

LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE

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ABSTRACT

Guardianship is the process by which a court delegates the right to make those decisions to a substitute decision maker. The aim of this study is to review the laws, legal practices and court procedures currently followed in Bangladesh in cases relating to guardianship. With particular focus on the issue of guardianship of children and mothers' right as guardian, the aim of this study is to review the applicable laws, mechanisms, and procedural reforms. This article also attempts to deliberate on the guardianship of person and property of a minor in Family laws and Statutory laws of Bangladesh with special focus on mothers right as a guardian. For family laws the article refers to the Muslim laws, Hindu laws and Christian laws. A thorough analysis of family laws, statutory laws and trends of court in these regard is carried out. Effort is made to bring out similarities, differences and developments in child custody laws of Bangladesh. In the end it is suggested that laws can be amended for the greater interests of minor and protecting mother's right of guardianship.

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INTRODUCTION

A guardianship is a legal relationship created when a person or institution named in a will or assigned by the court to take care of minor children or incompetent adults. Sometimes called a conservatorship. To become a guardian of a child either the party intending to be the guardian or another family member, a close friend or a local official responsible for a minor's welfare will petition the court to appoint the guardian. The guardianship of a minor remains under court supervision until the child reaches majority at 18. The judge does not have to honor the request when someone is named in a will as guardian of one's child in case of the death of the parent, it is construed as a preference, but is usually honored. The term "guardian" may also refer to someone who is appointed to care for and/or handle the affairs of a person who is incompetent or incapable of administering his/her affairs. Guardians must not benefit at the expense of those they care for (wards), and in many cases are required to make accountings to the court on a periodic basis. In some courts, a guardian may be reimbursed for attorney fees related to the guardianship. Court rules regarding accountings of expenses and requirements of guardians vary and local court rules should be consulted.

RESEARCH QUESTION

1. Is the law of Bangladesh sufficient enough to protect the rights and interest of minor as well as mother's right of guardianship?
2. Is this law required to be amended with conformity of the modern world?

MINOR IN BANGLADESH

According to the Black's Law Dictionary, Minor means an infant or person who is under the age of legal competence. A term derived from the civil law, which described a person under a certain age as less than so many years. According to Sec: 4(1) of the guardian and Wards Act 1890 "minor" means a person who, under the provisions of the Majority Act, 1875, is to be deemed not to have attained his majority.

According to Section: 4 (2) of The Guardian and Wards Act, 1890 "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. Age of majority of persons domiciled in Bangladesh: Under Section 3 of the Majority Act, 1875, Subject as aforesaid, every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Schedule I, Order XXXII of the Code of Civil Procedure, 1908,] has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of

Wards before the minor has attained that age shall, notwithstanding anything contained in Succession Act, 1925,] or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

GUARDIAN IN BANGLADESH

Guardian means a person who takes care of and provides maintenance for him/her. A guardian may be natural such as father, or mother, or legal who is appointed by the court. However, anybody who takes care of or maintains can be a guardian. Guardianship means the acts of a guardian through which he/she discharges responsibilities in that capacity.

According to Sec: 4(2) of The Guardian and Wards Act viii of 1890 “Guardian” means a person having the care of the person of a minor or of his property, or of both his person and property.

GUARDIANSHIP IN MUSLIM LAW

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. 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 Act 1890 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.

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.

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 foster age5(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. In the light of hadith literature available and the decisions of Prophet Mohammad (pbuh) on the cases

brought before him on child custody, three principals 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 remarry, Secondly in a situation where both parents profess different religions, custody of the child should go to that parent who follows the religion of Islam and lastly when the child has gone past the years of minority (7 years) he will be given an option to choose between both parents⁸.

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 mother⁹. When the child reaches the age when he is in a position to decide right from wrong, his wish is taken into consideration¹⁰ and mother has a superior right of custody as long as she does not remarry. In addition when the child is in mother's custody, the father is responsible for his nafaqa. 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. 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.

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

Three kinds of guardianship:

In Muslim law, guardians fall under the following three categories: Muslim law recognizes three kinds of guardianship. They are as follows:

1. Guardianship of person 2. Guardianship in marriage 3. Guardianship of property

Guardianship of person

Under Muslim law the mother is entitled to use custody of the person of her minor child up to a certain age according to the sex of the child, during marriage and after separation from her husband, unless she be a wicked or unworthy to be trusted.

