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Child Custody in Pakistan: The Role of Ijtihad

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CHILD CUSTODY IN PAKISTAN: THE ROLE OF IJTIHĀD

MARTHA F. DAVIS*

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I. INTRODUCTION

The Hanafī School of Muslim Law¹ recognized by most Pakistanis, stipulates that a divorced mother's right to the care and custody of her children outweighs the father's claims until the girls reach puberty and the boys reach age seven. The father's right to custody arises thereafter, though the father retains legal, if not actual, custody throughout the children's minority.² More often than not, custody decisions entered by the Pakistani courts deviate from these rules. Jurists cite the custody provisions of the Guardians & Wards Act of 1890 to mask their reliance on a "best interests of the child" standard similar to the test found in British family law.³ The legal technique by which courts incorporate the "best interests" test into the Pakistani rule of decision is the ancient concept of "ijtihād" or "the exercise of human reason to ascertain a rule of [Muslim] law."⁴

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¹ Abū-Hanifa (d. 767) was a leading authority on the law of Kūfa, an early Islamic province. After his death, the school of Kūfa became the Hanafī school, "for the faithful pupil ash-Shaybānī attributed the authority for all his writings to his former master Abū-Hanifa." N. COULSON, *A HISTORY OF ISLAMIC LAW* 51 (1964). The Hanafī school, which was the official school of the Ottoman and Moghal empires, predominates in the Middle East and the Indian subcontinent. Esposito, *Perspectives in Islamic Law Reform*, 13 N.Y.U.J. INT'L L. & POL. 217, 219 (1980). Other schools of law are the Mālikī, Shāfī, and Hanbalī schools. N. COULSON, *supra*, at 51, 71.

² Legal custody is the judicially enforceable right to custody. It includes ultimate legal responsibility for the child's welfare. Actual custody is physical custody. A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 189 (1964) (citing Tyabji § 235 and Mulla § 352).

³ See *S(BD) v. S(ID)* (1977) 1 All E.R. 656; *J v. C* 1970 A.C. 668. See generally J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1981).

⁴ N. COULSON, *supra* note 1, at 237. Ijtihād is one of the four classic sources of Islamic law. The most important is the Qur'ān itself. The second is the sunna, or the Prophet's deeds as recorded outside the Qur'ān. The third source, ijma', denotes consensus of opinion. The final source is ijtihād al qiyās or reason by analogy. Bonderman, *Modernization and Changing Perceptions of Islamic Law*, 81 HARV. L. REV. 1169, 1173 (1968). Several forms of ijtihād contributed to the development of Islamic law. Two important types are istihsān or juristic preference, and istislāh or public interest. These were used to achieve equity when qiyās (strict analogical reasoning) led to unnecessarily harsh results. Esposito, *supra* note 1, at 241. According to Joseph Schacht, during "the first two and a half centuries of Islam . . . there was never any question of denying to any scholar or specialist of the sacred Law [shari'a] the right to find his own solution to legal problems." J. SCHACHT, *INTRODUCTION TO ISLAMIC LAW* 70 (1964), quoted in C. SMITH, *ISLAM AND THE SEARCH FOR SOCIAL ORDER IN MODERN EGYPT* 233 (1983). The scope of ijtihād narrowed considerably as the law became codified, until it could be

Pakistani judges relying on *ijtihād* have drawn the lines for a debate which is central to the role of law within the Islamic state. *Ijtihād* is a technique of change.⁵ In a world where Muslim family law is strained and pulled by current events, and "western" views of accepted behavior are exported wholesale to Moslem consumers,⁶ a mechanism for evolution is a safety valve. But change is difficult to reconcile with a Qur'anic state. *Ijtihād* may represent innovative legal reasoning which would strengthen Islam in Pakistan, but to prove their case, jurists advocating *ijtihād* must argue that it is unremarkable — that it has always been an organic part of Muslim law, ready to be exercised in just such a way. In the context of Pakistani child custody and Anglo-Muhammadan law, this position is entirely tenable.

