



## Constitutional Interpretation and Gender Equality: Analyzing the High Court Division's Landmark Decision on Maternal Guardianship in Bangladesh

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### Abstract

**Research Objective.** This research examines the significant ruling by the High Court Division of Bangladesh's Supreme Court on January 24, 2023, recognizing mothers as legal guardians of their children. The study analyzes this major shift from traditional frameworks recognizing fathers as primary custodians to a system emphasizing equal maternal rights in child custody matters. **Research Methodology.** The methodology employs comprehensive socio-legal analysis combining doctrinal legal examination, case law analysis, and interdisciplinary perspectives. Multiple analytical approaches examine statutory provisions, constitutional articles, and judicial precedents, integrating sociological and psychological perspectives to assess broader societal implications. **Results.** The Court's ruling represents a fundamental transformation in Bangladesh's family law tradition, establishing legal precedent for maternal guardianship rights. Analysis demonstrates a documented shift from patriarchal custody norms toward gender-neutral guardianship frameworks aligned with constitutional equality principles. **Findings and Implications.** Research reveals multidimensional implications across legal, social, and psychological domains. Legal implications establish constitutional recognition of equal maternal custody rights. Social implications demonstrate transformation of traditional gender roles and women's empowerment within family structures. Individual implications include enhanced parenting choices, decision-making authority, and improved access to education and healthcare services. **Conclusion.** This landmark ruling represents a pivotal moment in women's legal status evolution within Bangladesh's family law system, fundamentally altering traditional structures by challenging patriarchal norms and highlighting changing women's roles within legal contexts. **Contribution.** The study provides comprehensive documentation of family law transformation, contributing to legal scholarship, gender studies, and social policy development by demonstrating how judicial decisions catalyze broader social change. **Limitations and Suggestions.** Research recommends additional legal reforms to protect children's rights and addresses implementation challenges, suggesting comprehensive policy amendments to ensure effective transformation of family law practices in Bangladesh.



## Introduction

The issue of guardianship or custody frequently arises when a marriage dissolves, especially in situations where the father's identity is unrecognized. It is crucial to distinguish between guardianship and custody, as they are separate matters.<sup>1</sup> In some instances, custody of minor children may be granted to the mother, while the father maintains his status as their natural guardian. Generally, both parents have a right to custody of their children. According to the Majority Act of 1875,<sup>2</sup> However, under Muslim law, a mother is not regarded as a natural guardian; she has the right to custody of her child until the child is seven years old for boys and reaches puberty for girls.<sup>3</sup>

The Supreme Court of Bangladesh has established several precedents in this area through its rulings. In addition to observing the age guidelines, the family court has the authority to determine eligibility for child custody.<sup>4</sup> Ultimately, the well-being and best interests of the minor

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<sup>1</sup> Syeda Afroza Zerin, "Legal and Judicial Responses to Muslim Mothers' Rights to Guardianship in Bangladesh," *Pharmacognosy Magazine* (University of Dhaka, 2021); Asma Jahan, "LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE" 1, no. 3 (2015): 76–95; Sonali Abhang, "Guardianship and Custody Laws in India-Suggested Reforms from Global Angle," *IOSR Journal Of Humanities And Social Science* 20, no. 7 (2015): 39–58, <https://doi.org/10.9790/0837-20763958>; Taslima YASMIN, "Judicial Trends in Child Custody Cases in Bangladesh: Traditional Islamic Law Rules versus Welfare Considerations," *Asian Journal of Comparative Law* 12, no. 2 (2017): 233–56, <https://doi.org/DOI:10.1017/asjcl.2017.14>; Rumana Sharmin Barsha, "An Overview of Violation of Mother's Right to Custody of Child and Patriarchal Influence: A Critical Analysis in Reference to Existing Statutes and Case Laws" 8, no. 1 (2021): 13–16; Maksuda Akter and Roquia and Begum, "Factors for Divorce of Women Undergoing Divorce in Bangladesh," *Journal of Divorce & Remarriage* 53, no. 8 (November 1, 2012): 639–51, <https://doi.org/10.1080/10502556.2012.725364>; David Pearl, "The Legal Rights of Muslim Women in India, Pakistan and Bangladesh," *New Community* 5, no. 1–2 (June 1, 1976): 68–74, <https://doi.org/10.1080/1369183X.1976.9975434>; Shafi Md Mostofa and Muhammad Sazzad Hossain and Siddiqui, "Faith Leaders and Child Well-Being in Bangladesh: An Empirical Study," *The Review of Faith & International Affairs* 22, no. 1 (January 2, 2024): 59–74, <https://doi.org/10.1080/15570274.2024.2303286>.

<sup>2</sup> YASMIN, "Judicial Trends in Child Custody Cases in Bangladesh: Traditional Islamic Law Rules versus Welfare Considerations"; Roundtable Conference, "Comparative Analysis of Family Law in the Context of Islam," in *Comparative Analysis of Family Law in Context of Islam*, ed. Orzala Ashraf Nemat (Kabul, Afghanistan: Heinrich Böll Foundation, 2006), 1–55; Angela M Crossman et al., "Child Testimony in Custody Cases," *Journal of Forensic Psychology Practice* 2, no. 1 (January 1, 2002): 1–31, [https://doi.org/10.1300/J158v02n01\\_01](https://doi.org/10.1300/J158v02n01_01); Sarah C. White, "Patriarchal Investments: Marriage, Dowry and the Political Economy of Development in Bangladesh," *Journal of Contemporary Asia* 47, no. 2 (2017): 247–72, <https://doi.org/10.1080/00472336.2016.1239271>.

