

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.45156 of 2019
(**_____ v. Judicial Magistrate and 5 others**)

JUDGMENT

Date of hearing	02.08.2019
Petitioner by:	Malik Zeeshan Ahmad, Advocate
Respondents by:	<ul style="list-style-type: none">• Malik Naveed Akram, Assistant Advocate General• Mr. Shaukat Ali Mirza, Advocate for Respondents No.5 & 6
<i>Amicus curiae</i>	Mr. Sheraz Zaka, Advocate
<i>Research Officers:</i>	<ul style="list-style-type: none">• Mr. Muhammad Sher Abbas• Mr. Shafqat Abbas Mighiana• Mr. Muhammad Shafique• Mr. Fakhar Bashir Sial (Lahore High Court Research Centre)

TARIQ SALEEM SHEIKH, J.- The Petitioner, _____, has filed this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the “Constitution”), praying that her minor daughter _____ be recovered from the alleged illegal custody of Respondent No.5 & 6 and dealt with in accordance with law.

2. Brief facts giving rise to this petition are that the Petitioner is a Christian by faith and her husband is confined in jail serving sentence in a criminal case. She is supporting a large family all by herself working in different houses. Respondent No.5 & 6 employed her 14-year-old daughter _____ for household chores promising not only to pay for her needs but also provide education. After a few months when the Petitioner went to meet

Respondents No.5 & 6 told her that she was with the sister of Respondent No.5 in another city and having embraced Islam did not want to see her any more. The Petitioner protested but they tuned her out of their house. She approached the Respondent SHO but he did not help. The local Christian leader, [redacted], then intervened and informed the Respondent SHO that the incident had hagridden his community and urged him to recover the girl. The police officer was initially reluctant but eventually agreed to produce her before the Judicial Magistrate, Sargodha, on 5.7.2019. Respondents No.5 & 6 also entered appearance before the Magistrate that day. During the proceedings the Respondent SHO confirmed that [redacted] had embraced Islam but, in view of her tender age, requested that she should either be handed over to the Petitioner or sent to *Dar-ul-Aman* (shelter home). The Magistrate recorded [redacted]'s statement who expressly stated that she did not want to go with the Petitioner. Accordingly, he lodged her in *Dar-ul-Aman*. His order dated 5.7.2019 is reproduced hereunder:

"بیان از ازاں [redacted] قلمبند شد۔ اندریں حالات سائلہ کے بیان بالا کی روشنی میں اور اس حقیقت کو مد نظر رکھتے ہوئے کہ سائلہ نے اسلام قبول کر لیا ہے اور اب جہاں / جس گھر میں وہ کام کر رہی ہے وہاں پر بھی غیر محرم رشتہ کے لوگ ہوں گے جن کے ساتھ اس کا رہنا نامناسب و غیر شرعی ہو گا۔ ان حالات میں سائلہ کو دارالامان بھجوائے جانے کا حکم صادر کیا جاتا ہے۔ ایس ایچ او تھانہ اربن ایریا کو ہدایت کی جاتی ہے کہ سائلہ [redacted] کو بحفاظت پولیس دارالامان سرگودھا چھوڑ کر آئے۔ روکار بنام انچارج دارالامان جاری ہوئے۔ سائلہ کو آئندہ بتقرر 19.07.2019 پیش عدالت کیا جائے۔"

3. According to the Petitioner, she requested the Superintendent Dar-ul-Aman to allow her to see [redacted] but he refused. On 8.7.2019, she learnt that the Magistrate had ordered her release and the Superintendent had once again handed her over to Respondents No.5 & 6. Consequent thereupon she filed the instant petition before this Court.

4. This Court directed the Respondent SHO to recover [redacted] who has produced her today.

5. The learned counsel for the Petitioner contended that [REDACTED] was a minor and Respondents No.5 & 6 had converted her to Islam through inducement and undue influence. The girl being of tender age could not make an informed decision to change her religion and even if she had consented to it the same was of no legal consequence. He further contended that even if [REDACTED] conversion was recognized and declared valid, the Petitioner being her mother could not be deprived of her custody. He argued that in their enthusiasm to support the conversion of a female of tender age Respondents No.1 to 4 had not only ignored the Injunctions of Islam but also the law of the land. The learned counsel prayed that the custody of [REDACTED] with Respondents No.5 & 6 be declared illegal and she may be returned to the Petitioner.

6. The learned Assistant Advocate General adopted the arguments of the learned counsel for the Petitioner and supported this petition.

7. On the other hand, the learned counsel for Respondents No.5 & 6 vehemently opposed this petition. He contended that [REDACTED] had converted to Islam with her own choice being impressed with its teachings. This was evident from the fact that she had learnt by heart a number of *Surahs* from the Holy Qur'an within a short span of time. He further contended that this Court would put her life and security at great risk if it gave her to the Petitioner. He prayed for dismissal of this petition.

8. Mr. Sheraz Zaka, Advocate, the learned *amicus curiae*, submitted that employment of [REDACTED] with Respondents No.5 & 6 was violative of Section 3 of the Punjab Domestic Workers Act, 2019, which prohibited engagement of a child below the age of 15 years for any household work. Although there was no evidence to show that it was a forced conversion, it was doubtful

that the girl could make an intelligent decision about changing her religion at the age of 14. He added that even if it was assumed that she had done so freely and voluntarily, the Petitioner could not be deprived of her right of custody.

