

## **Is joint custody compatible with the Islamic law? A discussion on child custody in Bangladesh as well as different contemporary countries of the world**

Faizunnessa Taru

Lecturer, Department of Law, International Islamic University Chittagong

---

**Abstract:** Since 19<sup>th</sup> century, many countries of the world prefer joint custody in the issue of divorce or separation. As a matter of family law custody of child has a great magnitude in Islam. The study intends to examine that whether the Islamic law permits joint custody or not. This paper is an attempt to explore there is no provision in respect of custody matters in our country but the visitation rights and child support obligation is awarded by court in case by case. Thus very few Muslim countries awarded joint custody on the basis of ever changing society. The significance of the study is that the Muslim countries of the world have enough scope to rethink on custody dispute. However the research in the area of joint custody is not significantly developed. Besides, there are no specific directions in Islam with regard to joint custody, and then it is difficult for the Muslim countries to adopt legislation. Hence this research highlights joint custody that may be beneficial to children and most importantly this paper will clarify the point that our country can make legislation in respect of joint custody which is not incompatible with the Islamic law.

**Keywords:** Custody and guardianship, custody in Islam, joint custody, best interest principle, child support and visitation right

---

### **I. Introduction:**

Child custody in the present situation is really very important issue not only in our country but also whole of the world. By examining the present situation it is found that the divorce rate is gradually increasing and it is more alarming for the child the battle run between parents that who would be entitled the custody right. For instance in child custody cases most of the Islamic countries applied their law on the basis of schools of Islamic jurisprudence where the provision of joint custody is silent and it is a very rare case where courts award joint custody in determining custody decisions while other than the Muslim countries, most of the developed countries joint custody is given frequently.

We know that Islamic law is based on sharia law. Many muslim Countries applied sharia law directly but some of the countries recognized a part of Sharia as it is not static. But the difficulty takes place whilst a new dilemma does not covered or not possible to make a decision on the basis of sharia law that is Quran, Sunnah, Ijma, Qias and different schools of the Islamic Jurisprudence. In that situation Islamic scholars resolve the problem through their knowledge to meet the ever changing society on the well established process, is called ijthihad. The adaptation of ijthihad encourages to respond the changing needs of muslim society. Sharia is subject to interpretation in order to meet the ever changing needs of society. Thus subject to some limitations they have to try to reinterpret sharia law with reference to present-day challenges. Thus, muslim must try to deal with the stagnation existing within their minds. They must try to reinterpret (but within some limitations), which can give them suitable answers with reference to contemporary challenges.<sup>1</sup> Therefore, this article focuses on joint custody is the best solution for determining the child custody considering the 'best interest principle' and there is no contradiction exists with Islamic law because Islamic law is not static and many Muslim countries accepted joint custody on the basis of ever-changing society as like as other countries of the world.

### **Determining Custody and Guardianship:**

The expression 'custody' and 'guardianship' almost similar. Custody and guardianship indicate the legal relationship between parent and their child such as the right of the child to make decisions and the parents' duty to care of the child etc.

Custody of children is one of the most gender based law in our legal system. Law of custody and guardianship is a mixture of : i) Sunni Hanafi Law ii) Colonial legislative innovation (Guardianship & Wards

---

<sup>1</sup> Arshia Javed, Muhammad Javed: the need of Ijthihad for sustainable development in Islam. Volume 9 of IIUC Studies, pages 215-224, 2011. Masud M.K.: Iqbal's reconstruction of ijthihad. 2<sup>nd</sup> Edition, Iqbal Academi publishers, Lahore, Pakistan, 2003

Act, 1890) iii) The wide use of the powers of judicial discretion, iv) Social and cultural practice of gender stereotyping.<sup>2</sup>

In Arabic language guardianship is termed as waliyat and custody as hidhanat. Custody means physical or material possession of the children, whereas its Arabic equivalent Hidhanath literally means 'upbringing of the child'. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its Arabic equivalent 'Wilayat' literally means to 'protect' or to defend.<sup>3</sup>

According to Guardians and Wards Act<sup>4</sup> (hereinafter GWA) of Bangladesh, "a person having the care of person of minor or of his property or of both his person and property".<sup>5</sup>

There are two types of guardianship which are fixed for a child from the time of its birth:

-- The first is the child's spiritual or natural guardianship. The spiritual guardian may be the father or a full blooded male relative of the father.

-- The second is guardianship over the child's property which usually is carried out by the father.

