

## **APPLICATION OF THE ISLAMIC LAW ON GUARDIANSHIP OF CHILDREN AND THEIR PROPERTY: PROBLEMS AND PROSPECTS<sup>1</sup>**

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### **ABSTRACT**

As the saying goes: “children are the leaders of tomorrow” and for their tomorrow to be bright and positive, they need to be properly guided. This can be achieved either by the biological parents or the guardians. Islamic law has provided detailed provisions for the guidance of such children in terms of their person and property. This paper examines the said provisions with emphasis on Maliki School of Jurisprudence, with the aim of creating awareness on its existence and all-encompassing nature to the *Ummah*. This was achieved utilising data obtained through the doctrinal method. It was observed that there are possible areas of conflict with the Child’s Rights Act (CRA) and also some judges give more consideration to custom as opposed to the law, in their decisions. It is recommended, amongst others, that the National Judicial Council (NJC) should sanction such judges and the application of the CRA should be restricted to non-Muslims only.

### **1.1 Introduction**

The protection of life, property and honour amongst others forms the essential objectives of *Shari’ah*. This protection is

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meant for all categories of persons under the shield of Islam whether of competent or defective legal capacity, and part of those with defective legal capacity but entitled to such protection are children. A child does not possess sufficient understanding to realise the consequences of his acts or omissions; and, to avoid the possibility of his being taken advantage of by unscrupulous persons, the law has provided for the guardianship of both his person and property to ensure the protection of his welfare.

This paper therefore, examines the provision of *shari'ah* on the concept of guardianship (*wilayah*) of a child and his property with emphasis on the Maliki school of jurisprudence. It also highlights the potential challenges to its effective implementation.

## 1.2 The Concept of Guardianship in Islamic Law

The term *wali* is derived from the root word *wala* which means to be near. Literally *wali* means helper, protector, friend, relative and caretaker. Technically, it stands for a person who is authorised, under the law to protect the person and property of someone who is unable to do so independently.<sup>2</sup> Therefore, guardianship is defined as the power to control the movement and actions of a person who, owing to physical or mental defects, is unable to take care of himself and to manage his own affairs such as an infant, lunatic and an idiot.<sup>3</sup> Such right extends to the custody of the person and power to deal with the property of the ward and these rights may be vested in different individuals.<sup>4</sup>

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<sup>2</sup> Gurin, A. M., *An Introduction to Islamic Family Law*, (Zaria: Jodda Comm. Press Ltd., 2001) p.64; Abd al-Ati, H, (1982). *The Family Structure in Islam*. (Lagos: Academy Press Ltd.) p.71; Sabiq S. (nd), Vol.2, *Fiqh-ul-Sunnah*, (Cairo: Al-Fath.) p.82.

<sup>3</sup> Abd al-Ati, H, *The Family Structure in Islam*. (Lagos: Academy Press Ltd. 1982) p.72

<sup>4</sup> AbdurRahim. M.A. *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools*. (Lahore: 1911) p.344

Guardianship is solely for the benefit of the minor and cannot therefore be said to be the absolute right of any person, in the sense that the court will be bound to recognise it apart from the question whether it will promote the welfare of the child or otherwise.<sup>5</sup> A guardian is a fiduciary and is subject to the high standard of care in exercising his powers.

### **1.3 Legal Basis of Guardianship in Islamic Law**

The Islamic law rules guiding guardianship are derived mainly from authorities in the Qur'an and Sunnah such as the following:

1. 'To orphans restore their property (when they reach their age), Nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin.'<sup>6</sup>
2. 'To the weak of understanding make not over your property, which God hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice.'<sup>7</sup>
3. 'Those who unjustly eat up the property of orphans, eat up a fire into their own bodies: they will soon be enduring a blazing fire.'<sup>8</sup>
4. 'The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms...'<sup>9</sup>
5. 'The prophet (SAW) is reported to have said to a mother that reported to him the denial to her of her right to child custody: 'You have more right to him as long as you do not marry.'<sup>10</sup>

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<sup>5</sup> ibid

<sup>6</sup> Qur'an 4:2

<sup>7</sup> Qur'an 4:5

<sup>8</sup> Qur'an Q4:10

<sup>9</sup> Qur'an 2:233

<sup>10</sup> As quoted in Al-Jaza'iri A. B., *Minhaj Al-Muslim: A Book of Creed, Manners, Character, Acts of Worship and other Deeds*, vol 2, (Darussalam: 2001). p.392

6. 'The Prophet (SAW) said: "The right to keep that child belongs to you until you marry again and have consummated the marriage."<sup>11</sup>
7. ...they ask thee concerning orphans. Say: "the best thing to do is what is for their good; if you mix their affairs with yours, they are your brethren; But God knows the man who means mischief from the man who means good. And if God had wished, He could have put you into difficulties: he is indeed Exalted in Power, Wise."<sup>12</sup>
8. Make trial of orphans until they reach the age of marriage; if then you find sound judgement in them, release their property to them; but consume it not wastefully, nor in haste against their growing up, if the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When you release their property to them, take witnesses in their presence: but all-sufficient is God in taking account.<sup>13</sup>

