

Powers & Limits of Guardian in Exercising Minor's Legal Rights

A comparative study of Shariah & Pakistani Law

Thesis LL.M. Muslim Family Law



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Bismillah

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Dedication

Dedicated to

My father **Muhammad Younis Khan** who is not only my father but my teacher, spiritual guide, real role model and source of inspiration to me as well.

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Nafees Ahmed Khan

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Approval Sheet

Powers & Limits of Guardian in Exercising Minor's Legal Rights

A comparative study of Shariah & Pakistani Law.

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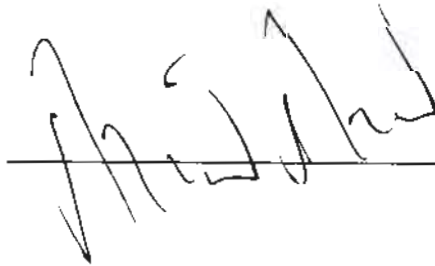
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Declaration

I, **Nafees Ahmed Khan**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

Nafees Ahmed Khan

Acknowledgement

All Praise to Allah, the Sustainer of the worlds, the most Merciful, the most Beneficent, and the most Compassionate! By whose grace this thesis has been completed. May His everlasting blessings and peace be upon Muhammad, the last of His Messengers!

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Thesis Statement

Provisions of statute regarding exercise of Minor's rights by Guardian are very limited in Pakistani legal regime, hence unable to meet the requirements, while Islamic Law provides comprehensive detail.

INTRODUCTION / ABSTRACT

Islamic Law particularizes the issue of guardianship over person and property of a minor. The primary sources of Islamic law provide fundamental rules on guardianship; these rules assisted the Muslim Jurists to comprehensively derive laws on guardianship. The Jurists from the four Sunni schools of thought, i.e. Hanfi'a, Shafi'a, Malki'a and Hanbali'a discussed the issues related to the guardianship over person and property of a minor exhaustively. On some issues of guardianship the views of all school of thoughts are same while on some other related issues the views are different which provides the researcher a variety of opinions. The research is comprised of Islamic law and the Pakistani law. In Pakistani law, the Act which directly deals with the issues of guardianship over a person or his property, rights and obligations of a guardian and other related matters is called Guardian and Wards Act, 1890. Although there are some other statues which are also related to the same issues, like *Majority Act 1875*, *Dissolution of Muslim Marriages Act, 1939*, *The Muslim Family Law Ordinance, 1961* and *Child Marriage Restrain Act, 1929* but the most important Act is '*The Guardian and Wards Act, 1890*'.

This Act was formulated 57 years before the foundation of Pakistan which shows that this Act was not only for Muslims, but it was for the whole population of the subcontinent irrespective of their religion and castes. After the foundation of Pakistan the same Act was adopted without any change due to the comprehensiveness of this Act. Later on, when the '*Muslim Family Law ordinance*,

1961' was formed, some minor changes were made in Acts which were dealing with Muslim personal law and family matters, it had a very minor influence on *Guardian and Wards Act, 1890*. But as it stated earlier that it was for all the Indians, as the matter of fact '*The Guardian and Wards Act, 1890*' is not purely Islamic and some of its provisions are in direct clash with the provisions in Islamic law. Another key problem with this Act is that in comparison with Islamic law, it is very short and general that's why it does not discuss various issues which are highlighted in detail in the Islamic law. Pakistani family courts are bound to decide all matters related to guardian and wards according to '*The Guardian and Wards Act, 1890*'. However the provisions of this Act are unable to provide deep detail about numerous issues of guardianship; judges are also recommended to decide Muslim Personal law in the light of injunctions of *The Holy Quran and Sunnah* according to (Section 2 of) the '*Shariat Application Act, 1962*' & '*Constitution of Islamic Republic of Pakistan, 1973*'. The judges are empowered to interpret law according to their own understanding because of which the judgments are different in different localities.

The foremost purpose of guardianship is to provide maximum benefit to the minor's person and property. The provisions of '*The Guardian and Wards Act, 1890*' are so general and according to it the appointment of guardian, cessation of guardian's authority, rights and duties of a guardian and all other related matters, should be dealt keeping in mind the maximum benefit of the ward.

The maximum Pakistani case laws which are available on topic of guardian and ward are dealing with the welfare of the minor. There are hundreds and thousands of cases available on guardianship in different law digests but they are dealing some specific provisions of '*The Guardian and Wards Act, 1890*'. The maximum cases are

on the custody (Khazanat) of minor (which is not our issue here). Then, there are few cases which talk about the authority of the guardian as natural, de-facto or de-juri guardian. Then there are very few cases which deal with the property matters of the ward (which directs the guardians about the fair use of property) then there are a small number of cases dealing with the person of the ward (by giving directions to the guardian about the health, education and welfare of the ward). In contrast with Islamic law, Pakistani case laws are also unable to discuss the matters of person and property in detail.

The basic purpose of this research is to analyze, the concept of Guardian and Ward within in Shariah perspective, and prove that the existing Pakistani law regarding guardianship over person and property of a minor is so general and diminutive, hence, unable to meet the requirements, it needs to be codified in detail in accordance with the injunctions of Islam, on the other hand Islamic law provides satisfactory detail on the issue. The comparative method has been used in this research and Islamic and Pakistani laws are gathered on one place. The emphasis of our research on the topic entitled is to analyze the Powers of Guardian over person and property of minor and limits imposed by Shariah and Pakistani law on it. The issue of custody of minor is not discussed along with the guardianship of the minor separately in order to contain the discussion in limits. While in Pakistani law guardianship and custody are mixed up to some extent.

The research contains 3 chapters.

Chapter 1 discusses some basic concepts and definitions which are helpful to understand the topic. The definitions cover the meaning of guardian, ward and minor. Then the legal capacity has been exhausted in detail to provide the

understanding of need of guardianship for a minor. Moreover the kinds, order, conditions and classification of guardianship for a minor have been discussed.

Chapter 2 is on Guardianship over person of a minor. Guardianship over person is divided into general guardianship and guardianship for marriage. The General Guardianship over person illuminates the matters related to food, education, religion, and daily base personal needs of a minor, like food, clothing and shelter. While Guardianship for marriage of ward highlight the matters related to the selection of a suitable life partner for a ward. The question of selecting the partner of the minor; it is to be decided by the guardian himself, without the consultation of the ward. However in some cases and circumstances, this question is decided by the minor himself, while in some other cases it is to be decided by both, the guardian and ward collectively. The guardianship for marriage does not end with the marriage of the ward but the matters related to marriage also come under it, like maintenance, dowry, divorce and khula.

Chapter 3 is on Guardianship over property of a minor. Guardianship over property of minor deals with the issues of property related matters of a minor, for instance general matters of property, guardian's authority over the property of a minor, sale and purchase of the immovable property of ward, sale and purchase for the welfare of the ward, doing business by the wealth of the ward, investment of minor's wealth in any business, doing mudariba by the use of minor's wealth and the limits imposed by law on the authority of the guardian. All of the above chapters comparatively converse the Islamic and Pakistani law on the issues of guardianship of the minor.

After the detailed discussion on topic and making comparison between Islamic and Pakistani law, conclusions of the thesis and recommendations are recorded. At the end, a selective bibliography has been given.

CHAPTER 1

MEANING & CONCEPT

1. DEFINITIONS

This research is based on the powers and limits of guardian in exercising a minor's legal rights. Before going in detail it is better to discuss some relevant definitions in order to provide the reader a good idea about the importance of this topic. The definitions include guardian, guardianship, ward and minor.

1.1. Guardian

Guardian has been defined by *The Guardian & Wards Act, 1890* as:

- i. "Guardian is a person who has the legal authority to take care of another person or his property or of both his person and property".¹

Guardian has been defined by *Rafiq's Law Dictionary* as:

- ii. "Guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of

¹Guardian and Wards Act, 1890, (VIII of 1890) S. 4(2).

age, understanding, or self-control, is considered incapable of administering his own affairs.”²

“Guardian as defined in S. 4(2) of *Guardian and Wards Act, 1890*, means person having de facto or de jure care of person and property of minor, such person may or may not have custody of minor”.³

1.2. Guardianship

The guardianship has been defined by *Law* as;

- i. Lawful power charged with the duty of taking care of the person and managing the property and rights of another person is called as guardianship.

The guardianship has been defined by *Shariah* as:

- ii. Taking care of the person and property of a minor (incapable) by a major.⁴

- iii. "هي سلطة المرئ على نفس او مال غيره التي يستمدها صاحبها من شخص آخر، كالوصى التي يستمد ولايته من الاب او الجد او القاضى، او الوكيل الذي يستمد ولايته من موكله ونحو ذلك"⁵

²Muhammad Abdul Basit, *Rafiq's Law Dictionary*. 2nd ed. (Lahore: Federal Law House, 2010), 33.

³PLD 1968 Kar 774.

⁴*Mosua al-Fiqhia, al-Wazarah al-o' kaf wa al-sha'on al-Islamiyyah*, al-Kuwait, 1980, vol. 45,159-60.

⁵Wahba Zuhaili, *Fiqh al Islami wa Aadilatohu*. vol.10, 489.

“This is the authority of a person over a person and property of another person, which he takes from another person. Like legal guardian who holds guardianship on behalf of father, grandfather or the judge...”

1.3. Ward

Ward has been defined by the *Guardian & Wards Act, 1890* as:

- i. “The Ward is a person, who is under the protection or control of a guardian by reason of minority, lunacy or other incapacity”.⁶

A person whose personal and property interests are given in legal authority of his guardian to take care of them is called as the ward.

According to *Rafiq’s Law dictionary*:

- ii. “A child or young person for whom a guardian has been appointed by the court or who has become directly subject to the authority of the court is called Ward of Court.”⁷

Ward has been defined by Shariah as:

- iii. هو المحجور عليه وهو الصغير او المجنون، و المعتو، والسفيه ونوالغفلة.⁸

“He is the one who has been stopped (to act in his personal capacity), and that one is child or mad or insane or idiot or intoxicated.”

The ward may be a minor, idiot, mad or insane in case of property and other cases; it also can be a major in case of marriage held by any guardian.

⁶ The Guardian and Wards Act, 1890, S. 4(3).

⁷ Basit, *Rafiq’s Law Dictionary*, 33.

⁸ Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 9, 165.

1.4. Minor

A person below the age of full legal capacity is called minor. He lacks the complete legal capacity.

Minor has been defined by *Shariah* as:

i. هو الذى لم يبلغ الحلم نكرا كان او انثى.⁹

“This is the one who not yet attained (age of) puberty whether he is male or female.”

Minor is the person who has not attain the age of majority (male or female), the minor will be called orphan incase of death of his father. After attaining the age of majority he will be no more a minor or orphan.

Under the Majority Act, 1875 minority ceases upon the completion of 18 years, unless a guardian of the person or property or both, of the minor has been, or shall be appointed before the minor has attained the age of 18 years, or the property of the minor is under the superintendence of a court of wards, in which case the age of minority is prolonged, until the minor has completed the age of 21 years.¹⁰ Accordingly, notwithstanding *Shariah*, minority of a child continues until the completion of 18 years. Until then, the court has the power to appoint a guardian for the child and her/ his property or both under the provisions of ‘*The Guardian and Wards Act, 1890*’.¹¹

⁹Ibid, vol. 9, 165.

¹⁰ Majority Act, 1875; PLD 1995 Pesh 14.

¹¹ Guardian & Ward Act, 1890. Section 41.

2. CONCEPTS

A guardian is appointed to look after the person and property of a person who because of minority or any other defect, lacks power of discretion or acquires less discretion and is unable to take better decisions in the favor of his person and property. The purpose of guardianship is to facilitate a minor, by insuring maximum welfare and benefit, who does not acquire complete legal capacity to save his person and property from any actual loss.

The power to acquire rights and perform duties is called Ahliyah or Legal Capacity. Some time; a minor acquires complete capacity, some time; he acquires less capacity and some time he completely lacks the legal capacity.

A minor who is not yet mature mentally, does not acquire complete capacity. He needs someone to take care of his person and property because of his minority.

Ahliyyah or legal capacity is further divided into two main types

1. Ahliyyat al- Wajub or Capacity to acquire rights
2. Ahliyyaht al- Ada or Capacity to perform duties¹²

The above types of legal capacity are again divided into four types.

The detail of different levels of capacity is as follows;

2. 1. Legal Capacity in General

The literal meaning of the word capacity is “absolute fitness or ability”¹³. In international law “The capacity of natural & legal persons in general, determines

¹²Ahmed Yousaf Salman, *Aqood al Moawidat al Maliyah*, 37.

¹³Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Shariah Academy, 2010), 115.

whether they may make binding amendments to their rights, duties and obligations, such as getting married, entering into contracts, making gifts or writing a valid will. Capacity is an aspect of status.”¹⁴

Ahliyyah is “the ability or fitness to acquire rights and exercise them and accept duties and perform them.”¹⁵ This meaning indicates two types of capacity the first is based on the acceptance or acquisition of rights and the other on the performance of duties. These are called *ahliyyat al-wujub* and *ahliyyat al-ada* or the capacity for acquisition (of rights) and the capacity for execution or performance of duties. Capacity for acquisition enables a person to acquire both rights and obligations, while capacity for execution gives him the ability to exercise such rights and perform his duties.

In the opinion of some jurists, the term *dhimmah* also means the ability to acquire rights and obligations. The majority of the jurists consider *dhimmah* to be an imaginary container that holds both the capacity for acquisition and the capacity for execution. It is the location or place of residence for the two kinds of capacity. In short, *dhimmah* is the balance-sheet of a person showing his assets and liabilities, in terms of his rights and obligations.¹⁶

In Islamic law, *dhimmah* is deemed a mandatory condition for the existence of capacity. In the view of Imam al-Sarakhsi, *dhimmah* is the “trust” that was offered to the mountains, but they refused; Man accepted it. Thus, *dhimmah* is an attribute conferred by the Lawgiver. It is a trust resulting from an agreement. The fact that

¹⁴<http://www.en.wikipedia.org/wiki/capacityin-english-law> (accessed: June 25th, 2015).

¹⁵ Muhammad Amin ibn Uthman ibn Abd al-ziz Ibn Abidin, *Radd al-Muhtar ala al-Durr al-Mukhtar* (Riyadh: Dar Alam al-Kutub, 2003), 73.

¹⁶ Ahmed Yousaf Salman, *Aqood al Moawidat al Maliyah*, 37

dhimmah is an agreement between the Lawgiver and the subject means that *dhimmah* can be assigned to a natural person alone. In Western law, the term *dhimmah* conforms to “personality”, which is a quality, granted to a natural person as well as an artificial person.¹⁷

2.1.1. The Basis of Legal Capacity

Legal capacity, as stated, is of two types: *ahliyyat al-wujub* and *ahliyyat al-ada*. *Ahliyyat al-wujub* is defined as “the ability of a human being to acquire rights and obligations”. It may, therefore, be referred to as the capacity for acquisition.

Basis for the existence of the capacity for acquisition is the attribute of being a human or natural person. There is complete agreement among jurists that this form of capacity is possessed by each human being irrespective of his being a *mukallaf*.¹⁸

Capacity for execution, on the other hand, is defined as the “capability of a human being to issue statements and perform acts to which the Lawgiver has assigned certain legal effects.” The basis of the capacity for execution is intellect and discretion. Intellect here implies the full development of the mental faculty. As there is no definitive method for checking whether this faculty is fully developed, the Lawgiver has associated it with puberty. Thus, the presumption is that a pubescent person is assumed to possess intellect necessary for the existence of the capacity for execution. This presumption, however, is rebuttable, and if it is proved that though a

¹⁷Shams al-A'immah Sarakhsi, *Kitab al-Mabsut*. Vol. 6 (Beirut: Dar al-Kutub al-Ilmiyyah, Beirut, 2001), 30.

¹⁸Nyazee, *Islamic Jurisprudence*, 124.

person has attained puberty, he does not yet possess intellect; capacity for execution cannot be assigned to such a person. This is according to the majority of the jurists.

The Hanafis acknowledge a deficient capacity for execution for purposes of some transactions for a person who has attained a degree of discretion, even if his mental faculties are not yet fully developed. Thus, a minor who possesses discretion, or exhibits “mental maturity” may be assigned such a capacity, for the civil matters (khitab of muamalat). Again, there is no way here of determining whether the minor has attained discretion, the Hanafi jurists have, therefore, fixed the minimum age of seven years for assigning such a capacity; anyone over seven years of age who has not yet attained puberty may be assigned such a capacity, but the law makes this dependent on the guardian’s will and discretion.¹⁹

Accordingly, this type of capacity is divided into three kinds on the basis of the type of liability associated with an act.

1. Capacity for the khitab of jina’i or legal capacity for punishments. It is based on the ability to understand the khitab jina, i.e., the communication pertaining to criminal acts.²⁰
2. Capacity for the khitab of ibadat or legal capacity for worship. It is based on the ability to understand the khitab of ibadat, i.e., the communication for the Lawgiver pertaining to acts of worship.²¹

¹⁹ Abu Bakr ibn Mas’ud Kasani, *Bada’i al-Sana’i*, Vol 5. (Beirut: Dar ul Fikar, 1996), 98.

²⁰ Nyazee, *Islamic Jurisprudence*, 117.

²¹ Ibid.

3. Capacity for the khitab of mu'amalat or legal capacity for transactions. It is based on the ability to understand the khitab of mu'amalat, i.e., the communication from the Lawgiver pertaining to the mu'amalat.²²

Two of these are civil and criminal liability, while the third is an addition because of religious law. The reason for separating the capacity for execution into these three types is to indicate that a person may, for example, be in possession of the capacity for transactions, but not the capacity for punishments. To put in differently, all three kinds of capacity may be found into a person who is sane and a major, but one or more of these may be lacking in other persons.²³

2.1.2. Complete Capacity

Muslim jurists divided legal capacity into three types complete, deficient and imperfect. The terms kamilah, naqisah and qasirah are used to distinguish between such capacities.

Complete Capacity for acquisition is found in a human being after his birth. This makes him eligible for the acquisition of all kinds of rights and obligations. Complete capacity for execution is established for a human being when he or she attain full mental development, and acquires the ability to discriminate. This stage is associated with the external standard of puberty. The physical signs indicating the attainment of puberty are the commencement of ejaculation in a male and menstruation in a female. In the absence of these signs, puberty is presumed at the age of fifteen in the both males and females According to the majority of the jurists,

²² Ibid.

²³ Nyazee, *Islamic Jurisprudence*, 118; Salman, *Aqood al-moawadat al-malia*, 41.

and at the age of eighteen for males and seventeen for females According to Imam Abu Hanifah attaining bulugh (puberty) alone is not sufficient, however;

For a person to acquire complete capacity for execution, in addition to puberty, the possession of *rushd* (discrimination; maturity of actions) is stipulated as well. The legal evidence, for this is the ayah of the Qur'an

رَابِلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ (الى الآخر)

“Make trial of orphans until they reach the age of marriage; then if ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up.”²⁴

This ayah lays down clearly that there are two conditions that must be fulfilled before the wealth of orphans can be handed over to them. These are puberty (*bulugh al-nikah*) and discretion (*rushd*).²⁵

The term *rushd*, according to the majority, signifies the handling of financial matters in accordance with the dictates of reason. The *Rashid* is a person who can identify avenues of profit as well as loss, and act accordingly to preserve his wealth. *Rushd* is the opposite of *safah* (foolishness), which implies waste and prodigality. Shafi jurists define *rushd* as maturity of actions in matters of finance as well as of *din*. In their view, a person who has attained puberty and is adept in dealing with financial matters cannot be called *rushed* unless he obeys the *ahkam* of the *shari'ah* in matters of *ibadat* as well.²⁶

²⁴ Qur'an 46.

²⁵ Nyazee, *Islamic Jurisprudence*, 117.

²⁶ *Ibid*, 118.

A person, then, is eligible for taking over his wealth if he is both a baligh and a Rashid. This is the general view. Abu Hanifah, however, maintains that a person, who attains the age of twenty-five years, must be delivered his property irrespective of his attaining rushd. In addition to this, he maintains that if a person attains bulugh and rushd and is given his property, but subsequently loses his rushd, while yet under twenty-five, he cannot be subjected to interdiction (hajr). Abu Hanifah appears to be giving preference to life and freedom of the individual over his wealth in these cases. The majority of jurists (jumhur) subject a person to interdiction if he has not attained rushd or even when he loses it subsequently, irrespective of his age.²⁷

On attaining complete capacity, an individual comes liable to punishments because of the khitaḥ jina'i being directed towards him, just as he becomes liable because of the khitaḥ of transactions and ibadat.²⁸

2.1.3. The Stages Leading to Complete Legal Capacity

The conditions laid down by the Hanafi jurists indicate that there are three stages through which an individual passes with respect to his capacity for execution.

1. The first stage is from birth till the attainment of partial discretion, which is considered to be the age of seven years. During this period, the child is assumed to lack intellect and discretion completely, and is ineligible for the assignment of a capacity for execution.²⁹

²⁷Salman, *Aqood al Moawidat al Maliyah*, 41.

²⁸Nyazee, *Islamic Jurisprudence*, 119.

²⁹Ibid.