In Muslim jurisprudence father is the natural guardian of the person and property of the minor child. Whereas not only any of the parents but also any person can claim custody of the minor, not the property.

### **Child Custody Law in Islam: Is a woman has more preference on right of custody?**

There is no verse specified in Quran on custody of minor. But children are focused in Islam that after divorce parents have joint responsibilities towards children. So the responsibilities of the parents are dividing as per best ability of each parent by the mutual consent and counsel. In the Holy Quran (2:233) Children's future after divorce is specifically emphasizes with the principle of 'mutual consent and counsel' focusing on co-parenting relationship. Holy Quran says: "Take mutual counsel together, according to what is just and reasonable." (65:6)

However, it must be noted that as an explanation of the statement of the verse 233 of Surat al- Baqara: (Mothers shall breastfeed their children for two full years.)<sup>6</sup> It proves that the custody of the child is a right of the divorced mother, and is left to her discretion. If the divorced wife consent to it husband has no option to disagree with it which puts into words as "if both desire weaning by mutual consent and counsel."<sup>7</sup> Though Quran has no verse on child custody but in some hadith available on the matter of child custody.

A Hadith in Sunan Abu Dawud, the messenger of Allah said to a woman who complained that her husband was going to take her child away from her. The messenger of Allah said: "you are more rightful of the child as long as you don't marry"<sup>8</sup>

A man professed Islam but his wife refused to accept it. Then the prophet made the son sit down between them. The son embraced to his mother. The Prophet then said: "O Allah! Give him guidance" Then he inclined to his father and he took him.<sup>9</sup>

On the basis of Hadith available and the decisions of Prophet Mohammad(sm) on the cases brought before him on child custody, three principles have been laid down while deciding the custody of child. Firstly, the mother has more priority over any other person and she is not considered as disqualified. Secondly, if either of the parents is non muslim custody of the child should go to that parent who follows the religion of Islam and finally after completion of 7 years he or she has an option to choose between both parents.<sup>10</sup>

Besides, different schools of Islamic thought differ as to custody of child. In Hanafi law, a mother retains the right of custody boys and puberty for girls. In Maliki law she retains custody till her son reaches puberty and a daughter is married. In Hambali law the prevailing opinion is that once a boy reaches the age of discernment, he is given a choice between either parents but a mother will lose the right of custody of her daughter when she is seven years old. In Shafi' law both boys and girls are given a choice as to whom they

---

<sup>3</sup> Aayesha Rafiq, Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis), International Journal of Humanities and Social Science Vol. 4 No. 5; March 2014 viewed on October 4, 2016

<sup>4</sup> Guardians and Wards Act, 1890

<sup>5</sup> 4(2)GWA

<sup>6</sup> Saeid Nazari Takkoli, Child custody in islamic jurisprudence

<sup>7</sup> AL-Mizan – An Exegesis of the Quran by allama as-sayyid, volume-4, World Organization for Islamic Services.

<sup>8</sup> Sunan Abu Dawud, no: 2276 & Mustadrak al-Hakim, 2/207

<sup>9</sup> [http://www.irfi.org/articles/articles\\_551\\_600/custody\\_of\\_children\\_in\\_shari.htm](http://www.irfi.org/articles/articles_551_600/custody_of_children_in_shari.htm) viewed on september, 7, 2015

<sup>10</sup> Aayesha Rafiq, Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis), International Journal of Humanities and Social Science Vol. 4 No. 5; March 2014 viewed on October 4, 2016

would prefer to live with after reaching the age of discernment. In Ithna 'Asharia Law a mother retains custody of both boys and girls only for the first two years of their lives.<sup>11</sup>

Under the above discussions we find that there is no consensus among all the juristic schools, but the general rule among the scholars give first preference to a mother's claim to physical custody of her young child provided that she satisfies all the requirements of a female custodian.

There are certain eligibility to determine custodianship in Islamic law .these include: 1. A woman must be mature 2. A woman should be Muslim 3. A woman must be honest with good reputation 4. A women living at such place where there is no risk, morally or physically to the child 5. Custodian must physically be able to perform his/her duties and responsibilities towards that child.

It is noteworthy that these religious rules do not appear to be absolute. The court may consider custody on the basis of the welfare doctrine and best interests of the child.

### **Child support and visitation in Islam:**

It is evident that the issue of custody and who should undertake this responsibility is brought up when the parents have been separated; but in case of continued matrimony, this issue is out of discussion because the parents cooperate in taking care of the child.<sup>12</sup>

In several verses, the Koran calls on Muslim fathers to support their children after dissolution of marriage. Sunni and Shi'a jurisprudence agree that during and after termination of the marriage, the father must maintain the children whether the wife is poor or rich.

