



## Comparative study of persons responsible for custody in Law of Iran, England and Children rights convention

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### Abstract

*Custody is maintaining and upbringing child so as his physical and mental health and education is met regarding his existing and future needs and benefits and position of parents. Custody is created from the birth of a child which is part of rights and duties of parents and it is usually presented as a conflict when family is collapsed because of divorce or death. Here the discussion of parties responsible for custody and their claim is revealed.*

**Keywords:** Custody, child, children rights' convention, law of Iran; England.

### Introduction

In this article, we present a comparative study of parties responsible for custody in law of Iran and England and provisions of children rights' convention. In order to study persons responsible for custody, first we must identify custody concept in these three legal systems and then we study persons responsible for custody in law of Iran and England in three modes: custody of mother and father; custody in the case of death of father and mother; custody after divorce and finally we know persons responsible for custody under the children rights' convention and conclude by comparing them. Therefore; we can present solutions with comparative studies, using legal experiences and positive points of other countries and studying various aspects of the problem and reduce adverse effects of various family tensions on children and support their rights<sup>1</sup>.

Hizanat (custody) is from the root Hizn meaning supporting, accepting, upbringing and nursing child (Amid, 1984). At first order, mother and father have the custody of child. Custody has financial and spiritual aspects; it means that looking after a child includes physical rearing and providing necessary facilities for his growth, such as food, cloth, accommodation and in the case of illness, providing doctor, drug and treatment. Generally, all that is needed for the survival of a child are custody<sup>2</sup>. Spiritual growth is needed besides physical development. Recognition of environment, rituals and culture of a society in which the family lives or identifying cultural advantages of this society and education, which are the most important tools for mental rearing, is considered as education<sup>3</sup>.

Although custody and qualified guardians for children is concerned during marital life and routine life, it is equally important when the family is destroyed and the mental peace of family changes to concerns and when the divorce or death cut the bonds in family. Although father and mother and other

relatives suffer from these events, but the most important victims of this event are children who need help<sup>4</sup>.

### Methodology

It is clear that every research method had direct relation with the main subject of research and this study is based on theoretical aspect. As a result, we used documentary and library method in writing this article and prepared it using books, articles and laws regarding custody in legal systems under study.

**Background:** Comparative studies riches legal literature about the subject matter and creates revolution in regulatory and criminal policy in legal system of every country. Comparative study of persons responsible for custody in comparison with children rights' convention 1989, which is the most perfect document of human rights, is an applied subject<sup>5</sup>.

Regarding high number of graduates in law, all branches and fields are studied by lawyers and there are numerous researches, papers and thesis<sup>6</sup>. There are papers and thesis about the subject of this paper. In literature review we face comparative papers including papers about guardianship of children in civil law of Iran and France but the subject of this paper, as I know, is not studied in any thesis. There are some papers about England law and children right act but there was no comparative study as this<sup>7</sup>.

**Definition of custody:** Hizant in Persian means side. Custody is accepting and rearing a child and any bird which sits on egg to born chicken id doing Hizanat. Hizn is from underarm to chest and between to arms. Although there is no definition of custody in law, but lawyers has defined it with slight differences: some believe that custody is the authority that law has given to father and mother for maintaining and rearing child. Others believe

that custody is guardianship and dominance in rearing children and its requirements<sup>8</sup>.

Custody is defined as this in English law: custody is a relationship between a child and a person who has the right for managing, maintaining, educating and providing welfare provisions. These authorities are in the control of parents who are obliged to maintain, support and manage child<sup>9</sup>.

From this convention point of view individuals below 18 years old are child. In this definition the end of childhood is determined but there is no reference to beginning of childhood. Perhaps it is said that this is a clear issue and the beginning of childhood is from birth but some had said this is not acceptable by Islam because from Shia's point of view, beginning of childhood is right from fertilizing sperm<sup>10</sup>.

