

## Appraisal of the Protection of Children Bill 2009

Mudasra Sabreen

Faculty of Shariah and Law, International Islamic University, Islamabad,  
PAKISTAN.

### ABSTRACT

*Pakistani law lacks detailed legislation on the issues related to children. Provisions related to such issues are scattered in different statutes. A consolidated Child Act is needed to deal with the issues related to children. The Protection of Children Bill 2009 is an effort to do so. This Bill was produced in the parliament in 2009 and is still pending approval. The Bill is an effort to incorporate provisions of the Convention on the Rights of the Child 1989 in Pakistani law. Through this Bill Pakistan has tried to reform its child law. A critical evaluation of this Bill will help in understanding its positive and negative points. The article analyzes the provisions of the Bill and highlights the areas which still need reforms.*

**Keywords:** Pakistani law, child protection bill, child rights, minor

### INTRODUCTION

Pakistan inherited most of its statutes from Britain at independence in 1947. Family law in Pakistan is a combination of statutory law and Muslim Personal law and as a result courts enjoy a huge discretion which occasionally results in contradictory decisions.<sup>1</sup> Child law is a neglected field which needs consideration by the legislature. The laws related to children are scattered in different Acts for instance the Majority Act 1875, the Guardians and Wards Act 1890, the Juvenile Justice System Ordinance 2000 (JJSO). Pakistan needs a consolidated Child Act to cover issues related to children.

The Convention on the Rights of the Child 1989<sup>2</sup> is the most significant child rights document and has contributed the most in recognition and protection of their rights. It is also the most ratified document in the world. It was adopted by the United Nations General Assembly in 1989 and entered into force in 1990. This document is ratified by 192 countries except Somalia and USA. The Convention contains 54 articles and three optional protocols on the involvement of children in armed conflict, on the sale of children, child prostitution and child pornography and on communication procedures. These protocols were entered into force, respectively on 12<sup>th</sup> of February, 18<sup>th</sup> of January 2002 and 19<sup>th</sup> December 2011. There is a committee on the Rights of the Child which was first elected in 1991 and is a monitoring body which monitors obligations of the states parties to implement principles of the

---

<sup>1</sup>Tanzil-ur-Rahman, *A Code of Muslim Personal Law*, (Karachi: Hamdard Academy, 1978), Vol. 1, 690-692. [Hereinafter Rahman, 1978]; Shaheen Sardar Ali and M. Nadeem Azam, *Trends of the Superior Courts of Pakistan in Guardianship and Custody Cases (1947-92)*, *A Handbook on Family Law*, Ed. Cassandra Balchin, (Lahore: Shirkatgah, 1994), 145, 146. [Hereinafter 'Ali and A'zam, 1994]. To see an example of contradictory decisions see *Peggy Collin v. Muhammad Ishfaq Malik*, PLD 2010 Lahore 48; *Louise Anne Fairley v. Sajjad Ahmed Rana*, PLD 2007 Lahore 300; *Ibrar Hussain Bukhari v. Additional District Judge Lahore*, 2012 YLR Lahore 1703; *Mst. Nusrat v. Shahzad Riaz*, 2011 SCMR 1325; *M. Umar Faraz v. Additional District Judge*, PLD 2012 Lahore 170.

<sup>2</sup>Hereinafter the CRC or the Convention.

Convention in all their laws.<sup>3</sup> Pakistan signed and ratified the CRC in 1990. Initially Pakistan entered a reservation that the provisions of the Convention shall be interpreted in the light of the principles and values of Islamic law but in 1997 the reservation was withdrawn. Pakistan while withdrawing its reservation on the Convention said there is nothing in the CRC inconsistent with Islam.<sup>4</sup> It is generally believed by Muslim states that the provisions of the CRC are in conformity with Islamic law.<sup>5</sup>

## THE PROTECTION OF CHILDREN BILL, 2009

The Committee on the Rights of the Child has always pushed Pakistan to formulate a consolidated Child Act to cover all issues related to children. In 2009 the Protection of Children Bill<sup>6</sup> was proposed but is still pending approval in Parliament. This Bill is an effort to incorporate provisions of the Convention on the Rights of the Child 1989 in Pakistani child law. This Bill covers areas of family law, criminal law and labour law related to children.

