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# **Patriarchal Influence and Women subordination in Bangladesh and Violation of Mothers' Right to custody of Child: A critical Analysis in reference to existing statutes and case laws**

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## **Abstract**

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 mothers' right to get the custody is very much within the theory and mostly not in practice.

**Keywords:** Custody, patriarchy, subordination, divorce, discrimination, guardianship.

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## Prologue

Bangladesh has a legal system consisting two types of laws, the general and the personal laws. The general law could be said to be based on egalitarian principles of sexual equality but the personal or family law based on religion, does not operate on the basis of absolute equality to men and women moreover, the patriarchal interpretation of the law continues the dominance of patriarchal attitudes. But the religious and official family laws of Bangladesh clearly aim for gender equality. The crux of the problem is that many women in Bangladesh today are deprived even of the rights granted by the religious and state sponsored family laws. Women in Bangladesh are subordinated within an intensely hierarchical system of gender relations which constantly attempts to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled (Kabeer Naila, 1998, pp. 95-121). Islamic law is based primarily on the religion of Islam. The Holy Quran and the early Islamic law are concerned about the betterment of the status of women (Khan Qamaruddin, 1990, p13). On the other hand, Hindu personal laws are based on Hindu dharma or religion which had its origin in India. There are three sources of dharma: Sruti (Vedas), Smrti (memory) and good customs. Vedas constitute the fundamental sources of Hindu religion. The Vedic texts, considered to be revealed and heard (sruti or oral knowledge) by the most ancient sages from God and handed down from generation to generation, are of primary importance Smrti or memory is the second source of dharma and includes, amongst others three codes like the Code of Manu, the Code of Yajnavalka and the Code of Naroda. It has rightly commented that every moral obligation defined in the sharia does not form a legal obligation under the fiqh (Fyzee Asaf. A. A., 1976, pp 14-32). However, Muslim scholars unfortunately differ widely on the interpretation of the verses, of the Holy Quran. Moreover, most of the verses were interpreted and developed by the all male classical Jurists in their own way only to serve patriarchal interests (Fyzee Asaf. A. A., 1974, pp. 14-32).

Usually the term child custody is used in family law courts to characterize legal guardianship of a child under the age of eighteen. When the spouses are living separately or the marriage has broken down and the parties are divorced then the question of child custody arises. Custody means the power or right to supervise an individual along with his or her property, who is unable to look after him or herself such as minor or mentally imbalanced ones. Each parent has an equal right to the custody of the child when they are separate. But in most cases both parents continue to share legal child custody but one parent gets physical child custody. According to the different religious and statutory laws the right to get the custody and

guardianship of the children lies on different persons. 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. Under the Hindu law the Dharmashatra did not deal with the law of guardianship. During the British regime it came to be established that the father is the legal guardian of the children and after his death mother is the natural guardian. However regarding the right to the custody of the children the codified laws for Hindus indicate that the children of tender age should be committed to the custody of the mother and older boys should be in the custody of the father but older girls in the custody of the mother. But whatever be the law, the practical situation does not always complied with that.

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 to ensure the unimpeded access of women to the courts of Justice.

## **Research Methodology**

This study would be based among other, on primary sources such as books, articles, journals, case materials, Internet sources, so that the analysis is taken with a multiple nary approach by keeping the phase of justice method and socio economic variables in considerations. Moreover, combining both formal and informal methods of investigation. While quantitative data are necessary to determine the prevalence of a phenomenon. It is the qualitative study that reveals the complexities. In the present study the combining of methods were considered essential to overcome the difficulties involved in the study. The primary respondents being the women it was necessary to allow them space to talk freely and without inhibitions. Moreover, since in this 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.

