



Determining the Custody of a Child in Pakistan

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Abstract

The primary law on the custody of the child in Pakistan is contained in the Guardian and Wards Act, 1890. It has been in existence since aeon without substantial amendments over the period. Each parent goes to every extent to interpret the legal provisions to establish his/ her custody of the ward/ child. The lacunas in the legal provisions have resulted in far-reaching consequences for the ward. This article tends to focus on the deficiencies existing in the prevailing laws and traces the development in the legal framework on the subject. It highlights the pertinent factors concerning the custody of the ward that has been established by the judicial interpretation of the legal provisions on custody. The article concludes that the deficiencies need to be addressed within the legal boundaries while focusing on the welfare of the child.

Key Words: Child Custody in Pakistan, Custodial Rights on Custody of the Child, Law on Child Custody, Determining the Custody of the Ward

Introduction

Child Custody has always been a subject of utmost discussion in underdeveloped and developing countries like Pakistan where the socio-economic complexities make this even more important. In the event of a divorce, the parents and their families engage in a new battle to take custody of the child, letting their egos rue their minds. Under Pakistani and Sharia law, the mother has the preferential right of custody till a certain age i.e. Hizanat. Afterwards, the fathers' right to the custody of the child is preferred over the mother as he is believed to be in a better position, financially and socially, to take care of the child. If the custody of the child is given to the mother, fathers create a hostile situation to hinder the smooth upbringing of the child. The purpose is to establish that the mother cannot take care of the child and therefore, the custody be given to him. The issue regarding child custody blazes like wildfire following every divorce across the country, which necessitates both the parents to acquaint themselves with child custody laws and their applicability. Each parent tries to establish and interpret the legal provision in his/her favour to qualify for the custody of the child. In this struggle to attain custody, the psychological effects and far-reaching consequences for the ward are ignored and the child is deprived of his natural and inalienable right to enjoy and witness the care and affection of both the parents.

The voluminous loads of family cases, the separating parents go to the extent of contesting their cases till its final adjudication before the court of last resort just to let each other down instead of resorting to affect patch-up for the better and conducive upbringing of their children. Furthermore, the lacunas, mishandling of the custody issues and misuse of the legal provisions have resulted in the abuse of wards. Considering the example of visitation hours of the non-custodial parent, the procedural technicalities and limited visitation schedule i.e. once in a month for two hours in the court premises victimize the non-custodial parent. The visitation meetings can easily be avoided by presenting a fake medical certificate of the child (Siddiqi, 2015). Due to the discrepancies in the law on custody, it is important to not just understand a general, legal and constitutional aspect of the subject but also to consider the development of the legal framework and principles in this regard. This article intends to

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focus on the deficiencies existing in the prevalent laws and the need for judicial and legislative intervention primarily relating to child custody and guardianship matters owing to the separation between the spouses in Pakistan. The Guardian and Wards Act 1980, hereinafter referred to as "the Act" predominantly governs and encompasses issues and disputes relating to guardianship and child custody in Pakistan. The discussion is confined to its various clauses, deficiencies, judicial interpretation of the provisions on custody of the child and suggestions to improve the prevailing state of affairs currently being witnessed before the Guardian Courts across the country.

Law on Custody of Child in Pakistan

The law of custody in Pakistan can be traced historically back to the Guardian and Wards Act 1890 currently being in existence. However, it is important to stipulate that it is more than a century old, there do not exist express provisions to cope up with every foreseeable eventuality. Hence it is the case laws and judicial dictums that are often credited with the development of the law in this area. Starting with the definition of the word 'custody' which is instrumental to any further understanding of the law on custody, one needs to explore ([Sultana Begum v Mir Afzal, 1988](#)). The court defined it as, 'upbringing of a ward/ child by the mother or by someone legally entitled to it.' It is important to lay down the fact that infant custody of the minor in his early years of life rests with the mother as it is perceived to be in the best of the child's interest to remain in the custody of the mother considering the religious and legal aspect in this matter. However, significant discrepancies coupled with character flaws could be considered good grounds to pass on child custody from mother to father. The 'custody' in its most general term signifies the physical rearing and upbringing of a child on daily basis in contrast to the 'guardianship' that implies the task, concentration and supervision to effect legal transactions and contracts on behalf of the person and/or property of a ward. This being the reason, unlike guardianship, in custody, the child lives with the custodian appointed by the court while exercising parental jurisdiction under the act keeping in view the welfare of the child. The Act portrays 'guardianship of person' for matters of custody and "guardian" for the custodian.