Mother:

- (i) Under Hanafi School, mother is the guardian of her minor till he attains age of 7 years and of her daughter till she reaches puberty. Under shia school, mother is the guardian of her son till he attains the age of 2 years and of her daughter till she attains the age of 7 years.
- (ii) An illegitimate child is left in the charge of mother till the age of 7 years but legally belongs to neither of his parents.
- (iii) In the absence of mother, under hanafi school, custody belongs to: (a) Mother's mother (b) Father's mother (c) Full sister (d) Uterine sister (e) Consanguine sister (f) Full sister's daughter (g) Uterine sister's daughter (h) Consanguine sister's daughter (i) Maternal aunt (j) Paternal aunt

However, the right of *hizanat* of the mother is lost if she leads an immoral life or, neglects to take proper care of the child or, marries a person not related to the child within prohibited degrees or, if during the subsistence of marriage, she goes and resides at a distance from the father's place.

In *Rahima Khatoon v Saburjanessal*[1], the court held that the mother loses the guardianship of the minor daughter if she remarries with a person not related to the child within prohibited degrees. In this case, the court granted the certificate of guardianship to the child's paternal grandmother.

In default of mother and other female relations, *hizanat* belongs to:

- (a) Father (b) Nearest paternal grandfather (c) Full brother (d) Consanguine brother (e) Full brother's son (f) Consanguine brother's son (g) Full brother of the father (h) Consanguine brother of the father (i) Son of father's full brother (j) Son of father's consanguine brother
- Father- is the defacto guardian of son over the age of 7 years under Hanafi school and 2 years under Shia school and unmarried daughter over the age of 7 under Shia school and who has attained puberty under hanafi school.

The court will interfere with the father's guardianship of his children only if he is unfit in character and conduct or is unfit as regards external

circumstances or waives his right or enters into an agreement to the contrary or is out of jurisdiction of the court or intends to go abroad.

Guardianship in marriage (jabar)

The following persons can act as guardians in the marriage of a minor, in the order of enumeration:-

(i) Father (ii) Father's father (iii) Full brother and other male relations on the father's side (iv) Mother (v) Maternal relations within prohibited degrees (vi) Qazi or the court Shariah law recognizes only the father and failing him the father's father howsoever high as guardian in the marriage of a minor. The rule of Muslim law is that when a remote guardian allowed marriage, when the nearer one is present, the validity of the marriage is dependent upon the latter's ratification and consent. A marriage by a remoter guardian when the nearer guardian is present and has given his consent is not only irregular but void.

Guardianship of property

The guardianship of a child's property becomes an issue where the child acquires significant assets particularly through succession to the deceased's estate via Testamentary succession under the deceased's will or succession by operation of law.

The guardian is responsible for managing the child's property honestly and in his best interests, using it to pay for normal living expenses, health and education. A guardian is a fiduciary and is subject to a very high standard of care in exercising his powers. However, there are cases where the guardian fails to discharge his duties accordingly and wastes or mismanages the child's property causing financial loss to the latter's property. If a minor owns movable or immovable property, a guardian is necessary to manage it. Muslim law prescribes certain persons in order of priority who can be a guardian of a minor's property. Three kinds of guardians are recognized for the purposes of guardianship of property such as-

a. Legal guardian b. Guardians appointed by the court c. De facto guardian

(a) De-jure guardianship- legal or natural guardian order of persons entitled to guardianship of the property of a minor:- (i) Father

(ii) Executor appointed by father's will (iii) Father's father

(iv) Executor appointed by the will of father's father

(b) Certified guardianship- guardian appointed by the court- in absence of legal guardians, the duty of appointing a guardian falls on the court.

(c) De facto guardianship- a person who is neither a legal guardian nor a guardian appointed by court but has voluntarily placed himself in charge of the person and property of a minor is known as de facto guardian. He is a mere custodian of the person and property of the minor and has no right over them.

