

Guardianship, Custody, Visitation, Child Support under Islam and Pakistan Law

Mian Zafar Iqbal Kalanauriⁱ

Mediator & Advocate Supreme Court of Pakistan

This Research article attempts to deliberate on the Guardianship, Custody, Visitation, and Child Support under Islam with special focus on development of custody laws in Pakistan. A thorough analysis of customary practices, personal status laws and trends of courts is carried out. In the end it is suggested that some changes can be brought in laws, rules and practices can be formulated for Pakistan, in the light of Islamic principles, contemporary practices of the Muslim world, and International laws.

Cases of child custody fall under *muamlat*¹ in compendiums of Islamic *Fiqh*. *Muamlat* unlike *Ibadat*² are subject to change with respect to time and place. Islam lays down general principles as a directive for deciding child custody cases. These principles are still upheld by the contemporary courts and legislative authorities of Pakistan. In Pakistan Islam is legally recognized as the State religion and the Sharia is generally given a special place in legislation and administration of justice.

Custody and Guardianship

Before we proceed with the detailed study of the subject it is important to distinguish between the terms 'Custody' and 'Guardianship'. Though these terms are used interchangeably, both have different implications in law.

¹ Muamalat is set of rules (fiqh) related to worldly matters such as business/trading/commerce transactions, lending and borrowing contracts. Muamalat also involves the rules regarding the social interactions between human such as marriage, inheritance (waqaf, faraidh) and other human activities

² Ibadat is an Arabic word, that means devotion to Allah (God)

In Arabic language guardianship is termed as '*Wilayat*' and custody as '*Hidhanat*'. Custody means physical or material possession of the children, whereas its Arabic equivalent *Hidhanat* literally means 'training' or upbringing of the child'. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its Arabic equivalent '*Wilayat*' literally means to 'protect' or to defend. Legally the term guardianship is defined in the Guardians and Wards Act³ of Pakistan as '*A person having the care of person of minor or of his property or of both his person and property*'. The terms custody and guardianship seems to have similar connotations, but it is often argued that guardianship is a superior right.

According to the principles of established Muslim jurisprudence, father is the natural guardian (*Wali*) of the person and property of the minor child⁴. Whereas custody (*hidhanat*) is a right of the child and not of either of the parents, or any other person claiming through them. The basic consideration always is to provide to the child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of the society. Islam keeps the institution of family in high esteem and tries to preserve it. Rights and duties of the spouses have been prescribed in a manner to keep an ideal balance. While it is the man's job to earn livelihood and provide sustenance to the family, the wife's duty is to give birth to the children, to bring them up and to groom them. She is not required to work for her family or earn a living.

Law of *hidhanat* in *Sharia* has been framed keeping in view the roles of both parents. That is why mothers are given preference while deciding custody of the children born out of the wedlock during child's initial years (till 7 years). There is a consensus of all *sunni* schools of thought on this. Schools of *fiqh* differ in custody laws for boys and girls after 7 years of age. It has been observed in the recorded cases of classical Islamic era that the judges took into consideration the wishes and welfare of the minors while deciding their custody. It must be remembered here that wish of the ward is subject to the following two considerations:

- Welfare of the child
- Reasons of disqualifications of the mother and father to seek further custody

According to Ibn Qayyam, 'There are two types of guardianships. In one, father prevails over the mother and that is in matters of money and marriage. In ⁵the other one the mother prevails over the father and that is in matters of nourishing and upbringing'⁶

³Guardians and Wards Act 1890, section 4 (2)

⁴ PLD 1963 Lah.534

⁵ Ibn Qayyam (1292-1350CE / 691 AH- 751 AH) was a Sunni Islamic

Under Islamic law even if the mother has the physical custody of her children, father continues to be the guardian of the child as he is supposed to support the child financially. However it should be noted that under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibility and in most cases is the main contributor to the financial needs of the family then the privilege of ‘guardianship of person and property’ should vest in her as well.

Child Custody in Quran, Sunnah and Fiqh

An in depth study of Islamic law reveals that there is no verse in Quran on custody of minors but the classical Muslim jurists have referred to the verse of fosterage⁷ (*Ayat al Radha'at*) which says that the mother should breast feed their infants for two complete years. Therefore through *Iqtada al Nass* it is inferred that in the years of infancy the right of upbringing and fostering the child remains with mother.

As per the provisions of Verse No. 2, Ayat No. 233 of the Holy Quran, no parent will be subjected to torture for his being the parent of a child. The said provision is reproduced here to below for the perusal:

رَزَقْنَهُنَّ ۖ وَعَلَى الْمَوْلُودِ لَهُ لِمَنْ أَرَادَ أَنْ يُنَمِّ الرِّضَاعَةَ ۖ وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ ۖ
 ۖ لَا تَضَارُّ وَالِدَةً بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ لَا يَتَكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۖ وَكَسَوْتُهُنَّ بِالْمَعْرُوفِ
 ۖ جُنَاحٌ عَلَيْهِمَا إِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا ۖ
 ۖ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَسْتَرِضِعُونَ أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُم بِالْمَعْرُوفِ
 تَعْمَلُونَ بَصِيرًا

The mothers shall give suck to their Children for two whole years, (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child, or father on account of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they both decide on weaning, by mutual consent, and after due consultation, there is no sin on them. And if you decide on a foster suckling-mother for your Children, there is no sin on you, provided you pay (the mother) what

jurist and commentator of Quran. His scholarship was focused on *Hadith* and *fiqh*.

⁶ Ibn Qayyam, *Zad al Ma'ad*, translated by Syed Rais Ahmad Jaferi (Karachi: Nafees Academy) Vol 4, p.289

⁷ Al-Quran 2:233

you agreed (to give her) on reasonable basis. And fear Allah and know that Allah is All-Seer of what you do.

(البقرة سورة), Al-Baqara, Chapter #2, Verse #233⁸

In the light of hadith literature available and the decisions of Prophet Mohammad (pbuh) on the cases brought before him on child custody, three principles have been laid down while deciding the custody of a child. Firstly, the mother possesses priority right of child custody so long as she does not remarry⁹. Secondly in a situation where both parents profess different religions, custody of the child should go to that parent who follows the religion of Islam¹⁰ and lastly when the child has gone past the years of minority (7 years) he will be given an option to choose between both parents¹¹.

An analysis of the opinions/ decisions of the Companions of the Prophet (pbuh) seem to be in complete harmony with the decisions of Prophet Mohammad (pbuh). Decisions of the companions of the Prophet show that priority right of the child custody in the years of infancy goes to the mother¹². When the child reaches the age when he is in a position to decide right from wrong, his wish is taken into consideration¹³ and mother has a superior right of custody as long as she does not remarry¹⁴. In addition when the child is in mother's custody, the father is

⁸ Translation by Mushin Ali

⁹ Al Bahaiqi, *Sunan al Kubra*, Dakkan, Vol8, p.4

¹⁰ Al Bahaiqi, *Sunan al Kubra*, Dakkan, Vol8, p.4

¹¹ Al Bahaiqi, *Sunan al Kubra*, Dakkan, Vol8, p.4

¹² Zaid bin Ishaq bin Jariya narrated that once a child custody case was brought to Abu Bakr who decided in favor of the mother and then said I have heard from Holy Prophet (pbuh) that 'Do not separate the mother from her child.

¹³ Narrated by Ibn e Abbas when Hazrat Umar divorced his wife Jamila they disputed on the custody of their son Asim and the dispute was brought before Abu Bakr. Abu Bakr decided in favor of the mother till the child reached such an age when he was in a position to decide right from wrong.

¹⁴ Ibn Qayyam, *Za'ad al Ma'ad*, Translated by Syed Rais Ahmad Jafri (Karachi: Nafees Academy) vol. 4, p.289. In another narration of the

responsible for his *nafaqah*.¹⁵

Up till the era of companions we do not find much discrepancy on the principles laid down while deciding child custody between the decisions of Prophet Mohammad (pbuh) and those of the companions, neither do we find a decision in which child custody gets automatically transferred to the father when child attains certain age.¹⁶ The underlying principles while deciding the child custody cases remain that the child in his early years must not be deprived of the warmth, affection and full time attention that he needs in his growing years, which he/she can experience with his/her mother better than his/her father. Once a child reaches a mature age, three considerations have to be kept in mind, the religion of the parents, the choice of the child and welfare of the child.

A deviation from the above principles is observed during the time when *fiqh* was codified and we come across the rulings of the masters of five leading schools of thought. According to Abu Hanifa, custody transfers to the father when the boy reaches the age of 7 years and the girl when she attains puberty. In Imam Malik's opinion, mother has the right to her son's custody till he is able to speak clearly and the daughter till her marriage.

According to *Shafi'i* and Imam Hanbal, mother has the right of custody or upbringing till 7 years of age for both son and daughter. After this age the option will be granted to the children to choose with whom they wish to live.¹⁷

In Shi'a *fiqh*, mother has the right to keep her son in her custody till he is two years old and daughter till she is seven. After this, the right of custody is transferred to the father.¹⁸

According to the principles of established Muslim Jurisprudence, father is considered to be the child's natural and legal guardian because upon

above mentioned case it is written that Abu Bakr told Umar that mother is more caring and gentle towards her children so she has a superior right of custody till she does not marry.

¹⁵ Al Bahaiqi, *Sunan al Kubra* (Beirut:Dar al Kotob Al-Ilmiyah) vol.8, p. 8

In the same case of dispute over Umar's son Asim, Umar was directed by Abu Bakr to pay *nafaqa* of Asim and he did not argue.

¹⁶ Ibn e Hammam, *Fath al Qadeer*, Egypt 1356H, Vol. 3, p.316; Al Kasani, *Bidaya al Sina'a*, Egypt 1328H, vol.4, p.42

¹⁷ Ibn Qaddama, *Al Mughni*, Egypt: 1367, vol. 7, p. 614-16 (Hanbali scholar, 541-573 AH)

¹⁸ Najm ud din Jafar, *Shara'i al Islam*, Tehran, vol. 2, p. 1-2

him is the responsibility of *nafaqa* of his child. Mothers are the custodians till a particular age after which the custody either reverts to the father or the child is given option by the court to choose between both parents, though no such age limit is stated in the texts.

An interesting case has been recorded in *Nayl al Autar*¹⁹ which was brought before Ibn e Taiymiya²⁰. In this case, child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted for the custody of the father. On it the mother asked the court to inquire from the child why he has preferred the father. On court's inquiry the child said, mother compels me to go to the school where the teacher punishes me every day while the father allows me to play with the children and do whatever I like. On hearing this court gave the custody to the mother.²¹ This clearly shows that wishes of the minor while deciding his or her custody has always been subject to the principle of welfare of the minor even in classical Muslim legal tradition. Classical scholars have added that when it is detrimental for the child to live with his or her mother due to her remarriage, profession or religion then the custody will transfer to the father. This further reinforces the principle of welfare of the child. In *Nayl al Autar* it is stated that, '*It is essential to look into the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear about any one of them that he or she would be more beneficial to the children from the point of view of their education and training then there is no need of qur'a or choice of the children.*'²² This view was upheld by Allama Ibn Qayyam also.

Another important aspect while deciding child custody is that, who is responsible for providing *nafaqa* of the child in case of dissolution of marriage or divorce? Classical Muslim Scholars agree that subsistence of the child is incumbent upon the father even when he is in mother's custody. Under Islamic law it is not the responsibility of the mother to provide sustenance and protection of progeny.

Al Murghanani further adds that if mother refuses to keep the child then there is no constraint upon her as a variety of causes may

¹⁹ Najm ud din Jafar, *Shara'i al Islam*, Tehran, vol. 2, p. 1-2

²⁰ Taqi ad din Ahmad ibn Taymiyya (1263-1328 CE), born in Harran what is Turkey today near Syrian border, was a Hanbali theologian of 7th century AH.

²¹ Imam Shaukani, *Nayl al Autar*, Syria: Dar al Fikr, vol. 7, p.142

²² Ibid.

operate to render her incapable of charge.²³

Islamic law lays down that as a general rule in initial years child should remain with the mother and a thorough study of Islamic legal literature shows that even if the child custody is contested by the father in the initial years when the child is unable to make a sound judgment, custody has been granted to the mother in majority of the cases. When the child reaches the age whereby he can tell right from wrong, his wish is taken into consideration by the courts which is subject to the welfare of the child.

Child Custody Laws in Pakistan

Council of Islamic Ideology assists the state in carrying out its mandate as stated in the constitution of Pakistan. The constitution of Pakistan states that 'all existing laws shall be brought in conformity with the injunctions of Islam as laid down in Holy Quran and Sunnah. There are Sharia courts, including an apex body called the Federal Sharia Court, to adjudicate on Islamic matters and enforce the Sharia law.