<sup>3</sup> Muhammad Adnan Aziz et al., "Custodial Challenges: Islamic and Pakistani Law in Child Custody Matters," *Current Trends in Law and Society* 3, no. 1 (2023): 88–102, <https://doi.org/10.52131/ctls.2023.0301.0019>; Syeda Afroza Zerin and Tahsina Tahmin Tarin, "REVISITING THE LAWS ON MUSLIM MOTHERS' RIGHT TO GUARDIANSHIP OF MINORS IN BANGLADESH," 2023, <https://doi.org/10.21868/PGnG.2023.2.1.Dr.>; Aayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)," *International Journal of Humanities and Social Science* 4, no. 5 (2014): 267–77.

<sup>4</sup> Nowrin Tamanna, Muhammad Amirul Haq, and Sara Hossain, "Chapter 3 Muslim Women's Rights under Bangladesh Law: Provisions, Practices and Policies Related to Custody and Guardianship" (Leiden, The Netherlands: Brill | Nijhoff, 2019), 145–94, [https://doi.org/10.1163/9789004357273\\_005](https://doi.org/10.1163/9789004357273_005); Sidney

child must be the paramount consideration. The mother is the sole named guardian in recent decisions by the High Court Division. According to the historic decision that was made by the High Court in the case of Bangladesh Legal Aid and Services Trust and Others vs. Bangladesh, the mother may also accept that she is the legal guardian of a student.<sup>5</sup>

This ruling on maternal guardianship is a significant advancement in the pursuit of women's rights and gender equality. Historically, only fathers were recognized as legal guardians of students on official paperwork. There will be two supplementary options: the mother's name or the legal Guardian's name. Students cannot be coerced into disclosing their father's name against their consent. This study seeks to examine how this ruling enables a mother to assume the role of legal or sole Guardian of a child.<sup>6</sup>

This study seeks to accomplish several interconnected objectives that address critical gaps in contemporary child guardianship legislation and policy frameworks. The research aims to conduct a comprehensive reevaluation of existing legal frameworks governing child guardianship while analyzing and enhancing maternal rights within custody contexts. Additionally, the study focuses on developing comprehensive legal provisions and protective mechanisms specifically designed for children of unknown or unestablished paternity, ensuring adequate safeguarding of their rights and welfare within existing guardianship structures.

The research also undertakes a critical examination of discriminatory elements embedded within current child guardianship legislation, particularly gender-based discrimination and systemic bias, while establishing robust legal foundations that simultaneously strengthen maternal guardianship rights and implement protective measures to safeguard children's identity rights and overall well-being. These objectives collectively contribute to evidence-based recommendations for legal and policy reforms that promote equity, protection, and the best interests of all parties involved in guardianship arrangements.

## Method

This research employs a qualitative methodology grounded in constitutional legal analysis alongside theories of judicial interpretation to investigate the landmark ruling of the High Court Division regarding maternal guardianship rights in Bangladesh. The study utilizes a comprehensive doctrinal approach that aligns constitutional interpretation frameworks with jurisprudential themes centered on gender equality. It examines the extent to which the court's decision in the case of Bangladesh Legal Aid and Services Trust and Others vs. Bangladesh signifies a pivotal transformation in the understanding of maternal guardianship within the constitutional context of gender equality and fundamental rights.

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Ruth Schuler, Islam Farzana, and Elisabeth and Rottach, "Women's Empowerment Revisited: A Case Study from Bangladesh," *Development in Practice* 20, no. 7 (September 1, 2010): 840–54, <https://doi.org/10.1080/09614524.2010.508108>; Fathima Sherin Ottakkam Thodukayil, Palaniswamy Udhayakumar, and Aswathy and Kunjumon, "The Causes of Divorce and Its Effects on Women: A Systematic Review," *Marriage & Family Review*, n.d., 1–36, <https://doi.org/10.1080/01494929.2025.2484781>; Md. Rizwanul Islam, "Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in Bangladesh with Not so Benevolent Consequences," *Oxford University Commonwealth Law Journal* 16, no. 2 (July 2, 2016): 219–34, <https://doi.org/10.1080/14729342.2016.1272943>.

<sup>5</sup> Mahmuda Akand, "The High Court Division (Bangladesh) Verdict Acknowledging Mother as Legal Guardian of a Child and Its Probable Impact on the Person and the Respective Society," *Asian Studies, Jahangirnagar University Journal of Government and Politics* 42 (June 1, 2023): 85–93.

<sup>6</sup> Martha C. Nussbaum, *WOMEN AND HUMAN DEVELOPMENT*, 1st Pub (Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo Cambridge: Cambridge University Press, 2001). P.231



The primary data collection involves a systematic analysis of the High Court Division's ruling, encompassing constitutional provisions pertaining to equality and non-discrimination as well as relevant statutory frameworks that govern child guardianship under both secular and religious personal laws. Secondary sources include comparative constitutional jurisprudence from other South Asian nations, scholarly examinations of methodologies in constitutional interpretation, and international legal instruments that address gender equality and children's rights. The study employs critical legal analysis to scrutinize how principles of equality enshrined in the constitution have been interpreted and applied in the context of maternal guardianship rights.

The analytical framework integrates constitutional interpretation theory, specifically investigating how courts reconcile traditional legal tenets with the evolving constitutional values of gender equality and human rights. This research critically evaluates the reasoning presented by the court, the constitutional principles referenced, and the interpretative methods employed to reach the landmark ruling. A comparative analysis with analogous constitutional developments in other jurisdictions situates this judicial intervention within a broader context, emphasizing its significance in advancing gender equality through constitutional interpretation.

