FATHER AS BREADWINNER OR FATHER AS CAREGIVER?
CRITICALLY ASSESS CAROL SMART’S FEMINIST
JURISPRUDENTIAL ARGUMENTS ON THE POLITICS OF CHILD
CUSTODY

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Introduction

The purpose of this essay is to critically assess feminist lawyer Carol Smart’s analysis of and suggestions on issues about legal regulations and practices of child custody. She thinks the privileged status of mothers in modern family law system will be threatening by new voices and images from fathers and by the increasing interventions from professional. The discourse of ‘the best interests of child’ can no longer provide women the theoretical foundation of their controlling and defining power over child-relating issues as it did before. Worry about this could lead to the resurgence of negative patriarchal power in family, her main concerns then are to maintain the status quo privileged status of mothers in present family law system and, at the same time, to block the possibility and to refute the legitimacy of fathers to have similar say and weight as mothers over family affairs. Her ideal is allowing lone mothers to be able to live ‘autonomous motherhood’ without interventions from fathers or courts. She adopts a perspective of the politics of gender and suggests introducing ‘the primary carer principle’ into custody disputes to replace the discourse of ‘the best interests of child’. Formal equal parental rights and joint legal custody between father and mother is generally refuted under the primary carer principle. She believes the application of the primary carer principle can best protect and serve most mothers’ benefits by enjoying greater power in issues concerning child-caring in modern Anglo-American family law systems. In the majority of cases, mothers deserve greater say and control over their children because they ‘care for’ their children more and have better nurturing skills. Moreover, she criticizes the usual legal practice and arrangements about the court’s favour of issuing ‘contact order’ for non-resident fathers. She argues that it is mothers who should have the final say and decision over fathers’ access to children. In respect of the problem of economic conditions of lone mothers with child,
she prefers policies which would enable lone mothers to ask more maintenance from non-resident fathers and more social supports from government.

I would like to argue while we respect and admire her contribution for enhancing and protecting women rights, her proposal, however, can not be implemented without unfairly compromising the needs and interests of father. Her matriarchal family ideal, the ability argument fallacy and the heterosexual-mothers-favoured bias are the main points to be examined. Because of the above weaknesses, she fails to provide feasible and fair suggestions on child custody issues. Her disproportionately ‘normal-heterosexual-mothers-favoured’ blueprint would in the last analysis cause every member of family, including heterosexual mothers, suffering. The whole society cannot benefit from a family law system which does not present due respect and proper accommodation for each group of members, no matter they are mothers, children, the elderly or fathers. If our societies do prepare to welcome and expect men to share more household works and caring jobs, our public institutions ought to respect and recognize fathers’ caring ability and suitability when considering child custody decisions and not to treat them as a parent of less importance or as just breadwinning machine, as modern English family law system or Carol Smart tends to do. The most reasonable and desirable alternative we can adopt is formally acknowledging and positively encouraging shared breadwinning and caring roles of both parents in and after marriage by public policies and through legal institutions.

The Legal Regulations and Practices of Custody Disputes in Present English Family Law:

Before entering into the discussion of Carol Smart’s feminist jurisprudential arguments of the politics of child custody, it is better for us to have a quick look about how modern English family law copes with child custody conflicts generally.

The guideline for the court to make decisions on child custody is the welfare principle of children. Arrangements (order of residence and order of contact) should be made and based on the best interests of the disputed child. However, welfare is an all-encompassing and vague word. The Children Act 1989 seeks to reduce
indeterminacy and to make explicit certain values by codifying the most important factors conceived in the welfare of children. Thus, a checklist of these factors was incorporated into the statute. Among these enumerated factors are ‘the child’s wishes’, ‘the likely effect of any change’ (the status quo principle), ‘the child’s need’ and ‘the child’s age, sex, background and any characteristics of his/her which the court considers relevant’. Although these factors are gender-neutral principles in outlook, they are gender-stereotyped in reality. Since it is always mothers who tend to receive the order of residence and become resident parent, fathers are more unlikely to get the chance. This is partly because the mother may well be considered to be the ‘natural’ carer who best serves the child’s need unless there are indications to the contrary. This is also because mothers tend to benefit from the status quo principle in custody disputes: ‘the parent who takes on the care of the children when a relationship breaks down may have an advantage should a dispute over residence rise.’