2. The second stage commences for the age of seven and continues up to actual puberty or the legal age of puberty, whichever is earlier. Deficient capacity for execution is normally assigned during this stage, as the individual possesses a certain amount of intellect and secretion.³⁰
3. The final state commences from actual physical puberty or the legal age determined for it, whichever is earlier. On reaching this age the individual is assigned complete capacity for execution, and becomes eligible for each kind of khitab. An exception arises in the case of safah (being idiot) and the individual may be placed under prohibition for some time. Discretion is a condition for attaining this stage, in addition to puberty.³¹

2.1.4. Defective or Imperfect Capacity

Deficient capacity is assigned in cases where the base of legal capacity is not fully developed. Thus, a person may not have been born as yet or he may not have full mental development. In other cases, the attribute of being a human may be missing altogether.³²

Imperfect capacity is assigned in cases where the bases of capacity, being a human possession of discretion, are present, but an external attribute has been introduced that does not permit the recognition of the legal validity of certain acts.³³

³⁰Ibid.

³¹Nyazee, *Islamic Jurisprudence*, 115.

³²Kasani, *Bada'i al-Sana'i*, vol. 5, 96.

³³Nyazee, *Islamic Jurisprudence*, 115; *Aqood al-moawadat al-malia*, 44.

2.2. CAPACITY OF THE MINOR (SABI) IN PARTICULAR

A child possesses a complete capacity for acquisition of rights and obligations, but until he attains the age of actual or legal puberty, he lacks the capacity for execution. To facilitate matters, this child is made liable by the Shari'ah on for those obligations that he can meet.³⁴

Deficient capacity for execution is assigned to a non-pubescent who possesses some discretion, or to a ma'tuh (idiot) who has attained puberty yet lacks complete mental development. The person who possesses deficient capacity is not subject to the khitab jina'i he cannot, therefore, be held criminally liable. The minor, however, is subjected to discipline the reason being that the khitab jina'i is applicable to that person alone who understands the khitab fully. This is based on the principle of legality in Islamic law.³⁵

With respect to the ibadat, there are detailed discussions whether the khitab is addressed to the sabi (minor) and ma'tuh (idiot) by way of recommendation or choice, or whether it is addressed to them at all. There is no dispute that there is reward for such a person for the performance of the worship.³⁶

The Hanafis treat the issue of legal capacity of the minor in a somewhat different way. (Our major concern here is for the capacity of such a person for the purpose of transactions.)

1. Financial transactions are established against the dhimmah of the sabi.

Though he cannot meet them personally due to the absence of the capacity

³⁴ Ibid.

³⁵ Ibid.

³⁶ Kasani, *Bada'i al-Sana'i*, vol.5.96.

for execution, the lawgiver allows his wali (guardian) to stand in his place and represent him through a substitutory duty. The sabi is also liable for any damage caused to another's property, and for the maintenance of his wives and near relatives. He is also liable, except in the opinion of the Hanafi School, for the payment to zakat. All financial transactions are divided into three types for determining the liability of the discriminating minor.³⁷

- a. Purely beneficial transactions: The transactions falling under this category are the acceptance of a gift or of sadaqah. These are allowed to the person who has not attained puberty, but who can discriminate and has been permitted by his wali (guardian) to exercise such acceptance.
 - b. Purely harmful transaction: The granting of divorce, manumission, charity, loan and gift, as well the making of trust and bequest are considered transactions resulting in pure financial loss. These are not permitted to Minor (who has some discretion).
 - c. Transactions vacillating between profit and loss Sale, hire, partnership, and other such transactions are considered valid if ratified by the guardian.
2. Criminal liability does not exist in the case of a person who has not attained puberty, because he is not a mukallaf, and the guardian cannot stand in his place for criminal offences. But a minor who has reached an age of discretion (which starts from seven years) may be punished, with punishments which

³⁷Ahmed Yousaf Salman, *Aqood al Moawidat al Maliyah*; Imran Ahsan Khan Niyazi, *Islamic Jurisprudence* (Sharia Academy 2010), 117

are not fixed by the shariah as Tazir, for the crimes committed by him for the purpose of his welfare in future and to save him from such crimes in his coming life.

3. The worship is not obligatory on a minor as he does not possess the capacity for execution.

The deficient capacity granted to the discriminating minor by the Hanafis is also granted to the Idiot. The majority of the Jurists oppose the Hanafis and refuse to acknowledge any kind of capacity for the discriminating minor. They maintain that the communication is not directed towards such a minor at all, and it is of no consequences whether the transactions are beneficial or harmful.³⁸

2.3. KINDS OF A MINOR REGARDING TO HIS INTELLECT

Minor is a person who has not attained the age of majority yet. The age of majority in Pakistan law is 18 years while in sharia there is no fix age. The child will cease to be a minor/ward when he will attain full mental discretion (Ahliyat al-Ada).

Minors are of two kinds;

- a. The one who has power of discretion, he knows what is better for him and what is harmful for him in ordinary matters up to some extent (sabi mummiyaz).³⁹

³⁸ M Nymatullah Qasmi, *Bache- Haqook o Ahkam* (Karachi: ZamZam Publishers, 2009), 73.

³⁹ *Mosua al-Fiqhia, al-Wazarah al-o' kaf wa al-sha'on al-Islamiyyah, al-Kuwait*, vol. 45, 161.

- b. The one, who does not have power of discretion, means he is still unable to find what is beneficial and what is harmful for him, because of his minority (sabi ghair mummiyaz).⁴⁰

2.4. GUARDIANSHIP IN ISLAM

The law makes a distinction between guardian of the person, guardian of the property, guardian for purpose of marriage in case of minors, and guardian for purpose of marriage in case of an adult female, and custody.

There are three main kinds of it;

1. Guardianship over person,
2. Guardianship over property,
3. Guardianship over person & property

2.4.1. Guardianship over Person

Guardianship over person means to look after the personal affairs of a minor like marriage, general education, moral education, teaching skills, medical care etc. This kind of guardianship is of father, grandfather specially (and other guardians who are in close relation with the ward generally in some conditions).⁴¹

It is classified as

- Willaya tul Ijbar

⁴⁰Ibid.

⁴¹Shams al-A'imamah Abu Bakr Muhammad ibn Abi Sahl Ahmad Sarakhsi, *Almabsoot*. Vol. 5, 49.

- Willaya tul Ikhtiyar
- Willaya tul Istihbab
- Willaya tul Mushtarika

2.4.2. Guardianship Over Property

Guardianship over property means to look after the property related affairs of a minor (the affairs other than the body). This kind of guardianship is of father, grandfather, the person appointed by the both (father & grandfather) and the judge⁴².

It is classified as

a) Dejure Guardianship

It is legal or natural guardianship.⁴³

b) Certified Guardianship / Judicial Guardianship

“Guardian appointed by the court in absence of legal guardian”, the duty of appointing a guardian falls on the court.⁴⁴

c) De facto Guardianship

“A person who is neither a legal guardian nor a guardian appointed by a court but has voluntarily placed himself in charge of the person and property of a minor is known as de facto guardian”. He is a mere custodian of the person and property of the minor and has no right over them.⁴⁵

⁴²Basit, *Rafiq's Law Dictionary*, 33; Zuhaili, *Fiqh al Islami wa Adilatohu*, vol.10, 495.

⁴³Ibid., 491.

⁴⁴Ibid., 492.

⁴⁵PLD 2009 SC 751; PLD 1975 SC 311.

2.4.3. Guardianship Over Person & Property

Guardianship over person & property means to look after both, the person and property of a minor. Some time a guardian acquires only one type of guardianship. Like guardianship of person of minor or guardianship over property of minor. But some time same person holds both types of guardianships, e.g. guardianship over person & property. This kind of guardianship is of father and grandfather only. In case of their absence, the guardianship shifts to other person with some strict conditions. One person should be appointed guardian both of person and property of minor if law permits.⁴⁶

2.5. CLASSIFICATION OF GUARDIANSHIP

Guardianship in Islamic law has been classified differently on the basis of different grounds as under⁴⁷

1. On the basis of Subject
2. On the Basis of Origin
3. On the Basis of Discretion of the Guardian
4. On the basis of Absence of a Guardian

⁴⁶PLD 1958 Pesh 26

⁴⁷*Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 155.

2.6. CLASSIFICATION OF GUARDIANS

There are many types of Guardians

Natural Guardian, Legal Guardian, Judicial Guardian(appointed by the court), de facto Guardian, de jure Guardian, Guardian ad litem and Testamentary Guardian;⁴⁸

1. Natural Guardian: The father and grandfather are the natural guardians. They are in the most close relation with the child and in their presence no one else can take their place, because of their kindness towards the minor (but in exceptional cases), that's why they are called natural guardians. They are also called so because they need no appointment by the court and have direct authority over the person and property of the minor.⁴⁹
2. Legal Guardian: The guardian, appointed by the father or grandfather of the minor is called legal guardian or wasi.⁵⁰
3. Judicial Guardian: The person, appointed by the court keeping in view the greater interest and welfare of the child is called judicial guardian or the guardian appointed by the court. That guardian may be a close relative or anyone else; the court may appoint such guardian keeping in view the greater interest of the minor. Some times when a natural guardian fails to act in the welfare of minor, dies or ceases his authority over minor because of any defect, the court appoint another guardian itself for the welfare of the minor.⁵¹

⁴⁸ Basit, *Rafiq's Law Dictionary*, 33.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

4. De Facto Guardian: The person who has voluntarily placed himself in charge of the person and property of minor and who is neither a natural guardian, legal guardian, nor guardian appointed by the court is a de facto guardian. A de facto guardian has no power to transfer any right or interest in the immovable property of the ward, such a transfer is not merely voidable but is void.⁵²
5. Testamentary Guardian: Guardian appointed by a will is called Testamentary Guardian.⁵³
6. Guardian ad litem: The person appointed by the court to protect a minor's interests in a lawsuit is called Guardian ad litem.⁵⁴
7. Dejure Guardian: It is legal or natural guardian.

All the above mentioned guardians have some specific limits and boundaries to perform their duties which we will discuss in detail.

Usually, a person acquires the status of guardian because of incapability of ward of caring for his or her own interests due to infancy, incapacity, or disability. Most states around the globe have laws which provide that the parents of a minor child are the legal guardians of that minor, and that the parents can designate; who shall become the child's legal guardian in the event of death of any one of them, subject to the approval of the court.⁵⁵

⁵² PLD 2009 SC 751; PLD 1975 SC 311.

⁵³ Basit, *Rafiq's Law Dictionary*, 33

⁵⁴ Code of Civil Procedure, 1908, (V of 1908), Order 32 Rule 4.

⁵⁵ www.jillani.org/LAW%20OF%20GUARDIANSHIP%20IN%20PAKI (accessed: July 10th, 2015).

2.7. CONDITIONS FOR ELIGIBILITY OF A GUARDIAN

There are many conditions for the eligibility for the guardian, if he does not fulfill these conditions, he may not be appointed as a guardian.

According to Islamic law the guardian,⁵⁶

1. Must have complete legal capacity (majority and intellect).
2. He must be of the same religion as that of the ward.
3. He must be a male (conflicted).

Majority of Jurists: In their view the guardian must be a male.

Hanafia: In their view a female could be a guardian.

4. He must be a just one (conflicted).

Shafia and Hanabila: The Holy Messenger (SAW) said 'there is no nikah unless two just witnesses and just guardian.

Hanafia and Malikia: Being just is not a condition for a natural guardian, apparent just is enough because either he is just or unjust but he loves his children equally.

5. Intellect (conflict in meanings)

Hanabila: The guardian must have to be aware of interests of marriage and marriage affairs.

Shafia: The guardian may not be a hazil, means he does not waste hisward's property but take care of it.

⁵⁶Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 490-91.

2.8. ORDER OF THE GUARDIANS

In Islamic law order of appointed of guardian is different according to different schools of thoughts;

- i. In the view of Hanfia: Order of inheritance will be adopted while appointing a guardian over person or property of a minor.⁵⁷
- ii. In the view of majority of the Muslim jurists the order of appointment of guardian will be the kindness of the guardian towards the minor and the kinder will be preferred to be appointed as a guardian.⁵⁸

⁵⁷Zuhaili, *Fiqh al-Islami wa Adilatohu*, vol. 10, 490.

⁵⁸Kasani, *Bada'i al-Sana'I*, vol. 5, 96; Abu al-Walid Sulayman ibn Khalaf Baji, *Al-Mantiqa Sharh Muwatta al-Imam Malik* (Beirut: Dar al-Kutub al-Arabia, 1984), 54.

CHAPTER 2

RIGHTS AND OBLIGATIONS OF THE GUARDIAN OVER PERSON OF A MINOR

3. GUARDIANSHIP OVER PERSON

Guardianship over person means to look after the personal affairs of a minor like managing the affairs of marriage, general education, moral and religious education, skill training and medical care of a minor boy or girl etc⁵⁹. Guardianship over person is mainly divided into two types, which are general guardianship over person and guardianship in marriage of a boy or girl. The issues related to the guardianship over person of a minor are as follows;

3.1. APPOINTMENT OF THE GUARDIAN / ORDER OF GUARDIANSHIP

3.1.1. Who Has the Authority over Person?

In Islamic Law the views of Muslim Jurists are as follows

Hanfia's View

The guardian over person is the son, the father, the grandfather, the brother or the paternal uncle respectively. It means that guardianship over person in Hanfia's view

⁵⁹M Nymatullah Qasmi, *Bache- Haqook o Ahkam*, 384-386.

is regarding the classification under inheritance. In this situation the real brother and uncle will be preferred upon the other brothers and uncles. If there is no guardian available in close relatives then the guardianship will be shifted to the mother and none real remote relatives.⁶⁰

Malik's View

The guardian over person is the son, the father, the guardian appointed by the father, the brother, the grandfather, the paternal uncle or the judge respectively. The guardian can take the ward from the custody of his mother after the ending of Hadana period.⁶¹

Natural guardians need no approval from court to perform their duties relating to the person or property of a minor and also the court has no right to cease the guardianship of a natural guardian if that guardian is father, because Holy Prophet (PBUH) said

انت وملك لايبك

“You and your property is of your father”⁶²

Somehow, some exceptions are there like: the natural guardian is an idiot or insane or mad, in this case the natural guardian might be replaced with another guardian.

If the natural guardian is missing then there are close relatives who will be appointed as a guardian, and those persons will be preferred to be guardians who are selected by the natural guardian. If no one has been selected by natural guardian then a close relative will be appointed as a guardian according to the provisions of Shariah and

⁶⁰ Ala al-Din ibn Ahmad ibn Muhammad Haskafi, *al-Durr al-Mukhtar Sharh Tanwir al-Absar* Vol. 2 (Beirut: Dar al-Kutub al-Ilmiyyah, 2002), 427.

⁶¹ *Mosul-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 161.

⁶² Ibn-e-Maja, *Sunan*, Hadith No 769; Ibn-e-Haban, *Al-bazaz*, Dar-al-qutni and Abu Ya'la

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those persons will be preferred to be the guardians which are legal heirs of the minor, and the most closer will be preferred because of his share in the property and his kindness towards the child.

No one can himself be a guardian of a minor on his own desire if there are already guardians existed according to Shariah. At the end if there is no one to be appointed as guardian, the court itself will be the guardian of such minor on behalf of head of the state.

السلطان ولي لمن لا ولي له

“Head of state is the guardian of the person who has no other guardian”.⁶³

In Pakistani Law there is no specific order to appoint a guardian over the person of a minor. The paramount consideration of court during appointment of a guardian is the welfare of the minor. The person who will be most suitable for the welfare of minor will be appointed as a guardian.

Section 8 of the ‘*The Guardian and Wards Act, 1890*’ deals with this issue

According to it, the court will not take any action to appoint a guardian over person or property of a minor until it receive any application for such appointment. And the person appointed as guardian may be;

- a. *The person desires of being, or claiming to be the guardian of the minor; or*
- b. *Any relative or friend of the minor or*
- c. *The collector of the district or other local area within which the minor ordinarily resides or in which he has property, or*
- d. *The collector having authority the respect to the class to which the minor belongs.*⁶⁴

⁶³ Imam Hmad bin Hanbal, *Musnad*, chapter of Wilayah, Hadith 199/42

⁶⁴The Guardian and Wards Act, 1890, Section 8.

The court will not appoint any guardian on the person of a minor if a natural guardian already exists who is not unfit in the view of court to look after the affairs of a minor.

Section 19 (b) explains the conditions under which court will not appoint a guardian.

It says

Nothing shall authorize the Court to appoint or declare a guardian of the property of minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the persons.

(b) of a minor whose father is living and is not, in the opinion of the Court unfit to be guardian of the person of the minor⁶⁵

Father is a legal and natural guardian, not only according to Islamic law but also according to 'The Guardian and Wards Act, 1890', west Pakistan Muslim Personal Law 1962 and According to the Majority Act of Pakistan.

In the case of Muhammad Siddique Vs Mrs. Sadiq Safoora, father claimed for the guardianship of his child, while the mother took plea that she acquires right of custody of minor as well as she has the pure right of guardianship. Lahore High Court held that

"A Muslim father is natural and legal guardian of his minor children until they attain age of majority. Custody of minor with mother does not distract from father's right to supervision and control of minor".⁶⁶

Father is competent to apply for restoration of custody of minor under section 25 of 'The Guardian and Wards Act, 1890'.

In case of non availability of a natural guardian the court will appoint a guardian keeping in view the welfare of the minor. Section 17 of 'The Guardian and Wards

⁶⁵Ibid.,S. 19.

⁶⁶ PLD 1963 Lah. 534.

Act, 1890' explains how a guardian will be appointed and who has the right to be appointed as guardian, it says

*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.*⁶⁷

*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.*⁶⁸

*If the minor is old enough to form an intelligent preference, the Court may consider that preference.*⁶⁹

*The Court shall not appoint or declare any person to be a guardian against this will.*⁷⁰

In the above section of 'The Guardian and Wards Act, 1890' it is mentioned that a Guardian Court while appointing a guardian for ward will always prefer the welfare of the minor in all matters. It is the discretion of the court to decide what is in the welfare of the minor and what not. The other things to be considered for the appointment of a guardian by the court are the relationship of the proposed guardian with the ward, his capability to be a guardian and most importantly the wish of ward's deceased parent, which means that if the natural guardian himself was willing to appoint someone as the guardian of his children, the wish of natural guardian will not be neglected and that person will be preferred upon other nominated persons. Court while appointing a guardian of a person or property of minor will always prefer the welfare of the minor. And that person would be selected as guardian who is most beneficial, merciful, kind and near to kin for the minor.

⁶⁷The Guardian and Wards Act, 1890, S. 17 (1).

⁶⁸Ibid., S. 17 (2).

⁶⁹Ibid., S. 17 (3).

⁷⁰Ibid., S. 17 (5).

Section 17 and 25 of 'The Guardian and Wards Act, 1890' deals with the appointment of the guardian.

In a family case of custody of a minor, Supreme Court of Azad Kashmir setting the basic criteria for appointment of guardian argued that:

Court while dealing with application for appointment of guardian and restoration of custody of minors would base its findings on the conditions laid down in section 17 and 25 of Guardian and Wards Act, 1890, which says that while appointing guardian of minor, fundamental importance should be given to the welfare of minor. Welfare of minor if found with the father then custody should be given to him and if welfare of minor was found with mother then custody should be given to her, where minor (male) had attained age to 7 years or above, it was neither necessary nor obligatory that their custody be given to father. Welfare of the minor was the guiding factor in the matter of delivery of custody. Father although a natural guardian yet his right was also subordinate to the welfare of the minor. Overriding fundamental consideration was always the welfare of minors rather than that was the sole criteria which must prevail.⁷¹

In the case of Khalid Mehmood Vs Additional District Judge, where husband divorced his wife and took his daughter in his own custody, the wife put an application in trial court. Application by mother of minor girl for custody was accepted by the court. Appeal filed by the father of the minor girl against judgment of the trial court was dismissed by the appellate court. Marriage between father and mother of the minor was dissolved on the ground of Khulah and mother after dissolution of marriage had contracted another marriage whereas father has not contracted second marriage.

Female minor aged 10 year was a "special person" and also had kidney problem. Treatment of minor required huge expenses and mother of minor neither herself nor her parents were in a position to provide for the medical expenses of the minor. Minor was in the custody of her father, who had been providing her all medical

⁷¹ PLD 1994 S.C (AJ&K) 372.

facilities. (In appointing the guardian of the minor, main consideration for the court should be welfare of the minor. Court must see as to who was the most likely to contribute to the well being of the minor and who would be in better position to look after and take care of the minor). In the present case father had been providing special care to her minor daughter and he was in position to bear the expenses as well. Concern which father had shown had proved that he loved his daughter and would defiantly look after the minor in much better way than the mother. Mother of the minor who had contracted second marriage with a stranger would remain depended upon her second husband, who could not provide maintenance and care to the minor.

No reason existed to disentitle the father for custody of the minor. Judgments of the two courts below were set aside and the father who was natural guardian of the minor was declared/ entitled to the custody of the minor.⁷²

In the Case of Abdul Ghaffar Vs Awwam Un-Naas, where question raised before the court that who has the preference and upon what basis a guardian will be preferred.

Is it close relationship, same religion or anything else?

The Court held that

*Court's while appointing a guardian of minor and taking decision with regard to his custody are expected to keep in view the welfare of the minor. All other circumstances, including the relationship of the parties with minor, the faith and religion of the minor, are subordinate to this consideration. Other circumstances are no doubt looked into to decide as to where lay his welfare.*⁷³

The court may consider the wish of minor also during selection of a guardian for the person and property of the minor, if the minor is old enough to form an intelligent

⁷² 2011 CLC 889 (Islamabad).