Data analysis entails a meticulous examination of legal reasoning, constitutional arguments, and judicial precedents to ascertain the manner in which the High Court Division's decision reflects wider trends in constitutional interpretation related to gender equality. The study investigates the interactions among constitutional mandates, statutory provisions, and judicial activism in reshaping the legal perspective on maternal rights. Ultimately, it assesses the contributions of this landmark ruling to the evolution of gender equality jurisprudence and its prospective implications.

## Result and Discussions

### *Statutory Provisions and Constitutional Challenges*

In Bangladesh, guardians are legally obligated to care for the needs of minors, whether concerning their personal welfare or their property. According to Section 4(2) of The Guardian and Wards Act, 1890,<sup>7</sup> a guardian is defined as an adult entrusted with the responsibility of looking after a minor's well-being or assets (or both). Guardianship encompasses the supervision of a minor throughout their childhood. This role can be fulfilled by a legal guardian appointed by the court or by a natural guardian, such as a parent.<sup>8</sup> For the sake of the minor's best interests, a legal guardian undertakes the responsibilities typically associated with parenting. This subsection details the specific legal instruments and their provisions that form the core of the guardianship discourse in Bangladesh.

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<sup>7</sup> Legislative and Parliamentary Affairs Division, Justice and Parliamentary Affairs Ministry of Law, and Bangladesh Secretariat, "The Guardians and Wards Act, 1890," Laws of Bangladesh, accessed April 21, 2024, <http://bdlaws.minlaw.gov.bd/act-64/section-19359.html?lang=en>.

<sup>8</sup> Mohi Uddin, "Status Of the Child of Assisted Reproductive Technology (Art) In Islamic Law and Their Rights to Inheritance," *Journal of Law and Sustainable Development* 12, no. 7 (2024): 1–20.



Legal Instrument	Section/Article	Key Provision	Relevance to Guardianship
The Constitution of Bangladesh	Article 26	Protection of fundamental rights	Basis for challenging discriminatory laws.
The Constitution of Bangladesh	Article 27	Equality before the law	Ensures equal treatment under the law.
The Constitution of Bangladesh	Article 28(2)	Prohibition of sex-based discrimination; equal rights for men and women	Prohibits gender discrimination in public life and legal frameworks.
The Guardians and Wards Act, 1890	Section 19(b)	Father as a minor's natural guardian	Historically discriminatory clause, subject to challenge.
The Guardians and Wards Act, 1890	Section 29(b)	Father as a minor's natural guardian	Clause deemed to violate the Constitution.
The Guardians and Wards Act, 1890	Section 7	Court obligation to appoint guardian for minor's welfare	Establishes the court's authority in guardian appointment.
The Guardians and Wards Act, 1890	Section 17	Criteria for selecting a guardian	Guides the court in assessing suitability of a guardian.
The Guardians and Wards Act, 1890	Section 4(2)	Definition of a guardian	Provides legal definition of a guardian.
The Family Courts Act, 2023	Section 5	Family court jurisdiction over child custody and guardianship	Establishes exclusive jurisdiction for family disputes.
The Family Courts Act, 2023	Section 27	Alignment with Guardians and Wards Act 1890	Mandates compliance with existing guardianship legislation.

Table 1: Relevant Constitutional Articles and Statutory Provisions

Custody refers to the physical possession of a child until they reach a certain age, which may be shared by one or both parents. This legislation specifies the rights and obligations of parents about child custody, particularly in the context of Muslim families. Under Muslim law, there is a distinction between custody (Hizanat) and guardianship (wilayat-e nafs),<sup>9</sup> though these terms are sometimes used interchangeably. 'Hizanah' (custody) applies to children during their formative years, specifically until the age of seven for both boys and girls. Generally, during a child's minority, the father, or in the absence of the father, the paternal grandfather, is tasked with the comprehensive supervision of the child, which is regarded as guardianship. Family courts have been created under the Family Courts Act 2023 as the sole venue for addressing family disputes, especially those concerning child custody. This legislation enables judges to prioritize the child's

<sup>9</sup> Abdul Mannan Bhuyean, "The Powers and Functions of the Family Court with Reference to the Laws and Judicial Development in Bangladesh : An Overview," *International Journal of Social Science and Education Research* 7, no. 1 (2025): 371-74.





welfare when making custody determinations. Per Section 5 of the Family Courts Act 2023, these courts are tasked with managing cases related to child custody and guardianship.<sup>10</sup>

Judgments from the High Court Division of the Supreme Court of Bangladesh suggest that the Family Courts Act does not violate the religious freedoms of any plaintiffs. Although it remains unclear if this is applicable to non-Muslims, it implies that the Act is applicable to everyone, regardless of their religious beliefs. The Act is applicable to all families, regardless of their faith. It establishes criteria for assessing the best interests of the child and details the legal framework for appointing guardians for minors. There may be cases where the provisions of the Guardians and Wards Act conflict with Muslim personal law. In such instances, the Guardians and Wards Act of 1890 takes precedence.<sup>11</sup> The Act indicates that decisions concerning minors should be guided by specific laws.