Eight years after the birth of Pakistan on August 4, 1956 the government of Pakistan announced the formation of a Commission on Marriage and Family Laws. The question of custody of the child was raised in the questioner drafted by the Marriage and Family Laws Commission.

The question was that, *'At present the mother is entitled to the custody of her minor child only up to certain age i.e. the male child up to seven years and female child till she attains puberty. These limits have no authority either in Quran or Hadith but have been fixed as a result of opinions of some Muslim Jurists. Do you consider it admissible to propose some modifications?'*

In answer to this question Commission stated in its report that; *'In the opinion of the Commission it is admissible to propose changes in matter of custody of minor children as the Quran and Sunnah have not fixed any age limit and some of great Mujtahid Imams have expressed the view that the matters of age limit in this respect is an open question.'*²⁴

Maulana Amin Ahsan Islahi (1904-1997)²⁵ commenting on the reply of

²³ Hedaya, p. 138

²⁴ Marriage Commission Report X-Rayed by Prof. Khurshid Ahmad (Karachi:Chiragh e Rah Publications 1959) p. 218

²⁵ Pakistani Muslim scholar famous for his Quranic commentary '*Tadabbur i Qura'n*', also served as a member of Muslim Marriage and Family Law Commission set up by Government of Pakistan in 1956. He was one of the founder members of Jamaat e Islami but

the Commission said that, *'It is correct that there is no explicit implication of Quran and Sunnah which prescribe the age limit. But it does not mean that legists have fixed the limit just out of fancy and had no sound reasons for these deductions..... a careful study of the verdicts of Holy Prophet (pbuh) in the cases that were brought before him reveals that a very basic consideration has been the welfare and wellbeing, education and training, protection and interests of the minor. If they could be achieved well when the children are under the custody of the mother, this was done and when the case was otherwise they were given under the custody of the father.....'*

Five years later in March 1961 many of the recommendations of the Commission on Marriage and Family Laws were embodied in Muslim Family Laws Ordinance of 1961 but it remained silent on the issue of custody of minors. All Pakistan Women's Association (APWA) continued to agitate and finally proposed a reform on child custody as an amendment to the MFLO 1961. It proposed that, *'Family Laws Ordinance is silent on the issue of custody of minors. The law should provide that whilst deciding about the custody of the children of broken homes the court should keep in view not only the welfare of the minors but also wishes of such children.'*

Maulana Maududi (1903-1979)²⁶ an eminent Pakistani religious scholar states;

*'The right thing in this regard is that the interest of the child should be kept above everything else. In every particular case preference should be given either to the father or mother after giving full consideration to the prospects of education and training in their respective custodies..... also under whom so ever's custody they might be no restrictions should be placed on children meeting the other party.'*²⁷

Justice Tanzil ur Rehman²⁸ states;

abandoned the party in 1958.

²⁶ Founder of Jamaat e Islami, Pakistani journalist, theologian Muslim revivalist and a controversial 20th century Islamic thinker.

²⁷ Marriage Commission Report, op., cit., p. 887

²⁸ Justice (R) Dr Tanzil ur Rehman, Prominent Pakistani Jurist and scholar of Islamic Studies, former Chief Justice, Fedral Shariat court, Member CII and author of many books.

In granting the right of upbringing, the child's security and betterment should be kept in mind, and as long as there is no ma'ani (hindrance/hurdle) the mother's custody will be preferred. In certain situations, child has to be given the option to choose between the two. Sometimes such circumstances may arise in which it would be appropriate to give the child to maternal grandmother or maternal uncle even in the presence of the parents. If it is not appropriate to hand over the child to the mother due to her religion or profession then the court will decide by itself to whom the custody may be granted.^{29'}

Child Custody Following Divorce

Under Shari'a, a father is the natural guardian (*al waley*) of his children's persons and property. Shia doctrine also gives the child's paternal grandfather joint guardianship.³⁰ According to Shari'a, a child's paternal grandfather is his or her natural guardian after the father.³¹ Under the laws of countries such as Kuwait, guardianship passes to the next relative on the father's side if the father and paternal grandfather are unable to act as guardian.³² Depending on local laws, a father may be able to transfer his power of attorney over his child to other family members. In custody abduction cases, a father brought into court may use this as a means of keeping the child in the custody of his relatives and he may claim that he lacks legal authority to return the child to its mother.

A mother generally has a right to physical, not legal, custody of her child until the child reaches the age of custodial transfer, at which time the child is returned to the physical custody of the father or the father's family. The right to physical custody is not an absolute right in the sense that a mother or father who possesses physical custody may not prevent the other parent from seeing the child. While the parent with physical custody cannot be compelled to send the child to the other parent's residence for visits, he or she must bring the child to a place where the

²⁹ Tanzil ur Rehman, (1991) *Majmua Qawaneen e Islmi*, Islamabad: IRI, vol. 2, p. 886-887

³⁰ *Cairo v. Melani Rena George*, Civil Action, Said El Arabi Mohammed Ahmed, South Cairo Court, Circuit 41 Personal Affairs/Foreigners (January 18, 1999) (judicial document) (translated from Arabic).

³¹ Nasir, *supra* note 2, at 206.

³² *Id.* at 185

other parent can see him or her.³³ Furthermore, in order to have physical custody, a parent must fulfill certain conditions. Firstly, the father or mother seeking custody must have reached majority and must be sane. He or she must also be capable of raising the child, looking after its interests, and protecting its physical and moral interests. Aside from these basic requirements, there are specific requirements based on the parent's gender.³⁴ Since, by definition, Muslim fathers satisfy the specific requirements of a male custodian,³⁵ the following discussion will address the requirements placed on a mother.

Requirements of a Mother Custodian

To have physical custody, most juristic schools maintain that a mother must not be married to a stranger (a non-relative) or to a relative who is not in a prohibited degree of relation to the child.³⁶ The Shias, however, prohibit a mother from retaining custody if she marries any other man as long as the child's father is alive and eligible for custody.³⁷ While only the Shafii and Shia schools require a mother to be Muslim in order to have physical custody over a Muslim child born to a Muslim father, the Hanafi school considers denouncement of Islam (apostasy) a sufficient ground for denying a mother who was previously Muslim her right to custody.³⁸ Jurists of the other Sunni schools generally only require that the mother raise the child in the Islamic faith. However, the Sunni schools maintain that a mother loses her right to custody if there is reason to believe that she would influence the child's religious beliefs so as to compromise his or her Islamic upbringing. Examples of this would be the mother taking the child to church, teaching the child the articles of another religion, or performing the rites of another religion in front of him or her.³⁹ Certain other requirements also must be satisfied for a mother to

³³ *Id.* at 207

³⁴ *Id.* at 178.

³⁵ *Id.* at 181.

³⁶ *Id.* at 172.

³⁷ *Id.* at 173.

³⁸ The Shia and Shafii schools do allow a Jewish, Christian, or, under the Shia school, a magi mother, to have physical custody over a child that shares her religion. *Id.* at 180.

³⁹ *Id.*

have custody, such as the requirement that the mother not house the child in a home where he or she is disliked.⁴⁰

A Mother's Right to Physical 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.⁴¹ After divorce during the period of the mother's custody, she is generally entitled to receive custody wages from the father to help her maintain the child.⁴² However, the period of female custody ends once the child reaches a certain age of custodial transfer. The Hanbali and Shafii schools do not distinguish between girls and boys regarding the duration of female custody. The Hanbalis 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. The Shafiis allow female custody until the child reaches the age of discretion and may choose either parent as custodian. The Malikis rule that female custody of a boy shall last until he reaches puberty, and for a girl until she marries.⁴³ Under the Hanafi School, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most Hanafi jurists set this age of independence at seven years, although some set it at nine. Hanafi 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.⁴⁴

The importance of the early nurturing and physical custody of the mother is emphasized and protected in many Islamic countries. Preserving the bond between mothers and their young children is so important that it may result in the children accompanying their mother to prison. In Saudi Arabia, for instance, it has been reported that nearly half of the population of the Central Riyadh Woman's Prison in 1983 consisted of children under the age of seven years.

⁴⁰ *Id.*

⁴¹ *Id.* at 173-174.

⁴² Nasir, *supra* note 29, at 139-140.

⁴³ Nasir, *supra* note 2, at 187.

⁴⁴ *Id.* at 188.

Gender Relations and Restrictions on Women

Islam and the customs of traditional Islamic societies emphasize the need for women to be protected from accidentally falling into disobedience or dishonor. This objective is best accomplished by limiting women's opportunities to sin. Consequently, in countries such as Saudi Arabia, Iran and Afghanistan women are prohibited from having direct contact with men outside the family circle. The sexes are separated at the work place, in public situations and, traditionally, in the home.⁴⁵ Certain societies expect women to cover their hair and bodies, to the extent that the dress code is enforced by self-appointed moral guardians of the community, one's family, and strangers, to the point where the conservative dress code is required if a woman wishes to avoid disgrace and public disdain. The most restrictive dress, required in Saudi Arabia, is the floor-length black *abaya*. Very conservative Islamic communities and families also require women to veil their faces. Although each society will differ in its interpretation of appropriate female attire, Islamic countries generally expect women, both Muslim and non-Muslim, to dress conservatively.

Some of the more conservative Islamic societies require women to be escorted in public at all times by their husband, or a *mahram* (a man with whom the woman is prohibited sexual relations). A *mahram* would include her father, brother, or son when he reaches the age of adulthood. In certain traditional societies, women cannot travel alone. In Saudi Arabia, this restriction extends to the prohibition on women driving cars and traveling within the country without official permission.

Children and the Parent-Child Relationship

In traditional Islamic societies, motherhood in marriage is expected to be the primary aim of a Muslim woman's life.⁴⁶ While the intelligence and capabilities of women are recognized, women cannot rival men in those areas. A woman may work and pursue various aspirations deemed

⁴⁵ Joelle Entelis, International Human Rights Regarding Women's Equality and Islamic Law 20 Fordham Int'l L.J. 1269-1270 (1997).

⁴⁶ Joelle Entelis, International Human Rights Regarding Women's Equality and Islamic Law 20 Fordham Int'l L.J. 1269-1270 (1997).

appropriate for the feminine role, but her family must be her priority. Parenthood is also central to the lives of Muslim men in traditional Islamic societies, although men generally have more freedom and opportunities to assume other roles in the world outside the home.

While fathers are responsible for the spiritual guidance and education of their children, a mother's role is to care for her children. Until a child reaches the age of spiritual awareness, his or her mother is the primary care provider. At that time, the child begins to participate in religious activities, such as prayers and fasting, and his or her father assumes his role as spiritual instructor and teacher. The mother continues to nurture the child and sets an example of obedience to God and to her husband.

Islam and traditional Muslim cultures emphasize the need for children to respect their parents. The Quran notes in particular the costs of pregnancy and breast feeding to mothers.⁴⁷ It instructs grown children to care for their elderly parents: "Treat them with humility and tenderness and say, 'Lord, be merciful to them; they nursed me when I was an infant.'⁴⁸ Failing to give one's parents their due is considered a sin. The only exception is cases where the actions of one or both parents threaten the child's fidelity to God. The child's duty to God is absolute, and supersedes the duty of obedience to parents.

Extended Family

In many traditional Islamic cultures, adult male children are expected to provide a home for their mother and unmarried sisters once their father has passed away. This expectation, along with the obligation in some societies for a woman to have a *mahram*, can result in a widowed mother-in-law taking up residence in the home of her son and his wife. The situation sometimes results in a transfer of authority from the wife to the mother-in-law.

Many families in Islamic societies are large and include several generations and extensions within a single household. The community of siblings, cousins and other relatives identify themselves as close members of the family and often seek the companionship of the group. The family is often self-sufficient in managing the affairs of its own members. For instance, many Islamic cultures expect that disputes among members be mediated first within the extended family. The father of a wife will often mediate on her behalf if divorce is anticipated.

⁴⁷ Quran 46: 15-16.

⁴⁸ Id. at 17:24.

West's notions of individual identity can clash with traditional Islamic cultures' concepts of community, mutual support, and the submersion of self into the family.

Custody Abduction to the Islamic Countries

Because of the gender-based custody and divorce laws, and the lack of recognition of foreign secular, non-Islamic family court decisions, there are no legal processes that would require the return of an abducted child to the Western Countries. Further, there is little cultural support for such a return, as the act of abduction from the Western Countries is often perceived as a courageous act of rescue from life in a country with traditions contradicting those of Islam. Although the abducting parent may be motivated by resentment or may be acting in retaliation against his spouse, a parent who abducts a child from the Europe often emphasizes the conviction that the act is in the best interest of the child. Islamic Countries have become a safe-haven for those who commit custody abduction, due in part to the gender-based custody and divorce laws discussed above. It must be noted that the governments of the Islamic Countries do not actively promote custody abduction and prohibition of access to a loving parent is a non-Islamic act and not justified within the Muslim community.