Since child right convention did not give perfect definition of custody it has pointed in some cases to the rights of child and maintaining. Article 3 states that: In doing every action which is related to the child, either in public, private, official, unofficial or other parts, interests and health of child is superior to other issues. Also this document has obligated member countries to support right of children, preserving rights of parents, and conducts necessary legal and real actions. According to article 4 member countries conduct necessary and suitable legal actions to implement accepted rights in this agreement. Governments must use their national resources, as far as possible and international resources, in necessary cases, to meet provisions of this agreement regarding law and political, political and cultural conditions.

Regarding definitions from Iran and England laws we can say that child rights convention is forming principles which indicate essential and basic needs of children and duties of family, society and government in meeting their needs and guaranteeing administrative initiatives in supporting children. Thus, we can define custody from child rights convention's point of view and guardianship of child and meeting needs and providing suitable environment for their growth.

**Persons with the right of custody:** Competence for custody in Iran's law from the birth to puberty is related to parents, collectively. Therefore; we cannot say that this competence for mother is only to seven years for boy and after that, the mother cannot impose her right. Accepting custody of mother after 7 years old is an issue that is accepted by Iranian legislator, because according to article 1171 civil law in the case of death of one of parents custody is duty of alive parent, even the deceased one was the father of child and has determined a guardian for his child. If mother of one-day old newborn dies his father can take his custody until puberty. If father dies, mother can take custody until child reaches puberty.

Competence for custody is for father and mother for the time that child is minor but its exercise is so in the life of both

parties: custody of child is responsibility of father and mother until 7 years old but because of emotions and needs in this period mother is superior. Therefore, as far as father and mother are alive and have the competence for maintain child the custody is for them and none of fraternal or maternal relatives cannot claim in this case. But if parents have separated custody is no longer for them. This separation is caused by death and divorce. In common law father has the custody of legitimate child until 21 years old, but if observing right leads to moral damages or was not from goodwill, in this case father loses this right.

Equity rule has given right of custody to father but if the welfare of child necessitates this right will be violated. Although in equity rule the right of father is lower than in common law, but until late of 19<sup>th</sup> century, if the child suffer from physical threat or mental damages, equity rule intervened and violated the right of father for custody and did not permit any action against interests of child (Bromley, 1976). In middle 19<sup>th</sup>, England parliament has changed some regulations which their effect was gradual decrease in father's right of custody and seeking to give it to mother which is briefly mentioned here: i. Talford 1839 act: Although this act is not terminated, it shows a turning point in the history of family law. According to this law mother has the right of custody until the child reaches 7 years old. ii. Child's custody rule 1873 : This rule has extended Talford law by delegating the rights to courts for giving right of custody to mother until the child reaches 16 years old that later this has extended to 21 years old by child's guardianship act 1886. iii. Child's guardianship act 1925: It was stated in this act that in any claims before courts father and mother are not superior to each other in any point and mother has granted same rights and authorities as father for determining guardian. iv. Minority guardianship act 1973: This act is about the process of homogenizing legal position of parents by stipulating that in relation with child's custody mother has the same right as father and has completed minority guardianship act 1971. About contracts of guardianship, it was stated that all contracts which decrease rights of parents or destroys integrity of family with transferring right of custody to others is against common law, therefore; these contracts are null and void.

According to clause 2 article 1 guardianship of minor act 1973 in England any contract between husband and wife that will be exercised during their separation while they are in marriage, if one of them ignores rights pointed in clause 1 article 1, if court has determined that this contract is not to the benefit of child, the court will be prevented its implementation.

In England law it is possible that a person tries to take custody of a child like grandparents, other relatives, step-father, and step-mother or nurse in common law. These persons must first take allowance of court for custody application to take custody. In these cases, custody is granted to other relatives or step-parents or an organization which its necessary condition is considering interests of child.

**Child custody in Iran's law:** Persons who can take custody are determined in civil code. Custody is exclusive right of father and mother and until they are alive and have competence for rearing their children the right of custody is for them and none of maternal or paternal relatives can claim for this but after death of father and mother, if grandfather was alive, he is guardian based on the law. Otherwise, in the case of divorce, law gives priority to mother until the child is 7 years old and then this right is granted to father. If parents die and there is no grandfather, guardianship is granted to executor and if there was no one from these three groups custody is granted to a guardian which is determined by the court with the proposal of public prosecutor.

