

# On norms of custody and guardianship

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IN Bangladesh, we follow Family Courts Ordinance, 1985 and Guardians and Wards Act, (GWA) 1890 while dealing with cases related to custody and guardianship of children. As per the legal provisions of law, a father is the legal and natural guardian of the children until they attain the age of majority under the general law of

financial needs of the family, then the privilege of 'guardianship of person and property' should vest in her as well (PLD 1963).

In the light of *hadith* literature available and the decisions of Prophet Mohammad (PBUH) on the cases brought before him on child custody, three principles have been laid down to be considered while deciding upon the custody of a child. Firstly, the mother possesses priority right of child

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 favour of protecting the interests of the child in question.

The true spirit of the *Zohra case* has been reinforced by the Appellate Division in the well-celebrated case of *Abu Baker Siddique v S M A Bakar* 38 DLR. Rejecting the traditional age-sex rule of *hizanat*, the apex court in that case denied the father's entitlement to the custody of his eight-year-old son on considerations of the special needs of the child who was suffering from rare medical complications. Thus, offering a similar reasoning as the *Zohra case*, the Appellate Division held that: rules of *hizanat* or custody are seen to differ from school to school.... Hence this rule (a father's entitlement to the custody of a son who has attained 7 years) would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure...Thus deviation from such a rule would seem permissible as the paramount consideration should be the child's welfare. So we should say that custody and guardianship of child can lie both on father & mother equally depending on the best interest of child and circumstances. Similar stances were taken in cases like *Ayesha Khanum v Major Shabbir Ahmed*, 46 DLR and *Rahamatullah v Sabana Islam* 54 DLR too where a widow was held not to lose her guardianship on the mere reason of her getting remarried for the protection of the minor.

The courts in our jurisdiction have been showing a tendency of leaning towards the welfare of the children whenever the issue of child custody comes in front of them. The vesting of child custody or guardianship on the mother is not beyond the tenets of personal law; the welfare of the child is what the paramount consideration is - be it of religion or of law. Hence, considering the need and welfare of the children (applying the best interest principle), a change in stance is very much possible and expected as well.

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# Defamation



ALTHOUGH there was the justification of criminalisation of the commission of defamation, i.e. maintaining an apt poise between the protection of an individual's reputation and freedom of expression and thereby to protect people against false and libellous statements causing damage to their honour, fame and reputation, these provisions are increasingly enabling the harassment of journalists and media organisations, who face the disproportionate sanction of up to two years imprisonment and/or a fine if found guilty. Even though the defences of 'truth' and 'public interest' are available, and such cases rarely reach court or result in conviction, the mere existence of criminal defamation provisions and pending cases chills media freedom because the process of litigation itself carries a penalty.

Multiple legal suits for a single (alleged) defamatory incident are common, including against media actors and outlets. International standards are clear in stating that imprisonment is an inherently disproportionate sanction for defamation, with various international human rights mechanisms recommending the repeal of criminal defamation laws entirely. In the year 2011, Human Rights Committee of the International Covenant on Civil and Political Rights called on states to expel criminal defamation on the grounds that it harasses and intimidates citizens and unreasonably restricts people's right to freedom of speech.

According to sections 499 and 500 of the Penal Code, defamation is making or publishing any imputation by words, either spoken or intended to be read, or by signs or by visible representations concerning any person intending to harm the reputation of such person is said to defame that person and whoever does this commits the offence of defamation which is punishable by 2 years simple imprisonment or with fine or

with both. The nature of the offence is 'non-cognizable' and 'bailable'; and an offence under section 499 and 500 is to be tried by Magistrate of First Class.

Section 198 of the Code of Criminal Procedure 1898 states that no court shall take cognizance of an offence of defamation, except upon a complaint made by some 'person aggrieved' by such offence. Some critics argue that it clearly states the term 'person aggrieved' and avoided the term 'person defamed'. Now the question is who is a 'person aggrieved'? Section 198 of the CrPC clearly states the term 'person aggrieved' and avoided the term 'person defamed'. It has been argued that legislators put the word 'aggrieved' so that the third party in some appropriate cases can file a defamation suit on behalf of other. However, it must be noted that even though, the third parties are allowed to file a case, the prior leave of the court shall have to be taken. Generally before taking cognizance of the complaint the court needs to see how the complainant is aggrieved and in what manner his fame, reputation or honour has been damaged. Furthermore, if he is filing the case on behalf of a deceased person, it is to be proved that how he is connected to 'that person's' family or near relatives in that particular complaint. If the complainant fails to satisfy the court then one option is left before the court - to dismiss the complaint on the merit of insufficient ground under section 203 of the CrPC.