Allah says, " Then if they give suck to the children for you, give them their due payment."<sup>13</sup>. It means that if the children are in custody of a divorced

Women, then their father must support them, and the mother who has custody of child who is still breastfeeding has the right to ask for payment for nursing the child.

Irrespective of who (mother /father) has the right of custody, the other party has visitation rights according to mutual understanding and consent. Generally the party having the rights of custody use the child as a weapon to punish the other party by depriving them of visitation rights which is totally against the concept of Islam.<sup>14</sup>

Under the above discussion it means that despite the legal relationship between the parents has ended, their roles and responsibilities as parents continue.

Religious and marriage restrictions are definitely peculiar to Islamic law and can cause problems particularly for female custodians in modern settings. Nevertheless Islamic law contains an adequate body of juristic opinion to moderate this. It may take some lateral thinking but the way to that is also provided within Islamic law through procedures such as ijihad. Arguably Islamic law ,by laying down comprehensive yet rather objective rules, principles and detailed criteria for identifying the right custodian, limits the discretion of adjudicating body in applying its own version of the 'best interests' standard. Nevertheless the best interest of the child remains the paramount consideration and override any conflicting rights of the person entitled to custody and guardianship.<sup>15</sup>

So, it may be concluded that despite the absence of a clear provision on the concept of joint custody in Islamic law, the Islamic law substantially acknowledge the application for equal joint custody provided that there is no serious ongoing parental conflict between the divorced parents and they are willing to cooperate and compromise in managing the child's upbringing.

### **Position in Bangladesh in the issues of custody matters:**

The Guardians and Wards Act, 1890 is a core law regulating questions of guardianship and custody for all children within the territory of Bangladesh., irrespective of their religion. The Act is a complete code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them.

---

<sup>11</sup>Shabnan Ishaque and Mu hammad Mustafa Khan, The best interest of child: A prevailing consideration within islamic principles and a governing principle in child custody cases in Pakistan,International journal of Law,Policy and The family,2015,29,78-96 viewed on october,5

<sup>12</sup> Child custody in Islamic Jurisprudence-Sajid Nazari Takkoli Part two: A study of the Legal issues of child custody(Hidhanat)I Books on Islam and Muslim I Al- Islam.org viewed on october 6,2015

<sup>13</sup> (Al-Talaaq 65:6)

<sup>14</sup> [www.central-mosque.com](http://www.central-mosque.com) viewed on october 10.

<sup>15</sup>Shabnan Ishaque and Mu hammad Mustafa Khan, The best interest of child: A prevailing consideration within islamic principles and a governing principle in child custody cases in Pakistan, International journal of Law, Policy and The family,2015,29,78-96

The GWA, however, is not a self-contained law as it reserves the courts' (now the Family Courts) power to appoint guardians in accordance with the personal law applicable to the minor.<sup>16</sup> Section 7 of the GWA authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the 'welfare of the minor.'

By an amendment brought in the GWA in 1982 it has been 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 (Sec.7).

Section 9 of the GWA gave the District Court to entertain application in respect to the guardianship of the minor. The term "District Court" has been defined in the GWA to include the High Court Division. Subsequently, through the FCO, the Family Courts have been afforded the status of District Courts and also given exclusive jurisdiction to decide guardianship and custody cases.<sup>17</sup>

(2) Notwithstanding anything contained in the Guardians and Wards Act, 1890(VIII of 1890), an appeal from an order made by a Family Court as District Court under that Act shall lie to the Court of District Judge, and the provisions of section 17 shall apply to such appeal.

Section 15 states that the courts decide *the joint guardianship of minor* if thinks fit.<sup>18</sup>

Section 19 of the GWA deals with cases where the court may not appoint a guardian. Section 19(b) states that a court is not authorized to appoint a guardian to the person of a minor, whose father is alive, and who, in the opinion of the court, is not unfit to be a guardian. The earlier Section 19(b) prevented the court from appointing a guardian in case the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 in India and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.<sup>19</sup>

Section 17 lays down factors to be considered by the court when appointing guardians.

