REVISITING THE LAWS ON MUSLIM MOTHERS' RIGHT TO GUARDIANSHIP OF MINORS IN BANGLADESH[*]

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Bangladesh is predominantly a Muslim, male-dominated, and paucity-stricken country. Therefore, the present research is confined only to the norms of Muslim law regulating the guardianship of minors. The principal objective of this study is to identify the difficulties and barriers that Bangladeshi Muslim mothers face in obtaining or exercising their right to guardianship of minor children after the cessation of their marriage or after the death of their husband. To this end, our research combines both doctrinal analysis and empirical studies.

Keywords
Muslim law, welfare of children, custody, Bangladesh, judicial decisions

1. Introduction

Bangladesh is predominantly a Muslim, male-dominated, and paucity-stricken country. Therefore, the present research is confined only to the norms of Muslim law regulating the guardianship of minors. The principal objective of this paper is to identify the difficulties and barriers that Bangladeshi Muslim mothers face in obtaining or exercising their right to guardianship of minor children after the cessation of their marriage or after the death of their husband.

According to the modernists[3], in the classical texts of Muslim law, there is nothing explicit about the right of the mother to the guardianship of the children. Nonetheless, as the father is obligated to support the child, from this point of view, the father is considered a legal guardian. But this status is not absolute. Though, as per the orthodox view, the father is the only legal guardian, in case of his absence, another male member – but not the mother – may be appointed as the guardian of the child. However, modernists have rejected the orthodox view. They said, as per the 'welfare theory', that whoever might be able to ensure the welfare of the child by providing him with the required maintenance and by being able to protect the property of the children may be appointed as the guardian of the minor (Ahmed 1997). According to the modernists, Islam distinguishes men and women as complementary to each other and thus as

[*] DOI 10.21868/PGnG.2023.2.1.
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[3] The word 'modernist' used here refers to those scholars who worked for the reform of Islamic tradition through an absolute emphasis on the Quran and Sunnah to meet the needs of modern society, including its institutions and technology arose in the nineteenth century. Islamic modernism underwent its richest development in the Middle East under Al-Afghani's Egyptian disciple Muhammad Abduh.

equitable in the private sphere. Consequently, men's liability to maintain the child and the wife never automatically establishes that only the father might be the guardian. But the orthodox jurists have undermined the mother's right to guardianship of the children despite the absence of any Quranic verse regarding this issue.

Therefore, modern legislative reforms took place in different Muslim countries including Bangladesh with the object of ensuring the welfare of the children and enhancing the opportunities of also appointing the mother as the guardian of the minor in suitable cases. It is pertinent to mention that most modern legislations emphasize the point that the Holy Quran is silent on the question of what should happen when men cease to be providers financially, emotionally, or otherwise (Mashood 2003). According to the modernists, therefore, it leaves open the question of the status of women when they are no longer dependent on men as the providers or bread earners (Esposito 1976, 56). They also mentioned that recent trends show that families are increasingly finding it very hard to live on the husband's income alone and many husbands are failing to provide their normative commitment. In that case, societally created male domination and women's subordination to men should not continue anymore.

Under Islamic law, even if the mother has the physical custody of her children, the father continues to be the guardian of the child as he is supposed to support the child financially. But, under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibilities and in many cases is the main contributor to the financial needs of the family, then the privilege of 'guardianship of person and property' should be vested in her as well. Since its independence, the Bangladesh judiciary has not only accepted the progressive decisions of the Pakistani judiciary but has also made its independent contribution to interpreting child custody and guardianship rules by taking a more child rights-based approach, without blindly following the rigidity of the classical Hanafi law texts. Thus, in Bangladesh, a welcome trend is discernible from the decisions of the higher judiciary, where the courts have favored welfare considerations of the child over personal laws in interpreting the Guardians and Wards Act 1890 (hereinafter GWA or "the Act"). Even though not many of such progressive judgments have ventured into assessing whether welfare is ingrained within the broader framework of Sharia law, the courts have certainly taken a stance in favor of protecting the interest of the child in question. This chapter is followed by chapters discussing the rationale of the research, the objectives of the research, the statement of the problems, and the methodology including research methods, and how the interviews were conducted. The outlines of the thesis, the scope and the limitations of the research have also been incorporated in this chapter.

As per section 17 of the GWA, the guardianship of children is to be determined as per the subject of the family law of the concerned children. Based on this provision, our Judges of the Family Courts are blindly giving guardianship only to the father or other members of the family but not to the mothers in any case. Even though Sharia law has not incapacitated the mother to be the guardian and did not provide any unilateral right to the father to be the only guardian of the child. But our judiciary, both higher and lower courts, has not yet come out with any progressive decisions in this regard with minor exceptions. And the matter remains one of the unexplored areas among the researchers, which is another reason for conducting comprehensive research in this field.

Firstly, the main objectives of this research are to revisit the applicable mechanism – the laws and legal practices currently followed in Bangladesh in cases relating to guardianship of minors and to identify the major gaps in the existing literature on Muslim mothers' right to guardianship in Bangladesh. Secondly, identifying the underlying causes for refusing the mother to provide guardianship of a minor. Thirdly, assessing the perceptions of the judges, lawyers, and litigants on a mother's right to guardianship. Fourthly, analyzing the significance of guardianship of the mother. Finally, suggesting necessary reformative measures and some way–outs for further improvements in the policies, laws, and judicial practices that would ensure the mother's right to guardianship of a minor.