In this bill a child is defined as a person under eighteen years of age.<sup>7</sup> The best interests of the child is made a 'primary consideration in all actions either by public or private bodies, for protection, survival, development and participation of children'<sup>8</sup> but the term 'best interests' is not defined by the Bill. It is left to the discretion of the court to determine the best interests of the child in each case. The Bill makes it a duty of the Federal Government to establish a Commission for Protection of Children which will review the national laws and propose amendments to bring Pakistani law in conformity with the CRC. The Commission will also monitor implementation of the laws related to children.<sup>9</sup> Each Provincial Government will establish a Child Protection Bureau which will review relevant provincial laws and will propose amendments. This Bureau will monitor implementation of child laws on provincial level.<sup>10</sup> The Provincial Government will also appoint child protection officers who will be responsible to monitor situation of the child during custody period.<sup>11</sup> According to the Bill it is a duty of the Provincial government to establish Child Protection Centers in the province. Such centers will be responsible to provide residential, educational, medical and all other necessary facilities for those children who are in need of care.<sup>12</sup> According to this Bill each Provincial Government will have a duty to establish the Child Protection Courts after consultation with the concerned High Court.<sup>13</sup> The High Court in the province has authority to confer status of the Child Protection Court to a Family Court or a court of a Senior Civil

---

<sup>3</sup>Imran Ahsan Khan Nyazee, Islamic law and the CRC, *Islamabad law review*, Vol. 1(1 & 2), (2003), 78. [Hereinafter Nyazee, 2003].

<sup>4</sup>Samra Fayyazuddin, AneesJallani and ZarinaJillani, *The State of Pakistan's Children*, (New Delhi: A. P. H. Publishing Corporation, 1998), 34, 39. [Hereinafter Fayyazuddin, Jillani and Jillani, 1998].

<sup>5</sup>Mashood A. Baderin, *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2003), 155. [Hereinafter Baderin, 2003].

<sup>6</sup>The text of the bill is available on [www.na.gov.pk/uploads/documents/1302215481\\_467.pdf](http://www.na.gov.pk/uploads/documents/1302215481_467.pdf). Last visited 30<sup>th</sup> May 2013. Also see [www.crin.org/resources/infodetail.asp?ID=25667](http://www.crin.org/resources/infodetail.asp?ID=25667). Last visited 31<sup>st</sup> May 2013.

<sup>7</sup>The Protection of Children Bill 2009, Section 2(a) and (g).

<sup>8</sup>Ibid., Section 2(c).

<sup>9</sup>Ibid., Section 12.

<sup>10</sup>Ibid., Section 24.

<sup>11</sup>Ibid., Section 36.

<sup>12</sup>Ibid., Section 49.

<sup>13</sup>Ibid., Section 38. Pakistan has five High Courts one in each province and one in the capital.

Judge.<sup>14</sup> If this Bill is passed by Parliament the biggest challenge for the Government will be allocation of resources to establish all the above mentioned institutions and courts. In the past the same happened with the JJSO that due to lack of resources the proposed institutions were not set up which is a hindrance in implementation of the JJSO.

The Bill proposes changes in custody law as well. According to the Bill it will be a duty of the Child Protection Court to inform the child about the situation about custody and ask its views.<sup>15</sup> But it is clear that despite this provision the court is not bound to accept the views of the child. Acceptance of such views depends on the age of the child and also on the fact whether the child's views are in conformity with its welfare or not. In deciding custody matters the Bill asks the court to consider continuity in the upbringing of the child, the child's ethnic, religious, cultural and linguistic background. The best interests of the child is the basic criterion in all cases related to custody.<sup>16</sup> It is a duty of the court to monitor the situation of the child who is given in someone's custody by taking reports by the Child Protection Officer or the Officer of the Child Protection Bureau. The court can also ask the custodian to produce the child in front of the court if it deems fit.<sup>17</sup> Sixty days' time limit is fixed for decision of custody cases otherwise the judge is bound to record reasons for delay and communicate them to the District Judge.<sup>18</sup> This is a positive provision as usually in Pakistan litigants suffer because of prolonged litigation. To impose a time limit will benefit all parties to the case including the child. If the Child Protection Officer notices that any offence is committed against the child by the custodian (whether the parent or some other person) he/she can take custody of the child and produce it in the court within twenty four hours.<sup>19</sup> In such a situation if the court deems fit it may give custody of the child to some other person or may order the child to be sent to the Child Protection Centre. All these decisions will be based on the best interests of the child.<sup>20</sup> The time period of custody will be till the time the child reaches the age of eighteen years or if the court thinks it necessary it may order to terminate the period of custody earlier than that.<sup>21</sup> It seems that the Bill makes 'welfare of the child' the basic criterion and the rules of Personal Law will be subservient to the welfare of the child. Currently in Pakistan custody matters are governed by the rules of Personal Law. Islamic personal law presumes that it is in the welfare of the child to live with the mother during tender years. To make personal law subservient to the welfare of the child implies that this presumption will be dropped and welfare of the child will be the only criterion in custody cases. Pakistan needs a law on custody as the Guardians and Wards Act 1908 does not give detailed rules about custody and a lot is left to the discretion of the courts.

