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দাপ্তরিক গোপনীয়তা আইন ও তথ্য-অধিকার

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Guardianship in Islam: A legal study

Dr. Muhammad Faiz-ud-Din^{*}

Md. Sahal Uddin^{**}

Abstract

Islam is a complete code of life. All spheres of human life are covered in it. From birth to death how a human being will lead his/her life is described in Islam in a systematic way. Islamic concept of guardianship gives a clear idea of maintaining a child until it attains the age of majority. This maintaining includes taking care of body, property and other belongings of a minor. After coming to this world normally a child is maintained by its parent. Father and mother are jointly responsible to take care of their child. Similarly, husband is to maintain his wife from the moment of marriage. The Article deals with the maintenance of minor children, wife, poor parents and also with the application of both the Shariah and Statutory laws in Bangladesh to ensure protection of the rights of the children wife and poor parents.

1. Introduction

Guardian means a person who is to take care of the person (*Hizanat*), property (*maa'l*) and marriage of a minor in accordance with the Islamic Shariah law. Guardianship is defined as, "a right to control the movement and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs for example, an infant, an idiot, a lunatic. It extends to the custody of the person and the power to deal with the property of the ward."¹

In pre-Islamic Arab, Properties of the minor, in most cases, were misappropriated and embezzled. So Islam felt the necessity of the introduction of specific cases concerning the protection of the rights of the minor. We find the provisions regarding the protection of rights of the minor in the holy Quran, hadith and in the writings of the great doctors like Abu Hanifa, Iamm Malik etc. The Quran specifically mentions the rules about the protection of the property of the minor, which are as follows: "Restore to the orphans their property (when they come of age); do not substitute good for bad (take not what you find of value among their effects to your own use and give them worse in its place), nor devour their wealth into your own wealth. Surely, that is a great sin!"² It further states, "Who so is rich let him (guardian) abstain entirely from taking

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¹ Abdur Rahim, *Muhammadian Jurisprudence*, P. 344.

² *Al-Quran*, 4:2 . .

the property of orphans; and who so is poor let him take thereof a reasonable and moderate gratuity (for his guardianship). And when you deliver unto your wards their property, have (the transaction) witnessed in their presence."³

2. Minority in Islamic law

Minority, under Islamic law, signifies want of puberty. Puberty is a physical state, which may be attained by different persons at different stages. Usually the people of hot tropical regions attain puberty earlier than the people of cold regions. It also depends on the stock, race and diet. Of course, under Islamic law there is a legal presumption that a person is presumed to have attained puberty after the completion of fifteen years of age,⁴ unless there is any evidence to the contrary. Under Islamic law the earliest age of puberty in the case of boy is twelve years and in the case of girl is nine years.⁵ When a boy or a girl approaches the age of puberty and they declare themselves adult, their declaration must be credited and it can only be ascertained by their testimony, and consequently when they notify it, their notification must be credited.⁶ So minority of a male or female terminates when he or she attains puberty. Puberty and majority is one and the same thing.

3. Majority under statutory law

Section 2(a) of the Child Marriage Restraint Act, 1929 defines child as a person who, if male, is under 21 years of age and if female, is less than 18 years of age. Section 3 of the Majority Act, 1875 and section 4 of the Guardians and Wards Act, 1890 prescribe the minimum age of attainment of puberty. Under the Majority Act minority ceases on the completion of the 18th years and under Guardians and Wards Act minority ceases on the completion of 21 years. But the Majority Act does not apply in the case of marriage, dower, and divorce.⁷ A Muslim, who is a major under the personal law, but not under the Majority Act, can fix the amount and nature of dower.

4. Classification of Guardianship

Guardians may be classified into three categories - natural, testamentary and court appointed.⁸ Father is the natural guardian of the legitimate children. A testamentary guardian is a person appointed as a guardian by the natural guardian by testament or will. The court appointed guardian takes place when no natural guardian is available

³ *Al-Quran*, 4:6

⁴ *Hedaya*, tr. Charles Hamilton, P. 523.

⁵ *Hedaya*, *Ibid*, p. 530; *Nawab Sadik Ali Khan Vs. Jai Kishori* (1982) 30 Bom. L.R.1346(P,C).