9. Arguments heard. Record perused.

10. There is no precise definition of religion. It is a matter of faith and belief in God is not essential to constitute religion. In *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (AIR 1954 SC 282), the Supreme Court of India observed:

“Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion, and these forms and observances might extend even to matters of food and dress.”

11. On the other hand, religious conversion is “the adoption of a set of beliefs identified with one particular religious denomination to the exclusion of others. Thus ‘religious conversion’ would describe the abandoning of adherence to one denomination and affiliating with another. This might be from one to another denomination within the same religion, for example, from Baptist to Catholic Christianity or from Shi’a to Sunni Islam.”¹

12. Freedom of conscience and the right to profess, practice and propagate religion is reckoned as a fundamental human right. The Universal Declaration of Human Rights (1948) (UDHR),

1. Stark, Rodney and Roger Finke, “Acts of Faith : Explaining the Human side of Religion,” University of California Press, 2000 p.114.

which is a seminal multilateral instrument that provides “a common standard of achievement of all people and all nations”, specifically recognizes it as such. Article 18 thereof states:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship or observance.”

13. Article 18 of the International Covenant on Civil and Political Rights, (1996) (ICCPR), articulated the United Nations’ aforementioned Declaration regarding religious freedom as follows:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

14. Similar provisions are found in a host of other international instruments. In this context reference may be made to Article 9 of European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 12 of the American Convention on Human Rights (1969), Article 8 of the African Charter on Human and Peoples’ Rights (1981), Universal Islamic Declaration on Human Rights (1981), and Arab Charter on Human Rights (1994).

15. ICCPR protects not just the internal components of belief, such as choosing one's religion, but also "the freedom to communicate within one's own religion or belief group, share one's conviction with others, broaden one's horizons for communicating with people of different convictions, cherish and develop contacts across State boundaries, receive and disseminate information about religion or belief issues and try to persuade others in a non-coercive manner."² The Human Rights Committee, the body charged with monitoring implementation of ICCPR, explained in General Comment No.22 that freedom to "have or to adopt" a religion or belief includes the right to change one's current religion or belief or to adopt atheistic views. Relevant excerpt from General Comment No.22 is reproduced hereunder:

"The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert."³

16. Pakistan signed the ICCPR on 17.4.2008 with the following reservation:

"The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Covenant at the time of ratification."

17. On 23.6.2010 Pakistan ratified the ICCPR subject to certain reservations. However, through a subsequent communication dated 20.9.2011 the government notified the Secretary-General that it had decided to partially withdraw the

2. Meghan G. Fischer, Anti-Conversion Laws and the International Response, 6 PENN.ST.J.L. & INT'L AFF.1(2018). Available at:<https://elibrary.law.psu.edu/jlia/vol6/iss1/5>

3. CCPR/C/21/Rev.1/Add.4, General Comment No.22.

reservations, made upon ratification, to Articles 3 & 25 and to Articles 6, 7, 12, 13, 18, 19 & 40.⁴

18. Our Constitution of 1973 envisages “equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.”⁵ Besides, it commits that “adequate provision shall be made for the minorities **freely** to profess and practice their religions and develop their cultures.”

19. The freedom to religion lies at the heart of our democratic enterprise. Article 20 of the Constitution of 1973 sanctifies it as a fundamental right reading as under:

20. Freedom to profess religion and to manage religious institutions. — Subject to law, public order and morality-

4. In a communication dated 20 September 2011, the Government of Pakistan notified the Secretary-General that it had decided to partially withdraw the reservations, made upon ratification, to Articles 3 and 25 of the Convention. These reservations read as follows:

Article 3

‘The Government of the Islamic Republic of Pakistan declares that the provisions of Article 3 of the International Covenant on Civil and Political Rights shall be so applied as to be in conformity with Personal Law of the citizens and Qanun-e-Shahadat.’

Article 25

‘The Government of the Islamic Republic of Pakistan states that the application of Article 25 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in Article 41 (2) and Article 91 (3) of the Constitution of Pakistan.’

In the same communication dated 20 September 2011, the Government of Pakistan notified the Secretary-General that it had decided to partially withdraw the reservations, made upon ratification, to Articles 6, 7, 12, 13, 18, 19 and 40 of the Convention. These reservations read as follows:

“Article 3, 6, 7, 18 and 19

‘[The] Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the provisions of the Constitution of Pakistan and the Sharia laws’.

Article 12

‘The Islamic Republic of Pakistan declares that the provisions of Articles 12 shall be so applied as to be in conformity with the provisions of the Constitution of Pakistan’.

Article 13

‘With respect to Article 13, the Government of the Islamic Republic of Pakistan reserves its right to apply its law relating to foreigners’.

Article 40

‘The Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 40 of the Covenant’.

5. The Objectives Resolution, which is not only the preamble of the Constitution but also forms part of its substantive provisions by virtue of Article 2A.

(a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

20. In **Suo Moto Case SMC No.1 of 2014** (PLD 2014 SC 699) the Hon’ble Supreme Court of Pakistan held that the freedom of religion must be construed liberally to include freedom of conscience, thought, expression, belief and faith. Freedom, individual autonomy and rationality characterize liberal democracies and the individual freedoms thus flowing from the freedom of religion must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as a community-based freedom.

21. In order to reassure the above-mentioned right, Article 21 prohibits imposition of any special tax the proceeds of which are to be spent on the propagation of any religion other than a person’s own. Article 22 *inter alia* provides safeguards as to educational institutions in respect of religion.

