

The Custody of Children (A Comparative Study of the Shari'ah, English and Pakistani Law)

*Abdul Haye Abro

Abstract

This article examines the existing law relating to the right of custody. It provides a comparative study of British common law and the existing Pakistani laws in fact a legacy of the legal system left by the British India. The study reveals that there are many differences in both of the jurisdictions regarding the method of interpretation of law relating to the custody of children. The principle is the same at both jurisdictions i.e. to assess the welfare of the children; however, variation arises when it is interpreted. The Pakistan is a common law country. The Guardian & Ward law traces back to 1890 when the country was ruled by the English under British India. The differences in the method of interpretation of law are due to nature of Islamic state. The state religion of Pakistan is Islam. The discussion revealed that character and morality as defined by Islam is one of the paramount considerations for deciding the cases of the grant of the custody.

In spite of the differences, there is a lot of harmony do exist between the laws of these states. Both of the jurisdictions strive to bring the welfare of the child in accordance with their social values.¹

Keywords: Custody of Children, Islamic law, English Law, Pakistani Law, Hidana

Introduction:

This paper compares the jurisprudence developed in the common law of the England and the law of Pakistan. The arguments developed in this article will evidence the fact that despite being a common law country, the interpretation of common law principles in Pakistan has become significantly different since its birth in 1947. The study highlights the differences in the method of interpretation of the law relating to child custody.

The custody of children was granted in accordance with the principles of the common law in the undivided India. Now, the principle is the same i.e. the welfare of the child for the grant of the custody. But the way the principle is interpreted is different from the one it was interpreted in accordance with the common law principles. These differences are owing to the fact that the Pakistan is a country based in Islamic ideology and Article 2 of the Constitution of the Islamic Republic of Pakistan declares Islam as the state religion.² Since Islam is the grand norm of the constitution.³ Therefore, any law which is repugnant to Islam is null and void.⁴

*Associate Professor Department of Shari'ah, International Islamic University Islamabad.

The paper discusses the English jurisprudence that has developed with regard to the issue of custody and also laws relevant to the same which may be found enshrined in Islamic jurisprudence. This discussion is useful in understanding the grand norm of the laws in the two selected jurisdictions. After embarking upon a discussion on the general principles, the article endeavours to trace the brief development of the law in the selected jurisdictions. Analysis of this development is of immense importance since it helps in understanding how the common law principles were originally applied in the undivided British-India and continue to be applied in Pakistan.

English Perspective

Until parents separate⁵, both the mother and the father of the born child have an equal right and equal responsibility to raise their child and to make decisions about their child's care and upbringing. After separation, arrangements to share their parenting rights and responsibilities become imperative. This often leads to hectic court proceedings in which both of the parents struggle to claim right of the custody of the child. The courts at both jurisdictions are legally required to look into and decide in accordance with the welfare and the best interest of the child. Before analysing comparatively as to what constitutes the welfare of a child in the selected jurisdictions, it is suitable to discuss the concept of the custody generally.⁶

Custody in English law has been used to connote two meanings; in the earlier law perspective, it meant the person's rights of control to the child, whereas in the other perspective, it only designated as care and control⁷. In the legal perspective, custody refers to the right to make the important decisions about the care and upbringing of a child. In addition to decision-making, custody normally includes the physical care, control, and upbringing of the child. The child usually lives with the parent who has the custody.

The statutory law has also defined the custody in quite similar way. The Children Act, 1975, defined custody as "parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent"⁸. In a strict sense, legal custody was defined in the Domestic Proceedings and Magistrates' Courts Act, 1978, as the rights and duties which by law the mother and the father have in relation to the person of a legitimate child even though the particular child is illegitimate.⁹

The custody is not merely a physical transfer of the child from one parent to the other or to the parent who held it earlier. The essence of custody is to grant the power to either parents or both of them to make decisions for the child. But the Courts do not act in a mechanical way but the exercise high precaution in deciding the applications of the custody. This is because the courts count several factors while deciding the application. These factors are discussed in the later part of the paper. The right to confer custody generally rests in the courts' discretion; courts can hesitate to enforce it if it is proved to be against the wishes of the child. It starts with a right of control and ends with little more than advice.

Since the inception of the Children's Act of 1989 however, the term custody has been abandoned in favour of the terms Residence and Contact. Residence orders by the courts of England determine with whom the child would live while contact simply signifies the right of the parents limited to meet and spend time with their child only. A residence order not only determines whom the child will live with but also vests in the person (obtaining the residence order) the parental authority, i.e. the authority to make decisions in respect of the child.¹⁰

Shari'ah law's perspective:

The legal term for custody¹¹ in Shari'ah law is *Hadānah* which refers to the upbringing of a minor child by the mother or by someone legally entitled to it.¹² Children are focus of gravity in Islamic family tradition and law. Child upbringing is a paramount joint responsibility when spouses are living together. This includes the child's physical care and health, emotional, educational, and religious welfare. When spouses separate by divorce or annulment, welfare responsibilities get also split according to the best abilities of each parent. While fathers are vested with financial burden and legal guardianship roles, mothers are given role of physical care and emotive guardian of child(ren). Inherently, Islamic system balances between multitude levels of child(ren)'s need.

