

An overview of violation of mother's right to custody of child and patriarchal influence: A critical analysis in reference to existing statutes and case laws

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Abstract

In Bangladesh, disputes over custody and guardianship involving Muslim parties are principally governed by Muslim personal law. There remains a constant dilemma in judicial decisions over custody and guardianship matters as to what should be the paramount consideration in awarding child custody to a party – should traditional Muslim personal law rules or the welfare of the child prevail? Custody of minor children is a very brittle and susceptible issue. Typically the term child custody is used in family law courts to the exemplified legal guardianship of a child under the age of eighteen. When the spouses are divorced then the question of child custody arises. Every parent have an equal right in the time of custody of their child even they are separate. The social practices of Bangladesh are institutionalized within a patrilineal and patrilocal system. Family, kinship and marriage play a major role in shaping social gender practices. The patriarchal structure of our society, seclusion of women from others, women subordination and factors like discrimination against women are not letting them enjoy their natural rights of womanhood. In consequence, the women in Bangladesh are getting deprived of their natural right to get the custody of their children and to some extent also from the guardianship. However in this write up an attempt has been taken to focus on the issues that in the unequal fight for custody between the sexes, it is regularly the women who lose because of their social disabilities and monetary constraints but behind which they themselves had no fault. Moreover, there is no stipulation that how much the child will proliferate both mentally and physically being in stroke with the mother. As both the *shariah* law and statutory law in our country is conferring the responsibility of maintenance of the children to the father and father is also considered as the legal guardian, therefore mothers' financial condition cannot be a decisive factor to justify her capability to get the custody of her child. Although, much has been talked about this instant issue but owing to patriarchal mind-set and women subordination, the mother's right to get the custody is very much within the theory and mostly not in practice.

Keywords: custody, guardianship, welfare of child, maintenance, divorce, discrimination

Introduction

A dispute may arise relating to child custody when a marriage breaks down and ends in divorce and also for various other reasons. In Bangladesh, the Family Courts Ordinance 1985 and the Guardians and Ward Act 1890 are followed while dealing with the cases relating to custody and guardianship. In some cases, a dispute may arise between the provisions of the Guardian and Wards Act over the provisions of the Muslim personal Law. In such case, the guardian and Wards Act, 1890 will prevail over the Muslim personal Law. A father is a natural guardian of his minor children. Even when the minor children are in the custody of their mother, the legal control of the children vests in the father. But guardianship and custody are not the same. So, in case when the couple divorce, the question arises who will be the custodian of the child? The father is the natural guardian and the mother is the custodian of the child till certain age. Mother is entitled to minor's custody even if she had to leave the home of her husband under unavoidable circumstances. This means that the guardian/father will have to perform the duties, including the duty to provide for maintenance of the child though the mother will be able to retain the custody of the child.

The mother is entitled to the custody of her male child until he is the age of seven years and of her female child until she has attained puberty (18 years). 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. According to Muslim law a mother is recognized as one of the most desirable person to have the custody of a small child. But in the matter of guardianship of children, a Muslim woman is definitely at odds. Under the Muslim law the father alone is the legal guardian of the children. However this write up will focus on custody and guardianship cases of Bangladesh in detail basically for two reasons. First, custody cases frequently bring to mind the primordial emotions and lead to bitterness and litigations, the victims of which are the children. Second, in the unequal fight for custody between the sexes, it is regularly the women who lose because of their social disabilities and monetary constraints but behind which they themselves had no fault. Here, we cannot in any way say that nonexistence of law is the main cause rather favorable court attitude, wakefulness among the common people and confirmatory action is necessary

Methodology This study is based on among other, on primary sources, such as books, articles, journals, case materials, internet sources, so that the analysis is taken with multi plenary approach by keeping the phase of justice method and socio economic variables in considerations. While quantitative data are necessary to prevalence of a phenomenon. It is the qualitative study that reveals the complexities. In the present study the combining of methods

are considered to overcome the difficulties involved in the study. Moreover, science in the write-up I have taken an attempt to focus on the practical scenario of patriarchal arbitrariness and women subordination in the society as well as the deprivation of the women from the right to get the custody of the children.

Guardianship under Muslim Law

Guardianship of a minor person means the overall supervision of the minor's temperament. It means that the care and welfare of the kid together with the liability to take care of it. It is more than mere custody of the kid upon a particular age.

The Statutory Laws Relating to Custody and Guardianship in Bangladesh

In Bangladesh, custody and guardianship of children related cases are dealt in the light of Family Courts Ordinance, 1985 and Guardians and Wards Act, 1890. Guardianship and custody are two separate matters. Even when the custody of the minor children rests with their mother, the father is a natural guardian. Generally, both the parents have the right of the child custody. However, when the marriage breaks down, the question arises who will be the custodian of the child.