Mullah's "Principle of Mohameddan Law" deals with legal property guardians of a Muslim minor in Section 359. In the order, only father,

executor appointed by the father's will, father's father and the executor appointed by the will of the father's father, are legal guardians of property. No other relation is entitled to be the legal guardian of the property of a minor has no power to sell the immovable property of the minor except in the cases [1] where he can obtain double its value; [2] where the minor has no other property and the sale is necessary for his maintenance; [3] where there are debts of the deceased, and no other means of paying them; [4] where there are legacies to be paid, and no other means of paying them; [5] where the expenses exceed the income of the property; [6] where the property is falling into decay; [7] when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Removal of guardian

A guardian can be removed in the interest of the minor. The court may remove a guardian appointed or declared by court or a guardian appointed by will or other testament if: (1) He abuses trust (2) Fails to perform his duties (3) Incapacity to perform duties (4) Ill-treatment or neglect of ward (5) Continuous disregard of provisions of Guardianship and Wards Act or of any order of the court (6) Conviction of an offence showing moral turpitude (7) Having interest adverse to his duties as a guardian (8) Ceases to reside within limits of the court (9) Goes insolvent (guardian of property) (10) Cease to be under the law to which the minor is subject.

Mothers right of guardianship under Muslim law:

According to the principles of established Muslim jurisprudence, father is the natural guardian (Wali) of the person and property of the minor child. 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 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 the other one the mother prevails over the father and that is in matters of nourishing and upbringing'.

In Muslim Law mother is not the natural or the legal guardian of the child, and is merely entitled to preferential custody up to certain ages. In absence of father, his executor and in executor's absence father's father and his executor are natural guardians. Brothers/Mother/Sister cannot be natural guardians unless so appointed by court or by will (testamentary guardians) hence property sold by mother of minor – without court's concurrence is VOID. The father or the paternal grand-father of the minor may appoint the mother, brother or uncle or any other person as his executor or executrix of his will in which case they become legal guardian and have all the powers of the legal guardian. The Court may also appoint any one of them as guardian of the property of the minor in which case they will have all the powers of a guardian appointed by the court. In the case of *Imambandi v. Mutsaddi* [(1918) 45 I.A. 73] the Judicial Committee envisaged the grounds on which and the circumstances in which the property of a minor could be alienated by legal guardian. In *Venkama Naidu v. S.V. Chistry* [AIR 1951 Mad. 399], the Madras High Court had held that after the father's death, the mother, as the guardian of the minor, has no power to execute a sale deed. Therefore, the sale deed executed by the mother was held to be void and inoperative under mohamaddan law. In *Mumammadan law* by Syed Ameer Ali [Vol .2] also it is stated at page 500 that unless mother is appointed by the father as the guardian of his minor children's estate or is so appointed by the Judge, she has no power to intermeddle with their immovable property. All her dealings with the property are ipso facto void. In case the minor has no means of support except the property, she must apply to the court for sanction in order to deal with the property. Father is the natural guardian and in his absence other legal guardians would be entitled to act. The same principle has been consistently been adopted in cases of gifts to minor's – Mother/Brother in absence of father's consent/acceptance – does not constitute valid acceptance to the gift.

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.

In Bangladesh now the welfare doctrine reveals that the interest of the child will get paramount importance to the court to determine who the custodian will be. Authoritative precedent of the welfare doctrine is the *Abu Bakar Siddiqui* case. In this case the Appellate Division of the Supreme Court deviated from the traditional principle of the Hanafi

School regarding the duration and allowed custody in favor of the mother though the child crossed the age limit. Here custody of a boy over seven years of age, who was sick and needed treatment abroad, has been given to the mother, who was a physician. The Court considered three grounds in giving this verdict. First, the mother in this case is the best person to rear up a sick child than any other person including the father. Secondly, there is neither *Quranic* injunction nor tradition of the *Prophet* regarding custody of a child. Thirdly, there is no consensus among the Muslim jurists on the question.

Though there are numerous cases where courts have observed that the welfare of the child will get paramount importance to determine the custody, the *Abu Bakar Siddique's* case is the only one where the court has deviated from the traditional rule of the Hanafi School. Mullah observes that a female including the mother will lose the right to custody if (a) She re-marries a person not related to the child within prohibited degrees; (b) If she goes and resides, during the subsistence of a valid marriage, at distance from the husband's place of residence; (c) If she is leading an immoral life and; (d) If she neglects to take care of the child. Therefore, re-marriage of a mother is a crucial point to determine the custody of a child under traditional Muslim law.