⁶ *Hedaya*, P. 530.

⁷ *Ameer Ali, Muhammedan Law*, Vol.2. P. 235.

⁸ *Syed khalid Rashid, Muslim Law*, Eastern Book Company Lukhnow, Third Edition, p.142

and testamentary guardian has also not been designated. Legal guardians are of three types depending on the origin of their right. They are as follows:

(1) Guardians appointed by the court.

(2) Natural guardian

(3) Testamentary guardian

The court may appoint or declare a guardian if it considers necessary for the welfare of the minor.⁹ The court is the final authority to decide on the welfare and benefit of the minor.¹⁰ The welfare of the child is not to be measured by money or by physical comfort only. The word must be taken in its broadest sense. The moral and religious welfare of the child must be considered as well as its physical well-being.¹¹ The rights, duties and liabilities of the guardian appointed by the court are, in fact, governed by the order of his appointment and the minor is deemed to be the ward of the court. He cannot without the permission of the court mortgage or charge or transfer by sale, gift, exchange any part of the immovable property of his ward, or lease any part thereof for a term exceeding five years.

(2) Natural Guardian

The natural guardian, according to Islamic law, is the father and in his absence, the father's father h.h.s and none else.

(3) Testamentary guardian

Testamentary guardian is the executor of the father or the executor of the father's father. The powers of a guardian of property ceases-

(a) by death, removal or discharge.

(b) by the court of wards assuming superintendence of the property of the ward. and

(c) the minor's attaining majority.

In Islamic law guardianship are of three types for three purposes namely:

(1) Guardian of the person of a minor for custody and upbringing (*Hizanat and tarbiyat*)

(2) Guardianship of the property of minor (*Waliyat-e-mal*).

(3) Guardian of Marriage.

5. Guardian of person

Guardians of person are of three types (A) Custody of Minor Children (B) Custody of Children after the Term of *Hizanat* & (C) Custody of Minor Wife and Illegitimate Child. These are discussed below-

⁹ Section 17, *The Guardians and Wards Act*, 1890.

¹⁰ *Nargis Sultana Vs Aminul Bor Chowdhury* 50 DLR 1998 HCD 533 at p. 540.

¹¹ *Nargis Sultana Vs Aminul Bor Chowdhury* 50 DLR 1998 HCD 533 at p. 539

(A) Custody of minor children

According to Hanafi law The right of *Hizanat* or custody of a male child below 7 years and a female child till she attains puberty which is either 15 or 18 years and as per the Shia law a male child till two years and a female child till 7 years belongs to the mother or a near female relative.¹² The following relatives in order of precedence will have the rights to the custody of the children.

- (1) Mother
- (2) Mother's mother how high so ever (h.h.s.)
- (3) Father's mother h.h.s.
- (4) Full sister
- (5) Uterine sister
- (6) Consanguine sister
- (7) Daughter of full sister
- (8) Daughter of uterine sister
- (9) Daughter of consanguine sister
- (10) Maternal aunts h.h.s and
- (11) Paternal aunts. h.h.s.¹³

The position of traditional Muslim law is, a Muslim mother has absolute right against the father over the minor children's custody till she remarries.¹⁴ The mother is, of all persons, the best-entitled person to the custody of her infant children during the connubial relationship as well as after its dissolution unless otherwise disqualified; even she remains separate from her husband.¹⁵

But in the absence of female relatives, as stated above, the right of custody of person of the minors belongs to the following male relatives of the minors in the order given below:¹⁶

- (1) Father;
- (2) Father's father h.h.s;
- (3) Full brother;
- (4) Consanguine brother;

¹² Syed Khalid Rashid, *Muslim Law*, Eastern Book Company Lukhnow, Third Edition, p. 144.

¹³ *Hedaya*, P. 138; *Bibi Fatima V. Bakar Shah* AIR (1921); *Amar Ilahi V. Rashida Akhtar* PLD (1955), Lah. 412.

¹⁴ *Romana Afrin Vs fakir Ashrafuddin Ahmed* 1996 BLD 487; *Ayesha Khanom Vs Major Sabbir Ahmed* 46 DLR 1994 HCD 399

¹⁵ *Zynab Bibi V. Mohammad Ghousé*, AIR 1952 Mad. 284.