The Guardian and Wards Act governs the issues related to the custody of wards. However, the Act though a governing instrument, being in existence since aeon without substantial amendments over the period has glaring deficiencies which need to be addressed and interpreted within the legal boundaries. Taking examples of 'custody' and 'guardianship', the Act does not differentiate between them. One can hardly understand the essence of the Act if one is unaware of the differentiation and its understanding. The custody and the guardianship may attract different sets of rules and principles concerning qualification, rights and obligations ([Sabreen, n.d.](#)). The custody of the child relates to the upbringing, his/her nursing, fostering and taking care of a child's activities daily. On the other hand, the custody to influence legal operations, deeds, contracts, agreements with responsibility and consideration following its consequences relates to 'guardianship' of the child. The Act asserts that the custody of a child is a preferential right and it can be enforced by going through judicial/legal proceedings. Unlike guardianship, each parent prefers custody of the child in the first place for the custodian at times and mostly becomes the guardian of the ward through the application as and when the Guardian court is involved accordingly. Custody, in most cases, is considered as a kind of Guardianship by Pakistani courts. The Guardian courts, as the name itself, bears testimony to the very fact that the courts are the Guardian court and not the Custody courts. Moreover, the name of the Act also contains the word Guardian, not the custody so the connotation is though clear but still it gets mixed on many an occasion and the difference between both i.e. Guardianship and Custody seems to be hard to clarify. 'Section 4 of the Act defines Guardian as a person having the custody of the person of a ward or his property, or both his person and property.' In Pakistan, a ward's custody can be recognized effectively as a person having custody of the ward. He is responsible for the provision of the raising, medical services, government assistance, nursing and/or cultivating of the ward/child along with dealing with the ward/child individual issues and feelings on an everyday premise. Whereas the guardianship of the ward/child implies the ability to impact contracts with duty regarding the legitimate outcomes and lawful exchanges and agreements in the paramount interest of the ward.

One of the significant questions arising during child custody in Pakistan is to make the ward's appearance before the court. Customarily in our general public after separation, couples become the most terrible foe of each other. They develop intense hatred and prefer not to have any sort of contact both inside and outside the

court. Despite estrangement between spouses, both are bound by the procedural laws to come in contact and therefore this contact no matter how brief does not cease to exist. A person enjoying legal custody expediently surrenders his right for the time being in favour of a non-custodial parent at the instance of the court. Along these lines, it is the bounden obligation of a Guardian court while giving visitation rights to strike the reasonable balance between the custodian and non-custodial parents (*Zahida v Javaid, 2019*). The Act primarily provides custody to a person desirous of securing custody of a ward by allowing him to invoke Section 25 of the Act. Section 12 of the Act caters to the need for change in interim custody which by and large is allowed in exceptional cases. Non-custodial parent by fulfilling the mandate and conditions attached by the court, most important being the payment of maintenance amount on time, is allowed to meet his child according to the settled schedule. Meeting in such circumstances usually takes place between the ward and his non-custodial parent either within the court or outside the court's compound. Visitation rooms designated for such meetings at the judicial complexes in most major cities present a dilapidated picture. The gloomy atmosphere adds to the miseries, where an already destitute child brainwashed by his custodial parent, starts raising hue and cry and the meeting for which the non-custodial parent is anxious to have come to an end in a flash without any exchange of tenderness and affection.

Several initiatives and measures have been taken to amend the law on custody but many of these attempts and proposals remained on papers. Starting from the proposed amendments in the Guardian and Wards Act 1890 by the Law and Justice Commission in its report published in 2007-08, the Commission declared certain provisions of the Act including 19 and 41 as discriminatory on the gender basis i.e. against the mothers. The rule on the appointment of the guardian is enunciated in section 19 (b) of the Act. It states that the court will not appoint any person as a guardian if the father is fit for the appointment as guardian of the /ward/ child. It implies that if the father's fitness for the guardianship would preclude the mother from being appointed as a guardian. The Commissions noted that section 19 (b) is based on gender discrimination and suggested to include 'mother' in this rule on the appointment of guardianship. Similarly, section 41 of the Act states the condition under which the authority or power of the guardian comes to an end i.e. in the event of the father's unfitness to be as a guardian of the ward/ child. The Commission opined that these provisions contain gender disparities and proposed equal rights of the mother in matters related to the custody and guardianship of the ward/ child. The proposed amendments were not incorporated in the law ([Sabreen, n.d.](#)).