Trends of Courts in Pakistan

The prime object of Guardians and Wards Act, 1890 is to safeguard the interest and welfare of the minors by appointing and declaring title of guardian to custody of a ward in favour of a fit and suitable person. A Court while acting as guardian judge exercises parental jurisdiction and it is a primary responsibility of a guardian judge, while adjudicating upon cases of appointment of guardians of person and property of minors or declaration of title of guardian to custody of wards, to play his role as a watchdog for the interest and welfare of minors. The welfare means both material and spiritual welfare of the minors. Therefore, in deciding guardian cases which are sensitive in nature an arduous and cautious duty falls upon a guardian judge to keep in view the paramount consideration i.e. the welfare of the minor, and that is why it is a rationale behind the fact that jurisdiction to entertain applications under the Guardians and Wards Act, 1890 in view of Section 9 of the Act vests with the District Court or under section 4-A of the Act is ordinarily delegated to the Senior Civil Judge of the District.

A general view which prevails in Pakistani society is that in cases of marital breakup, divorce or dissolution of marriage child custody is given to father when the child is seven years of age (as stated in Hanafi *fiqh*)

and that this is supported by Islamic law as well as Pakistani law. In reality Muslim Family Laws Ordinance of 1961 of Pakistan is silent on the issue of child custody therefore there is a need to see the trend of courts in Pakistan while deciding child custody cases.

Cassandra Balchin⁴⁹ after a careful study of the trends of courts in Pakistan with respect to family laws states that, '*Studies of Pakistani case law shows that courts have preferred a case by case consideration of the fact rather than rigidly applying the principles of established Muslim Jurisprudence.*⁵⁰

In one of the cases a minor having attained age of 17 years had been living with his mother since his birth. Minor who was present in court stated that he was a student of a college and was being well looked after by his mother. Keeping in view age of the minor his desire could not be ignored. Order of the court below dismissing father's application of custody of minor and mother's custody being valid and proper was affirmed in these circumstances.⁵¹

Welfare of the minors is the guiding factor in the matter of deciding the custody and personal law is subordinate to such consideration. Father although a natural guardian yet his right was also subordinate to the welfare of the minor. Overriding, fundamental and paramount consideration is always the welfare of minors, rather is the sole criteria which must prevail.⁵²

Cassandra Balchin adds that an analysis of reported case law of Pakistan, in the area of custody and guardianship reveals that there are four basic influencing factors.

1. Firstly like all other individuals and institutions, the judiciary cannot remain above societal norms and political pressures.
2. Secondly a combination of Muslim personal law and a variety of statutory law is applied by courts in adjudicating such cases.
3. Third factor is the colonial impact in statutory laws as well as in molding the general trends of the courts in pre- partitioned India.

⁴⁹Cassandra Balchin, formerly a journalist based in Pakistan, has been linked with the network 'Women Living under Muslim Laws' since the early 1990s. Her research and writing has focused on Muslim family laws and law-reform processes, and more recently on critiques of international development policy and practice regarding religion.

⁵⁰ Cassandra Balchin, *A Handbook on Family Laws in Pakistan* (Lahore:Shirkatgah, 1994) p.164

⁵¹ 1994 MLD 950

⁵² PLD 1994 SC(AJK) 1

4. Fourthly the Roman concept of Justice, Equity and good conscience as it was introduced by the then Indian judiciary.

Balchin has made no reference to the religious norms, Prophetic traditions and custody cases decided by the companions of the Prophet and those decided by the Muslim jurists of 4th and 5th centuries, nor has she made any reference to the impact of these precedents on the trends of Pakistani courts today. Influencing factors on the trends of Pakistani courts according to Balchin are the societal norms, political pressures, personal laws, colonial impact and Roman concept of justice, equity and good conscience.

Cassandra Balchin further states that, '*Courts in Pakistan have succeeded in making inroads into established Muslim Jurisprudence and have at times over ridden express provisions of law.*' We have seen above that the broad principle of '**the welfare of the minor is of paramount consideration**' was upheld by classical Muslim jurists and courts in Pakistan today have reverted towards this principle. Not only this, a careful study of the verdicts of Prophet Mohammad (pbuh) in cases brought before him reveal that the very basic consideration has been the welfare and wellbeing, education and training and protection and interest of the children.

After a deliberate study of child custody in customary laws, laws of personal status and trends of courts spanned over the classical Muslim era till today's Muslim World. It is established that the custody of male or female children does not automatically transfer to the father after seven years.

The definition of term visitation rights does not find mention in the Guardians and Wards Act, 1890. But according to Black's Law Dictionary visitation or visitations rights mean in family law, visitation refers to non-custodial parent's right of access to his child; while non-custodial parent is responsible for care of child during visits, visitation differs from custody because non-custodial parent and child do not live together as family unit. In marriage dissolution or custody action, permission granted by Court to a non-custodial parent to visit child or children.

The Guardians and Wards Act, 1890 is an old statutory law came into force on the first day of July 1890 which is one of the subject and enactment of family law but it embodies no provisions regarding visitation rights. In Pakistan it was in the year 2002 when visitation rights were given statutory effect by an amendment in the Schedule of West Pakistan Family Courts Act, 1964 and visitation rights were granted to the non-custodial parents. It does not mean that prior to the said amendment the Courts did not grant visitation rights to the non-custodial parents but Courts keeping in view the facts and circumstances of each and every

case used to award visitation rights to the non-custodial parents. However, it is a bounden duty of a Guardian Judge while granting visitation rights to maintain an equilibrium between a father and mother because psychologically any disassociation or deprivation of fatherly or motherly love and affection to the minors may likely cause them split personality disorder which is highly injurious to their future upbringing and welfare. Under the Guardians and Wards Act, 1890 usually three types of applications are filed i.e. application for the appointment of guardians of person and property of minors application for declaration of title to permanent custody and application for interim custody of minors.

The first application is moved under Section 7 by the persons mentioned in Section 8 of the Guardians and Wards Act, 1890. Ordinarily an application for permanent custody of minors under Section 25 of the Guardians and Wards Act, 1890 is accompanied by an application under Section 12 for interim custody of minor.

The decision of application under Section 7 has no concern whatsoever with the visitation rights whereas while deciding applications under Sections 12 and 25 of the Guardians and Wards Act, 1890 a Guardian Judge lays down a visitation schedule by which a parent whose application for interim or permanent custody having dismissed is granted visitation rights to meet his or her minor child once or twice a month for one or two hours in or outside the Court. The application under Section 12 is decided on the basis of prima facie evidence available on record with a guiding factor of welfare of the minor. Whereas the application under Section 25 of the Guardians and Wards Act 1890 is decided after taking down evidence of the parties and recording finding on a single or main issue whether it is in the interest and welfare of the minor that the petitioner is entitled to the permanent custody of minor or, in whose custody welfare of the minor lies.

The primary consideration in guardian courts whilst granting custody of minors to either parent or sometimes to grandparents or other relatives is the welfare of the minor. The said law is the main mode of attaining custody of children. In a guardian / custody proceedings pending adjudication in a family/ guardian court there are three parties to the said proceedings, the Custodial Parent, the Non-Custodial Parent and the Minor.

After fixation of visitation schedule pragmatically in order to streamline it and have a close watch and monitor of visitation rights by the guardian judge a meeting sheet or Parcha Mulaqaat is also drawn up which contains following particulars:--

- (i) Title of case;
- (ii) Name of party / parent to produce the minor (s);
- (iii) Name of party / parent to meet the minor (s);
- (iv) Name(s) or number of

minor(s);(v) Venue/place of meetings;(vi) Number and days of periodic of meetings in a month;(vii) Time and duration of periodic meetings.

The venue/place of meeting should be cautiously decided and in deciding the same primarily factors like welfare of the minor(s), convenience and mutual antipathy/bitterness between the parties should always be considered. Similarly number, time and duration of periodic meetings must be rational and reasonable not affecting the minors. The visitation rights for overnights should be granted in exceptional cases because shuttling of minors from one parent to the other may environmentally mal-adjust them which materially impacts the mental health and education of the minors. As the guiding consideration in deciding guardian cases and fixation of visitation schedule is the welfare of the minor and in order to achieve this paramount consideration the following principal considerations as laid down in Section 17 of the Guardians and Wards Act 1890 are kept in view namely:

(a) Age,(b) Sex,(c) Religion of the minor,(d) Character and capacity of the proposed guardian,(e) Nearness of kin to the minor,(f) Wishes of the deceased parent,(g) Any existing or previous relations of the proposed guardian with the minor or his / her property,(h) If the minor is old enough to form intelligent preference, that preference has to be considered.

In Lahore four Guardian Courts are performing their functions. In most of the private schools of Lahore there is a weekly holiday on Saturday so with the object that education of minors should not be affected by visitation schedule usually Saturday is fixed by these three Guardian Courts for periodic meetings for the non-custodial parents to meet their minor children in the Court premises. On each and every Saturday an average of 200 to 300 minors used to meet their non-custodial parents in a congested and packed atmosphere of Court premises but since 2008 a relatively better arranged and facilitated meeting room has been constructed where non-custodial parents of minors meet with their minor children conveniently, safely and comfortably.

The visitation rights are also granted to the non-custodial parents of minors after recording evidence of the parties in petition under Section 25 of the Guardians and Wards Act, 1890 which is adjudicated upon with a deciding factor i.e. the welfare of the minor and in both the cases of either acceptance or rejection of petition the non-custodial parent is granted periodic visitation rights once or twice a month for a specific time. The Court in exceptional cases, while keeping in view the paramount consideration of the welfare of the minor, may grant visitation rights for overnights. Similarly at the time of final disposal or during the pendency

of petition under Section 25 the Guardians and Wards Act, 1890 the Court also lays down visitation schedule for special occasions like Eid ul Fitr, Eid ul Azha, summer vacations or birthdays of minors. During the pendency of petition under Section 25 the Guardians and Wards Act, 1890 a Guardian Court on the application of non-custodial parents also grants visitation rights to them for summer vacations and on special occasions like Eid ul Fitr, Eid ul Azha and birthdays of minors. In view of judicial precedents of Superior Court of Pakistan it is a trite law that notwithstanding the right of the mother or father for the permanent custody of male or female child under the personal law, the predominant consideration in determining the question of custody of minor is always the welfare of the minor. There are negligible cases in which custody of a minor is shifted from one parent to the other. A parent having custody of minor is allowed to continue to retain custody of minor unless there is immediacy of threat to the interest and welfare of the minor in continuance of such custody. Since a mother of the minors is considered as a God 's cradle on earth that is why in most of the case she is awarded to continue to the custody of minors especially where minors are suckling babies. In this context a comparative study of our Pakistan and U.S. indicates that according to more recent U.S Census Bureau divorce statistics about 2.5 million people get divorced each year. According to the National Center for Health Statistics (NCHS), nearly 75 per cent of all child custody awards are made to the mothers. Only about 10 per cent of child custody awards are made to fathers. The rest of the child custody awards involve some sort of joint custody arrangement.

International Scenario

Each jurisdiction has its own protocols about custody and different method of calculating child support. Parents generally work out visitation routines as part of a parenting plan.

Custody refers to the court-approved living arrangements of minor children, the legal supervision and protection of the child until he or she reached a majority, however that term is defined in a given jurisdiction. Custody is a coin with two sides -- legal and physical, and it is always subject to modification as circumstances change. Joint custody, which is also known as shared custody, has two elements: joint legal custody, which refers to equal rights and responsibilities to make major decisions for the children, and joint physical custody, which refers to the parents' participation in the "day-to-day upbringing of the child." More than 30 states now have statutes specifically authorizing joint custody awards, and most states now hold that a court's authority to award joint custody does not depend upon the parties that request it. In awarding joint custody, the single most important consideration is the ability of the

parents to cooperate. In fact, in cases where both parties can cooperate for the benefit of the child, joint legal custody awards are generally upheld even when one or both parents may have sought sole custody. Joint legal custody to both parents does not preclude sole physical custody to one parent. At the least, the parent who has physical custody must have a suitable place to live, provide adequate supervision when absent, maintain reasonable discipline, and nurture the child with affection.

Visitation describes designated times and sometimes conditions under which the noncustodial parent sees his or her children apart from the custodial parent. Visitation refers to access a particular party to particular children, at a set time and date, for a fixed period. Normally the term applies to parents, but grandparents may have visitation rights.

Child support describes the payments made by the noncustodial parent to the custodial parent for the support of children. Many jurisdictions have a complicated formula for calculating support, and most also have websites that provide a general estimate of child support that a noncustodial parent pays.

The chart support method, used in some legal jurisdictions to establish a base for support, takes into account the gross income of both parents, less special adjustments (such as support paid for children of previous marriage). The chart support method uses the net monthly income of the noncustodial parent as the basis of support.