**Custody of father and mother:** According to article 1168 civil code of Iran custody is the right and duty of parents. This right is not absolute and if court identifies that living child with family damages his health and education it can decide about his custody. For this purpose, legislator states in article 1173 civil code that:

When, as a result of lack of maintaining or ethical problems of father and mother of a child, physical health or moral education of child was in danger, courts can decide any decision for custody of child by the application of relatives or guardian or public prosecutor.

As we found from custody concept, it has two elements: maintaining and rearing. Therefore; how can we leave a child in the custody of incompetent father and mother and speak about right of custody for parents?

As some lawyers have pointed out we must not think that father and mother are employees of government which court can separate their child from family whenever it wants. For this purpose, article 1175 civil code of Iran, in order to prevent misuse of court in decision-making for child, states that: A child could not separate from parents or his father and mother except there was a legal cause. We will consider legal causes in next sections.

**Custody of child in the case of death of father and mother:** There is no doubt that grandfather along with father has forcible guardianship for minor child. In this regard article 1180 civil code states that: minor child is under forcible guardianship of his father and grandfather.

Now we must see that whether the grandfather which has guardianship of child based on law has the right of custody? This question raises where father and mother have died or their custody has been violated because of betray or inability in managing minor child. As we know, custody relates to rearing of child and guardianship is related to monitoring financial and non-financial rights, although some scholars have interpreted custody as guardianship.

But this guardianship is different. Although there is a direct relationship between custody and guardianship i.e. financial power of child and its consumption has direct effect on quality of custody but custody is not function of guardianship to say that custody of grandfather like his guardianship is along with custody of father and mother. Some scholars believe that after death of mother and father custody is for grandfather.

The most important reason is the statement of author of Java her: Custody is the right of father, since the child belongs to him and in the case of presence of mother the right of custody transfers from father to mother. Therefore, if custody of father and mother is violated custody is for grandfather because he is father and the child is belonged to him. Therefore, as he has guardianship in financial affairs he has guardianship in custody.

In contrast, other scholars had not accepted this reason and said grandfather in the custody of child is like other relatives. They said in response to those considering right of custody for grandfather that: if this direction is the cause to grant the right we will grant it to grandmother because she is like mother. Others reasoned that considering fraternal relatives as father and mother is illegal which is made by legislator. Therefore; certain cases will be considered.

According to one lawyer doubt of jurisprudents is transferred to writers of civil code because according to article 1188 civil code: Father or grandfather can determine an executor for his child after death of the other to rear them and manage their properties after his death.

Not only grandchildren will be children of grandfather, but also granting the authority for determining executor shows that grandfather has the right of custody, so how can we see that one who has not the right grants it? On the other hand, article 1173 civil code means that by violating guardianship of father and mother court is free in selecting guardian and grandfather is not superior in this case and these two articles have contradictions.

Some lawyers by summing these two articles say that it seems if father and mother die custody is for forcible guardian i.e. grandfather (article 1188 civil code) or if there is separation between husband and wife or a case which necessitates change in the condition of child the court must give priority to child and is not obliged to consider right of grandfather. In fact, they consider cause of violating custody as a factor for justifying double position in both articles but it seems that violating parents' right of custody is not distinguishing. It is not different that parents die or lose competence, an important point here losing the right of custody for every reason.

However, legislator in article 43 family rights code explicitly declared that: custody of children whose father is dead is for mother unless court, by the request of forcible guardian or public prosecutor decides that mother's custody is against interests of child. Therefore; until father and mother are alive

they have right of custody unless court has given another verdict and an important thing in decision of court is interest of child. So the legislator has stated in another article: Article 45 family rights code 2012: observing interest of child and adolescents is obligatory in all decisions of courts and authorities. Therefore; it seems that considering interests of child is an important point in determining right of custody after death of parents because if the custody is granted to incompetent parents his future will be unknown.