Another significant amendment was proposed in 2008 in the Guardian and Wards Act 1890. The Guardian and Wards Act Amendment Bill 2008, was presented in the National Assembly. The Bill protected the custody rights of the mother and emphasized the welfare of the ward/ child. The Bill suggested facilitating the visits of the father to the ward/ child and amend the provisions relating to the custody disputes under section 12 of the Act. The section empowers the Guardian courts to grant interim custody of the ward to the mother if the child has not attained the age of seven years in the case of boys and the age of puberty in the case of girls. Furthermore, in 2014, a bill was presented in the National Assembly to upgrade the Child Protection System in Islamabad. Considering the principles laid down in the Constitution concerning child protection and welfare, the Child Protection System Bill focused on the effective implementation of the provisions on child rights. Although, the Bill was related to the protection of child rights in general. It also contained provisions regarding the custody of the child. The Bill proposed the age-limit of eighteen years for the child and included the child whose parent or guardian are not fit to take care of the child in the definition of 'child at risk'. The 'child at risk' was given in the custody of the child protection institutions or any other suitable person appointed by the court. The powers of the courts were enhanced in determining the matters related to custody, the appointment of a guardian and imposing additional conditions on the custodian for the welfare of the child. The most significant features of the Bill included the submission of the periodic reports concerning the custody of the child and physically presenting the child in court. To ensure the implementation of the proposed provisions, the Bill provided for the punishment with imprisonment that may extend to 2 years or a fine of 50,000/- rupees or both for contravening the provisions or conditions attached by the court ([Sabreen, n.d.](#)).

Determining the Custody of Ward/ Child

While we are looking at the general layout of legal opinion on the matter of custody, especially preferential custody, it is important to understand the foundations on which all of this stands i.e., the welfare of the child

concerned. Domestic jurisprudence of Pakistan pays special consideration to the welfare of the child and it is determined in a subjective manner taking into consideration the sex, age, religion, customs and traditions of the child and his family. A review of the significant parameters is included in this article to present the approach of the Guardian courts in granting custody of the child.

Welfare of the Ward/ Child

The welfare of the Child is the determining question taken into due consideration by the court while granting custodial/ preferential rights to any parent regarding the custody of the child (*Riasat v Nadia*, 2014). Therefore, certain aspects which eventually become highly consequential such as the financial stability of a parent, reported misconduct, character, and capacity of parent are attached great importance to the issue on the anvil. The idea of welfare of a ward takes root in Section 17 of the Act which declares it to be of extreme importance and the matters to be considered by the court in appointing the Guardian are laid down in (*Salam v Samina*, 1988).

The custodial parent is responsible for a wide range of needs of the ward and the custody is to be gauged concerning each of these which makes him liable for his acts. These particularly include health and education. However, when considering the welfare of the child along with the preference of the child, there needs to be a balance that the court must strike. If the court gives too much importance to the child's preference it might make a decision that might not be in the best interests of the child as he is not expected to make credible decisions for his/herself. Hence when making a decision, the court is under a burden to look at everything in the broader context of determining the most suitable custodial environment for the child including the physical and emotional nourishment within the resources available for his/her brought up.

Age of the Ward/ Child

The principle of the mother being given precedence over the father has its roots in the biological need of breastfeeding a young child. The preferential right of the mother is also duly recognized by Sharia law. This precedence of giving the mother preferential treatment was referred to in a case (*Imtiaz v Tariq*, 1995). The Court established that there exists a preferential right to custody on the mother's part during the child's breastfeeding years. When considering the age of the child during which there exists a preferential right to custody on the mother's part, it is important to highlight that this right exists till the age of seven for a son/boy and till puberty in the case of a daughter/girl as per the Sharia law. In the Muslim personal laws, the mother is not considered a natural guardian. However, she has been given the right of Hizanat i.e. the custody of the minor. The mother's right of Hizanat comes to an end if the conduct of the mother is found objectionable by the court. Following the Hizanat, a father may file a custody petition in the guardian court. The custody of the child is given to grandparents, in case of the absence of the parents or their incapability to take care of the child ([Law Society Pakistan, n.d.](#)). This benchmark of preferential custody as to the ages of the ward was also reaffirmed (*Imtiaz v Tariq*, 1995). The court elaborated that attaining the legal age of the ward to receive formal education would be determined after considering the customs and societal norms of the parent's place of residence.

The Religion of the Ward/ Child

Considering religion being an especially important part of our socio-economic culture, it is usually a wider held belief that the child is to follow the sect of his/her father. In a case (*Imran v Iffat*, 2008), the Sindh High Court held that the sect of the father also had a bearing on the children's custody. The court further held that the father being an Ismaili Shia was in a better/preferable position to raise his child and was hence declared him the better custodian. Extrapolating the principle set out in this case, it can be said that when religion is to be a part of the consideration about custody, the child is presumed to be following the religion of his/her father.