Section 17(1) states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the 'welfare of the minor.' Section 17(2) clarifies that in determining what is for the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing or previous relation of the guardian with the person or property of the minor. Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court 'may' consider his/her preference.<sup>20</sup>

Section 20 states that a guardian stands in a fiduciary relation to his ward so long the ward has ceased to be a minor.<sup>21</sup>

Section 24 indicates that it is the duties of the guardian *to look after and support the child* in a proper manner.<sup>22</sup>

Section 25 of the GWA deals with the authority of the guardian over the custody of the ward. Section 25(1) states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that it is for the 'welfare of the ward' to be returned to the custody of the guardian.<sup>23</sup>

Reading the above provisions together, it can be concluded that, in appointing a guardian to the person or property of a minor under the GWA, courts are to be guided by concern for the welfare of the minor/ward. This is evident from the language of Sections 7 and 17.

<sup>16</sup> Section 6 of the GWA provides: "nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of person or property, or both, which is valid by the law to which the minor is subject."

<sup>17</sup> Section 24 of the FCO states: (1) A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890 (VIII of 1890), and notwithstanding anything contained in this Ordinance, shall, in dealing with matters specified in that Act, follow the procedure specified in that Act.

<sup>18</sup> See s.15 of guardian and Wards Act,1890

<sup>19</sup> Personal Laws (Amendment) Act, No. 30 of 2010, § 2.(INDIA)

<sup>20</sup> Section 17 reads: "(1) 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.

(2) 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.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

\*\*\*

(5) The Court shall not appoint or declare any person to be a guardian against his will."

<sup>21</sup> See section 20 of the Guardian and Wards Act, 1890

<sup>22</sup> See section 24 of the Guardian and Wards Act, 1890

<sup>23</sup> Guardian and Wards Act, 1890, s. 25

Besides GWA, we have also another laws namely, The Majority Act, 1875 and the Family Court Ordinance, 1985 (FCO), a relatively recent law which deal with guardianship. Generally, substantive and procedural custodial issues continue to be governed by FCO and GWA. However, FCO provided a new court with exclusive jurisdiction over all family matters, including guardianship and custody disputes. According to S.5 of the FCO, a family court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: (a) dissolution of marriage; (b) restitution of conjugal rights; (c) dower; (d) maintenance (e) guardianship and custody of children.”

There are two sets of remedies for obtaining custody of a minor under the Code of Criminal Procedure (Cr.P.C). The first are orders under section 100 of the Cr.P.C. by judicial, metropolitan and executive magistrates, and the other are orders made under section 491 of the same Code by the High Court Division. When there is any reason to believe that any person is unlawfully confined under circumstances that amount to a criminal offence, the court may issue a search warrant addressed to both the person allegedly confined and the alleged captor. Although opinions are often divided as to whether or not removal of the custody of a minor from one parent’s custody by another amounts to unlawful confinement, the magistrates’ courts frequently issue search warrants in such cases under section 100 of the Cr. P. C. facilitating speedy recovery of minors. The High Court Division under section 491 of the Cr.P.C. also has the power to issue directions similar to habeas corpus to achieve the same results. Upon an application by any person under Article 102(2)(b)(i), of the Constitution, usually referred to as a habeas corpus writ petition, the High Court can issue an order against a respondent directing him/her to produce before the court any other person in his/her custody so that the Court may satisfy itself whether or not such a person is held in custody ‘without lawful authority’ or ‘in an unlawful manner’.<sup>24</sup>

#### **Joint custody and the best interest standard:**

Child custody classified as physical custody, legal custody, sole custody and joint custody. Physical custody means that a parent has the right to have a child live with him or her. Legal custody of a child means having the right and the obligation to make decisions about a child's upbringing. One parent can have either sole legal custody or sole physical custody of a child. Courts generally won't hesitate to award sole physical custody to one parent if the other parent is deemed unfit -- for example, because of alcohol or drug dependency or charges of child abuse or neglect. Parents who don't live together have joint custody (also called shared custody) when they share the decision-making responsibilities for, and/or physical control and custody of, their children. Joint custody can exist if the parents are divorced or separated. Joint custody may be:

- joint legal custody
- joint physical custody (where the children spend a significant portion of time with each parent), or
- Joint legal and physical custody.

The definition in the State of Virginia recognizes this:

“Joint custody” means (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.<sup>25</sup>

The welfare of the child is the paramount consideration in all custody disputes under the Act. Though it does not precisely define the concept, it provides a check-list of factors that constitute the welfare and best interest of the child. It include wide ranging factors such as age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kinship to the minor along with the wishes, if any, of a deceased parent.<sup>26</sup>

In our country the Supreme Court has delivered a number of judgments in the area of custody and guardianship applying the “welfare of child” doctrine in a range of situations. Many view these judgments as “best practices”. The following discussion highlights these “best practice” cases on custody and guardianship.