## **The socio-economic and legal sphere and female subordination**

Women in Bangladesh are perceived to be degraded to the position of second-class citizens because of their economic, social, political and legal bondages in relation to gender. (Oakley, 1972, p18). The discrimination against women as women depends on many causes. Not only the traditional cultures, patriarchal structures or seclusion are responsible, but also the social science literature, T.V., radio, theatre and cinema all depict and perpetuate the inferior status of women. It is thus arguable that an important reason for women's continued subordination is that the social science literature on 'Bengali women' deals with such second-rate status rather than emphasizing the significance of traditional female roles. This clearly aggravates the circumstances. For example, a Bengali intellectual has simply stated that men dominate all societal spheres, domestic and non-domestic, and that women suffer from through discrimination underpinned by social and religious mores (Hossain, 1975,). Some writers go to the extreme when they state that this female inferiority and perpetual dependence on men emanates from the social beliefs that a women is physically weak, intellectually poor, mentally inconsistency, timid, irrational and psychologically emotional.

Thus undermining the women our society itself is shaking the position of women regarding their right to get the custody and guardianship of their own children. On the other hand, women are seen as an embodiment of God's power, as the creative power is most obviously working in a woman. From this point it is argued that women are in fact superior to men because of their special power to bear children and nature, which men do not have. But women are hardly given any credit for it.

The general law and the Constitution are premised on sexual equality, while the family law provides only equitable rights. The limited literature on women and law in Bangladesh confuses this, missing significant points of the realities of women's lives in a patriarchally dominated society. However, sexual equity can be meaningfully developed by better enforcement of the existing legal rights.

## **Gender Relations in Bangladesh**

Bangladesh belongs to what has been described as the belt of *classic patriarchy* characterized by extremely restrictive codes of behavior for women, including *purdah* or seclusion of women (Kabeer, 1988, p.101). This implies that the social practices of Bangladesh are institutionalized

within a patrilineal and patrilocal system. Family, kinship and marriage plays a major role in shaping social gender practices.

Reinforcing the social, cultural and religious traditions, the society of Bangladesh promotes a division of social space and difference in behavioral norms between men and women. From childhood, women are raised with an awareness of their inferior position in relation to their brothers (Amin, 1989). They are taught to develop their sense of modesty and secure physical chastity, because these female virtues are intertwined with the honor of the family (ibid). Thus, discriminatory gender norm practices for men and women begin at home and govern the rest of their life.

The practice of patrilineal descent clearly devaluates women by allowing them no independent social identity (Kabeer, 1988, p101). Children are identified by their father's name. Women are also in an inferior position concerning socio-economic status compared to men. Even though they constitute of half of the total population, they are far beyond their male counter parts in relation to education, health and employment opportunities. Since women are considered as subjects to be protected, the household remains their primary domain, for them to be secured. Therefore, they are assigned the role of home-makers (Begum, 1989, pp.519-528). Consequently, there is less stress on formal education for women, which makes them dependent on their male guardians (Amin, 1989). Moreover, investments in daughters are limited by the idea of "watering the neighbor's tree; you take all the trouble to nurture the plant, but the fruit goes to someone else" (Kabeer, 1988, p. 101). This implies that there are few benefits from investing in daughters, since by marriage they become the assets of their husband's household.

Culturally, women's sufferings to the benefit of brothers, fathers, and children are cultivated as their glorifying qualities of self-sacrifice (Amin, 1989, Pp.4-10). At a structural level, as the male participation dominates the political spheres, the system runs in favor of men, while it subordinates women (ibid). The institution of *purdah* limits women's physical mobility make them confined to private spheres (Kabeer, 1988). Thus, "the structural elements of patriarchal control are reinforcing and include aspects of kinship system, political system and religion" (Cain, 1979, p. 406).

There is no big difference in the gender norms for rural and urban women (Amin, 1989). However, it is generally argued that women's education, employment, and fertility, and the social processes associated with it, affect the status of women. Therefore, the urban culture is not highly

traditional. While increased education brings mental transformation of by empowering the individuals with information, consciousness, capabilities and confidence; labor force participation brings them out of the stereotype traditional roles (Afsar, 1990). But very surprisingly to be considered as a good one the male nation of our society does not even need to have any qualities mentioned above for woman. A man is a perfect human being and qualified to enjoy all fundamental and human rights only due to the very fact that he is a male which is a complete violation of the principle of gender equality. Basically, for this patriarchal approach of our society even the mothers are getting deprived from the natural right of having the custody of their children.