¹⁶ *Hedaya*, P. 139.

- (5) Full brother's son;
- (6) Consanguine brother's son;
- (7) Full paternal uncle;
- (8) Consanguine paternal uncle;
- (9) Son of father's full brother;
- (10) Son of father's consanguine brother.

In the absence of the above persons, the court may appoint a guardian of the minor.

(B) Custody of Children after the term of *Hizanat*

After a boy has attained seven years or a girl has attained puberty the right to his or her custody belongs to the father, because at that age they are to be educated and to be protected, which can not be provided by the women. This is according to Hanafi law. But according to Shafei law, if the mother is living then the child has the option to remain with her, even after the period of *hizanat* is over.¹⁷ Shia law prescribes the following rules regarding *hizanat*:

- (1) The right of the mother to the custody of her child terminates after attaining the age two in case of male and seven in the case female. After this period the father is entitled to the custody of the children.
- (2) In case of death of the father, the mother is entitled to the custody of children till puberty.
- (3) If both father and mother are dead the right of *hizanat* belongs to the following persons in order of preference-
 - (a) Executor of the father i.e. according to the desire of the father.
 - (b) Father's father h.h.s.
 - (c) Executor of father's father, i.e according to his desire.
 - (d) Sister.

(C) Custody of minor wife and illegitimate child

The mother is entitled to the custody of her married minor daughter as against the minor daughter's husband. The custody of an illegitimate child belongs to the mother and her relations.¹⁸

6. Qualifications necessary for the persons to be entitled to the custody of minor (Hazina)

The right of *Hizanat* or custody belongs to the mother or a near female relative which have been mentioned earlier, is called a *Hazina*. A *Hazina* must have to bear the following qualifications to exercise the right of *hizanat*:

¹⁷ Hedaya, P. 139.

¹⁸ A. Fyze, *Out lines of Muhammadan Law*, P. 201; Gohar Begam V. Nazma Begum (1960), I.S.C.R., (India).

- (1) She should be of sound mind.
- (2) She should be of an age, which would qualify her to bestow on the child the care which it may need;
- (3) She should be of good moral conduct. And
- (4) She should live in a place where the minor may not undergo any risk physically or morally.¹⁹

7. Disqualifications of Guardianship of persons.

(1) Mother and other female relations lose their guardianship in the following cases:

- (a) If she married a second husband who is not related to the child within the prohibited degrees by consanguinity;²⁰
- (b) If she leads an immoral life;²¹
- (c) If she does not take proper care of the child;²²
- (d) If she resides at a distance from the father's place of residences so that she cannot make contact with child;²³
- (e) If she apostates or converts to another religions;²⁴
- (f) If she is guilty of misconduct or negligence or cruelty to the child.²⁵

(2) In the case of male guardian

A male guardian of a minor unmarried girl not related within the prohibited degrees is disqualified. The purpose of this Islamic law is to avoid the custody of a male guardian who may marry the girl. In the like manner a minor cannot be a guardian of another minor. A person of unsound mind is also debarred from *hizanat*. When a guardian becomes permanently insane, his guardianship ceases. According to Hanafi Law, if the madness continues for a month without lucid interval, it is to be regarded as permanent.²⁶ Similarly, a person who leads an immoral life (profligate) is also debarred from *Hizanat*.

(3) In the case of a husband of a minor wife

A husband cannot be the guardian of a minor wife, because she is not capable of consummation due to the absence of puberty.

¹⁹ Ameer Ali, *Muhammedan Law*, Vol. 2, P. 256.

²⁰ PLD 1958, Pesh. 26.

²¹ Neil Baillie, *Digest on Mohammedan Law*, P. 435.

²² Wilson, *Ango-Muhammadan Law*, P. 185.

²³ Syed Khalid Rashid, *Muslim Law*, P. 158.

²⁴ Ameer Ali, *Muhammadan Law*, Vol. 2, P. 255.

²⁵ Ameer Ali, *Muhammadan Law*, Vol. 2, P. 256.

²⁶ Ameer Ali, P. 244.

We may summaries the disqualifications of a guardian of person of a minor, male or female, in the following languages.