There is no specific verse in the Quran on the right of custody, but Jurists by way of analogy deduce it from the Qur'anic verse related to fosterage. In verse 233 of Surah albaqarah, Allah (swt) says that:

The mothers shall give such to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear God and know that God sees well what ye do.¹³

The jurists of Islamic law thus held that since a child is dependent on the mother for fosterage, consequently the custody of the child also would belong to the mother.¹⁴

The law with regard to the right to custody can also be deduced by having recourse to the prophetic traditions, for example:

- According to 'amr Ibn Shu'aib, a woman came to the Prophet (PBUH) and said: 'Truly my belly served as a container for my son here, and my breast served as a skin-bag for him (to drink out of) and my bosom served as a refuge for him; and now his father has divorced me, and he (also) desires to take him away from me.' The Prophet (PBUH) said: 'you have a better right to have him, as long as you do not marry again'.¹⁵

- It was reported by Qāsim b. Muhammad. He stated that ‘Omar b. al-khattāb had married a woman from the Ansār. She gave birth to a son whose name was ‘āsim. ‘Omar divorced the woman. One day when ‘Omar was proceeding on his horse-back towards Qubā’, he found his son playing in front of the mosque. He caught hold of him and placed him on the horse-back. A quarrel arose between the maternal grand-mother and Omar about (the custody of) that boy. Both of them came to Abu Bakr who was the caliph. Omar said, “He is my son” Abu Bakr said, “O, ‘Omar! Leave this woman and the child” ‘Omar said nothing in reply (raised no objection to this decision).¹⁶

The mother is recognized as generally the fittest person to take care of the children, because of the instinctive love and tenderness she feels for them and her closer contact with them throughout pregnancy, nursing, and childhood. All the *Sunni* and *Shi’a* schools of fiqh unanimously hold that the mother has the first claim to the custody of her child regardless of whether she live with her husband or have been separated. However, if the mother remarries she would generally forfeit her right to custody. In recognition of an infant's need for female care, all the juristic schools give first preference to a mother's claim to physical custody of her young child provided that she satisfies all the requirements for a female custodian.¹⁷

After divorce, the mother is entitled to custody wages from the father during the custody period.¹⁸ This is meant to help her maintain the child. However, the period of female custody ends once the child reaches a certain age of custodial transfer. The Ḥanbalī and Shafi’ī schools do not distinguish between girl and boy regarding the duration of female custody. The Ḥanbalīs maintain that the female custodian should have custody from birth until the child reaches the age of seven, at which point he or she may choose between parents.¹⁹ The Shafi’īs allow female custody until the child reaches the age of discretion and may choose either parent as custodian. The Malikīs rule that female custody of a boy shall last until he reaches puberty, and for a girl until she marries. Under the Ḥanafī law, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most of the Ḥanafī jurists set this age of independence at seven years, although some set it at nine. Ḥanafī jurists differ on when a mother's custody of her daughter ends. Most maintain that the mother's custody ends when the girl reaches puberty, set at either nine or eleven years of age. However, others allow the mother's custody to last until the girl reaches the age of womanhood.²⁰

Eligibility for guardianship:

At the time of determining the custody of a child, there are certain conditions pertaining to the persons claiming custody which must be satisfied before the child is given into their custody. Some of these conditions are common to both males and female while some are specific to either females or males. The common conditions for custody include majority, sanity, freedom, ability of upbringing the ward, looking after its interests and protecting it both physically and morally.²¹

The first and foremost prerequisite specific to the *hadina* (female custodian) is that she must not be married to any male who is not in prohibited degree to the

ward. Furthermore, it is also essential that the *hadina* herself be a relation that falls in the prohibited degree towards the ward, a female who falls in the prohibited degree on grounds of fosterage is not eligible to become *hadina* of the minor.²²

Wages for Custody:

Under Islamic law, the *hadina* may or may not be the mother of the minor. The Hanafi *fuqaha* subscribe to the view that if custody is of the minor is decided in favour of the mother she is not entitled to claim wages for it during the subsistence of her marriage or the *iddat* since she receives maintenance in both cases.²³ However in cases where the woman receives no such maintenance, she becomes entitled to custody wages. On the other hand, a *hadina* who is not the mother of the minor is entitled to custody wages;²⁴ she may however offer her services for free.²⁵ This view is upheld by all the schools. Another peculiar aspect of Hanafi School is that in a case where a woman entitled to custody refuses to take it without wages while another woman falling in the prohibited degree to the minor offers to accept it without any wages, then she would be given precedence over the former.²⁶ Thus even a woman who volunteers to take custody without cost may even be given preference over the mother of the minor (who refuses to do the same if not given due wages).