In *Ayesha Khanam v Major Sabbir Ahmed*<sup>27</sup> made an important contribution in clarifying policy priorities. The court, in its judgment made a very important observation: “The personal law and the welfare doctrine is not in conflict here and even if there was, the welfare doctrine would have precedence”. (Para. 15)

In *Abu Bakar Siddique v SMA Bakar*,<sup>28</sup> It held:

<sup>24</sup> Nowrin Tamanna, Sara Hossain, Muhammad Amirul Haq, Muslim women’s right under Bangladesh Law Provisions, Practices and Policies related to Custody and Guardianship The South Asian Institute of Advanced Legal and Human Rights Studies (SAILS) 2011 viewed on October 11.

<sup>25</sup> VA Code Ann. § 20-124.1. viewed on october, 12

<sup>26</sup> s. 17 of the GWA 1890

<sup>27</sup> (1993) 13 BLD (HCD) 186

“Question[s] regarding hizanat of a minor boy or daughter [are] not solely dependent on his or her age but the consideration is welfare of the minor and this has to be the determining factor even though the opinion of well-known Muhammadan jurists may not be followed.”

The commitment to this principle is significantly enshrined in the United Nation Convention on Rights of the Child (Article 3). However, the content and application of the principle differ across borders. Many countries have experienced substantial shifts over the last several decades in the types of custodial arrangements that are thought to best serve children’s interests, one of which is shared parenting. (Baker and Townsend, 1996).

Despite the absence of a specific provision in our legislation on equal shared parenting in physical custody, care and control of the child or equal shared parental responsibility in the legislations, the Supreme court in Bangladesh in many cases have always exercised its discretion in making such order if it is in the best interest of the child.

For instance, in *Md. Nurul Huda Moulavi vs. Most. Ratna Begum and Ors.*,<sup>29</sup> It was held that “Admittedly the daughter has been brought up by her father in his own residence since her age 3 months when the parents become separated from each other and the father appears to be careful about the education of his daughter and even today the daughter appears happy with the company of her father. In such situation I hold the view that the daughter Amena Begum will remain under the custody of her father as usual, but the father should allow Mst.Ratna Begum to see her daughter on the occasions convenient to both of them and the father will not be detrimental to the mental and physical health of the daughter and to develop her character.”

In *Abdul Jalil & ors. vs. Mrs. Sharon Laily Begum Jalil*<sup>30</sup> the court observed :“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 their 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.”

On analyzing the judgments of the Supreme Court it is found that in the custody disputes best interest principle is used. In the absence of legislative guidance regarding what factors should be used to assess the best interest of a minor; courts gave some directions to effect children’s welfare on a case by case basis. Courts in Virginia are guided by nine factors used to determine what custody situation is in the best interests of the child. These criteria include the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life... ;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role which each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent ...;
7. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
8. Any history of family abuse... ;
9. Such other factors as the court deems necessary and proper to the determination.<sup>31</sup>

In line with the above concept, Article 18 of the Convention on the Rights of the Child 1989 provides: Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be legal guardians have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern

**Joint child Custody in different countries:** In almost all industrialized country, divorced parents have the option of some form of joint custody arrangement. In Europe, joint custody was introduced in Sweden in 1976, in Norway in 1981, in Germany in 1997 and in Austria in 2001, among others. In the US, Indiana was the first state to pass a joint custody regulation in 1973.<sup>32</sup> Some muslim majority countries have adapted traditional laws disadvantageous to women , while others have adopted reformed versions of laws and allow women greater rights and authority.<sup>33</sup>

---

<sup>28</sup> (1986) 38 DLR (AD) 106

<sup>29</sup> (2009) 17 BLT (HCD) 22

<sup>30</sup> (2007) 50 DLR (AD)55

<sup>31</sup> VA. CODE ANN. § 20-124.3 (Michie 1950).