⁷³ 1988 CLC 670 S.C (AJ & K).

preference. The court may not appoint or declare any person to be a guardian against this will.

In a case of appointment of guardian by the wish of minors, on the question that how court will determine the maturity of minors, the court held that "To form an intelligent preference the court will ask relevant questions to minor, if he or she is old enough to understand the same."⁷⁴

Now if we compare Pakistani law with Islamic law, we may find that the view of both laws is same in most of the issues of appointment of a guardian over person of a minor, but there are some things which are not same between these two laws like Pakistani law during appointment of a guardian always prefers the welfare of the minor and on the doctrine of welfare of the minor court uses its own discretion and appoints someone as a guardian but there is no specific order of guardians in Pakistani law. Some time a close relative not fulfils the requirement of welfare of the minor so the court appoints any remote relative of the minor as a guardian keeping in view the welfare of the minor.

While in Islamic law, Shariah also prefers the welfare of the minor but the core consideration of Shariah during appointment of a guardian is the kindness of the guardian to his ward and according to the view of Muslim jurist the base of kindness is the closeness of the relation. So, therefore the most close in the relation with the minor will be preferred on other nominated persons as a guardian. On the doctrine of Kindness the Muslim jurists made an order of guardians and Islamic Courts usually does not neglect this order during appointment of a guardian while Pakistani Courts

⁷⁴1999 MLD 2768 (Kar.)

often does not follow any order, they just prefer the welfare of the minor and closeness of relation has no weight at all in appointment of guardian.

There are many case laws which show that the core consideration of the court is the welfare of the minor and if a close relative of the minor is willing to be appointed as a guardian, he first has to prove that the welfare of the minor lies with him not with the other persons.

Natural guardian in Islamic law is not only the father but in the absence or non availability of father, grandfather is also a natural guardian. He has all such authorities which a father has. While in Pakistani Law only father is the natural guardian, grandfather will not be treated as a natural guardian.

Another point to be mentioned here is that, in Islamic law a natural guardian enjoys maximum authority over his ward as he can perform all such acts on behalf of minor which that minor was assumed to perform after getting puberty. While in Pakistani law a natural guardian does not enjoy absolute authority over the person and property of his ward. The authority of a father being a natural guardian is limited up to some extent and he needs approval from court to use his authority in some cases, like sale and purchase of immovable property on behalf of minor.

In a case of guardianship titled *Kaneez Akhtar Vs Abdul Qadoos*, father of the minor took plea that being a natural guardian he has absolute right of guardianship of the minor and he has no need to prove his care towards the ward. Court held that;

Father is entitled to the custody of the minor on account of his conduct in the light of facts and circumstances of each case. Right of the father as natural guardian is not absolute right.⁷⁵

In another case of guardianship of minor named Firdous Iqbal Vs Shifaqat Ali, father took same plea as above (being a natural guardian he has absolute right of guardianship of the minor and he has no need to prove his care towards the ward).

Court held that

Right of father to claim the custody of minor son was not an absolute right. Welfare of minor is always a paramount consideration. Father may disentitle himself to custody on account of his conduct in the light of facts and circumstances and facts of each case.⁷⁶

3.2. GENERAL GUARDIANSHIP OVER PERSON

The guardianship over person is divided into different types. A guardian over person of a minor is liable to take care of him by taking care of the matters related to the survival and welfare of the minor by providing him food, shelter, education, good health and all other things which a minor requires. In this behalf the guardian is not only liable to take care of body of a minor but he is also liable to take care of moral ethics of the minor, which is of same importance as the body of minor is. In this regard the education of a minor will be of several types. Like; general education (related to the ordinary matters of life and daily practice), religious education (related to the religion of minor), moral education (related to the moral ethics).⁷⁷

In Pakistani law Section 24 of 'The Guardian and Wards Act, 1890' explains general liabilities of a guardian of the person. It says

⁷⁵ 2005 MLD 828 (Lah.).

⁷⁶ 2000 SCMR, 838.

⁷⁷ Ulama al-Hind, *Fatawa al-Hindiyyah (Fatawa Alamgiri)* (Beirut: Dar Ihya al-Turath al-Arabi, 2002), vol.5, 93.

*A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.*⁷⁸

Both Pakistani law and Islamic law on the issue of general guardianship over person are same. Pakistani law in this regard follows the provisions of Shariah as laid down in Holy Quran and Sunnah of the Holy Messenger (SAW). A general rule provided by the *Guardian and Wards Act, 1890* in appointment of a guardian is that, the person who claims guardianship of a minor, must look after the welfare of minor.

In a case where the issue raised that whether welfare of minor is interlinked with his moral and spiritual education, the court held that; “Welfare of minor includes his moral, spiritual and material well being. While considering the welfare of minor the court shall have regard to the age, sex, religion of the minor, the character and capacity of the proposed guardian, his nearness of kinship to the minor and the preference of the minor if he / she is intelligent enough to make it”.⁷⁹

The guardianship over person is classified under:

3.2.1. Guardianship for Education of the Minors

In Islamic Law the guardian is bound to educate his ward. When the ward reaches the age of minimum discretion (which is four years) the guardian is liable to educate the ward according the customs of the area. He will arrange the teacher for the ward for his modern education. This liability will be imposed upon the guardian keeping

⁷⁸The Guardian and Wards Act, 1890, Section24.

⁷⁹ 2003 YLR 3245 (S.C) (AJ&K).

in view the financial position and also the customs of the area where both (guardian and ward) lives.⁸⁰

The guardian will not be held liable to provide extra ordinary education. He will also not be held liable if he is a poor man and ward has no property, but if the ward is a wealthy person then the guardian will take some share from his property for the sake of his education.⁸¹

In Pakistan basic education is mandatory and the state in this regard is facilitating its people to educate their children. State in this behalf has provided free education from primary to secondary level. Government schools are available in each locality and there is no fee for basic education till metric. According to the article 25 of the constitution of Pakistan, right of education is a fundamental right.⁸²To provide basic education to his ward is the duty of a guardian.

3.2.2. Guardianship for Religious Education

Under Islamic Law the guardian is also fully liable to provide religious education to the ward. Being a Muslim guardian, Shariah imposes this duty on the guardian. When the minor reaches age of basic discretion or *sin al tameez*, Shariah orders his guardian to educate him in religious matters. Holly Prophet ordered guardians of minors to ask their ward to perform prayer when they reach 7 years of age.

مروصبياتكم بالصلوة اذا بلغوا سبع⁸³

⁸⁰Qasmi, *Bache- Haqook o Ahkam*, 384.

⁸¹ Ulama al-Hind, *Fatawa al-Hindiyyah*, vol.5, p.65.

⁸²Constitution of the Islamic Republic of Pakistan, 1973, Article 25,

⁸³*Sunan Abi Dawood*, Hadith No. 494.

“Give order to perform prayer to your children when they attain 7 years of age”

The guardian can punish his ward if the ward is not acting upon his instruction about religious matters when he reaches 10 years of age.

واضربوهم اذا بلغوا عشر⁸⁴

“Beat them (on non performance) when they attain 10 years of age”

On another place it is mentioned that the guardian is liable to educate his wards about the right and wrong and if he lacks to do so and the ward acts any sin or immoral act the guardian should be held liable in the eyes of ALLAH.⁸⁵

Pakistani Law is also in support of Shariah. Religious education is also mandatory in Pakistan. In schools religious education is mandatory for every student. There are different subjects on religion which are part of syllabus from very first class till the age of majority of the minor. The State itself supports the guardians to provide religious education to their wards by providing Mosques and Imams in every locality.

3.2.3. Guardianship for Character Building

Under Islamic Law the guardian is bound to provide the basic education of rules of morality to his ward which means that the guardian should himself be a good person, he may not be a person of bad character, and he should not be a criminal or habitual offender. He should be a man of good moral ethics; if a guardian is not fit for a

⁸⁴ Ibid.

⁸⁵ Muhammad Bin Muhammad al-Hanafi Astroshini, *Jamia Ahkam al-Sighar* (Cairo:Dar al-Fazila, 1994), vol. 2, 54.

minor because of his bad character, the court may cease his guardianship and appoint another guardian.⁸⁶

In a family case court while answering the question that, whether relationship and nearness of the guardian to the minor is enough for his appointment or his character will also will be checked? The court held that;

*“Mere entitlement of father as natural guardian of minors would not be sufficient to decide such questions. Prime consideration while deciding custody of minor would be their welfare keeping in view character and capacity of their proposed guardian”.*⁸⁷

The guardian is liable to educate the ward basic moral ethics (as to avoid intoxication, adultery, theft, gambling, misbehavior, and lie, sin etc.) for that a guardian is not required to be a person of angle nature.⁸⁸

The basis of this view is the ayah of Holy Quran:

قُوا أَنْفُسَكُمْ وَأَهْلِيكُمْ نَارٍ⁸⁹

In order to stop a minor from committing sins or crimes, it is the right of the guardian to punish the minor to prevent him from committing any crime.⁹⁰

If the guardian himself compels or appreciates his ward to commit a crime, the guardian will be held fully liable because the minor was acting on behalf of his guardian.⁹¹

⁸⁶Qasmi, *Bache- Haqook o Ahkam*, 387.

⁸⁷2012 CLC 784 (Lah.)

⁸⁸*Moso' a al-Fiqhia*, al-Wazarah al-o' kaf wa al-sha'on al-Islamiyyah, vol 45, 163.

⁸⁹Qur'an 6:66.

⁹⁰Ulama al-Hind, *Fatawa al-Hindiyyah*, vol.5, 234.

⁹¹Ibid.

If the guardian is a notorious person and commits crime habitually, the court will cease him as guardian, and will appoint a new guardian, keeping in view the welfare of ward.⁹²

Pakistani Law supports the view of Shariah here, as according to the '*The Guardian and Wards Act, 1890*' the guardian should be a man of good character.⁹³ A person of bad character ceases his authority over a minor as a guardian according '*The Guardian and Wards Act, 1890*'.⁹⁴

3.2.4. Guardianship for Skilled Education / Training

Under Islamic Law when the ward reaches the age of discretion and becomes a *sabeeh mumaiyaz*; the guardian will be responsible to teach him some basic skills which are necessary to survive in an ordinary society. In this case to teach skills is recommended by the Shariah it is not mandatory on the guardian.⁹⁵

Pakistani Law supports the above view of Shariah as according to the '*The Guardian and Wards Act, 1890*' the guardian is responsible to teach his ward some basic skills which are necessary to survive in an ordinary society.⁹⁶

3.2.5. Guardianship for Health

According to both laws (Pakistani & Islamic) The guardian is fully liable to take care of his ward's health.⁹⁷ For this purpose he is bound to provide healthy food to his

⁹²Ibid.

⁹³The Guardian and Wards Act, 1890, Section 17(2).

⁹⁴ Ibid. Section 39(f).

⁹⁵ Qasmi, *Bache- Haqook o Ahkam*, 309.

⁹⁶The Guardian and Wards Act, 1890, Section 24.

ward. In case of any disease it is the duty of the guardian to provide medicine and to take him to hospital if the case is serious. In this case no kind of any negligence will be accepted by him. If the court thinks that the existing guardian is not fit for the welfare of the ward, it may cease his authority and appoint another guardian.⁹⁸

3.3. GUARDIANSHIP IN MARRIAGE

The most important classification under guardianship over person is Guardianship in marriage. The views of Muslims Jurists are different on this issue. There are many debates on the above issue between Muslim Scholars from 2nd century till now. The books are full with different views of scholars on the issue of guardianship of marriage.

The point of conflict here is, whether a guardian is authorized to contract marriage of a minor who is in direct control of him? Whether he is authorized to conduct marriage of his ward or not?

Pakistani Law in this issue follows the provisions of Islamic law (Shariah) as laid down in Quran and Sunnah.⁹⁹

(We will discuss only those points which are directly relevant to our topic. Non relevant detail should be avoided.)

⁹⁷Ibid.

⁹⁸ Ulama al-Hind, *Fatawa al-Hindiyyah*, vol. 5, 76; The Guardian and Wards Act, 1890.

⁹⁹The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, Section 2.

3.3.1. Marriage of a Virgin Adult Girl

In case of a virgin adult girl there is conflict of opinions among the Muslim jurists:

According to Hanfia: virgin adult girl has the right to marry herself, while majority of Muslim Scholars say that her marriage should be contracted with the consent and permission of her guardian.¹⁰⁰

In the view of Hanabila; the girl should be asked for permission while, according to Malikia and Shafia; if the women is already married (widow or divorced) she will be asked for permission but if she is virgin then her guardian can conduct her marriage without her permission.¹⁰¹

Pakistani Law in this issue follows the provisions of Islamic law (Shariah) as laid down in Quran and Sunnah.¹⁰² The judges in this regard consults Hanfi School of thought. But most of the time judges themselves decide the cases doing ijthad; they interpret the provision of Quran and Sunnah according to their own understanding.¹⁰³

3.3.1.1. Guardianship as a Condition in Marriage

Regarding the condition of guardianship of women in their marriages there is a conflict in this proposition whether it is a binding condition of marriage or not. Therefore, four views were developed which are mentioned as under;

¹⁰⁰Kasani, *Bada'i al-Sana'i*, vol. 5237; Zuhaili, *Fiqh al-Islami wa Aadilatohu*, vol. 9, 159.

¹⁰¹Zuhaili, *Fiqh al-Islami wa Aadilatohu*, vol. 9, 159.

¹⁰²The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, Section 2.

¹⁰³Alamgir Serajuddin. *Muslim Family Law, Secular Courts and Muslim Women of South Asia*, 110.

First View of Jurists in Islam

According to Imam Malik & Imam Shafi: marriage of a female is not allowed without the consent of her guardian. They based their view on the following provisions of Quran and Sunnah:

فلا تعضلوهن ان ينكحن ازواجهن

“Place not difficulties in the way of their marrying their husbands”¹⁰⁴

...الا لا يزوج النساء الا الاولياء ولا يزوجن الا من الاكف

“(O Muslims) be aware that no one shall contract marriage of women except their guardians’ and their marriage should not valid except it is conducted with those who are compatible to them.”¹⁰⁵

لا نكاح الا بولي

“No marriage is valid without the permission of the guardian.”¹⁰⁶

ايما امره نكحت بغير اذن وليها فنكاحها باطل باطل باطل

“The marriage of a woman is void, which contracted marriage without permission of her guardian.”¹⁰⁷

In the light of these aya’s and traditions they argued that guardianship of a woman is a binding condition in her marriage and she is not allowed to marry any one without the consent of her guardian.¹⁰⁸

¹⁰⁴Qur’an 2:232.

¹⁰⁵Narrated by Ibn Maja and Tirmadi in chapter Kitab al-Nikah.

¹⁰⁶ Ibn Majah, *Sunan*, Kitab al-Nikah, Hadith 1879.

¹⁰⁷Tirmidi, *Sunan*, Kitab al-Nikah, Hadith 1102.

¹⁰⁸Muwaffaq al-Din abu Muhammad Abd Allah ibn Ahmad ibn Muhammad Ibn Qudamah al-Maqdasi, *al-Mugni* Vol.7(Makkat al-Mukarramah: Dar Alam al-Kutub, 1997), 337; Abu Muhammad, Ali bin Ahmed bin Saeed bin Hazam, *Al-Muhallah* Vol. 9 (Beirut: Dar al-Ahya al-Taras al-Arabi, Moa’sisa al-Tareekh al-Arabi, 2000), 25; Abu al-Walid Muhammad ibn Ahmad ibn Muhammad Ibn Rushd, *Bidayat al-Mujtahid wa-Nihayat al-Muqtasid*. vol. 2(Cairo: Maktba at al-Madinah, 1995), 8.

Second View of Jurists in Islam

According to Hanfia; marriage without consent of guardian is valid if concluded with her compatible one.

They based their opinion on the following ayahs of the Holy Quran

فلا جناح عليكم فيما فعلن في انفسهن بالمعروف

“There is no sin for you in that which they do of themselves within their rights.”¹⁰⁹

ان يتكحن ازواجهن

“Their marrying their husbands.”¹¹⁰

حتى تتكح زوجا غيره

“Until she hath wedded another husband.”¹¹¹

According to the above verse of the Holy Quran it proves that woman has been given discretion to choose her life partner herself and the approval of guardian has not been mentioned here.

Hanfis are of the view that there is no explicit provision regarding guardianship of women in their marriage as a binding condition. They say that the condition of guardianship is not proved by (Tawatar) specific evidence.

Here two situations developed now

- If guardianship is a condition, guardians must have discretion in her marital affairs without their any discrimination.
- If guardianship is a condition, there must not be any discrimination among her guardians on the bases of the attributes, types and orders.

¹⁰⁹Qur'an 2:240.

¹¹⁰Qur'an 2:232.

¹¹¹Qur'an 2:230.

This school of thought declared the guardianship to be binding if she marries a non-compatible one without the consent of her guardian, and declared it to be binding in case when she is minor and her father or grandfather gives her in marriage.¹¹²

Third View of Jurists in Islam

This view point of Zaheriyah: Imam Dawood Al Zahiri differentiated between a virgin and one who once has been married, if she is a virgin then guardianship of her guardian is binding and if she has once married, condition of guardianship is not a binding condition.

الثيب احق بنفسها من وليها

“A married woman (widow or divorced) acquires full right on her person than her guardian”¹¹³

الايام احق بنفسها من وليها والبكر تستامر في نفسها وانها صماتها

“A deflowered woman has greater authority over herself than her guardian, an a gown up virgin girl will be asked permission about herself, if she is silent, it is her permission”¹¹⁴

تستامر يتيمه في نفسها ولا تنكح اليتيمه الا باذنها

“The permission should be taken from a orphan girl and an orphan girl will not be married without her permission”¹¹⁵

Fourth View of Jurists in Islam

It is not obligatory, it is just a Sunnah.

This view point is of most of Zaheriyah and some of the latest Muslim Jurists.¹¹⁶

¹¹² Sarakhsi, *Almabsoot*, 468.

¹¹³ Narrated by Abu Daood, Ibn Maja and Tirmadi in chapter of Nikah.

¹¹⁴ Abu Dawood, *Kitab al-Nikah*, Hadith No. 303.

¹¹⁵ Bukhari, *Kitab al-Nikah*, Hadith No. 5138.

¹¹⁶ Zuhaili, *Fiqh al-Islami wa Aadilatohu*, vol. 9, 98.

Pakistani Law on this issue follows Hanfi School of thought. Marriage without consent of guardian (Court marriage) is allowed in Pakistan¹¹⁷ but the main point to be understood here is that the marriage should be contracted according to the Islamic method. All necessary requirements of a valid contract should be fulfilled like free will of the parties and presence of witnesses.

There is a proper procedure of contracting Nikkah of a Muslim girl in Pakistani law. Union council of each locality is bound to select suitable person as Nikkah registrar, who understand all issues related to Islamic marriage. Section 7 and 8 of *West Pakistan Rules under Muslim Family law Ordinance, 1961* explains the procedure to appoint a Nikkah registrar.¹¹⁸

Muslim Family Law Ordinance, 1961 also makes necessary to register a marriage¹¹⁹. The statutes in Pakistani law does not explain a detailed procedure of contract of marriage nor these statutes provide any detail on the stipulations imposed on contracting parties. Pakistani law just provides a general rule that the marriage of Muslim should be conducted according to the provisions of Islamic Law (Shariah).¹²⁰

3.3.1.2. Authority of a Guardian over a Female Ward during Her Marriage

Muslim Jurists divided the “authority of a guardian over a female ward during her marriage” into three parts, which are:

¹¹⁷2006 MLD 298 (Lah.).

¹¹⁸West Pakistan Rules under Muslim Family law Ordinance, 1961 Section 7/8.

¹¹⁹Muslim Family Law Ordinance, 1961. Section 5.

¹²⁰The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, Section 2.

- i. Willayahtul Istihbab
- ii. Willayahtul Mushtarikah
- iii. Wilayahtul Ijbaar

According to the opinion of some Muslim jurists guardian of a female acquires all above mentioned authorities which he can use according to his discretion, while according to some other jurists, guardian acquires only first two kinds of authority. Majority of the Muslim jurists are of the view that guardian does not acquire Willaya Tul Ijbaar over her female ward during her marriage.

Here we will discuss the views of Muslim jurists on " authority of a guardian over a female ward during her marriage" in detail;

i. **Willayahtul Istihbab**

It is a guardianship in which the women are authorized / permitted to choose their life partner; their marriages are valid, if concluded without consent of their guardians. This type of guardianship is especially attached with the girl, who once has been married. In case of virgin and minor female it is binding upon the guardian to get permission of ward when he intends to conduct her marriage. In short, under this type of guardianship, in case of adult the women has sole discretion to conclude her own marriage and her guardian just act as an advisor whose recommendations are not binding upon the ward.¹²¹

¹²¹ Nizam-ud-Din Abdul Hameed, *Ahkam al-Usrah Fi al-Fiqh al-Islami*, 77.

ii. Wilayahtul Mushtarikah

The guardianship in which marriage must be concluded by the consent of both (guardian and ward) but right of marriage devolves to the guardian. Therefore if she marries without the consent of guardian the marriage is not binding and becomes valid on the later consent of her guardian otherwise the guardian may have the right of objection.¹²²

iii. Wilayahtul Ijbaar

The guardianship in which the ward has no right to express his/her consent for conclusion of the marriage and marriage is concluded solemnly on the will of the guardian. This is proved for the minors. And if a minor marries without the consent of her guardian the marriage is void. In this type of guardianship, right of marriage *حق توليه العقد* is with the guardian.