The mother is the best person to get the custody of an infant, her right is not absolute. Her right is rather conditional, under control and supervision of the husband. It is true that the courts have been following the welfare doctrine to determine the custody of the child; but benefit of this doctrine mostly goes to the husband. Sometimes the wife is being deprived of her right to custody due to the welfare, Economic condition or the point that she is not financially sound enough to support the child is one of the common reasons for denying her the right. Our courts do not direct the father to give adequate expenses of the child while it is in the custody of the mother in accordance with the living standard. For example, in the *Nilufar Majid's* case the court has deprived the mother from getting custody of her child on two grounds: (a) she is re-married to a stranger and (b) being a service holder she will have to spend most of her time in the office. Therefore, the child will mostly depend on the maidservant which, according to the court, is against the welfare of the child.

It is also interesting to see that the court does not pay attention to the re-marriage of the husband and does not consider it harmful to appoint him as the custodian of the child, even though the busyness of a father is immaterial whereas this point is strong enough against the mother of the custody of her child.

In the matter of guardianship of children, a Muslim woman is definitely at odds. Under Muslim Law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian either of the person or property of the child; the father alone, or if he is dead, his executor is the legal guardian. Salma Sobhan points out "In Islam a careful distinction is made between being entitled to the custody of one's children and being

their guardian.....one would be tempted to compare the difference between these two concepts to the difference between possession and ownership. In any event, in Muslim Law, the mother is never entitled to the guardianship of her children.....However; a mother is always entitled in the first instance to the care and custody of her young children. Her sons she may keep till they are seven, and her daughters till puberty. The father is responsible for their maintenance during that period. A mother may lose custody of her children, particularly her daughters, if she re-marries a stranger, someone that is, who is not barred to the children by the rule of consanguinity. These are the basic rules, but they have been modified, not only by the Guardian and Wards Act, but there is also a fairly substantial amount of case-law on the subject, which on the whole has been very sane. "(16) It is laid down by the Guardian and Wards Act, 1890 that the courts have stated that these provisions are for the benefit and protection of the child, and that it is the courts paramount duty to consider the welfare of the children over the rights of the parents. (20 D.L.R.1968 P.1). According to Salma Sobhan again "Thus remarriage of the mother outside the permitted degrees has not been held an absolute reason for depriving her of the custody of her children. Were the children having been all along in the custody ceased, it was still considered advisable to let them continue in her care and control, as the father had re-married and it was felt that the children's interests would not be so well looked after by their step-mother. The father is only free from the burden of maintaining his children where they are being withheld from him illegally. The mother's poverty is never a sufficient reason to deprive her of her right to the custody of her children." (Dhaka Law Reports, 1955, 1958, 1964 and Guardian and Wards Act, 1890.) Under the Guardian and Wards Act, further, a mother can always apply to the court to be appointed the guardian of her children.

GUARDIANSHIP (RIGHTS/RESPONSIBILITIES GRANTED) AS PER BANGLADESHI LAW:

The Guardian and Wards Acts, 1895

According to Section 4(2) of The Guardian and Wards Act, 1895 "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property: Minority means 4(1) "minor" means a person who, under the provisions of the Majority Act, 1875, is to be deemed not to have attained his majority. Age of majority of persons domiciled in Bangladesh: Under Section 3 of. Majority Act, 1875, Subject as aforesaid, every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Schedule I, Order XXXII of the Code of Civil Procedure, 1908,] has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall,

notwithstanding anything contained in Succession Act, 1925,] or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

Power of the Court to make order as to guardianship

Section 7

- (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-
 - (a) appointing a guardian of his person or property, or both, or
 - (b) declaring a person to be such a guardian, the Court may make an order accordingly:
Provided that no person, other than a citizen of Bangladesh, shall be appointed or declared to be a guardian of a minor who is a citizen of Bangladesh.]
- (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.
- (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

Matters to be considered by the Court in appointing guardian

Section 17

- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
- (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
- (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

- (4) The Court shall not appoint or declare any person to be a guardian against his will.

Guardian not to be appointed by the Court in certain cases:

Sec: 19

Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor 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 provisions of this Act with respect to European British subjects, 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.