<sup>32</sup> Halla Martin, Do joint custody laws improve family well-being? Viewed on October 20

<sup>33</sup> Custody and child support , Muslim and Canadian family laws , Canadian council of women (CCMW)-ccmw.com

**Malaysia:** Despite the absence of a specific provision on equal shared parenting in physical custody, care and control of the child or equal shared parental responsibility in the Malaysian legislations, the Civil and Shariah courts in Malaysia in many cases have always exercised its discretion in making such order if it is in the best interest of the child. For instance, in *Karen Cheong Yuen Yee v Phua Cheng Chuen*, the court allowed the application of the father for joint custody of his three children in order for him to be actively engage in decision making process that involved the children's education, health and other matters related to their upbringing. In this case, the court viewed joint custody as appropriate since both parents lived closely with each other and there is no proven evidence of violence, harassment or cruelty inflicted by the father on to the mother. Thus, both parents have equal rights to have the daily care, control and responsibility, and to make decision about the future upbringing of the children.

In *Mohamed Radhi v Khadijah*, the court cautioned both parents to always maintain harmonious relationship after the divorce especially between parent and the child. In this case, the court gave the plaintiff the liberty to arrange amicably the visitation rights between his two sons and their mother. Similar line of judgment were held in *Zawiyah v Ruslan*, *Azura binti Adna v Mohd Zulkefli bin Saleh*, *Faridah binti Daud & Anor v Mohd Firdaud Abdullah @ Jettle Francis and Roslaili bt Abdul Ghani & Anor v Ahmad Azman bin Yaacob*. In these cases, the court granted reasonable access without specifying the term of access. The purpose of granting reasonable access is to allow the parents to set up their own arrangements according to the needs and interests of the children.<sup>34</sup>

**IRAN:** Basically there is no express provision of joint custody in Iranian civil code but the civil code provides for right of visitation of the child by the non-custodial parent, and, absent parental agreement, a court must provide for the time and place of visitation. Failure of a custodial parent to provide the child for visitation is an offense that may result in imprisonment until compliance.<sup>35</sup> In Iran the maintenance of the children is the duty of the father.

**MOROCCO:** Under the Moroccan constitution, Islam is the state religion. The Islamic provisions of the law are inspired by Maliki jurisprudence. The Personal Status Law was amended in 1992, 1993, and 2004 in order to increase gender equality. In the event of divorce, children up to the age of 15 stay with their mother, and thereafter may choose to stay with the mother or father. In Morocco, the 2004 Family Code dictates the visitation right of non-custodial parent. Visitation is a right and its terms may be reached by an agreement that is included in the custody decree. Otherwise, the court will determine visitation on a case-by-case basis. The best-interest-of-the-child rule applies. Moroccan law differentiates between a custodian's salaries, payments for the child's breast-feeding, and maintenance. All are payable by the father if he is responsible for the child's support. If a father is unable to support all the persons he is legally required to support, precedence shall be given to the wife before the children.

**Indonesia:** In Indonesia, Custody of children is subject to the nation's civil code, which is influenced by Dutch law and Shafi'i jurisprudence. In the absence of parental agreement, the court must make a child's custody as part of a divorce decree. Following the judgment granting divorce, the court determines the issue of visitation. The parent who has not been appointed guardian or who has been denied visitation may oppose the ruling and appeal. The court, upon showing change of circumstances, may amend its ruling. In the matter of child support, the parents are obliged to support their minor children as decided in Court.<sup>36</sup>

**Australia:** Australia enacted its shared parenting legislation in 1996. A key aim of the legislation was to emphasize "the joint responsibilities" of separated parents for their children's care. The Australian Family Law Act 1975 (as amended 2008) does not actually use the term shared parenting, but incorporate a rebuttable presumption of shared parental responsibility. It was pointed out that the court, when making a parenting order, must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility (Department of Parliamentary Services, 2005) except where there are reasonable grounds to assert that one of the parents has been engaged in family violence or child abuse (section 61DA(2) of the FLA (amended 2008)). When there is an order for equal parental responsibility, both parents are required to jointly make decisions about long-term issues in relation to their child, like their education, religious and cultural upbringing (subsection 4(1)(4) of the FLA).

**Denmark:** According to the Act on Parental Responsibility that came into force on 1 October 2007 joint custody is now the principal rule. The court can only terminate joint custody for compelling reasons (§11). If one of the parents has sole custody the court can order joint custody (§14). Child both parents have maintenance obligations towards their children below the age of 18 years.

<sup>34</sup> Roslina Che Soh, Shared Parenting As An Interpretation Of The Best Interest Of The Child In Custody, *Journal of Applied Sciences Research*, 7(13): 2405-2410, 2011 viewed on October 16

<sup>35</sup> Consultive Op. No. 7-4905 (1379/05/31, Aug. 21, 2000).