The legislative enactments and court decisions which attempt to define, interpret, or limit Muslim law in Pakistan and India are termed Anglo-Muhammadan law.⁷ According to Coulson, Anglo-Muhammadan law is

an expression of Islamic law unique not only in form — for it is genuinely applied as a case-law system through a hierarchy of courts which observes the doctrine of binding precedent — but also in substance, inasmuch as it has absorbed English influences, particularly those of equity.⁸

The major part of Anglo-Muhammadan law was assimilated into Pakistani law through article 224 of the 1956 Pakistan Constitution, which provided for the incorporation of pre-existing law "save as is otherwise expressly provided in the Constitution" and "so far as is applicable and with necessary modifications."⁹

The Guardians & Wards Act of 1890 was enacted at a time of pervasive British influence in what is now Pakistan. The early British practice of applying Islamic law to Muslims in matters governed by the personal law of the Qur'ān had been effectively abandoned.¹⁰ The Pakistan Penal Code of 1860 severely limited the operation of Muslim religious and customary law, as did the Divorce Act of 1869. The Punjab Laws Act IV of 1872 reinforced the secondary role of Muslim law as a rule of decision by calling for judicial reliance on, first, custom which was not contrary to justice or good conscience and not void or overridden by other enactments, and second, Muhammadan law to the extent that it had not been legislatively abolished or altered.¹¹ Muslim personal law was generally

exercised only with reference to the hadiths (the narratives relating to the Prophet), *qiyās* or deductive analogy, and the consensus of the legal community, *ijmā*. SMITH, *supra* at 233.

⁵ See generally Rahman, *Islamic Modernism*, INT'L J. MIDDLE EAST 317 (1970); TANZIL-UR-RAHMAN, *ISLAMIZATION OF PAKISTAN LAW* (1978).

⁶ Rahman, *supra* at 319 *passim*.

⁷ N. COULSON, *supra* note 1, at 171-72.

⁸ *Id.* at 171.

⁹ PAK. CONST. of 1956 art. 224. Though the 1956 constitution was abrogated in 1958, later constitutions have contained similar provisions. See, e.g., PAK. CONST. of 1973 art. 268.

¹⁰ The Mufassal Regulation of 1772 provided that:

in all suits regarding inheritance, marriage and caste, and other religious usages and institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentoos, and where only one of the parties shall be a Mahomedan or Gentoos, the laws and usages of the defendant shall invariably be adhered to.

Quoted in A. GLEDHILL, *PAKISTAN: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 278 (1967). By 1827, the Bombay Regulation IV placed customary law above Muslim law as a rule of decision. See discussion in R. PATEL, *WOMEN AND LAW IN PAKISTAN* 4-5 (1979).

¹¹ PAKISTAN CODE, Vol. II, 73-74.

overridden by capricious application of equitable principles in cases reaching the courts,¹² and by legislation preempting entire categories of Muslim law.

II. THE GUARDIANS & WARDS ACT OF 1890

Though the Guardians & Wards Act sets out the framework for court consideration of custody disputes, only section 25(1) explicitly concerns custody. It states that "[i]f a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return."¹³ On its face, this merely allows for the possibility of court intervention to reestablish the original arrangement. But since both divorced parents may retain a form of custody — the mother exercises actual custody while the father relies on legal custody — the provision has been applied to transfer custody from one parent to the other when "it will be for the welfare of the ward."¹⁴ In other words, the courts may disregard Hanafi custodial hierarchy.

The scope of a court's section 25(1) power to adjust custody awards is bounded by the somewhat confusing statutory definition of "guardian." According to section 4(2) of the Guardians & Wards Act, a guardian is "a person having the care of the person of a minor, or of his property, or of both his person and property."¹⁵ A guardian may have actual or legal care of the person of a minor,¹⁶ and "in this sense even a mother who has only the custody of the child is its guardian."¹⁷ If, then, the children of a marriage live with their mother after the divorce, the mother will have actual custody and care, and the father will have constructive custody and care. A form of guardianship and custody will reside with each parent. If, however, the father retains custody after divorce, he will hold all the rights of guardianship since he is the "legal and natural guardian" of his minor children under the Majority Act (IX of 1875).¹⁸ If the children are within the ages when Hanafi law gives custody to the mother, it may be argued that she retains constructive custody and can rely on section 25(1) if she wishes to be reunited with her children. Otherwise, she must rely on other provisions of the Act.