Conditions for custody

Initially, the child is entitled to live in a conducive family environment within the care of both the parents. However, conditions for child custody may have to be decided in three instances; on the death of either parent, during separation and in Matrimonial causes.

- **Custody on the Death of either parent:** As earlier noted, courts empowered fathers to appoint testamentary guardians who could take over the care of their children after death. Mothers had little if any intervention until 1891 when the Custody of children Act 1891 was enacted and which manifested the concept of equality of parents' rights and powers with respect to their children. This Act didn't only give mothers powers to act jointly with fathers' appointed testamentary guardians but also gave her limited powers to appoint testamentary guardians. Section 3 of the Guardianship of Minors Act 1971 provided that on the death of either parent the survivor shall be guardian of their legitimate minor children together with any guardian appointed by the other.

In Pakistan, father can't appoint testamentary guardian. The mother is the natural guardian of the child unless the welfare of child is in question. In such a case, the family court decides the issue of the welfare of the child.

- **After separation:** The question of custody also comes into play after separation of the parents. The current statistical data indicate an increase in the number of divorcing parents. Children in this state will be in a transient state before their parents form new relationships. The issue of child's custody comes in to decide where the child should live at the time when parents part.

• **Matrimonial causes:** *Section 42 (1) of the Matrimonial causes Act empowers the court to grant custody to anyone in case custody has been granted to the other parent, and to both parents when custodianship order is made to the third person, or the child is placed in the care of the local authority, or he is made a ward of court. In these cases, both parents can be given reasonable access to the child as they sort out their disputes. The court has wide jurisdictions in granting access under any circumstance, including cases of illegitimate children. Granting access is mainly based on two considerations:*

(i) **The welfare of the child:** the child's welfare remains the paramount consideration while granting access to a child and it will be refused if the parent is not a fit and proper person to see the child at all.²⁷ However, a parent's previous conduct may not be a sufficient reason for denying access to a child unless it is proved to have an effect on his welfare. For instance, in *B. v. B.*,²⁸ the court of Appeal regretfully denied access to the father of a 16 year old boy who had developed such hostility to him that it might have been harmful to force them to meet..

(ii) **Effect on the parent with actual custody:** The court must put into account what will be the effect of allowing access on the parent with actual custody. It can therefore deny it if deemed to be not in the former's interest.²⁹ However this may be unravelled by sanctioning access with a presence of a neutral third person or a welfare officer. The basis for granting custody preference will be on the child's welfare which is the paramount consideration as provided by the Guardianship of Infants Act 1925. Let us now examine the two cardinal issues in children custody; child's welfare and access.

Child's Welfare:

In England the law relating to the custody of the child is governed by the Children Act of 1989. The law obliges the courts to look into the welfare of the child while determining the question of the custody. The Section 1 of the Children Act 1989 states that "when a court determines any question with respect to the upbringing of a child, or the administration of a child's property or income, the child's welfare shall be the court's paramount consideration."³⁰ This section implies that upbringing applies only to those processes of which the child is the object, and to those in which the child is the subject.³¹

Child's welfare, or sometimes expressed as its best interest is the paramount fact that has to be considered when resolving questions of its custody and upbringing. This, as Lord Mac Dermott held, is the top item in a list of items to the matter in question, when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances have been taken into account and weighed, it is the best interests of the child that rules upon or determines the course to be followed.³² The child's "best interests" encompasses what the entire courts think about what is good for the child both physically and emotionally, including any special needs it may have. However, reaching at the best interests of the child cannot

be achieved by quantitative methods of assessment, it is not a straight forward issue, but can be resolved by using some sort of “points system”.³³

Section 1 (3) of The children Act sets out a list of factors to which the court should have regard in determining issues relating to the child’s welfare. It was hoped that such a list would help achieve greater consistency and clarity in the application of the law. The list includes the following:

The child’s wishes and feelings:

The relevance of a child’s own wishes was re-enforced by the Gillick decision which regarded the right of the child to be heard as a cornerstone of the legislation.³⁴ In *Re s* (contact: children’s views) [2002], the father sought contact with his three children, V, JO and JA, aged 16, 14 and 12 respectively. It was held that there was no point in making an order in respect of V, who was opposed to contact. JO was prepared to have limited contact with his father, but only on his own terms and the courts simply ordered that he makes himself available for contact by mutual agreement. The judge noted that the father had not grasped the fact that his children were young adults and that hectoring them, and not listening to them, was likely to be counter-reproductive. Since the youngest child had maintained contact with his father, the order allowed him some choice – “commensurate with his age” – about what form of contact should take.