In Bangladesh, a Muslim mother, despite being acknowledged as the primary caregiver of her children, is not entitled to the legal guardianship of her minor children. The GWA is the fundamental law that addresses guardianship and custody disputes in Bangladesh. Most of the time the Family Courts of Bangladesh are refusing to hand over the guardianship of the minor children to the mother in the name of the provisions of sections 17 and 19(b) of this Act. Actually, 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 is the guardian of the child entitled to his or her custody and the mother has little scope to apply for the custody of the minor children under the GWA. But in Bangladesh, the Family Courts are giving preference to mothers in cases of custody of children applying the principle of the 'welfare of the child'. Unfortunately, in the guardian's matters, they are not ready to apply the principle of the 'welfare of the child'. But the Supreme Court has already delivered judgments regarding guardianship matters applying the 'welfare of the child' doctrine in a range of situations applying the current statutory provisions and handed over the guardianship to the mother.

Therefore, an effort has to be taken in this research to find out the causes of Family Courts not granting guardianship to the mother and to find out the way to ensure the application of the 'welfare' doctrine in guardianship matters to ensure the best interest of the children and to ensure Muslim mothers' right to the guardianship of their minor children. Therefore, having consulted both primary and secondary sources, this thesis aims at reviewing the existing laws applicable to custody and guardianship and academic commentaries including reported and unreported judgments of the Family Court and the Supreme Court to justify the grounds for granting the right to guardianship of minor children to the Muslim mother in Bangladesh.

The hypothesis of this paper is that, despite having the guidelines and judgments from the higher court, mothers are getting deprived of being appointed as a guardian of their minor children in Bangladesh. The object of the GWA is to ensure the welfare of the children. But the present trend of the Family Courts of our country is to give priority to the parental rights over the rights of the children and therefore, though the appointment of the mother as a guardian could ensure the welfare of the child, the Family Courts are following the traditional line of interpretation of both the Shariah Law and the Statutory Law, thus depriving suitable mothers of being appointed as a guardian.

The present research is confined to the Bangladeshi Muslim mothers' right to guardianship. As the claims for such guardianship increased in manifold in recent years with the increased participation of women in economic activities, the research will only cover the data on denial and acceptance of guardianship to mothers in this new millennium – from the year 2000 to 2017. The research covers only the mother litigants, judges, and lawyers involved in guardianship cases at the Family Courts of Dhaka. We have deliberately chosen the Family Courts of Dhaka, as it was found that mothers of almost all types of occupations, with varying levels of education, and from diverse backgrounds with different perspectives are coming here as litigants to claim the right to guardianship over their children. As a matter of coincidence and the Family Courts' concurrent jurisdiction, the issues of custody and maintenance are referred to in some cases with the narratives of guardianship.

2. Literature review

The existing literature on Muslim mothers' right to guardianship of minors is very insufficient. Therefore, the paper was written on the basis of the existing laws, judicial decisions, articles and some books. The GWA is the central law which addresses guardianship and custody disputes in Bangladesh. Section 7 of the Act discusses the power of the Court to make an order as to guardianship. This section states that where the Court is satisfied that it is for the 'welfare of a minor' that an order should be made appointing a guardian of his person or property, or both, or 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. Section 17 provides: "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."

Abu Bakar Siddique vs. S.M.A. Bakar and others (1986) is the first case where a mother was allowed by the Supreme Court to get the custody and guardianship of her 9-year-old minor son. In this case the Appellate Division ruled: "It is true that, according to Hanafi School, the father is entitled to the hizanah or custody of the son over 7 years of age. Indisputably, this rule is the recognition of prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor in Sunnah would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure".

In the case *Mrs. Nilufar Majid vs. Mokbul Ahmed* (1984), it was decided by the Court that the second marriage of a mother cannot be the only consideration to disqualify a mother for guardianship if a mother is otherwise held to be fit to be the guardian. The Court stated that "It is the welfare of the child which will be of paramount consideration. A mother who married to a stranger loses her preferential right of custody over a minor child but that will not totally exclude her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor."

However, Professor Dr. Taslima Monsoor mentioned in her book *From Patriarchy to Gender Equity* (Monsoor 1999, 106), by giving reference to the suggestion given in a

report made by the Indian Law Commission, that in the absence of the father the Family Court should be able to appoint the mother for the protection and management of the minor's property.

3. Methods of the research

The present research combines both doctrinal analysis and empirical studies. The doctrinal aspect of the study, as a starting point, delivers the stimulus through which the empirical investigation itself can provide the information based on which the research can cover the trends and issues influencing mothers' right to guardianship as well as the efficiency of the existing legal regime to guarantee such a right. To minimize the gap between theory and practice, both qualitative and secondary quantitative methodologies were applied in this research.

The research retrieved both primary and secondary sources, revising the existing laws applicable to guardianship and academic annotations including reported and unreported judgments given by the family courts of Dhaka and higher courts. It has been very problematic to accumulate these judgments from the Family Courts as they had to be replicated from the original judgments of the courts. It was also tough to make those decisions reachable for this research, as not only they are confidential but they are also typically in Bangla. However, an attempt has been made in this research to scrutinize the unreported decisions of the Family Courts of Dhaka to provide a more comprehensive picture on the status of mothers regarding their right to guardianship of minors than what one would be able to get solely based on reported cases.