<sup>36</sup> Abbas Hadjian, THE CHILDREN OF SHARI'A viewed on October 22, 2015

**Finland:** Joint custody is becoming more common. The custodians of a child are jointly responsible for the duties inherent to custody and make joint decisions relating to the child, unless otherwise provided or ordered. If one of the custodians cannot take part in the making of a decision relating to a child due to absence, illness or another reason and if a delay in the decision would be detrimental, the consent of the custodian is not necessary. However, in a matter that is of great significance for the future of the child, the custodians may only make a joint decision, unless it is clear that the best interests of the child do not require the same (Child Custody and Right of Access Act, sec. 5).

**France:** Joint custody applied in just under 90% of cases. Information on how it is the right of care also includes the right to determine the place of residence of the child. Under § 1687 Para. 1 Sentence 2 Civil Code, the parent with whom the child normally lives may decide on everyday matters alone. The other parent basically has a right of association with the child under § 1684 Civil Code.

**Turkey:** Shared custody of children has been seen rarely. The judge decides to whom to give the custody and the conditions for the other side for the access to the child. In recent years, shared residence orders have been made more frequently.

**United Kingdom:** In recent years, shared residence orders have been made more frequently. It must be noted that these do not imply an equal sharing in terms of time.<sup>37</sup>

In the legal system of several western countries that there is a presumption in favor of joint custody and in Muslim world joint custody is awarded only in exceptional circumstances but both parents still have the rights and responsibilities with

regard to the upbringing of the child, including matters pertaining to education, religion, discipline, medical treatment, consent to marry, surname etc. and the traditional views of right to access or visitation are reflected in the decision of court.

### **What should be done now?**

To ensure that the best interests of the child are preserved in all types of custody cases, some amendments to the existing laws need to be made. Thus, it is suggested that

1. Clarification of the term 'custody' as opposed to 'guardianship' should be made.
2. What constitutes rights and responsibilities of parents should be made clear by Bangladeshi legislation.
3. Detailed legislative text by recommending the insertion of a new chapter dealing with 'custody, child support and visitation arrangement.'
4. S.15 of the GWA, 1890 must be amended. Thus provide specific guidelines to assist the court in deciding matters, including processes to determine whether the welfare of the child is met and factors to be taken into consideration when determining grants for joint custody.
5. The preferential position of father deals in s.19 of the GWA must be amended and in determining whether a person is unfit to be a guardian in these circumstances, the welfare of the minor u/s. 17 shall be paramount consideration.

The court has to give power to make different kinds of custody orders provided such order would be made in the welfare of the child.

So in determining joint custody courts are considered the following issues--- welfare of the child, preference of the child, parenting plan, visitation, child support and decision making. So, in this context, joint custody has been demanded by the progressive quarters of the society.

## **II. Conclusion:**

Under considering the above discussion it may conclude that the current Islamic law is challenged not to be in line with the legal and theoretical views of the school of law. The observations indicate that after divorce or separation there should be joint parental responsibility and care for the child. In the present world most of the developed countries in interpreting the best interest of child prefer the modern approach or joint custody arrangements than conventional approach or sole custody arrangement. Conceptually there should be no presumption for or against joint custody, thus the court have to exercise their judicial discretion having regard to the facts and circumstances of each case. Some Muslim countries also awarded joint custody in considering the best interests of child. So in order to protect the rights of the child, there is need to legal reform in Bangladesh and in deciding custody cases the court can consider joint custody which would not be contrary with the Islamic law.

## **References**

- [1]. Aayesha, R. (2014) Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World

<sup>37</sup> ( Council of Europe Family Policy Database [www.coe.int/familypolicy/database](http://www.coe.int/familypolicy/database)) viewed on October 16