In another case, the court ordered contact against the wishes of the mother, at least in part because of the child’s express wish that contact should continue.³⁵

However, this varies according to the child’s age and understanding and the child’s wishes are never the paramount consideration; for instance in *Re R* (A Minor) (Residence: Religion) [1993]2 F.L.R. 63, CA, a boy of nine who was living wholly within what the judge describes as the “stifling” religious conditions of the Exclusive Brethren believed he should neither live with nor even see his father, his only surviving parent. But the court made a residence order in favour of the father based on the view that to be bound by the child’s religious beliefs would amount to an abandonment of the court’s duty to decide what the child’s welfare viewed objectively, required.

Similarly in Pakistan, the wishes of the child are duly considered by the judges at the time of determining custody. The case of *Sardar Hussain v. Mst. Parveen Umer*³⁶ for example, pertained to determining lawful custody of three minor children of Sardar Hussain and Parveen Umar who had been divorced. Pursuant to the divorce, Parveen contracted a second marriage and continued to retain the custody of the minors. Sardar Hussain thus, filed a petition before the supreme court of Pakistan to obtain custody of his sons who had attained age of seven years. The learned counsel for the petitioner contended that as per Islamic Law, the father was entitled to the custody of the sons and also that the contracting of a second marriage by the respondent raised concerns as to the welfare of the children. The learned Supreme Court however, relying on the judgment of the Civil Petition No.1246 took into consideration the fact that although the three minors were entrusted to the petitioner for more than 15 days, yet there was no change in their attachment or inclination towards their father. Furthermore, upon questioning by the court, it was

evidenced that they had a sentimental attachment towards their mother and considered their father almost alien. Thus, the court dismissed the petition, keeping in view the paramount consideration of the welfare of children, while determining the issue of custody and also the child's own wishes.

The wishes of the child however are not the sole factor upon which the courts in Pakistan would grant custody. In the case of *Mst. Nighat Firdous v. Khadim Hussain*³⁷ the honourable Supreme Court maintained that, 'The preference of the minor, in guardianship cases, is ordinarily taken into consideration but it is not always relevant because the minor is not the best judge of his/her welfare'.

Assessing the existing position

The child's welfare can be evaluated by assessing its prevailing conditions of care and control and what it reflects on his future mental and physical health. In many cases, courts have considered the effects of change of care and control on a child's development, and denied a claimant the right to custody, if change will prove to be detrimental to the child's development.³⁸

This factor is equally valued in Pakistan. The Supreme Court of Pakistan held that 'nearness of kin to the minor' is to be valued while deciding the application for the grant of the custody by the Courts of the Pakistan.³⁹ This shows that the law is similar to both selected jurisdiction on this point.

Personality and character of the claimant:

It is obvious that one's personality and character is most likely to affect the child. Therefore, the two must be taken into consideration so that a child whose custody rights have been granted in his favour, is not exposed to the danger, e.g. of physical ill-treatment, moral corruption, among others. However, the importance of stability may be outweighed by other factors; for instance in *Re M (Child's Upbringing)*⁴⁰ the court decided that a Zulu child, who had been cared for in England by a white woman, should be returned to his parents (the woman's former servants) in South Africa. This ruling was based on the consideration that the child's cultural background outweighed the importance of maintaining the status quo. Unfortunately, the arrangement order did not work out and the child returned to England with in a relatively short period.

The personality and character of the claimant is given prime importance while deciding the application for the grant of the custody. Being an Islamic country, the Courts are likely to grant the custody to a parent who holds good moral character in preference to one whose integrity is doubtful.⁴¹ The case of *Josip Stimac v. Mellitta Syed Shah*⁴² in the Pakistan concerned the custody of minors whose parents are alive by their maternal grandparents. The case revolved around the custody of two minor girls, Sana aged 13 and Abrash aged 6 (Austrian Nationals) whose mother had been sentenced to jail in Pakistan on account of drug trafficking. Resultantly the minors were also confined along with their mother in jail. Nevertheless, the maternal grandparent of the minors who also possessed Austrian nationality filed a petition before the Lahore High Court for the release and custody of the minors. During the proceedings however it was brought to the notice of the court that the father of the

minors, had already filed a petition under section 25 of the Guardian and Wards Act for the custody of the minors. The learned Advocate general in this behalf submitted that till the final verdict of the Guardian Court on the issue of custody, the LHC should order for the minors to be sent to SOS village. Thus, the court had to decide whether custody of the minors was to be awarded to their father or grandparents, or were they to be sent to the SOS village. The court was not in favour of sending the children to an orphanage thus they had to choose between the father and grandparents. It was held that the custody be given to the grandparents since they had been living there and seeking education prior to the arrest of their mother and it was thus in the best interest of the minors that they live there with their grandparents and elder brother. The father was denied custody since he failed to come forward and ask for custody despite the fact that he had been required by the court to do so. However in this case is question regarding the character of the claimant has not been clearly raised and the case has been decided on the basis of the best interest of the children.