4. The core laws on guardianship

4.1 The provisions of Guardians and Wards Act

The GWA is the central law which addresses guardianship and custody disputes in Bangladesh. The GWA is a British colonial-era law promulgated back when the English principle of equity played a leading role in shaping the laws of the Indian sub-continent. As a nonspiritual piece of legislation (applicable to parties of all religions), the GWA incorporated English child welfare considerations, which play a central role in deciding the guardianship of minors. However, because of the cognizant detachment that the expatriate policy maintained from the religion-based family laws dominant in the subcontinent during their management, rules of personal laws were also given priority under the Act in deciding guardianship disputes. The provisions, as they appeared in the original Act, have not been altered much in substance in the context of Bangladesh since its promulgation (Sir Thomas & Guillaume 1931). Under the GWA 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 (Sir Thomas & Guillaume 1931, 310). The GWA was enacted with a view to amending and consolidating the rather scanty legislative provisions in the field existing before its enactment. This law was passed in addition to the provisions of various personal laws relating to guardianship of children, and not in place of them. It, therefore, exists side by side with the provisions of the personal laws. The Act itself makes it clear that it leaves the rules of personal law

unaffected. The Act, thus, comes into operation when an application to appoint a guardian of a child has been made under it, and it prevails over the personal law in case of conflict with the latter. The Act is divided into four chapters. The first chapter deals with certain preliminary matters. Chapter two deals with the appointment and declaration of guardians. Chapter three is the longest chapter in the Act. It is concerned with the duties, rights and liabilities of guardians and some operative provisions of the Act are supplemented by chapter four of the Act.

However, the main purpose of the Act was to ensure the application of the principle of welfare of the child in custody and guardianship matters. But due to a literal interpretation of the provisions of the Act and the complexity of the language of the Act, the principle of welfare is still not being applied in the guardianship matters in our country. It is significant to mention here that the context of mother's right to guardianship of minors is nearly absent in the existing literature regarding guardianship and custody of minors. Most of the books and articles fixate on the mother's right to custody. It is already taken for granted by all that guardianship is an uniliteral right of the father or other members of the family and not the mother. Few articles delineate the overall lack of the matter in the GWA. But in this chapter an effort has been made to discuss those sections that need to be amended to improve the mother's right to guardianship of minors.

Particularly, Sections 7, 17 and 19. Section 7 is the operative provision of this Act, dealing as it does with the power of the Court to appoint the guardian of the person or property or both. Section 17 is of great importance. It is concerned with the matters to be considered by the Court in appointing a guardian (Mahmood 1989). Section 19 prohibits the appointment of a guardian in certain cases. Although negative in form, this Section has given rise to several problems in interpretation and to the question of the inter-relationship between Section 17 and Section 19.

Section 7 discusses the power of the Court to make an order as to guardianship. This section states that where the Court is satisfied that it is for the 'welfare of a minor' that an order should be made appointing a guardian of his person or property, or both, or 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.

This section also states that 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. It is seen that Section 7(1) empowers the Court to make an order as to guardianship and may be described as the pivotal section in the entire Act. The power is to be exercised only for the welfare of the minor; for this reason, the introductory words of the section have been described as the keynote of the Act. The Court must be "satisfied" that the order should be made for the 'welfare of the minor'. Its satisfaction must be based on some material and must not be illusory (Sarat vs. Girindra, 1911). In making an appointment of a guardian under the Section, the Court will, of course, have to bear in mind the fact that the effect of an appointment would be to ensure the welfare of the child.

Section 17 provides: "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. 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. If the minor is old enough to form an intelligent preference, the Court may consider that preference. As per this section the Court shall not appoint or declare any person to be a guardian against his will."

This section deals with the matters to be considered by the Court in appointing a guardian. The subject matter has assumed greater importance because of the debate as to the relative importance to be attributed to each of the various factors that come up for consideration, the welfare of the minor, his or her personal law and rights of the guardian thereunder and the fitness of the parent or other person claiming to be the guardian. Implementing the rigid submission of the rules of guardianship, etc.

While, in general, the power of the Court to appoint a guardian is required for the welfare of the minor, ought not to be subject to any restriction, the Legislature has considered it proper to impose a prohibition against an appointment by the Court in certain special cases, enumerated in Section 19. The Section seems to be based on the assumption that by personal law, the husband of a minor married female and the father of a minor are vested with guardianship of the person of the minor, and the guardianship so vested ought not to be interfered with except where the guardian is unfit.

Section 19 deals with the guardian not to be appointed by the Court in certain cases. This Section states that "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 of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person, or 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 the guardian of the person of the minor, or 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."

However, it is to be noticed that section 19 lays down restrictions as to (1) cases in which a guardian of the property cannot be appointed, and (2) cases in which a guardian of the person cannot be appointed. As to property, it bars the appointment or declaration of a guardian where the minor's property is under the superintendence of a Court of Wards (National Archives n.d.). The preference given by section 19(b) is confined to the father.

So, it can be said, based on the above discussion, that this Act declares that the guardian is to be determined on the basis of the personal law to which the child is subject but with the consideration of the welfare of the child, but the concept of "welfare of the child" does not find a mention in the Act. However, it is like a thread that is visible at some places but gets blurred elsewhere by being entangled with others. It needs now to be painted in glowing colors.

4.2 Judicial decisions on custody and guardianship

This part is an effort to accentuate the present inclination of the court regarding the right of the mother to be appointed as a guardian of their minor children. Traditionally, the right of guardianship of children is always confined to the father (Pearl & Menski 1998). Most of the judges stated: "Custody has more to do with the stuff, such as care and control of the child, while guardianship centers on the legal rights and obligations of the child's father and his representatives." Thus, the issue of legal guardianship of the child continues to remain a sensitive one, presumably due to proprietary implications often associated with such legal guardianship. This involves gaining authority over the minor's property. However, there has been a discernible change in current judicial trends in the higher courts in matters related to custody, which means favouring the mother in the name of upholding the best interest of the children. Not only that, even in the arena of guardianship matters, the Supreme Court has already delivered judgments referring to the welfare of the child doctrine in a series of circumstances. But even during this period, the Family Court would handle this issue the conventional way and declined the mother to become the child's legal guardian.