The right of a woman to the custody of an infant child is made void by her marriage with a "stranger", because it is presumed that a woman who entered into a new family through marriage cannot extend the same love or affection for her child as before. The right of *hizanat* is lost if the guardian is not worthy to be trusted due to misconduct. If she, for example, be found leading an immoral life or if she be convicted of theft, she becomes unfit to the right of the custody of the infant. Further, a woman who frequently leaves her home and neglect her children and as such they starve, that woman is unworthy of trust. Again a woman who abjures the Islamic faith, whether before or after the right vests in her, is disqualified to claim the *hizanat*.

The right of *hizanat* is also liable to forfeiture if the guardian removes the child, without the consent of its father to such a distance from his place of residence as would prevent him from exercising the proper supervision or control over her. But when the change of residence is caused by unavoidable conditions or when it has been done for the welfare of the child, the right of *hizanat* is not lost.²⁷ The frequent change of residence, for example, due to the necessities of employment will not disqualify her from the right of custody of the child. The Court or *Kazi*, however, can use its discretion regarding the determination of the qualification or disqualification of a *Hazina* or guardian depending on the benefit or welfare of the minor.

8. Termination of guardianship of person

The guardian's right of *hizanat* or guardianship ceases to exist in the following cases:

- (1) In case of death of the guardian.
- (2) In case of his or her removal by the court.
- (3) When the minor attains majority.
- (4) The minor girl marrying a person capable to be her guardian.

9. Guardian of the property of a minor

Islamic law recognizes two types of guardians for the property of a minor. These are-

- (1) *De jure* or legal guardian, and
- (2) *De facto* guardian.

A *De facto* guardian is in actual control of the property irrespective of his states. He voluntarily placed himself in charge of the person or property of a minor though not appointed by any authority.

²⁷ Ameer Ali, *Muhammedan Law*, Vol. 2, PP. 257-260.

A *de facto* guardian is merely a custodian of the person or property of the minor and have no rights but only obligations.²⁸ Neither the mother nor the brother, nor the uncle can, without the authority of the court, deal with the property of a minor,²⁹ though they are *defecto* guardians. The courts are very cautious in deciding the guardianship of minor's property and follow the provisions of section 27 of the Guardian and Wards Act literally.³⁰ This section imposes obligations upon all guardians of the property of a ward to deal it as carefully as a man of ordinary prudence would deal with it.³¹ Even regarding guardianship of property the courts are keen to safeguard the interest of the minor and may depart from the traditional law in this respect by appointing a stranger in preference to a near relative.³²

10. Order of precedence among the guardians

Under Hanafi law, the following are the guardians (natural and testamentary) of the minor's property in order of precedence:

- (1) The father;
- (2) The executor appointed by the father's will;
- (3) Father's father;
- (4) Executor appointed by the will of the father's father; and
- (5) Executor of the last-named executor, if any

Thus the only persons who are entitled to appoint a guardian of other property of a minor by will are his father and father's father. Mother has no power to appoint by will a guardian of the property of her minor children.³³

11. Alienation of property by legal guardians

A legal guardian can sell or pledge the movable property of the minor for the utmost necessity of the minor, such as food, clothing or nursing.

Generally, a legal guardian is not entitled to alienate the immovable property of the minor except in the following cases,³⁴ namely-

- (1) Where he can obtain double its value; or

²⁸ *Imam bandi V. Mut Saddi* (1918) 451A73.

²⁹ *Musati Khan V. Nazir Ahmad*, PLD 1952, Pesh. (W.P).

³⁰ Prof. Dr. Begum Asma Siddiqua, *Women's Security Paper, The Family Courts of Bangladesh: An Appraisal of Rajshahi Sadar Family Court and the Gender Issues*, Forum on Women in Security and International Affairs, Bangladesh Freedom Foundation, December 2005, p.59

³¹ *Meherun Hossain Vs Nurul Islam* 46 DLR 1994 HCD 86.

³² *Rahimannessa Vs Ashraf Miah* 25 DLR 1973 HCD 167.

³³ D.F Millah, *Principles of Mahomedan Law*, P. 293.