Section 19(b) is one such possibility. It states that a court may not intervene to appoint a guardian for 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." If the father is found to be unfit,¹⁹ the mother can apply for guardianship, but the court may make an appointment only "where the court is satisfied that it is for the welfare of a minor that an order should be made."²⁰

¹² Lord Hobhouse in *Waghela v. Masludin*, 14 INDIAN APP. 89, 96 (1887), admitted that "in point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances," cited in A. FYZEE, *supra* note 2, at 55.

¹³ The Guardians & Wards Act of 1890, § 25(1).

¹⁴ M. MOKAL, THE GUARDIANS & WARDS ACT (VII OF 1890) AND THE MAJORITY ACT (IX OF 1875) WITH COMMENTARY 17 (1979). Compare *Re S* 1977 Fam. 173; *S(BD) v. S(ID)* (1977) 1 All E.R. 656.

¹⁵ The custodial disputes discussed in this essay are exclusively disputes over the person.

¹⁶ M. MOKAL, *supra* note 14, at 16.

¹⁷ *Niaz Bi v. Fazal Ilahi*, P.L.D. Lah. 442 (1953).

¹⁸ The Majority Act of 1875, § 2(a). See M. MOKAL, *supra* note 14, at 446.

¹⁹ A father will be found unfit if he has deserted the family, exhibited bad character, or applied the minor's property to his own use. F. TYABJI, MUSLIM LAW § 25b (4th ed. 1968). Factors such as harshness, bad temper, intemperance or remarriage are relevant but not decisive. *Id.*

²⁰ The Guardians & Wards Act of 1890, § 7.

Factors to be considered include "the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property." Further, "[i]f the minor is old enough to form an intelligent preference, the Court may consider that preference."²¹

In summary, section 25(1) of the Guardians & Wards Act of 1890 empowers the courts to decide simple custody disputes between parents according to the minor's welfare. If one of the parents has been declared unfit or has lost custodial rights for some other reason,²² section 19(b) enables a court order in the child's welfare. The court shall be guided by the law to which the minor is subject, and shall consider the statutory factors listed above. When the minor's father is living and has not been declared unfit, the court may not appoint a guardian, but may apparently give mere custody to another person.

III. DECISIONS UNDER THE GUARDIANS & WARDS ACT OF 1890

Courts confronting this cobweb of rules have, since 1964, generally relied on a "welfare" test for determining custody under all circumstances. Prior to 1964, the place of Muslim personal law in the Act's scheme was problematic. Only section 17(1) requires that Muslim law be considered, and then only when it is clear that the minor's welfare requires a guardianship order arising under that particular section. In contrast, the Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948) provided that for custody decisions and other family law issues "the rule of decision shall be the Muslim Personal Law (Shariat) where the parties are Muslim." The parallel law applicable in Pakistan, the Muslim Personal Law (Shariat) Application Act (Act XXVI of 1937), was weak and ineffective and aggravated the problem of what law applied under the Guardians & Wards Act. The judiciary resolved the questions in 1964 by reviving a dormant legal technique. The events of nine years prior to that important development enabled the courts to open a door to *ijtihād* which had long been closed.²³

A. *Ijtihād* before 1964

The right of individual reasoning, i.e. *ijtihād*, was disfavored from A.D.900.²⁴ It was superseded by the duty of *taqlīd*, or adherence to established law. Though the doctrine of *taqlīd* was "not unchallenged in theory, in practice [it] had been consistently observed"²⁵ to the time when the Pakistani Commission on Marriage and Family Law was set up in 1955.

The Commission consisted of three laymen, three laywomen, and one representative of the 'ulamā.²⁶ The group was created to review existing legislation and formulate the changes necessary "in order to give women their proper place in society according to the

²¹ The Guardians & Wards Act of 1890, § 17(2), (3).