Here are key facts to remember about custody:

- Divorce splits the bond of husband and wife, and custody splits the responsibilities of parenting, often between the custodial and noncustodial parent (very often, respectively, the mother and the father).
- The court makes the final decision, but when possible, generally tries to give both parents shared legal custody of the children.
- In making decisions about custody, visitation and child support, courts in all jurisdictions are guided by the phrase the best interests of the child, which means in practice, what a judge says it means.
- When custody of the children is contested, some states allow the judge to consider the child's wishes, according to his or her age.
- In a situation involving more than one child, experts feel that it is usually best to keep all siblings together with the custodial parent.
- A custody dispute is more likely to be more difficult than the divorce itself, because the bond of parenting is typically stronger than that of marriage and because every family is unique, with very distinctive needs and desires that must be kept at the forefront.

Here are key facts to remember about visitation:

- When one parent is awarded custody of the child, the other parent is granted the right of visitation. Visitation plays a role in almost all custody arrangements unless deemed not to be in the best interests of the child.
- The guidelines for visitation should be clear to prevent any future misunderstandings. It is the responsibility of the parents to arrange for a reasonable schedule of visitation. Failure to do so in a timely manner forces the court to assume complete control, which judges do not want to do. This discussion should be approached by both parents openly, in order to thoroughly address the central issues of when, where, and for how long.
- A child has a right to maintain an ongoing relationship with both parents. Once arrangements have been made, they should not be deliberately interfered with or ignored.
- It is the responsibility of the custodial parent to prepare the child for the first visitation. The visits are normally unsupervised and occur at the non-custodial parent's residence.
- Visitation routines after the final divorce typically reflect the pre-divorce relationship. However, the temporary visitation arrangements made before the final divorce are not always the guidelines followed after the divorce.

Here are key facts to remember about child support:

- Divorce never ends the legal obligation for support. Each parent still retains a legal responsibility to provide adequate support until the child reaches the age of emancipation. The legal duties of support are based upon the needs of the child in conjunction with the abilities of the parents as dictated by income and assets owned.
- Child support is subject to modification, depending upon the changing circumstances of the reconstituted family.
- The courts generally focus on income after taxes, and support is rarely the sole responsibility of the non-custodial parent, because the principal job of the custodial parent is to provide a sufficient household. Child support is a combined effort to obtain a fair distribution of financial responsibility, so the child may live -- at least materially -- in a manner similar to which he or she enjoyed before the divorce. Depending on the jurisdiction, there are many different variables to be taken into consideration.
- Courts approve support arrangements they deem "fair and reasonable," and the court has the authority to deviate from the formula as it deems necessary. Courts throw away the chart when the judge deems deviation from it is in the best interest of the child.

All questions involving custody, visitation or child support turn on a hinge called the best interests of the child. In the case of a dispute or a contest about custody, visitation or child support, the court will have the final say in all matters. Thus, again, an out of court agreement is often the best measure to guard against the unexpected. The court makes the final decision. The judge assumes full responsibility in order to permanently safeguard the child against feelings of guilt. And all judges are very pleased when competent parents make reasonable and fair agreements about custody, visitation or child support. Custody of the children is not the reward for winning a battle, nor is it the end of contact with the former spouse. In her book *Mom's House, Dad's House*, Isolina Ricci quotes a recently divorced mother who discovered that divorce is not the end. "The greatest disappointment of the first months of divorce was my realization that, like or not, I had to relate to the children's father. I had wanted him out of my life completely. I wanted never to see him or hear his voice again. But when you have children together, that's not how it works."

The 1924 Geneva Declaration of the Rights of the Child declared that the child must be protected above and beyond all considerations of race, nationality or creed and that he must be given the means requisite for his normal development materially, morally and spiritually. He must be brought up with conscious belief that his talents must be devoted to the service of his fellow men. However, the Declaration did not grant any legal rights to children nor imposed any obligations on the States. The concern for the welfare and protection of children was expressed in the Universal Declaration of Human Rights, 1948 wherein it was stated that parents had a prior right to choose the kind of education that would be given to their children and that the family was the natural and fundamental group unit of society and was entitled to protection by society and the State. Article 10 of the United Nations General Assembly Declaration on The Rights of Child, 1959, declares that the child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood. The provisions of the International Covenant on Economic, Social and Cultural Rights, 1966 as well as the International Covenant on Civil and Political Rights, 1966, are also directed towards taking of measures for the protection and safeguard of rights of children. The Charter of Fundamental Rights of the European Union, 2000 also lays down that children shall have the right to such protection and care

as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity and that every child shall have the right to maintain, on a regular basis, a personal relationship and direct contact with both his and her parents.

The protection from child abduction, in the context of **transnational jurisdiction**, is the real dark side of globalization. The abduction or kidnapping of children is a very complicated, multi-dimensional issue involving elements of deceit, coercion, fraud and exploitation. It has a close nexus with human trafficking. The legal systems have been hard pressed to find a satisfactory solution to the problem. Many abducted children have a dual nationality and are nationals of a country to which they are taken. Global efforts have been made to develop a range of strategies in civil, criminal, domestic and international law based on the principle that the interests of children would be best served by preventing their abduction. The object of these measures is to make it difficult for any one of the parents and/or other persons to remove the children from their lawful custody for being taken to another country, and in case of their abduction, to facilitate their early return so that disputes, including as to their custody, are determined by the Courts of their home State. Therefore, it is all the more necessary that the laws relating to their return are strictly adhered to and enforced with promptitude.

Civil Aspects of Child Abduction

There are civil as well as criminal aspects of child abduction both at the domestic and international level. It is not possible to lay down a precise and all-pervasive definition of abduction. Child abduction may involve disputes of guardianship and custody giving rise to the question of transnational jurisdiction. In such cases, a parent may need to take legal action to secure return of the children. However, some countries have also enacted domestic laws in order to deal with cases of international child abduction. For example, in the UK, the Child Abduction Act, 1984 makes child abduction a criminal offence while the Child Abduction and Custody Act, 1985 deals with the cases of wrongful removal or retention of children.

Since every country has its own judicial system, custody orders made in one country are not necessarily recognized in another. Judicial cooperation between states can be highly contentious. Sadly, the issue of child abduction is a prime example of the limitations of international co-operation in the judicial area. There are a number of international

covenants, protocols etc., which were adopted to prevent the abduction of children and to facilitate their safe and speedy return to the country of their habitual residence. A more specific sector of this kind of abduction is International Parental Child Abduction. In a reliable study, it has been remarked that:--

“Parental Child Abduction is a crime against humanity which is aimed at destroying the basic roots and identity of a child. Parental Child Abduction is an ongoing life long process which works primarily on the concerned child but as well on the left behind environment and the abducting environment. Because of the harmful effects on children, parental abduction has been known as a form of child abuse. 5 Abducted children suffer emotionally and sometimes physically at the hands of abductor parents. Many children are told that the other parent is dead or no longer loves them. Uprooted from the family, many abducted children often are instructed by their abducting parents not to reveal their real names or where they lived before. In child stealing the children are used as both objects and weapons in the struggle between the parents which leads to the brutalization of the children psychologically and specifically destroying their sense of trust in the world around them.”

The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction was opened for signature in 1980 in a bid to address this problem. The aims of the Hague Convention are to: Trace abducted children; Secure their prompt return to the country of habitual residence; Organize or secure effective rights of access.

To achieve these tasks, each country that is a signatory to the Hague Convention (“Contracting State”) has set up an administrative body known as the “Central Authority.” These Central Authorities process applications and, where necessary, take appropriate steps to ensure that court proceedings are brought. Action is supposed to be taken quickly.

The Hague Convention applies to all children younger than the age of 16 who, being habitual residents in one Contracting State, are wrongfully removed to or retained in another Contracting State (Article 4). “Wrongful” for these purposes means a removal or retention in breach of rights of custody attributed to a person; an institution; or any other body, either jointly or alone, under the law of the State in which the child is a

habitual resident immediately before the removal or retention (Article 3). “Wrongful removal” occurs where a child is taken across an international frontier without permission of those having custody rights, and wrongful retention occurs where a child is kept in another country beyond a period agreed to, as for example, a holiday or access (visitation) period. If the application for return is brought quickly, that is within 12 months of the child’s wrongful removal or retention, the court must order a return “forthwith”, unless it is established in terms of Article 13 that: (a) The person seeking the return was not exercising custodial rights at the time of removal or retention; or consented to, or subsequently acquiesced in the removal or retention; or (b) There is a grave risk that a return would expose the child to physical or psychological harm, or to an intolerable situation; or (c) The child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. None of these exceptions are intended to be easily established and, even where they are established, the court still has the discretion (under Article 18) to order the child’s return. In other words, the general expectation is that any child (younger than the age of 16) wrongfully removed to or retained in another Contracting State will be returned to the country of his or her habitual residence. Moreover, under the Hague Convention, courts are forbidden from looking at the merits of the case. They should not determine which parent should look after the child, for that is the task of the court of the State in which the child is a habitual resident. In other words, the purpose of the Hague Convention is basically to ensure, except in rare circumstances, that the child should be returned to the Contracting State of habitual residence, where his or her long-term future will be determined. It is important to note that many countries are not yet party to the Hague Convention, including most of the Muslim countries, countries in the Far East, and of the former Soviet Union except Ukraine. Pakistan has also not ratified the Hague Convention so far.

United Nations Convention on the Rights of the Child, 1989

The United Nations Convention on the Rights of the Child, 1989, calls for action by the Contracting States on child abduction and to “take measures to combat the illicit transfer and non-return of children abroad” and to that end must “promote the conclusion of bilateral or multilateral agreement or accession to existing agreements.” Under Article 35, the Contracting States must “take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of

or traffic in children for any purpose or in any form.” Other relevant obligations are set forth in Articles 9 and 10 which include the child’s “right to maintain contact with both parents if separated from one or both”; and the “right of children and their parents to leave any country and to enter their own in order to be reunited or to maintain the child-parent relationship”; Article 18 embodies the principle that “both parents have joint primary responsibility for bringing up their children and the State should support them in this task.” The Convention was unanimously approved, and has received ratification by almost all the states. This demonstrates the concern of the international community for the welfare and protection of the children. Muslim countries seem to be quite reluctant to sign the Convention unconditionally. Pakistan had originally ratified the Convention with the reservation that the provisions of the Convention would be interpreted in the light of Islamic laws and values. However, the reservation was withdrawn on 23rd July, 1997. Similarly, Djibouti ratified the Convention with the reservation that the Government of Djibouti would not consider itself bound by provisions that are incompatible with its religion and its traditional values. Similar reservations were expressed by other countries like Algeria, Bangladesh, Brunei, Egypt, Indonesia, Iran, Jordan, Malaysia, Oman and Qatar. Mr. Perez de Cuellar, the then Secretary General of the United Nations observed that:--

“The way a society treats children reflects not only its qualities of compassion and protective caring but also its sense of justice, its commitment to the future and its urge to enhance the human conditions for coming generations. This is as indisputably true of the community of nations as it is of nations individually. With the Convention on the Rights of the Child, the United Nations has given the global community an international instrument of high Quality protecting the dignity, equality and basic human rights of the world’s children.”

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996

Another important international document is the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation In Respect Of Parental Responsibility and Measures for the Protection of Children, which was concluded on 19th of October, 1996. The State signatories to the Convention considered the need to improve

the protection of children in international situations. The objects of the said convention, as laid down in Article 1, are:-

- (a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- (b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
- (c) to determine the law applicable to parental responsibility;
- (d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- (e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

For the purposes of the convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child. The Convention is applicable to children until they reach the age of 18 years. Article 7 provides for the exercise of transnational jurisdiction in cases of wrongful removal or retention of the child. It lays down that the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention would keep their jurisdiction intact.

The removal or retention of a child is to be considered wrongful where:

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph

- (a) above, may arise in particular, by operation of law or by reason of a judicial or administrative decision, or by an agreement having legal effect under the law of that State so that the authorities retain their jurisdiction.

The authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child. The measures taken would remain in force according to their terms even if a change of circumstances had eliminated the basis upon which jurisdiction was founded, so long as the authorities which had jurisdiction under the Convention had not modified, replaced or terminated such measures. In terms of Article 15, in exercising their jurisdiction, the authorities of the Contracting States would apply their own law.

However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State concerned. In case the child's habitual residence changes to another

Contracting State, the law of that other State would govern, from the time of the change. The attribution of extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the changed habitual residence of the child. The measures taken by the authorities of a Contracting State would be recognized by operation of law in all other Contracting States. Article 33 makes a provision of Islamic Institution of '*kafala*' for care of a child in another Contracting State.

The European (or Luxembourg) Convention on Recognition and Enforcement Of Decisions Concerning Custody of Children, 1980.