Possession of a child physically means custody (hizanat). Under the Majority Act 1875, a father is the legal and natural guardian of the children until they attain the age of majority. Although a mother is not natural guardian under Muslim Law, she has a right of custody of her child up to the age of seven years in situation of a male child, and up to the age of puberty in situation of a female child. The higher courts developed various precedents in this connection with their decisions. The power of the family court to determine the entitlement of a party to the custody of a child is not limited to mere observance of the 'age rule', the supreme consideration is to be the concept of the welfare and best interest of the minor child, this is the main essence of such decisions. Thus, where the child's welfare is concerned, deviation from the literal application of the age rule is permissible.

In all cases, the interests of the ward are paramount. This has been confirmed by a number of judgments, such as Muhammad Abu Baker Siddique v. S.M.A. Bakar & others, (38 DLR (AD) 1986). The Court's ruling contradicted the classical dictates of Hanafi law according to which the mother's custody over a boy ends at 7. The Court stated that "indeed, the principle of Islamic Law (in the instant case, the rule of hizanat or guardianship of a minor child as stated in the Hanafi School) has to be regarded, but deviation there from would seem permissible as the paramount consideration should be the children welfare." (Nazly 2014)^[11]. Qumrunnessa Nazly also cited in his write up titled —Muslims personal Laws in Bangladesh: Issues of Women's Equality that The Court also pointed out that the rationale for the departure from classical positions is justified as there is no clear and distinct statement of the Quran or Sunnah to rely upon, and also because the jurists themselves never reached any consensus. The Zohra Begum v. Latif Ahmed Munawar (1965 (17) DLR (WP) and PLD 1965 (Lah) 695) and other rulings deviating from classical law are also cited. As there are detailed rules for the division of estates according to classical law, there is little legislation in this area. In general, property devolves upon the heirs

according to Hanafi or Jafari rules of succession. The Muslim Family Laws Ordinance 1961 also introduced obligatory bequests in favor of orphaned grandchildren, allowing them to inherit from their maternal or paternal grandparents in place of their deceased mothers or fathers. The Guardians and Wards Act, 1890 (GWA) is the core law which addresses guardianship and custody disputes in Bangladesh. The Family Court Ordinance, 1985 (FCO), a relatively recent law, made a few changes. These have been insignificant in respect of substantive legal provisions. However, they provided a new court with exclusive jurisdiction over all family matters, including guardianship and custody disputes. According to Section 5 of the FCO, a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: (a) dissolution of marriage; (b) restitution of conjugal rights; (c) dower; (d) maintenance; (e) guardianship and custody of children. The GWA, however, is not a self-contained law as it reserves the courts' (now the Family Courts) power to appoint guardians in accordance with the personal law applicable to the minor. Section 17 of the GWA further strengthens this rule by requiring courts to be guided by considerations of the minor's welfare as consistent with the personal law to which she /he is subject. Stipulated factors for consideration include the age, sex and religion of the minor and her/his capacity to form intelligent preferences and the character and capacity of the guardian, among others. Unlike Muslim personal law, the GWA does not differentiate between custody and guardianship and it charges the guardian with custody of the minor. In practice, the father being the guardian of the child under Muslim personal law is entitled to his/her custody, and the mother has little scope to apply for custody of the minor under GWA. However, the definition of guardian in the GWA, if read independently, including any person having the care of the person or property of a minor and it has been decided in a significant number of cases in South Asia that a mother can also file a petition for return of her minor child to her custody when such minor is removed from her custody. Under the legislation, if the minor is very young or is a female, the courts are directed to give preference to the mother.

Muslim Law and Mother's Right to Custody of Children Normally children are supposed to live both with their father and mother. The question whether a child will be with their father or mother may come Patriarchal Influence and Women subordination when the parents got separated from one another either by divorce or by any other form of dissolution of Muslim marriage. According to Shari'a, basically a father is the natural guardian of his children's persons and as well as her/him property. Shia doctrine also gives the child's paternal grandfather joint guardianship According to Shari'a, a child's paternal grandfather is his or her natural guardian after the father. 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 (Kalanauri 2016)^[9]. Depending on local laws, a father may be able to transfer his power of attorney over his child to other family members. The right to physical custody of child is not an absolute right in the sense that a mother or father who possesses physical custody of a child may not prevent each other from seeing their 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 other parent can see him or her. 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. Since, by definition, Muslim fathers satisfy the specific requirements of a male custodian, the following discussion will address only the requirements placed on a mother. Muslim law entrusts *hizanat* (custody) of children in their tender age to mother and the guardianship to father during formative years of the child. In the event of the father being alive, he is the sole guardian of the person and property of the minor children. We can appoint any person by his will, a guardian of his children. The right of *hizanat* belongs to the mother and nothing can deprive her except her own misconduct. It is a right recognized solely in the interest of the children but it is not an absolute right. This means that if at any time it is felt that in the circumstances other life it would not be conducive to the physical, moral or intellectual welfare of the child to be kept in her custody, she can be deprived of it. In the classical Hanafi Law the custody of the child is first vested in the mother. The Hanafi law as plasticized in India recognizes -the mother's custody until the son reaches 7 years or a daughters puberty wherefrom the custody is transferred to the father. Thus mother's right to custody is qualified.