Rights/responsibilities of Guardian:

Variation of powers of guardian of property appointed or declared by the Court:

Section 32. Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject. Right of Guardian so appointed or declared to apply to the Court for opinion in management of property of ward sec: 33. (1) A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward. (2) If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.(3) The guardian stating in good faith the facts in the petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.

Obligations on guardian of property appointed or declared by the Court :

Sec: 34. Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall,-

- (a) if so required by the Court, give a bond, as nearly as may be in the prescribed form, to the Judge of the Court to ensure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;
- (b) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court or within such other time as the Court directs, a statement of the immoveable property belonging to the ward, of the money and other moveable property which he has received on behalf of the ward up to the date of delivering the statement and of the debts due on that date to or from the ward;
- (c) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs;
- (d) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts, or so much thereof as the Court directs; and

apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.

Duties of guardian of the person

Section: 24. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

Sec: 27. A guardian of the property of a ward is bound to deal therewith as careful

ly as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts

which are reasonable and proper for the realization, protection or benefit of the property.

Powers of testamentary guardian:

Sec: 28. Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immoveable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order of the court.

Article 28(4) of the Constitution of Bangladesh permits the making of special provision in favor of women or children or for the advancement of any backward section of citizens and the above Article permits the State to make special provision for children, amongst others. Then came the Children Act, 1974, which predated the United Nations Convention on the Rights of the Child 1989, the "CRC", by about 15 years. It is beneficent legislation purposely enacted in accordance with various international instruments of the United Nations in order to safeguard the juvenile from exposure to the rigors of the process of Court.

Then came the Family Courts Ordinance, 1985, providing for the establishment of Family Courts and under section 5 of the Ordinance, a Family Court has exclusive jurisdiction to entertain, try and dispose of any suit relating to or arising out of all or any of the following matters:

- (a) dissolution of marriage
- (b) restitution of conjugal rights
- (c) dower
- (d) maintenance
- (e) guardianship and custody of children

CASE LAWS

Although under traditional Islamic Law the mother cannot be recognized as a guardian, in appointing or declaring a guardian of a minor the Courts in Bangladesh consider the welfare of the minor as provided in subsection (1) of section 17 of Guardian and Wards Act 1890. The Appellate Division in the case of *Md. Abu Bakar Siddique v. S.M.A Bakar* reported in 38 Dhaka Law Reports (Appellate Division) page 106 held that the principle of the best interests of the child is to be the determining factor in deciding the custody of children and the courts in Bangladesh are now following this principle. In the above case the Appellate Division held, "In case involving the question of guardianship their decision are seen to be influenced by the concept of welfare of the minor child concerned." In this regard it may be mentioned that, under the provisions of the Guardians and Wards Act, the Court to whom an application is made under that Act must

be satisfied that the welfare of the minor requires the appointment of a particular person as his guardian, but the court is to make the appointment consistently with the law to which the minor is subject. Though there are numerous cases where courts have observed that the welfare of the child will get paramount importance to determine the custody, the *Abu Bakar Siddique's* case is the only one where the court has deviated from the traditional rule of the Hanafi school¹ as to the age limit of the child.

An important case in Bangladesh regarding child abduction (cross-frontier problems) is *Abdul Jalil v. Sharon Laily Begum* reported in 50 Dhaka Law Reports (Appellate Division) page 55. The facts of the above case are that Sharon Laily Begum, S, was born on 24 April 1968 in Middlesborough, England. Abdul Jalil, A, originally hailed from Bangladesh. A and S were married on 12 July 1984. In due course they had four children, all born in England. In November 1993, A took S and their four children to Bangladesh for a visit but on arrival in Bangladesh A took away all their passports and over the next 19 months he visited England on several occasions but he kept S and the children in a rented house in Dhaka and not only refused to take them back to England, but also subjected S to physical abuse. On 8 May 1995, A deceitfully removed the children including the youngest one, who was a breastfeeding infant, from the custody of S and took them to his parental home in the village, Sylhet. On 10 May 1995, S received a copy of the notice of divorce dated 9 May 1995.