²² A parent may, for example, leave the country and forfeit custodial rights. See *Khizar Hayat Khan Tiwana v. Zainab Begum*, P.L.D. (S.C.) Lah. 402 (1967).

²³ See Bonderman, *supra* note 4, at 1174-75.

²⁴ Coulson, *Islamic Family Law: Progress in Pakistan*, in *CHANGING LAW IN DEVELOPING COUNTRIES* 240, 242 (1963).

²⁵ *Id.*

²⁶ "Ulamā" (singular=alim) are Islamic religious specialists or "guardians of the law." They are expected to be competent in leading prayer and sermonizing. Nagata, *Islamic Revival and the Problem of Legitimacy Among Rural Religious Elites in Malaysia*, 17 *MAN* 42-57 (1982).

fundamentals of Islam."²⁷ The results appeared in 1956 in a report recommending reforms in marriage, divorce, and family maintenance law. In Coulson's words, advocacy by the Pakistani Commission of "a sudden and total break with past tradition by the reopening of the door of *ijtihād* as the foundation for comprehensive reform naturally shocked the conservative element into violent reaction."²⁸ The controversy continued until and beyond approval of the Muslim Family Laws Ordinance of 1961.²⁹

The 1961 statute is a watered-down version of the original report — a compromise between the dramatic reforms proposed by the Commission and the practices advocated by conservative Muslims. The Act requires that marriages be registered and that arbitration councils be set up to deal with family law disputes. It limits polygamy to those instances where an arbitration council gives written permission and requires notice of a *talāq* divorce³⁰ after it has been pronounced. The most far-reaching reforms are those touching polygamy and altering the structure of succession.³¹

B. *Effect on Custody Decisions*

Though custody was not within the Commission's purview, the Commission's partial success encouraged the judiciary to test the waters of reform. In 1964, the High Court of Lahore ruled that "if there is no clear rule of decision in Qur'ānic and Traditional Text . . . a Court may resort to private reasoning and, in that, will undoubtedly be guided by the rules of justice, equity, and good conscience."³² The decision was followed in the custody case of *Zohra Begum v. Latif Ahmad Munawwar*³³ in 1965.

The *Zohra* dispute arose over custody of two children, a son age seven and a daughter below the age of puberty. The mother took the children from the father in 1953. In 1961, the parties obtained a divorce. The father then brought an action for custody under section 25 of the Guardians & Wards Act. The lower court applied the principle that "the rule of Personal Law proceeds on the welfare of the minors and the welfare of the minor does not mean that appointment shall be inconsistent with the rule of Personal Law."³⁴ Therefore, custody of the seven year-old boy belonged to the father, while the girl would remain with the mother until she reached puberty. The father's objection that the mother was unfit to serve as guardian failed.

On appeal, the High Court reconsidered the question of what law should determine the outcome of the dispute. Section 25 ties a custody award to the minor's welfare. Section 17, on the other hand, required a decision inconsistent with "the law to which the minor is subject." A literal reading of these provisions might lead to disparate results in similar

²⁷ Esposito, *supra* note 1, at 224. See also J. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* (1982) [hereinafter cited as ESPOSITO, *WOMEN*]; CHANGES IN MUSLIM PERSONAL LAW, A SYMPOSIUM (1964).

²⁸ Coulson, *supra* note 24, at 247.

²⁹ See ESPOSITO, *WOMEN*, *supra* note 27, at 100 (discussing the Pakistani government's reconsideration of the Muslim Family Ordinance Provisions concerning notice of divorce, reconciliation, and inheritance).

³⁰ "Talāq" divorce means, literally, "repudiation." ESPOSITO, *WOMEN*, *supra* note 27, at 29-30. Talāq comes from the root "tallaqa" meaning to release a human being from any obligation incumbent upon him. It signifies one spouse's release of the other spouse from the marriage bond, whether by repudiation or legal process. *Id.* In Hanafī law, there are five grades of talāq.

