

Child Custody, the Best Interest of the Child and the Socio-legal and religious Construction of Pakistan, France, and United Kingdom: A comparative Analysis

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Abstract

This article studies the child Custody, the Best Interest of the child and the socio-legal and religious Construction of Pakistan, France, and United Kingdom. It finds that the notions of 'best interest' and 'welfare of the child' have been used since a long in custody cases although the vision of both notions has been changed now by the United Nations Convention on the Rights of the Child 1989. The standards for awarding custody of child and interpretation of the principles of 'best interest' and 'welfare of child' have been different in all three jurisdictions i.e., Islamic Republic of Pakistan, France, and UK. All three jurisdictions have devised their distinct system of custody or control of children after the separation/divorce of their parents. The different standards and different interpretations entail the different legal systems, social structures and constructions, religion, conventions, customs, and development as well. The standards and interpretations of these notions depend on and are motivated mostly by Islamic law of *Shari'ah* in Pakistan while modernism and liberalism in France and United Kingdom.

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Introduction

The notions of the best interests and welfare of the child have been widely used only in the custody cases² since a long, but as the United Nations

² Custody simply entails the care, contact, maintenance and control over the child, which court awards to one or both (shared) parents following separation or divorce proceedings. There are many terms that are used to describe different types of custody. Following terms/kinds may be used in the court proceeding while adjudicating child custody cases.

1. Physical Custody (la Garde Physique). Physical custody provides that where child will live either with father or mother. It entails day-to-day care. The parent having child custody is called "*Custodian Parent*" and parent without child custody is called "*non-custodian parent*". **2. Legal Custody (la Garde Légale).** Legal custody means to have authority, right and obligation over decision making for child's upbringing. A parent with legal custody can decide about the schooling, religious teaching, and health care. **3. Sole Custody (la garde exclusive).** Where the legal and/or physical custody of the child is given to one parent only, is called sole custody. **4. Joint Custody (la Garde Conjointe).** The arrangements made, where both parents are separated and don't live together, are given physical and/or legal custody to both parents. **5. Shared Custody (La Garde Partagée).** The shared custody is an arrangement, where child live for an extended period of time with one parent, and then for a similar and equal amount of time with the other parent. Both parents retain authority and control over the child in share custody. **6. Alternating Custody (la Garde Alternée):** in

Convention on the Rights of the Child 1989 has changed the earlier concepts, and the best interest principle now entails every aspect of child's life. In fact, the triangular relationship between the state, parents, and the children, is no doubt, the most important liaison in a society. This triangular liaison becomes more relevant, when the breakdowns occur among spouses in society by divorce, death of both or one parent, abuse, or the parental incompetence otherwise, where the state has to intervene especially for the control and custody of the child. It becomes more complicated matrix, when there is involvement of fourth party such as

this kind of custody arrangement, the child live for an extended period of time with one parent and then for an alternate and similar amount of time with other parent. When the child is with either parent, the custodial parent has sole responsibility and authority over the child. This custody arrangement can also be called as "divided custody". **7. Split Custody (La Garde Divisée):** a kind of custody, where the children are more than one, and one parent has full-time and sole custody over some children and other parent has full-time and sole custody over the other children. **8. Bird's Nest Custody:** it is a kind of joint custody, where child remain at his same permanent residence and parents move in and out. In this arrangement the child does not go from one parent to other, but parents come to the child alternatively. The burden of movement and upheaval is upon parents rather than children. **9. Third Party Custody (la Garde Tiers):** in this type of arrangement, the child does not live with his biological parents, but under the custody of any other third person. This kind of arrangements are made, where the both parents either are not available (dead or unknown) or are unfit, or otherwise it is not in the best interests of the child to be in the custody of his/her biological parent.

foster mothers, stepparents, or grandparents. Custody is a misleading term, as it exhorts a unitary thing, when it refers to responsibilities and rights, as it sounds like a "property"³. Custody cases for children are most difficult and highly traumatic for third parties either the judges or other welfare officials⁴.

Children benefit from regular and continuing contact with both parents, when they communicate, cooperate, and have low levels of conflict⁵. However, without going to the complexity of these relations, this paper analyses the comparative legal contexts of the child custody in three countries.⁶

First of all, the word custody may not signify the same thing in UK, France and Pakistan. For example, the French law mostly talks in the words of "*parental authority*" (l'autorité parentale) rather than custody. Custody, as a word, has been set aside from the French Civil Code since the laws of 1987⁷, 1993⁸ and 2002⁹ about keeping parental authority after

³ Donald C. Hubin, "Parental Rights and Due Process." *the Journal of Law and Family Studies* 1(2): 123-150.