Having failed to see her children, S returned to England and filed a suit in the High Court Division of Justice (Family Division). The said Court, by order dated 12 July 1995, directed that the children be made wards of Court and they be returned to its jurisdiction. By a further order dated 14 July 1995, the said Court directed that A be forbidden from seeking to prevent or delay S from bringing the children to the jurisdiction of the said court and further directed that A forthwith handover the children to the physical care of the petitioner S and that the children remain in the interim care and control of S until further order.

With the above backdrop S brought an action in the High Court Division of the Supreme Court of Bangladesh under Article 102(2) b(i) of the Constitution of Bangladesh in the nature of *habeas corpus*. In the meantime on 30 July 1995 A had filed an application before the Family Court of Bangladesh under section 25(1) of the Guardian and Wards Act 1890 read with section 5 of the Family Courts Ordinance 1985 for custody of the children. The High Court Division of Bangladesh entertained S's application but without finally deciding the question of custody, held that S, as mother, was entitled to the custody of the children below the age of 7 years and the father was to have custody of the children above 7 years. A filed an appeal to the Appellate Division on the question as to the maintainability of the writ of *habeas corpus* and the Appellate Division, referring to section 17 of the Guardian and Wards Act 1890, held that in proceedings like this it was not the rights of the parties but the rights of the child which were in issue and accordingly, in the circumstances, S, the

aggrieved mother, had the right under the Constitution to immediate custody of the children which could be ordered in the interest and for the welfare of the said children, until the matter was finally decided by the Family Court. In the above decision the Apex Court took note of the principles propounded in the General Assembly of the United Nations which were adopted and proclaimed on 20 November 1959 to the effect that the child shall enjoy special protection and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

GUARDIANSHIP UNDER HINDU LAW

In Hindu law mother is not legal guardian. Guardians of the minors are:

(i) Father,

(ii) Persons appointed by will by father,

(iii) Person appointed by court and Guardians and Wards Act, 1890. Thus mother can be deprived of guardianship by father by appointing guardian by will. It is a gender biased law and contradictory to the law of equality. Controversially, mother is the natural guardian of her illegitimate child. Thus puts extra burden on mother.

There is significant gender imbalance when it comes to guardianship of children under Hindu family laws. The father is the natural guardian of the person and property of his minor children. In Order of priority, the mother comes next, but the father has been given the authority to appoint by will, some other person who supersedes the mother. Thus, it is abundantly clear that the father has an absolute dominance on the issue of guardianship of children. It is this author's view that the law in this regard should also be modified. Now here in the world can we see such an imbalance of authority when it comes to issues of guardianship. At least, when it concerns children, one would have thought that women should have an upper hand.

CHRISTIAN LAW

Some of the civil laws directly governing family matters of Christians in Bangladesh are as follows: i. The Christian Marriage Act, 1872

ii. The Divorce Act, 1869.iii.The Guardian and Wards Act, 1890.iv.The Succession Act, 1925.

Sections 41-44 of the Divorce Act, 1869 deal with provisions as to the custody of children . The matter has been left to the discretion of the Court. Christians in Bangladesh are governed generally by the provisions of the Guardians and Wards Act of 1890 in matters relating to guardianship of minors in respect of their person and property.

Christian law per se does not have any provision for custody but the issues are well solved by the Divorce Act 1869. The Divorce Act, 1869 contains provisions relating to custody of children. Section 41 of the said Act provides with the powers to make orders as to custody of children in suit for separation. -In any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court. Century old civil laws governing Christians in Bangladesh are not able to provide women equal rights. The situation is even worse in the case of Catholic women who are morally bound by Canon Law or the Law of the Catholic Church. But it is high time that the laws are brought in conformity with the changing world.

RECOMMENDATIONS

In this matrix of problems, a secular Uniform Family Code has been demanded by the progressive quarters of the society. Their conviction is that Bangladesh is under an obligation to maintain the principle of equality under the Constitution and also in accord to international human rights mechanisms. On the other hand, this demand has encountered strong opposition and resistance by the traditionalists who believe that the religious law is God's law or eternal and no one has the authority to alter it. The Law Commission Report 2005 rejected the demand of framing the Uniform Family Code taking the shelter of S.2 of the Muslim Personal Law (Shariat) Application Act of 1937 and Articles 8(1) and 8(1A) of the Constitution. The heated debate over the adoption of a Uniform Family Code seems to be unending. There are those who feel that the personal laws should be codified instead of its present unwritten form so as to stop misinterpretation and arbitrary judgments. There are those who suggest the partial reforms to the personal laws in order to remove the inconsistencies and discriminatory provisions keeping the personal laws in its traditional religious shape. This denotes the harmonization of family laws.