22. The freedom to religion is guaranteed to “every citizen” in the country irrespective of his age and whether he is a Muslim or non-Muslim. In **Suo Moto Case No.1 of 2014** (PLD 2014 SC 699), *supra*, the Hon’ble Supreme Court of Pakistan explained:

“15. Of all the Articles relating to the minorities’ rights, Article 20 is of prime significance. A close reading of this provision would indicate that the freedom to practice religion and manage religious institutions under this provision is multifaceted because:

(a) The right to religious conscience conferred under this Article does not make any distinction between majority and minority or Muslim and Non-Muslim. It is in the nature of an Equal Religious Protection Clause conferred on every citizen, every religious denomination and every sect thereof. This equal religious protection clause is in the same nature as the equal justice under the law and equal protection under the law clauses conferred under Articles 4 and 25. In other words, every absolute equality and there is no distinction among citizens, religious denominations and sects thereof, as far as the right to religious conscience, is concerned.

(b) The right to religious conscience is a fundamental right. It has not been subjected or subordinated to any other provision of the Constitution because it is only subject to law, public order and morality and not to any religious clauses of the Constitution. The very term law, public order and morality has been used in non-religious terms as the notion of law or public order or morality is not reducible to the Islamic meanings of these terms. Therefore, Article 20 has a certain preeminence in the Constitution being only subject to the general restrictions of law, public order and morality, which three terms cannot be interpreted or used in such a restrictive way as to curtail the basic essence and meaning of the pre-eminent right to religious conscience.

(c) The right to profess and practice is conferred not only on religious communities but also on every citizen. What this means is that every citizen can exercise this right to profess, practice and propagate his religious views even against the prevailing or dominant views of its own religious denomination or sect. In other words, neither the majority religious denominations or sect nor the minority religious denomination or sect can impose its religious will on the citizen. Therefore, not only does it protect religious denominations and sects against each other but protects every citizen against the imposition of religious views by its own fellow co-believers. It needs to be mentioned here that every citizen would necessarily include both males and females (Article 263), which point needs emphasis considering the exclusion or subordination of women in relation to numerous forms of religious practices.

(d) As far as every religious denomination is concerned, even sects within these religious denominations have been conferred the additional right to establish, maintain and manage its religious institutions. Therefore, even sects within these religious denominations have been protected against their own co-religious denominations.

(e) The right of religious conscience conferred on every citizen is a right conferring three distinct rights, i.e. Right to Profess, Right to Practice and Right to Propagate. What this means is that Article 20 does not merely confer a private right to profess but confers a right to practice both privately and publicly his or her religion. Moreover, it confers the additional right not only to profess and practice his own religion but to have the right to propagate his or her religion to others. It is important to note that this propagation of religion has not been limited to Muslims having the right to propagate their religion but this right is equally conferred on Non-Muslims to propagate their religion to their own community and to other communities. This should not be seen as a right to encourage conversions but more importantly, should be seen as a right against forced conversions or imposing beliefs on others because if all citizens have the right to propagate then no citizen has the right of forced conversion or imposing beliefs on others. (emphasis added)

23. It is pertinent to note that, as the Supreme Court of Pakistan highlighted in the above-mentioned judgment, Article 20 grants right to the citizens to propagate their faith but this right does

not extend so as to allow any one to convert a person to another religion by coercion or inducement. Forced conversion or imposing beliefs on others rather constitutes infringement of the right to freedom of religion. The Supreme Court of India expressed similar view in Rev. Stainislaus v. State of Madhya Pradesh & others (AIR 1977 SC 908) while construing Article 25 of the Indian Constitution which is analogous to Article 20 of our Constitution. It said:

“We have no doubt that...[what] the word, ‘propagate’ in Article 25(1) [of the Constitution of India],...grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees ‘freedom of conscience’ to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all the citizens of the country alike....we find no justification for the view that it grants a fundamental right to convert persons to one's own religion. It has to be appreciated that the freedom of religion enshrined in the Article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion.”

The Supreme Court of India reaffirmed the above view in Smt. Sarla Mudgal, President, Kalyani and others v. Union of India and others (AIR 1995 SC 1531) and Lily Thomas, etc. v. Union of India and others (AIR 2000 SC 1650).

24. Heiner Bielefeldt, the United Nations Special Rapporteur on freedom of religion or belief from 2010 to 2016, reported that owing to violations of the right to convert the issue of conversion has “become a human rights problem of great concern.”⁶ According to him, there are different perpetrators of, and motives for, such violations:

6. Interim report of the Special Rapporteur on freedom of religion or belief, 15, U.N.Doc.A/67/303(Aug.13, 2012).

“For instance, abuses are perpetrated in the name of religious or ideological truth claims, in the interest of promoting national identity or protecting societal homogeneity, or under other pretexts such as maintaining political and national security. While some undue restrictions on the rights of converts or those trying non-coercively to convert others are undertaken by State agencies, other abuses, including acts of violence, stem from widespread societal prejudices. Violations in this sensitive area also include forced conversions or reconversions, again perpetrated either by the State or by non-State actors. In addition, the rights of converts or those trying non-coercively to convert others are sometimes questioned in principle.”