In 1980, at about the same time that the Hague Convention was completed so too was its European counterpart. The European Convention has the same objectives of locating children, securing their prompt return, and enforcing access rights by the use of the administrative mechanism of Central Authorities.

In contrast to the Hague Convention, however, the European Convention is concerned with the recognition and enforcement of court orders. Accordingly, in order to use the European Convention, applicants must either already have or must obtain court orders that support their position.

Most of the Member States are also Contracting States to the Hague Convention. In practice, where there is a choice between the two Conventions, the Hague Convention is generally applied.

UK-Pakistan Judicial Protocol on Child Abduction

The UK-Pakistan Judicial Protocol on Child Abduction was signed on 17th January, 2003 by the President of Family Division of the High Court of England and Wales and the then Chief Justice of Pakistan. Its avowed purpose was to protect the children of UK and Pakistan from the harmful effects of wrongful removal or retention, from one country to the other, and to fulfill the commitment by the judiciary of both the countries to the welfare of the children by promoting judicial co-operation. It was agreed that the welfare of the child was best determined by the courts of the country of the child's habitual/ ordinary residence. If the child was removed from UK to Pakistan, or vice versa, without the consent of the parent who had already obtained a custody /restraint order, from the Court of the child's habitual/ ordinary residence, the Judge of the court of the other country to which the child had been removed would not ordinarily exercise jurisdiction over the child, save in so far as it was necessary for the court to order the return of the child to the country of the child's habitual / ordinary residence. The Protocol is also applicable where a child is taken to either of the countries by a parent with visitation/access/contact rights in terms of the order of the Court of the Child's habitual ordinary residence without regard to the nationality, culture or religion of the parents or either parent. The court is required to decide the issue of habitual/ ordinary residence of a child as a preliminary one.

The Governments of both countries were called upon to give urgent consideration to identify and establish an administrative service to facilitate and oversee the resolution of child abduction cases. It was decided to nominate a Judge of the superior court from each side to work in liaison with each other to carry out the purposes of the Protocol.

As a result of mutual deliberations, a joint written statement was issued on 30th February, 2006. The Chief Justice of Pakistan emphasized the risk of legal challenge to the protocol thus the requirement to secure its future by incorporation into law. It was noted that there was a need for taking appropriate measures by the governments of UK and Pakistan to formalize the Protocol and to incorporate it into domestic legislation, where necessary, and that clear administrative procedures were required in order to initiate litigation in Pakistan following a reference to the Liaison Judge especially when the court had no jurisdiction to act suo motu. Both sides agreed that administrative arrangements would be put in place to facilitate the implementation of the Protocol. The Protocol is working alright. But

much more is required to be done to make it more successful. It is a unique experience of bilateral understanding at the highest judicial level of two countries. In the words of Henry Setright QC and Anne-Marie Hutchinson, Solicitor, the Judicial Protocol reflects, formulates and formalizes the consensual, bilateral judicial policy of the United Kingdom and Pakistan which contains clear guidance on the principles that will be adopted in the Courts of England and Pakistan in International Children's cases. The cornerstone of the Protocol is the welfare of children as laid down in its preamble and to protect the children of UK and Pakistan from the harmful effects of wrongful removal or retention from one country to the other. It appears that the provisions of the Hague Convention were kept in view while drafting the Protocol. It is surely a step forward in the right direction. The judiciaries of both the countries are making all out efforts to ensure that the Protocol is made to work quite effectively and successfully.

In Pakistani law, various provisions can be used regarding a case of trans-national parental abduction introduced by a foreigner parent. For example,

- the case may be lodged under Section 491 of the Criminal Procedure Code (CrPC) for the production of the child (Power to issue directions of the nature of habeas corpus) and
- under Sections 7 or 25 of the Guardian and Wards Act for the custody of the child (respectively, the Power of the Court to make an order as to guardianship and Title of guardian to custody of ward).

Such a case is usually considered as a matter of custody and handled by Pakistani Sessions/Guardian Courts. If a Pakistani parent disobeys the court's orders issued under Section 491 of the CrPC or Sections 7 and 25 of the Guardian and Wards Act, there is a chance that the court may order the arrest and detention of that parent. However, there are no reported cases in which courts have sent parents to jail.

Similarly, according to the PPC, child abductions by a non-parent are of a criminal nature and tried before the criminal court. Removal of a child by a parent is not criminal and is dealt with by the Guardian Court. Consequently, trans-national movement of a child without the consent of the foreign parent would not lead to the detention of the alleged abductor, nor would that parent be punished under any section of the PPC for bringing the child to Pakistan.

Even the superior courts of Pakistan do not recognize this as an offence. In 2001, the High Court of Lahore, decided in a judgment that “Father of a child is always a natural guardian along with the mother. He can never be ascribed or attributed the offence of kidnapping of his own child. The only fetter placed upon the right of a father to the custody of the child is that when he takes the child from the custody of his wife for a purpose recognized in law as immoral or unlawful, in such a circumstance removal of the child, would amount to an offence”.

If it is established that the father or the mother removed the child for mala-fide intentions, then he/she is a criminal. Still, the parents are expected to produce the child in court and to hand him/her over to the parent to whom the court has temporarily granted custody. Violation of the court’s orders would then lead to the detention or punishment of the offending parent, even though that parent may be the primary caregiver, a situation that is arguably not in the child’s best interests.

Pakistani parents who abduct their child (usually the fathers) often base their decision on moral grounds, as they fear that the religion of the mother and the immorality of western cultures may taint their children and render them immoral. Such claims or arguments based on religion or culture have been rejected by Pakistani courts.

In the recent past, two French mothers (Ingrid Brandun Berger in 2012 and Peggy Collins in 2009) were allowed to take their children back to France after a struggle in the Pakistani higher courts. Their battle to secure the custody of their children was an onerous task but a successful one.

In Berger’s case, her child’s father argued that he brought his daughter to Pakistan and kept her there because of the Muslim faith they share. He claimed that he was her rightful custodian, based on his religious beliefs and his dislike of western culture. The girl’s grandfather also wished not to see his granddaughter ‘growing up as an infidel’ in a western liberal culture.

The case of Peggy Collins was similar – the father’s grounds for retaining his nine-year-old son in Pakistan were also based on religious and moral concerns. Mrs Collins’ ex-husband referred to several judgements given by the Supreme Court, the Mohammadan Law and Hidayah, and argued that the custody of the child should not be given to an alienated, non-Muslim mother who would encourage him to deviate from his father’s religion.

Such arguments, based on the mother's religion or culture, were not taken into account by the Pakistani courts. In both cases, the judges made their decision according to logic, justice, law and the child's best interests. In Berger's case especially, the court observed that the father did not give any consideration to the mother's religion when he married her. His ex-wife's religion, culture or nationality obviously didn't matter when he fell in love and married her. According to the court, accepting arguments such as faith, nationality and culture would have been adverse to justice, equity and good conscience. In both cases, the child's best interest was the courts' primary consideration of for granting custody of these minors to their mothers. Moreover, the Pakistani judges respected foreign courts' orders. Those stated that the fathers had broken some foreign laws, resulting in deprivation of education and proper welfare for their children.

In another unique case, Roshni Desai, an Indian lady from Canada, came to reclaim custody of her three-and-half-year-old son through the High Court of Lahore. Like Collins and Berger, Desai had filed a habeas corpus application under Section 491 of the CrPC. She gave birth to a son who was illegally removed from Canada by his father, after he broke up with Desai. The father, Jahanzeb Niazi, argued that, according to the Islamic laws, a Muslim child could not be entrusted to a non-Muslim mother. Since the child was born out of wedlock, the court drew attention to the facts that, not only was it difficult to determine which parent should be granted custody of the child, but that living in Pakistani culture would also prove troublesome for the child, due to his illegitimate status. Therefore, the court temporarily granted custody of the child to Desai and asked both parents to reach a mutual agreement.

During the next hearing, the court allowed Desai to take the child back to Canada and stated that Islamic law does not allow a father to keep custody of his illegitimate child. In such situations, the custody can only be given to the mother. Desai through her advocate said in the court that she believed in the court and Pakistani laws and considered that the court would decide the case on merit. Therefore, she did not need to settle the case out of the court. The court further observed that "Under Islamic laws, the bond between a mother and her illegitimate child is stronger than the bond between this child and his/her father. And a father cannot become guardian of his illegitimate child. (...) Roshni [Desai] is free to go wherever she wants to."

The UK-Pakistan Protocol has been enforced by Pakistani courts and mothers are allowed to take their children back to the United Kingdom.

Lately, the High Court of Azad Kashmir- Pakistan had a child recovered from the custody of the father and handed over to Najma Begum, following the application of this British mother. The Court stated that, in light of the Protocol, the relevant court in the United Kingdom would have to decide about the future and custody of the child. The mother of the child had filed a habeas corpus application with the High Court under Section 491 of the CrPC.

In 2006, the prominent case of Misbah Rana, a twelve-year-old, Scottish-Pakistani girl, attracted considerable media attention. Misbah's mother, Louise Campbell, approached the High Court of Lahore and filed a lawsuit against her ex-husband and Misbah's elder sister, both of whom had illegally taken Misbah to Pakistan. She claimed that Misbah should be sent back to Scotland and the custody matter decided by the relevant court in Scotland, as per the Protocol. Louise Rana was worried that Misbah would be forced to marry at her early age, whereas Misbah consistently denied, through a news conference, that her Pakistani family was trying to force her into such a union. After listening to both parties' arguments, the Court ordered that Misbah should be handed over to the British High Commission within seven days, so that the case could be decided as per the Protocol and the custody heard in Scotland's relevant court. Upon hearing that she would be handed over to her mother, Misbah protested against the Court's decision and expressed the desire not to go back to Scotland. Owing to Misbah's wish to stay with her father, both parties decided to settle the issue outside the court. The court allowed Misbah to stay with her father and granted access to her mother, so that she could visit her daughter under certain measures.

In Misbah's case, many people still consider that the High Court violated the UK-Pakistan Protocol and that the child's custody was decided by mutual agreement rather than the legal system created under the Protocol. On the other side, the court respected Misbah's point of view, which is central in the field of child rights as envisaged in Article 9 (2) of the UNCRC: "In any proceedings (...), all interested parties shall be given an opportunity to participate in the proceedings and make their views known." Article 12 of the UNCRC also states that the child's point of view should be taken into consideration by the courts.

Cases of Wrongful Removal and Custody of Children In Pakistan

The matters of custody, wrongful removal and guardianship of children in Pakistan are normally dealt with under the provisions of the Family Courts Act, 1964 and the Guardians and Wards Act, 1890. Section 9 of the Act of

1890 requires that application in such cases shall be made to the Family Court having jurisdiction at a place where a minor ordinarily resides. However, the High Court may also exercise its jurisdiction of Habeas Corpus under Section 491 Cr.P.C. or under Article 199 of the Constitution of the Islamic Republic of Pakistan in appropriate cases of illegal and improper removal of children from lawful custody. The child is recovered and is returned to the person having parental responsibility. Now, the District and Sessions Judges have also been invested with powers under Section 491 Cr.P.C.. The Courts of Pakistan are quite liberal in returning the custody of minor children to the persons who are lawfully entitled to the same.⁵³

Abduction from or to a Non-Convention or Contracting State

In the case of international abduction, it is difficult to get the return of a child taken to a non-Convention/ Contracting State unless there is a bilateral or multilateral agreement as contemplated by Article 11 of 1989 Convention on the Rights of Children. If a child is abducted to another country, proceedings must be instituted there. It is optional for the courts of that country to apply the principles of the Hague Convention. The English Courts have generously and sometimes unilaterally adhered to the principles of the 1980 Hague Convention and have exercised their inherent jurisdiction where the children were abducted to UK from a Non-Convention State. The interesting case *Re. S (Minors) (Abduction)*⁵⁴, decided by the Court of Appeal of England involved Pakistani Muslim parents. The couple were both born in Pakistan, had married in England but had then moved to Pakistan. There had three children and at some point, without the father's knowledge or consent, the mother brought the two younger children to U.K. The father applied to the Court for an order for their return to Pakistan, which was granted. The mother's appeal in the court of Appeal also failed. It was held that in view of the facts, it was in the best interests of those children to be returned to Pakistan, to allow the courts of their own country to decide what would be in their best interests. A somewhat similar view was taken in other cases.⁵⁵

⁵³ Muhammad Javaid Umrao versus UzmaVahidi (1988 SCMR 1891) and Hina Jillani, Director A.G.H.S versus Sohail Butt (PLD 1995 Lahore 159)

⁵⁴ (1994) 1 F.L.R 297

⁵⁵ *Re. E (Abduction: Non-Convention Country)* (1999)2 FLR642), *Re. M (Abduction: Pre-emptory order of return to Dubai)* (1996)1 FLR 478 (C.A), and of *Re E (Abduction: Non-Convention Country)* (1992 2 FLR 642)

However, in *Re: J (a child) (return to foreign jurisdiction: convention rights)*⁵⁶, the child's father was a Saudi Arabian national whereas the mother had dual Saudi Arabian and British nationality. The House of Lords overturned the decision of the Court of Appeal which had allowed the appeal of the father from a decision of the Trial Judge refusing the application of the father for a specific issue order under Section 8 of the Children Act, 1989 that the child be summarily returned to Saudi Arabia. In that case the child was born in the United States.