The natural guardian has the authority to conduct the marriage of a minor, unmarried or virgin adult girl, in this case the natural guardians have no need to take consent of the girl this is allowed under *presumption of continuity*(Istishab) in the greater interest of the girl because a minor or a virgin adult girl may be unable to understand her good and bad properly, while her father or grandfather or experienced person knows better what is in the greater interest of the girl and because of their close relation with the girl, they are not assumed to take any wrong decision. The marriage of a minor girl conducted by her father or grandfather will be considered legal in certain conditions which are

¹²²Ibid., 78.

- i. The guardian has no kind of enmity with the ward.
- ii. The selected person by the guardian is (Kuf) compatible to the girl.
- iii. The Dower should be proper (Misli).
- iv. The Dower must be in cash (Mo'ajal)
- v. That the husband should be able to pay the Dower.
- vi. The husband of the girl should not be a defective person like a blind or an old man.
- vii. That the Hajj should not be mandatory on the girl, because husband can stop her to go on Hajj.¹²³

Regarding wilayah tul Ijbaar many of the contemporary Muslim jurists like Maulana Mawdudi and Hamudah Abd al Ati opposed it and declared it to be coercive in terms of right of freedom in conclusion of the marriage for the females.¹²⁴ According to Mawlana Mawdudi it is only an Ijtihadi opinion of the jurists.¹²⁵

These scholars argue in their favours under:

- i. The Holy Messenger (SAW) terminated many such marriages which were contracted by the guardian without the consent of girl and did not discriminate between minor and major or whoever was the guardian.
- ii. Silence of Ayesha (R.A) on conclusion of her marriage does not prove that she was deprived of this right. Dr. Tahir Mansoori opines that emphasis of guardian authority by the jurists is based on the assumption that the father take care in the best interest of the ward, but assumption is

¹²³ Al-Khatib; *Mughni al-Muhtaj ila Ma'ani Alfaz al-Minhaj*, vol. 3, 168; Mansoori, *Family Laws in Islam*, 56.

¹²⁴ <http://www.islam.org.com> (accessed: July 27th, 2015).

¹²⁵ Mawdudi, *Haquq al-zowjain*, 113.

not always true. In such a case Islam provides a legal mechanism to make his or her desires known and to revoke a contract made against his or her will.¹²⁶

Guardianship of a minor girl is obligatory and is binding, Imam Al-Sarakhsi says in his well known book *Al-Mabsoot* that if she marries a non-compatible one without the consent of her guardian, her marriage is void.¹²⁷

A (a girl) marries without her guardian, and causes humiliation to B (her guardian). Both have the different claims regarding the marriage, the claim of the girl will be considered to be the correct, unless B proves his claim. So, whatever is the type of guardianship for women in Islamic law in case of any conflict the women are facilitated until proven to be wrong.¹²⁸

According to the view of some jurists marriage contract is not like other contracts in which contracting parties have full discretions to conclude between them whatever they want, marriage contract is more concerned with personal aspects of the parties and human personality is (more or less) linked with some passionate concerns, which are being shared by whole family of the parties. This keen sharing of respect and dignity creates a right for the men to have interference in the marital affairs of women, that is why, our beloved Holy Messenger (SAW) gave a very clear provision that

لا نكاح الا بولي

¹²⁶ Muhammad Tahir Mansoori, *Family Law in Islam* (Islamabad: Shariah Academy International Islamic University, 2010), 57.

¹²⁷ Sarakhsi, *Al-mabsoot*, Idara al Quran wal uloom al Islam, vol. 19, 471.

¹²⁸ Kasani, *Bada'i al-Sana'I*, vol. 5, 640.

“No marriage can be concluded but with the permission of the guardian”¹²⁹

Shah Waliullah writes in his famous book *Hujjatul Baligha* that right of Guardianship for the men is the evidence of their dignity and it is sign for the chastity of the women. Here Shah Waliullah considers the guardianship of the men in the marriages of the women a binding principle of the Muslim society.¹³⁰

The tradition of the Prophet

الثيب احق بنفسها من وليها...

“A married woman (widow or divorced) acquires full right on her person than her guardian”¹³¹

If married woman has more authority on her person with compare to her guardian, then in opposite we can understand that in case of virgin, her guardian has more right to conclude her marriage (in her comparison).

Pakistani Law on this issue follows Hanfi School of thought. Adult males and females are allowed to contract their own marriage with their free consent without taking permission from their guardians and Court marriage is allowed in Pakistan but the main point to be understood here is that the marriage should be contracted according to the Islamic method. All necessary requirements of a valid contract should be fulfilled like free will of the parties and presence of witnesses.¹³²

There are number of case laws decided by Pakistani courts which support our above view.

¹²⁹Imam Tirmidi, *Sunan*, Chapter of Nikah, 399/3

¹³⁰ Shah Wali Allah al-Dihlawi, Ibn Abd al-Raheem, *Hujjatullah al-Baligha* (Karachi: Idara al-Quran wa al-Aloom al-Islmiyyah, 1995), 87.

¹³¹ Narrated by Abu Daood, Ibn Maja and Tirmadi in Chapter of Nikah.

¹³² Mansoori, *Family Law in Islam*, Chapter Marriage.

3.3.2. Guardianship on the Marriage of a Minor (Male and Female)

The jurists are of different views on this issue which are as follow:

- i. Ibn-e-Shibrma, Abu Baker Asam and Usman Al-Battee are of view that the marriage of minor (boy & girl) should not be contracted by guardian until they got the age of puberty. They argue from the ayah of Holy Quran”:

وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ

“Make trial of orphans until they reach the age of marriage; then if ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up”¹³³

According to this ayah the marriage should be conducted when both the parties (boy & girl) reaches age of marriage, because there is no benefit of Nikkah if the couple is yet minor, also minors have no need of Nikkah (they don't have lust (Shahwat)) also they are unable to be parents.¹³⁴

- ii. According to Ibn-e-Hazam Nikkah of a minor girl is permitted; he takes evidence from the companions of the Holy Messenger (SAW) like Hazrat Ayesha and Hazrat Ali (both conducted marriage of minors as their guardians). While the minor boy, his marriage is void until he reaches the age of puberty and if he marries then his marriage is voidable. He has the right of divorce.¹³⁵

¹³³ Qur'an, 4:6.

¹³⁴ Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 9, 93.

¹³⁵ Abu Muhammad Abd Allah ibn Sa'id Ibn Hazm. *Al-Muhallah*. Vol 6 (Cairo: Idarat al-Tiba al-Muniriyah, 1933), 560.

iii. According to Jamhor (Hanfia, Malikia, Shafia, Hanabila) nikkah of a minor girl is permitted if her husband is compatible (kuf) to her¹³⁶ they argue in their favor from Quran, Hadith and Acts of companions of the Holy Messenger (SAW).

a. Quran

وَالَّتِي يَبْسُنَ مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ أَرْبَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةَ أَشْهُرٍ وَالَّتِي لَمْ يَحِضْ

“There waiting period is three months and those women yet have not reached puberty”¹³⁷

In the above ayah ALLAH almighty has explained the waiting period of a minor girl and the waiting period comes after marriage (through divorce) so this ayah shows that the marriage of a minor girl may be conducted and she can be given divorce. On another place there is order of the GOD which is

وَأَنْكِحُوا الْأَيَّامَ مِنْكُمْ

“Conduct marriage of those women who yet have not married”¹³⁸

The word Al Ayama can be used for both adult and minor girl.¹³⁹

b. Act of the Holy Messenger (SAW):

i. The Holy Messenger (SAW) married Hazrat Ayesha (R.A) when she was a minor girl. Hazrat Ayesha (R.A) says that The Holy

¹³⁶ Mirqat al Mafateeh, 206.

¹³⁷ Qur'an, 65:4.

¹³⁸ Qur'an, 32:24

¹³⁹ Ustarushani. *Jamia Ahkam al-Sighar*, 54.

Messenger (SAW) married me and I was six years old and he (SAW) consumed marriage when I was nine years old. ¹⁴⁰

- ii. The Holy Messenger (SAW) himself held marriage of his uncle's daughter with the son of Salma (R.A) both (couple) were minor and the parents of both were died as a Shaheed in the battle of Uhud. The Holy Messenger (SAW) was their close relative as he was a cousin of the girl and step father of the boy. He also has the right of guardianship over them as sultan. ¹⁴¹

iii. Act of companions of the Holy Messenger (SAW)

It is also proven from the life of companion of the Holy Messenger (SAW)

- i. Hazrat Ali (R.A) conducted marriage of his minor daughter Umm-e-Kulsom with Hazrat Umer (R.A) the second Caliph also he conducted marriage of another daughter with Urwa bin Zubair (R.A) while both (couple) were minors. On another occasion a person married his daughter to Abdullah bin Hassan bin Ali (R.A), Hazrat Ali (R.A) validated the act of that person. ¹⁴²
- ii. The wife of Hazrat Abdullah Bin Masood (Famous Companion) married her minor daughter with Ibn-e-Musayab bin Nakhiyah; Ibn-e-Masood validated that marriage. ¹⁴³

¹⁴⁰ Asar-a-Ayesha; Mutafiq Sahee Bukhari; Sahee Muslim; Masnad Ahmed Bin Hamble.

¹⁴¹ Ustarushani, *Jamia Ahkam al-Sighar*, 82; Qasmi., *Bache- Haqook o Ahkam*, 160-161.

¹⁴² Qasmi, *Bache- Haqook o Ahkam*, 162.

¹⁴³ Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol.9, 54.

While In Pakistani Law a child marriage is illegal, and the person who conducted that marriage will be punished with fine or imprisonment or with both according to the '*Child Marriage Restraint Act, 1929*'¹⁴⁴.

Provisions of *Child Marriage Restraint Act* are repugnant to the injunctions of Islam as Shariah has not fixed any specific age of marriage or puberty. The physical signs indicating the attainment of puberty are the commencement of ejaculation in a male and menstruation in a female which are different in different localities which shows that there no fix age of puberty.

In Shariah a girl will be said to acquire puberty when she is having menstruation and is able to bear sexual intercourse, while '*Child Marriage Restraint Act, 1929*' of Pakistan specified the age of puberty for a girl which is sixteen years and every marriage done before sixteen years of age will be called child marriage and thus will be considered illegal.¹⁴⁵ In this way some provisions of '*Child Marriage Restraint Act, 1929*' are against the provisions of Islamic law.

According to section 4 (7) of Dissolution of Muslim Marriages Act 1939 the girl, who was married by her father or any other guardian, before attaining sixteen years, by her guardian, is allowed to dissolve her marriage through court if she is not happy to live with her existing husband.¹⁴⁶

There is ambiguity between two statutes of Pakistani Law which creates doubt in the mind of an ordinary person, as the provisions of *Child Marriage Restraint Act 1929* tries to refrain a guardian of a minor girl to contract her marriage while on the other

¹⁴⁴Child Marriage Restraint Act, 1929. Section 6,

¹⁴⁵Ibid, S 2.

¹⁴⁶Dissolution of Muslim Marriages Act. 1939, Section 4 (7).

Abdullah bin Umer (R.A) says that Hazrat Miqdad bin Maz`oun (R.A) married the daughter of his died brother (Usman bin Maz`oun R.A) with Ibn-e-Umar (R.A) when the matter was brought before the Holy Messenger (SAW), they said;

تستامر يتيمه في نفسها ولا تنكح اليتيمه الا باذنها

“Orphan girl should be asked and her marriage should not be contracted without her consent”¹⁴⁹ (which shows that only father has the right to force her daughter on marriage and no one else has this right)

- ii. In the view of Hanfia the close relatives other then the father and grandfather also have the right to conduct marriage of a minor girl. They argue in their favor from the ayah of Holy Quran

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا

“If you are in fear that you should not be able to provide justice to the orphans...”¹⁵⁰

So in the ayah the guardians have been given permission to contract marriage of their wards (Quran has not specified the kind of guardians here, so all of them acquire this right.) According to Abu Hanifa if the close relatives are missing then the other relatives also have this right (these are mother, sister and aunty) he argues from the ayah of Holy Quran

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ

¹⁴⁹ Narrated by Ahmed bin Hamble and Dar-ul-Qutni with the reference of Ibn-e-Umer, According to Imam Nawvi it is Hassan.

¹⁵⁰ Qur'an, 4:3.

“Conduct marriage of those women who yet have not married”¹⁵¹

The word Al Ayama can be used for both adult and minor girl.

In this ayah no guardian has been specified.

- iii. Shafia says that no one except father and grandfather has the right to conduct the marriage of a minor girl. They argue in their favor from the Hadith

الايام احق بنفسها من وليها

“Experienced women herself has the right to marry herself without the permission of her guardian.”¹⁵²

In the light of above evidence it shows that the permission should be taken from married women while the virgin girl, her father will take care of her marriage and the grand father is like father, so he also has this right. (They have this permission because of their close relation with the ward and because of their kindness)¹⁵³

As we already mentioned that in Pakistani law a child marriage is illegal, and the person who contracted that marriage will be punished with fine or imprisonment or with both According to the ‘*Child Marriage Restraint Act, 1929*’.¹⁵⁴ But after contracting such marriage, the marriage itself will be valid and the court will not

¹⁵¹Qur’an, 65:4.

¹⁵²Abu Dawood, Kitab al-Nikah, Hadith No. 303

¹⁵³Ala al-Ansari al-Dhelvi, *Fatawa Tatar Khania*. Vol. 3 (Karachi:Idara al-Quran wa al-Aloom al-Islmiyyah, 1997), 70.

¹⁵⁴Child Marriage Restraint Act, 1929, Section 6.

nullify marriage of a minor boy or girl. In this case the minor girl acquires option of puberty.¹⁵⁵

3.3.2.2. Guardian Working as an Attorney of Third Party

It is allowed for a person to take an attorney in marriage but if the attorney marries him with his minor girl, jurists says that the marriage is not valid and father is not allowed to do so but if, he did so, whether is it implemented on her daughter or not?

According to Fatawa Tatar Khania, if a person took another person as his attorney to arrange his marriage and that person conducted his marriage with his minor daughter or the minor daughter of his died brother, that marriage will not be valid because that attorney has no such authority.¹⁵⁶

Guardian appointed by the father to conduct her daughter's marriage: according to Ibn-e-Nujaim, if someone authorized someone else to conduct marriage of his minor daughter, that appointed guardian has no authority to marry her on a dower less than the proper dower (missal).¹⁵⁷

3.3.2.3. Right of Compulsion in Marriage

In Hanfia's View: Every guardian can compel his ward while in Malikia's and Hanabila's view only father, guardian appointed by the father and judge can compel

¹⁵⁵Dissolution of Muslim Marriages Act 1939, Section 4 (7).

¹⁵⁶Child Marriage Restraint Act, 1929 Section 6.

¹⁵⁷Ibrahim bin Muhammad Zain-ud-Din Ibn Nujaim, *al-Bahar al-Ra'aiq*. Vol. 3 (Deoband: Maktaba Zakaria, 2000), 68.

- ii. Shafia & Hanabila: in their view the welfare of the minor should be preferred. They hold opinion that marriage of female minor is binding and irrevocable if it meets following conditions
- a. The guardian has no kind of enmity with the ward.
 - b. The selected person by the guardian is (Kuf) compatible to the girl.
 - c. The Dower should be proper (Misli)
 - d. The Dower must be in cash (Mo'ajal).
 - e. That the husband should be able to pay the Dower.
 - f. The husband of the girl should not be of defective like a blind or an old man.
 - g. That the Hajj should not be mandatory on the girl, because husband can stop her to go on Hajj.¹⁶¹
- iii. Malikia: Says that the father can marry his minor daughter without Dower, the compatibility (Kuf) is also not necessary in their view, while if the father died, the guardian can himself marry her, if she is above ten years of age with the permission of court. The court will check the compatibility and the Dower on the time of Nikkah.¹⁶²
- iv. Hanabila: Says that the father can conduct the marriage of her minor girl without her consent by fixing proper dower.¹⁶³

¹⁶¹Shirbini, *Mughni al-Muhaj* vol. 3 (Cairo: Sharikh wa Matba'ah Mustafa al-Babi al-Halabi, 1933), 168.

¹⁶²Zuhaili, *Fiqh al-Islami wa Aadilatohu*, vol. 9, 175.

¹⁶³Ibid.

3.3.3. Option of Puberty

A girl who was compelled to marry when she was a minor can revoke her marriage. The term used in this contest is called Option of puberty. According to majority of Sunni school of thoughts, every girl acquires option of puberty after attaining the age of majority if she was compelled on marriage by her guardian; but the opinions are different among the Scholars on this issue.

In the view of Hanfia Father and Grandfather of a minor girl obtain the right of compulsion. They can compel her on marriage and the marriage contracted by the father or grandfather is irrevocable and the girl has no right of puberty against them. But the court can annul such marriage only when such marriage is clearly against the welfare of that girl, like; the husband of that girl is not compatible to her in status and social standings. Other guardians, other than the natural guardians don't have right of compulsion and the girl has option of puberty against the marriage contracted by them. In this case she is not bound to present any reasonable cause.¹⁶⁴

In the view of Shafia the girl has option of puberty against the marriage contracted by all guardians if it misses the essential conditions of marriage which are regarding to the welfare of the girl. The girl can revoke her marriage if;

- A. the guardian or the prospective husband is hostile to her
- B. the husband is not of the same status as she
- C. the husband is not able to pay a reasonable dower

In above situation the girl can ask the court to dissolve her marriage against all Guardians. Shafia does not differ among Natural guardians and other guardians. But

¹⁶⁴Ibn Nujaim, *al-Bahar al-Ra' aiq*, vol. 3, 311.

if the husband was not hostile to the girl and he was of same status as the girl, he was also able to pay proper dower; in this case the marriage is irrevocable and the girl has no right to revoke her marriage through option of puberty.¹⁶⁵

In the view of Malikiyah only father of a minor girl has right to contract her marriage. No other guardians have such right. A marriage contracted by the father is irrevocable; the girl has no option of puberty after attaining age of majority.¹⁶⁶

On the issue of option of puberty Pakistani Law supports the view of Majority of Muslim Scholars, which is that every girl has the right to use option of puberty. According to the Dissolution of Muslim Marriages Act, 1939 a girl, who was compelled to marry without her consent by her guardian when she was minor, has right to claim for dissolution of her marriage through court. The court will take it as a valid ground for dissolution of marriage and will dissolve her marriage.¹⁶⁷

Every girl who was married by her guardian when she was major, has right to dissolve her marriage after attaining age of majority¹⁶⁸. In a family case, court while deciding the issue of option and age of majority, held that: "Every Muhammadan of sound mind who has attained puberty may enter into a contract of marriage. Puberty is presumed to have been attained on completion of age of 15 years in the absence of evidence. Provision of S.2 (VII), Dissolution of Muslim Marriages Act, 1939, does

¹⁶⁵Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 9, 98.

¹⁶⁶Fakhr al-Din al-Hasan ibn Mansur al-Uzjani al-Farghani Qadi Khan, *Fatawa Qazi Khan* (Karachi: Idara al-Quran wa al-Aloom al-Islmiyyah, 1997), 96; Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 9, 98.

¹⁶⁷The Dissolution of Muslim Marriages Act, 1939, (VIII of 1939) sec 2(7).

¹⁶⁸PLD 1981 Kar 11.

not lay down that female attains puberty at the age of 16 years only, it simply enables a girl to exercise the option of puberty when she attains age of 16 years".¹⁶⁹

3.4. DOWER IN CASE OF MARRIAGE OF A MINOR GIRL

To pay dower is mandatory According to provisions of Quran

فاتوهن أجورهن فريضة¹⁷⁰

“Give them their fixed dower”

If the dower was not been fixed on the time of Nikkah the proper dower should be paid in this situation, also if a thing other then the currency has been fixed as dower on the time of Nikkah which has no value (if soled) in this case also proper dower will be paid.¹⁷¹

Now the case is if father or grandfather of a minor girl fixed dower other then the proper dower, will it be valid?

The answer of this question is that if marriage is conducted by any other guardian other then the father or grandfather that will not be valid, if the fixed dower is less then proper dower, but if the natural guardians did so the marriage will be valid according to Imam Abu Hanifa, and the fixed dower will be considered as a proper dower because it is assumed that father and grandfather often act in the greater interest of their ward. So they fixed dower less then proper dower because of any Masliha (welfare) of the girl. But According to Imam Abu Yousuf if that dower was

¹⁶⁹1988 CLC 113 (Lah.)

¹⁷⁰ Qur'an, 4:24.