In the majority of cases, it is fathers who are in full-time career and play the role as breadwinner, and it is mothers who take care of the household work and do only part-time jobs or do not enter labour market at all. If father would like to abandon his full-time job for the sake of caring for his child, this may be frowned on by the court, particularly if this would entail his reliance on state benefits to fulfill this caring work. Carol Smart, generally speaking, supports the present English legal practice which favours mothers to get a residence order and seldom allows shared residence.

However, she is unsatisfied with the strong presumption in the present legal system that it is in the child’s best interests to have contact with the non-resident parent, usually father. She views the court’s issuing of contact orders to fathers as government’s unjustifiable interventions into mothers’ autonomy and power over their children. The court usually makes the order of contact to the non-resident parent and encourages he/she to maintain a continuing relationship with his/her child. However, a

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1 The Children Act 1989, Section 1(3).
high percentage of non-resident fathers have difficulty in keeping contact with their children partly because the resident mothers can easily disobey and neglect the order of contact.

Though non-resident parents are denied custody of their own children and have only little say over the decisions relating to children substantially, the present English legal system (the Child Support Act and the Child Support Agency) still requires the non-resident parent (mostly father) to pay regular amount of maintenance to the resident parent. Lone mother with child can get benefits from government as well. For a lone mother with no paid employment, she can expect at least 200 Pounds pre-tax income per week. Normally, it is not difficult for her to claim more than 300 Pounds per week from maintenance and benefits. Carol Smart also contends that it is the obligations of the non-resident parent and government to provide enough financial support for the resident parent.

The regulations and practices concerning child custody decisions in English family law shows that despite the recognition of children’s needs of fathers through the issuing of contact order, the law still treats mothers as better and more suitable caregivers than fathers. The main role the law expects from and ask for fathers is still the money-provider. Fathers are supposed to be good breadwinners, no matter in or after marriage. The legal system is still very reluctant to fully recognize and accept fathers’ ability and role as a fully qualified caretaker.

Child Custody Disputes: Carol Smart’s Suggestions:

Carol Smart starts her arguments from her observations and worries that the new fatherhood and the increasing father/child bond is going to erode the greater power women are enjoying in family law and will threaten the present privileged status of motherhood in child-related issues.

Different from the subordinate and inferior status entitled historically, women now

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benefit from the narratives and claims of the uniqueness of motherhood and the supposed natural bond between the mother and child in modern English family law and are authorized greater power and control over children than fathers when disputes emerge. The claims that mother provides the uniquely physical and emotional care the child needs ‘created a shift in the power nexus of parenthood’ and enabled women to claim a privileged status and to `employ greater power in family issues’.

However, from the end of last century, she finds that the status of fatherhood has taken on a new meaning and may threaten the privileged status and power of modern mothers in family law. The new idealized images of the father ‘who is more than just a good economic provider, but actually becomes involved in the physical and emotional care of his children,’ provide sources for people to speak of the importance of father. The new fatherhood allows more public recognition of the significance of father to the welfare of children and seems to have earned some degree of legal standing in family law. For the sake of protection of mothers, Carol Smart and her colleagues are unwillingly to see fathers being empowered of equal say in decisions over children. Her goal then is to develop and construct a new set of arguments and accounts that are able to serve to uphold women’s advantaged domination of child issues and to prevent men from being permitted of equal weight and influence in child-related issues.

The rhetoric she finds to be able to serve the above purpose is the introduction of the ‘primary carer principle’ into custody decisions. She lists at least four reasons for the benefits of the introduction of this principle. The main spirit of the principle is to

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7 For instance, the courts now incline to encourage contact between divorced fathers with children by normally issuing orders of contact to them. However, mothers are still more likely than fathers to receive orders of residence.
recognize the *status quo*, which means giving benefits to those in charge of most of the child care when the conflicts about custody emerge. Carol Smart contends that this principle ‘can provide security for those parents who do most of the child care.’ Since in most of the occasions it is men who act as primary breadwinner and work for fulltime jobs and it is women who stay at home and take the main caring work, mothers, consequently, will be the group who can benefit most from this principle. Fathers, on the contrary, will be likely to lose custody of child because of their main breadwinner role. Under the arrangement according to the primary carer principle, not only mothers’ main carer role will be maintained, but also fathers’ primary breadwinner role will be asked to keep performed, in order to pay for their child and (ex-)partner after the breakdown of family.