⁴ Jon Elster, "Solomonic Judgments: Against the Best Interest of the Child." *the University of Chicago Law Review*, 54, no.1 (1987): 1-45.

⁵ Belinda Fehlberg, "Bruce Smyth, Mavis Maclean, and Ceridwen Roberts, Legislating for Shared Time Parenting after Separation: A Research Review." *International Journal of Law, Policy and Family* 25, no. 3 (2011): 318-337.

⁶ However, for a detailed discussion on this triangular relation among the state, parents, and the children, see for example, Mary Ann Mason, *From Father's Property to Children's Rights: A history of Child Custody in the United States*, (Columbia University Press, 1994).

⁷ La Loi n° 87-570 du 22 juillet 1987 sur l'exercice de l'autorité parentale

separation. The current word used in French legal system is "*residence*". Pakistani legal system borrowed the word "*custody*" from English law. In Pakistan, *Hadānat* an Arabic word is used for custody and *wilāyat* for the guardianship. *Hadānat* means, "training or upbringing of the child" while custody means, "physical or material possession of the child". On the other hand, *wilāyat* means, 'to defend' or 'to protect' and guardianship means, "constructive possession of child and his property to take care of both". The person who has guardianship (*wilāyat*) is called *walī*¹⁰. In 1972, the Peshawar High Court, in the case of *Juma Khan v Gul Ferosha* defined custody "it is constructive or actual or possession of the child for the purpose of protection"¹¹. Again In 1988, the Karachi High Court in the case of *Sultana Begum v Mir Afzal* defined custody as "it is upbringing of a minor child by the person either mother, father or someone else legally entitled to it"¹². Generally, the mother has preferred custodial rights over the father in the matters of nourishing and upbringing, while father's custodial rights prevail over mother in marriage and money matters¹³. Particularly during the period of breastfeeding and lactation, the mother

⁸ La loi du 8 janvier 1993 relative à l'état civil, à la famille et aux droits de l'enfant et instituant le juge aux affaires familiales

⁹ La Loi n° 2002-305 du 4 mars 2002 relative à l'autorité parentale

¹⁰ The Guardian and Wards Act of 1890, Section 4(2) defines the guardian as "*A person having the care of person of minor or of his property or of both his person and property*".

¹¹ PLD 1972 Pesh 1.

¹² PLD 1988 Kar 252.

¹³ Ibn Qayyim, *Zād-ul-Ma'ād*, trans. Syed Rais Ahamd Jaferi (Karachi: Nafees Academy, n.d), 4: 289.

has exclusive preferential rights, but if she refuses to do so, the other relevant factors be considered.¹⁴

The other interesting thing relating to the custody of child, in UK and France, the *shared or joint custody/responsibility* is used since last four decades, in case of separation of parents after divorce. However, in Pakistan, the father is the natural guardian of person and property of the child¹⁵ but the mother is entitled to physical custody of the child till certain age limit of the child in case of divorce¹⁶. However, till the parents

¹⁴ Mst. Imtiaz Begum v Tariq Mehmood, 1995 CLC 800.

¹⁵ PLD 1963 Lahore 534

¹⁶ The Islamic law provides the rules of custody depending upon the roles of the parents. The child in his/her early years needs severely the care, affection, and love of the mother, which cannot be provided by the father. So, if the welfare of the child is not endangered, then the custody of the baby or infant always goes to the mother. The father, the natural and legal guardian of the child, can claim for the custody of the child after certain age limits. The limits vary among different schools of thought and sects of the Islam. For example, Hanafi School of law provides that mothers have the custody of the child for male till 7 years and female till puberty. *Maliki School* provides, mother is entitled to child custody for male till puberty for female till marriage. *Shafi'i school* does not provide any age limit, but provides that the child will remain with mother, until he/she becomes mature to choose one among the parents. *Hanbali School* provides that, till the 7 years of age, the child will remain with mother irrespective of the sex. After 7 years of age child can chose, with whom he/she wants to live. The *Shia school* provides 2 years for boys and 7 years for girls to be compulsorily with mother. In Pakistan, the Hanafi school of thought is followed, so the mother is entitled for

live together, both parents have paramount joint moral obligation¹⁷ and joint responsibility¹⁸ of the upbringing of the child. However, only the father is responsible for the financial needs and education during the marriage and after the divorce, even the child was within the mother's custody or one of her relations¹⁹ or became adult but was getting education yet.²⁰