Sex and Age of children:

Disputes of child custody can be resolved basing on the child's sex and age. Normally, children of tender age and particularly girls need mothers' care and control, and not doing so may be deemed as not being in the child's best interests. Likewise, boys of an older age are presumed to be more inclined to fathers than to mothers, so if this is supported with empirical evidence, awarding custody to the contrary may be deemed as not being in the child's best interest.

In *Brixey v Lynas*,⁴³ it was held that "the advantage to a very young child of being with his mother is a consideration which must be taken into account in deciding where lie its best interests it is neither a presumption nor a principle but rather recognition of a widely held belief based on practical experience and the working of nature... where a very young child has been with its mother since birth and there is no criticism of her ability to care for the child only the strongest competing advantages are likely to prevail".⁴⁴ However, this position is much likely to change based on other factors. For instance, In *Re D (a child) residence: ability to parent* [2001]2 F.C.R. 751,CA, the father obtained a residence order when his daughter was only one year old, due to concerns over the mother's drinking habits. This order was confirmed at a final hearing and upheld on appeal. Though the mother was available as a full-time career, the importance of this was diminished where the attachment between mother and child had been interrupted, and the father had been caring for the child for longer than the mother.

As a matter of general principle the custody of a male child up to the age of 7 and female child up to the age of 9 should be given mother. This is in accordance with the Hanafi School. However, there is a difference of opinion on this point from the Maliki school which states the male child is to be with mother up to the age of his puberty and female child to be till her marriage.⁴⁵ According to Shafi'i School the child will be with her mother up to the age 7 or 8 years, thereafter, the child will be given option to choose the parent with whom to live. This means that preferably the guardianship of very young children should be handed over to the mother. According to the Hanbali school, male child up to the age of 7 years will remain with mother,

thereafter the child will be given option of selection; whereas, female after seven years of age will remain with father till her puberty.⁴⁶ Hence, it is clear that under Islamic Law the interpretation of the right to custody differs in according to the individual's Fiqh. This is in harmony to the Muslim Personal Law of Pakistan. For that reason, if a person believes in the Hanafi law, the custody will be decided in accordance with the Hanafi law.

Faith and Moral Conduct:

The role and effect of faith on individuals is quite indisputable and each parent strives to see that his or her child follows the footsteps of his religious inclination. Previously, in the nineteenth century, courts were loath to give custody to a person whose beliefs differed from those of the child, probably on the ground of the fear of proselytism which may spark off conflict of interests between the child and its caretaker. This is contained statutory reference to "background" which may involve the consideration of the child's cultural and religious background⁴⁷. But, application for custody may be dismissed or denied on grounds of the claimant's religious belief and devotion if proved to be against the child's welfare, e.g. in terms of his socialization, or curtailing his opportunities for further education⁴⁸. For instance, in *Re P (Section 91 (14) Guidelines) (Residence and Religious heritage)*,⁴⁹ CA, the orthodox Jewish parents were unable to care for a Down's syndrome baby and she was fostered with non-practicing Catholic foster parents. The parents applied for the child to be returned to them when the child was eight, and backed their application with the claim that a child had a presumptive right to be brought up by her own parents in her own religion, and that although a move would cause short-term trauma, the long-term benefits of culture and heritage would shift the balance decisively in favour of the parents. But the court of Appeal rejected this claim basing on the belief that though the importance of an Orthodox Jew of religion was a factor to be put in the balance but could not be overwhelming. Moreover, the child would not appreciate the reasons why she was being moved from the family in which she had lived for seven years. But sometimes the court will resort to attempts to preserve both aspects of the child's background. For instance, in *Re S (Change of Names: Cultural Factors)*,⁵⁰ Fam Div: a Muslim girl who eloped to Gretna Green with a Sikh man had a child with but their marriage was not successful and after the divorce, the mother wanted to change her son's Sikh names on the basis that the Muslim community would not otherwise accept him. The court held that the child should be known by Muslim names and be brought as such in order to ease his integration into the community but his Sikh identity had to be preserved by encouraging the child to respect the Sikh faith as well.

As per prevailing common law in Pakistan faith is the paramount consideration in deciding the welfare of the child.⁵¹

On the question of a claimant's moral conduct, it was the practice of the divorce courts during the nineteenth century not to give care and control to a mother who had been guilty of adultery. This position was rescinded in Custody of Infants Act of 1873. When this proviso was ignored, the courts could no longer be

concerned with punishing any adult for his conduct, by denying him custody rights on grounds of his or her moral conduct.