She then insists that fathers have to change their behaviours in relation to child care first, which would then, in turn, alter their inferior position in child-related law\(^8\). Her logic is that because fathers do not devote as much time and energy as mothers do to their children, they deserve humble role in family law. Borrowing the terminology from J. Tronto, Carol Smart distinguishes two modes of caring: ‘caring about’ and ‘caring for’\(^9\). While the former is a kind of intellect concern, the latter indicates the physical work of caring, a real moral practice. She contends that it is the real moral practice(caring for) which has the right of more moral claims and recognition.

Fatherhood, on most occasions, is based solely on biological status or on abstract ‘caring about’; whereas mothers are real care givers towards children. The caring practice gives rise to a moral position and social perspective of motherhood and is the reason why the primary carer, usually mothers, is worthy of greater authority concerning child issues. The conclusion, however, is highly problematic. She totally ignores the influences from social culture which force men to play as main breadwinner in family. She deliberately neglects the present unfriendly social

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environment for men who would like to commit more in child cares. She also plays down significantly the contributions from father to family. Without the contributions from hard working fathers, most mothers can hardly be able to stay at home with child without taking any earning employment. When most fathers leave the caring opportunities for mothers and fight for breadwinning outside, fathers are doing their ‘caring for’ to their children as well, in a way deeply required by our society, our culture, social reality and most mothers. Moreover, fathers are also forced to sacrifice closer relationship with children because of the breadwinning jobs and stereotyped social role. Carol Smart put all the blames unfairly on fathers without further reflecting on the bigger social backgrounds.

In addition, she claims that even in ‘intact’ families, according to Kathryn Backett’s research, ‘fatherhood is mediated through the behaviour of the mother and that it does not operate as an independent relationship with the children.’ In respect of the responsibility for children, ‘fathers adopt largely a supportive role.’¹⁰ Fathers generally do not have similar quality of caring skills as mothers. Nevertheless, Carol Smart seemingly does not deny this problem can be overcame as long as fathers do make their minds to commit more on their relationships with children¹¹.

What also bothers Carol Smart is the political and economic advantages full time house wives have had to suffered. Mothers’ better nurturing skills and caring work are seriously undervalued, taken for granted and becoming invisible and unpaid. Echoing the voices from I. M. Young and Martha Fineman, Carol Smart tends to appeal for more government financial benefits and greater economic supports from divorced or unmarried fathers for lone mothers. While acknowledging mothers enjoying an important site of emotional satisfaction with children from staying at home caring for


children, she also argues that they lose their full citizenship and relevant rights for the sake of this kind of ‘sacrifice’.

If mothers give up these rights in order to meet the welfare of their children, it seems a hard lesson to insist that this was an irrelevant sacrifice at the point when they divorce, especially as the routes back into this style of citizenship are so limited. (Carol Smart, *The New Family?* 1999)

She then argues that equal, joint parenting and equal weight between parents after divorce is undesirable and unfair to mothers. Mothers will be encouraged to be more like fathers, that means, devoting more energies to wage earning if equal parenting after divorce is the policy. Lone mothers ought to acquire enough subsidies from fathers and government to sustain their full time caring role. I would like to suggest that the labour division should not be encouraged by public policy. Neither men nor woman should be told to limit their role as just breadwinner or caregiver.

Carol Smart believes the application of the primary carer principle can achieve another goal: to reduce disputes in court and to attribute to the autonomy of motherhood. Disputes and conflicts in court are likely to be reduced under the introduction of this principle, however, at the cost of silencing fathers’ voices and claims. Under the principle Carol Smart suggests, breadwinner fathers are told by legal system explicitly that their claims would have only tiny chances to be prioritized or to be equally treated as mothers’. The application of the principle will also, as Carol Smart expects, allow mothers even more defining power in family issues. Nevertheless, we have good reasons to doubt whether we need such a matriarchal system of family law. Will the members of society really benefit from such family law system?

Finally, she insists the primary carer principle could restrict the negative form of men’s power over women which derives from their material status and symbolic role in family, on the one hand, and enhance women’s positive power to care and nurture autonomously, on the other. It would not be an overstatement to say that she commits a prejudiced and naïve description concerning forms of power in family here. If there exists the possibility of negative form of fathers’ power in family, then the threats
from the negative form of mothers’ power exist as well, especially when family law favours them asymmetrically.