³¹ See Abbot, *Pakistan's New Marriage Law*, 1 *ASIAN SURVEY* 26 (1962). Much of the controversy surrounding the 1956 Report stemmed from the alleged exercise of *ijtihād* by untrained laypersons.

³² *Khurshid Jan v. Fazal Dad*, 2 P.L.D. (W.P.) Lah. 558, 562 (1964).

³³ 2 P.L.D. (H.C.) Lah. 695 (1965).

³⁴ *Id.* at 699.

cases. The High Court resolved the question by interpreting Hanafī law itself as an application of the welfare principle:

[A]ll rules of Muhammadan law relating to the guardianship and custody of the minor are merely application of the principles of benefit of the minor to diverse circumstances. Welfare of the minor remains the dominant [*sic*] consideration and the rules only try to give effect to what is [the] minor's welfare from the Muslim point of view.³⁵

The court then considered whether the children's welfare in *Zohra* coincided with the traditional Hanafī provisions. Conflicting views in textbooks as to custodial provisions were examined by the presiding judge. The court concluded that there were no clear provisions of applicable Muslim law, circumventing the embarrassment of a direct conflict between a child's welfare and "the law to which the minor is subject." Instead the court ruled that

Where there is no Qur'ānic or Traditional Text or an *Ijma* on a point of law, and if there be a difference of views between *A'imma* and *Faqihs*, a Court may form its own opinion on a point of law. . . . Courts which have taken the place of *Qazis* can, therefore, come to their own conclusions by process of *Ijtihad*. . . . [I]t would be permissible for the courts to depart from the rule stated therein if, on the facts of a given case, its application is against the welfare of the minors.³⁶

On the merits, the court decided that both minors should remain in their mother's custody.

The *Zohra* decision establishes a two-step analysis in custody cases. First, in principle, welfare overrides other considerations when determining custody. Secondly, *ijtihād* may be exercised to determine where the welfare of the minor lies.

Prior to *Zohra*, Muslim personal law took a different direction. In the custody case of *Muhammad Bashir v. Ghulam Fatima*,³⁷ for example, the court quoted Tyabji's *Muhammadan Law*:

[I]t is not for the Courts to say that it is against the minor's welfare that custody should be taken away from the person (if any such there be) who is by law entitled to the custody, as of right; since, when the law lays down that the custody shall be with a specified person, the law presumes (to adopt Coleridge, J.'s words) that where the legal custody is, there . . . is the greatest welfare of the minor to be placed. The Court is bound by the provision of the law in forming its opinion as to whose custody is most for the welfare of the minor.³⁸

In cases following *Zohra*, the child's welfare gained the determinative role. *Tahera Begum v. Saleem Ahmed Siddiqui*³⁹ found that the mother should have custody of her daughter until the latter attained puberty "subject, however, to [her daughter's] welfare."⁴⁰ Backing

³⁵ *Id.* at 700 (quoting *Bakhsh v. Ghulam Fatima*, P.L.D. Pesh. 26 (1958)).

³⁶ *Id.* at 695.

³⁷ P.L.D. (H.C.) Lah. 73 (1953).

³⁸ *Id.* at 80.

³⁹ P.L.D. (H.C.) Karachi 619 (1970).

⁴⁰ *Id.* at 620.

away, the 1974 case of *Anwar Mirza v. Qamar Sultana*⁴¹ required that the father's right to custody be honored unless "weighty considerations" dictated another arrangement. In *Juma Khan v. Gul Ferosha*,⁴² however, the High Court seemed to reject these presumptions, stating that "[i]n deciding the question of the custody of a minor the welfare of the minor alone is to be considered."⁴³