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.

In Bangladesh now the welfare doctrine reveals that the interest of the child will get paramount importance to the court to determine who the custodian will be. Authoritative precedent of the welfare doctrine is the *Abu Bakar Siddiqui* case. It is also interesting to see that the court does not pay attention to the re-marriage of the husband and does not consider it

harmful to appoint him as the custodian of the child, even though the busyness of a father is immaterial whereas this point is strong enough against the mother of the custody of her child. Sometimes the wife is being deprived of her right to custody due to the welfare, Economic condition or the point that she is not financially sound enough to support the child is one of the common reasons for denying her the right. Our courts do not direct the father to give adequate expenses of the child while it is in the custody of the mother in accordance with the living standard. For example, in the *Nilufar Majid's* case the court has deprived the mother from getting custody of her child on two grounds: (a) she is re-married to a stranger and (b) being a service holder she will have to spend most of her time in the office. Therefore, the child will mostly depend on the maidservant which, according to the court, is against the welfare of the child. So mother should have prior right over her child in case of guardianship of person as mother is the best custodian and in case of guardianship of property she must get preference in absence of father .

In India radical changes as regards Hindu laws have been made but in Bangladesh the ancient pre-1947 laws have remained in force. The reason behind the changes in India is that the majority of the population in India is Hindus, they themselves demanded changes, the leaders of this community came forward and consequently changes had been made through enacting laws by legislature. But in Bangladesh the issue is avoided as a sensitive minority issue. Even the leaders of this community don't take any major attempt to address the problem. As there is no attempt to reform Hindu personal law, so one question may arise and that is whether there is any constitutional bar to reform Hindu family law. If we read Articles 10, 19, 27, 28 and 29, we see that there is no such bar in our constitution rather it encourages the Govt. to remove social and economic disparities among the citizens. In fact, free democratic environment is needed for the reforms of Hindu laws. The government recently enacted the Hindu Marriage Registration Act, 2012. This provides for registration of Hindu marriages on an optional basis. The author supports the view that reforms have to be introduced in the sphere of Hindu family laws on a priority basis. Hindu women should have preferential rights regarding guardianship of children; and there should be strict legal requirements for a valid marriage, regarding, age, consent, capacity and form.

Century old civil laws governing Christians in Bangladesh are not able to provide women equal rights. The situation is even worse in the case of Catholic women who are morally bound by Canon Law or the Law of the Catholic Church. But it is high time that the laws are brought in conformity with the changing world. But existing laws and customs on Christian marriage are not in conformity with the constitutional norms and international human rights obligations on equality and non-discrimination. It should be mentioned that personal laws of Christians in many countries underwent massive changes in line with universal norms of human rights. Similar arrangement should be made in Bangladesh with the consultation

of Christian communities to make the personal laws of Christians in consistent with international human rights obligations.

CONCLUSION

Article 28(1) of the Constitution of the People's Republic of Bangladesh pledges not to discriminate on the grounds of gender. As a ratifying country of CEDAW and by not having any reservation towards Article 15, Bangladesh is bound to grant women equality in all spheres of public as well as personal life. The mother is the best person to get the custody of an infant, her right is not absolute. Her right is rather conditional, under control and supervision of the husband. It is true that the courts have been following the welfare doctrine to determine the custody of the child; but benefit of this doctrine mostly goes to the husband. Sometimes the wife is being deprived of her right to custody due to the welfare, Economic condition or the point that she is not financially sound enough to support the child is one of the common reasons for denying her the right.

Discrimination regarding guardianship and custody of children between father and mother should be abolished and the government should take measures to ensure preferential rights regarding guardianship of children. Article 182 of the Turkish Civil Code states, "As a principle, the judge grants the custody of the children to the parent he or she believes will look after the children better. Men do not have any superiority over women in this respect." In Bangladesh we can also apply this in guardianship law.

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