The moral scrutiny of potential applicant of custody is still in place in Pakistan. If the character of the applicant is notorious, the courts are reluctant to grant the custody. The Court refused the custody to father who married second wife on the ground that the child is likely to be spoiled in the atmosphere of step mother.⁵²

The Past Behaviour:

The past behaviour of a parent is not considered unless it makes them less able to act effectively as a parent, for instance the violence or abuse towards any child or a member of the family or household would usually be considered or if the child's morals may be corrupted or affected by assimilation.⁵³ But the judge would not take into account which parent was to blame for the break-up of their relationship. Therefore, the past behaviour is considered in Pakistan for deciding the application.

Accommodation and Material Advantages:

Parties to custody disputes may not be at the same position as far as providing the child with material support is concerned. The court will therefore be concerned to award custody rights to a claimant who is in position to bring happiness to the child even though his or her financial position may not be as such better than the other party to the dispute. However, this point must be assessed in relation to the stability of home life where the child will be placed by custody order. The child's own wishes should also be considered if he or she is old enough to express its own wishes, unless proved to have been coached by one parent at the expense of its long-term interests that the court may feel justified.⁵⁴

In Pakistan, the financial position is not that much important in considering the application. The father is required to provide maintenance to a child, who is in the custody of the mother.⁵⁵

There is a harmony of the law regarding certain factors which are taken into consideration while granting the custody of the child in both jurisdictions. These factors are briefly discussed as under:

- The emotional ties between the child and each person seeking custody or access, other family members who live with the child and anybody else involved in caring for the child. This includes love and connections the children have with other people in their lives (e.g. grandparents, teachers, and friends).

In *Re B (Residence order: Status Quo)*,⁵⁶ a residence order was made in favour of the father despite the child's tender age (four years). The father had given up his work to care for the child full time. Two years later, the mother (who had remarried) applied for and was granted a residence order. Although the welfare officer had reported that there was no overwhelming reason for moving the child, the judge took the view that short-term distress caused by the change of would be relatively insignificant compared to the benefits the child would gain from the improvements in the contact arrangements that he thought would follow the change. The court of appeal held that this decision was plainly wrong, and that the

overwhelming importance for securing the child's future was preservation of the status quo.

Education and training for the children (e.g. the opportunity for stable school attendance and participation in extracurricular activities). The court will often be primarily concerned with the dangers of uprooting a child from a school where satisfactory progress is being made. But there may be cases in which there is a clash of values to be resolved: for instance, in *May v May* [1986] 1 F.L.R. 325, CA, the question was whether two boys, aged six and eight, should live with their father or their mother. There was no conflict about the competence of either parent, but there was a conflict of values between them. The father attached importance to academic achievement, punctuality, tidiness, and giving assistance in the household. The mother and her cohabitant had, in contrast, a much more free and easy approach to life and to such issues as the amount of time that the children should spend working, the time they should spend watching television and so on. The court of appeal refused to upset the trial judge's decision that the children should live with the father.

- The child's wishes (when the child is mature enough to know and express them).
- The stability of the child's present home environment and how long the child has been in that home is also taken into consideration. In *Re E* (children residence order) [2001] EWCA Civ 567, the court made a residence order in favour of the father because there were a number of concerns about the mother, including the fact that she had a number of unsatisfactory relationships, including one with a violent partner. This led to a conclusion that the children were at some risk from violence.
- The ability and willingness of each parent to take care of the physical, emotional, and other needs of the child.
- The plans each parent has for the care and upbringing of the child.
- The permanence and stability of the family each parent would provide.
- The biological or adoptive relationship between the child and each person seeking custody or access. This is usually considered when someone other than a parent is seeking custody or access.
- The previous conduct in terms of the person who has done most of the parenting until now. This will prove the parent's ability to do a good job of caring for the children.

Access:

The issue of access arises automatically when custody rights have been granted in favour of one of the parents. Its objective is to allow periodical visits at specified times so that the aggrieved party can keep in touch with the child.