25. Some countries, including India, Nepal, Myanmar and Bhutan, have enacted anti-conversion laws. The legislatures in Pakistan and Sri Lanka considered anti-conversion bills but did not pass them. In *Pakistan Hindu Council v. Pakistan through Ministry of Law* (PLD 2012 SC 679) the Hon’ble Supreme Court of Pakistan observed that in Pakistan it was probably not required because Article 20 of the Constitution guarantees sufficient protection to the minorities against all accesses.

26. Children have rights and liberties like adults but they are sometimes restricted because of their vulnerability. The human rights law also focuses on them, particularly in respect of religious freedom. For this reference may usefully be made to the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981) and the Convention on the Rights of the Child (1989). So far as religious freedom is concerned, Article 5 of the said Declaration of 1981 recognizes (a) the right of the parents or legal guardians to bring up the child in their religion or belief; and (b) right of the child to education in religion or belief, in accordance with the wishes of the parents and the right not to be compelled to receive education against their wishes. On the other hand, the Convention of 1989 provides:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion,

political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

27. Having discussed the law on the subject, I turn to the case before me. It involves the following moot points:

- I. Whether Pummy Muskan, who is admittedly a 14-year-old minor, could change her religion without the consent of her parents?
- II. Whether her conversion is tainted and forced?
- III. Whether the Petitioner is entitled to her custody notwithstanding the fact that she has embraced Islam?

I take up these issues *seriatim*.

Moot Point I

28. Prophet Muhammad (peace be upon him) said:⁷

مَا مِنْ مَوْلُودٍ إِلَّا يُلَدُّ عَلَى الْفِطْرَةِ فَأَبَوَاهُ يُهَوِّدَانِهِ

[No babe is born but upon Fitra. It is his parents who make him a Jew or a Christian or a Polytheist.]

7. Sahih Muslim, Book 33, Hadith No.6426.

29. Islam teaches that everyone is Muslim at birth but the parents or society cause one to deviate from the straight path. Therefore, when someone accepts Islam he is considered to revert to his original condition. Nevertheless, Islam prohibits use of force against anybody to get him converted. The following verses of the Holy Qur'an are very instructive:

Surah 2 Verse 256:

لَا إِكْرَاهَ فِي الدِّينِ ۚ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ ۚ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ وَيُؤْمِنْ
بِاللَّهِ فَقَدْ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَىٰ لَا انْفِصَامَ لَهَا ۗ وَاللَّهُ سَمِيعٌ عَلِيمٌ

[There is no compulsion in religion. The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm handhold which will never break. Allah is Hearer, Knower.]

Surah 10 Verse 99:

وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مَنْ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا ۖ أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّىٰ
يَكُونُوا مُؤْمِنِينَ

[And if thy Lord willed, all who are in the earth would have believed together. Wouldst thou (Muhammad) compel men until they are believers?]

30. Hafiz Ismail Ibn Kathir (1300-1373), a great historian, exegete and scholar, has explained the above-mentioned Divine Command in his famous commentary *Tafseer Ibn Kathir* as under:

“Do not force anyone to become Muslim, for Islam is plain and clear, and its proofs and evidence are plain and clear. Therefore, there is no need to force anyone to embrace Islam. Muslims have a collective responsibility to share the message of Islam, but the normative way to do this has been clearly described in the Qur'an, itself i.e. “Invite all to the Way of your Lord with wisdom and kind advice, and only debate with them in the best manner (16:125).”

31. Neither any verse in the Holy Qur'an nor specific Hadith of the Prophet (peace be upon him) expressly stipulates minimum age for conversion to Islam. Hazrat Ali (R.A) was only 10 years old when he accepted it.⁸ However, Muslim jurists regard mental capacity of a child as of crucial importance when

8. Encyclopedia of Islam, University of the Punjab.

considering the question of his conversion. Age of discernment is generally reckoned as the age when one attains puberty.

32. According to some jurists, the minimum age of puberty for boys is 12 years while for girls it is 9. After that age whenever they show signs of puberty they would be considered *baligh* (adults) and when they get 15, without distinction of sex, they would be considered *baligh* irrespective of the fact whether there are any visible signs. While discussing the subject of the “*Wilayet-ul-Jabar*”, or the Doctrine of Patria Potestas, in Chapter IV of his book on Muhammadan Law, Ameer Ali states that:

“Puberty is presumed on the completion of the fifteenth year, according to most of the schools, unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and *sui juris*, possessed of the capacity to enter into legal transactions (page 235)”.

33. In *Muhammad Sadiq v. (Mrs.) Sadiq Safoora* (PLD 1963 (WP) Lahore 534), Anwar-ul-Haq, J. considered Ameer Ali’s aforementioned statement and a host of other authorities on the subject and stated the law as under:

“There is consensus of opinion among Muslim jurists that when a child attains the age of discretion (*Sinee Rushd*) he is regarded a major or *sui juris* for all purposes. As a general rule, the age of discretion or majority and the age of puberty are equated. Majority is attained at the age of 15 years except in a case where the child is not of ripe discretion at that age.”