¹⁷¹Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 9, 98.

so less or having no value then the marriage will be valid but the husband will be asked to pay proper dower.¹⁷²

Pakistani Law in this regards supports the Islamic law. According to *The Muslim Family Law Ordinance, 1961*

*Where no details about the mode of payment of dower are specified in the Nikkah nama or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.*¹⁷³

3.4.1. Person who is bound to pay the dower

A male minor

- a. Mehar (dower) is the real responsibility of the husband (like maintenance) now if the husband is a minor who has wealth, the dower will be taken from his wealth and his guardian will be considered liable to pay the dower.¹⁷⁴ This is the view of Ibn-e-Nujaim it is also near to norms of shariah.
- b. If the father of a minor boy during Nikkah took the responsibility to pay the dower (acting as the guardian of the boy) the wife can asked her husband to pay the dower.¹⁷⁵
- c. If a father paid dower of his son from his own wealth, whether he can ask for that wealth from his son or not? Jurists say that, yes he can do

¹⁷² Ala al-Ansari al-Dhelvi, *Fatawa Tatar Khania*. Vol. 3 (Karachi: Idara al-Quran wa al-Aloom al-Islmiyyah, 1997), 39.

¹⁷³ The Muslim Family Law Ordinance, 1961. Section 10.

¹⁷⁴ Ala al-Din ibn Ahmad ibn Muhammad Haskafi, *al-Durr al-Mukhtar Sharh Tanvwir al-Absar* Vol. 4 (Beirut: Dar al-Kutub al-Ilmiyyah, 2002), 287.

¹⁷⁵ Ibn Nujaym. *Al-Ashbah wa al-Naza'ir*, vol.3, 306.

so but doing so will not be appreciable because father is the one who spends his money on his children.¹⁷⁶

- d. If on the time of Nikkah the husband was minor and his father took responsibility to pay the dower but before paying it the husband became major (reached the age of puberty) now this responsibility shifted from the father to son and the son will be held liable to pay the dower.¹⁷⁷

3.4.2. Person who is entitled to Receive the Dower

Before Islam the sum of dower was considered property of the father and the father of the girl on her birthday was congratulated as

هنياً بك النافجة

“You are greeted with a camel”.¹⁷⁸

Because it was assumed that the father will get a camel from the husband of her daughter on the day of her marriage.

Islam has nullified this old custom and said that the woman herself is the owner of her dower. Now I will discuss some issues related to the dower

A female minor

- a. If the wife was minor whether her father can ask for dower from her husband? The first opinion is that yes he can, the second opinion is

¹⁷⁶Ibid.

¹⁷⁷ Ulama al-Hind, *Fatawa al-Hindiyyah*, vol.1, 306.

¹⁷⁸ Fakhar al-Din ibn Muhammad Razi, *al-Tafseer al-Razi*. Vol. 5 (Beirut: Dar al-Kutub al-Ilmiyyah, 2002), 16.

that, he can't do so until her daughter reaches the age of puberty.¹⁷⁹

This opinion is better because paying of dower becomes mandatory on husband after the sexual intercourse or *Khalwat-e-Sahiha* and both these things happen when the wife reaches the age of puberty or becomes able to consummation (she stays at her father's house before attaining puberty, after the contract of marriage).¹⁸⁰

- b. If a minor girl acquires the power of discretion that she knows the value of money and also she is able to perfect her title She will acquire right to take her dower and insure her possession on it but if she does not have such discretion and the husband pays the dower the natural guardian, of that girl has the right to take the dower and keep it in their possession until the girl reaches the age of puberty. No other guardian has such right.¹⁸¹
- c. The wife has right to stop her husband from the consummation or sexual intercourse until she gets the dower, also the guardian can keep her away from her husband until the payment of her dower, and if the minor girl is willing to go to her husband's house her guardian can stop her from doing so because she is still unable to understand what is in her welfare.¹⁸²
- d. The dower is pure right of the wife, if the guardian of the minor girl on the time of her *Nikkah* took responsibility to pay the dower on

¹⁷⁹ Al-Dhelvi, *Fatawa Tatar Khania*, vol.3,36.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Qadi Khan, *Fatawa Qazi Khan*, vol.1, 386.

behalf of husband, he will be liable to pay the dower in this case. The girl may ask him to pay. In this case he will pay the fix amount to the girl and will receive that amount from her husband later on, if he took responsibility with the consent of the husband. In this case the girl is allowed to claim her dower from both the guardian and the husband.¹⁸³

- e. As, the dower less than the proper dower is harmful for her, as such dower more than proper dower is harmful for the husband, if he is not a rich person, in this case if the dower was fixed with the mutual understanding of his natural guardian that will be valid, but if any other guardian of boy other than his father and grandfather fixed the dower, the boy will not be liable to pay it from his property, in this case he will pay proper dower.¹⁸⁴

3.4.3. Right to Forgive the Dower

Who has right to forgive the dower? Is it a right of female minor or her guardian or none of them acquires the right to forgive the dower?

Answer of these questions is as follows:

- a. If a minor girl forgives her dower to her husband, her forgiveness will not be considered, her authority will be considered after her puberty and maturity. In this case when the puberty of a girl is doubtful and

¹⁸³ Ulama al-Hind, *Fatawa al-Hindiyyah*, vol 1, 326.

¹⁸⁴ Abd al-Rahman ibn Muhammad ibn Sulayman Shaykh'zadah, *Majma al-Anhur fi Sharh Multaqa al-Abhur*. Vol. 1 (Beirut:Dar al-Ahya al-Taras al-Arabi, 1997), 345.

she is forgiving her dower, the judge will take great care during investigation, According to Fatawa Hindia if a girl claims to be major and forgives the dower or gifts it back to her husband; the body shape of that girl will be seen, if she looks like an adult female her claim will be accepted but if she is not looking like an adult girl her claim will be rejected. The judge will see the age of that girl and will ask her to explain how she came to know that she has attained the puberty.¹⁸⁵

- b. The father of a minor girl has authority as her guardian to fix the dower in cash on time (Moajal) or to fix it as (Mo-ajal) later on. But if he fixed the dower on time of marriage as Moajal he has no authority to shift it on future (Mo-ajal) According to Allama Ismail Alstroszni (with the reference of Al Muheet) the father after using his authority during Nikkah can't alter in the status of dower as making it one time or on future.¹⁸⁶
- c. The father or any other guardian of a minor girl has no authority to forgive the dower or to reduce the sum of dower¹⁸⁷ (as it is the right of woman, not her guardian)
- d. If a person acquires the delegated authority to conduct the marriage of a minor girl, he has no authority to claim the dower until he takes the responsibility to pay it to the girl on behalf of the husband. In its

¹⁸⁵ Ulama al-Hind, *Fatawa al-Hindiyyah*, vol.1, 317.

¹⁸⁶ Ustarushani, *Jamia Ahkam al-Sighar*, vol 1,68.

¹⁸⁷ Ibid., 168.

opposite case the girl can't ask him to pay the dower until he takes the responsibility¹⁸⁸.

- e. The girl has right to claim her dower from the guardian who was appointed by her natural guardians, whether he took the responsibility or not. If a guardian conducted the marriage of an orphan girl, that girl can ask for the dower from that guardian whether he took the liability or not.¹⁸⁹
- f. The minor girl has no claim of dower by herself until she (reaches the age of puberty) became able to bear sexual intercourse. In this case she may claim it after *Khalwat-e-Sahiha*.¹⁹⁰

3.5. DIVORCE BY A MALE MINOR

According to Islamic law the marriage of minors (boy & girl) is just valid, it is neither mandatory nor recommended, so if the guardian of a minor couple conducted their marriage which became no worth and at the end the boy or his guardian are of view to divorce the minor girl.

Whether the minor husband has the authority to divorce his wife or not?

On this issue the narrations are different and also the Muslim Jurists are of different views.

¹⁸⁸Ibid., 100.

¹⁸⁹Ibid.

¹⁹⁰Ulama al-Hind, *Fatawa al-Hindiyyah*, vol.1, 303-305.

- a. According to Imam Ahmed bin Hanbal the divorce, pronounced by a minor who has discretion and knows the after effect of divorce, is valid but if he has no discretion and is unaware of after effects of divorce his divorce will not be valid. He has no authority to divorce his wife.

Ibn-e-Qudama says that divorce of a Sabi-e-Mumaiaz will be valid while the divorce from a Sabie-e-Ghair Mumaiaz is not valid because he has no such right and authority.¹⁹¹ He takes a Hadith in favour of his argument which is

كل طلاق جائز الا طلاق المعتوه

Abu Huraira narrates the Holy Messenger (SAW)“every divorce is valid but the divorce of person who has no discretion”. (Matuv/Sabih)¹⁹²

- b. According to the majority of Jurists (other than Imam Ahmed bin Hanbal) the divorce by a minor will not be valid whether he is Mumaiaz or not or understands the after effect of divorce.¹⁹³ Because the shariah has given the right of divorce only to an adult person, that’s why a minor has no right to divorce in any condition.

In favor of their view point they have presented so many Ahadith of the Holy Messenger (SAW), According to which a minor is not having the capacity to perform the order of the law giver, like

كل طلاق جائز الا طلاق الصبي و المجنون

¹⁹¹ Ibn Qudamah, *al-Mugni*, vol.10, 348-49.

¹⁹² Jamia Tirmizi, Chapter Talaq-ul-Matuv, Hadith 1191.

¹⁹³ Burhan al-Din Abu Bakr Murghinani, *Al-Hidayah fi Sharh Bidayat al-Mubtadi*. Vol 2 (Dar Ihya al-Turath al-Arabi, 1995), 358; *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol.45, 165.

“Every divorce is valid but the divorce of minor and mad person”¹⁹⁴

In a book written by Abdul Razzaq there is a list of narration narrated by Hazrat Ali (R.A), Ibrahim Al Nakhee and Shabee which strengthen the view point of Jahmhor.¹⁹⁵

Pakistani Law on these issues is silent and all schools of thought are permitted to decide the validity or non validity of divorce according to the view of their School of thought. Courts while dealing with the issue of divorce decide keeping in view the sect and school of thought of each individual. Because Sunni Muslims have their own view while Shia Muslims have their own. There are hundred and thousand case laws on divorce but divorce is not our subject here, so no case law will be mentioned here.

3.5.1. Authority of Guardian in Divorce

The guardian of a minor boy has no authority to pronounce divorce on behalf of a minor boy as his attorney, because this is a pure right of husband and the minor boy who has not yet got maturity to understand his good or bad is unable to use his authority, this is to save him from harm but if a minor delegated his authority of divorce to his guardian and the guardian performed that authority; the divorce will be voidable, and will be valid if the boy after getting puberty validated it and will be void if he will not validate the act of his guardian.¹⁹⁶

¹⁹⁴ Murghinani, *Al-Hidayah fi Sharh Bidayat al-Mubtadi*, vol. 1, 209. Not authentic according to Imam Zal'ee

¹⁹⁵ Musanif Ibn-e-Abi Shaiba 5:34-35.

¹⁹⁶ Ibn Nujaim, *al-Bahar al-Ra'aiq*, 434; Haskafi, *al-Durr al-Mukhtar Sharh Tanwir al-Absar*, vol.4, 451.

3.6. GROUNDS OF DEMANDING KHULAH BY A MINOR WIFE

Whether minor wife, who was married by her guardian, can demand khula or not, if she is not satisfied to stay with her husband?

- i. A minor girl who is having discretion (Tameez) and understand the basis and cause of Nikkah can claim for Khula, in this case her guardian can't stop her to do so but it is better to take the consent of guardian.

Allama Shami states; the minor girl is not bound to take permission from her guardian for Khula¹⁹⁷

- ii. In Khula the wife is liable to pay something to take it from her husband or she can forgive her dower, but if a minor girl herself claims for Khula, the Khula will be valid, the marriage will be dissolved, but the wife is not liable to pay anything to her husband.¹⁹⁸

But if the father of that girl as her guardian took responsibility to pay some sum of money against Khula, he will be liable to pay it to the husband but he has no right to forgive dower in consideration of Khula, the father will not forgive dower of her daughter because this is beyond his powers.¹⁹⁹

According to Pakistani Law a minor girl can revoke her marriage if the marriage has not been consumed yet, in this case she needs no approval by the court. Her marriage

¹⁹⁷ Muhammad Amin ibn Uthman ibn Abd al-ziz Ibn Abidin, *Radd al-Muhtar ala al-Durr al-Mukhtar*. Vol.5 (Riyadh: Dar Alam al-Kutub, 2003), 112.

¹⁹⁸ Qasmi, *Bache- Haqoook o Ahkam*, 83.

¹⁹⁹ Murghinani, *Al-Hidayah fi Sharh Bidayat al-Mubtadi*, vol. 1, 209.

will be considered dissolved automatically right after attaining majority if she is not willing to stay with her husband after becoming major.²⁰⁰

3.6.1. Authority of Guardian in Khula

The guardian of a minor girl himself has no right to claim Khula because this is a pure right of woman.²⁰¹

3.6.2. Grounds of Khul'a

The guardian has the authority to compel her ward over marriage in this case if father as her guardian marries her with a defective person, who is unable to perform the conjugal rights of her wife and the wife is not willing to live with him, in this situation the guardian has no authority to dissolve the marriage. He will wait the girl to become major, and then the girl herself can claim for the Khul'a.²⁰²

3.7. GUARDIANSHIP OF AN ADOPTED CHILD (LAQEET)

This is a hot debating issue now days because it is a trend that the couple, who is not having any child of its own, adopts a child. The question is that which kind of authority it has as the guardian of an adopted child?

²⁰⁰Alamgir Muhammad Serajuddin. *Muslim Family Law, Secular Courts and Muslim Women of Sout Asia*. Karachi: Oxford University Press, 2009

²⁰¹Consensus of Jamhoor see also Bachy Haqooq o Ahkam by Naimatullah Qasmi

²⁰²Ulama al-Hind, *Fatawa al-Hindiyyah*, vol.1, 525.

The guardian of an adopted child has only the right to take care of him like; his general education, moral education, health, food and shelter because the original guardian of that child is the king if that child is orphan, so he has the real guardianship over the adopted child.

The guardian of that child has no right to marry him, if he did so the marriage will not be valid.²⁰³ The basis of this argument is the Hadith;

السلطان ولي لمن لا ولي له

“Head of the state is the guardian that person who has no guardian.”²⁰⁴

In this case the guardians of that adopted child will consult to the court while using any discretion or taking any decision about that child.²⁰⁵

3.8. REMOVAL OF GUARDIAN

A guardian over person will be removed by the court when he will breach the duties of office of guardianship. The paramount purpose of appointing a guardian over person of a minor is his welfare and benefit. The guardian is supposed to protect the interests of his ward by insuring his maximum welfare and benefit. If the guardian is not capable to protect the interests of his ward, or he is neglecting the duties of his office as a guardian he will be removed²⁰⁶ and the court will appoint any other suitable guardian, keeping in view the provided order of guardians by the Shariah.

According to both laws(Islamic & Pakistani) The Court may on the application of any person interested, or of its own motion, remove a guardian appointed or declared

²⁰³ Ulama al-Hind, *Fatawa al-Hindiyyah*, 285.

²⁰⁴ Narrated by Bukhari, Muslim and Ibn-e- maja in the chapter of Willaya

²⁰⁵ Qasmi, *Bache- Haqook o Ahkam*, 90.

²⁰⁶ 2008 CLC 1391 (Sh. Court) (AJ&K); 1986 CLC 329 (Kar)

by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely -

- (a) for abuse of his trust;
- (b) for continued failure to perform the duties of his trust ;
- (c) for incapacity to perform the duties of his trust;
- (d) for ill-treatment, or neglect to take proper care, of his ward;
- (e) for contumacious disregard of any order of the Court ;
- (f) for conviction of an offence implying, in the opinion of the Court, defect of character which unfits him to be the guardian of his ward ;
- (g) for having an interest adverse to the faithful performance of his duties;²⁰⁷

Note A natural guardian will not be removed because of abuse of his office. He can only be removed if he is an idiot or becomes medically or mentally, unfit to hold his office by lacking Legal Capacity of Execution.

The evidence on my view is the famous Hadith of the Holly Prophet

انت و مالک لایبک

“You and whole of your property is of your father`s”²⁰⁸

Which means that the Father as a Natural guardian is fully authorized to take any decision for the person and property of his ward nevertheless it comes in the welfare of the minor or against his welfare. The court will warn him if he continuously acts against the welfare of the minor, after such warning if he does not refrain, the court now can cease his authority. Father acting as a natural guardian acquires absolute

²⁰⁷ Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10. 496; *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 160; The Guardian and Wards Act, 1890, Section 39.

²⁰⁸ Narrated by Ibn-e-Maja, 769/2; Ibn-e-Haban, Al-bazaz, Dar-al-qutni and Abu Ya'la

authority over a minor because of his kindness and his nearness to kin to the minor, and usually it is not expected that he will act against the welfare of the minor.

While in Pakistani law father does not have absolute authority over minor and he may be removed because of abuse of his authority on application of any close relative. In a case of guardianship named *Kaneez Akhtar Vs Abdul Qadoos*, father took plea that being a natural guardian he has absolute right of guardianship of the minor and he has no need to prove his care towards the ward. Court held that;

*Father is entitled to the custody of the minor on account of his conduct in the light of facts and circumstances of each case. Right of the father as natural guardian is not absolute right.*²⁰⁹

In another case of guardianship of minor named *Firdous Iqbal Vs Shifaqat Ali*, father took same plea as above (being a natural guardian he has absolute right of guardianship of the minor and he has no need to prove his care towards the ward).

Court held that

*Right of father to claim the custody of minor son was not an absolute right. Welfare of minor is always a paramount consideration. Father may disentitle himself to custody on account of his conduct in the light of facts and circumstances and facts of each case.*²¹⁰

3.9. END OR TERMINATION OF GUARDIANSHIP

3.9.1. Minor (Male)

In the view of Hanfia the guardian of person ends when the minor boy reaches the age of puberty means when the boy reaches the age of discretion and sign of puberty

²⁰⁹ 2005 MLD 828 (Lah.).

²¹⁰ 2000 SCMR, 838.

shows. The boy will be considered major after reaching the age of 15 years, but after attaining that age, if he still has no discretion the guardianship will remain in existence until he gets discretion or 25 years of age.²¹¹

3.9.2. Minor (Female)

The guardianship of a girl will remain in existence until her marriage. After marriage her husband is her guardian. The father of a married girl will still act as her guardian if the girl is living in her father's house and she is still unable to understand good and bad. After attaining discretion she will still remain in the custody of her guardian but now she has the right to choose the place of her residence, she can stay with her mother, if her mother is separated from her father. In this case her father as her guardian is not authorized to stop her from doing so.

The Hanfia did not describe any specific age for a girl, which means that she will always be in custody of a guardian whether the guardian is her father or husband.²¹²

According to Maliki the guardianship ends with the end of the cause (to appoint the guardian) which is minority, illness, madness and having no discretion.²¹³

Pakistani Law on the issue of ending of guardianship follows Islamic law, according to '*The Guardian and Wards Act, 1890*'

The powers of a guardian of the person cease: -

(a) by his death, removal or discharge ;

(b) by the Court of Wards assuming superintendence of the person of the ward ;

²¹¹Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 491.

²¹²Ibid.

²¹³Ibid.

(c) by the ward ceasing to be a minor ;

(d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to husband who is not, in the opinion of the Court, so unfit ; or

(e) in the case of a ward whose father was unfit to be guardian of the person of the ward by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.²¹⁴

In a family case of guardianship the court while deciding the question of cessation of guardian's authority, held that "Muslim father is legal and natural guardian of his minor children until they attain age of majority not according to Muhammadan Law but under general law of land (Majority Act 1875)".²¹⁵

Guardianship over person ends when minor reaches 18 years of age.²¹⁶

²¹⁴The Guardian and Wards Act, 1890, Section 41.

²¹⁵ PLD 1963 Lah. 534

²¹⁶ PLD 1978 Lah. 932

CHAPTER 3

RIGHTS AND OBLIGATIONS OF THE GUARDIAN OVER PROPERTY OF A MINOR

4. GUARDIANSHIP OVER PROPERTY

Guardianship over property means to look after the property related affairs of a minor (the affairs other than the body). The guardianship is required for those persons who are unable to run their affairs properly (these affairs are related with their person and property), these persons have defective legal capacity and these are minor, mad, idiot, insane and patient. Guardianship over them remains until they got the power of discretion (Tameez).²¹⁷

4.1. THE ORDER OF APPOINTMENT OF GUARDIANS OVER PROPERTY

According to the Islamic and Pakistani law if a minor owns any property a guardian should be there to take care of that property. The office of guardianship is mandatory and a guardian must be appointed to save a minors property from any loss. The order of appointment of guardian over property of a minor is as follows:

²¹⁷ *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45,160.

4.1.1. Natural Guardian over Property

The consensus of all Muslim school of thoughts is that the father has original right of guardianship, if his minor boy acquires any property. In this case the father is under a duty to take care of the moveable and immoveable property of the minor, he is recommended to do business using the wealth of the minor.²¹⁸

According to Pakistani Law Father of a minor is real and natural guardian over his person and property. Grandfather of the minor may also be considered natural guardian, in case of death of father in Islamic law but in Pakistani Law only father is the Natural Guardian.²¹⁹

4.1.2. Appointment of Guardian other than Natural Guardian

The jurists are of different opinions on this issue.

- i. In the view of Hanfia; father has the right of guardian ship over property of the minor, then the guardian appointed by the father has this right, then the grandfather, then the guardian appointed by the grandfather, then the judge and in the end the guardian appointed by the judge.²²⁰

No one else (accept above) has the right of guardianship over the property of the minor; like brother, mother and uncle because in the view of Hanfia they are less in kindness with the child. Mother although has much kindness but she has less power of discretion being a woman and the brother and uncle

²¹⁸Consensus of all schools of thoughts (Qasmi, Bachy, Haqooq-o-Ahkam)

²¹⁹The Guardian and Wards Act, 1890.