Another interesting point in this Bill is that even if custodian is not the parent of the child the court may ask the parents to pay maintenance. Parents may also be held responsible to pay compensation for any loss caused by the child to someone else's property.<sup>22</sup> It is noticeable

---

<sup>14</sup>Ibid., Section 38(3).

<sup>15</sup>Ibid., Section 39(2)(3).

<sup>16</sup>Ibid., Section 39(4).

<sup>17</sup>Ibid., Section 39(5).

<sup>18</sup>Ibid., Section 39(6).

<sup>19</sup>Ibid., Section 40-42

<sup>20</sup>Ibid., Section 42.

<sup>21</sup>Ibid., Sections 44, 50.

<sup>22</sup>Ibid., Section 51.

that the Bill holds ‘parents’ and not the ‘father’ responsible to pay maintenance. In Islamic law the father of the child is responsible to pay maintenance to the child and the same is followed by courts in Pakistan. The law should be clear about determining the amount of maintenance of the child. A formula should be developed to determine maintenance for instance a specific percentage of the net income of the father can be fixed as maintenance for the child.

The Bill proposes repeal of the Child Marriage Restraint Act 1929.<sup>23</sup> This Bill raises the age of marriage for a girl from sixteen to eighteen years. According to this Bill marriage with a girl who is under eighteen years of age is a child marriage which is an offence for which the groom, the parents or the guardian of the child and the person solemnizing this marriage will get up to two years imprisonment or Rs. 100,000 fine or both.<sup>24</sup> A woman involved in such marriage in any capacity will not be punished with imprisonment but with fine. The person in charge of the minor will be presumed to have allowed such marriage unless proved otherwise.<sup>25</sup> Cognizance of such marriage cannot be taken after lapse of six months from the date of marriage.<sup>26</sup> If the court gets information about a child marriage taking place it may issue an injunction to stop it.<sup>27</sup> Apparently the bill considers a marriage a ‘child marriage’ only if the bride is under eighteen years of age. A marriage in which the groom is a child is not a child marriage according to the definition provided by this bill. Secondly this bill like the Child Marriage Restraint Act 1929 does not make a child marriage void but only gives penal sanctions for the persons involved. The punishment for the persons involved is increased which is a positive thing previously according to the Child Marriage Restraint Act 1929 the punishment was one month imprisonment or a fine up to one thousand rupees<sup>28</sup> which was symbolic.

In sections 58 to 78 the Bill deals with offences against a child and punishments for such offences including corporal punishment in educational institutions<sup>29</sup>, sexual abuse, child pornography, violence against children and harmful vocation. A major change which this Bill, if passed by Parliament, will bring is that it proposes to raise the age of criminal responsibility from 7-12 to 12-15 years. Right now the age of criminal responsibility in Pakistan is 7-12 which means that after 12 years everyone is responsible for his/her actions whereas between 7 and 12 the court will decide whether the child is mature enough to be held responsible or not. The Committee on the Rights of the Child has always pushed Pakistan to raise the age of criminal responsibility. According to this Bill a child who is under twelve years of age is not responsible for its criminal actions according to the Bill. A child between twelve and fourteen, if it has committed an offence, will get punishment in the form of community service through a probation officer. For a child above fourteen years old the

---

<sup>23</sup>Ibid., Section 85.

<sup>24</sup>Ibid., Sections 53-55.

<sup>25</sup>Ibid., Section 55.

<sup>26</sup>Ibid., Section 56.

<sup>27</sup>Ibid., Section 57.