Contrary to Pakistan, the marriage is no longer a compelling value in the UK and France. After the Second World War, the ratio of marriages in UK and France have decreased dramatically due to various reasons such as industrialization, modernization, liberalization, change in lifestyles and work, urban development, and economic changes.²¹ The trend of very weak and fragile Common Law marriages (*l'union libre*) have been evolved, which put adverse effects on the lives of children. Secondly, the high ratio of divorces, separations and instability of families has led to a new form of family, i.e., "*single-parent family*" (*la famille monoparentale*).

custody of the male child till the 7 years and for girls till the age of puberty. The Hanafi School sometimes provides the 9 years of age, for the age of puberty.

¹⁷ Abdul Rauf v. Shireen Hassan, PLD 2001 SC 31.

¹⁸ Muhammad Shafi alias Papan v. State, PCrLJ 2011 Karachi 1424

¹⁹ *Id.*

²⁰ Arbab Mir Muhamad v. Irum Altamas, PLJ 2005 SC 742. The French Law also provides that the duties of the parents do not come to an end towards their child, if he becomes major. See for example Civil Code, Art. 371-2.

²¹See for example: Dr Giselle Vincett, Dr Kristin Aune, Dr Sonya Sharma, "*Women and Religion in the West: Challenging Secularization*". (Ashgate publishers, 2008).

The recognition of the abortion rights in United Kingdom in 1967²² and in France in 1975²³ have made the men powerless and they see themselves in a difficult situation in both jurisdictions. The fathers have just supervisory role in families. Nevertheless, it is encouraging that UK and France have stepped into to tackle with the situation and devised shared parental authority and residence.

The law and practices of child custody in UK and France have gone through many ups and downs, but not too many transitions have occurred in Pakistan. The radical changes in divorce law with substantial liberalization of grounds for divorce have caused the immense increase during the last half Century²⁴. As France is the 3rd in the World with most divorces at ratio of 55%²⁵. The United Kingdom is the 7th in the World with most divorces. In UK 47.6% marriages end in divorce, but in Pakistan the ratio is very low i.e., 7.1/1000²⁶ people.

²² The Abortion Act 1967

²³ La Loi n° 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse

²⁴ Edward Kruk, "Child Custody determination: An Analysis of the Litigation Model, Legal Practices, and Men's Experience in the Process", *the Journal of Men's Studies*, 1, no. 2, (1992): 163-185.

²⁵ Divorce Rate by Country: The World's 10 Most and Least Divorced Nations, available at: <https://www.unifiedlawyers.com.au/blog/global-divorce-rates-statistics/> site visited on 20/01/2020. nEU Marriage and Divorce Statistics present at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics, site visited on 09/04/2020.

²⁶Family Inequality, present at: <https://familyinequality.wordpress.com/2014/11/13/asian-divorce-rate/> site visited on 09/04/2020.

On the other hand, the women have been facilitated for divorce, but not such abrupt changes to liberalise them occurred in Pakistan, as in France and UK. So, with the increasing ratio in the divorce, the custody disputes are also multiplying day by day in three jurisdictions along with the whole world.

The Religious, Cultural, Structural and Legal Differences Existing in Three Jurisdictions which may affect Child Custody and the Best Interest of the Child

The different standards and different interpretations of same notion are due to different legal and cultural backgrounds. The difference in territorial locations, social and cultural aspects lead to different practice and jurisprudence. France and United Kingdom have much synonymy in culture and geographical location, while Pakistan has inherited legal system from United Kingdom. However there exist huge differences in culture, law, and jurisprudence in all three jurisdictions regarding the custody of the child. Religion is one of the most influencing factors in adjudication of custody cases at least in Pakistan, Islam being the state religion of state²⁷. However, Christianity has been major religion in both France and United Kingdom, although both states claim to be seculars where religion does not affect state and state has nothing to do with religious beliefs and apprehensions of the people. Following may be some social, cultural, religious, or legal factors that make sharp differences in all three jurisdictions.

i. Family Structure

The customary family in UK and France has gone through abrupt changes especially after industrialization and modernization; resultantly new forms of family such as "*nuclear*" or the "*single unit family*" have evolved.

