does not have jurisdiction over the Constitution, Muslim personal law or any laws relating to the procedure of any court or tribunal. In 2000 the Federal Sharia Court held in *Allah Rakha vs Federation of Pakistan PLD 2000 FSCI* that it had jurisdiction to examine whether the Muslim Family Laws Ordinance is consistent with Islam because the codified laws applicable to Muslims does not come under the category of Muslim personal laws as mentioned in Article 203 (c) of the Constitution. However, this judgement has been assailed before the Supreme Court and there has been no alteration to the law to date.

There is a separate law for Family Courts in Azad Jammu and Kashmir, which is The Azad Jammu and Kashmir Family Courts Act, 1993. These courts have exclusive jurisdiction to hear cases in the region concerning divorce, maintenance, custody, dower, restitution of conjugal rights and guardianship.

Filiation

Although there is no strict definition of illegitimacy in Pakistani law, paternity is typically established by the birth of a child within a valid marriage, at least six months after the date of marriage. The custody and

guardianship of a child born outside marriage belongs to the mother and the child does not inherit from the father. Under Sunni law, a child born outside marriage inherits from the mother and her family, whereas under Shia law the child will not inherit from either parent.

Custody

When considering issues of custody in Pakistan it should be noted that the emphasis on the principle of the best interests of the child, as introduced in the Guardians and Wards Act No.8 of 1890, remains a priority. This is confirmed by Section 25 of the Family Court Act 1964. However, all things being equal, the best interests of the minor are usually presumed to be in following the principles of the minor's religious law. It is always preferred that a Muslim child is brought up in an Islamic atmosphere.

According to Hanafi jurisprudence, the mother has the most right to custody, which lasts until a male child reaches seven years of age and a female child reaches puberty. If the mother is deceased or unable to perform the duties of the custodian, custody is awarded to the maternal grandmother, then the paternal grandmother, a full sister, a uterine sister, a consanguine sister, nieces in that order, maternal aunts and then finally paternal aunts. At the end of the period of custody physical care does not transfer to the father automatically. He must file a case for custody. In Jaafari jurisprudence the period of custody continues until a male child is two and a female seven. In the absence of the mother, the father would be granted custody and next in line is the paternal grandfather.

When granting custody the court will take into account certain criteria. The criteria include the age of the prospective custodian, gender, marital status, character, religion and ability to raise the child, although the courts do maintain some flexibility in awarding custody due to the emphasis on the welfare of the child. Once the mother has been granted custody she may lose it if she remarries. She would also lose custody if she was found to have neglected the child or to be leading an immoral life, or if she removes the child at a distance away from the guardian so as to make it impossible for him to fulfil his duties as guardian of the child. For this reason it is difficult for a non-Pakistani mother to get custody of a child that she intends to raise outside of Pakistan. There have been exceptions to this in cases when the foreign mother has been a Muslim, for example *Gulbalar vs Suhail Butt Lahore High Court 1994*.

Guardianship

The natural guardian of the person and property of a minor is the father. After the father the right to be appointed guardian of the property of a minor is awarded to the father's executor, the father's father and then the executor of the father's will. The executor must be a male Muslim relative.

Access

The right of both parents to maintain contact with their child is upheld, subject to the welfare of the child.

Non-Muslim Family Law

The non-Muslim communities of Pakistan are not subject to Muslim family law but there is no uniform civil code that governs them. The Guardian and Wards Act 1890 and Family Court Act 1964 apply to all Pakistanis, regardless of religion. The Courts are guided by section 17 of the Guardian and Wards Act and therefore the custody of non-Muslim children is normally awarded in the best interests of the child, although it is the father who has the responsibility to maintain the child regardless of who has custody because the father is assumed to be the guardian. If the father is absent the mother may apply for guardianship. If both parents are absent a guardian can be appointed according to the will of either parent.

Nationality

According to sections 4 and 5 of the Pakistan Citizenship Act 1951 Pakistani citizenship is acquired by birth in Pakistan, if either of the parents are Pakistani or by naturalization. If the parent is Pakistani by descent, the child born outside Pakistan will not be considered a citizen of Pakistan unless the birth is registered at a Pakistan Consulate in that country or unless the parent is, at the time of the birth, in the service of any Government in Pakistan.

Leaving the Jurisdiction

Children do not need permission from their guardian to travel abroad unless they are restricted from doing so by a court order, for example a custody

order. Women do not need permission to apply for a passport or to travel abroad.

International Law

Pakistan signed the Convention on the Rights of the Child in 1990 and withdrew their general reservation in 1997.

Pakistan signed a protocol with the United Kingdom in January 2003 in order to facilitate the resolution of abduction cases between the two countries. This protocol is a judicial agreement, which emphasises judicial co-operation and the importance of mediation in the resolution of family disputes and is a simple document of nine articles. It provides for the concept of return to habitual residence, however the child is only returned if there is a custody or residence order in place in the jurisdiction of the normal residence of the child.¹ The protocol is also applicable if a child is wrongfully retained beyond the period for which permission was given to take the child. In other words, the protocol makes no judgement on wrongful removal or custody issues. It merely ensures that the orders in place in the jurisdiction of the place of habitual residence are enforced by the courts in the jurisdiction to which the child has been abducted or wrongfully retained. The restriction that there must be a custody or residence order in place in order for a child to be returned reflects the procedure adopted by the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children signed in Luxembourg on 20th May 1980.

It is unclear as to whether the Pakistan Protocol is officially applicable in the region of Azad Jammu and Kashmir. To date it is not being enforced in practise and should not be relied upon in child abduction cases to this region.

¹ Pakistan Protocol 2003, Article 2

“If a child is removed from the UK to Pakistan, or from Pakistan to the UK, without consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child’s habitual/ordinary residence, the judge of the court of the country to which the child has been removed shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child’s habitual/ordinary residence.”

Child Abduction

According to section 361 of the Pakistan Penal Code it is an offence to remove a male child under the age of fourteen or a female child under the age of sixteen away from the lawful guardian. The case law as to whether this provision can be invoked in cases of parental child abduction is conflicting. Although this section has been used against a parent removing a child from the other parent, case law is more in favour of the non-applicability of this section in parental child abduction. The term lawful guardian has been interpreted to mean “any person lawfully entrusted with the care or custody of such minor”. If the removing parent believes themselves to be entitled to lawful custody then this section would not apply to them unless they removed the child for an unlawful reason.

One remedy for child abduction that has been used with some success in Pakistan is the writ of habeas corpus. A writ of habeas corpus is a petition filed with a court by a person who objects to his own or another's detention or imprisonment and is commonly filed by persons serving prison sentences. However, they can also be used in family law, for example a parent who has been denied custody of his other children by a trial court or whose child has been illegally removed may file a habeas corpus petition. This petition would have previously been made directly to the High Court under Section 491 of the Criminal Procedures Code and Article 199 of the Constitution of Pakistan, however a habeas corpus petition is now normally made to a Court of District or Sessions Judges. A petition could still be heard by a High Court, however this depends on the discretion of the judge.

An application for Habeas Corpus does not determine who should have the ultimate custody of the child and the application must be attached to a substantive application.

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