### **Right of Custody of Children as a natural corollary of divorce**

In Islam divorce is considered as an exception to the status of marriage. The Prophet Muhammad (pbuh) declared that among all the things which have been permitted by laws, divorce is the worst. Very surprisingly, though according to Muslim Law Marriage is a civil Contract but it is the easiest and simplest transaction among all other legal transaction. Thus the party breaking the contract is remaining irresponsible to bear the consequences if the breach entails any hardship or other difficulties to another party. Islam has provided a good number of provisions relating to the obligations of the husband and rights of the wife before and after the divorce. But due to the misinterpretation of laws by the male Islamic jurist most of the people are not aware of their rights and duties after the divorce.

Thus the unilateral right of the husband to divorce his wife without the intervention of the court is often exercised arbitrarily and irrationally, making the lives of women miserable. Most of the women are not solvent in our society. Before marriage, the women depend on parents. After marriage, women depend on husband. But after dissolution, women come back to their parent's family. Women become a burden for her family. Divorced women become helpless and her maintenance and accommodation become uncertain. According to George Mason University sociology and law professor and author Lenore Weitzman, women are more likely to face damaging financial consequences and a diminished standard of living than their male counterparts. Her studies found that after a divorce, a woman experiences a 73 percent reduction in standard of living while a man's standard of living is enhanced by 42 percent. It's important to take into account, however, that the results of these studies can fluctuate depending on several contributing factors such as dependents and stable employment. "For divorced women maintenance should be

provided on a reasonable (scale). This is a duty on the righteous". (Al-Baqara: 241) But most of the divorced women do not get their deserved maintenance. Divorced women get maintenance only for *Iddat* period not more. But the Decision of *Shah Banu case* was reversed by *Hefzur Rahman v. Shamsun Nahar Bagum and Others*, 59 (1999), DLR, AD, 172. "Where it says that a Muslim divorced woman is entitled to have maintenance till the period of *iddat* and no further"

Divorce creates several cases relating to maintenance, dower, guardianship and custody. Usually, after the dissolution of marriage, the communication gap between the parties is increased. So it is being difficult for the women to recover the dower and maintenance, simultaneously it become too tuff on her part to establish her right of custody regarding her children.

### **The Statutory Laws Relating to Custody and Guardianship in Bangladesh**

Custody of a child in Bangladesh is governed by the Guardians and Wards Act 1890. The Act stipulates that the courts of Bangladesh is obliged by the personal law to which the minor is subject in case of custody of a child. In this respect the courts mostly consider the age, gender and religion of the minor and also the character and capacity of the proposed guardian, the courts also consider the minors own opinion if s/he is old enough to give their opinion. In respect of Muslims, the general rule is that the divorced mother is always entitled to custody over their male child till the age of 7 (classical Hanafi position) and over female child till puberty. Under the legislation, if the minor is very young or is a female, the courts are directed to give preference to the mother. 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). Qumrunessa 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)

case, 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.

### **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



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). 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 *hidana* (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 *hidana* 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. Under the Indian Divorce Act 1869 the Court has an unfettered discretion in making interim orders for the custody, maintenance and education of the

child. The discretion is to be exercised by the court in considering the consideration of any particulars case. No hard and fast rule can be laid down. Thus it is evidenced that to Act 1869 emphasizes the father's prerogative.

### **Hindu Law and Mother's Right to Custody of Children**

Right to custody and right to guardianship do not bear the same legal doctrinaire. Guardianship is a broader term than custody. Former comprises looking after the interest of the child, such as education etc. but custody on the other hand implies physical closeness and control "over the child and its upbringing. Under the Guardians' & Ward, Act 1890, the superior right of the father in respect of guardianship- was established. The position of the mother as a guardian of her children was of the second grade. Even the father could under old. Law nominates a guardian of his children so as to exclude the mother of the child through orally or the process of the execution of deed. The mother had no power to appoint testamentary guardian even if the father of the child had expired.