<sup>28</sup>The Child Marriage Restraint Act, 1929, Sections 5-6.

<sup>29</sup>The national Assembly of Pakistan has passed a the Prohibition of Corporal Punishment Act 2013 which prohibits corporal punishment of children in all types of educational institutions. A person guilty of giving corporal punishment to a child will be punished with 1 year imprisonment and/or Rs. 50000 fine. It was reported in national newspapers on 12<sup>th</sup> March 2013. <http://jang.com.pk/jang/mar2013-daily/12-03-2013/index.html>. Last visited 12th March 2013.

punishment will be up to half of the term of imprisonment prescribed for the offence. If the punishment for the offence is payment of fine such child cannot be imprisoned for non-payment of fine.<sup>30</sup> The Juvenile Justice System Ordinance 2000 applies to a child who is above fifteen years and under eighteen years age. The punishment for such a child can be from community service up to the imprisonment prescribed for the offence.<sup>31</sup> This last provision will give the courts huge discretion.

### Lacunae in the Bill

Although the Bill proposes many positive changes but it has certain lacunae as well. It is proposed that the definition of a child marriage should be changed to include a marriage in which the groom is also a child. A law on maintenance of the child is needed but it should be a duty of the father and not of both parents as it is in Islamic law. A formula should be devised by the court to calculate maintenance for instance a particular percentage of the income of the father should be fixed as maintenance for the child. In Pakistan most of the women are not financially independent as their own maintenance is on their father or husband in such situation how can they be held responsible for maintenance of their children. The Bill does not deal with the issue of discrimination of children on the basis of legitimacy. The Bill does not have any provisions on adoption or *kafalah*. Pakistan needs to formulate a law on *kafalah* to provide alternate care to children in need.

The Protection of Children Bill is pending approval since 2009. In 2009 the Federal Government had authority to legislate on issues related to children but in 2010 the law was changed. In 2010 article 142 of the Constitution of Pakistan 1973 was amended and the issue of child rights was made more complicated by making it a subject on which Provincial Government and not the Federal Government has authority to legislate.<sup>32</sup> There is a need to bring child rights in the domain of Federal Government as a law made by the Federal Government extends to the whole of Pakistan. Secondly if there is a contradiction between a provincial law and a federal law the latter prevails.<sup>33</sup> For the sake of consistency throughout the country the child law should be promulgated at the Federal level.

Pakistan is going through the worst period in its history with a deteriorating security situation, corrupt politicians, weak institutions and lack of political will on the part of the politicians to bring reforms. The last Coalition government (The Peoples Party, Muttahida Qaumi Movement, Pakistan Muslim League (Quaid-e-Azam Group), Awami National Party) was successful in bringing the eighteenth, nineteenth and twentieth Constitutional amendments but was disinterested in reforming any other law. Pakistan had elections in May 2013. It is interesting to note that in 2013 elections no political party had included family law reforms in its election manifesto.<sup>34</sup> There is a need to reform Pakistani child law to cater for the needs of

---

<sup>30</sup>The Protection of Children Bill 2009, Section 79.

<sup>31</sup>Ibid., Section 80.

<sup>32</sup>The Constitution of Pakistan 1973, Article 142. The Constitution (Eighteenth Amendment) Act 2010 made amendment in article 142.

<sup>33</sup>The Constitution of Pakistan, 1973, Section 143.

<sup>34</sup>Main political parties in 2013 elections were Pakistan Muslim League (Nawaz Group), Pakistan Tehrik-e-Insaaf, Pakistan Peoples Party and Muttahida Qaumi Movement. For Pakistan Muslim League (Nawaz Group) manifesto see [www.pmln.org/pmln-manifesto-englishurdu/](http://www.pmln.org/pmln-manifesto-englishurdu/); for Pakistan Tehrik-e-Insaaf manifesto see [www.scribd.com/doc/135200186/PTI-Manifesto-2013-Urdu](http://www.scribd.com/doc/135200186/PTI-Manifesto-2013-Urdu); for Pakistan Peoples Party's manifesto see

the society. To reform its family law Pakistan needs political will and allocation of resources to build institutions and it will depend on the Government to do this.