Criminalization of the International Abduction of Children

Article 11 of the Convention on the Rights of Child 1989, makes it obligatory on the States to take measures in combating the illicit transfer and non-return of children abroad. Several countries have enacted laws making abduction of a child a criminal offence. In UK, we find the Children Abduction Act, 1984 enacted for the purpose. Now, the United Nations Convention against Transnational Organized Crime also takes into account the criminal abduction of children. In order to supplement the said Convention and to prevent and suppress trafficking in persons, especially women and children, a Protocol was adopted by the General Assembly of the United Nations on 25th May, 2000. The purposes of this Protocol are:

- (a) to prevent and combat trafficking in person, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

The "trafficking in persons" has been defined in Article 3 of the Protocol and means the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another, for the purpose of exploitation.

The Protocol makes provision for effective measures to prevent and combat trafficking in persons, especially women and children, requiring a

⁵⁶ (2005) (3 All ER 291) (House of Lords)

comprehensive international approach in the countries of origin, transit and destination to punish traffickers.

Trafficking of Children as Camel Jockeys

Horse and camel racing are the traditional sports in the Arab region. Children are smuggled there to be used as camel jockeys in these races. The children often die or are grievously injured as they are tied to the camel's back to scare the camel into running faster. There are several factors leading to the abduction of such children including poverty, unemployment and lack of opportunities. During the past few years, hundreds of children have been abducted and trafficked from various counties of Asia to the United Arab Emirates (UAE).

They were kidnapped by human traffickers or their poor parents had presented them for monetary considerations. Countries like India, Bangladesh and Pakistan are the main targets for abduction of these children. Most of them are below 14 years of age. Recently, the U.A.E government has imposed only a partial ban on the use of children below 45 KG in weight and 14 years of age, for these races. It means that children above that weight or age are still being used as camel jockeys.

In the year 2005, as many as 185 Pakistani camel jockey children were recovered and repatriated from U.A.E. The Federal Investigation Agency (FIA) registered criminal cases against the traffickers or other persons concerned including some travel agents. The criminal cases are being tried in the courts. The F.I.A has established an Anti-Trafficking Unit for investigating the cases of human trafficking. UNICEF and the Government of Punjab (a Province of Pakistan) are also coordinating and co-operating for the repatriation of camel jockeys from UAE to Pakistan. This is a serious issue concerning international child abduction at a large scale which needs to be addressed by the international community for protection of children.

Criminal Law of Abduction in Pakistan.

The Constitution of the Islamic Republic of Pakistan, 1973, by Article 11 specifically prohibits all forms of "traffic in human beings". Article 35 enjoins upon the State functionaries to protect the family, the mother and the child. The expression "traffic in human beings" used in Article 11 of the Constitution is of wide amplitude and is to be liberally construed in order to enlarge its scope. It includes the prohibition of traffic in women or children

for any immoral or other purposes as held by the Supreme Court of India.⁵⁷

The Prevention and Control of Human Trafficking Ordinance, 2002 was promulgated by the President of Pakistan on 3rd October, 2002. It aims to provide effective measures to prevent and punish offences of human trafficking, including abduction of children up to age of 18 years and to protect and assist victims. The offence of abduction or kidnapping is punishable, with rigorous imprisonment which may extend to 10 years with a fine. A person found guilty of harboring, transporting or obtaining a child or a woman through coercion, kidnapping or abduction into or out of Pakistan or any attempt thereto is also punishable with imprisonment which may extend to 14 years with fine.

Section 359 of the Pakistan Penal Code, which is the general criminal law of Pakistan, provides that there are two kinds of kidnapping, i.e. kidnapping from Pakistan and kidnapping from lawful guardianship. Kidnapping from Pakistan means conveying any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorized to consent on behalf of that person. Section 361 lays down that whoever takes or induces any minor under 14 years of age, if a male, or under 16 years of age if a female, out of the keeping of the lawful guardian, is said to kidnap such minor from lawful custody. The offence of abduction has also been defined under Section 362 of the Code, whereunder, whoever by force compels or by other deceitful means induces any person to go from any place is said to have abducted that person. Various punishments have been provided for in the Code for different kinds of abduction or kidnapping. The application of the Extradition Act, 1972, can also be extended for the extradition of the abductors.

Conclusions on Child Abduction and Transnational Jurisdiction

While these international instruments exist, experience shows that they are not adequate to resolve child abduction cases. Sadly, although countries sign international treaties, they are not always applied uniformly. The abduction from or/and to the Convention and/or Non-Convention countries appears to be on the rise. In every Convention country, a designated Central Authority provides necessary assistance to the parties even where abduction involves a non-16 convention country. Sometimes, the term habitual residence is treated as a term of art, which approach is

⁵⁷ Vishal Ject versus Union of India (AIR 1990 SC 1412)

not correct. The abduction of a child under 16 who is habitually resident in one Contracting or Convention State and is wrongfully removed or retained in another country would attract the jurisdiction of the courts for his speedy and smooth return to the country of which he is a habitual/ordinary resident. Removal or retention of a child is wrongful where it is in breach of 'rights of custody' attributed to a person, institution or other body as held in *Re J (a minor) (child abduction)*⁵⁸. However, the rights of custody are determined under the law of the country of the habitual residence of the child.

In case of breach of rights of custody, the person insisting the return of the child must prove that the consent was given by the person having parental responsibility. A declaration of wrongful removal obtained from the requesting State, would not finally determine the matter because the requested State is free to take its own view of whether the child was habitually resident of the requesting State at the time of removal and whether his removal was in breach of custody rights. In actual practice, the views of children having attained sufficient maturity are also ascertained by the courts for the purpose of his or her return to his native country or otherwise. However, the courts are not bound to accept the same in all cases. The jurisdiction of the courts is not circumscribed in determining the disputes of return of a child to the country of his habitual residence. If a dispute of protection of a child is not governed by the 1980 Convention, it is necessary to establish as to what is the requirement of the welfare of the children. The parent desirous of the child's return from a Non-Contracting State may seek the order asking the child's return and also make an effort to have the abductor extradited or the offence of abduction, and may also bring the proceedings in the country where the child is found. A number of countries have not so far ratified the conventions or protocol relating to abduction and return of child. Difficulties are also faced for securing return of children even in some of the Contracting States where proceedings are protracted. In appropriate cases of international abduction of children relating to matrimonial custody or access, the recourse to Alternate Dispute Resolution (ADR) should be preferred over formal judicial proceedings of a criminal or civil nature.

Pakistan Context

In the Courts at the time of visitation of minors with their non-custodial parents very sentimental scenes are, seen where often an emotionally

⁵⁸ (1992) 1 FLR 276)

charged atmosphere is created. Such situation is created due to ego-centric attitude of parents of minors which substantially affects the welfare of innocent minors a lot and demands parents to resolve their disputes of child custody amicably by adopting tolerant attitude only for the welfare of the minors. It is observed that a Guardian Judge through his concerted efforts by convincing the parents of the minors and with their mutual consensus can decide extremely complicated and knotty cases amicably which shall not only result in expeditious and inexpensive justice but also reduce the heavy backlog of cases and objectively prime consideration of the welfare of the minors can also be achieved significant.

The recent trend in our society is seeing a paradigm change in the matrimonial relationship. The number of divorce cases are raising, particularly in the last two decades, more and more middle and lower middle Class Couples having been approaching family courts for divorce resulting in rise of bitter child custody battles. Often the innocent child / children are being used as a tool to wreck vengeance by vindictive litigants who feel no hesitation to inflict severe emotional and psychological abuse on the child thereby seriously affecting the child in his / her later part of life. With many other implications that a divorce has on the individual, family and society at large, children of divorced couples are the one who bear the brunt of the entire happening. It is a common practice among couples to use kids as pawns in the game of emotional chess. It amounts to absolutely irresponsible parenting to scar children emotionally post separation. In due course the parents move on in their lives and onto another partners but children carry the trauma of being manipulated and torn apart emotionally, all their lives. A large number of these kids suffer from personality problems, conduct, disorder, and substance abuse, criminal and anti-social traits etc.

Parental Child Abuse

The most common kind of child abuse is parental child abuse which often occurs when the parents separate or begin divorce proceedings. A parent may, remove or retain the child from the other parent, seeking to gain an advantage in the expected or pending child custody proceedings, or because that parent fears losing the child in the lengthy pending child custody proceedings. A parent may refuse to return a child at the end of an access visit or may even flee with the child to prevent an access visit. This very retention of the parent itself creates tangible effects on a child psychology which is often unaddressed.

The worst possible thing that can happen in a child's life, apart from losing a parent, is to become a rolling ball in a parents' divorce and ensuing custody battles. Whilst the spouses and their families hurl accusations and try to get the better of each other, the trauma being suffered by the child

may sometimes be overshadowed by the volley of hurt and anger of the parties.

Cases pertaining to custody / visitation issues of the minors are not ordinary cases like the breach and enforcement of other civil rights/ obligations , such as the property disputes etc. these cases have their own dimensions , repercussions and consequences , founded upon the human emotions and the sentiments. The resolution and adjudication of this special kind of matters, therefore should be conceived, considered and settled in a different perspective and context, which obviously revolves around the welfare of the minor, but at the same time the natural feelings of the parents cannot be overlooked and ignored. If the parent means something great for a child, the child may also mean the whole world for the parents.

Three Stake Holders in a Custody Litigation

When the lis is between the parents, there are three main characters of the scenario, a mother, a father and a child and in certain cases the brothers and sisters of the minor, they are all the stake holders and the emotions and feelings of every one of them should be kept in view while deciding the noted issue, besides the personal law of the minor and rule about his welfare as mentioned earlier which should be of pivotal consideration.

All these putting together contemplate that regarding the visitation schedule neither the mother should be altogether deprived of the complete custody of the minor nor the father should be deterred and prevented to meet and see his own child with whom in the normal situation, he shall have a free access and interaction and could shower his love and affection, if the relation between the parents was normal; this also is true position vice versa.

The third important character is the Child himself, who under the law of nature should have the privilege of the love and affection of both the parents, which is one of the greatest blessings of Allah Almighty, but if for certain reasons, the parents on account of their discord and disparity have fallen apart, the Child shall not be deprived of having the maximum of what he/ she could achieve from either of the parents. And it does not behoove of the adversary parties, who may even have hatred towards each other to claim exclusive possessory rights over the child to the exclusion of others, as one could demand in the matter of property disputes etc.

Duration of a Custody Case

An average Family / Custody Case under the Guardian & Wards Act lasts approximately to three to five years in the guardian courts. During these years, due to lack of interaction between the minors and the non-custodial

parents, the parent-child bond keeps on depleting and often completely brakes after a while. In majority of the observed cases, the custodial parent keeps on brain-washing the minors against the non-custodial parent. On top, the guardian courts strengthened the revengeful motives of the custodian parent by not granting reasonable visitation schedule between children and the non-custodial parent. It is seen that non-custodial parent initially struggles and contests the litigation in hope to get justice, but then finally gives up after being disappointed. He/she remarries and starts a new life and bears new children. In result the minors normally end up losing one of the parents forever.

2 Hours Visitation Once in a Month to a Non-Custodial Parent

Family matters were not to be decided strictly on the yardstick of procedural laws nor any other principle aimed at the observance of technicalities , Paramount consideration before the court must be the welfare of the minor and betterment of the minor , courts in such a matter are required to act in a Loco Parentis position and large many considerations are required to be kept into consideration by the guardian Court, which of-course is not the practice observed by the Courts adjudicating guardian and custody matters pending adjudication in Pakistan. what has actually been done in vast majority of cases pending in multiple guardian courts in Pakistan is that the non-custodial parents are subjected to abuse and victimization in the name of procedural technicalities especially during the pendency of Divorce and custody of minor proceedings. Even after waiting for months for the first face to face meeting with his/her own children, the non-custodial parent gets extremely limited visitation schedule to meet their children. This visitation schedule is often as little as **“Once in a Month for Two Hours within Court Premises”**. Surprisingly, this visitation schedule is being followed widely in the guardian courts of Pakistan for over decades and has now become **precedence**. In other words “once a month for 2 hours in court” has become a “template” of visitation orders being granted to non-custodial parents in guardian courts. In addition even the above said visitation schedule of Two Hours can be conveniently avoided by a custodial parent simply by presenting a fake medical certificate. In such cases the non-custodial parent is left with no choice but to wait for the next scheduled meeting. The guardian courts are generally very casual towards such excuses furnished by custodial parents.