- [2]. (An Analysis), Vol. 4 No. 5, 267-277 Retrieved from [http://www.ijhssnet.com/journals/Vol\\_4\\_No\\_5\\_March\\_2014/29.pdf](http://www.ijhssnet.com/journals/Vol_4_No_5_March_2014/29.pdf)
- [3]. Abbas, H. (2013,May), The children of Sharia. The Los Angeles Lawyer Magazine Retrieved from <http://abbashadjian.com/tag/child-custody-visitation/>
- [4]. AL-Mizan – An Exegesis of the Quran by allama as-sayyid , volume-4, World Organization for Islamic Services.
- [5]. (Al-Talaaq 65:6)
- [6]. Arshia, J. Muhammad, J (2011): the need of Ijtihad for sustainable development in Islam. Volume 9 of IIUC Studies, pages 215-224.
- [7]. Child custody in Islamic Jurisprudence-Sajid Nazari Takkoli(2011),1st edition Part two: A study of the Legal issues of child custody(Hidhanat) . Retrieved from <http://www.al-islam.org/child-custody-islamic-jurisprudence-saeid-nazari-tavakkoli>
- [8]. Consultive Op. No. 7-4905 (1379/05/31, Aug. 21, 2000).
- [9]. (Council of Europe Family Policy Database) Retrieved from [www.coe.int/familypolicy/database](http://www.coe.int/familypolicy/database)
- [10]. Custody and child support, Muslim and Canadian family laws , Canadian council of women (CCMW)- [http://ccmw.com/wp-content/uploads/2014/04/Custody\\_and\\_Child\\_Support.pdf](http://ccmw.com/wp-content/uploads/2014/04/Custody_and_Child_Support.pdf)
- [11]. Guardians and Wards Act, 1890
- [12]. Halla, M.(2015).Do joint custody laws improve family well-being? The Institute for the Study of Labor (IZA) Retrieved from doi: 10.15185/izawol.147 | Martin Halla © | May 2015 | wol.iza.org
- [13]. Masud M.K... (2003). Iqbal's reconstruction of ijthad. 2<sup>nd</sup> Edition, Lahore, Pakistan, Iqbal Academi publishers. Retrieved from <http://www.assignmentpoint.com/arts/law/guardianship-custody-children.html>
- [14]. Nowrin, T. , Sara, H. Muhammad, A H , (2011).Muslim women's right under Bangladesh Law Provisions, Practices and Policies related to Custody and Guardianship. The South Asian Institute of Advanced Legal and Human Rights Studies retrived from [http://www.academia.edu/1586979/Muslim\\_Women\\_s\\_Rights\\_under\\_Bangladesh\\_Law\\_Provisions\\_Po](http://www.academia.edu/1586979/Muslim_Women_s_Rights_under_Bangladesh_Law_Provisions_Po)
- [15]. Personal Laws (Amendment) Act, No. 30 of 2010, § 2. (INDIA)
- [16]. Roslina C. S..(2011), Shared Parenting As An Interpretation Of The Best Interest Of The Child In Custody , Journal of Applied Sciences Research, 7(13): 2405-2410, 2011 Retrieved from <http://www.aensiweb.com/old/jasr/jasr/2011/2405-2410.pdf>
- [17]. Shabnan, I. and Muhammad, M. K...(2015), The best interest of child: A prevailing consideration within islamic principles and a governing principle in child custody cases in Pakistan, International journal of Law, Policy and The family,2015,29,78-96 retrieved from <http://lawfam.oxfordjournals.org>
- [18]. Sunan Abu Dawud , no: 2276 & Mustradrak al-Hakim,2/207 [http://www.irfi.org/articles/articles\\_551\\_600/custody\\_of\\_children\\_in\\_shari.htm](http://www.irfi.org/articles/articles_551_600/custody_of_children_in_shari.htm)
- [19]. [www.central-mosque.com](http://www.central-mosque.com)
- [20]. Section 6 of the GWA provides: "nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of person or property, or both, which is valid by the law to which the minor is subject."
- [21]. Section 24 of the FCO states: (1) A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890 (VIII of 1890), and notwithstanding anything contained in this Ordinance, shall, in dealing with matters specified in that Act, follow the procedure specified in that Act.
- [22]. See s.15 of guardian and Wards Act, 1890
- [23]. Section 17 reads: "(1) 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.
- [24]. 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.
- [25]. If the minor is old enough to form an intelligent preference, the Court may consider that preference.
- [26]. \*\*\* (5) The Court shall not appoint or declare any person to be a guardian against his will."
- [27]. See section 4(2) of the Guardian and Wards Act, 1890
- [28]. See section 20 of the Guardian and Wards Act, 1890
- [29]. See section 24 of the Guardian and Wards Act, 1890
- [30]. See Guardian and Wards Act, 1890, s. 25
- [31]. VA. CODE ANN. § 20-124.3 Retrieved from <https://vacode.org/20-124.3/>
- [32]. VA Code Ann. § 20-124.1.Retrieved from <https://vacode.org/20-124.1/>
- [33]. (1993) 13 BLD (HCD) 186
- [34]. (1986) 38 DLR (AD) 106
- [35]. (2009) 17 BLT (HCD) 22
- [36]. (2007) 50 DLR (AD) 55