The magistrates have pivotal role to play to stop any abuse of this law. Therefore, before allowing complainants' claim to file defamation cases, magistrates should consider whether there was, in fact, any damage to the complainants' reputation. Only feeling of being defamed cannot be ground for taking cognizance of a defamation case.

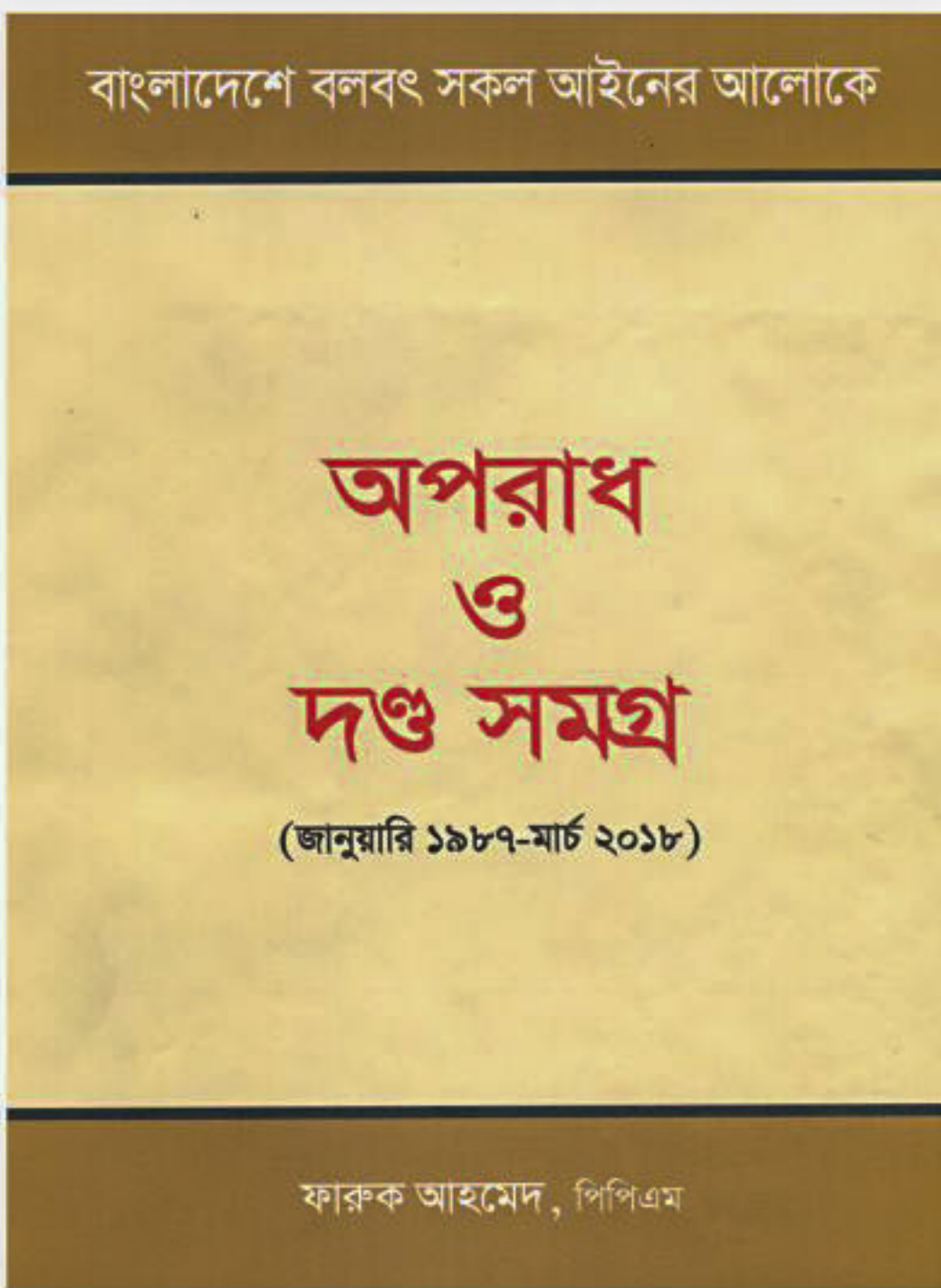
-FROM LAW DESK

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## Compilation on penal laws