34. The Qazis in the Ottoman Empire used to classify minors in three categories when dealing with conversions to Islam: children under the age of seven; children of about the age of seven to ten; and adolescents above this last age.⁹ In the first age-group the children could not convert independently of their parents as they had not yet attained the age of discretion. Their embracing Islam followed from their parents’ conversion and their affiliation to them. It’s validity relied on the view that the child at this stage is subject to his parents’ will and it is beneficial that he should follow

9. Eyal Ginio, Childhood, mental capacity and conversion to Islam in the Ottoman State, *Byzantine and Modern Greek Studies* 25(2001) 90-119.

them. The children of seven to ten falling in the second category could convert without the permission of their parents. However, the Qazi was supposed to treat each case separately: to present the basic articles of the Islamic faith before the child and to assess his comprehension and then validate or reject his conversion. The third category comprised the young adolescents. Since Islamic law considers the first signs of sexual maturity as indicators of the termination of childhood, they were not considered as children. The Qazi would generally assume that they fully understood the meaning of their act and acknowledged their conversion without further questioning.

35. The UDHR and ICCPR do not expressly provide minimum age for religious conversion. In the absence of global consensus on this issue, jurisprudence in different States varies.

36. In Malaysia, development of law on conversion of minor to Islam is broadly classified into pre-Independence and post-Independence eras. **Re Maria Huberdina Hertogh**, [1951] MLJ 164, is the leading case of the first period in which it was held that a minor had no capacity to decide her own religion as she was subjected to the consent of her parents. The evidence was that the child, whose parents were Roman Catholics, had been brought up as a Muslim from her tender years until she was fourteen years old. The court returned her custody to the natural parents holding that she had no capacity to decide what religion she should follow and it was the right of her parents to determine it. After the independence the issue of conversion to Islam is regulated by different enactments at the federal and state level. Briefly, the process and procedural aspect of conversion under the States Administration of Enactments provides for three stages, namely, pre-conversion, conversion solemnization and, finally post-conversion registration. A non-Muslim who intends to convert must fulfill two basic requirements: he should be of sound mind and have the age qualification. Presently the States Enactments stipulate two

categories of age requirement: (a) upon attaining the age of majority (*baligh*) in accordance with the Islamic law; and (b) upon attaining the age of 18 years. If the intending convert does not meet the age requirement, consent of his parents or guardian, as the case may be, is required. In *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor*, [(1990) 2 MLJ 300], the appellant challenged the High Court's order validating the action of Majlis Ugama Islam Kelantan converting his minor daughter without his permission. The Supreme Court held as follows:¹⁰

“It is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act, 1961, which incorporates the rights, liabilities of infants and regulate the relationship between infants and parents. We do not find favour with the learned judge's view that the rights relating to religion is not covered by the Act on the ground that the word 'religion' is not clearly spelt out in the law. In all the circumstances, we are of the view that in the wider interest of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian.”¹¹

37. In Pakistan there is no uniform standard definition of age of majority. To this end, various laws prescribe different ages for exercising civil, political, economic, social rights or criminal liabilities. Nevertheless, for our present purposes the Majority Act, 1875 (the “Majority Act”), is relevant. Section 3 thereof stipulates that every person domiciled in Pakistan shall be deemed to have attained his majority on attaining the age of 18 years. However, where a Court has appointed or declared the guardian of the minor's person or property, or both, or where the Court of Wards has assumed superintendence of his property, he attains majority on completing his age of 21 years. These provisions are subject to Section 2 of the Act which read as under:

10. The Supreme Court held that although the appellant was entitled to the declaration prayed for, it declined to make it because the girl had attained the age of majority when the appeal was decided.

11. This case is often cited to prove that parental consent is a must before a minor can convert to Islam. However, there is a conflict in court decisions on the point as to whether consent of both the parents is required or permission of one of them suffices.

2. Savings. – Nothing herein contained shall affect –

(a) the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption;

(b) the religion or religious rites and usages of any class of citizens of Pakistan.

38. For interpretation of a statute it is imperative that the Court should find out the intention of the legislature. To this end, it must consider every word used by it. In *Shahid Nabi Malik and another v. Chief Election Commissioner, Islamabad and 7 others* (PLD 1997 SC 32), the Supreme Court of Pakistan held that the “most settled principle of interpretation is that the Court must deduce the intention of the parliament from the words used in the Act.” The language employed in Section 2, *supra*, seeks to exclude religion and all religious issues (except guardianship matters) from the operation of the Majority Act. The purpose is to give maximum liberty to the people to follow their faith. The term “religion” is wide enough to encompass religious conversion. However, the question would be whether the age of majority for the purpose of conversion would be determined with reference to the personal law to which the intending convert is subject or the faith that he wants to embrace. According to the Madras High Court, it would be the former. Relevant excerpt from the case *Reade v. Krishna* [(1886) I.L.R. 9 Mad. 391] is reproduced hereunder:

“The construction suggested for Appellant is that when a Hindu youth of 16 changes his religion, his father’s right to custody ceases; and adopting as we must do, the finding of the District Judge that the youth had completed his 16th year, he was according to Hindu law *sui juris* and therefore competent to change it; still this would not affect the right of the father to the custody and control of his minor son, and that right is not taken away by the Act; and in this suit the question with which we have to deal is, as the District Judge very properly remarks, not a question of interference with the right of a Hindu son to change his religious persuasion, but whether Hindu father is entitled to the custody of his son and to such control over him as he may lawfully be entitled to exercise.” (emphasis added)

39. In contrast, Islamic jurists and even in some cases our Courts have held that where a person intends to become a Muslim, the governing law for determination of the age of majority would

be Islamic Law. In this regard Mst. Rani v. Roshan Masih and another (1986 PCr.LJ 1404) may be referred. In the instant case, [REDACTED] is admittedly 14 years old and a minor by all means. Therefore, any discussion on the aforesaid issue would be of academic interest only and should be postponed for some other time.