Types of Access:

- **Reasonable access:** Access arrangements are often left open and flexible, if parents can agree. This can be the case whether custody and access are decided by an agreement between the parents or by court order. The agreement or order does not specify when or how often the parent with access can spend time with his or her

child. Instead, it simply states that one parent will have custody and the other parent is to have "reasonable access".⁵⁷ The same principle is still applied in Pakistan.⁵⁸

- **Fixed or limited access:** Like in the reasonable access, the terms of access are fixed, either by written agreement or by court order. The order or agreement sets out how often access visits will take place, how long they will last, and probably give the exact times for the visits.⁵⁹ Some orders also specify where access will take place, or any other conditions of access. The same agreement can be made by the parties in Pakistan. However, the court refused to grant access for the female child to her father at night time.⁶⁰

- **Supervised access:** Under certain circumstances, a judge might order that someone else must be there when the access parent and the child are together. The other person might be a relative, a friend, a worker at a supervised access centre, or a Children's Aid worker. Supervised access is ordered when the judge has concerns about how the parent with access will behave while he or she is with the child. Ruling on supervised access may be based on the past experience, for example, if the non-custodial parent has abused the child in the past, or has threatened or tried to take the child away from the parent with custody.⁶¹

There are similar precedents available in the Pakistan when it comes to the concerns of the court that there is likelihood of the harm of the child by granting access. But such orders are rare in nature because a parent who could harm the child or impede in the court orders is likely to be refused access.⁶²

- **Refusal of access:** Only in the most extreme cases will a judge deny a parent access. For example, access might be denied when serious child abuse has been proven and the abusing parent refuses treatment. The same is true for Pakistan. The parent is not entitled to any kind of access if it comes on record that the parent is abusing the child. This is because the courts look into the welfare of the child in deciding the custody and not the emotions of the parents.⁶³

- **Custody of children in Matrimonial causes:** Failure to provide reasonable maintenance to a child may tantamount to making an order for its custody. Such a child is legally dubbed a child of the family. The law is concerned of the child's welfare during divorce proceedings, nullity and judicial separation. Under these circumstances, the court is at choice either to direct the child to be made a ward of court, or placed under supervision of the welfare officer. In both situations, the court may make an order for financial provision compelling the parent(s) to provide maintenance to the child.

In Pakistan, it is the responsibility of a father to provide maintenance of the child. Therefore, it is not an issue that the mother cannot maintain the child to be delivered to the father for the sole factor of maintenance. If the court comes to the conclusion that the welfare of the child lies with the father, the court is likely to order the father to provide maintenance. The Supreme Court of Pakistan held: Mere inability to maintain minors or poverty was no ground for depriving mother of her right of custody over her minor children. Father being a natural guardian was

bound and responsible to provide maintenance to children even though they were in the custody of their mother.⁶⁴

- **The Right of Access under Islamic Law:** In accordance with the principles of Islamic law if a mother has been given the custody of the minor, she is cannot prevent the father from meeting the child. Similarly the father who has been granted custody cannot stop the mother from meeting her child. Although there is no mention of the frequency of access in the classical Islamic texts but it may be deduced by analogy with a wife's right to see her parents, to be once a week.⁶⁵

Conclusion:

The study reveals that there are differences in both the jurisdictions regarding the method of interpretation of law relating to the custody of children. The principle is the same at both jurisdictions i.e. to assess the welfare of the children in accordance with their social values.

However, the variation arises when it is interpreted. The Pakistan is a common law country. The Guardian & Ward law traces back to 1890 when the country was ruled by the English under British India. The differences in the method of interpretation of law are due to the fact that state religion of Pakistan is Islam. Therefore, the same law is given an Islamic flavour by applying Islamic values while interpreting the general principles enshrined in the Act.

The discussion revealed that character and morality as defined by Islam is one of the paramount considerations for deciding the cases of the grant of the custody. The differences are also due to the question of the financial position of the parties. Nevertheless, the new interpretation revealed that the financial position is not much important as it is the responsibility of the father to pay maintenance even though the child is in the custody of the mother.

References / Notes:

¹ This is because Pakistan has inherited its legal system from the British India.

² The Constitution of the Islamic Republic of Pakistan, Article 2

³ The Constitution of the Islamic Republic of Pakistan, Article 2-A declares the preamble of the constitution as the substantive part. The preamble states that all laws of the Pakistan are to comply with the principles of the Islam.

⁴ The Constitution of the Islamic Republic of Pakistan, Article 2-A declares the preamble of the constitution as the substantive part. The preamble states that all laws of the Pakistan should comply with Islamic principles.

⁵ It is pertinent to note here that English law does not discriminate between cases pertaining to the custody of children born outside of a wed lock and those who are born within it,

⁶ P M. Bromley, Family Law, 6th ed., 1981, p.282

⁷ P M. Bromley, Family Law, 6th ed., 1981, p.282

⁸ The Children Act, 1975, Section 86; Interpretation Act 1978, Schedule 1 and schedule 2, paragraph 4

⁹ The Court Act, 1978, Section 36

¹⁰ Rachael Stretch, *Q&A Family Law 2011-2012* (), 199.