Table 1: Statistics of disposal of guardianship cases and percentage of granting guardianship to father

Court of 2nd Assistant Judge and Family Court							
Year	Total number of guardianship and custody suits	Contesting	Mediation	Withdrawal	*Exparte*	Number of decisions granting guardianship to father	Percentage
2015	663	365	85	23	192	189	98.43
2016	532	463	53	45	323	322	99.69
2017	928	756	113	17	668	657	98.35

Source: author's compilation

Table 1 demonstrates that out of 192 cases, in 189, the father has been appointed as the guardian in the year 2015. In the year 2016, the father got the guardianship in 99.69% of cases, whereas the percentage was 98.35% in 2017. Moreover, the rate of mediation is also very low, and most importantly, the rate of *exparte* decrees is also high in most of the guardianship cases; consequently, a Muslim mother, despite being acknowledged as the primary caregiver of her children, is not entitled to the legal guardianship of her children. With regard to custody, she does have the first claim of custody, although it is of a limited nature, but even during this period, the mother cannot be the child's legal guardian.

Therefore, pertinent judgments of some selected reported and unreported cases are discussed here to focus on the existing trend of the Family Courts of not granting guardianship to mothers on a regular basis, as well as to show the development of guardianship-based analysis of the principle of welfare by the Supreme Court.

Abu Bakar Siddique vs. S.M.A. Bakar and others is the first case where a mother was allowed by the Supreme Court to have custody and guardianship of her 9-year-old minor son. In this case, the Appellate Division ruled: "It is true that, according to Hanafi School, the father is entitled to Hannah or custody of the son over 7 years of age. Indisputably, this rule is the recognition the of prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor in Sunnah would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure." (see also case *Syed Ali Nawaz Gardezi v Muhammad Yusuf* PLD 1963).

It was further held in the above case that the welfare of the minor was assumed to be the determining factor that the court regards as 'paramount consideration', even though the opinion of well-known jurists may not be followed. Thus, the rules of custody and guardianship propounded in Hanafi law may be departed from in permissible circumstances, in consideration of the minor's welfare. In the above facts of the case, the mother was preferred to be the guardian of the minor also. The Appellate Division of the Supreme Court of Bangladesh, the apex concerning overall decisions conclusively determined that "In cases involving the question of guardianship their decisions are seen to be influenced by the concept of the welfare of the minor child concerned. In this connection, it may be mentioned that under the provisions of the GWA, the Court to whom an application is made under that Act is to be satisfied that the welfare of the minor required the appointment of a particular person as is guardian, but the Court is to make the appointment consistently with the law to which the minor is subject. 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 law) has to be regarded, but deviation therefrom would seem permissible as the paramount consideration should be the Child's welfare. We think in the present case the learned Single Judge while considering the welfare of the boy, has rightly determined the question which need not be disturbed. Facts as revealed point out that the welfare of the boy requires that his custody should be given to the mother or that she should be appointed as his guardian." (*Ahmad Mia vs. Kazi Abdul Motaleb* 1971).

It is germane to remark that in a case of custody the court refused to follow the dictums of the classical jurists, concerned with the right of a mother to the custody of her children (*Rashida Begum vs. Shahab Din* PLD 1960). Here, the court held that though under the Hanafi law, the mother has the custody of a son until seven years and a daughter until puberty and after that, the custody reverts to the father but in this case, considering the welfare of the child the mother got the custody. Because the court held that since the Hanafi law on custody was not founded on any injunction of the Qur'an or the Sunnah, the decision concerning custody should be guided solely by 'the welfare of the minor.' And it is pertinent to mention that the child was sick and the mother was a doctor. The Court also observed that: "If the interpretation of the Holy Qur'an by the great Commentators who lived thirteen or twelve hundred years ago, is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron

cage and not allowed to develop along with time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed." (*Rashida Begum vs. Shahab Din* PLD 1960).

In the light of the decision of the above case, it can be said that modern reformers tried to adopt different liberal interpretations of primary sources to comply with the principle of welfare for the minor. Modernist Muslim scholars believe that Islam has always been in accord with common sense and justice. They argue that the Sharia law as developed by the classical jurists in the early years of Islam to deal with the prevailing social situation is subject to change, with the passage of time and necessity. Citing from Sayeh and Morse (Sayeh & Morse 1995), Shaheen Sardar Ali (Ali 1997) says,

> "Sharia allows different interpretations of an existing precedent, at least in three situations as laid down in Quran and Sunnah, such as necessity or the public interest, change in the facts which originally gave rise to the law, and change in the custom or usage on which the particular law was based. If anyone of the above conditions is present, the jurist may interpret in the light of the existing situation and his interpretation becomes part of Sharia law, provided it does not conflict with the Qur'anic provision."

But this is only a rare case where a woman as a specific individual was recognized as having the right to custody and guardianship when her own ability and interest to help the child was greater than that of her husband. This was probably not a plan of the father to get rid of a handicapped child, using the convenient fact that the mother was a doctor, the mother wanted to have custody of the child (Monsoor 1999, 105, 106, 192).

In the *Mrs. Nilufar Majid vs. Mokbul Ahmed* (1984) case, the Court decided that the second marriage of a mother will not be the only consideration to disqualify a mother for guardianship if a mother is otherwise held to be fit to be the guardian. The Court stated: "It is the welfare of the child which will be of paramount consideration. A mother who married a stranger loses her preferential right of custody over a minor child but that will not exclude her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor."