40. [REDACTED] being a minor lacked legal capacity to abjure her religion without the consent of her parents or guardian. I have noted that in paragraph-4 of her application before the Judicial Magistrate (a copy whereof is appended with the present petition at page-19) the Petitioner stated that she had no objection to [REDACTED]'s conversion to Islam. I am not inclined to attach much importance to the said statement and take it as a parental consent for change of religion because, in my opinion, she made it in anxiety under a misguided belief that this would help her get custody of her daughter.

41. The learned *amicus curiae*, Mr. Sheraz Zaka, Advocate, urged this Court to declare [REDACTED]'s conversion void in view of her legal disability. I am afraid, this cannot be done. The concepts of valid, void and voidable cannot be applied to religious rights and the resulting personal law unless the latter itself ordains or the statutory law sanctions them. For instance, in Islam marriage between certain relations is prohibited and thus void. On the statutory plane, Section 10 of the Hindu Marriage Act, 2017, empowers the Court to declare a Hindu marriage null and void on the conditions specified in clauses (c) and (d) of Section 4. To this end, clause (c) indicates any prohibited relationship between the two parties, and clause (d) relates to another living spouse at the time of marriage. The learned *amicus curiae* has not referred to any rule of law to support his prayer.

42. A person's religious belief is not a tangible thing and cannot be seen or touched. Thus, the Privy Council held in Abdul

Razack v. Aga Mahomed Jaffer Bindanim [(1894) L.R. 21 I.A. 56] that “no Court can test or gauge the sincerity of religious belief.” On this premise too a court cannot declare a person’s conversion invalid or void – unless he/she is of very tender age. However, it may refuse to recognize or give effect to it for certain legal purposes.

Moot Point II

43. The question as to whether [REDACTED]’s conversion is forced or otherwise has lost significance in view of my holding that she lacked the legal capacity to make such decision. Nevertheless, I would like to make a few observations.

44. Conversion from one religion to another has far reaching consequences. It affects succession, marital status and also the right to seek elective office. Divorce can be granted on the ground that the spouse has changed the religion. Upon conversion a person may be governed by a different personal law. The right to contest elections from a constituency reserved for minorities may be lost. Thus, the event of conversion is of critical importance from the point of view of rights and disabilities of a convert.

45. In Islamic Law it is a well recognized principle that a person who has read ‘*Kalma*’ even once, believes in the unity of Allah and that Prophet Muhammad (peace be upon him) is the last prophet and professes to be a Muslim, must be accepted as such. Paragraph-19 of Chapter II of the Principles of Muhammadan Law by D.F. Mullah states:

“19. Who is a Muhammadan. – Any person who professes the Muhammadan religion, that is, acknowledges (1) that there is but one God, and (2) that Muhammad is His Prophet, is a Muhammadan. Such a person may be a Muhammadan by birth or he may be a Muhammadan by conversion. It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief. It is sufficient if he professes the Muhammadan religion in the sense that he accepts the unity of God and the prophetic character of Muhammad.”

46. The principle that when a person declares that he professes Islam (or has converted to it) has to be believed was reiterated in Moulabux v. Charuk and others (PLD 1952 Sind 54) and Mst. Zarina and another v. The State (PLD 1988 FSC 105).

47. Some other religions also require certain rituals – like “Suddhi” in the case of Arya Samajists and baptism in Christianity – for admission. However, the Supreme Court of India has ruled in a number of cases that no formal ceremony of purification or expiation is necessary to effectuate conversion. For this reference may be made to Punjabrao v. Dr. D. P. Meshram and others (AIR 1965 SC 1179), Perumal Nadar v. Ponnuswami Nadar (AIR 1971 SC 2352), and S. Anbalagan v. B. Devarajan and others (AIR 1984 SC 411).

48. Conversion may not always be for spiritual reasons. It can also be motivated (a disingenuous act for worldly gains) or a forced conversion. It may also be a pretense or a ruse. In Skinner v. Skinner [(1897) L.R. 25 I.A.34] the Privy Council held that where the sole object of conversion is to alter rights, liabilities or disabilities prescribed by law to which the parties are subject, such conversion is to be considered as fraud upon the statute and will not be permitted by the courts.

49. In view of the foregoing, in certain cases courts may be called upon to decide whether the conversion is *bona fide*, genuine, voluntary or otherwise. In such eventualities they give findings on the basis of evidence produced before them. Unless there is a statutory prescription about the nature of proof required, subsequent conduct of the convert has immense importance. The courts insist that declaration of conversion must be followed by adherence to cultural and spiritual traditions. The convert must take to the mode of life of his new religion. In this context, the Privy Council laid

down the following dictum in *Abdul Razack v. Aga Mahomed Jaffer Bindanim* [(1894) L.R. 21 I.A. 56]:

“...the question of conversion must be decided not by an enquiry into the mind of the convert but by an enquiry into the conformity of his acts to the conduct that may reasonably be expected from a person of his alleged religion.”

50. In *Kailash Sonkar v. Smt. Maya Devi* (AIR 1981 SC 600), the Supreme Court of India adopted a similar approach while dealing with a case of reconversion. It ruled:

“In our opinion, the main test should be a genuine intention of the reconvert to abjure his new religion and completely dissociate himself from it. We must hasten to add here that this does not mean that the reconversion should be only a ruse or a pretext or a cover to gain mundane worldly benefits so that the reconversion becomes merely a show for achieving a particular purpose whereas the real intention may be shrouded in mystery.”

