RETHINKING CHILD RIGHTS AND PARENTAL EQUALITY

When a mother has custody but not guardianship

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A mother wants to take her child abroad for urgent medical treatment. The doctors have advised that the treatment should not be delayed. She has raised the child, paid for the child's education and healthcare, and shouldered almost every responsibility since her divorce. Yet she cannot proceed because the father, who has been largely absent from the child's life, refuses to provide a no-objection certificate (NOC).

In another case, a university teacher receives an opportunity to pursue higher education abroad and hopes to take her daughter with her. The father refuses consent. After prolonged negotiations, he agrees—but only after the mother signs an agreement on non-judicial stamp paper, undertaking to arrange a visa for him after reaching the destination country. The mother's academic future and the child's opportunity are thus made conditional on the father's consent.

These are not isolated accounts. They expose a structural problem in Bangladesh's laws governing child custody and guardianship. The problem affects mothers, children and, in certain circumstances, fathers as well. It raises a fundamental question: why should a child's healthcare, education, mobility and future depend on the consent of a parent who may have little involvement in the child's upbringing?

A child is born from the union of two parents. Their marriage may end, their personalities may differ and their lives may take separate directions. But the child should not become a casualty of their disagreement. The law must protect the child's interests—not preserve one parent's authority at the expense of the other.

CUSTODY AND GUARDIANSHIP: THE UNEQUAL BURDEN OF PARENTHOOD

Custody generally concerns the child's physical care, residence and day-to-day upbringing. Guardianship, by contrast, involves legal authority over important aspects of a child's life, including education, property and certain major decisions. A mother may therefore have custody without possessing equivalent legal authority as a guardian.

Under traditional Muslim personal law, a mother is generally entitled to preferential custody (hizanat) of young children, subject to established conditions. Under the Hanafi school, the conventional rule allows a mother to retain custody of a son until the age of seven and a daughter until puberty. However, courts increasingly consider the child's welfare when applying these traditional custody rules.

The more persistent inequality lies in the distinction between custody and legal guardianship. The father is generally recognised as the natural or legal guardian, even when the mother performs most of the actual caregiving. A mother's remarriage may also be treated under traditional personal law as grounds for losing preferential custody, although it should not be understood as an automatic or conclusive bar where the child's welfare points in another direction.

This arrangement creates an unequal burden of parenthood. Mothers are frequently expected to provide care, sacrifice professional opportunities and take responsibility for their children's everyday needs, while fathers retain a superior legal position in important decisions. Even a mother who has not remarried and has been the child's principal caregiver may encounter serious difficulties in obtaining independent guardianship while the father is alive and not legally considered unfit.

This is not an argument that every mother is necessarily a suitable caregiver or that every father is unsuitable. Neither parent should receive automatic preference simply because of gender. The central question should be whether a particular parent can best protect the child's physical, emotional, educational and psychological wellbeing. A legal system that presumes superiority or incapacity on the basis of motherhood or fatherhood risks overlooking the actual circumstances of the child.

AN OUTDATED LEGAL FRAMEWORK AND AN UNRESOLVED CONTRADICTION

Bangladesh's principal statute governing guardianship is the Guardians and Wards Act 1890, a colonial-era law that is more than 130 years old. Section 7 provides for the appointment or declaration of a guardian, while Section 17 identifies factors relevant to the welfare of a minor. Section 19(b), however, restricts the appointment of another person as guardian when the father is alive and is not considered unfit.

This provision creates a serious difficulty. Although the Act recognises the welfare of the child as a central consideration, the father's status may prevent the court from appointing the mother as guardian unless the statutory condition is satisfied. The result is a tension between the welfare principle and the traditional preference for paternal guardianship.

The Family Courts Act 2023 gives family courts jurisdiction over disputes involving guardianship and custody. However, the Act operates within the wider framework of personal laws. Bangladesh does not have a uniform civil code governing family matters. Different religious communities remain subject to different personal law rules, and the practical legal position of children may therefore vary according to the religion of their parents.

The question is not whether a court should always appoint the mother. It should not. The question is why the law should make the father's authority the starting presumption and require the mother to overcome additional legal barriers. Both parents should be assessed by the same standards, with the child's best interests as the paramount consideration.



A mother plays cricket with her son at a practice facility. Despite shouldering much of the responsibility for raising children, mothers in Bangladesh do not enjoy equal legal guardianship rights with fathers.

PHOTO: FIROZ AHMED



The welfare and best interests of children must remain at the heart of every decision concerning custody and guardianship, with both parents assessed on equal terms.

AI-GENERATED ILLUSTRATION.

This is not to suggest that people belonging to other religious communities face no difficulties. They do. Hindu, Christian and other families may encounter their own problems concerning custody, guardianship and the management of children's property. The difficulty is that the existing legal framework does not provide a single, comprehensive and clearly articulated child-centred standard that operates equally across religious communities.