In *Abdul Jalil and Others vs. Sharon Laily Begum Jalil* (1998) case, the father divorced the mother in 1995 and removed the children from her custody. The mother filed a habeas corpus petition, first in the United Kingdom and then under Article 102(2)(b)(i) of the Constitution for the recovery of the children. The learned advocate for the respondents frankly conceded that, given the provisions of law provided in this regard, the petitioner may have custody of the children but in such cases, the welfare of the children is to be considered prime. He submitted that, considering all aspects of the matter, particularly regarding the lifestyle of the petitioner, the children should not be given to her custody. But the Court directed to hand over the three minor children to the custody of the petitioner because all the children have been illegally and deceitfully removed from the lawful custody of the petitioner and are being illegally detained by the respondents; the petitioner is entitled to the custody of the children, being their mother, having genuine love and affection for the children and having devoted her entire adult life to their upbringing. However, in this suit affirming the principle of welfare of the children, the Appellate Division clarified the meaning of 'welfare' in the

following language: "It is now settled that the term 'welfare' must be read in the largest possible sense as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do. The moral and religious welfare of the child must be considered as well as its physical well-being."

Based on this interpretation, the Court decided that "the issue of the minor's welfare must be treated with paramount importance regardless of the disputing parent's legal rights or entitlements. After being directed by the Court to hand over the children to Mrs. Sharon Laily, Mr. Abdul Jall moved to the Supreme Court to get back the custody and guardianship of his minor children. It is found from the facts of the case that Mr. Jalil divorced his wife Mrs. Sharon who was a Christian British and Bangladeshi citizen and removed the children from her custody. After filing a writ petition, she got back the custody of her minor children then Mr. Jalil moved to the Supreme Court. But the Court directed that to ensure the welfare of the children they should remain in the custody of their mother and granted the father visitation rights."

In *Rahmatullah (Md) and Others vs. Sabana Islam and Others*, (2002), a civil revision was preferred by the paternal uncles and aunts of the minor against the mother who had successfully made an application before the Court of Assistant Judge to be appointed as guardian in respect of the minor's person and property. In this case, the Court held that "Before us all the parties are Muslim and the minor is, no doubt subject to the Mohammedan Law. Then, the question unfurled is how far the principles of Mohammedan Law would come on the way to appoint the mother as guardian of the minor after her marriage to a stranger even when the facts and circumstances of the case as found by the Courts below that the welfare of the minor would be best secured and achieved in the custody of the mother."

No other disqualification of the mother except expecting her marriage to a stranger was raised. It was the view of the courts that the uncles were acting in the interest of the minor by recourse to litigation to deprive her of the property bequeathed to her by her father. The Court of Appeal had correctly affirmed the conclusion of the Assistant Judge that the welfare of the minor would be best secured and achieved in the custody of the mother.

In a more recent case, *Samudra Ejazul Haque and others vs. Farhana Azad and another* (2008), the High Court division has clearly observed that the child's welfare is the supreme consideration, irrespective of the rights and wrongs of the contending parties. In this case, the Court provided for interim remedy enabling the mother to retain custody of minors until the matter could be disposed of by a competent Court. Here, the father was living abroad and in his absence the mother divorced him while their children were allegedly detained by the paternal grandfather and grandmother. The mother claimed that she and her brother had been made to put their signatures to blank paper which was later used to forge a deed of 'handing over' the minors in favor of the paternal grandparents. Subsequently, the mother tried several times to visit her minor children but was not allowed to do so. In the meantime, the father remarried in the USA and returned to Bangladesh with his new wife. He was about to hold a wedding reception when the petitioner came to know about the forged deed and his remarriage. Upon receiving a petition from the mother, the High Court held: "In deciding the question of custody of the minor children the paramount consideration before the Court

is welfare of the minors. The term welfare must be read in the largest possible sense which means that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do… Till the custody of the minor is decided by a competent Court, the mother is legally entitled to retain the custody of her minor children. Before adjudication of the custody of the minors by a competent Court, if they remain in the custody of anybody other than the mother, that custody will be without lawful authority. The Family Court will take care of the case, and will come to a definite finding as to who is or are entitled to the custody of the minors, taking into consideration the paramount question of welfare of the minors, but till then, the minors shall remain in the custody of the mother as provided under the law."

In *Zahida Alam (Liza) vs. Syed Noor Uddin Ahmed and another* (2009), the Court emphasized that the child's welfare is the supreme consideration. This case involved a *habeas corpus* writ petition which was followed by a family suit. The petitioner was the mother of a 10-year-old boy, who had been living in London for the preceding six years along with her son and husband. After their arrival in London, the child was diagnosed with significant psychological and physical health problems. Following a breakdown in the relations between the father and mother, the child was wrongfully removed by his father from the mother's custody and brought to Bangladesh without her knowledge. The mother being aggrieved by the deceitful removal of her son from her custody filed a writ petition before the High Court Division. The Court held: "According to Mohammedan law of *Hizanah*, there is no doubt that the father is entitled to the custody of his child when he attains the age of seven years. But the law relating to custody does not permit deceitful removal of the child from the custody of her mother. By doing so the respondent has taken the law in his own hand without waiting for adjudication of the custody and welfare of the child." The Court emphasized that "child's welfare is the supreme consideration irrespective of the rights and wrongs of the contending party and directed the respondent to hand over the child to the custody of the mother and granted the father the right of visitation."

In *Sefina Ferdousi Shimla and another vs. Jaohar Kabir and others* (2009), Jaohar Kabir filed a family suit stating that he was married to Sefina and a son was born to them a year after their marriage. About three months after the birth of their son, Sefina went to her father's house for a visit. When Jaohar went to bring her back, she told Jaohar that she wanted a divorce. Jaohar at several times attempted reconciliation but Sefina refused and sent a divorce notice. A *talaq* was ultimately executed due to non-appearance of the petitioner (Sefina). Sefina remarried before the divorce became effective. In such a situation, Jaohar filed a suit for custody of their son. Sefina, in the meantime, divorced her second husband before she brought the revision petition. The Family Court Judge awarded custody to Sefina. But the Appellate Court reversed this decision and directed the petitioner to hand over the custody to the father of the child. In this case, the observation of the Court was as follows: "A mother who is remarried to a stranger loses the preferential right of custody over a minor child but that will not totally exclude her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor."