**Critiques: Problems of Carol Smart’s Arguments of The Politics of Child Custody:**

The author will in this section indicate and examine the problems of Carol Smart’s feminist jurisprudence of child custody. Five separate points would be picked up and addressed. First of all, there is a concern over mothers’ possible abuses of power and privileges in family. Carol Smart has failed to face and recognize the fact and problems that the unbalanced parental rights may easily enable and cause some mothers consciously or unconsciously abusing their superior power over fathers and children, then unsuitably damaging children’s and fathers’ well-being. Carol Smart has distinguished the negative and the positive meanings of the term of ‘power’. The negative aspect of power means oppression and exploitation, for example, the past domination of men over women in family. The positive aspect of power suggests self-determination and autonomy. She tends to view the privileged status and greater authority of mothers entitled in modern family law as totally a kind of positive expression of power. She can see almost nothing bad or danger to empower women to have more bargaining chips and greater say over men in family decisions. Actually, she seems to suggest that lone mothers should be able to make decisions over children by themselves without consulting the opinions of unmarried or divorced fathers. However, the matriarchal design, like the old patriarchal pattern, silences and marginalizes the voices of the other part who is allowed only inferior status in family law. The kind of autonomous motherhood Carol Smart suggests is a kind of exclusion of and oppression on fatherhood and is a type of incitement for some irrational women to become dominators and dictators in family affairs. If Carol Smart cannot tolerate husbands in the past punished and exploited their wives through enforced separation from their children, how can she neglect the sad fact when witnessing a lot of fathers nowadays being denied of even the contact opportunities with their children by mothers for revenges or other selfish or unwise reasons? Suppose a situation that Carol Smart herself has a son who has been refused custody and contact with his child by his ex-partner simply because she is not willing to see them meeting up, how will
the grandmother Carol Smart feel in mind?

Carol Smart may thus reply, simply because it is mothers who do more ‘caring for’ towards their children, it is reasonable and justifiable to let mothers have greater say and control over issues of children. This kind of logic, nevertheless, is unconvincing and unacceptable. First, the fact that a mother A who provides the most daily care for the child B does not necessarily mean that the care A provides is of best quality or is the kind of care which is most suitable for B. It needs not suggest father C cannot perform the same job well simply because he was expected to be full time wage earner. Father C may provide similar or even better care if he is given similar chances and supports to carry out the service. Besides, to provide daily care does not necessarily mean to provide proper and harmless daily care. The care and education the primary carer provides to the children may sometimes be harmful or dangerous and should be able to be challenged or negotiated by another significant member to the child. Shared parenting can help reduce the danger of such harm.

Not to mention, most women are able to play the role of primary caregiver and experience the emotional gratification of caring simply because their male partners devote their lives to be major breadwinner for families. Without the contributions and devotions of fathers in full time work, most mothers will not have the same conditions and backgrounds to be full time or almost full time house wives as they like. As have stated above, when most fathers leave the house caring opportunities for mothers and fight for family breadwinning outside in highly competitive labour markets, fathers are doing their ‘caring for’ to their children as well, in a way required by our society, our culture, social reality and most mothers. Fathers should not be deprived of due say of and participation in their children over custody decisions and after divorce simply because they have sacrificed opportunities of building closer relationships with children in order to fulfill the heavy responsibility as breadwinner for their families.

Furthermore, Carol Smart’s suggestions will keep and deepen the division of labour between sex while at the same time block the possibility for both gender towards a more unconventional gender role. The unfortunate consequences of this proposal are that both women and men are deprived of comprehensive participation of meaningful
human lives, either it is of ‘public’ civil society or of ‘private’ domestic community. Women, under the principle of Carol Smart, will be most likely to still choose housekeeper as their main career, commit themselves only limitedly in work markets and have to rely on welfare benefits and support or maintenance from men. The structural inferior economic status and political voices of women will still remain. For men, however, the system sends them clear messages that they are not viewed as significant as women to their family and children, their role of father are not as appreciated as mothers by public institutions. These messages will keep driving fathers away from identifying themselves as capable caretaker and from committing as much as mothers in child caring jobs. Without entering into career, women have difficulties in experiencing full citizenship in society; without active participation in child caring, men cannot reap the benefits of full membership in family. Just as the legal system endeavors itself to help women entering careers market with equal opportunities and payment, our legal institutions should do its best to help and persuade fathers to share the caring jobs, to enjoy the caring process and to develop close and intimate relationships with their children.