Psychological Backdrop of the Ward/ Child

It is also incumbent upon to visualize the psychological backdrop of child custody if a custodial decision is to be made in the child's best interest. After a divorce/separation between spouses, children are sometimes seen as articles of gaining superiority over the other party. Each party has the intention of gaining custody not just for

ensuring the child's best interests but also to gain a societal superiority over the other partner. This has a significant bearing on the child's nourishment as when partners are not seeking the best interests of the child no matter which partner the child ends up with, the odds are that they are not treated well. This psychological evaluation also explains the significant cases of child abuse post custodial decisions as children are a mere article of tussle and sometimes are the outlook of slow simmering anger that the parents have had as a result of the failure of their relationship. The state and its institutions have a responsibility to consider post custodial aspects as well when making such a decision.

Moral and Ethical Character of the Custodian

The good moral and ethical character of the custodian is considered a condition precedent for the formal and legal handing over of the child. The civility of spouses in such cases almost always plays an instrumental role. The criterion followed by Pakistani Courts is that mere accusations regarding character are nearly insufficient to disqualify the natural guardian from the custody of the ward. In a landmark judgment delivered by the Supreme Court (*Munawwar v Muhammad*, 1995), wherein the mother/wife applied for the custody of the ward but the father/husband levelled the allegations of bad character along with Zina against the mother/wife to deprive her of her right to the custody of her children. The mother/wife was acquitted by the trial court but the father/husband filed an appeal against the decision. The wife raised the point that the fabricated accusation of Zina against her is just to deprive her of her right to custody of her child. The appellate court granted her custody partly only to the extent of her daughter which decision was eventually fortified by the Supreme Court declaring that the maintenance is the duty of the father and the mother's right to custody could not be ignored or infringed for merely on the fact of her inability to maintain the child and assertions on the part of contesting parent alleging false accusations against the other spouse. It is also pertinent to mention that it is not just the character of the custodian and his/her traits that affect the determination of best-suited custody. The preference of the child also has a significant amount of weight once he/she can rationally answer the questions put forward by the court which can rightly differentiate right and wrong (*Imran v Madiha*, 2018).

Financial Position of the Custodian

The financial position of the mother is no doubt considered by the Pakistani Courts. However, the courts usually do not influence or take stock of the financial status of the mother and invariably considers the father to be responsible for the maintenance and upbringing of their children. In practice, there has been a lack of consistency in this sphere of financial consideration as well. Maintenance is no doubt an obligation of the father but the Lahore High Court (*Imtiaz v Tariq*, 1995), while deciding took into account the financial position of the mother before granting custody to the mother. This decision was opposite and contrary to previous practices of the court but as there is no express legislation in the prevailing circumstances allowing for conflicting interpretation by the courts.

Legal Guardian of the Property of Minor

The provisions of the Mohammadan law by D. F. Mulla reveals that the mother or female relative of the minor does not qualify as the legal guardian of the property of the minor. The mother has not been given the power to transact the matters related to the property. If the alienation of property of the minor is required, it can be done by the permission of the court only by the legal guardians appointed by the court ([Law Society Pakistan, n.d.](#)).

Conclusion

The significant aspect of the issues related to child custody is that notwithstanding the prevailing customs, norms and personal laws; any of the non-custodial parent desirous of his child custody and failing in reaching a private settlement has to reach the court of law and seek recourse to the Guardian and Wards Act of 1890. The Act is a century-old, failing to cater to the needs and challenges of the present-day situation. The lacunas in the law on custody in Pakistan have created a complex situation for the child. The ambiguities in the legal provisions have to lead the courts to follow the personal law of the ward or resort to his best interest. The reforms and initiatives are not sufficient enough to bring a positive change in the law on custody. The absence of a time frame in deciding

the custody disputes results in prolonged and protracted law cases. The cases under the Guardian and Wards Act may take three to five years on average. During this parent, the parent-child bond keeps on depleting due to the influence of the custodial parent. Also, the irregularities and unreasonable restrictions in the visitation of non-custodial parents bring disappointment and result in losing one of the parents ([Siddiqi, 2015](#)). The focus of the legal provisions and judicial interpretation should be on the ward's eventual benefits rather than on the fact that which parent is better or more affected. The additional factors include the affection of the ward with the parents, the cooperation, communication and relationship of the child with his parent/s, sibling/s, and any other individual who may altogether influence the child's wellbeing and brought up, the child's acclimation towards his home, school, and locality/community are but the few psychological, emotional and social factors that should be kept in juxtaposition while deciding the matters of custody. Prompt efforts need to be made to reform the law on custody for detailed rules regarding custody of a child.

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