IGNORANCE of law is no excuse' and in a country like Bangladesh, knowing and learning about all the laws is a task of such a gigantic nature which we cannot expect of everyone, considering the inherent complexities involved in getting formal legal education and also the intricacies of legal jargons and language in particular which is not comprehensible to everyone. The book titled 'Oporadh o Danda Shankalon' [Trans. 'Compilation on Crimes and Punishment'] is dedicated to elucidate laws in general and to make mass people and everyone concerned aware.

The crimes and their punishments under the laws in force in Bangladesh is the main theme of the book. In order to make it more comprehensible, the crimes and their respective punishments have been provided for in the book in tabular form. Not only fines (monetary penalties) and incarceration have been brought within the purview of 'punishment' rather disciplinary actions too have been encompassed. The issue of offences being compoundable or otherwise, too have been



taken into account in this compilation so as to make mass people aware. Care was taken so that that the book does not become too big in size. However in that case, the vast number of laws was a bar. In many cases, only one section (and one line) is dedicated to provide for the punishment for the violation of a law. In such cases, one might need to go through the entire law to get a proper idea.

This compilation has accommodated all the laws from 1987 to March 2018 and the next edition will deal with laws from 1836 to 1986. From 1987, laws started to get enacted in Bangla. There are laws where there is no offence and no indication of punishment; in those cases, only the name of the law has been mentioned. The laws have been accommodated in accordance with the time of enactment, alphabetical order and relevant ministry so that the law can very easily be found. The compilation has been done by Farooque Ahmed, PPM. He is currently working with the Police Headquarters as the AIG (ASP).

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## National Moot Court Competition held at Cox's Bazar

ON 2 November, 2018, Department of Law, Cox's Bazar International University organised a national Moot Court competition in collaboration with The Network for International Law Students (NILS)

Bangladesh on Public International Law. The Moot court competition was held at Cox's Bazar International University. This was the very first time that a national moot court competition was held at Cox's Bazar. 16 teams from 12 universities

from all over the country participated in this competition.

North South University grabbed the Champion Trophy with individual award of "Best Advocate" and State University of Bangladesh (SUB) was awarded with 1st Runner Up award while the other team of SUB secured 4th position. University of Chittagong won the Best Researcher award and became the second runner-up of this competition. Team representing Cox's Bazar International University won the Best Memorial award.

The chief guest of the closing and prize giving ceremony was Justice S.M Mozibur Rahaman, Honourable Justice of the Bangladesh Supreme Court. He said that he was amazed by the arguments delivered by the law students coming from 12 universities and also expressed that he was feeling as if he were in a High Court Division Bench.

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To celebrate World Human Rights Day 2018, **LAW&OUR RIGHTS**, *The Daily Star* is pleased to announce a legal write-up competition for all law enthusiasts.

**The competition is open for anyone with legal and human rights knowledge.**

The write-up should be based on any of the following themes:

- Realising SDGs for the Better Protection of Human Rights
- Online Freedom of Expression and Responsible Use of Social Media
- The Constitutional Reality of Right to Vote
- Human Rights for Peace, Non-violence and Harmony
- The Future of Human Rights and New Technology

### Guideline:

- The length of each write-up should not exceed 600 words.
- Write-ups must be original in writing and sufficiently analysed.
- One individual can submit only one write-up.
- Any plagiarised or already published write-up will not be considered for participation in this competition.

The best two essays will be published in **LAW&OUR RIGHTS** special supplement of *The Daily Star* after being reviewed by distinguished experts of the legal arena.

The write-up must be submitted by November 30, 2018 at: dslawdesk@yahoo.co.uk