²⁷ The Constitution of Islamic Republic of Pakistan, 1973, Art. 2.

On the other hand, in Pakistan there is still joint family system. Contrary to Pakistan where the emancipation occurs very late, in UK and France, the children becoming adult are almost free from their parents. In Pakistan the children, even after their marriages, obey their parents, as they are still minors, motivated by the religion and culture.

ii. Custody, Parental Responsibility and Parental Authority

The common words used in three jurisdictions that may have even wider scope than custody. For example, UK has replaced it with "*parental responsibility*"²⁸. In France, since 1970 "*parental authority*" has replaced the earlier term of "*parental power*"²⁹. However, the word custody has been replaced by "*residence*" since 1987. While in Pakistan, the word "*custody*"³⁰ is used, to have control over the child, although the words the parental powers and parental responsibility are used as well. But in post-divorce custody proceedings, the word custody is the major and common word, used by the courts in Pakistan.

iii. Family Disputes, Separation and Divorces

Normally, the disputes over the child custody arise after the separation or divorce. As far as, the divorce in Pakistan is concerned, its rate is far less than UK and France. But, if we see earlier, the rate was even very low. For example, in British Indian Courts, the woman's right to divorce

²⁸ The Children Act 1989, Sec. 3(1).

²⁹ Pierre Delion, "*La Fonction Parentale*." (Bruxelles, 2011): 8-9.

³⁰ Guardian and Wards Act of 1890, the word custody has been used in Section 10, 11, 12, 24, 25, 45, 47 and 50.

(*Khul'*)³¹ was subject to the husband's agreement to dissolve marriage³². Even after coming into being of Pakistan, same continued, but the first time in Pakistan, the concept of *Khul'* (woman's right of divorce) was given new meanings in 1959 in the case of *Bilqis Fatima*³³, where it was held that the, *Khul'* is a right of woman, not that of man. Again in 1967 in the case of *Khurshid Bibi v. Baboo Mohammad Amin*³⁴, the Supreme Court of Pakistan liberalised it further. It was held that "The Husband is given the right of divorce to his wife, though, of course, arbitrary divorces are discountenanced. Similarly, wife is given the right to ask for *Khul'* in case of extreme incompatibility."

³¹ *Khul'* is the right of woman in Islam to seek a divorce from her husband, although the different Islamic schools of thought differ on the requirements and conditions of *Khul'* such as, the consent of the husband, compensation, role of the court, custody of the children and *Iddah* (*Iddah* is the time period, woman has to observe after the divorce or the death of her husband. The period is, if she is pregnant, till the delivery of the child but if she is not pregnant then three months or three menstrual periods. She cannot marry to another man during this period). See the *Qur'ānic* verses relating to Divorce, *Khul'* and *Iddat* such as, 2:228-229, 2: 232, 2:234-235, 4:128, 65:4.

³² For example, in the cases of *Majida Khatoon Bibi v. Paghalu Muhammad*, PLD 1963 Dac. 583; *Muhammad Ali v. Ghulam Fatima*, AIR 1935 Lah. 902; *Mst. Umatul Hafeez v. Talib Hussain*, AIR 1945 Lah, 56, the wife was denied the *Khul'*.

³³ *Bilqis Fatima v. Najmul Ikram*, PLD 1959 Lahore 566.

³⁴ PLD 1967 SC 97, at p. 112. Soon this trend led the women to apply for *Khul'* and they succeeded too, see for example *Muhammad Siddiq v. Ghafuran Bibi*, 25 DLR (S.C.) (1973) 1.

This led to the increase of divorces demanded by the women. At the same time, with increase of divorce ratio, the disputes for the child custody also multiplied.

iv. The Severity of the Divorce Consequences

Unlike UK and France, the divorce in Pakistan brings severe consequences for all the parties, i.e., husband, wife, and children. It does not bring only bad consequences for ex-spouses but rivalry and conflicts among their families too. Along with others, who suffer the most, are the children. They become hanged between mothers and fathers, and often suffer many psychological, mental and health problems. Even the children of divorced parents do not feel confident among their friends and society as well and their performance in schools gets affected, but the same case is not in UK and France where the divorce is not a social or religious taboo as in Pakistan³⁵.

v. Child Belongs to Whom?