## CONCLUSION

The Committee on the Rights of the Child has always pushed Pakistan to formulate a consolidated Child Act to cover all issues related to children. The Protection of Children Bill is an effort to incorporate provisions of the Convention on the Rights of the Child 1959 into Pakistani law. The Bill is pending approval since 2009. Although this Bill has many positive provisions like putting sixty days time limit in custody cases and raising the age of criminal responsibility. But at the same time there are certain lacunae like the definition of a child marriage only includes such marriage in which the bride is a child. This definition should be changed to include a marriage in which the groom is also a child. A law on maintenance of the child is needed but it should be a duty of the father and not of both parents as it is in Islamic law. The Bill does not deal with the issue of discrimination of children on the basis of legitimacy. The Bill does not have any provisions on adoption or *kafālah*. Pakistan needs to formulate a law on *kafālah* to provide alternate care to children in need. If these gaps are filled, this Bill can be changed into a law which deals with all matters related to children. The Government of Pakistan should pay attention to lack of detailed legislation on the issues related to children and should allocate resources so that this Bill is not only passed by the parliament but also is implemented.

## ACKNOWLEDGEMENT

The author wishes to thank Prof. Ian Edge for his valuable suggestions and guidance during the writing of this paper.

## REFERENCES

- [1]. Ali, S. S., & Azam, M. N. (1994). *Trends of the Superior Courts of Pakistan in Guardianship and Custody Cases (1947-92)*, *A Handbook on Family Law*. Ed. Cassandra Balchin. Lahore: Shirkatgah.
- [2]. Baderin, M. A. (2003). *International Human Rights and Islamic Law*. Oxford: Oxford University Press.
- [3]. Fayyazuddin, et al. (1998). *The State of Pakistan's Children*. New Delhi: A. P. H. Publishing Corporation.
- [4]. Nyazee, I. A. K. (2003). Islamic law and the CRC. *Islamabad law review*. Vol. 1(1 & 2).
- [5]. Rahman, Tanzil ur. (1978). *A Code of Muslim Personal Law*. Karachi: Hamdard Academy.
- [6]. Pakistan Muslim League (Nawaz Group) manifesto available at [www.pmln.org/pmln-manifesto-englishurdu/](http://www.pmln.org/pmln-manifesto-englishurdu/). Last visited 9<sup>th</sup> May 2013.

---

[www.ppp.org.pk/pppchange/manifestos/manifesto2013.pdf](http://www.ppp.org.pk/pppchange/manifestos/manifesto2013.pdf); for MuttahidaQaumi Movement's manifesto see [www.mqm.org/englishnews/1793/manifesto2013](http://www.mqm.org/englishnews/1793/manifesto2013). Last visited 9<sup>th</sup> May 2013.

- [7]. Pakistan Peoples Party's manifesto available at [www.ppp.org.pk/pppchange/manifestos/manifesto2013.pdf](http://www.ppp.org.pk/pppchange/manifestos/manifesto2013.pdf). Last visited 9<sup>th</sup> May 2013.
- [8]. Muttahida Qaumi Movement's manifesto available at [www.mqm.org/englishnews/1793/manifesto2013](http://www.mqm.org/englishnews/1793/manifesto2013). Last visited 9<sup>th</sup> May 2013.
- [9]. Pakistan Tehrik-e-Insaaf manifesto available at [www.scribd.com/doc/135200186/PTI-Manifesto-2013-Urdu](http://www.scribd.com/doc/135200186/PTI-Manifesto-2013-Urdu). Last visited 9<sup>th</sup> May 2013.

#### **ACTS**

- [10]. The Child Marriage Restraint Act, 1929.
- [11]. The Constitution (Eighteenth Amendment) Act 2010.
- [12]. The Constitution of Pakistan 1973.
- [13]. The Prohibition of Corporal Punishment Act 2013.
- [14]. The Protection of Children Bill 2009.

#### **CASES**

- [15]. Ibrar Hussain Bukhari v. Additional District Judge Lahore, 2012 YLR Lahore 1703.
- [16]. Louise Anne Fairley v. Sajjad Ahmed Rana, PLD 2007 Lahore 300.
- [17]. M. Umar Faraz v. Additional District Judge, PLD 2012 Lahore 170.
- [18]. Mst. Nusrat v. Shahzad Riaz, 2011 SCMR 1325.
- [19]. Peggy Collin v. Muhammad Ishfaque Malik, PLD 2010 Lahore 48.