The Hindu Minority and Guardianship Act were established in 1956 as part of the Hindu Code Bills. Three other important acts were also created during this time and they include the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Adoptions and Maintenance Act (1956). All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to modernize the then current Hindu legal tradition. The Hindu Minority and Guardianship Act of 1956 were meant to enhance the Guardians and Wards Act of 1890, not serve as its replacement. This act specifically serves to define guardianship relationships between adults and minors, as well as between people of all ages and their respective property (Wikipedia, 2016).

The Hindu Minority and Guardianship Act 1956 reiterate the traditional superiority of men and inferiority of women. The Kerala High Court established in the case of Rama Chandra K.V. Annapurni Ammalithat under Sec. 6 of the Act 1956 the father is natural guardian and it is only after him the mother can be natural guardian only in the case of an illegitimate child, the mother is recognized as fully capable of looking after the child. The Act 1956, for the first time conversion the mother of the child the right to appoint a guardian by will ignore the testamentary guardian appointed by the father. The Act 1956 also lay down that the custody of the child up to the age of 5 years will be with the mother. The right to custody has been qualified by the word, 'ordinarily'. This has raised the dilemma in the judiciary.

The Act 1956 does not categorically specify the welfare of the children as a paramount consideration for conferring guardianship between father and the mother though Sec. 13(1) of the said Act has recognized that in case of declaration of any person a guardian of the Hindu minor by Court. The welfare of the children shall be the paramount consideration. In the same way when in a matrimonial proceedings under the Hindu Marriage Act 1955 spouse demands the custody of the children under Sec. 26 of the Act the court should not strictly adhere to the priority of the fathers claim of custody and guardianship over mothers claim. The Court should consider not only the economic position of the parents but the interest and welfare of the child should be taken into consideration. The 'welfare' is defines or illustrated in the Acts it is difficult to" state; The Kerala High Court in case of Reddy V Fleddy' has clarified 'welfare is not merely material but also moral welfare. Whenever the welfare of the children has been considered as paramount the courts everywhere raises a presumption in favor of mother.

In the United State Cases is observed that a child of tender years is best served by, being entrusted to his mothers custody. Similar attitude has been reflected in the Indian Contemporary verdicts pronounced by High Courts and Supreme Court has now considered the welfare to the minor dismissing the preferential right arguments. The impact of the provision of sec. 6(a) of Hindu Minority and Guardianship Act 1956 claiming father's prerogatives, over mother has now been watered down by the judicial activism regard being had to the Section 13(1) of the Act 1956. Though Sec. 13(1) is specifically meant for guardianship and not for custody the courts have applied it to the disputed cases of custody of children under Sec, 26 of the Hindu a Marriage Act 1955 considering that both guardianship and custody are interlocked concept.

In an unreported case of 2013, the Bombay High Court has held that a father cannot take away custody of a minor child from the mother if the latter has separated from him. The claim of the father in such a case that he was a lawful guardian of the child would be naturally partly correct. However, the mother is equally lawful guardian as in the absence of father she becomes the lawful guardian of the child, said Justice Roshan Dalvi in a recent judgment.

The Supreme Court of India has constantly held that in deciding cases of child custody *'the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute'* (Jayant,2013). In a landmark judgment the SC driving home the equality of the mother to fulfill the role of a guardian held that *'gender equality is one of the basic principles of our Constitution, and, therefore,*

*the father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category.* To the lay person, this was akin to the highest Court in the country saying gender was not a consideration in deciding matters of child custody and guardianship (Jayant, 2013).

### **Requirements of a Mother Custodian**

For deciding physical custody of a child, most juristic schools maintain that a mother must not be married to a stranger (a non-relative) or to a relative who is not in a prohibited degree of relation to the child. The Shias, however, prohibit a mother from retaining custody if she marries any other man as long as the child's father is alive and eligible for custody. The *Hanbali* and *Shafii* schools do not distinguish between girls and boys regarding the duration of female custody. The *Hanbalis* schools rule is that the female custodian have a duty to have custody from birth to till the child reaches the age of 7 years, at which point he or she may choose between parents. The *Shafiis* allow female custody until the child reaches the age of discretion and may choose either parent as custodian. On the point of view of *Malikis* schools is that the female custody of a male child shall last until he reaches puberty, and for a female child until she marries. Under the *Hanafi* School, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most *Hanafi* jurists set this age of independence at seven years, although some set it at nine.