²²⁰Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 491.

may not be so kind full. That's why they will not be allowed as guardians. Their appointed person has same status, but if there is no one else then they might be preferred but in specific case with the permission of court.²²¹

- ii. In the view of Malikia and Hanabila; father has the right of guardianship of property of minor, then the person appointed by the father, then the judge, then the person appointed by the judge, then the other Muslims have this right.²²²
- iii. In the view of Shafia; the guardianship over the property is the original right of father, then the grandfather, then the person appointed as a guardian, then the judge or the person appointed by the judge. Shafia prefers grandfather over the guardian appointed by the father because the grandfather is same as father; he also stands on the place of his son in his absence that's why he has the authority to arrange the Nikkah (of his grandchild).²²³

In Pakistani Law there is no specific order to appoint a guardian over the property of a minor. The paramount consideration of court during appointment of a guardian is the welfare of the minor. The person who will be most suitable for the welfare of minor will be appointed as a guardian.

Section 8 of '*The Guardian and Wards Act, 1890*' deals with this issue

According to it, the court will not take any action to appoint a guardian over person or property of a minor until it receive any application for such appointment. And the person appointed as guardian may be

²²¹Ibid., 161; Kasani, *Bada'i al-Sana'i*, vol. 5, 155.

²²²Ibid.

²²³Ibid.

*If the minor is old enough to form an intelligent preference, the Court may consider that preference.*²²⁸

*The Court shall not appoint or declare any person to be a guardian against this will.*²²⁹

In the above section of *'The Guardian and Wards Act, 1890'* it is mentioned that a Guardian Court while appointing a guardian for ward will always prefer the welfare of the minor on all other things. It is the discretion of the court to decide what is in welfare of the minor and what is not. The other things to be considered are the relationship of the proposed guardian with the ward, nearness of him to kin to the minor, his capacity as a guardian and most importantly the wish of ward's deceased parent. It means that if the natural guardian himself was willing to appoint someone as the guardian of his children, the wish of natural guardian will not be neglected and that person will be preferred upon other nominated person, who was selected by the natural guardian.

The court while appointing guarding guardian will also prefer the wish of the minors if they are old enough to make a valid wish. If they are able to make a valid discretion then their wish will not be neglected.

In a case of guardianship over person and property of the minors named Zar Bibi Vs Abdul Ghaffar, where the parents of the minors were died in an accident and the minors were living with their step mother. The real uncle of the minors applied for the guardianship of the minors, while the minors were willing to live with their step mother. The family court decided in the favor of paternal uncle. Later on the stop mother of the minors applied in appellant court against the decision of the Family

²²⁸Ibid., S. 17 (3).

²²⁹Ibid., S. 17 (5).

Court. The appellat court after examining all the evidences and examining the minors (while minors were willing to live with their step mother) decided in the favor of their real uncle and held that the benefit of the minors lies with their uncle, not with their step mother.

Minors were not willing to go with their uncle. Step mother of minors again file a petition in High Court. High Court examined thrice the minors and after looking all the evidences held that

The wish of the minors will not be neglected. They are living with their step mother from last eight years and their step mother is taking great care of their person and property. Their uncle was of ninety years and also living in a city while the minors were living in a village. The court argued that the uncle is unable to look after the benefits and welfare of the minors because of old age; also he is living in city while the property of the minors is in the village. Also the minors are willing to live with their step mother.

High Court set-aside the decision of the both subordinate courts, taking plea that courts below had passed impugned orders without taking into consideration intelligent preference of minors and evidence on record that petitioner could look after welfare of minors better then respondent who being male member and of advanced age would not be in position to look after female minor girls, therefore impugned orders of courts below were set-aside and the application of guardianship was accepted in the favor of step mother.²³⁰

Court while appointing a guardian of a person or property of minor will always prefer the welfare of the minor. And that person would be selected as guardian who is most beneficial, merciful, kind and near to kin for the minor.

Section 17 and 25 of 'The Guardian and Wards Act, 1890' deals with the appointment of the guardian.

²³⁰ 1998 MLD 1697 (Quetta).

The office of guardianship is divided into three different divisions

- a. Custody of minor
- b. Guardianship over person
- c. Guardianship over property

Islamic Law while appointing custodian, prefers a female as custodian and the office of custodian is called *Hadanah* in Arabic. The mother of the minor has preference over all other females. If mother is not available because of her death or any other reason, than any other close relative of the minor may be given right to be a custodian. In this case paternal grandmother, maternal grandmother, paternal aunt or maternal aunt and elder sister, are preferred. If none of them is available then the custody may be given direct to the father of the minor²³¹. But one thing should always be kept in mind that the custodian is different from the guardian.

Some time custody lies with the mother of the minor and guardianship lies with the father. Some time both, (custody and guardianship) lies with father and some time both lies with the mother. As custody and guardianship are different, same as guardianship over person and guardianship over property are different. Some time same person enjoys both guardianships and sometimes two different persons enjoy these offices as one may be guardian over person and the other may be guardian over property.

According to Islamic law custody rottenly lies with females while guardianship lies with males, but in some exceptional cases a female could be a guardian and a male

²³¹Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 491

could be a custodian. But in Pakistani law there is no difference between male and female both could be custodian and both could be guardian.

The criteria for selection in Pakistan personal law is the welfare and benefit of the minor. The person who is most suitable for the welfare of the minor would be given preference upon other candidates and the authority of selection lies with the court.

In Pakistan it is the discretion of the court to select the most suitable person as a guardian, and the person who selected as a guardian by the court has so many restrictions and conditions to follow by the court. While using his authority as a guardian over property of the minor he is bound to take prior permission from the court, otherwise his authority may be challenged, and all his acts related to property of the ward may be held void.

In a case of custody and guardianship of minors named Sardaran Vs Majeedan Begum, both the mother and paternal grandmother applied for the custody and guardianship of the minors. Father of minor died and because of his death the issue of guardianship was raised. Two inferior courts decided in the favor of mother, while High court set-aside the decision of both subordinate courts and appointed sister of deceased as guardian of minors as their mother got married with stranger.

In fact deceased sister also married with stranger which was ignored by high court. Later on mother applied in Supreme Court for the custody of minors. Supreme court set-aside the decision of High Court and preferred the decision of Family Court and held that mother was rightly appointed as the guardian of minors.

The elder brother of minors was in position to look after the matters of the property. So the court appointed both the mother and elder brother of the minors as joint guardians over property of the minors.²³²

In the case of Muhammad Rasool Khan Vs Mst. Masroon Bibi, where husband and wife were separated due to divorce. The wife who was the mother of three minors filled application for appointing her guardian of person and property of minors. Application was accepted by the family court and she was appointed as guardian of minors as prayed by her and she was issued a guardian certificate.

Mother on the strength of said guardianship certificate, sought leave of the court to sell the property belonging to minors, in order to incur their expenditure for their betterment, but the court refused to grant such leave and petition in this respect was dismissed. And the guardian judge subsequently took no further action, declared "guardianship certificate" issued to the mother as canceled; however on appeal against said order of the guardian judge, appellate court set-aside judgment of the guardian judge and guardianship certificate was restored.

Father of the minors as well as the minors filled revision petition against judgment of the guardian judge where by the mother was allowed to sell the property of the minors. In the application filled by the mother for appointing her as guardian of person and property of minors, father of the minors as well as public-at-large was a party who was served/ informed through proclamation in the newspaper and was placed ex-parte, which ex-parte had never been challenged by the petitioners.

²³² 1982 SCMR 1100.

Such was purely a case under *Guardian and Wards Act, 1890* to which the provisions of CPC were applicable in according to section 48 of '*The Guardian and Wards Act, 1890*'. The petitioners had a right of revision of petition before the high court. However on merits the petitioners had no case because the mother was dully appointed as guardian of person and property of the minors and she has already obtained permission from the court to sell the property, which was never challenged and guardianship certificate in favor of the mother was still intact.

Challenge to the sale proceedings by the petitioner (father) was the result of greed on his part to deprive the bona fide purchasers from their entitlement. There was no illegality and irregularity which may point out by the council for the petitioner in the proceedings before the guardian judge and that of the appellant court.

The Court held that

*The mother of the minors has followed all requirements of the court; she has proper approval of the court to sale the property of the minor for their own benefit and welfare. The father as a petitioner never challenged that authority. So the revision was dismissed in the favor of the mother.*²³³

In the case of Mst. Chand Bibi Vs Mst. Bulbullah, the high court held that

One person should be appointed guardian, both of person and property of minor if law permits.

In another question that, in which case a mother of the minors would be deprived from the guardianship. The court held that

*"Mother of minors marrying a stranger should not be appointed as guardian".*²³⁴

²³³ 2010 CLC 1078 (Pesh).

²³⁴ PLD 1958 Pesh. 26.

In case of death of father the real brother of deceased has a pure right of guardianship over person and property. He may be appointed through a will or instrument or the court may itself appoint him as guardian, keeping in view the welfare of the minor. No one can change his authority over person or property of minor if he used to work in pure benefit of the minors. His authority may be challenged by any other close relative, if he is violating his authority, and doing such acts which are harmful for the person or property of the minors. In this case the court may on application of any close relative of the minors, cease his authority as a guardian and may appoint another suitable guardian.

In the case of Muhammad Khalil Vs Ibrahim, where the paternal uncle of minors was appointed by the family court as a guardian, cousin of the minors applied in appellat court against the uncle of the minors and alleged that the uncle is not fulfilling his duties. The appellat court decided in favor of paternal uncle, later on the said cousin file a petition against the uncle of the minors. It was admitted that the uncle was looking after for the interest of minors very well.

The alleged cousin of the minors neither could point out evidence on record to show that he was connecting with minors nor he was able to say anything that welfare of minors was not being looked after properly by respondent. Such real uncle of minors, who was looking after welfare of minors properly, held, was correctly appointed as guardian of person as well as property of minors.²³⁵

²³⁵ 1988 CLC 2123 (Lah.).

In case of custody of minor and guardianship over person and property the court will see the pure benefit and the welfare of the minors rather to see the close relationship of someone with the minors.

In a case of guardianship over person and property of the minors named Zar Bibi Vs Abdul Ghaffar, where the parents of the minors were died in an accident and the minors were living with their step mother. The real uncle of the minors applied for the guardianship of the minors, while the minors were willing to live with their step mother. The family court decided in the favor of paternal uncle. Later on the stop mother of the minors applied in appellat court against the decision of the Family Court. The appellat court after examining all the evidences and examining the minors (while minors were willing to live with their step mother) decided in the favor of their real uncle and held that the benefit of the minors lies with their uncle, not with their step mother.

Minors were not willing to go with their uncle. Step mother of minors again file a petition in High Court. High Court examined thrice the minors and after looking all the evidences held that

*The wish of the minors will not be neglected. They are living with their step mother from last eight years and their step mother is taking great care of their person and property. Their uncle was of ninety years and also living in a city while the minors were living in a village. The court argued that the uncle is unable to look after the benefits and welfare of the minors because of old age; also he is living in city while the property of the minors is in the village. Also the minors are willing to live with their step mother.*²³⁶

High Court set-aside the decision of the both subordinate courts, taking plea that courts below had passed impugned orders without taking into consideration intelligent preference of minors and evidence on record that petitioner could look

²³⁶1998 MLD 1697 (Quetta).

after welfare of minors better than respondent who being male member and of advanced age would not be in position to look after female minor girls, therefore impugned orders of courts below were set-aside and the application of guardianship was accepted in the favor of step mother. Supreme Court of Pakistan in a latest case of custody and guardianship of minor held that the Constructive Guardianship always remains with the father, and no other close relative can take this right from the father.²³⁷ Which means that the matters related to the education and marriage of a minor will always be decided by the father of the minors, mother on the other hand acquires right of general custody over the minors.²³⁸

4.2. AUTHORITY OF A GUARDIAN OVER PROPERTY

According to Islamic Law the guardian has some limits in using his authority over the property of minor. He is bound to follow these limits, in case of violation of these limits his authority may be ceased by the court. The rule to use guardian's authority over a minor's property is as under:²³⁹

1. The transactions which are purely in favor of ward those transactions will be allowed for a guardian.
2. The transactions which are floating between benefit and loss they will also be permitted.
3. The transactions which are purely against the benefit of the ward will not be allowed for a guardian.

²³⁷ Recent decision, not published yet.

²³⁸ Tanzil-ur-Rehman, *A Code of Muslim Personal Law* (Karachi: Hamdard Academy, 1978), Constructive Custody.

²³⁹ Nyazee, *Outline of Muslim Personal Law*, 290.

The guardian is authorized to use the property of ward with due care and caution; he will take care of his ward's property as he takes care of his own property. On this issue there is a consensus among the jurists the basis of it is a famous Hadith²⁴⁰

لا ضرر ولا ضرارا

“No injury is to be caused and none is to be borne” (in Islam)²⁴¹

ليس منا من لا يرحم صغيرنا—

“One who does not have compassion for our young ones is not one of us.”²⁴²

Causing injury to a minor is not part of compassion at all.²⁴³

Limits of authority of a Guardian

The guardian has no authority to gift away the wealth of the minor to another without compensation, because this is transfer of ownership without compensation and is pure injury. Likewise, it is not permitted to him to gift it away with compensation either according to Imam Abu Hanifah and Imam Abu Yusuf, but he has this authority according to Imam Muslim.

He does not have the right to give away his wealth by way of charity, nor can he make a bequest with it. The reason is that charity and bequest are transfer of ownership without financial compensation. This amounts to injury and he does not possess this right. He does not have the right to divorce the ward's wife, because divorce is a transaction of pure injury.²⁴⁴

²⁴⁰ Moata Imam Malik also Imam Novavi stated it as Hassan.

²⁴¹ Ibn-e-Ma'ja, *Sunan*, Chapter Al-Ahkam, 784/2.

²⁴² Tirmidi, *Sunan*, Chapter of Nikah, 322/4.

²⁴³ Sarakhsi, *Almabsoot*, vol.22. 19.

²⁴⁴ Zuhaili, *Fiqh ul Islami wa Aadilatohu*, vol. 9, 97.

The guardian does not have the right to set free his slave. Doing so without compensation is mere injury. He does not have the right to give his wealth on loan, because loan is the transfer of ownership without present compensation. This is the meanings of the statement of the jurists; loan is donation. The guardian does not have the right to make all other kinds of donations, so also this. He does have the right, however, to sell the wealth of the ward on credit.²⁴⁵

Powers of a Guardian

On the other hand, the guardian can undertake some transactions on the behalf of ward, like he has the right to accept gift, charity and bequests on his behalf, because this is a pure benefit accruing to the ward. The guardian therefore, has this authority. He has the authority to marry away his slave girl as that brings a benefit. He has the authority to sell and buy property for reasonable value. The value should not be one that would be considered fraudulent by the people.²⁴⁶

He has the authority to rent property for him at less than its rental value that is not deemed fraudulent in practice. If he rents out the wards personal services or his property, and the minor reaches the age of majority during the rental period, he has an option in the contract for personal services. If he likes he can continue it or he can annul it, but he has no option in the case of the rented property.²⁴⁷

He has the authority to place his wealth on deposit, because deposit is also a necessity of trade. He has the authority to permit him to trade if he has the mental maturity to sell and buy, because the permission to trade is less than trading itself. Thus, if he

²⁴⁵ *Mosul-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol.45, 162.

²⁴⁶ Kasani, *Bada'i al-Sana'i*, vol. 5. 65.

²⁴⁷ Nyazee, *Outline of Muslim Personal Law*, 293.

possesses the right to trade, possessing the right to permit is evident. He has the right to conclude a contract of Mukatibah with his slave, because Mukatibah is a commutative contract and falls within the conception of slave.²⁴⁸

He also has the right to Pledge his property for his debt, because pledge is a part of trade. He has the authority to Pledge the wards property for his own debts, because the subject meter of the pledge is the possession of the pledge. If, however, it expires, he compensates the amount that was to be paid out of it for his debt.²⁴⁹

The transactions which are not beneficial for the property of ward and may reduce his property, such kind of transactions will not be permitted, like the guardian has no authority to gift, make a will, give it to a trust, or to free the slave from the property of his ward.²⁵⁰

If the guardian did any act which we mentioned above he will be held liable to pay the compensation from his own property. He will also be liable if he appointed any other person who was unable to perform any duty given to him and he caused harm to the property of the ward.

The above transactions are prohibited just because it causes harm to the property of the ward by reducing it and making it less. The guardian will be allowed to gift from the property of ward if in return any other thing is gifted which is not less from the value of the thing gifted.²⁵¹

²⁴⁸ Ibid.

²⁴⁹ Qasmi, *Bache- Haqook o Ahkam*, 261-268.

²⁵⁰ *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 162.

²⁵¹ Kasani, *Bada'i al-Sana'i*, vol. 5, 153.

1. The guardian is permitted to use the ward's property in any beneficial trade; he can also use it in any business because through business there is a chance of increase in ward's property.²⁵²
2. The guardian can also give a share of the property of ward on Mudariba with the agreement of profit.²⁵³
3. The guardian can purchase anything on the behalf of the ward, which can be beneficial in future for ward like purchasing any land or property value of which will increase in future, for the benefit of the ward.²⁵⁴

Hanfia's View:

The guardian is not allowed to give any share from the property of the ward to any one; he is also not authorized to take it as loan for himself. But the judge is authorized to give loan from the wealth of minor.²⁵⁵

Shafia's View:

The guardian is not allowed to give loan from the property of ward but in case of need. like the guardian fears that, if the property will remain in the custody of minor there is a chance of burning because of fire or during sea journey to sink it in ocean or he is going on a journey and he is in fear that may someone steal it. In above cases

²⁵² Ibid.

²⁵³ Ustarushani, *Jamia Ahkam al-Sighar*, vol. 1, 307.

²⁵⁴ Abu al-Walid Sulayman ibn Khalaf Baji, *Al-Mantiqa Sharh Muwatta al-Imam Malik*. Vol.2 (Beirut: Dar al-Kutub al-Arabia, 1984), 111.

²⁵⁵ Kasani, *Bada'i al-Sana'i*, vol. 5, p. 153; Ustarushani, *Jamia Ahkam al-Sighar*, 154; Ibn Abidin, *Radd al-Muhtar ala al-Durr al-Mukhtar*, 340.

the guardian is allowed to give that property on loan to a person who is a noble man of good character and the guardian is insure that he will return the loan.²⁵⁶

If he loaned, he has discretion to take pledge on it or not? It will be measured According to the conditions. If the guardian has two options (in case of fear of losing wealth/property); the one is to give the property on loan and the second is to put it as Wadiyah in custody of someone, in this case he will preferred to give it as a loan. The cause of it is that in case of loan the person taking loan is fully liable to return back the sum of loan, but in case of wadiyah the person is not bound to return it back, in case of destruction of property without his negligence to the person who kept that property in his custody.²⁵⁷

But the judge has authority to give a part of ward's property on loan without need or necessity. It is because the judge is a renowned person and no one might stand against him, so there is no fear of destruction of the property.²⁵⁸ The judge can take witnesses or something as pledge on the time of giving the property on loan.

Hanabila's View:

The guardian can give loan from the property of his ward incase of need. In this case he is not bound to take anything as pledge but as a matter of care he is preferred to take surety or pledge.²⁵⁹

²⁵⁶ *Mosu-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 163.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Mosu-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 164; *Sharah Muntaha al Iradaat.*

In Pakistani Law section 24 of *'The Guardian and Wards Act, 1890'* describes the duties of a guardian of property. *'The Guardian and Wards Act, 1890'* divided guardians into three kinds

- i. Natural guardian
- ii. Testamentary guardian
- iii. Guardian appointed by the court²⁶⁰

According to section 27

*A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.*²⁶¹

According to this Act a natural guardian is fully authorized to do all necessary acts using his authority for the protection and benefit of the property. In this case he is not bound to take approval from the court. He is fully authorized to sale, gift, exchange, transfer or mortgages any part of the moveable or immoveable property of the ward.

In a civil case against the right of father to sale immovable property of his ward, court held that; "Father being legal guardian of property of his minor children is empowered to alienate immoveable property belonging to them on specified conditions. Power to alienate was neither absolute nor without conditions. Islam subjects such power to stringent conditions".²⁶²

²⁶⁰ The Guardian and Wards Act 1899, Section 24.

²⁶¹ Ibid., Section 27.

²⁶² 1991 CLC 640 (Lah.).

According to section 28 of '*The Guardian and Wards Act, 1890*' a guardian who has been appointed by will or other instrument will be allowed to mortgage or exchange or transfer by sale, gift, exchange or otherwise; immovable property of the ward if he was authorized to do so according to that will or instrument. And if nothing was mentioned in the will regarding above authority then, he should take permission from the concerned court before doing mortgage, exchange or transfer by sale, gift, exchange or otherwise. If he violated his authority, his all acts in violation of his authority will be considered void. The exact words of '*The Guardian and Wards Act, 1890*' are

*Where a guardian has been appointed by will or other instrument, his power to mortgage or charge or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing.*²⁶³

In an old case named K. Krishan Vs Special Deputy Collector, where the de-facto guardian mortgaged the immovable property of the ward without prior permission of the court. The court ceased his authority and held that

*Power to transfer any right or interest in immovable property of minor, de facto guardian of minor would have no power to transfer any right or interest in immovable property of the minor. Such transfer was not merely voidable but void.*²⁶⁴

According to section 29 of '*The Guardian and Wards Act, 1890*' the person appointed by the court as a guardian over property of a minor is not authorized without the permission of the court to mortgage or exchange or charge or transfer by sale, gift, exchange or otherwise, property of the minor. He is not authorized to lease any part of that property for a term exceeding five years or for any term extending

²⁶³ Ibid.