51. Again, in *Sapna Jacob, minor v. The State of Kerala & others* (AIR 1993 Kerala 75), the Kerala High Court observed:

“In order to prove that the petitioner was a member of the Hindu community she must have established that there was a bona fide intention to be converted to the Hindu faith accompanied by conduct or unequivocally expressing that intention. It is true that no formal ceremony of purification or expiation is necessary to effectuate conversion. The petitioner is admittedly the daughter of a Jacobite Christian. So by birth she is a Christian. A convert must embrace Hinduism and follow the cultural system and tradition of that religion and should take the Hindu mode of life. It may be true that the Court cannot test or gauge the sincerity of religious belief; or where there is no question of the genuineness of a person’s belief in a certain religion, the court cannot measure its depth or determine whether it is an intelligent conviction or ignorant and superficial fancy. But a court can find the true intention of men lying behind their acts and can certainly find from the circumstances of a case whether a pretended conversion was really a means to some further end.”

52. The High Courts in our country cannot undertake factual inquiry while exercising jurisdiction under Article 199 of the Constitution. Inasmuch as the question as to whether a conversion is tainted or otherwise cannot be determined without recording evidence, it can be challenged by the party concerned only through appropriate proceedings before the forum/court provided by (sub-

constitutional) law. Reference in this regard may be made to *Mst. Kaniz Fatima through Legal Heirs v. Muhammad Salim and 27 others* (2001 SCMR 1493) wherein the Hon’ble Supreme Court held:

“Even otherwise such controversial questions could not be decided by High Court in exercise of powers as conferred upon it under Article 199 of the Constitution of Islamic Republic of Pakistan. In this regard reference can be made to case titled State Life Insurance Corporation of Pakistan v. Pakistan Tobacco Co. Ltd. (PLD 1983 SC 280). The superior Courts should not involve themselves into a thorough probe or an in depth investigation of disputed question of fact which necessitate taking of evidence. In our considered view this can conveniently and appropriately be done by the forums available in the hierarchy. The constitutional jurisdiction is primarily meant to provide expeditious and efficacious remedy in a case where illegality, impropriety and flagrant violation of law regarding impugned action of the authority is apparent and can be established without any comprehensive inquiry into complicated, ticklish, controversial and disputed facts.”

The above view has been reiterated in a host of other cases, including *Haji Sardar Khalid Saleem v. Muhammad Ashraf and others* (2006 SCMR 1192) and *Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others* (2011 SCMR 1813).

Moot Point III

53. Admittedly, the Petitioner is the real mother and natural guardian of [REDACTED]. The learned counsel for Respondents No.5 & 6 contends that she is disentitled to her custody because she has converted to Islam. In support of his contention he has relied upon both the Holy Qur’an and *Tafseer Ibn Kathir*. From the Book he has recited Verse No.10 of Surah Al-Mumtahana (Chapter 28) which reads as under:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا جَاءَكُمُ الْمُؤْمِنَاتُ مُهَاجِرَاتٍ فَامْتَحِنُوهُنَّ ۚ إِنَّ اللَّهَ عَلِيمٌ
بِإِيمَانِهِنَّ ۚ فَإِنْ عَلِمْتُمُوهُنَّ مُؤْمِنَاتٍ فَلَا تَرْجِعُوهُنَّ إِلَى الْكُفَّارِ

[O ye who believe! When believing women come unto you as fugitives, examine them. Allah is best aware of their faith. Then, if ye know them for true believers, send them not back unto the disbelievers.]

From *Tafseer Ibn Khathir* the learned counsel has referred to the following excerpt:

“In Surah Al-Fath, we related the story of the treaty at Al-Hudaybiyyah that was conducted between the Messenger of Allah and the disbelievers of Quraysh. In that treaty, there were these words, "Everyman (in another narration, every person) who reverts from our side to your side should be returned to us, even if he is a follower of your religion.”

This was said by Urwah, Ad-Dahhak, Abdur-Rahman bin Zayd, Az-Zuhri, Muqatil bin Hayyan and As-Suddi.

So according to this narration, this Ayah specifies and explains the Sunnah. And this is the best case of understanding.

Yet according to another view of some of the Salaf, it abrogates it.

Allah the Exalted and Most High ordered His faithful servants to test the faith of women who emigrate to them. When they are sure that they are faithful, they should not send them back to the disbelievers, for the disbelievers are not allowed for them and they are not allowed for the disbelievers.”¹²

54. I have thoroughly studied the above citations and noted, with respect, that they speak of Muslim women who came to Madina after Prophet Muhammad’s migration and have no relevance to the facts and circumstances of the instant case. Even if it is assumed otherwise, our legal framework does not permit enforcement of Islamic tenets unless they are enacted into a law through legislation. Respondents No.5 & 6 can at the best rely on Article 2A of the Constitution but the Hon’ble Supreme Court of Pakistan has settled long ago in **Hakim Khan and 3 others v. Government of Pakistan through Secretary Interior and others** (PLD 1992 SC 595) that it is not self-executory.