In UK and France, the Child belongs to both of the parents and both are equally responsible for his upbringing. Parental Authority and parental responsibility in case of France and UK lie on both parents equally even after divorce. The article 372 of French Civil Code stipulates that, "*The father and mother exercise joint parental authority*"³⁶. Moreover, in UK, Section

³⁵ But the situation is getting changed and the women in Pakistan now can approach to the courts for their rights, breaking the social and cultural barriers, see for example, Cassandra Balchin (ed.), "*Women, Law and Society: An Action Manual*". (Shirkat Gah Women's Resource Centre, Lahore, 1996): 92.

³⁶ Sonia Cohen-Lang, "De la prestation compensatoire à l'autorité parentale commune ou solus consensus obligat", (*Gazette du Palais*, 12 mars 1994): 302. In fact, the Law No. 87-570 of 22 July 1987 (also called Law of Malhuret) provided the joint parental authority by the both parents and even by one too. However, in

2 of Children Act of 1989 provides that the duties and rights of parenthood are equal. On the other hand, case is different in Pakistan. It provides that the both parents are equally responsible for upbringing the child, but the whole financial burden and other needs lie only to the father. The father is the sole responsible for child financial needs³⁷.

In fact, under Pakistani law, child belongs to the father³⁸, but the mother is entitled to the physical custody of the child till the certain age. After that threshold age limit, the child goes to the father³⁹. However, it is not absolute but subject to the welfare of the child⁴⁰ and courts consider the facts case by case and the principles of the best interest and the welfare of the child rather than applying established principles of Muslim jurisprudence⁴¹. If the welfare of the child requires otherwise, these are not conclusive or absolute rules. What the courts have held is the best

the case of natural families, i.e., unmarried or adultery, the joint exercise remained with the judicial decision or a joint declaration of the portents. So, the articles 287 and 374 amended by the Law of 1987, for parental authority suppressing the custody, court had to decide with whom the child will have residence or alternate residence.

³⁷ Riaz Ahmad v. Zahid Hussin Kahn, 2004 SCMR 821

³⁸ Asgharali Engineer, *"Islam and liberation theology: essays on liberative elements in Islam"*. (Sterling Publishers, 1990).

³⁹ Rashida Patel, Legal Status of Women in Pakistan, in Nasra Mehboob Shah (ed.), *"Pakistani Women: A Socioeconomic and Demographic Profile"*. (Pakistan, 1982): 119.

⁴⁰ Firdous Iqbal v. Shifaat Ali, 2001 SCMR 838

⁴¹ Cassandra Balchin, *"A Handbook on Family Laws in Pakistan"*. (Shirkat gah Lahore, 1994): 164.

interest and the welfare of the child. So, even if the mother is awarded the custody of the child, the father is liable to pay maintenance for the child, because ultimately child belongs to the father. In fact, under Muhammadan Law, the guardianship of the father does not cease even if the child is under the mother's custody⁴². The father being legal guardian has constructive custody in law of his minor children⁴³. However, taking away the child by the non-custodial parent from the custody of custodial parent without his/her consent constitutes an offence of kidnapping, severely punishable.⁴⁴

vi. Misinterpretation by Multilateral Judicial and Religious Bodies

Another interesting thing in Pakistan, (especially the family law and generally the whole legal system), is the parallel but conflicting interpretation by the superior courts in Pakistan and the archaic interpretation preached by the Islamic jurist, *fatwās* (opinions) of 'Ulamās. If we talk about the religion, in Pakistan there is no consensus upon a single school of thought⁴⁵ and different sects provide different interpretations of the same thing. Unfortunate is, the jurists, scholars,

⁴² Abbas Hadjian, "The Children of Shari'a." *Los Angeles Lawyer*, (2013): 36.