Parental Alienation Syndrome

In most cases the flawed court systems were being manipulated to take revenge from the non-custodial parent by not letting him/her meet his/her children. It is extremely easy to delay the proceedings simply by filing frivolous applications/appeals and assailing the orders to higher courts.

Using similar delaying tactics, thousands of children are kept from meeting their non-custodial parent for months and in some cases years. The guardian courts are unwilling to acknowledge the simple fact on ground that the nature of a child custody case is entirely different from routine civil cases. Child Custody litigation is a true representative of judicial litigation where "Justice delayed is justice denied". The mind of a child is like a perishable commodity. With the passage of time it is easy to change the innocent mind. Within months due to lack of interaction with non-custodian parent and constant brain washing by custodian parent and his/her family, the children start forgetting and in many cases disliking the non-custodian parent who once used to be extremely dear and loved. This phenomenon has been named as Parental Alienation Syndrome or simply "PAS" by the psychiatrists.

Welfare of the Minor

Amazing is the fact that there exist no specific duration or frequency defined in the Guardian & Wards Act 1890 for granting a visitation schedule for the minors. The basic paramount consideration to decide a reasonable schedule is the "**welfare of the minor**". In fact the entire Guardian and Wards Act 1890 are ultimately based on welfare of the minors. The Guardian Judge is required to act/think as a father in order to pass a decision. This extremely limited visitation schedule was adopted by guardian courts to avoid complications and hassle that arise during administering more frequent visitation meetings. However this negates the entire fundamentals of the Guardian and wards Act; because taking away a child from a parent cannot be in the welfare of the minor and should not be the solution to avoid administrative problems.

Non-Custodial Parents

The non-custodial parents can be divided into two categories; those who have harmed their children and don't deserve custody or visitation and those who are good, loving, parents who are not able to live with their child/children due to divorce or separation with their spouse. Statistics prove that in 99% cases, non-custodial parents fall into the second category; and deserve reasonable and regular visitation to their children. In vast majority of the cases a non-custodian parent has to wait for months before his/her first official meeting (within the court) with his/her own children. The delay arises due to the flawed /inefficient system of servicing of the notices. Delaying appearance in court by not receiving the notice/summon is common practice

In Pakistan, for reasons not conformed under the law, the guardian courts often hesitate in handing over the minors to the non-custodian parent for out of the court meetings. This is often justified by the threat of illegal snatching of minors by non-custodian parent and taking them out of the

court jurisdiction. However it is observed that the entire idea of running away with minors is evolved overtime and is a result of frustration of not being able to meet the minors. It's a fact that running away with the minors from the jurisdiction of court is often not easy. The non-custodian parent has to leave his/her social setup, home, business and a lot more in order to disappear with the minor children. He/she has to live a criminal life with the fear of being caught all the time. The act of running away is normally considered as a last resort after being disappointed by delayed and flawed judicial systems. Had the guardian court granted a reasonable visitation schedule to both parents, the non-custodian parent would never be tempted to take law into his hands. It has further been witnessed that keeping the minors away from the non-custodial parents further aggravate the already adverse relationship between custodial and non-custodial parents. Most separated / divorced couples after many years of litigation, forget the actual reasons of separation and start fighting on the visitation rights of children. Had the court not supported the element of revenge through children, things would have start cooling down between the parties with the passage of time.

Few innocent questions come to my mind.

- 1) Is two hours in month is welfare of minor under Guardian Ward Act 1890?
- 2) Does Guardian Ward Act 1890 recommend punishment for minor for a 2 hours visit when his/her parents are divorced?
- 3) Is divorce is so much a taboo that a non-custodial parent is unable to get good time to spend with him/her?
- 4) Is divorce a punishment for a child as per Guardian Ward Act 1890?
- 5) Will any judge or lawyer as a non-custodial parent will be satisfied to meet his/her child in court premises just for two hours in month?
- 6) Will the human right NGOs Like to visit their children in corridors of Karachi Guardian Court and other Districts by sitting on floor of Guardian Courts?
- 7) Weather a two hour meeting can contribute towards growth and welfare of minor when it is admitted joint responsibility of both the parents?
- 8) Can the more than a century old Guardian Ward Act 1890 fulfill the requirements and needs of current century?
- 9) If divorce is considered as a sin in Pakistani society then it is a serious question to answer for all the all Social Reformers, Government Officials, Legislators, Law and Justice Commission of Pakistan: what is the minor's sin that he/she should visit his/her

non-custodial parents in dark rooms, unhygienic conditions sitting on dirty corridors under threatened environment of courts?

- 10) Has the minor got no has no basic rights as human being to know about his his/her inheritance and non-custodial parent?
- 11) Are non-custodial parents some of whom are doctors, engineers, IT specialists, teachers, administrators, businessman, professors are unworthy of reliance to take their own children to their residence for meeting?
- 12) Is Failing marriage an excruciating affair, or a punishable crime?
- 13) Why do we witness so many families suffering endlessly when there are four Guardian Courts working in Lahore alone?
- 14) Is it the workload, absence of supporting law or mere lack of implementation that keeps a child from meeting one of the parents?
- 15) Why can a non-custodial parent in some cases meet his/her kids when even a sick-minded killer, an abuser or an addict has a right to meet his children under supervision?
- 16) Is it necessary for a non-custodial parent to give application to the Guardian Judge and require him several dates to meet the minor for to celebrate birth day and other occasions?
- 17) Whether the law governing custody issues amendments?
- 18) Is it not the duty of religious leaders and scholars to provide religious guidance to divorced parents, children and courts?

Child custody law: basic aspects you should know

The following are the basic guidelines in respect of custody of children, a decision that often haunts most parents even beyond the decision they have to take for themselves.

1. The most important aspect for the courts in Pakistan, by and large, remains what would be the best interest and welfare of the child.⁵⁹
2. Father: Under Islamic law, a father is the natural guardian (al waley) of his children's persons and property. Section 359 of the Muhammadan Law provides:
359. Legal guardians of property- The following persons are entitled in the order mentioned below to be the guardians of the property of the minor:-
 - (1) the father;
 - (2) the executor appointed by the father's will;
 - (3) the father's father; and
 - (4) the executor appointed by the will of the fathers father.

⁵⁹ Karisma Bibi vs. Additional District Judge Attock, 2009 YLR 1522

As per the aforementioned, the legal guardianship of property of a minor is primarily vested in the father of the minor. The father may also appoint an executor to act as the guardian of the property of his infant child by will. According to Shari'a, a child's paternal grandfather is his or her natural guardian after the father.

3. Mother: A mother, generally, has a right to physical, not legal, custody of her child until the child reaches the age of custodial transfer, at which time the child is returned to the physical custody of the father or the father's family. Section 352 of the Muhammadan Law provides:

352. Right of mother to custody of infant children.- The mother is entitled to the custody of (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.

4. The right to physical custody is not an absolute right in the sense that a mother or father who possesses physical custody may not prevent the other parent from seeing the child.
5. The father or mother seeking custody must have reached majority and must be sane. He or she must also be capable of raising the child, looking after its interests, and protecting its physical and moral interests. Aside from these basic requirements, there are specific requirements based on the welfare of a child.⁶⁰

Paternity law deals with the legal acknowledgement of a man and their child. This will be based on several factors and isn't half as straight forward as it may at first seem. At the same time it is very important to ascertain this legal right in a range of situations regarding custody but also various other issues, and this is what necessitates paternity lawyers.

If you are faced with having to go through a child custody dispute, you should be familiar with the basic aspects of child custody law and have an understanding of how the process works. Unless you are fully knowledgeable, always hire a qualified child custody attorney who is good in family law.

⁶⁰ Jamal J. Nasir, The Islamic Law of Personal Status(1990)

First, there are two basic aspects relating to the custody of a child – legal custody and physical custody. Legal custody covers the responsibility and decision making regarding the child's basic needs like for health, education and welfare. If only one parent has been given sole legal custody, then that parent can make all decisions relating to the children without consulting the other parent. Sometimes parents will be given joint legal custody and decisions will then have to be made jointly.

There may be various degrees of custody depending on the individual case. For example, a parent may have legal custody, but they may also have a duty of consultation with the other parent to inform them prior to any decision being made. However, it is quite common that one parent will have the decision making authority to avoid a situation where the parties will become deadlocked and can't reach a decision.

The other aspect of child custody law is the physical custody. This determines where the child will physically be living. Sole physical custody means the child will be primarily with one parent and will have visitation with the other parent. On the other end is true joint physical custody where the parents have equal time with the children. There may be other possibilities for physical custody.

Physical custody is always open to disputes as each parent will want to fight for their own right first and foremost. However, the law will need to look at the best interest of the child first. However, the best interest of the child may not be easily defined in real life and what seems best to one party may not appear so to be to another party.

The court will try to be fair to both parents but more often than not, equal time between parents is usually not possible or practical and one parent will have to make the sacrifice. I believe that parents should also accept that the needs of the child come first and not to focus only on what they themselves want. Too often parents focus only on why the other parent should not have custody and they fail to see their own shortcomings.

Emotions can run high in child custody disputes but in the end, the actual decision on each case must be based only on the facts of that case itself. Parents should avoid comparing custody cases of other people that they deem similar.

When there is an inevitable divorce, it is most important that parents work out a custody arrangement first, setting out how the parties will approach custody and visitation time with their children. Although the Courts can order a custodial arrangement, agreements reached directly between the parents will have the best chance of working out than those enforced by the court in the event of legal disputes.

Need For Change

The Guardians and Wards Act, 1890 was enacted more than a century ago. At the time of its enactment women had scarcely any rights: for them there was only social and legal insecurity and other manifestation of dominance and false superiority of men. The Act while providing the appointment of the guardian kept in view the welfare of the minor but laid emphasis on the superiority of the father or male member in the matter of appointment of guardians of minors and their custody.

In the social conditions that exist today, it is very necessary that parents must regard as their foremost responsibility to bring up their children as healthy, happy and useful individuals of an all-round standard of education and as active builders of society. The purpose, therefore, of the law of the guardianship should be to ensure this development of the child and to safeguard its interests. This can be done only if in the appointment of the guardian of a minor, the welfare of the minor is made the first and paramount consideration, and no other consideration, such as the superiority of the mother or father is taken into account. In appointing a guardian the Court must also see which of the claimants is best suited by his or her educational competence and influence, and by his own example to provide the requisite care in upbringing the child. There is a need to overhaul and revise the existing Guardians and Wards Act, 1890, so as to embody the idea of the welfare of the minor being the first and paramount consideration in the appointment of a guardian and in other related matters. Even as it is the working of the Act has revealed a number of defects and deficiencies which hamper the administration of the Act. Some of the legal provisions of the Act require elaboration and clarification, while others require tightening up.

Proposals for Amendments in the Act for Appointment of Guardianship on basis of Welfare of the Minor

The Law & Justice commission of Pakistan proposed changes to section 6 of the Guardians and Wards Act 1890 wherein it is mentioned that a minor 'who is not a European British subject', which, provision being old and having become redundant requires to be omitted from the Act. There exists no separate law applicable to European British subjects after creation of Pakistan therefore, the exception existing in the above provision of the Act needs to be deleted. The Commission agreed to the deletion of the words "who is not a British European subject" from Section 6 of the Act. The Commission further considered the discriminatory provisions contained in Section 19(b) (Section 19 of the Guardians and Wards Act, 1890 prohibits the appointment of a Guardian in certain situations) of the Act providing that no guardian of a minor be appointed by the court whose

father, in the opinion of the court is not unfit to be guardian of a person of the minor. The above provision excludes the mother despite having a right to lawful custody of the minor. The two female members of the Commission stated that in the presence of mother having custody of a child no guardian of person of the child may be appointed, if the mother is not, in opinion of the court, unfit to be guardian of a person of minor. The Commission approved the proposed amendment alongwith the consequential amendment in Section 41 (e) of the said Act with regard to reference of mother of the minor therein.⁶¹These useful

61

LAW & JUSTICE COMMISSION OF PAKISTAN REPORTS NO. 90 - 102 2007-2008

GUARDIANS AND WARDS ACT, 1890 The Guardians and Wards Act, 1890 consolidated the earlier sketchy legislation on the subject. The previous statutes included the Act 40 of 1858, which was for the minors in the Presidency of Bengal and Madras; the Act 20 of 1864, which was for the Presidency of Bombay; the Act 9 of 1861 and Act 1874 which were for the minors in territories beyond the jurisdiction of chartered High Courts. Therefore, in order to consolidate and to bring the law in accord with the requirements of time, these laws were consolidated in the Guardians and Wards Act (VIII of 1890). It may be relevant to mention that with the passage of time, particularly, after independence, some provisions of law lost their importance and became obsolete/redundant because they were framed in the perspective of the British Raj. For example, the expression "who is not a European British subject" finds mention in section 6 of the Act, which is unnecessary, especially when Section 5 of the Act 1890, relating to the power of parents to appoint in case of European British subjects has been omitted vide Federal Laws (Revision and Declaration) Ordinance 1981. Thus, the expression "who is not a European British subject", in Section 6 needs to be deleted. Section 19 of the Act, 1890 prohibits the appointment of a Guardian in certain situations. The Section states: Section 19: Guardian not to be appointed by the Court in certain cases. Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of minor whose property is under the superintendence of a Court of Wards or to appoint and declare a guardian of the person: (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person; (b) subject to provisions of this Act with respect to European British subject, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor; or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor. Clause (b) prohibits the appointment of a guardian in respect of minor British subject, whose father is alive and is not unfit to be appointed as guardian. In view of the deletion of section 5 of the Act 1890, the expression, "with respect to European British subject", became redundant, hence need to be deleted. The consequences of such deletion would be that no person could be appointed guardian of the property and person of the minor if his father is living and is not adjudged unfit by the Court. In a case reported in PLD 1963 Lah 534 it was held that the father must be regarded as the natural guardian of his children, both male and female until they attain the age of 18 years. Similarly, in another case reported in PLD 1975 Lah 793 it was held that in the presence of father, 27 no other guardian can be appointed unless the Court is of opinion that father is unfit to be a guardian.