There are no Quranic verses fixing the age limit of custody of children. But in the moral sphere it is specified in the Quran that the mother should breast-feed her offspring for two whole years (Rahman, 1907) this moral injunction implies in the ethical sense that custody in the first instance belongs to the mother. The *Hanafi* school entrust to the mother to have custody of her daughter until she attains puberty and of her son till he attains seven years of age, while the *shafi* and *Maliki* school to have the custody of the children until her second marriage (Tyabji 1940,). 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).

In the Pakistani Period a Commission on Marriage and Family laws was established on August, 1955 to find solutions of different family law issues. The Commission on Marriage and Family law argued that it is admissible to propose changes and modifications in the matter of custody of minor children under *Hanafi* law, as the divine origin or practice of the Prophet did not fix any age limit and some of the Muslim Jurists have expressed the view that the matter of age limit in this respect is an open question.

The critic of the Commission cited a *hadith* on which the *Hanafi* law of custody is based (Mernissi, 1988). The *hadith* stated that 'it orders children to observe prayers at the age of seven, making it obligatory for the father to start religious education of his children when they attain the age of seven.' Hence he can take over the custody of the children at that age. However the mother is entitled to the custody of a female child up to the age of puberty. According to the dissenting note, not only up to the age of puberty but up to the time of her marriage. (Smock, 1977) But other traditional writers did not take recourse to the modification of the legal age but were in favour of the theory of welfare of the child and cited illustrations where the mother was given custody when it was in the best interest of the child (Ali, 1985, pp 185-229). Traditional writers did not take recourse to the modification of the legal age but were in favour of the theory of the welfare of the child and cited illustration where the mother was given custody when it was in the best interest of the child (Islahi, 1959. p 220). Traditionally the right of guardianship of children always vested in the father. The Judiciary in Bangladesh is also not giving any enlightened judgments in cases of guardianship. They are mainly following the conservative line of interpretation of not recognising a woman as a natural guardian of her children.

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. Like 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.

In the case of *Mst. Fahmida Begum v. Habib Ahmed*, 20 DLR (1968) WP 254 it had been held that the Court in Pakistan can ignore the rules in textbooks on Muslim law, since there is no Quranic or traditional text on the point. Further on, the court concluded that it would be permissible to depart from the rules stated in those textbooks if on the facts of a given case its application was against the welfare of the minor. 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. Quamrunnahar 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.

In the case of *Smt. Surinder Kaur Sandhu v. Hurbux Singh Sandhu* AIR 1984, SC 1224, where the Supreme Court of India said: 'Section 6 of the Hindu Minority and Guardianship Act 1956 constitute the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conclusive to the welfare of the minor boy. The boy ought to be in the custody of the mother.' In the present case the personal law and the welfare doctrine conflicted, the welfare doctrine would have precedence. But this is only rare case where a woman as a specific individual was recognised as having the right to custody when her own ability and interest to help the child was greater than that of her husband. Moreover, the custody rules are only juristic views and are not based on the Quran and Sunnah. No accord has been established among the jurist, these rules diverge from school to school.

However, the cases discussed above show that in custody matters the higher court lead in favour of mothers. It is more so in the lower courts. Family court of Dhaka city has shown this healthy trend. 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**

When a couple go for separation by divorce then the wife has been compelled to get out of her husband's house leaving everything over there including her own children. Moreover as in Bangladesh, a son is looked upon as the father's natural apprentice and successor or supporter of the parents in old age. Sons are supposed to build up family prestige and prosperity. A father believes that he will continue to live in this world through his son. Therefore, even after the divorce if the child of that couple become boy, the father always feel like to get both the custody and guardianship of that child as if the mother has no title, no rights to her son. Generally, the socio-economic conditions of women have the effect of not favouring their cases and the preconceived idea remains that women are unable to maintain their children. Most probably due to these reasons Fatima Mernissi stated that the main problem of Muslim women subordination is not rooted in religion or tradition, but in patriarchal influence and arbitrariness which has dominated women for centuries.

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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