**Custody after separation and divorce:** When parents and children live with each other their maintaining and rearing is common right and duty of parents (article 1168 civil code) and husband and wife must solidify basis of family (article 1104 civil code). Parents have the right of punishing their child in the limit of rearing (article 1179 civil code). But sometimes there were problems in manner of rearing children and this causes separation. In this case, common right and duty for custody belongs to whom? For this purpose, legislator has given custody to mother until seven years old and after that, it is for father but if there was conflict between divorced parents custody is determined by court.

Here it is necessary to refer to a single article about right of custody of minors or incapacitated child to mother as an exception about persons responsible for custody in which legislator gives the right of custody of minors and incapacitated children to mothers by the law passed in 1981 or custody of child whose father martyred to mothers. This single article is implemented for three years and legislator has added three new clauses and amended it in 1985 as this: custody of minor or incapacitated child whose father were martyred or dead is duty of mothers and their costs is in the authority of religious guardian and what has paid by Bonyad Shahid is given to their mothers unless court had voted that mother is incompetent. Marriage of these mothers does not violate their right of custody.

Regarding these subjects it is necessary to say something about draft of bill for supporting children and adolescents which is under study in Islamic parliament. This bill is a positive step toward meeting interests of children and proximity of Iran's law with international norms including child rights act.

This draft about supporting in danger children and adolescents, gives opportunity to parents to provide suitable conditions in family and resolving problems and tries not separate child from family as far as possible and in the case of impossibility for life with family, legal authority will violate right of custody and guardianship.

This bill respects parents right of custody introduces new real and legal entities for custody. Based on article 46 court can issue conviction verdict and decides about below decision: i. Introducing children and adolescents or their family to public and private organizations responsible for helping helpless

families. ii. Violating right of meeting, custody, guardianship, and executor and supervising. iii. Giving child to welfare organizations, iv. Giving custody to centers for maintain children without parents.

In this article child without parents refers to all children that their parents have created dangerous conditions for them including inability or inattention to child, prevention from education, parents suffering from behavioral, mental and personality disorders or diseases, imprisonment, addiction to drug and alcohol, ecstasies, gambling, prostitution and violence, exploitation and misbehavior.

Legislator in this law refers to supporting organizations which with their help can achieve the goal of children right act which is better condition for their development. Among these organizations, we can refer to social workers. By approving and enforcement this law interests of children will be met and this is the goal of convention.

**Child custody in England law:** Children act 1989 considers relatives of child as grandparents, brother; sister, aunt, uncle and even step father and mother (CA, 1989). About persons responsible for custody it should be said that first mother and father has common right of custody unless the courts decides other thing. Relative discussion is somehow complex because of its nature. For example, some child has never seen their aunt and for others, their aunt is like their mother. The danger here that by delegating custody to relatives, child may be confused. Perhaps a relative or friend has custody of child without legal role, so there is no parenthood responsibility for him.

**Custody by father and mother:** Father and mother have common custody in law of England unless the court decides otherwise. Therefore; parents have priority for custody. Mothers have responsibility and this responsibility means that mother was with child in all pregnancy period with many devotions, so she is first for granting custody. Father has the right subject to these conditions: i. He has married mother of child. ii. He has contract of parenthood responsibility. iii. He has acquired verdict for parenthood. iv. He has right if residence. v. He was selected as guardian.

As a result, two sources are mentioned in acquiring responsibility: i. Mother, ii. Court.

Therefore; in England law about custody of father and mother, no one is superior than the other and court will be decide based on interests of child.