³⁴ *Kali Dutt V. Abdul Ali* (1888), 16 Cal. 627; *Imamband V. Mut Saddi* (1918) 45 I.A.73 Cal. 878.

- (2) Where the minor has no property and the sale is necessary for his maintenance; or
- (3) Where there are debt of the deceased and no other means of paying them; or
- (4) Where there is legacy to be paid and there is no other source to pay it; or
- (5) Where the expenses of maintaining the property exceed its income; or
- (6) Where the property is falling into decay; or
- (7) Where the property is in the hands of a usurper and the guardian *bonafide* believes that there is no chance of recovery, or
- (8) Where land-tax is to be paid.

A guardian of property appointed by the court, under the *Guardians and Wards Act*, 1890, shall not, without the previous permission of the Court, mortgage, or charge, or transfer by sale, gift, exchange, or otherwise, any part of the immovable property of his ward, or lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor. Under this Act, the Court shall grant permission to dispose of immovable property only in case of necessity or for any evident advantage of the minor.³⁵

12. Removal of guardian

The Court may, on the application by any person interested or of his own motion, remove a testamentary or court-appointed guardian on any of the following cases:³⁶

- (1) Abuse of his trust;
- (2) Constant failure to perform duties of his trust;
- (3) Incapacity to perform his duties of his trust;
- (4) Ill treatment or neglect to take proper care of his ward;
- (5) Contumacious disregard of the provisions of the *Guardians and Wards Act*, 1890 or any order of the Court;
- (6) Conviction of an offence, which the Court regards as a defect of character, which unfits him to continue as a guardian;
- (7) Having an interest adverse to the faithful performance of his duties;
- (8) Shifting of his residence from the local limits of the jurisdiction of the Court;
- (9) Bankruptcy or insolvency of the guardian of the property;
- (10) When the guardian ceases to retain his guardianship due to the law governing the minority of the ward.

³⁵ Sections 29, 30, 31 of the Guardian and Wards Act-1890.

³⁶ Wilson, *Anglo-Muhammadan Law*, P. 198.

13. Guardianship of Marriage (*Jabr*)

The prophet (peace be on him) said, 'Marriage is committed to the paternal kindred'.³⁷ Islamic law empowers a father to impose the status of marriage on his minor children. This power of imposition is called, *jabr* (*Wilayat*). The father is entitled to give his children of both sexes in marriage without their consent, until they attain puberty (*Bulugh*). A guardian of marriage (*Wali*) can give in marriage his minor child. Minority terminates at the age of fifteen years. A guardian in marriage must be-

(a) Muslim;

(b) Major and a man of sound mind.³⁸

The following persons are entitled to Act as guardians in marriage in order of priority:

³⁹

(1) The father, (2) father's father, h.h.s, (3) The brother, (4) The mother and maternal relations (5) The Court. A judge, however, cannot marry the girl to himself, for it would be a marriage without a guardian. A person if married during minority, can approve the marriage after attaining majority by exercising the option of puberty (*Khyarul Bulug*).

Conclusion

Islamic law recognizes three kinds of guardianship for three purposes viz, 1) Guardian of the person of a minor for custody and upbringing, 2) Guardianship of the property of minor & 3) Guardianship of Marriage. Statutory laws in Bangladesh have failed to determine specific age limit in different indicators of guardianship. Under the *Child Marriage Restraint Act, 1929* a male under the 21 years age and a female under 18 years age are regarded as child in case of marriage. On the other hand minority ceases on the completion of 18 years and 21 years age respectively under the *Majority Act-1875* & *Guardian and Wards Act-1890* for all purposes. *Majority Act-1875* and *Guardian and Wards Act-1890* do not differ between male and female in determining age of majority. In Islamic law age of majority is different for different purposes. Islamic law also differs between male and female in determining age of majority. So there exists a gross anomaly between Islamic law and statutory law in respect of determining age of majority, which stands as conflict of laws relating to guardianship in Bangladesh. This conflict must be removed by enacting new & effective statutory law keeping consistency with that of Islamic law.

³⁷ Cited in Fyzee's, *Out lines of Muhammadan Law*, P. 208.

³⁸ Asaf Fyzee, P. 209.

³⁹ *Ibid.*