⁴³ Mst. Mehnaz v. Judicial Magistrate 1st class, Attack, YLR 2008 Lahore 1669

⁴⁴ 2010 SCMR 1804

⁴⁵ Although there is not any provision in Law about any sect or whose jurisprudence will be followed or is state religion of Pakistan under Article 2 of the Constitution of Islamic republic of Pakistan, but courts have resolved this issue by their verdicts that in the case any person professes to be a Muslim but does not specify his particular sect, he/ she shall be presumed to be Sunni Muslim belonging to Fiqah-e-Hanafi, because the main stream or majority of the people in Pakistan follow the above said fiqh.

religious leaders and even the courts sometimes not only misinterpret the *Qur'anic* verses and *Hadiths* of Holy Prophet PBUH but manipulate to the extent to deny or minimise the rights and privileges to the women and children, bestowed by the Islam. I think, this problem does not exist in the courts of UK and France, being the secular countries.

vii. Amicable Separations and Divorces

In Pakistan, normally the spouses do not get divorced amicably and after divorce, they cannot reach at an amicable agreement over the custody of the children, if they have any issue. Almost all custody disputes come to the court, where the court has to opt one among the parents, with whom the child can live a better life. on the other hand, in France and UK, the parents when they feel that they cannot live more together, they plan mutually for separation and most of the times, they are successful to end up their disputes and differences without the intervention of the courts, regarding their disagreements in generally and custody the children in particular, if there are any.

viii. The Validity of inter-Parental Contracts Relating to Child Custody/Parental Authority

The French Law in the case of parental divorce or separation envisages that the parents should reach at amicable contract for the best interests of the child, because both the parents are the best judges for how to protect the best interests of their child, even the measures for the mediation are offered to the parents⁴⁶. Further if the parents could not reach at any agreement, then it the judge who will decide and how and with whom the child will be best served, and his best

⁴⁶ French Civil Code, Art. 373-2-7, 373-2-10, law No. 2002-305 of 4 March 2002, Art. 373-2-9, Law No. 2010-769 of 9 July 2010.

interests be protected⁴⁷. Same is the case in UK, where the divorced parents reach at amicable agreements and make voluntarily arrangements, which are satisfactory to the all parties concerned, i.e. father, mother and the children. The Courts honour this kind of agreement even religious arbitration but can be set aside if against the best interests of the child.⁴⁸

On the contrary such kind of amicable arrangements for the custody or residence of child are not common in Pakistan⁴⁹. However, if even there are such kinds of arrangements, the agreement between the parents relating to child custody is not exclusive, but what is the supreme, is the best interests of the child⁵⁰. For example, in 2006 in the case of *Mst. Razia Rehman v. Station House Officer and others*, the Supreme Court of Pakistan held that, even if the mother waived her rights of *hizanat* (custody) by any agreement or compromise, this compromise had no binding force in eyes of law⁵¹. The Court in another case held further that if agreement is against the

⁴⁷ *Ibid.* Art. 372-3. See also, Cour de Cassation, 1re Chambre civile 23 November 2011, Appeal No. 10-23391; 1re Cahmbre Civ., 3 December 2008, Appeal No. 07-19.767, Bull. 2008, I, No. 276. And even the Law No. 2011-1862 of 13 December 2011 established a system of mandatory family mediation prior to a referral to the family court on the terms of exercise of parental authority.

⁴⁸ Re AI and MT [2013] EWHC 100 (Fam.)

⁴⁹ Sharmila Mhatre *et al.*, "Access to Justice for the Women of Karachi: A pilot Assessment", Project Report by, CIET (Community Information, Empowerment and Transparency, Karachi, Pakistan, 2002): 26.

⁵⁰ *Mst. Aneeta Tanveer v. Muhammad Younus*, YLR 210 Krachi 513.

⁵¹ *Mst. Razia Rehman v. Station House Officer and others*, PLD 2006 S.C. 533. In the case of *Zahid Hussain v. Tahira Perveen*, CLC 2006 Lahore 1766, the Lahore

best interests of the child, then it was of no importance⁵². Sometimes, the courts try to make such arrangements that the child might get the love and affection of the both parents because none is the substitute of the other⁵³ and nor are the grandparents substitute to the mother's love⁵⁴.

ix. Shared/Divided Custody New developments

In UK and France, the concepts of shared or divided custody (residence) of the child have evolved, but these kinds of arrangements are very rare in Pakistan, that the both parents have custody over the child, or the child lives equal times with both parents. What is available in Pakistani legal system and culture, is only the *visitation rights*. Visitation rights are awarded to the non-custodial parent, that can be 2, 3 times per week, or once weekly, monthly etc. whatsoever the court feels reasonable. Most of the times, the visiting parent is *father*, because in custody cases, where the age of the child is less than 9, the custody is awarded to mother, so father has to meet all financial needs of the child/children and has visitation rights.

x. The Relations of Ex-Spouses after Separation

High Court rejected the father's contention that mother had herself abandoned the minor girl and had signed paper. Court held that this kind of agreement is of no importance and the custody of the minor was given to the mother.