²⁶⁴ 1989 MLD 1216 (Lah.).

more than one year beyond the date on which the ward will cease to be a minor. The exact words of '*The Guardian and Wards Act, 1890*' are

Where a person other than a Collector, or other than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court

(a) Mortgage, or charge or transfer by sale, gift, exchange or otherwise any part of the immovable property of his ward; or

*(b) 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.*²⁶⁵

Section 30 allows all acts of a guardian which causes benefit to the property of the ward or save it from a sudden loss without taking advance approval by the court if it is an emergency case and the response of the guardian is required on an instant basis.²⁶⁶

In this case the court may in its discretion restrict that

- a. A sale should not be completed without the sanction of the court.
- b. A lease should not be complete without the sanction of the court.

Section 32 says that for a guardian who was appointed by the court, the court may be define, restrict or extend his powers with respect to the property of the ward from time to time if court thinks it beneficial for the welfare of the ward. The exact words of '*The Guardian and Wards Act, 1890*' are

*Where a guardian of property of a ward has been appointed or declared by the Court and such guardian is not the Collector, the Court may, from time to time by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject.*²⁶⁷

²⁶⁵ *The Guardian and Wards Act 1890*, Section 29.

²⁶⁶ *Ibid.*, Section 30.

²⁶⁷ *Ibid.*, Section 32.

According to '*The Guardian and Wards Act, 1890*' only natural guardian has maximum authorities over the property of the ward. All other guardians who were appointed by the court are bound to take prior permission by the court before doing any changes in the property of the minor, in the shape of sale, purchase, rent, mortgage and so on. Guardian is bound to follow the instructions of the court in this regard.

While view of Hanfia is different on this issue, According to it, transactions permitted to the Father are permitted to the Grandfather and the guardians appointed by them, with some exceptions

What has been stated for the father is also the response for his appointed guardian (Wasi) in the father's absences, and also for the grandfather and the guardian appointed by him in his absence. Whoever there is a difference between the father and his appointed guardian and between the grandfather and the guardian appointed by him in certain special cases. Among these is that when the father or grandfather buy the property of the Minor for their own or sell their own property to the minor at the value of the property or at less than its value, it is permitted. If the appointed guardian does this, it is not permitted at all according to Imam Muhammad, but According to Imam Abu Hanifa and Abu Yusuf it is permitted if this is for the welfare of the Minor, otherwise not.²⁶⁸

Obligation on Guardian over Property Appointed or Declared By The Court

A guardian who is appointed by the court is bound to take permission from concerned court before using any authority over property of the minor, he is bound

²⁶⁸ Nyazee, *Outlines of Muslim Personal Law*, 290-292.

to take care of all the property of the minor in that way as he cares his own property. He is bound to take directions from the court before transfer of minor's property to sale, exchange or mortgage. He is not permitted to lease any immovable property of the minor. The guardians also bound to produce register of accounts before court on demand. And if he failed to do so, his authority may be ceased and he may be removed of such guardianship.

In the case of Muhammad Paryal Vs Umeed Ali, where the guardian appointed by the court was neither willing to produce register of accounts nor willing to submit accounts before court, on court's demand. When the court asked him to show cause, he produced evidence in favor of his guardianship indicating that he considered himself under no obligation to maintain regular and proper accounts in respect of income of properties of minor.

The court removed him from guardianship and held that

*He was removed because of his negligence towards the property of minor by not doing proper care which was required.*²⁶⁹

Pakistani law is same on most of the points with Islamic law on the issue entitled. Though there are some points where the views are not same but these points cannot be considered repugnant to each other, and the sole of Islamic law remains same.

4.2.1. Sale & Purchase using Wealth of Ward

Is it permitted for guardian to purchase the property of ward for himself?

In this issue opinion of Jurists are different.

²⁶⁹ 1986 CLC 329 (Kar.).

Malik's View:

The father is allowed to purchase anything for himself from the property of his son; he is also permitted to purchase something for his son from the wealth of son for his benefit.²⁷⁰

Shafia's View:

Only the father and grandfather are authorized to purchase the property of child for themselves or to purchase anything for child for his benefit because of their kindness towards the child. They are permitted to do so but no other guardian is permitted to purchase the property of child for himself.²⁷¹

Hanabila& Imam Zufar's View:

No guardian except father has right to purchase the property of his ward for himself. It is prohibited because it may cause blame (Tuhmat) on the guardian and make him imperfect for the guardianship over property. But the father has no such case (of blame) because no one can doubt on his kindness.²⁷²

Hanfiah's View:

The father is permitted to purchase the property of his son (as a guardian) for himself; he also can sell his own property to his son on market price. He is not permitted to purchase the property of minor without spending money (free of cost) or on market prices without the permission of judge that is to free the father from any blames (tuhmat).²⁷³

²⁷⁰ *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 164.

²⁷¹ Ibn Nujaim, *al-Bahar al-Ra'aiq*, vol.1, 259.

²⁷² Kasani, *Bada'i al-Sana'i*, vol. 5, 136.

²⁷³ Ustarushani, *Jamia Ahkam al-Sighar*, vol.2, 261-344.

If the father sold his own property to his son acting as a guardian the sale will not be complete just after sale contract but he has to take possession on that thing which was purchased on behalf of the ward and if before possession that thing destroyed, the father will bear harm (loss) not the son.²⁷⁴

Also, the guardian appointed by the father has authority to purchase the property of the minor for himself, or to sell his property to the ward if there is a benefit of the ward by doing so according to Imam Abu Hanifa and Imam Abu Yousuf, Its not permitted according to Imam Muhammad, but if there is no benefit for the ward the sale is not allowed according to the consensus of Hanfia.²⁷⁵

According to Pakistani Law the guardian is authorized to purchase things using wealth of his ward for his daily base necessities. Also, he is authorized to sell anything which is property of the ward if the guardian is taking care of any business of his ward and the business is of selling things.

On the other hand the guardian is authorized to sell immovable property of the ward by taking advance permission from the Guardian Court if he is not a natural guardian and is appointed by the court.

Section 28 and 29 of 'The Guardian and Wards Act, 1890' explains the authority of a guardian for sale

Where a guardian has been appointed by will or other instrument, his power to mortgage or charge or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing

²⁷⁴Ibid., 261.

²⁷⁵Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah, vol. 45, 164.

*notwithstanding the restriction, to dispose of any immovable property, specified in the order in a manner permitted by the order.*²⁷⁶

Where a person other than a Collector, or other than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court

*(a) Mortgage, or charge or transfer by sale, gift, exchange or otherwise any part of the immovable property of his ward.*²⁷⁷

Imran Ahsan Khan Nayazi in his book, *Outlines of Muslim Personal Law* states that

*The guardian has the authority to sell and buy property for reasonable value. The value should not be one that would be considered fraudulent by the people.*²⁷⁸

The guardian does not have the right to sell off his ward's property for less than its value to an extent that is considered fraudulent in practice. If he does sell it for a lower value, his sale is not executed as it is harmful for the ward.²⁷⁹

He does not have the right to buy property with his wealth at higher than its market-value to an extent that is deemed fraudulent in practice by the people. And if he does buy such property (at a higher value) the sale is executed against him personally, and he will be deemed the person for whom the purchase has been made, because purchase is executed against the buyer.

In a case where the mother (as a guardian over person and property of the minor) sold the property of the minors without courts permission, the guardian judge stopped it and plead that she need proper approval to sell the property before entering into any agreement of sale. Court also nullified the sale agreement between

²⁷⁶The Guardian and Wards Act, 1890, Section 28.

²⁷⁷Ibid., Section 29.

²⁷⁸Nyazee, *Outlines of Muslim Personal Law*, 290.

²⁷⁹Sarakhsi, *Kitab al-Mabsut*, 95.

mother of minors and other party saying that *the prior permission for sale was not taken before, that's why the sale is not valid.*²⁸⁰

4.2.2. Purchasing Property of Ward by the Guardian Himself

The guardian (father) can purchase his ward's property by giving extra money from the market value; he can also sell his own property to the ward by taking less money from the market value. The guardian appointed by the court is not permitted at all to sale or purchase the property of minor for himself.²⁸¹

In Pakistani Law section 20 of the '*The Guardian and Wards Act, 1890*' stops a guardian to purchase the property of his ward during the continuity of his office of guardianship and soon after the cessation of the ward being a minor because it may go against the benefit of the ward.

According to section 20

*A guardian stands in a fiduciary relation to his wards, and, save as provided by the will 'or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.*²⁸²

*The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor and generally all transactions between them while the influence of the guardian still lasts or is recent.*²⁸³

A natural guardian on the other hand stands in a different position, he may not cause any harm to the property of the ward because of his kindness toward the ward. In this case the Father is allowed to purchase property of the ward. Another reason to

²⁸⁰ 1987 MLD 2502 (Lah).

²⁸¹ Ustarushani, *Jamia Ahkam al-Sighar*, vol.2, 313; Kasani, *Bada'i al-Sana'i*, vol. 5, 136.

²⁸² The Guardian and Wards Act, 1890, Section 20 (1).

²⁸³ Ibid..Section 20 (2).

give him such permission is that, the ward is the successor of his natural guardian in inheritance, purchasing property from ward will increase the property of the guardian which ultimately will return to the ward after the death of his guardian, so it will not be against the welfare of the minor because guardian is paying him according to the value of his property and that property is suppose to be return to him soon, so there is double benefit for the minor. While the guardians other the natural guardians are not having such status that's why they are not permitted to purchase their ward's property.

While no other guardians have right to buy or sell the property of the minor for themselves at all.

4.2.3. Guardian Acting as Attorney of Minor in Legal Matters

According to Islamic Law

1. The guardian can claim in court for the right of ward (violated or created). He can also produce/present evidence in favor of his ward, he can also take oath on behalf of ward if the opposite party is denying from the right of ward.²⁸⁴
2. The guardian can pay the loan which was pay able by the ward after taking evidence and witnesses on the claim of the loan given.²⁸⁵

²⁸⁴ *Mos'u-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah, vol. 45, 164.*

²⁸⁵ *Ibid.*

3. He is authorized to take something in his possession on behalf of ward which was of ward's but was out of possession, when no one other claiming for it.²⁸⁶

According to Pakistani Law it is the duty of the guardian to defend his ward in legal matters. The guardian is fully authorized to

- a. act as an Attorney of minor in all legal matters
- b. Appoint another suitable person as an attorney if he is not capable to deal with legal matters
- c. Sign all legal documents on behalf of minor
- d. To pay fees of appointed attorney from the wealth of the ward
- e. Claiming for any right of minor in any property (violated or created)
- f. In case of infringement of any right of the minor; filing a suit on behalf of minor
- g. Withdrawing any case which is against the welfare of the minor

Section 27 of '*The Guardian and Wards Act, 1890*' provides the guardian such right

*A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.*²⁸⁷

Islamic and Pakistani laws are same on this issue.

²⁸⁶Ibid.

²⁸⁷The Guardian and Wards Act, 1890, Section 27.

4.2.4. Authority of Guardian to Sale the Land Of Minor

In Islamic Law the guardian appointed by the father or grandfather of the minor is not permitted to sale the land of the minor in ordinary cases, but he can do so legally if there is a pure benefit of the ward. There are situations in which an appointed guardian is legally authorized to sale the land of the ward in following situations:

- a. The land is saleable against a price which is 2 to 4 hundred percent above from the actual price and it is possible to purchase same land back in future with fewer amounts.²⁸⁸
- b. The guardian can sale the land if the taxes on such land are more from the benefit accruing from such land.²⁸⁹
- c. If the ward is in need of money and there are no other means to get money except of sealing land and the amount of sold land is going to be spent on ward like his daily base needs, education, health etc.²⁹⁰

As it was stated before that in Pakistani law no guardian other than a natural guardian is permitted to sell the property of the minors without advance approval from the court, and if any guardian sold the property of the minors without courts permission, the sale will not be held valid, hence it will be held void.

In a case of Abdul Khaliq Qureshi Vs Anis Ahmed, where the mother (as a guardian over person and property of the minor) sold the property of the minors without courts permission, the guardian judge stopped it and plead that she need proper

²⁸⁸Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 494.

²⁸⁹Ibid.

²⁹⁰Ibid.

approval to sell the property before entering into any agreement of sale. Court also nullified the sale agreement between mother and minors and other party saying that

*The prior permission for sale was not taken before, that's why the sale is not valid.*²⁹¹

4.4. TAKING BENEFIT FROM THE PROPERTY OF WARD BY THE GUARDIAN

Remuneration of guardian

The view points of jurists are different on it

Hanafia's View:

If the guardian is a poor person, he can take the charges of his services from the wealth of the ward (if he is in need of these charges) but if he is not a poor person, he will not charge for his services at all.²⁹²

Malkia's View:

The guardian is not authorized to use the property of minor for himself if he is a rich person²⁹³ because of the ayah of Holy Quran

وَمَنْ كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ

“The one who is rich he has to restrain”²⁹⁴

But if he is a poor person, he can take from the wealth of ward for his basic needs, because of the ayah of Holy Quran

وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ

²⁹¹ 1987 MLD 2502 (Lah.).

²⁹² *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 165.

²⁹³ *Ibid.*, 164.

²⁹⁴ Qur'an, 4:4.

“The one who is poor can feed himself in good manner”²⁹⁵

Shafia’s View:

The guardian is not permitted to take anything for himself as his maintenance or as charges but if he is a poor person and because of his duties toward the ward he is unable to earn his livings, he can take the minimum to meet his needs According to the permission of Quran

وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ

“The one who is poor can feed himself in good manner”²⁹⁶

In this case the guardian has no need to take permission from his ward. This permission is only for the guardian not for the government (because the government has no need of minor’s property)²⁹⁷

Hanabila’s View:

The guardian (except the government) is allowed to feed himself from the wealth of minor incase of need if he is a poor person but if he has no need then he will not be permitted to take anything as his service charges but he can feed himself without need if the government has fixed for him a specific share. While the government will not take anything from the property of minor because it has not need of it.

According to Al-jasas from Hanafia the guardian is completely un athesized to feed himself from the wealth of minor, because Quran says

إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَىٰ ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ نَارًا وَسَيَصْلَوْنَ سَعِيرًا

²⁹⁵Ibid.

²⁹⁶Ibid.

²⁹⁷ *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 164-165.

“The persons who eat the property of minor cruelly, they are feeding fire in their stomachs.”²⁹⁸

In the previous ayah (Nisa, 6) the permission is given to a guardian who is most poor.²⁹⁹

According to Pakistani Law a guardian is authorize to get a fixed amount of money or any other thing fixed by the court, as a price of his services provided by him over the property of a minor as a guardian.

According to section 20 of ‘*The Guardian and Wards Act, 1890*’

A guardian stands in a fiduciary relation to his ward; he would be assumed the most trustable person for the welfare and benefit of the minor. He is morally and legally liable not to breach the trust of his concerning peoples on him. Thus he would be stopped to take any kind of benefit from the property of his ward unless the court itself permits him to do so in shape of pay of his services or otherwise.

Section 20 states;

*A guardian stands in a fiduciary relation to his wards, and, save as provided by the will 'or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.*³⁰⁰

*The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor and generally all transactions between them while the influence of the guardian still lasts or is recent.*³⁰¹

According to Section 22 of ‘*The Guardian and Wards Act, 1890*’

²⁹⁸ Qur'an, 4:9.

²⁹⁹ *Mosul-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 164.

³⁰⁰ *Ibid.*, 20 (1).

³⁰¹ *Ibid.*, 20 (2).

*A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.*³⁰²

The guardian is not authorized to take extra amount beside the fixed amount by the court for his personal needs. And if he takes any amount other than the amount fixed by the court, he would be held liable for the violation of his authorities. And his guardianship may be ceased.

According to section 39 of '*The Guardian and Wards Act, 1890*';³⁰³

The court may remove any guardian from the office of guardianship if he violates his powers or goes beyond his specified limits.

On this issue both laws are same.

4.4.1. Taking the Money of Ward by the Guardian In-Case of Need

According to the Majority of Muslim Scholars (Hanafia, Malikia, Hanablia, Shafia) it is not mandatory for him (guardian) to return back what he has taken in need from the wealth of his ward because it is the charges of his services. It is like the salary of government servants which they take from the treasury.³⁰⁴

According to Ubaida Al-Sulemani and Abu Al-Alia the guardian is liable to pay back what he took in past from the wealth of his ward because the guardian is not owner of the property of the ward and he is just permitted to feed himself from that

³⁰² '*The Guardian and Wards Act, 1890*', Section 22.

³⁰³ *Ibid.*, Section 39.

³⁰⁴ Qasmi, *Bache- Haqook o Ahkam*, 87.

property in case of need. When the need is over, he is liable to pay back what he has taken.³⁰⁵

Guardian is allowed to take a nominal amount, fixed by the court, against his services provided for the care and protection of the property of the minor.

According to Section 22 of '*The Guardian and Wards Act, 1890*'

*A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.*³⁰⁶

The guardian is not authorized to take extra amount other than fixed by the court for his personal needs. And if he takes any amount other than the amount fixed by the court, he would be held liable for the violation of his authorities. And his guardianship may be ceased.

According to section 39 of '*The Guardian and Wards Act, 1890*';³⁰⁷

The court may remove any guardian from the office of guardianship if he violates his powers or goes beyond his specified limits.

4.4.2. Paying Guardian's Own Debts by the Wealth of Ward

Muslim jurists are of different view on this issue;

Hanafia says that the appointed guardian is not allowed to pay his own debt from the wealth of ward but the father is permitted to do so.³⁰⁸

³⁰⁵ Abu Bakr Ahmad ibn AliJassas al-Razi., *Ahkam al-Qur'an*. Vol.2 (Beirut:Dar al-Turath al-Arabi, 1992), 361.

³⁰⁶The Guardian and Wards Act, 1890, Section 22.

³⁰⁷Ibid., Section 39.

³⁰⁸ Ustarushani, *Jamia Ahkam al-Sighar*, vol. 2, p. 274.

According to the consensus of Muslim Jurists the guardian is authorized to spend on the ward from his (wards) property in good manner without Israf.

In the view of Shafia & Malikia in both cases he will be a sinner.³⁰⁹

In Pakistani Law the guardian in any case will not be permitted to pay his own debts from the wealth of minor because it will cause direct loss to the property of the minor by reducing it. It is also a shape of profit for the guardian which is not allowed for him at all.

Section 20 of '*The Guardian and Wards Act, 1890*' stops a guardian from making any profit out of his office. It says

*A guardian stands in a fiduciary relation to his wards, and, save as provided by the will 'or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.*³¹⁰

Taking amount from the wealth of ward to pay guardian's own debt is also the violation of his authorities.

4.4.3 Sale and Purchase for His Own Benefit

The guardian (father) can purchase his ward's property by giving extra money from the market value; he can also sell his own property to the ward by taking less money from the market value. The guardian appointed by the court is not permitted at all to sale or purchase the property of minor for himself.³¹¹

³⁰⁹ *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, p. 160.

³¹⁰ *Ibid.*, Section 20.

³¹¹ Ustarushani, *Jamia Ahkam al-Sighar*, vol. 2, 313, Kasani, *Bada'i al-Sana'i*, vol. 5, 136.

4.5. DOING BUSINESS AND TRADE USING WARD'S WEALTH

The jurists are of three opinions on this issue:

In the view of majority of jurists (Hanafia, Malikia, Hanablia) the guardian is permitted/recommended to do business using the wealth of his ward, because in it there is benefit of ward, as in case of no use of that wealth, it will decrease by spending and will increase, while with business it is a hope of increase in it.

The guardian is not permitted to use the wealth of his ward for his own benefit. The guardian is not allowed to do business because the purpose of office of guardianship is the betterment and welfare of ward not the welfare of the guardian.³¹²

In the view of Imam Malik there is no hurdle for the guardian to do business from the wealth of minor for his benefit and welfare when the guardian is a trustable person. In this case during business if lose accrues the guardian will not be held liable, if he took due care during business.³¹³ Hazrat Umer (second Caliph) says;

الامن ولى يتيما له مال فليتجر فيه، ولا يتركه حتى يأكله الصدقه

“Do business (something) using the wealth of the minor, don't leave it to be reduce by the payment of taxes.”³¹⁴

In the view of Al-Bajee it is the discretion of the guardian he can do business from the property of ward if he thinks it beneficial because the guardian over an orphan stands on the place of father (as guardian) so it is recommended to do business using the property of his ward for its incensement.

³¹² *Mosul-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45, 167.

³¹³ Al-Moata 1:451, Ustarushani, *Jamia Ahkam al-Sighar*, 305.

³¹⁴ Behki; Sunan Al-Kubra.

A guardian stands in a fiduciary relation to his wards, and, save as provided by the will 'or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

4.5.1. Investment of Minor's Wealth In Mudariba

In the view of Hanafia when the appointed guardian is authorized to do business from the welfare of the ward, he is also authorized to give it (wealth) to anyone else on Mudaribah.