According to Section 17(2) of the Guardians and Wards Act, the following aspects should be considered when selecting a guardian: the age, gender, and religion of the minor; the character and capabilities of the potential guardian; their family ties to the minor; the preferences of any deceased parents; the past or current relationship between the guardian and the minor or their property; and the minor's ability to express a considered preference should also be taken into account. While the father is acknowledged as the child's natural guardian, the mother holds custody rights until the child reaches a designated age. This custody right is known as "hazmat." The father possesses both natural and legal guardianship of the child until they attain the age of responsibility.<sup>12</sup>

### ***First woman in Bangladesh to be granted legal guardianship of a child***

Being the first mother in Bangladesh to get complete guardianship of her daughter, actress Azmeri Haque Badhon made legal history. As a giant leap forward in the fight for gender equality and empowerment, this landmark decision draws attention to the persistent gender gap in guardianship laws and the barriers women face when trying to advocate for themselves. By its latest ruling on April 22, 2024, the High Court closed a major legal loophole, granting Badhon exclusive Guardianship of her daughter and authorizing the establishment of a panel to formulate criteria for the appointment of a guardian for a minor. This shift signifies a new direction in Bangladeshi law, one that seeks to recognize and defend the rights of women involved in decisions about child custody.<sup>13</sup>

This chronological overview of judicial decisions highlights a clear trend of evolving legal interpretations and judicial involvement in Bangladesh concerning mothers' guardianship rights. This evolution signifies a significant finding, indicating a notable shift in legal precedent over time. Mothers were marginalized in the legal system since the father was usually granted sole guardianship of a minor under Section 19(b) of the Guardian and Guardianship Act, 1890. However, this antiquated clause has been contested as being incompatible with constitutional rights, which has sparked an important discussion about updating outmoded legislation to conform to modern ideas of justice and equality.

Badhon's difficult path of obtaining guardianship highlighted the structural obstacles that women have when navigating the legal system. She faced opposition in claiming her rights even

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<sup>10</sup> "The Family Courts Act, 2023," Pub. L. No. 26, § 5 (2023), <http://bdlaws.minlaw.gov.bd/act-details-1444.html>.

<sup>11</sup> "Navigating Child Custody in Bangladesh: 3 Legal Considerations," May 12, 2024, <https://sadarwat.com/child-custody-in-bangladesh-legal-considerations/>.

<sup>12</sup> The Guardians and Wards Act, 1890.

<sup>13</sup> Showtime Desk, "Badhon Wins Sole Guardianship of Daughter," *Dhaka Tribune*, 2024, <https://www.dhakatribune.com/showtime/344829/badhon-wins-sole-guardianship-of-daughter>.

though she was the only provider and the main caregiver, underscoring the widespread gender biases that exist throughout.<sup>14</sup>

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Case/ Incident	Key Parties/ Petitioners	Date of Key Ruling	Cour/ Body	Core Issue	Outcome/Ruling
Rajshahi Education Board Case	BLAST, Bangladesh Mahila Parishad, Naripokkho	August 2, 2009 (Initial Incident)	HCD	Denial of admit card due to missing father's name	Initial writ petition filed.
Rajshahi Education Board Case	BLAST, Bangladesh Mahila Parishad, Naripokkho	August 3, 2009 (Initial Ruling)	HCD	Discriminatory clause obstructing equality and education	Rule issued questioning discriminatory clause.
Rajshahi Education Board Case	BLAST	June 6, 2021 (Supplemental Affidavit)	HCD	Support for petitioners	Supplemental affidavit submitted.
Rajshahi Education Board Case	BLAST, Bangladesh Mahila Parishad, Naripokkho	January 24, 2023 (Final Verdict)	HCD	Mother's right to sole legal guardianship	Rule declared invalid; mothers allowed as sole legal guardians.
Azmeri Haque Badhon Case	Azmeri Haque Badhon	April 30, 2018 (Custody Grant)	Family Court	Custody of daughter	Custody granted to mother.
Azmeri Haque Badhon Case	Azmeri Haque Badhon	April 22, 2024 (Guardianship Grant)	High Court	Mother's right to sole legal guardianship	Sole guardianship granted; panel to formulate criteria.

Table 2: Summary of Key Guardianship Verdicts in Bangladesh

Lawyer Sara Hossain told reporters in the court premises, "This is a very big achievement. In Bangladesh, although women receive Custody of children, no one is granted guardianship except in one case. Our actress Azmeri Haque Bandhon got Custody of her child." Except for this, there is no other example in the history of Bangladesh in which women have been guardianship of children. Six years ago, on April 30, 2018, the 12th Assistant Judge and Family Court Judge, Dhaka, Israt Jahan, granted Custody of only daughter Michelle Amani Saira to Bandhon.<sup>15</sup>

#### ***Application and Interpretation of Child Custody Laws in Bangladesh: Statutory Provisions and Judicial Precedents.***

In the event of a marriage dissolution that leads to divorce, disputes concerning child custody and guardianship may emerge. In Bangladesh, such matters are governed by the Family

<sup>14</sup> Sajed Karim, "Badhon's Victory as a Mother: The First Woman to Win Legal Guardianship of Child in Bangladesh," *Share-Net Bangladesh* (Bangladesh, April 2024), <https://www.share-netbangladesh.org/a-mothers-victory-badhon-makes-history-as-the-first-women-to-win-legal-guardianship-in-bangladesh/>.

<sup>15</sup> Desk, "Badhon Wins Sole Guardianship of Daughter."



Courts Act of 2023 and the Guardians and Wards Act of 1890. Conflicts may arise at times between Muslim personal law and the provisions outlined in the Guardians and Wards Act; however, in these instances, the Guardians and Wards Act of 1890 takes precedence.

The Guardians and Wards Act mandates that the court adhere to the specific laws relevant to the minor. As stipulated in Section 17(2), the primary consideration for the appointment of custodians is the welfare of the minor. The court evaluates various factors, including the minor's gender, religion, age, physical and mental health, as well as the prospective guardian's capability, character, and relationship with the minor. Furthermore, the court considers the wishes of deceased parents and any past or present connections the potential guardian may have with the minor or their possessions. When appropriate for their age, the minor's preferences may also be taken into account.