In its judgment in the case *Anika Ali, daughter of late Kazi Haider Ali vs. Rezwanul Ahsan, son of Monjurul Ahsan Munshi*, the Supreme Court, citing the decision of *Abdul Jalil and others vs. Sharon Laily Begum Jalil*, stated that "nothing is more paramount, not even the rights of the parties under the rules of the personal law or statutory provisions, than the welfare of the children which must be determining factor in deciding the question of custody and guardianship of children whether in a proceeding in the nature of habeas corpus or in a proceeding for guardianship under the Guardians and Wards Act, 1890." The Supreme Court also cited the ruling in the case *Abu Baker Siddique vs. SMA Bakar*, where it was held that "If circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under Muslim Law, the courts did not hesitate to do so" to ensure the best interest of the child.

Thus, it is found that, with the passage of time, the Supreme Court has delivered a number of judgments in the arena of not only custody but also guardianship matters, applying the 'welfare of child' doctrine and developing the guardianship law where, irrespective of the rights of the parents, children's rights have been prioritized to ensure his or her interest. However, it is pertinent to mention that regarding the guardianship and custody of children, we do have only one statutory law and that is the Guardians and Wards Act 1890. And the provisions of this Act are interpreted by the different courts in different ways. Moreover, the reported and unreported judgments in custody and guardianship cases given by the court are also inconsistent with each other. Absence of any Quranic provisions on this particular area is another problem. The classical jurists heavily sided with the father and other male agnates excluding the possibility for a mother to be a guardian (Jamal 1990). But the thing is, all those classical opinions are also not purely Quranic. For God has given superiority to the men over women in some special matters of family and this is due to the fact that men have to pay alimony based on the interpretation of the verse "and for that, they expended of their property and righteous women are therefore obedient." To achieve this important position, at first, the duties and responsibilities of individuals should be determined. The responsibility of supporting life has been given to the men by the Holy Quran. Of course, this doesn't mean the superiority of all men over all women. The real advantage of the Quranic interpretation is related to virtue.

The cases on guardianship in Bangladesh highlight the disparity between theory and practice. Nonetheless, it is seen that both the non-statutory and statutory laws of Bangladesh inquire for implementation of the principle of welfare in the case of appointment of guardians for the minor, but most of the time, the Family Courts give the guardianship to the father. While there are some cases of custody where mothers are given custody of the children above the pre-determined age, the matter of guardianship of the property of the minor is decided according to the traditional conception of Muslim law (Monsoor 1999). In guardianship cases, the courts are deciding the issue based on the predetermined norms of Islamic law, i.e giving paramount importance to the right of the father. Generally, the socio-economic conditions of women do not affect their cases favorably. The image that a mother is unable to maintain the child is sustained, perhaps to protect men's own patriarchal interest (Jamal 1990). At this juncture in the thesis, judgments of some unreported suits on guardianship cases will be discussed to show the real situation.

In *Mossamat Sharifa Begum vs. Yunus Mia* (2011), it was decided by the court that it is no one else but the father who should be appointed as the guardian of the child. This was a family suit for claiming dowry, maintenance, guardianship, and custody of the children. In this suit, the plaintiff stated that her husband took a lot of money from her father as dowry during her marriage. But later he refused to maintain her and her daughter. She was compelled to come back to her father's house. She said that, naturally, when she had conflicts with the defendant, she demanded the dowry money back and asked for child support, and filed a case against the defendant in the Family Court for failure to do so. The defendant in his statement stated that he divorced his wife because of her immoral character. However, he failed to prove his statement. Finally, the court declared that the plaintiff is entitled to dowry, maintenance, and custody but declared the father as the legal guardian of the child. But in this case, we have seen that, as a husband, he failed to carry on his duty, specially, his duty to maintain his wife and child. But the court did not consider this issue. The court has followed the conservative line of interpretation of the laws.

In the case of *Monowara Parvin vs. Shaheb Ali* (2012), it had been held that, as the mother was a working lady, she would not be able to look after her child and therefore is not entitled to get the custody and guardianship of her minor children. The plaintiff's case, in brief, is that she got married to the defendant on 3 March 2005. On 13 April 2006, the plaintiff gave birth to a child. Thereafter, the defendant went to Saudi Arabia at her father's expense in 2007. In 2009, he came back and claimed dowry from the plaintiff. But the plaintiff refused to pay, following which the defendant ousted her from his house, keeping her three-year-old child with him. Thereafter she filed this case before the Family Court to get back the custody and guardianship of her child. The plaintiff was a teacher of a non-government college. As she was a working lady, it would be tough on her part to take proper care of the child, therefore, the court gave both the guardianship and custody to the father, while giving the mother the right of visitation.

This judgment indicates one thing very clearly: that on the one hand, the court is demanding a suitable mother whom they are ready to appoint as a guardian, and on the other hand, the criterion of suitability is not fixed, therefore, courts sometimes refuse to grant guardianship to the mother on the grounds that she is not competent enough to look after the property of the child, even though a mother is a working lady and has her own property – but her becoming a working lady is exactly why she is not granted guardianship.

In *Munir Hossain and others vs. Shalina Khanom* (2015), the suit was filed by the plaintiff for custody and guardianship of the minor child. Here, the plaintiff and the defendant got married on 22 September 2001. The husband was a shop keeper and the wife was a nurse. The couple had a daughter in 2004. However, unexpectedly, the husband died in 2006. Then the plaintiff started to live in her parents' house along with the daughter. In 2009, the plaintiff got married to another person. Thereafter, the uncles of the minor daughter filed this suit for the custody and guardianship of the child. The Court declared that, though the mother has lost her right to be appointed as the guardian of the child, the custody will remain with her for the best interest of the child.