⁵² Dr. Fauzia Haneef v. Dr. Raashid Javaid, PLD 2010 Lahore 206.

⁵³ Mst. Razia Rehman v. Station House Officer and others, PLD 2006 S.C. 533.

⁵⁴ Abdul Razzaque v. Dr. Rehnana Shaheen, PLD 2005 Karachi 610

In UK and France, it is not very bad thing or taboo⁵⁵ that the parents after getting divorce talk to each other especially in the matters concerning child. Both the parents can meet each other to discuss the child related issues such as school, education, health etc. but in Pakistan, after divorce, its (almost) enmity among the ex-spouses. The divorce does not remain among the spouses, but it goes beyond and the family of the both spouses get involved in enmity too. That makes and creates problems for children, as the both ex do not meet and talk after separation. So, the matters of children are not discussed between the parents and only the custodial parent is the authority in almost all spheres of life. Moreover, even after divorce, the custodial parent brainwashes the child against noncustodial parent about his/her cruelty, violence, non-cooperation, neglect, and bad character, so that the child automatically makes space from noncustodial parent. It is seen that child who, after divorce of his parents, have been in custody of one parent, after becoming adult, does not go or even does have talking terms to the noncustodial parent.

xi.State Intervention in Ruptured Families and the Sufferings of Children of Divorced Parents

Lastly, the state intervention and social security benefits in UK and France for the neglected, abandoned or otherwise affected children recover the children, but in Pakistan, due to multilateral problems, lack of political will and resources, there are not such kinds of initiatives and arrangements by the government at least practically, perhaps exist in papers. So, the children in

⁵⁵ The Muslims believe that the divorce is the worst thing that is allowed in Islam. There is a Hadith of the Holy Prophet PBUH that, أَبْغَضُ الْحَلَالِ إِلَى اللَّهِ الطَّلَاقُ *"the lawful thing which Allah hates most is divorce"*.

Pakistan, after the divorce of their parents suffer too much, than the children of those parents get divorced in UK and France.

xii. The Same Sex Marriages, Custody and Adoption of the Children

The same sex marriages in Pakistan are strictly prohibited and are severely punishable by imprisonment or fine or by both, but the same is permitted in UK and France. France permitted same sex marriages in May 2013 by *Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*, while before the legislation, in 2011, French Supreme Constitutional Court had held that same sex marriages were not contrary to the French Constitution⁵⁶. On the other hand, in UK, in July 2013, England and Wales allowed same sex marriage by *the Marriage (Same Sex Couples) Act 2013*. So, the question of child custody, adoption, parental authority or other child related issues for the homosexual parents is out of question in Pakistan, but these issues are regulated in UK and France, as the homosexuals can adopt a child, can have child custody and parental authority etc.

Conclusion

Custody simply entails the care, contact, maintenance and control over the child, which court awards to one or both (shared) parents following separation or divorce proceedings. However, the word custody may not signify the same thing in UK, France, and Pakistan. The different words and notions have been used in three jurisdictions. In Pakistani legal system words 'custody' and 'hizanat' are used. On the other side, in UK and France the institution of custody has gone through many changes. Talking about UK, instead of sole custody, they have devised joint

⁵⁶ Constitutional Council of France (Conseil Constitutionnelle), Decision No. 2010-92 of 28 January 2011.

custody, where both parents are entitled and responsible for the child even after separation. However, France even has devised a new institution called "residence" instead of custody, which earlier had been called as parental authority. Here too, in normal circumstances both the parents are responsible, but if court thinks that the best interest of the child could be in danger due to one parent, he/she can be denied visitation rights.

In Pakistan, the mother has preferred custodial rights over the father in the matters of nourishing and upbringing, while father's custodial rights prevail over mother in marriage and money matters, while in France and UK, both the parents are jointly responsible in all matters either custody or financial matters. However due to difference of social, cultural, and legal constructions, the custody awarding standards are different in all three jurisdictions. Nevertheless, in all three jurisdictions, what is the interpretation, the best interest principle enshrined by the United Nations Convention on the Rights of the Child 1989 in its Article 3 is always kept in mind as a primary and paramount consideration in all matters concerning child.