The Family Courts Act of 2023, particularly in Section 5, confers the authority to adjudicate matters related to child custody and guardianship. Rulings from higher courts have indicated that the Family Courts Act does not abrogate any personal rights of litigants, irrespective of their faith. However, it remains ambiguous whether this interpretation extends to non-Muslims. These precedents suggest applicability of the Act to all individuals, regardless of their religious affiliations.

In accordance with both Muslim and Hindu guardianship laws, the father is recognized as the natural and lawful guardian of a minor. The Majority Act of 1875 designates the father as the children's natural and legal guardian until the age of majority is reached. Under Islamic law, a minor's custody is referred to as *Hizanat*, while guardianship is termed *Wilayat-e Nafs*; in certain contexts, these terms are regarded as having equivalent meanings. A child under the care of a guardian is typically subject to close supervision. The natural guardian is generally the father (or his designated executor) or, in the absence of the father, the paternal grandfather.<sup>16</sup>

Custody (*Hizanat*) pertains to the physical possession of the child until a specified age. Under Islamic law, the mother is granted custody of her child until a designated age, even if she is not the biological guardian. Across all schools of Islamic jurisprudence, the prevailing principle asserts that the mother retains custody of her infant until a specific age. The mother is entitled to custody beginning prior to the child's birth, maintaining custody of a male child until he reaches the age of seven and of a female child until she attains puberty, typically around the age of fifteen. Should the mother remain single following her divorce or the death of her spouse, she continues to hold custody rights.<sup>17</sup>

In the *Ali Akber v. Mst. Kaniz Maryam* case, the Court unfairly granted the father custody of the minor son even though it was obvious that the mother was best for the child's well-being. Rigid rules should never be used to decide cases like the ones mentioned above since they could ruin the child's entire life and have a negative impact on him. But now, while rendering decisions, the Court considers the welfare of the kid as a whole. The court allowed his mother custody of their infant son, thereby avoiding the Hanafi age restriction.<sup>18</sup>

According to traditional Hanafi law, a boy's mother relinquishes custody of him when he turns seven years old. However, this ruling was overturned in a case; according to the Court, "as the child's welfare should be the primary consideration, deviation from the principle of Islamic law—in this case, the rule of *Hizanat*, or guardianship of a minor child as stated in the Hanafi school—would seem permissible." Furthermore, the Court observed that the jurists themselves

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<sup>16</sup> Tamanna, Haq, and Hossain, "Chapter 3 Muslim Women's Rights under Bangladesh Law: Provisions, Practices and Policies Related to Custody and Guardianship."

<sup>17</sup> Asma Jahan, "LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE," *Journal of Asian and African Social Science and Humanities* 1, no. 3 (2015): 75–95.

<sup>18</sup> *Zohra Begum v. Latif Ahmed Munawar* (1965)17 DLR(WP) and PLD 1965 (Lah) 695 (n.d.).





were unable to reach a consensus and that there is no clear and distinct declaration of the Quran or Sunnah on which to rely. This justifies the departure from the classical perspective. Therefore, it is secure to assert that, contingent upon the circumstances and the child's best interests, both the mother and the father may share Custody and guardianship of the child.<sup>19</sup>

Furthermore, the establishment of gender equality is guaranteed by Article 27 of the Constitution.<sup>20</sup> Moreover, Article 28(2) of the Constitution ensures men's and women's equal rights in all facets of public life and the state. In decisions such as *Rahmatullah v. Sabana Islam*, 54 DLR and *Ayesha Khanum v. Major Shabbir Ahmed*, 46 DLR, similar precedents were established where a widow was held to retain her guardianship only because she remarried for the protection of the minor.<sup>21</sup>

### ***Procedural Requirements for Guardian Appointment under the Guardian and Wards Act, 1890***

The Guardian and Wards Act of 1890, as articulated in Section 7, stipulates that if the Court is satisfied regarding the welfare of a minor, it is obligated to appoint a guardian. The Court possesses the authority to designate or declare any individual as the minor's guardian, provided that this individual is a citizen of Bangladesh. The Appellate Division of the High Court has established that, when reviewing an application under the Guardian and Wards Act, the Court must be persuaded that the appointment of a specific individual as guardian serves the best interests of the minor.<sup>22</sup>

It is imperative to note that a new guardian cannot be appointed to supersede one designated by a will or other legal documents until the powers of the existing guardian have officially expired in accordance with subsequent regulations. Section 17 of the Act provides a framework for the Court in selecting a guardian. Primarily, the Court must evaluate whether the appointment of a guardian is essential for the welfare of the minor and whether it adheres to legal stipulations. To assess the minor's welfare, the Court considers multiple factors, including the minor's age, sex, and religion, as well as the proposed guardian's character, capabilities, and proximity to the minor. The Court also takes into account the wishes of deceased parents and any previous or ongoing relationships the proposed guardian may hold with the minor or their possessions. Furthermore, it is necessary for the individual proposed as a guardian to provide consent for this appointment.

The Family Court is designated to adjudicate cases concerning the guardianship of minors. Under the Family Courts Act, these courts possess exclusive jurisdiction over matters about "guardianship and custody of children." In addressing issues involving minors, including guardianship, the Family Court is required to comply with the provisions outlined in the Guardian and Wards Act of 1890, as referenced in Section 27.<sup>23</sup> Moreover, the High Court Division has clarified that individuals of any religion are entitled to initiate legal action concerning the matters specified in Section 5 of the Family Courts Ordinance, which applies universally to all citizens of

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<sup>19</sup> Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)."