In this case, we have noticed that, even in the absence of the father, the mother who is undoubtedly eligible had been refused by the Court the guardianship of her minor

child. But the question is whether, if we can apply the principle of welfare in cases of custody, there is also a chance to apply this principle in cases of guardianship. But during the interviews, it was found that, due to the patriarchal attitude of our society, no one would like to see women in a leading position. That is why the mothers are not getting the opportunity to enjoy the right to be appointed as a guardian of the minor, even though there is a law.

In *Dr. Md. Rashidul Islam vs. Morsheda Parveen* (1998) the plaintiff instituted this family suit against the defendant for the custody and guardianship of his two minor sons. The plaintiff married the defendant on 14 December 1988 and they had two sons born within wedlock: one was born on 30 July 1991 and the other was born on 31 July 1996. The plaintiff divorced the defendant on 18 December 1997 and she left the plaintiff's house and went to the house of her father in the district of Rangpur, taking with her two minor sons and has been living there since. The plaintiff was a doctor, and he was practicing in *Bogra*. After the divorce, he has been sending money and clothes for his children, but the defendant refused to accept those. He also argued that the defendant and his father had no capacity to educate and maintain the minor sons properly. Consequently, on 8 January 1998 the plaintiff sent his mother and cousin to bring his sons back from the defendant and her father but they refused to hand them over. In these circumstances, the plaintiff was forced to bring a suit. But the defendant contested the suit by filing a written statement and contended that, after the divorce, the plaintiff had driven her away from his house along with her two minor sons. Since then, the defendant has been living at Mohammadpur in Dhaka, where she has been working as a school teacher with her elder son admitted to class 1 in the same school. She also contested that the plaintiff had not paid any money for their maintenance.

The defendant also filed a suit (No. 228 of 1998) in the Family Court and the Court of Assistant Judge, 1st Court, Dhaka to keep her sons in her custody as well as for the guardianship but the suit was decreed *exparte*. During the interview, this woman informed us that she had not been summoned properly and therefore failed to appear at the court, but the court has given an *exparte* decree in favour of the plaintiff. It is found from our research that in most of the cases the mothers do not get the guardianship of their children due to an *exparte* decree.

From the different reported and unreported suits, it is found that sometimes, the child's close relatives are hostile to him and wish him not to survive. Sometimes his mother's second husband has more love for the child, sometimes the close relatives may find to grab the property of the child in the name of guardianship by showing the excuse of the benefit of the child. Therefore, Ibn Abidin has rightly observed that the judge must use his insight and must keep in view the welfare of the child (Ur-Rahman 1982).

4.3 The importance of guardianship of mother

The position of women in a given society cannot be simply attributed to their role in providing offspring. There are many other social and economic roles of women than the stereotypical ones of mother and wife. The economic roles of women are shaped by socio-economic and political structures. According to an eminent author, these are reflected in women's ability to own or inherit and control income-earning assets, ability to participate in economic activities, control over their husband's income, which is

usually determined by the level of their education, age, and pattern of their marriage, family structure and residential status; and right and ability to control property (Ahmad 1991, 31).

Islam has established women's right to inherit property. Thus, it is understandable that if Muslim women get the right to inherit the property and can enjoy the absolute right to acquire, hold, manage, and dispose of their property, then in necessary implications, this proves that they have the capacity to handle and look after the property of their minor children. Consequently, there should not be any bar to appointing mothers as guardians.

Modernist Muslim scholars believe that Islam has always been in accord with common sense and justice. They argue that Sharia law as developed by the classical jurists in the early years of Islam to deal with the prevailing social situation is subject to change, with the passage of time and necessity (Asghar 2005).

In the socio-economic sphere, the major concern of the Quran was to improve the situation of women by giving her legal capacity, granting her economic rights (dower, maintenance), and raising her social status from the pre-Islamic period. Some verses, however, show unequal treatment of women and the superior position of the men over women, the most commonly cited one being Sura IV: verse 34 which states that men are in charge of women, Allah has made some of them excel over the others, and because they spend some of their wealth. Esposito explains that this priority of men over women has originated from the greater responsibility of men as protectors, maintainers, and providers within the socio-economic perspective of the Arabian society at that time; when women were dependent on men in that particular society.

But the social situation of the women has been broadly changed in the 21st century. They are not dependent on their husbands for bread and protection. Many women are virtually the sole protectors and providers of their family. Thus, the concept of priority and superiority of men over women, husband over wives must also change. Consequently, considering the best interest of the child in case of necessity the guardianship of minor should be handed over to the mother.

The mother is the painter of the child's personality and even his creator. Motherhood is a state that knows all the exquisite traits of beauty in a child's upbringing and sacrifices all her personal facilities and domains in this regard. A mother can educate her child only when her spiritual and mental peace is provided for at home. Clearly, the nature of a woman is such that she is prepared for accepting the responsibility of a child's upbringing and if we prevent her from this action, she will suffer from physical and psychological illnesses because her essence and nature is based on love and affection and this affection reaches its peak in her love towards her children. As God has placed this love and sacrifice in mothers, there is naturally an attachment placed in the child and this attachment is such that the child cannot pass a moment without his mother during the first years of life. It is clear that the absence of mother will result in great damage in the child because during the first years the child thinks of the mother as his only support and role model. In families where the mother and father live together, the child does not suffer irreplaceable damages of lack of parents but when the matter of divorce and separation is raised in a family or a child is placed in the situation of losing a parent due to a parent's death and the problems among families, very serious spiritual damages are brought upon the child. A nation's children represent a nation's future.