In applying the first part of the test, courts have wavered between recognizing a rebuttable presumption in favor of the parent who would have rightful custody under Hanafi law and assessing welfare without recourse to a presumption. The split between the courts which recognize a presumption in favor of the Hanafi guardian and those which do not is illustrated by two 1978 cases. In *Feroze Begum v. Muhammad Hussain*,⁴⁴ the Supreme Court applied the principle that "the overriding and paramount consideration always is the welfare of the minor. Indeed this is the consideration that must prevail in the final analysis and the fact that the father is the lawful guardian of his minor children does not compel the Court to pass an order in his favour unless it is in their welfare to do so."⁴⁵ The High Court in *Ghulam Sakina v. Ghulam Abbas*,⁴⁶ on the other hand, reiterated the rule of *Zohra* that the Muslim law was based on the minor's welfare and concluded that "when personal law gives the custody of the minor to the mother, it is presumed that the welfare of the minor is with the mother unless the facts leading to the contrary inference are proved."⁴⁷ *Feroze* caps the line of cases which hold welfare to be the sole consideration, to be evaluated anew with each decision. *Ghulam* follows those cases which take Muslim law to establish a presumption in favor of one party which may then be refuted by arguments that the minor's welfare lies elsewhere.

This distinction has no practical significance; in either line of cases welfare is a subjective standard leading to the result which the court deems preferable. Both lines of decisions acknowledge a wide variety of factors contributing to a minor's welfare: that a daughter is happy with her mother;⁴⁸ that her father has not paid a penny toward the minor's maintenance;⁴⁹ that the father's remarriage makes his custody unacceptable;⁵⁰ that children should stay in their established school.⁵¹ Other factors have been ignored by the courts. In *Zohra* itself, the mother admitted that she had suffered psychiatric problems in the past as a result of her husband's ill-treatment, but the court felt that her past problems should not be considered in assessing the children's welfare.⁵² Similarly, in *Ghulam Sakina*, that the mother was illiterate and unable to maintain the children was not considered. Her illiteracy had apparently not affected their education, and the maintenance was the father's responsibility.⁵³ In *Tahera Begum*, the parent's private agreement

⁴¹ P.L.D. (Note 90) Karachi 139 (1974).

⁴² P.L.D. (H.C.) Pesh. 1 (1972).

⁴³ *Id.* at 2.

⁴⁴ XI S.C.M.R. 299 (1978).

⁴⁵ *Id.* at 302.

⁴⁶ P.L.D. (H.C.) Lah. 1389 (1978).

⁴⁷ *Id.* at 1392.

⁴⁸ *Bharai v. Wazir Muhammad*, P.L.D. (H.C.) Lah. 333 (1967).

⁴⁹ *Id.*

⁵⁰ *Id.*; *Feroze*, S.C.M.R. 299 (1978); *Fahmida Begum v. Habib Ahmad*, P.L.D. (H.C.) Lah. 112 (1968).

⁵¹ *Feroze*, S.C.M.R. 299, 302 (1978).

⁵² *Zohra*, 2 P.L.D. Lah. 695, 698 (1965).

⁵³ P.L.D. Lah. 1389, 1391 (1978).

with regard to custody was given no weight by the court.⁵⁴ None of these decisions mention the desirability of keeping siblings together in the same home.

The most notable oversight seems to be failure to consider the mother's remarriage to a stranger,⁵⁵ a rule with an identifiable basis in the Qur'ān. According to *Muhammad Bashir*, "[t]he original saying of the Holy Prophet, on which this rule is based, is that a woman loses her right when she marries a stranger."⁵⁶

Courts have not, however, ignored the problem. In the *Bashir* case, for example, the mother's remarriage created a strong presumption in favor of the father which was not overcome. The High Court again examined the remarriage issue in the 1963 case of *Nazeer Begum v. Abdul Sattar*,⁵⁷ holding that, though "there can be no two opinions about this [Qur'ānic] proposition of law," the mother simply lost her place in the hierarchy of preferred custodial arrangements. If it nevertheless appeared that she was "of all persons entitled to the custody of her infant children," she might retain custody despite her remarriage.⁵⁸ The reasoning was extended in *Rahela Khatun v. Ramela Khatun*,⁵⁹ where the mother was awarded custody despite her marriage to a stranger and despite the applications of a paternal aunt and uncle.