<sup>20</sup> "The Constitution of the People's Republic of Bangladesh," The Constitution of 1972 to P. O. No. 76 of 1972 § (1971), <http://bdlaws.minlaw.gov.bd/act-367.html>.

<sup>21</sup> juralacuity, "Child Custody in Bangladesh," *Jural Acuity* (blog), October 7, 2019, <https://juralacuity.com/child-custody-in-bangladesh-2/>.

<sup>22</sup> Muhammad Abu Bakar Siddique vs S.M.A. Bakar & others, 38 DLR (Appellate Division (AD), Supreme Court of Bangladesh 1986).

<sup>23</sup> The Family Courts Act, 2023.



Bangladesh.<sup>24</sup> Thus, a non-Muslim individual is also able to seek legal recourse for guardianship issues related to a child if they encounter challenges.

### ***Background and the Way of Verdicts***

On August 2, 2009, the HCD handed down its ruling in a public interest litigation writ suit that was jointly brought by BLAST, Bangladesh Mahila Parishad, and Naripokkho. This petition was initiated in response to the Rajshahi Education Board's denial of an admit card for an SSC examination for a girl from Thakurgaon. The reason for the denial was that the girl had neglected to include her father's name in the Student Information Form (SIF). The media subsequently reported that her mother was responsible for her upbringing, as her father had abandoned the family.<sup>25</sup>

A bench that comprised Justice Naima Haider and Justice Md Khairul Alam declared the rule invalid. This decision will allow mothers to be designated as sole legal guardians in these situations. This decision was universally applauded by all parties involved, as it represents a substantial stride forward in the fight against gender discrimination and resolves a multitude of complications for unmarried mothers and fatherless children. This conclusion was universally applauded, as it addresses a multitude of issues for single mothers and fatherless children and represents a substantial advancement in the fight against gender bias.<sup>26</sup>

The Supreme Court's judicial activism was commended by Taslima Yasmin, an adjunct professor of law at the University of Dhaka. She also noted that legislators were not making significant efforts to address these issues. "This decision has created opportunities for the legislature to address the discrimination in other laws related to custody and guardianship in Bangladesh and to strive for a progressive future that prioritizes the well-being of the child," she stated. The legislature is now obligated to review all extant forms that require the identification of both parents and eliminate any discriminatory provisions in light of Bangladesh's international obligations. She also expressed her concern about the fourteen-year delay in issuing the ruling and the need for reforms to the nation's justice system. "It is also crucial that our higher judiciary consider the grievances caused by the substantive delay in disposing of the writ petition to ensure gender equality," she continued.<sup>27</sup>

This issue has resulted in discrimination against students and single mothers for an extended period, commencing with their enrollment in elementary schools and extending throughout their higher education. The priority has been given to mothers over fathers who do not participate in their children's lives. Nevertheless, these types of decisions appear to grant women in Bangladesh the confidence that equality is feasible despite the fact that it necessitates time and effort. Advocate Ainun Nahar Siddiqui, who represented the petitioner at the hearing, stated that the writ petition was submitted 14 years ago with the requirement that children record the names of their fathers as the legal custodians on forms, followed by the names of their

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<sup>24</sup> Nirmal Kanti Das vs. Sreemati Biva Rani, 47 DLR (n.d.).

<sup>25</sup> Senior Correspondent, "HC Recognises Mothers as Legal Guardians of Students Too," bdnews24.com, 2023, <https://bdnews24.com/bangladesh/ydx3u5jwoh>; Bhuyean, "The Powers and Functions of the Family Court with Reference to the Laws and Judicial Development in Bangladesh: An Overview."

<sup>26</sup> Nishat Tasnim Hridi, "From the Court Corridor: February 2023," *Dhaka Law Review*, October 26, 2023, <https://www.dhakalawreview.org/blog/2023/10/from-the-court-corridor-february-2023-6373>.

<sup>27</sup> YASMIN, "Judicial Trends in Child Custody Cases in Bangladesh: Traditional Islamic Law Rules versus Welfare Considerations"; Taslima Yasmin, "Reconciling ' Best Interests of the Child ' with the Traditional Muslim Law Rules on Child Custody : Trends in the Judicial Decisions of Bangladesh" (Brunel University London, 2023).



mothers.<sup>28</sup>

"The High Court Division has now determined that it will be sufficient to record the names of the father, mother, or legal guardian in official documents," she stated. Advocate Ayesha Akhter and Advocate MM Rezaul Karim also represented the petitioner in Court, while Deputy Attorney General Amit Dasgupta represented the state. On August 2, 2009, Bangladesh Mahila Parishad, Bangladesh Legal Aid and Services Trust (BLAST), and Nari Paksha, three human rights organizations, jointly submitted a writ petition in response to this incident, arguing that it was in the public interest. The following day, the High Court bench, which was composed of Justices Syed Refat Ahmed and Moinul Islam Chowdhury, issued a ruling in which they inquired as to why this discriminatory clause, which obstructs access to equality, human rights, and, in particular, the right to education, should not be declared as unconstitutional and unlawful. Furthermore, the HCD instructed the appropriate authorities to submit a report regarding the arrangements in place for students who are eligible to take a public examination but elect not to disclose their father's name.