1. He himself permitted to be a mudaribh as he may do business from the property of the minor, as a skillful person, and take a specified share of the earned income as the profit.³¹⁸
2. The guardian is recommended to take witnesses before doing mudaribah and specify the original amount and share in-case of profit but if he did not took any witnesses then the matter is between him and ALLAH.³¹⁹
3. If the guardian becomes a partner of his ward during mudaribah and gives the collective share (guardian and ward) to any other person he is also recommended to take witnesses upon it.³²⁰

³¹⁷Ibid., Section 20.

³¹⁸Sarakhsi, *Almabsoot*, vol. 22, 186-187; Jassas, *Ahkam al-Qur'an*, vol. 2.362; Ustarushani, *Jamia Ahkam al-Sighar*, vol. 3. 96-97.

³¹⁹Ibid.

³²⁰Ibid.

4. If the guardian and ward both were parties in *mudaribah* and the share of guardian was less from the share of ward the profit will be divided between them According to their shares.³²¹
5. If the guardian takes no witnesses the judge will fix the amount of profit keeping in view the share of both (guardian and ward).³²²

Hanabila's View

The guardian is fully authorized to do business using the wealth of ward because doing business is better than to leave it without doing so because of the narration of Hazrat Umer (second Caliph) from the Holy Messenger (SAW)

الامن ولى يتيما له مال فلينتجر فيه، ولا يتركه حتى يا كنه الصدقه

“If the ward is having any wealth, the guardian is recommended to do trade / business with it, and do not leave it (doing nothing) for taxes.”³²³

1. The profit (as a benefit of trade) will be purely for the ward and the guardian will take nothing from it as it is for the increasing of the wealth of the ward.³²⁴
2. The person other than the ward may take his share from the profit (of trade) if it was prior to the existed contract between the ward and that person.³²⁵
3. The guardian himself is not authorized to be a partner of his ward in *mudaribah* because it creates blame (*tohmat*) on him.³²⁶

³²¹Ibid.

³²² Ibid.

³²³ *Jamia Tirmizee* 3:24.

³²⁴ *Mosu-a al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol. 45.167.

³²⁵ Ibid.,167-168.

³²⁶ Ibid.

4. The guardian is authorized to give the wealth of ward on *mudaribah* to another trustful person by fixing share in profit because of the narration of Hazrat Ayesha (R.A), she was used to hire a skilful person to do business from the wealth of those minor orphans which were under her guardianship.³²⁷
5. The guardian is authorized to do all that what is necessary for the betterment of the ward and in business it is welfare and benefit for him as it increases his wealth. So the guardian can hire a skilful person and also can fix the share in case of profit.³²⁸

According to some jurists of Hanabila; the guardian can himself do *mudaribah* using the wealth of ward as a *mudarib* because when he is authorized to hire another person why he himself will not be permitted to do so.³²⁹

Shafi'a says the guardian is authorized to do business using the wealth of minor up to some extent and that will be allowed just to take out (earn) the expenses of the ward, like his maintenance, taxes and zakat etc. He will not be bound to still continue the business if he is able to fulfill the need of minor without decreasing his wealth.³³⁰

The guardian is authorized to do business and it is recommended (*Mustahab*) for him not mandatory (*wajib*) according to the ayah of Quran

ويسئلونك عن اليتيم قل اصلاح لهم خير

³²⁷ Moata Imam Malik 1:251.

³²⁸ Kashaf Al-Kina vol. 3, 437.

³²⁹ Al-Mubda vol 4, 338.

³³⁰ *Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol 45, 168.

“People ask you about orphans, say to take care of their welfare is better”³³¹

According to the above ayah it seems that the guardian is recommended, hence not ordered to do anything for the welfare of the ward.

In Pakistani Law the guardian also has the right to give minor's money on Mudaribah. Imran Ahsan Khan Nyazee in his book, *Outlines of Muslim Personal law* states that: the guardian has the right to travel with the wealth of his ward, and to give away his wealth on the basis of Mudaribah, on the basis of gratis marketing services, or on the basis of agency for sale and purchase the reason is that these acts fall within the category of trade. Thus, whoever has the authority to trade has the authority to do all these things. He has the authority to lend out his property for use, and this is on the basis of Istihsan, though on the basis of analogy this is not permitted.

He has the authority to take his wealth by way of Mudaribah himself, but it is necessary for him to take witnesses to the fact, and if he does not do so, he is entitled to the profit according to what is between him and ALLAH, but the Judge will not accept his claim. Likewise, if he becomes his partner, but his capital is less than the capital of the minor. If he does take witnesses, the profit is shared as stipulated, but if he does not take witnesses it is lawful for him morally, but the Judge will not deem him truthful and will allocate the profits in proportion to their capitals employed.

The evidence for the view mentioned above is Section 27 of '*The Guardian and Wards Act, 1890*' which supports the above opinion. According to it

A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the

³³¹ Qur'an, 4:220.

*provisions of this Chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.*³³²

4.6. REMOVAL OF GUARDIANSHIP OVER PROPERTY BY THE COURT

A guardian over property will be removed by the court when he will go adverse to his office of guardianship. The paramount purpose of appointing a guardian over property of a minor is the welfare and benefit of the minor. The guardian is supposed to protect the interests of his ward by insuring his maximum welfare and benefit. If the guardian is not capable to protect the interests of his ward, or he is neglecting the duties of his office as a guardian he will be removed and the court will appoint any other suitable guardian, keeping in view the provided order of guardians by the Shariah.

The guardian will be removed in following situations

- (a) for abuse of his trust;
- (b) for continued failure to perform the duties of his trust ;
- (c) for incapacity to perform the duties of his trust;
- (d) for ill-treatment, or neglect to take proper care, of his ward;
- (e) for contumacious disregard of any order of the Court ;
- (f) for conviction of an offence implying, in the opinion of the Court, defect of character which unfits him to be the guardian of his ward ;
- (g) for having an interest adverse to the faithful performance of his duties ;
- (h) for bankruptcy or insolvency.³³³

³³²Ibid., Section 27.

³³³Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 498.

Note: A natural guardian will not be removed because of abuse of his office. He can only be removed if he becomes, medically or mentally, unfit to hold his office by lacking Legal Capacity of Execution.

The evidence on my view is the famous Hadith of the Holly Prophet

انت و مالک لایبک

“You and whole of your property is of your father`s”³³⁴

Which means that the Father as a Natural guardian is fully authorized to take any decision for the person and property of his ward nevertheless it comes in the welfare of the minor or against his welfare.

4.7. CESSATION/ END OF GUARDIAN’S AUTHORITY

The guardianship over property ends when the ward attains the majority and power of discretion. In Pakistani law the guardianship over property of minor ends when the ward reaches 21 years of age.³³⁵ If a person after getting puberty becomes mad or the power of his discretion becomes defective, again someone will be appointed as his guardian to take care of his property.

The authority of a guardian over property ceases with his death, removal or discharge.

³³⁴ Ibn-e-Maja, *Sunan*, Bab Al-Tijarat, 769/2.

³³⁵ PLD 1995 Pesh 14.

Hanabila and Malikia's View:

Only the judge will act as a guardian of a mad. No one else will act as a guardian of the mad.³³⁶

Hanfia and Shafia's View:

The person who was acting as a guardian of a minor will again be appointed as a guardian, if the ward becomes mad after getting majority.³³⁷

Note: if the owner of a property is an idiot, the judge himself will be his guardian or he may appoint anyone else as his guardian because the purpose of the guardian ship is to take care of the property and to save it from lose³³⁸.

In Pakistani Law according to section 41(2)

The powers of a guardian of the property cease:-

(a) by his death, removal or discharge ;

(b) by the Court of Wards assuming superintendence of the property of the ward ; or

(c) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward of any accounts in his possession or control relating to any past or present property of the ward.

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as fraud which may subsequently be discovered.

In a family case against the removal of a guardian, court held that "Great responsibilities are placed on guardian of minors. Guardian is required to maintain

³³⁶Zuhaili, *Fiqh al Islami wa Aadilatohu*, vol. 10, 496.

³³⁷Ibid.

³³⁸*Mosua al-Fiqhia, al-Wazarah al-o'kaf wa al-sha'on al-Islamiyyah*, vol 45, 169.

proper and regular accounts so as to render exact accounts on demand. Court would be justified in removing guardian failing to maintain regular accounts.”³³⁹

On the issue entitled above Pakistani law is in accordance with Islamic law.

³³⁹1986 CLC 329 (Kar).

RELATED CASE LAWS

1. 2011 CLC1062 (Quetta)
2. 1994CLC1355(Lah)
3. 2008 CLC (Sh.C) (AJK)
4. 2011 CLC1062 (Quetta)
5. 1984 CLC1895(Kar)
6. 1998MLD1813 (Kar)
7. 2009MLD1274 (Lah)
8. 1991MLD166 (Lah)
9. PLD1963 Lah 534
10. PLD 1996 Kar 174
11. PLD 1954 Lah 704
12. PLD 1969 Pesh 134
13. PLD 1994 S.C (AJK) 1
14. PLD 1965 Kar 84
15. PLD 1965 Lah 183
16. PLD 1963 Kar 888
17. PLD 2008 Kar 198
18. PLD 2005 Lah 97
19. 1992 SCMR 1100
20. 1991 SCMR 19
21. 1998 SCMR 1593
22. 1999YLR666 (Lah)
23. 2003YLR141 (Quetta)
24. 2009YLR2339 (Lah)

CONCLUSION & RECOMMENDATIONS

CONCLUSION

The basic purpose of law is to contain peace in the society; to achieve this purpose law protects the personal and property interests of human beings. Law and order in a society is directly related to the interests of the natives of that society. People remain peaceful if no threat accrues for their personal and property interests. Law appoint guardians to take care of the interests of those persons who are (due to any defect) unable to protect their personal and property interests.

Guardianship is based on rights and duties. The concept of rights and duties arises with the birth of a natural person; a natural person automatically acquires some rights and duties. The society morally or legally imposes some duties upon him; in return society protects his rights both morally and legally. In performance of his duties (imposed by law or morality) a person is held liable civilly or criminally on breach of these duties. The liability is linked with the capacity of a person, the person who acquires complete legal capacity is considered fully liable on breach of his duties civilly or criminally and society imposes punishment on him in this case.

But the person who lacks complete legal capacity because of any defect may not be held accountable criminally. The liability arises with the level of capacity. The person who acquires less capacity is held answerable according to the level of his capacity. On the other hand, a person acquires some rights both morally and legally and the society protects his rights with the force of law. The base of imposition of

liability is discretion (mental maturity). Being human being every person acquires rights and duties, the duties are imposed on him according to his mental maturity.

The person who lacks mental maturity defectively or completely he may not be held liable for his wrong acts until he attains complete legal capacity but the society protects his rights and if an imperfect person (who is not mature mentally) is unable to protect his rights. In this case, a guardian is appointed over his person and property to protect his rights of person and property and perform duties on his behalf.

There are many people who lack legal capacity, like minor, mad, insane, idiot and mental patients. These individuals, who lack complete legal capacity, are not considered mature mentally because they don't know what is better for them and what is harmful. A minor too, lacks complete legal capacity because of his minority and he remains defective until getting puberty. Although he acquires some rights and duties over his person and property, to save him from loss a guardian is appointed over his person and property until he acquires mental discretion.

A minor because of defective legal capacity is unauthorized to decide the matters of his person and property, to take care of a minor a guardian is appointed. The office of guardianship of a minor is classified into guardianship over person and guardianship over property. The purpose of guardianship over person and property is to protect the rights of a minor and perform the duties which are imposed on minor by law on behalf of that minor

Guardianship has worldwide importance. Countries from all over the world (whether they are following Civil Law, Common Law or Religious Law) have formulated

rules and regulations on guardianship. As discussed in the introduction of the thesis; Guardianship is of three kinds; Guardianship over person, guardianship over property and mixed guardianship over person and property. The purpose of guardianship over person and property is to protect the rights of a minor and perform the duties of a minor on his behalf.

Guardianship over person is sub divided into general guardianship and guardianship for marriage. The General Guardianship over person discusses the matters related to food, education, religion, and daily base personal needs of a minor, like feeding, clothing and shelter of a minor. While Guardianship for marriage of ward discusses the matters related to the selection of a suitable life partner for a ward. In this case some time the guardian himself decides while some time the ward decides and some time both, the guardian and the ward collectively decide the life partner of the ward. The guardianship for marriage does not end with the marriage of the ward but the matters related to marriage also come under it, like maintenance, dowry, divorce and khula.

Guardianship over property of minor deals with the issues of property related matters of a minor, like general matters of property, guardian's authority over the property of a minor, sale and purchase of the immovable property of ward, sale and purchase for the welfare of the ward, doing business by the wealth of the ward, investment of minor's wealth in any business, doing mudariba by the use of minor's wealth and the limits imposed by law on the authority of the guardian.

The natural guardian of a ward over his person or property or of both is the father of that ward while in case of non availability of a natural guardian any other guardian

may be appointed. The guardian other than a natural guardian may be appointed by the father through will or other instrument or may be appointed by the court. In case of non availability of any guardian, the court itself acts as a guardian.

Islamic Law provides satisfactory detail on Guardianship and after making research in Islamic Law, no need for further inquiry remains and all possible questions end with proper solution. While Pakistani Law is not in much detail on the issue of Guardianship, the existing statute is unable to provide satisfactory detail therefore many questions about the issue remain unsolved.

Islamic Law about guardianship is not codified, it is scattered into hundred of books which are written during different times. We may find the issue of guardianship in basic books which are admitted as an authority on Islamic Law, we may also find it in the latest books of Islamic Law. In all Sunni & Shia school of thoughts the reader may find different details. This diversification has helped the reader as it provides variety of material on the issue and a researcher who is unable to find answer of his questions in one school of thought, may find it in another school of thought.

But it is not expected that a researcher will be unable to find any relevant thing related to his question in any school of thought. In this aspect Islamic Law is ideal, but on the other hand it has some drawback too. As mentioned above, Islamic Law is scattered in so many books of seven different schools of thoughts written in around fourteen hundred years. It needs a lot of hard work, motivation and patience from the side of a researcher. It may take a very long time to find answer of his question. Secondly, Islamic Law owns a variety of different opinions because of its diverse schools of thought which sometime cause confusion for its researcher as; he may

find himself unable to select the best solution of his problem. He may face a doubt while selecting that which prospective should be adopted and which should be neglected.

Pakistani law on guardianship is properly codified in one Act. If someone is interested to know Pakistani law on guardianship, he needs not to go here and there. He just has to open the relevant statute of Pakistani law from where he may be able to find the answer of his question. It is a plus point of Pakistani Law which saves important time of a researcher. It is also to the point, which prevents its reader to fall into any confusion.

Another important fact of Law of Guardianship of Pakistan is that in its some important provisions, it is so general. Whereas, the Islamic Law regarding guardianship deals all issues of guardianship separately and provides solution for every single issue, it is not general in its provisions. Like in Pakistani law the main purpose of guardianship revolves around the benefit and welfare of the minor, in appointment of guardian, no specific criteria is followed. Anyone could be a guardian and court while appointing the guardian will always prefer the benefit of the minor, it will not prefer the close relation of guardian and ward which means; if any remote relative is more suitable for the welfare of the minor from any close relative of the minor, the court may grant the guardianship to the remote relative and neglect the closer one.

While Islamic Law follows a strict procedure during appointment of a guardian. The purpose of guardianship in Islam is also the welfare of the minor, but according to it the welfare of minor lies with his close relatives, the more closely will be the relation

the more benefit will be acquired. The basis of appointment of guardian in Islam is kindness of the guardian towards the child, and the kindness comes with the closeness of the relation. Therefore, while appointing a guardian Islamic law follows a strict method and in all cases tries to stick on it. There is an order of guardian in Islam, Islamic Law strictly follows this order and never provides a full discretion to the family judges to appoint a remote relative as a guardian in the presence of a close relative.

Moreover, in the Islamic Law the mother of the minor acquires right of custody of minor only. She does not acquire right of guardianship over person and property of the minor. The mother lacks this right because of being a woman and women in Islamic Law are not considered capable to handle the matters of marriage and property of the minor because they are assumed to be less in discretion than men. If other close male relatives are available then the mother is not appointed as a guardian. Although, if no male relative is available than mother could be appointed as guardian in some exceptional cases with strict conditions. Contrary to this, in Pakistani Law the mother acquires right of custody as well as the right of guardianship over person and property of the minor. In Pakistani Law she is often dealt as a natural guardian, it means that she acquires same status as of the father of the minor, and some time court may give her preference on the father. If the father in the opinion of the court is not fit for guardianship or because of his other offices he is unable to run the office of guardianship properly. In this case, the guardianship shifts toward the mother, if she is capable in view of court to look after the benefit and welfare of the minors properly.

Another important point to deliberate here is that in the Pakistani law of guardianship, the law has given a full and unchallengeable authority and discretion to the court in appointment of the guardian under the doctrine of “welfare of minor”. This term “welfare of minor” is so general and its meanings covers whole area of guardianship and thus provides an unlimited authority to the court to decide what is in the welfare of the minor and what is against the welfare of minor. In this case there is a chance of misuse of authority by the court because judges of the courts as human beings are not free from errors, so while using their authority they may sometime take a wrong decision.

Conversely, Islamic law has specified the guardians by making an order of their appointment, so here the court has less discretion and that’s why there is a less chance of misuse of the authority.

Pakistani personal law is in direct conflict with Islamic Law in some of its most important provisions. Like child marriage is permissible in Shariah and Shariah laid down different provision in this regard. While “Child Marriages Restraint Act” 1929 prohibits child marriage and punishes the person who participated, directly or indirectly in conducting child marriage.

Pakistani Law itself is ambiguous in some of its provision of different Acts. These provisions create confusion in the mind of an ordinary lay man. Like under ‘*Child Marriage Restrain Act*’, child marriage is not permissible, but if someone conduct child marriage the Nikkah of supposes itself will not be held void and the parties would be accepted as husband and wife. Pakistani law on one hand prohibits child marriage, on the other hand it provides “Right of Puberty” under “*Dissolution of*

Muslim Marriages Act 1939” to a female the marriage of which was conducted by her guardians when she was minor to apply for dissolution of her marriage after attaining the age of majority, and now after attaining age of majority, she is not willing to live with her husband. ‘*Dissolution of Muslim Marriages Act, 1939*’ considered option of puberty as a proper ground for the dissolution of marriage under section 2.

Another important point to deliberate is that in Islamic Law the age of puberty and the age of majority are same and there is no specific evidence in Quran or Sunnah which fixes a specific age for getting puberty. Quran Says

وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ

“Make trial of orphans until they reach the age of marriage; then if ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up”(Qur’an, 4:6.)

On another place Quran Says (Qur’an, 4:5.)

وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَامًا

It means that a minor who is under the guardianship of a guardian will be tested until he reaches the age of marriage. But after attaining the age of marriage he will no more be considered a child and his property will be given back to him.

While in Pakistani Law a boy is lawfully authorize to conduct his own marriage when he reaches eighteen years of age, and a girl can marry herself when she reaches sixteen years of age According to “Child Marriage Restrain Act”1929. While According to “Majority Act” a person is considered major and capable for handling the mattes of property when he reaches twenty one years of age. So the age of

marriage under the Pakistani Law is eighteen while the age of majority is twenty one.

There is another interesting point that, in criminal matters a person is held fully liable when he reaches eighteen years of age. He can forgive Qisas (as his own right) as well he will be held fully liable if he did any crime. While in civil matters he will be given authority to take decisions when he reaches twenty one years of age.

In property matters Pakistani Law is so general, according to '*The Guardian and Wards Act, 1890*' the guardian is recommended to do all such acts which are in the best interest and welfare of the minor. A legal guardian is also bound to take permission from the family court before using any authority related to the property matters. Whereas in Islamic Law; Guardian is well directed in all matters whether it is related to the moveable or immovable property of the minor.

As stated earlier in the introduction that the judges are recommended to decide Muslim Personal law in the light of injunctions of *The Holy Quran and Sunnah* according to the '*Shariat Application Act, 1962*' & '*The Constitution of Islamic Republic of Pakistan, 1973*'. The judges are empowered to interpret law according to their own understanding, because of which the judgments are different in different localities.

It will be helpful to codify Pakistani Personal law in detail, keeping in view the injunctions of *Quran & Sunnah*, in order to refrain from contradiction. The contradictions should be removed and all ambiguities should be resolved by the law making authorities of Pakistan.

RECOMMENDATIONS

After studying and comparing both sides; i- Islamic Law on Guardianship and, ii- Pakistani Law on Guardianship, it is proved that both systems have many things in common. Both systems have contradictions in some of its important issues. Islamic Law provides a comprehensive detail to meet the challenges of the modern world while Pakistani law is very limited hence unable to meet the requirements. Pakistan Law itself creates ambiguity for an ordinary person to understand the exact meaning of the purpose of the state.

So keeping in view the above discussions, it is recommended that

- a. Guardian and Wards Act should be revised by the senior jurists of the country and after revising it should be codified in detail.
- b. The provision of Guardian and Wards Act should be made According to the injunctions of Islamic Law.
- c. The existing contradictions between Islamic Law and Pakistani Law on guardianship should be resolved properly.
- d. The ambiguity between different acts of family law should be resolved and new codification should be of clear meanings.
- e. The family judges should be given less discretion to reduce the chance of mistake and misuse of powers.

.....THE END.....

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