The problem becomes even more complicated in interfaith marriages. When parents belong to different religious communities, questions concerning custody, guardianship, inheritance and the management of a child's property may become legally complex. A child's rights should not become uncertain because the parents belong to different faiths.

A 2024 assessment by UN Women, Achieving Equality Before the Law in Bangladesh, identifies these shortcomings. It recommends amending Section 19 of the Guardians and Wards Act to recognise mothers alongside fathers as competent guardians, clarifying the distinction between custody and guardianship, and replacing the existing law with comprehensive secular legislation.

WHAT THE COURTS HAVE RECOGNISED AND WHAT REMAINS UNRESOLVED

Bangladesh's judiciary has made important interventions. In January 2023, the High Court Division recognised that educational institutions and relevant authorities should accept the name of either parent or a legal guardian in official educational documents. The decision addressed the discriminatory practice of requiring a father's name even where a child was being raised by the mother alone.

In April 2024, the High Court Division granted guardianship of a child to her mother, actress Azmeri Haque Badhon, and raised questions about the constitutional validity of Section 19(b) of the Guardians and Wards Act. These developments indicate that the traditional framework is not beyond judicial reconsideration.

A more recent decision illustrates the continuing contradiction. In Family Suit № 313 of 2025, decided by Family Court № 7, Dhaka, on 25 February 2026, the court declined to appoint the mother as legal guardian of her minor son because the father was alive and was not considered legally disqualified. Nevertheless, considering the child's welfare, the court appointed the mother as custodian after the child had passed the age of seven and until he attained majority. The father was directed to bear educational and medical expenses and pay Tk 15,000 per month in maintenance.

The decision recognises the mother's caregiving role but also exposes the central problem: custody and guardianship remain separate. The mother may be entrusted with the child's everyday life, yet the father retains the legal authority that can determine whether the child receives a passport, travels abroad or accesses certain opportunities.

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A teacher gives lessons to children at a daycare centre in Dhaka's Khilgaon, run by the Department of Women Affairs. Bangladesh needs stronger alternative care arrangements for children without adequate parental care.

PHOTO: PRABIR DAS

WHAT NEIGHBOURING COURTS HAVE RECOGNISED

Judicial decisions in neighbouring countries demonstrate that traditional assumptions can be reconsidered without automatically privileging either parent.

In Pakistan, the Supreme Court, in Raja Muhammad Owais v. Mst. Nazia Jabeen and others (Civil Petition No. 240 of 2021, decided on 5 October 2022; reported as 2022 SCMR 2123), rejected the proposition that a mother's remarriage should, by itself, disqualify her from custody. The Court emphasised that the welfare of the children, including their physical, mental and emotional wellbeing, must remain the paramount consideration. The judgment is significant because it shows that even within a Muslim personal law framework, traditional rules concerning maternal custody need not be applied mechanically at the expense of children.

In India, the Supreme Court's decision in Githa Hariharan v. Reserve Bank of India (1999) addressed the interpretation of the expression "after the father" in the Hindu Minority and Guardianship Act. The Court interpreted it to mean "in the absence of the father", rather than only after his death. It recognised that a father's absence could include circumstances in which he was indifferent, inaccessible or unable to act, thereby allowing a mother to exercise guardianship during his lifetime in appropriate situations.

Another important decision, ABC v. State (NCT of Delhi) (2015), concerned an unmarried Christian mother who had raised her child without the father's involvement. The Supreme Court held that the child's welfare was decisive and that the mother's guardianship application should not be rejected merely because she could not disclose or notify the putative father in the circumstances of that case.

These judgments do not establish that mothers should always prevail over fathers. Their broader significance is that parental rights must be assessed in relation to the child's actual needs and circumstances. A parent's absence, indifference, caregiving history and capacity to provide a stable environment cannot be ignored in determining what is best for a child. Bangladesh can draw valuable lessons from this child-centred judicial approach.

THE CHILD'S BEST INTERESTS MUST BE THE GOVERNING PRINCIPLE

The Convention on the Rights of the Child (CRC) provides a clear international framework for protecting children's interests. Article 3 establishes that the best interests of the child must be a primary consideration in all actions concerning children. Article 12 recognises the child's right to express views in matters affecting them, with due weight given to their age and maturity. Article 18 emphasises the common responsibilities of both parents in raising and developing their children.

Bangladesh was among the early signatories to the Convention, signing it on 26 January 1990, the day it was opened for signature, and ratifying it on 3 August 1990. This early commitment carries a responsibility to ensure that domestic laws and institutions give practical effect to the principles of child protection, equality and the best interests of the child.