¹¹ Under Islamic law, custody is considered as being the right of a child established since birth. Custody being a form of guardianship, is divided by the jurists into three categories i.e. guardianship of the infant (hadana) guardianship of education (wilayat al tarbiyya) and guardianship of property (al wilayatu al maal). *al-Mawsū'ah al-Fiqhiyyah*, Vol.45, p.187

¹² Tanzīlu-Ur- Rahmān, *A Code of Muslim Personal Law*, Vol.I, p. 718

¹³ Qur'ān 2:233, Translation by Abdullah Yusuf Ali < <http://www.gurantoday.com/BaqSec30.htm> > Accessed 21 May 2011

¹⁴ *al-Mawsū'ah al-Fiqhiyyah*, Vol.17, p.302

¹⁵ al-Bayhaqi: *al-Sunan al-Kubrā*, Deccan, Vol. VIII, pp.4-5

¹⁶ Ibid. p.4

¹⁷ Bidayat al mujtahid, Dar al Hadith, Cairo 2004, Vol.3, p.79; *al-Fiqh 'alā al-mazāhib al-khamsah*, Dār al-'ilm lil-malayīn, Beirut, 1982, 1982, pp.377-378

¹⁸ Ibid.

¹⁹ *al-Mughnī*, Vol. VII, pp.614-16.

²⁰ *Badāi' al sanā'i'*, Vol. IV p. 42; *Fathul Qadīr* Vol.VII, p.316; *Hāshiyat al-dasūqī 'ala al-sharḥ al-kabīr*, Vol.II p.532-533; *Mughnī al-muḥtaj* Vol.III, pp.456-460; *al-Mawsū'ah al-Fiqhiyyah*, Vol.17, pp.314-317

²¹ Jamal J. Nasir, *The Islamic Law of Personal Status* (Graham & Trotman 1990) 178

²² Ibid 180

²³ Ibid 181

²⁴ Ibid 181

²⁵ Ibid 181

²⁶ Ibid 182

²⁷ [1973] 3 All ER. 493

²⁸ [1971] 3 All ER. 683

²⁹ M. v. J., [1973] 2 All E.R. 81

³⁰ The Children Act 1989, Section 1

³¹ Kelly v BBC [2000]3 F.C.R. 509, Fam Div.

³² J. v. C, [1977]1 All E.R.647

³³ Bromley, p.295

³⁴ The Gillick decision was made on the basis that, in the absence of an express statutory rule, e.g. the one requiring parental consent to the marriage of a minor child, all parental authority as expressed by Lord Scarman "yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. The house of Lord by a 3-2 majority held that the application of a mother to the court to declare that young people could in some circumstances be given contraceptive advice and treatment without their parent's knowledge and consent was unlawful and wrong, should have been dismissed. See: *Gillick v West Norfolk and Wisbech Area HA* [1986] A.C. 113, HL.

³⁵ I v N [2003] EWHC 327

- ³⁶ PLD 2004 Supreme Court 357
³⁷ 1998 SCMR 1593
³⁸ [1965] 3 All E.R. 231, 249
³⁹ 1981 CLC 78
⁴⁰ [1996]2 F.L.R. 441, CA
⁴¹ 1985 MLD 161
⁴² PLD 2009 Lahore 393
⁴³ [1996] 2 F.L.R. 499 at 509
⁴⁴ Cretney's family Law p. 303, and Brixey v Lynas [1996] 2 F.L.R. 499 at 509
⁴⁵ *al-Mawsū'ah al-Fiqhiyyah* (The Encyclopaedia of Fiqh) KVol. 17 , pp 314-316
⁴⁶ *al-Mawsū'ah al-Fiqhiyyah* (The Encyclopaedia of Fiqh) KVol. 17 , pp 314-316
⁴⁷ Cretney, p. 305
⁴⁸ Hewison v. Hewison (1977), Family Law 207 CA
⁴⁹ [1999] 2 F.L.R. 573
⁵⁰ [2001] 2 F L R 1005
⁵¹ PLD 1972 Pesh. 1
⁵² NLR 1980 (Lah) 318
⁵³ S v S (Custody of Children) (1978), 1 FLR 143, CA
⁵⁴ [1977] 1 All ER.647, [1967] 1 All E.R, 202, 210
⁵⁵ PLD 1994 AJ & K 1
⁵⁶ [1998] 1 F.L.R. 368, CA
⁵⁷ Re W (A Minor) (1982)126 Sol Jo 725, Court of Appeal.
⁵⁸ 1996 CLC 1
⁵⁹ Re E (P) (An Infant), [1969]1 All ER 323
⁶⁰ 1985 CLC 592
⁶¹ Children Act 1975, and S.38 The Domestic proceedings and Magistrates' Court Act 1978
⁶² 1984 P Cr L J 3088
⁶³ The Guardians & Wards Act, 1890, Section 17
⁶⁴ PLD 1994 AJ & K 1
⁶⁵ Jamal J. Nasir, The Islamic Law of Personal Status (Graham & Trotman 1990) 185

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