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Requirements of a Mother Custodian

The right of the mother to the custody of her children continues even when she is divorced by the father of her children, but she forfeits the right of custody in certain circumstances, if she resides during the subsistence of marriage at a distance from the child's father's place of residence, if she neglects her children or fails to take care; if she leads an immoral life, e.g. if she is a prostitute or if she marries a person related to the minor's prohibited degrees or by marrying a stranger or by change of religion (Rahman, 1907, p 212) ^[14]. But the cases on custody in Bangladesh protect women more, as they exhibit mother's right of custody of young children as almost an absolute right. Enlightened pronouncements in the cases of custody of young children have encouraged mothers to claim custody beyond the conventional limitations relying on arguments about the welfare of the child. Likewise India and Pakistan, the *hizanat* or custody law of minor children is being governed in Bangladesh by the combination of statute laws i.e. The Guardians and Wards Act, 1890, Muslim personal laws, case law, and Court's concern for children well-being. However, the modern trend of judgment started, in fact, from the Pakistani period. The cases of custody demonstrate that the judiciary in Bangladesh is deciding the problem on the paramount consideration of the welfare of the minor. In *Abu Bakar Siddique v S.M.A. Bakar and Others*, 38 DLR (1986) AD 106 on the strength of precedents in the Pakistani period, the Appellate Division ruled: It is true that, according to Hanafi School, father is entitled to the *hizanat* or custody of the son over 7 years of age. However, it is an established fact that a mother is normally seen as better qualified to care for the child in his or her tender years and that committing the custody to her is of advantage to the child (*Rahimullah Chowdhury v Mrs. Sayeda Helali Begum*, 20 DLR (1968). But in *Dr. Rashiduddin Ahmed v Dr. Quamrunnahr Ahmed*, 30 DLR (1978) 208-211 the High Court considered it to be in the best interest of the children to place them in the interim custody of their father while the issue was finally settled in the lower court.

However, the cases discussed above shows that in custody matters the higher court lead in favour of mothers. It is more so in the lower courts. The favourable attitude of these courts has encouraged mothers to put forward claims for custody of children above the age limit, laid down by the classical jurists of the Hanafi School, and rely on the welfare doctrine of custody. This seems to reflect sensitization of the judiciary to give more rights to women.

Conclusion

In Bangladesh, though the judiciary is supposed to hand over the custody of child to the mother on the basis of the principle of welfare but it is always found that the financial condition of the mother is always becoming a considering factors behind renouncing the custody of the child to the mother. But there is no reservation that how much the child will grow rapidly both mentally and physically being in stroke with the mother. And it is only the mother who can afford the best care and support to the child. However, it is a matter of grief that whenever the question of custody comes, the question of material comfort comes at first and in majority cases the custody to the mother is denied. If the financial condition of a mother is always becoming a considering factors behind renouncing the custody of the child then in a country like Bangladesh no women will be

considered as an eligible one to get the custody of her children. Because, in Bangladesh still women are considered to be backward and the percentage of earning women in Bangladesh is low, therefore, considering the financial capacity as the only decisive factor behind the custody of the child is totally irrational and unexpected one. Moreover, a mother's love and affection cannot be compared or measured with anything else. As both the shariah law and statutory law in our country is conferring the responsibility of maintenance of the children to the father and father is also considered as the legal guardian therefore it should not be a matter of consideration whether the child is with the mother who is not financially solvent because the father is bound to provide the maintenance.

But the consideration factor should be the wellbeing of the child rather than the mother's financial condition. Mother herself alone is able to ensure the best interest of the child irrespective of her financial condition. According to our shariah law and statutory law father is always responsible to be responsible for maintenance of the child. Whether the child belongs to the mother or father is not the factor here. Therefore, the financial condition of the mother should never be a concern in case of denying the custody of the child to the mother rather the principle of welfare should be taken into consideration and mother should for eternity get main concern to get hold of the custody of the child.

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