How society treats its own children is a good reflection of the overall health and stability of that society. Notable point is that today, the father does not have full command on the family and their affairs and is not able to consider the child's interests and advantages and due to the increase of the women's scientific and intellectual level in society, it can be said that in case guardianship is assigned to the mother, no problem would occur for the child; rather, permitting guardianship for the mother will be able to ensure the overall welfare of the child and, most importantly, guardianship is not a unilateral right of the father or other male members of the society. Moreover, the granting of guardianship for the mother leads to the mother and the child's peace of mind: if the child is under guardianship of the father, all the other members of the father's family are involved in the child's management which leads to the child developing attachment issues. But if the child is with the mother and all his/her affairs are supervised by the mother, there would be no disturbance in the child's mental and physical state.

5. Conclusion

This research has argued that, irrespective of orthodox and modernist thoughts and ideas in Bangladesh, neither the statutory law nor the Muslim Sharia law grants the eligible mother the guardianship of the property of her children. Moreover, in every case, it is found that decisions given by the higher courts have generally been taken by the lower courts as precedent. But in case of guardianship, even though the higher court has already given a few enlightened judgments regarding the guardianship suits (where it was granted to the mother), lower courts (i.e. Family Courts) are not following those precedents. Still, they are pronouncing judgments based on their traditional role and orthodox views of not granting guardianship of property to the mother in any case. It is evident from this research that the law, at this stage of development, is ready to protect the right of mother by tackling the violation of rights of the mother, in any form e.g. depriving of the right of guardianship, but the societal milieu is lacking due to discriminatory treatments based on a patriarchal mindset.

In family matters, courts are often used as the last alternative when other attempts of conciliation and mediation have failed. This is not only because legal action involves pecuniary liabilities but is surely also due to the fact that a certain disgrace is attached to bringing personal issues into the public area. In the absence of support from the parental family to assist the woman, as litigation would adversely affect the family, few women feel inclined to bring family disputes to the court and henceforth do not seek the guardianship of their minor children.

From the fieldwork, it is found that most of the guardianship cases are decreed *exparte* in favour of the fathers. The close observations and interviews with the mothers revealed that causes behind these *exparte* decrees are repression and domination of women within the patriarchal society; and fraud and breach of trust from the part of their male counterparts. This image of subordination is enhanced and amplified by the traditional views of stereotyped female roles in the family and society. The main factors stated to contribute to this subordination are the patriarchy and paternalistic attitudes in the socio-economic and legal sphere.

Many Muslim countries have so far reformed their laws to grant the right of guardianship to the mother. They found their reformed or modernized laws consistent with the jurisprudence and principles of Islamic law. In this context, it is submitted that Bangladesh should not hesitate to adopt such reformative measures in accommodating the mother's right to guardianship by considering the rights and welfare of the children. Bangladesh needs to carefully look at its options and tailor its reformative measures without dismantling the basic principles of Islamic law.

Pursuant to the GWA, the District Court has jurisdiction to resolve guardianship cases. The term 'District Court' has been defined in the said Act to include the High Court Division. Later on, through the Family Court Ordinance, the Family Courts have been conferred the status of District Courts (for this Act) and also given exclusive jurisdiction to decide guardianship cases. But in practice, guardianship cases are exclusively decided by the Family Courts. Accordingly, either due to the lack of experience or due to some other reason, a very sensitive matter such as guardianship cases is handled very lightly. Therefore, the Family Courts should be separated from the Assistant Judges Courts and should be allowed an independent identity. Also, a Family Court should be a higher court of judiciary and should not be left at the lower end of the judiciary (Mahmood 1986, 87).

Control of the person and property of a minor should be vested in one person, either the father or the mother with the prime consideration of the child. If the mother gets the custody of the child but the child remains under the guardianship of the father, all other members of the father's family can interfere in the child's upbringing, which leads to the child developing attachment issues. But if the child is with the mother and all his/her affairs are supervised by the mother, there would be no disturbance in the child's mental and physical state. During this research, it was found that a significant number of guardianship cases are filed in the Family Courts of Dhaka for guardianship of children abandoned by their biological parents. It appears that the possibility of filing such applications has become possible due to the way in which section 7 of the GWA is being interpreted. Yet, it needs to be mentioned that these processes do not constitute adoption per se, since they do not provide the child with the same legal securities or rights. Furthermore, Muslim personal law as applied in Bangladesh does not yet permit adoption. This research, therefore, creates a scope for further study in the field of adoption in Muslim countries to explore the gender equality and welfare of the minor child without dismantling the basic principles of Islamic law.

The legal framework on guardianship of minors emerged under Roman law. Later, Islamic law also addressed the issue in a progressive and dynamic manner. During the British rule in the Indo-Pak subcontinent, the principal legislation governing the guardianship and custody of the children in Bangladesh was enacted, keeping the personal laws intact. The law apparently favours fathers and is, in practice, tilted towards the father as the absolute guardian of the minor in any case, irrespective of the interest and betterment of the children. International law dealing with the rights of children has also called upon states to give the paramount importance to the best interest of the children in any matter, including that of guardianship. But the precedent-setting courts of Bangladesh could not go beyond the black letters of law and largely remained indifferent to their role in removing injustice and in establishing substantive equality and justice in the society. Only exceptionally has the higher court given the

guardianship to mothers. However, fortunately, the recent ruling of the High Court Division issued on 24 January 2023, addressed this discriminatory requirement. According to the ruling, mothers can now act as their children's sole legal guardians. Therefore, considering the welfare of the children and the directions given in the judgment, it is inevitable to amend the existing law relating to the guardianship of children to place the mothers on an equal footing with the fathers regarding the right of guardianship of children.

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