Still one point worth noting is that the primary carer principle can only best serve the interests of heterosexual mothers. None the less, the paid off of it is to sacrifice the other minority groups parents’ or fathers’ opportunities to participate in the lives of their children. This is because in reality, the societies do not provide friendly atmospheres and equal opportunities for fathers or homosexual parents to be able to serve as their children’s primary carers. While assuming that heterosexual mothers are the most suitable carers, our societies are reluctant to accept homosexual parenting and frown on the attempts of fathers who try to be main caring-takers of their children. Employing the status quo principle in child custody conflicts simply means ruling out fathers’ and these minority parents’ opportunities for participation in their children’s lives further.

Although Carol Smart tends to devalue the love of fathers towards children and to

underestimate the caring role and nurturing skills of fathers in and after marriage\textsuperscript{13}, she nevertheless welcomes and is in needs of fathers to continually play the role of breadwinner, for the sake of accommodating the demands of full time caring mothers in and after marriage. Most fathers, according to her blueprint, easily become just substantially bread earning machines for mothers and children. Although this may not be her original intentions, none the less, we find that she does not take into enough account of fathers’ feelings, needs and situation in her theories. Fathers deserve tiny say and power on decisions about their children due to their main roles as maintenance providers. She does not bother to try to help and encourage fathers to be able to play as core caring role as well. Actually we have reasons to doubt whether she will be willing to see fathers playing more crucial role in caring and thus being allowed greater legal standing in family issues. According to her politics of gender, the empowerment of fatherhood easily signals and leads to the disfranchisement of motherhood. Contradictorily and ironically, she blames fathers for not caring for children enough on the one hand, but takes full advantage of fathers’ stereotyped breadwinner role to maintain mothers’ privileged status over family issues, on the other.

After all, Carol Smart’ confrontational approach of the politics of gender is unsuitable for us to adopt when considering family issues. No one ought to deliberately expect and seek greater power or control over others in family and no one can really profit from this kind of legal decisions in the long run.

\textbf{A Better Route for Child Custody Decisions:}

According to the perfectionist liberal Joseph Raz, the main purpose of our government and legal institutions is to assist every citizen to lead a successfully fulfilling life\textsuperscript{14}. Government ought to promote the pursuits of excellence of individuals by creating


appropriate societal conditions for members of society. For the purpose of personal autonomy to be ‘a realizable end-state’, the individual must be provided with a sufficient range of significant options at different stages of his/her life. Just like government and legal system have the responsibility to positively lend a hand to women in entering labour markets and on issues of equal pay and employment discrimination, they bear the duty to help and encourage fathers to be able to fulfill and enjoy the caring role and domestic life as well. Carol Smart’s feminist jurisprudential suggestions on custody issues not only do nothing to address the difficulties for fathers to be able to choose to be a carer, but also worsen the problem by playing down the affection and care from fathers and by implicitly treating them as just breadwinning machines. Unless our government and legal system could begin to recognize the equal status, ability, responsibilities, rights and suitability of fathers in caring and at the same time provide a friendly environment for fathers to perform caring jobs, fathers will still be forced to identify themselves as only breadwinners and be marginalized in child caring. Joint custody and shared parenting is one of the considerable policy for legal system to accept and recognize fathers’ caring role officially.

An old Chinese saying from Confucianism once indicates that one of the greatest happiness in the world, no matter for men or women, emerges from the process of getting along with and taking care of one’s own child and grandchild. Confucians have pointed out that when parents performing the day-to-day care for their child, they are sacrificing and devoting for their child, on the one hand; however, they are experiencing the most profound enjoyment and comfort in soul, on the other hand. The process of caring, though hard and time-consuming, could nevertheless be highly gratified and emotionally content. It belongs to both parents’ duties and rights to bear this ‘sweet burden’ in mind. Neither father nor mother has enough moral standings to exclude the other part’s participation of and devotion towards their children lives.

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