Subsequently, on June 6, 2021, the Bangladesh Legal Aid and Services Trust (BLAST) submitted a supplemental affidavit supporting the petitioners to the Court. The decision was made on January 24, 2023, by the High Court Bench of Justices Razik-Al-Jalil and Naima Haider, following numerous hearings. This decision is not only crucial for guaranteeing one's right to education, but it has also facilitated the contemplation of alternative yet conventional naming procedures and personal identity.<sup>29</sup>

### ***Justifications for Submitting a Writ Petition in the High Court Division of the Supreme Court***

This writ was filed by the petitioners in the public interest, asserting that Section 19(b) of the Guardians and Wards Act, 1890 infringes upon the fundamental rights of women to equality and nondiscrimination. Moreover, they requested a declaration that women and men should be regarded equally when applying for or being appointed as a minor's Guardian. In accordance with the Guardians and Wards Act of 1890, Articles 26, 27, and 28 of the Constitution protect fundamental rights.<sup>30</sup> The High Court Division has questioned the validity of clause "b" of section 19 of the Guardians and Wards Act, 1890, which only names the father as a minor's natural Guardian. The Court directed the pertinent government agencies to provide an explanation as to why the Guardians and Wards Act, 1890's clause "b" in section 19 should not be declared unconstitutional. Compliance with the regulation has been mandated by the National Human Rights Commission (NHRC), the Law Commission, the Women and Children Affairs Secretary, and the Law Secretary. The bench of Justices Naima Haider and Kazi Zinat Haque issued the ruling following their consideration of the writ petition submitted by the organizations.<sup>31</sup>

### ***Position of Bangladesh and the necessity of fair guardianship laws***

The legal framework regarding Guardianship and Custody of children in Bangladesh is

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<sup>28</sup> Tanha Tanzia, "Mothers as Guardians: HCD's Historic Verdict," *The Daily Star*, February 3, 2023, <https://www.thedailystar.net/law-our-rights/news/mothers-guardians-hcds-historic-verdict-3238756>.

<sup>29</sup> Mahmuda Akand, "The High Court Division (Bangladesh) Verdict Acknowledging Mother as Legal Guardian of a Child and Its Probable Impact on the Person and the Respective Society," *Jahangirnagar University Journal of Government and Politics* 42 (2023): 85–93.

<sup>30</sup> Tribun Desk, "High Court Issues Rule Nisi to Formulate Guidelines on Guardianship Rights," *Dhaka Tribune* (Dhaka, Bangladesh, April 2024), <https://www.dhakatribune.com/bangladesh/court/344599/high-court-issues-rule-nisi-to-formulate>.

<sup>31</sup> Bikashju, "HC Questions Legality of Father as Sole Natural Guardian of a Minor," *The Financial Express* (Bangladesh, April 2024), <https://thefinancialexpress.com.bd/national/hc-questions-legality-of-father-as-sole-natural-guardian-of-a-minor>.



rooted in a combination of Islamic family law, civil law, and statutory regulations. The country's approach is influenced heavily by the provisions set out in the Muslim Family Laws Ordinance of 1961 and the Guardians and Wards Act of 1890, with significant contributions from both customary and religious practices. The protection of children's rights is also governed by the Constitution of Bangladesh, which aligns with international standards, notably the United Nations Convention on the Rights of the Child (CRC), to which Bangladesh is a signatory.<sup>32</sup> As Bangladesh continues to evolve in terms of legal reform, efforts should be made to bridge the gaps between secular and religious laws, promote gender equality in custody decisions, and ensure the effective enforcement of custody orders. By doing so, Bangladesh can provide a more consistent and fair approach to child custody and guardianship, ultimately safeguarding the rights and well-being of children in the country.<sup>33</sup>

Child custody and guardianship in Bangladesh is governed by a legal system that combines civil law, Islamic law, and various statutes. While there are rules in place to protect the safety of children, there are significant gaps that hinder the fair and efficient resolution of custody disputes.<sup>34</sup> Disparities in financial status, gender bias, inconsistent application of the legal system, and a lack of clear criteria for determining the best interests of the child all contribute to these problems. Below are the main problems of the child custody and guardianship laws in force.<sup>35</sup>

A substantial shortcoming in this law is the conflict between civil law and religious law, particularly Islamic family law and the 1890 Guardianship and Trusteeship Act. This conflict often leads to confusion in court, especially in mixed-religion families or cases where religious customs clash with the principles of the Guardians and Trustees Act which prioritize the welfare of the child. Inconsistent application of the law can result in decisions that are not in the best interest of the child, creating uncertainty in custody cases.<sup>36</sup>

Bangladeshi law exclusively recognizes fathers as natural guardians, effectively denying this status to mothers. Under Section 29(b) of the Guardianship and Trusteeship Act 1890, only fathers are considered natural guardians of children, which violates the Constitution. Article 27 of the Bangladesh Constitution protects the right to equality before the law, but existing laws do not guarantee such equality. Article 28 explicitly

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<sup>32</sup> Syeda Afroza Zerin, "Legal and Judicial Responses to Muslim Mother's Rights to Guardianship in Bangladesh" (UNIVERSITY OF DHAKA, 2025), p. 113.

<sup>33</sup> Tasnuva Anika, "Custody, Guardianship, and Adoption: Comparing Bangladesh and Malaysia," *The Daily Star* (Dhaka, Bangladesh, December 2024), <https://www.thedailystar.net/law-our-rights/news/custody-guardianship-and-adoption-comparing-bangladesh-and-malaysia-3769496>.

<sup>34</sup> Meherun Wahed, "On Norms of Custody and Guardianship," *The Daily Star* (Dhaka, Bangladesh, November 2018); Nahid Ferdousi, "The Establishment of Children's Courts in Bangladesh: From Principle to Practice," *Oxford University Commonwealth Law Journal* 15, no. 2 (July 3, 2015): 197–221, <https://doi.org/10.1080/14729342.2016.1191158>.