55. It is trite that in all matters relating to custody of minors the Courts act in *loco parentis* and it is their legal duty to ensure their welfare. The question as to what is in the interest of a minor depends on the facts of each case and we have a rich jurisprudence on this point. The principles set out in the Guardian & Wards Act, 1890 (hereinafter called the “1890 Act”), serve as a lighthouse. Clause (b) of Section 19 of the said Act lays down the fundamental

12. <http://www.quran4u.com/Tafsir%20Ibn%20Kathir/060%20Mumtahinah.htm>

principle that no guardian can be appointed or declared in the case of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of his person. In Re Agar Ellis, [(1878) 10 Ch.D.49] James L.J. said:

“The right of the father to the custody and control of his children is one of the most sacred rights. No doubt the law may take away from him this right...or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make the resumption of his authority capricious and cruel towards the children. But, in the absence of such conduct by the father entailing such forfeiture or amounting to such abdication, the court has never yet interfered with the father’s legal right.”

56. Clause (b) of Section 19, *supra*, is of vital importance in the instant case because here the contest for custody of the minor, [REDACTED], is not between her parents (or their close relatives) but between them and a third party/strangers (Respondents No.5 & 6).

57. The welfare of a minor is not restricted to the child’s health, education, physical, mental, and psychological development alone; it also includes his/her spiritual and moral well being. Section 17 of the 1890 Act, which details the matters that the Court must take into consideration while appointing a guardian, gives us a cue in this regard. The said section reads as under:

17. Matters to be considered by the Court in appointing guardian. – (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to 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.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

(5) The Court shall not appoint or declare any person to be a guardian against this will.

58. Generally speaking, change of religion/conversion does not *ipso facto* deprive a parent of his right to custody of his child. **Reade v. Krishna** (ILR 9 Mad.391) decided in 1886 is one of the earliest authorities on the point. In that case a 16-year-old Brahman boy left his father to live with a missionary and after some time embraced Christianity and was baptized. His father filed a suit for his recovery which the District Judge decreed. He held that the conversion would not affect the right of the father to the custody and control of his minor son. The High Court upheld that decision in appeal. In the post-partition era, the case reported as **Mrs. Grace Abdul Hadi Haqani v. Abdul Hadi Haqani and others** (PLD 1961 (W.P.) Kar. 296) relates to a minor girl who was born to Muslim man and a woman who had converted from Christianity. The father was convicted under the Official Secrets Act by Court Martial and sentenced to 31 years' imprisonment. Before the said conviction the father and the mother signed a declaration that the child would be brought up as a Roman Catholic and was baptized at the age of one year on the date of declaration. Mother then started living an immoral life whereupon the child's maternal grandparents (Roman Catholics) took over her care. Court held that the father had not lost right to her custody notwithstanding her baptism. The next case that may be cited is **Mst. Ghulam Fatima alias Shammi Bai v. Chanoomal and another** (PLD 1967 Kar. 569). It involved a Hindu couple which had three children. The wife embraced Islam after the death of her husband. The Court held that mere change of religion was not sufficient for removing the minors from the lady's custody and the paramount consideration was their welfare. Relying upon the Privy Council's judgment in *Helen Skinner v. Sophia Evelina*

Orde [(1871) 14 MIA, 309] it ruled that it was in the minors' interest that they should be brought up in their father's religion and handed over the custody to their uncle. In another case, reported as **Peggy Collin v. Muhammad Ishfaque Malik** (PLD 2010 Lah. 48), this Court gave custody to a French Christian mother following the principle of the welfare of the child. The Muslim father of the child was a convict and was under arrest. The Court decided that the Muslim faith of the father was not enough to establish the fact that giving custody to the father was in the "best welfare of the child."

59. The same principle obtains in India. The Bombay High Court held in **Sheila Umesh Tahiliani v. Soli Phirozshaw Shroff and others** (AIR 1981 Bombay 175) that conversion cannot be regarded as a disqualification for custody of a minor child so long as the guardian is capable of providing him a congenial, comfortable and a happy home. Similarly, in **Lekshmi and another v. Vasantha Kumari** (AIR 2005 Ker. 249) the Kerala High Court held that the mere fact that the mother has married a person practicing another faith is not by itself a reason to take away the custody of the child from her.

60. The Petitioner being the lawful guardian of [REDACTED] [REDACTED] is entitled to her custody and exercise control over her. The girl cannot be lodged in Dar-ul-Aman against her will.

61. The prayer of Respondents No.5 & 6 that they may be permitted to retain [REDACTED] cannot be accepted for a number of reasons. Firstly, the Petitioner, her guardian, is against it. Secondly, Respondent No.6 is not related to her in the prohibited degree. Thirdly, Section 3 of the Punjab Domestic Workers Act, 2019, prohibits engagement of a child below the age of 15 years for any household work. Since [REDACTED] has not attained that age, her employment with Respondents No.5 & 6 was unlawful from the

inception and this Court would be perpetuating that illegality if it allows them to continue with her services.

Conclusion

62. [REDACTED] is barely 14 years old. As she is not *sui juris* she lacks legal capacity to change religion on her own. However, the question of faith being a matter of heart and one's conviction, no Court can declare her conversion invalid or void. It can only refuse to recognize or give effect to it for certain legal purposes. The Petitioner being the lawful guardian of [REDACTED] [REDACTED] is entitled to her custody. There is no reason to deprive her of that right.

Order of the Court

63. In view of the foregoing, this petition is **accepted** and the custody of [REDACTED] is handed over to the Petitioner.

(TARIQ SALEEM SHEIKH)
JUDGE

Approved for reporting

Judge

M.Khalid