According to Sir Abdul Rahim: Guardianship has been instituted solely for the benefit of the minor and cannot, therefore, be the absolute right of any one in the sense that the Court, will be bound to recognize it apart from the question whether in any individual case it will promote the welfare of the minor or not. It is the primary right of the parent to have the custody of the children...for a boy the limit is fixed at seven years and for a girl when she attains puberty. In order to provide equal right of guardianship, both as natural or declared guardian, clause (b) need to be amended by insertion of the word "mother" after the word father. In this way, both parents would be the guardian of the person and property of the minor, if otherwise not declared unfit. This will also require a consequential amendment in Section 41 of the Act relating to cessation of authority of guardian. Clause (e) of subsection (1) of Section 41 need to be amended by inserting the word, "mother", after the word father, so that the disqualification currently applicable to father may also apply to mother. It is therefore proposed, that, in section 19 and 41 of the Act, mother may be included with father to be considered for the appointment of guardian of a minor person, and should be liable to be adjudged disqualified under section 41 (1) (e) of the Act. Comparative Chart of the existing and proposed amendment is as under:

| Existing Provision | Proposed Provision |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section 6. Saving of power to appoint in each cases: In the case of a minor who is not an European British subject, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject. | Section 6. Saving of power to appoint in each cases: In the case of a minor . . . nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject. |

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| Section 19. Guardian not to be appointed by the Court in certain cases. Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor | Section 19. Guardian not to be appointed by the Court in certain cases. No change |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section 28 whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person--- | Section 28 whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person--- |
| (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or (b) subject to the provision of this Act with respect to European British subject, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor. | (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or (b) subject to the provision of this Act with respect to European British subject, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor. |

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section 41. Cessation of authority of guardian. (1) The powers of the guardian of the person cease— (a) by his death, removal or discharge; (b) by the Court of Wards assuming superintendence of the person the ward; (c) by the ward ceasing to be a minor; (d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or | Section 41. Cessation of authority of guardian. (1) The powers of the guardian of the person cease— (a) by his death, removal or discharge; (b) by the Court of Wards assuming superintendence of the person the ward; (c) by the ward ceasing to be a minor; (d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or |
| No change (b) subject to the provision of this Act . . . a minor whose father or mother is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or | No change (b) subject to the provision of this Act . . . a minor whose father or mother is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or |
| No change Section 41. Cessation of authority of guardian. No change | No change Section 41. Cessation of authority of guardian. No change |
| No change No change 29 (e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court. (e) in the case of a ward whose father or mother was unfit to be guardian of the person of the ward, by the | No change No change 29 (e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court. (e) in the case of a ward whose father or mother was unfit to be guardian of the person of the ward, by the |

recommendations however, were never incorporated in the Act by legislature.

Similarly the Ministry of Law & Justice through an amendment Bill proposed to amend the Guardians and Wards Act, 1890 in Peoples Party's Government with the object to protecting the right of mother for keeping custody of minor during age of his minority which would be in the welfare of the minor, wherein a Proviso to

Section 12, of the was to be added/inserted: that where the minor has not attained the age of seven years in the case of male or the age of sixteen years in the case of female, the Court shall, on the first date of hearing, pass interim order for the custody of minor to the mother and visiting rights to the father. But this was never passed by the Parliament.

Welfare of the minor being of the paramount importance a court make an appointment only when it was satisfied that it was necessary that an appointment should be made for the welfare of the minor. The guardian and ward act 1890 as well as the judicial pronouncement hae not omitted any opportunity to emphasize the importance of the welfare of the minor. Accordingly to the personal law to which the minor is subject should be the guild in the appointment of a guardian. But even this personal law is subject to two limitations. It is subject to the provision of this section and the welfare of the minor. It consideration

father or mother ceasing to be so or if the father or mother was deemed by the Court to be so unfit, by his or her ceasing to be so in the opinion of the Court. Reference: 1. AIR Patna 505 2. AIR Vol. 20 p 406 3. The Pakistan Code Vol. 3 Commission's deliberations The working paper was considered by the Commission in its meeting held on 27.7.2007 and the following are the deliberations:- The Commission considered the proposal to amend the provisions of the section 6 of the Guardians and Wards Act 1890 it is mentioned that a minor 'who is not a European British subject', which, provision being old and having become redundant requires to be omitted from the Act. There exists no separate law applicable to European British subjects after creation of Pakistan therefore, the exception existing in the above provision of the Act needs to be deleted. The Commission agreed to the deletion of the words "who is not a British European subject" from Section 6 of the Act. The Commission further considered the discriminatory provisions contained in section 19(b) of the Act providing that no guardian of a minor be appointed by the court whose father, in the opinion of the court is not unfit to be guardian of a person of the minor. The above provision excludes the mother despite having a right to lawful custody of the minor. Mrs. Nasira Iqbal and Dr Arfa Sayeda Zehra, members of the Commission stated that in the presence of mother having custody of a child no guardian of person of the child may be appointed, if the mother is not, in opinion of the court, unfit to be guardian of a person of minor. The Commission approved the proposed amendment alongwith the consequential amendment in Section 41 (e) of the said Act with regard to reference of mother of the minor therein.

of the welfare of the minor or the conclusions arrived at as a consequences of the guidance in the law itself make it impossible to allow the guidance of the personal law then the personal law may be abandoned and steps most conducive to the welfare of the minor and consistent with the provision of this section have to be taken. If the personal law of the minor is not inconsistent with either the provisions of this section or the welfare of the minor then it should be followed. Thus it is the personal law that should guide subject only to the welfare of the minor. Law gives the lead to courts. It sets out the line on which the welfare of the minor has to be considered. It is seen already that the welfare of the minor include his moral, spiritual and material well beings. In considering what is to the welfare of the minor the court shall have regard to the:-

(1) Age (2) Sex (3) Religion of the minor (4) The character and capacity of the proposed guardian (5) His nearness of kin to the minor (6) The wishes if any of the deceased parent (7) any existing or previous relations of the proposed guardian with the minor of his property.

The other aid to the decision of the court in the appointment of a guardian is given in the third should be considered. This guidance could have been incorporated in the previous sub section itself where it stated that the option of deceased parent shall also be considered. But a separate sub section is devoted to it. It is as if to give greater welfare to the intelligent preference of a minor that a separate sub section is devoted to give this lead to the court. The law is intended to enable the court to decide who out of the several applicants is capable of coming nearest to the lost parent of the unfortunate minor.⁶²

⁶² STATEMENT OF OBJECTS AND REASONS

Through this Bill amendment is being proposed in the Guardians and Wards Act, 1890 with the object to protecting the right of mother for keeping custody of minor during age of his minority which would be in the welfare of the minor.

MR. FAROOQ H. NAIK, Minister-in-Charge NATIONAL ASSEMBLY OF PAKISTAN.

A

BILL further to amend the Guardian and Wards Act, 1890 (VIII of 1890), and annex.

A BILL further to amend the Guardians and Wards Act, 1890

WHEREAS it is expedient further to amend the Guardians and Wards Act, 1890 (VIII of 1890), for the purpose hereinafter appearing;

It is hereby enacted as follows:-

Quasi Parental Jurisdiction

In Guardianship matters, courts should exercise quasi parental jurisdiction, the supreme consideration in such context would be the welfare of the minor, and to achieve such purpose courts have unfettered powers. Application under section 12 of the Guardian & Wards Act, 1890 was required to be decided on such principles. Admittedly, contesting parents has inherent right to seek visitation of the minor, especially the non-custodial parent who is mostly the father, who is inherently a natural guardian of the minor. Father is not only required to participate in the upbringing of minors but should develop love, bondage and affinity with the minors. In order to achieve this purpose, the Guardian Court should facilitate a congenial, homely and friendly environment and a reasonable visitation schedule to the non-custodial parent. Courtroom of a Guardian Judge or a separate room within the Court premises for visitation or meeting purposes is neither conducive nor effective. It lacks basic and proper facilities and arrangements and is not comparable to a homely environment. Meeting for two hours once in a month cannot serve the purpose of meeting and is not in the welfare of the minor to hold meetings there with the non-custodial parent i.e. a father.

It is therefore highly recommended that the Guardian Courts of Pakistan adjudicating guardian /custody cases should acknowledge the simple fact that the meeting of minors with non-custodial parent should preferably be held at the premises of the contesting parent to familiarize minors with environment there, to strengthen a healthy relationship between the minor and the non-custodial parent and dispel fears of a future re-union. Only in extreme and exceptional cases, Court of Guardian Judge could be chosen as a venue.

The courts of Guardian Judge should not be located in Court Complexes alongwith other courts but should be shifted to places like "Children Complex in Lahore", where facilities like play grounds, children games and

1. Short title and commencement.-

(1) This Act may be called the Guardians and Wards (Amendment) Act, 2008.

(2) It shall come into force at once.

2. Amendment of section 12, Act VIII of 1890.- In the Guardians and Wards Act, 1890 (VIII of 1890), in section 12, in sub-section (1), for the full stop at the end a colon shall be substituted and thereafter the following proviso shall be inserted, namely:

"Provided that where the minor has not attained the age of seven years in the case of male or the age of sixteen years in the case of female, the Court shall, on the first date of hearing, pass interim order for the custody of minor to the mother and visiting rights to the father."

rides, children's library etc. are available. A psychiatrist and physiologist should be available for minor's counseling there.

Guardians and Wards Act 1890, with few recommended changes above, the major law governing child custody in Pakistan is the best approach to family–conflict resolution. There is nothing wrong with its principle that the welfare of the child is paramount when deciding custody. Nor is there anything intrinsically wrong with its general rule, i.e. mothers be given preference in the custody of minor children whether male or female.

Separation and divorce represent the death of a marriage but for a child caught in the middle and too young to understand the significance of visitation rights it could mean the 'death' of a parent. The tearful reaction of a six-year-old girl to the Supreme Court's decision to hand her back to her Tajik-origin mother after the little girl was recovered from the estranged Pakistani husband highlights the emotional turmoil that a child is usually subjected to in legal custody battles. In a case a couple of year back, a nine-year-old boy reacted in similar fashion when a court decided to restore custody to his French-origin mother.

Such incidents have raised the question of whether traditional court litigation, as provided for under the Guardians and Wards Act 1890, the major law governing child custody in Pakistan is the best approach to family-conflict resolution. There is nothing wrong with its principle that the welfare of the child is paramount when deciding custody. But quite often such litigation proves damaging for both the children and the parents. In considering the rights of mothers and balancing those of the father, what is due to the child, i.e. the right to go with the parent he or she prefers, is often overlooked. Elsewhere in the world, estranged parents are increasingly being encouraged to resolve child custody issues through mutual agreement. This is usually done through out-of-court (though with legal help) dispute-resolution processes like mediation and collaborative law. The latter is a relatively new legal approach to family-conflict resolution involving lawyers and family professionals, and is increasingly gaining acceptance in many countries.

ⁱ **Zafar Iqbal Kalanauri** Mediator & Advocate Supreme Court Pakistan, Adjunct Faculty at LUMS 128-A, Upper Mall Scheme Lahore, Pakistan.

Web: <http://www.zklawassociates.com>

E-Mail: kalanauri@gmail.com Tel[Ⓢ] 92-42) 35760171 Mobile[Ⓢ] 92)-314-4224411 & (92)-0300-4511823.