<sup>35</sup> Xin Zhang, Shi Chen, and Mengyuan Wang, "Gender Bias in Child Custody Judgments: Evidence from Chinese Family Court," *PLoS ONE* 19, no. 7 July (2024): 1–17, <https://doi.org/10.1371/journal.pone.0305479>; Cynthia McNeely, "Lagging behind the Times: Parenthood, Custody, and Gender Bias in the Family Court," *Florida State University Law Review Volume* 25, no. 4 (1998): 891–956.

<sup>36</sup> YASMIN, "Judicial Trends in Child Custody Cases in Bangladesh: Traditional Islamic Law Rules versus Welfare Considerations."



prohibits discrimination based on sex. Therefore, the legislature is prohibited from making laws that discriminate against individuals based on sex.<sup>37</sup>

Gender inequality persists in child custody court decisions. In cases where mothers are the primary caregivers and better suited to meet the emotional and physical needs of their children, gender bias can lead to unfair outcomes. This gender imbalance in guardianship proceedings undermines women's rights and negatively impacts children's mental health. The current legal framework violates the fundamental rights protected by Articles 27 and 28 of the Bangladesh Constitution, as well as Article 26. In addition, the Family Courts Act 2023, which addresses guardianship issues, is aligned with the Guardianship and Trusteeship Act 1890, as provided for in Article 27. The discriminatory clauses in the Guardianship and Trusteeship Act 1890 have been of concern in this context.<sup>38</sup>

Although the Guardianship and Conservatorship Act emphasizes child safety in custody decisions, the criteria for identifying the "best interests of the child" remains unclear. This lack of clarity can lead to decisions that ignore the psychological and emotional well-being of the child, placing them in an unsuitable environment.

In Bangladesh, wealthier parents often get custody. Financial status can unfairly result in children from low-income families being placed with parents who are financially stronger but less caring and do not prioritize their well-being. In addition, the legal system in Bangladesh lacks an adequate support system for parents and children involved in custody disputes. The absence of comprehensive support leads to prolonged custody battles and further exacerbates the emotional burden for children and parents.

## Conclusion

The landmark ruling by the High Court Division in Bangladesh signifies a crucial milestone in the recognition of women as legitimate legal guardians. This decision challenges longstanding patriarchal structures and advances gender equality within family law. By empowering mothers to make pivotal decisions regarding their children's welfare, the ruling fundamentally alters the legal landscape and aligns with constitutional principles of non-discrimination.

This judicial intervention not only affirms maternal rights but also sets a progressive precedent that acknowledges the evolving social dynamics of contemporary family structures. It necessitates comprehensive legal reforms, including amendments to current legislation and the establishment of standardized guidelines that prioritize the best interests of children over traditional gender norms.

The broader implications of this ruling extend beyond immediate legal contexts, serving as a catalyst for social transformation and highlighting the judiciary's commitment to safeguarding fundamental rights. Although challenges in implementation and societal acceptance remain, this decision represents a crucial step toward establishing a more equitable and just legal framework that acknowledges the equal rights of both parents in matters of child guardianship.

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<sup>37</sup> Kawser Ahmed, "Interpreting Discrimination in the Constitutional Context of Bangladesh," *The Daily Star* (Dhaka, Bangladesh, December 2020), <https://www.thedailystar.net/law-our-rights/news/interpreting-discrimination-the-constitutional-context-bangladesh-2011377>.

<sup>38</sup> Daniel B Pickar, "Countertransference Bias in the Child Custody Evaluator," *Journal of Child Custody* 4, no. 3–4 (March 1, 2008): 45–67, [https://doi.org/10.1300/J190v04n03\\_04](https://doi.org/10.1300/J190v04n03_04); Claire Paterson-Young, Meenu Bajwa-Patel, and Richard Hazenberg, "'I Ain't Stupid, I Just Don't like School': A 'Needs' Based Argument for Children's Educational Provision in Custody," *Journal of Youth Studies* 25, no. 4 (2022): 452–69, <https://doi.org/10.1080/13676261.2021.1900553>.





The current guardianship and custody laws in Bangladesh operate under a problematic mixed civil-religious system that fails to adequately protect children's welfare. These deficiencies necessitate comprehensive legal reforms to create a unified framework that prioritizes the best interests of the child over traditional parental roles and religious conventions.

The core reforms focus on harmonizing civil and religious laws while establishing clear guidelines for Family Courts to ensure consistent decision-making. The legal system must explicitly define factors determining a child's best interests, including emotional needs and parental relationships, while eliminating gender bias by granting both parents equal custody rights. Additionally, the framework should promote shared parenting arrangements and provide essential support mechanisms for women, including free legal aid and counseling services.

Practical implementation requires substantial amendments to the outdated Guardians and Wards Act of 1890 to clarify legal guardianship concepts and ensure constitutional compliance. Administrative changes must also modify official forms to accommodate both parents as legal guardians. These comprehensive reforms aim to establish a modern legal framework that effectively protects children's rights while supporting family interests throughout Bangladesh.

### CRediT Authorship Contribution Statement

**Asmaul Husna Jusi:** Conceptualization, Methodology, Writing-original Draft. Supervision, Methodology, Writing - review & editing. **Mohi Uddin:** Methodology, Writing - review & editing

### Declaration of Competing Interest

The authors declare that they have no competing financial interests or personal relationships that could influence the work reported in this paper.

### Data Availability

Data will be made available on request

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