The constitutional principles of equality and non-discrimination also reinforce this responsibility. Articles 27 and 28 of the Constitution guarantee equality before the law and prohibit discrimination on specified grounds. Article 28(2) expressly recognises equal rights for women and men in all spheres of state and public life. Although the application of these provisions to personal law questions may involve complex legal considerations, they provide an important normative basis for reconsidering legal arrangements that systematically diminish a mother's capacity to protect her child.

The best interests of the child should not remain a phrase invoked only in court judgments. This principle must guide legislation, judicial decisions and administrative procedures. Courts should be able to examine the actual caregiving history, living conditions, behaviour, emotional relationships and parenting capacity of both parents. The child's views should also be heard in an appropriate manner, taking account of age and maturity. Where necessary and appropriate, a judge should have the opportunity to interact with the child independently, rather than relying exclusively on competing claims made by the parents.

CHILDREN WITHOUT PARENTAL CARE: WHERE DOES THE RESPONSIBILITY LIE?

The problem extends beyond divorced families. What happens when a mother dies, a father dies, both parents are absent, or neither is capable of providing proper care? What happens to children whose parents are missing, incapacitated, abusive or unable to protect them?

Bangladesh's Children Act 2013 recognises the need for alternative care. Sections 84–88 provide for arrangements that may include reintegration with parents or extended family, community-based care and institutional care. Therefore, it would be inaccurate to say that Bangladesh has no legal provision for alternative care. However, the country needs a more developed and accessible system of family-based foster care, professional assessment, monitoring and long-term support for children who cannot safely remain with their biological parents.

International experience offers useful models. Several European and North American countries have established foster care systems through which children can receive temporary or long-term family-based care under state supervision. In Muslim-majority societies, kafalah provides another relevant model. It allows an individual or family to assume responsibility for a child's care, education and protection without necessarily creating the same legal relationship as full adoption. UNICEF recognises kafalah as an important alternative care mechanism under the international child protection framework. Some Muslim-majority countries, including Tunisia, Indonesia, Malaysia and Turkey, also permit forms of legal adoption under their respective national laws.

Bangladesh should strengthen its own alternative care framework in a manner consistent with constitutional guarantees, child protection standards and the country's social and religious context. A child who loses one or both parents should not be left vulnerable to disputes over property, compensation or legal representation. The state must ensure that a suitable caregiver can be appointed and that the child's financial interests are independently protected.

A COMMON, RELIGION-NEUTRAL LAW IS NECESSARY

The solution is not necessarily to abolish religious personal laws or to interfere unnecessarily in matters of religious practice. Religious communities may continue to follow their respective personal laws in appropriate areas of family life. However, the state must have an independent legal framework to protect every child's welfare.

A common, religion-neutral law on child custody and guardianship should allow any mother or father, irrespective of religion, ethnicity, gender or social background, to approach a court seeking custody or guardianship on the basis of the child's best interests. The right to seek judicial protection should not depend on whether a parent belongs to a particular religious community or satisfies a gender-based presumption.

These experiences and needs have given rise to an initiative called the 'Children's Guardianship Expansion Proposition (CGEP)', involving parents, lawyers, child welfare activists, policymakers, religious scholars, journalists and civil society members. The central idea of the initiative is to expand access to guardianship while placing the child's welfare at the centre of legal decision-making. Religious personal laws need not disappear; rather, a common state law should ensure that no parent is prevented from seeking an appropriate judicial remedy simply because of their gender or religious identity.

Such a law must also give courts sufficient discretion to decide cases on the basis of evidence and actual circumstances. Judges should be able to assess the conduct and capacity of both parents, the child's relationship with each, the continuity of care, the child's own views and any risks to their wellbeing. The courts' hands should not be tied by outdated statutory restrictions or automatic parental preferences.

This does not mean giving judges unlimited or unstructured power. Their decisions should be guided by clear statutory criteria, reasoned findings and safeguards against arbitrary or discriminatory treatment.

Administrative procedures must also be reconsidered. Where a mother or father has lawful authority to make a decision concerning a child, unnecessary consent requirements from an uninvolved or obstructive parent should not prevent access to education, healthcare or other essential opportunities. Where the consent of both parents is genuinely necessary, there should be a fair and time-bound process for resolving disagreements, with the child's welfare as the overriding consideration.

The law exists to serve human beings; human beings do not exist to serve the law. A legal framework written in 1890 cannot be allowed to determine the opportunities and dignity of children and parents in a society that has changed so profoundly. Bangladesh needs a modern, humane and religion-neutral guardianship law—one that recognises both parents, protects every child and places the child's best interests above inherited legal privilege. A child is the shared responsibility of two parents, but the child's future belongs to the child. It is the duty of the law and the state to protect that future.

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