These remarriage cases are another example of *ijtihād*, clearer perhaps than *Zohra* since the reasoning is required to fill a gap between the Qur'ānic text and the case at hand. But like *Zohra* and its progeny, the controlling standard which emerges is the welfare of the child.

IV. CONCLUSION

The juxtaposition of British law and Pakistani-Muslim law after years of cohabitation is central to the *ijtihād* debate.⁶⁰ In his work on Pakistani law reform, Coulson asserts that it is virtually impossible to exercise *ijtihād* in the context of Anglo-Muhammadan law. He suggests that, of the domestic law reforms proposed by the Pakistani Commission, only the penalty assessed for failure to register marriages is genuine *ijtihād*. Unlike the other reforms, it directly reflects a Qur'ānic principle: the requirement that contracts be in writing. Reform by amendment, he adds, is "more practical and probably far better suited to the present mood and aspirations of Pakistan,"⁶¹ but it is not *ijtihād*.

Coulson's intimations reflect a problem of definition rather than substance. First, the product of *ijtihād* need not be a unique solution. Pakistan's 'welfare' test is virtually identical to the 'best interests of the child' standard of British law. The Guardians & Wards Act of 1890 does not, however, set out an unambiguous statement of the test, nor did British law clearly formulate the standard in 1890 when the Act was passed. Isolated in its Pakistani context, the welfare principle is in the nature of *ijtihād*. It follows from the landmark decision in *Khurshid Jan v. Fazal Dad*,⁶² which authorizes private reasoning

⁵⁴ P.L.D. Karachi 619, 620 (1970).

⁵⁵ A mother who divorces and marries a second husband who is not related to the minor by blood or marriage loses her preferential right to custody. F. TYABJI, *supra* note 19, at § 257 (4th ed. 1968); A. FYZEE, *supra* note 2, at 100-01.

⁵⁶ P.L.D. Lah. 73, 77 (1953).

⁵⁷ P.L.D. (W.P.) Karachi 465 (1963).

⁵⁸ *Id.* at 466.

⁵⁹ P.L.D. (H.C.) Dacca 24 (1971).

⁶⁰ Coulson, *supra* note 24, at 255-57.

⁶¹ *Id.* at 257. See also ESPOSITO, WOMEN, *supra* note 27, at 86.

⁶² P.L.D. Lah. 558 (1964).

“guided by the rules of justice, equity and good conscience or, in terms of Fiqah, by the doctrines of Istihsan and Istislah.”⁶³ That the best interests test appears in British law as well does not detract from its appropriateness in Pakistan. It is not an attribute of *ijtihad* that a just solution must be rejected because a similar solution has been implemented elsewhere.

Secondly, the process through which the judiciary arrived at the welfare test conforms to the requirements of *ijtihad*. In each of the cases discussed above, distinguished jurists examined existing law and identified conflicting, irreconcilable principles which could only be resolved through independent reasoning. In the remarriage cases, the reasoning filled a gap between the Qur’anic principles and the facts of a particular case. Other custody cases were decided in the face of disparate teachings from the various schools of Islamic law. In none of these cases do jurists begin with independent reasoning, nor do they advocate recourse to *ijtihad* by those other than legal specialists.

Zohra and its progeny have been called the “new *ijtihad*,”⁶⁴ but their newness is less apparent than is their organic relation with the old *ijtihad*. Anglo-Muhammadan law is not static. Just as the British influence peaked in the 19th century, so has it waned in the 20th. When faced with a concerted Islamic resurgence and deliberate exercise of Muslim jurisprudence by qualified jurists, the legal system has rebounded from Anglo-Muhammadism and toward the Islamic ideal. These recent cases do not depart from the long march of Islam, but enable courts to reinforce the Muslim point of view in situations where Islamic law must be dynamic to preserve the fundamental principles of Islamic society.

⁶³ *Id.* at 599.

⁶⁴ N. COULSON, *supra* note 1, at 202-17 (discussing neo-*ijtihad*); ESPOSITO, *WOMEN*, *supra* note 27, at 99. See also F. Rahman, *supra* note 5, at 326.