**Custody after death of father and mother:** If parents have common custody, in the case of death, the other will have sole custody. In contrast with Iran's law in the case of determining guardian for child by father and his death, the guardian will have no role in custody. If guardian was determined by father or mother, In the case of death of each one the survivor has

custody along with guardian. If deceased person has not determined a guardian or if the guardian did not do his duties, the court will determine another guardian but this right is exercised when court knows common action of both parties in behalf of child not meeting collective goals. Therefore; in Iran's law, in the case of death of parents, grandfather and executor and relatives will take custody, respectively but in English law if parents die court will decide about custody if there was no testament. Therefore; testament will determine custody of child after death of parents and it is possible that name of guardians were in testament. In fact, if there is no testament, it is assumed that they delegated decision to court.

**Custody after divorce:** In England law, in the case of parents' marriage, both of them will have responsibility and when father has not married mother, father will not have any responsibility but by the verdict of court or agreement both of them can have responsibility. Court issues common custody only in the case of parents' agreement or court confirms that parents will successfully exercise common responsibility and have authority and communication about interest of child (Herring, 2001). In England, after divorce each of parents can request custody. During divorce and after it, custody is the most important subject about child. Divorce needs structure and planning parents' rights and duties about child and if parents were agreed in this arrangement, there is no problem for court but in the case of non-agreement the court has authority about custody and meeting right.

Evaluation of child custody in divorce is as below in England law (Bromley, 1976): i. The major goal of evaluation is investigating best mental interest of child which is study of family and individual factors which provides interests of child. ii. Child interests and welfare is the best factor. Parents competing for custody or others requesting custody may have legal rights but the criterion is the best interest of child. iii. Focus of this evaluation is on competence and ability of parents i.e. psychological and development needs of child including (a) Evaluating ability and competence of parents like knowledge and skill. (b) Evaluating performance ability of parents in meeting these needs which includes evaluating balance between parents and child.

**Custody by virtue of child right act:** As it is clear from article 9 children must not be separated from parents. Therefore; custody and responsibility of children is for father and mother and change in this condition is controlled by competent authorities based on regulations and after legal investigation for the behalf of children. These decisions are taken in the case of misuse or inattention of parents or in divorce and there must be a decision about residence of child.

In article 18 common responsibilities of parents is referred and responsibility of parents about physical and mental health and promoting social happiness is recognized, member countries are asked to provide required facilities, services and legal

institutions. This is emphasized for children with employed parents.

**Suggestions about custody in Iran:** i. We must direct families toward peace and prevent divorce especially in cases that there are children. ii. We must consider all aspects in legislating and the law must be clear and explicit. iii. Social workers system in legislation organization is created for supporting children. iv. Government helps poor families which have many children and provides education for them. v. Developing physical, intellectual and emotional skills in children and adolescents and their education. vi. Criteria for delegating custody to parents or third party will be interest of child. vii. Government is forced to provide welfare and education for children that their custody is granted to a family. viii. Predicting an institution for controlling families so that they feel there are organizations which monitor their performance and relations with children. ix. Promoting legal culture about custody.

## Discussion

If we want to sum discussions about persons responsible for custody in Iran and England laws and child right act it seems that all three systems agree that custody is the right of parents but what is important is the custody after death or divorce that England law and child act have delegated it to the court. We must not forget that determining guardian in England law can change condition of custody and there is no need to court's verdict but in Iran's law regarding condition of child, legislator has selected persons for custody after death or divorce and in the case of conflict the court will decide, so the legal condition of Iran is more acceptable. It is necessary to say that by approving bill for supporting children and adolescents their interests will be met better and the main goal of convention which is providing best condition for development and life of children would be met.

## Conclusion

Family is a center for peace and love and meets needs of child. But when it destroys it suffers from inevitable damage which its effects are more significant on children. In this condition, it is necessary to provide a safe and secure shelter for children with the support of one the parents. Children in these ages more need their mother. Although the role and love of father is inevitable, children are more close to their mothers, so must put children under support of mothers until they can distinguish.

What is important about custody is the interest of child not parents' right of custody. If the interest of child is that none of parents be with him court will vote for third party because lack of support may create other problems. In other words, healthy family creates healthy society and children take their values from families and later transfer them to society. Therefore; the role of parents is important in shaping personality children and court can create freedom and peace of child in these cases.

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