#### 1.4 Classification of Guardians

Guardians are classified into viz:

1. Natural Guardians. These are guardians where there is parental relationship between the guardians and the ward. In relation to custody of the child, the first right goes to the mother while in relation to property, marriage, moral and religious education and maintenance, the first right goes to the father, according to Maliki school.
2. Testamentary Guardian. This is the executor of the father appointed in his bequest. He is like the father and has the right to take precedence in marriage of the ward over other marriage guardians.

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<sup>11</sup> As quoted in Hallaq, M. S.H., *Fiqh According to Qur'an and Sunnah. Translation of Al-Lubab Fee Fiqhus- Sunna wal Kitab*. Vol. 2. (Darussalam: 2008), p.202. (The hadith is considered as Sahih).

<sup>12</sup> Ali A.Y, *The Holy Qur'an: Text, Translation and Commentary*, (U.S.A: Amana Corp., 1983) Q2:220

<sup>13</sup> *ibid* at Q4:6

3. Legal Guardian. This is the guardian appointed by the court of law.
4. De facto Guardian. This is a mere custodian of the minor's person and property but has no legal right over either. He has only responsibilities towards the minor's person and property or both but no rights in respect thereof. They are usually relatives of the minor but without right to be the guardian under Islamic law. He is an officious intermeddler with the minor's property and has no status or position to alienate it without the courts permission. A sale by such a guardian of the minor's immovable property without the court's permission is void.<sup>14</sup>

The paper examines the powers, rights and responsibilities of these classes from three perspectives viz: custody, marriage and property.

## **1.5 Guardianship of Person for Custody**

### **1.5.1 Concept of Custody (*hadanah*)**

Custody is known as *hadanah* in Islamic law. *Hadanah* is derived from the word *hadana* which literally means 'to embrace' or 'hug'. In *shari'ah*, it means raising up or bringing up of a child.<sup>15</sup> In the Maliki School, *hadana* is defined as the taking care of a child with respect to his/her accommodation, provisions, feeding, clothing etc.<sup>16</sup> It is defined as 'the caring for the infant during the period when it cannot do without the women related to it within the prohibited degrees who have lawful right to bring it up'.<sup>17</sup> It refers to 'providing care and guardianship for a minor until he or she reaches the age of

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<sup>14</sup> Roy. A. (2010) *A Study of Guardianship of Person and Property Under the Muslim Law*. Available at <https://papers.ssrn.com>. p.2.

<sup>15</sup> Hidanah (Custody) of Children. Retrieved from [www.irfi.org/articles/articles-551-600/custody-of-children-in-shari.htm](http://www.irfi.org/articles/articles-551-600/custody-of-children-in-shari.htm) accessed on 13/12/2016 at 10:25pm

<sup>16</sup> Jamal J. Ahmad Nasir. *Infra*. p.3.

<sup>17</sup> Jamal J. Ahmad Nasir. *The Status of Women Under Islamic Law and Modern Islamic Legislation*. (Boston: Brill. Leiden 2009) p.186

puberty.<sup>18</sup> In other words, *hadanah* could be defined as the act of nurturing a child by its relatives until it becomes physically and mentally fit to live outside the maternal embrace.

*Hadanah* relates to the sleeping arrangements, care of the child's feeding, clothing, beddings and personal hygiene. If the child has a father, then he shall bear the cost of all that has been discussed above and in addition, the child's education, vocation, marriage and even his circumcision. According to Imam Al-Fasi, the father bears the cost of everything. The mother only bears the responsibility of moral training (*tarbiyyah*) and accommodating the child at her place (*mabiiit*).<sup>19</sup> The marriage ceremony (*zafaf*) should be for both father and mother, but the *zahir* view is that since the right to keep custody extends to consummation (*dukhul*), it should be the right of the mother.<sup>20</sup>

### 1.5.2 Right to Custody of Children

There is a difference of opinion over whether *hadanah* is a right of the custodian (*hadin*) or the right of the child (*mahdun*). The preponderant (*mashhur*) opinion is the former which means the right can be relinquished by its possessor.<sup>21</sup> Therefore, by the *mashhur*, the right belongs to both parents during the subsistence of the marriage. After the termination of the marriage however, whether by death or divorce, the right to custody of children is vested in the mother, first and foremost. This right shall not be denied to the mother unless she is found wanting or she waives the right even if she is a Christian, a Jew or a concubine.<sup>22</sup> This is based on the interpretation of a tradition of the Prophet where a man called Rafi' bn Sinan who accepted Islam but his wife refused to accept it. The Prophet (SAW) then made the mother sit on one side and the father on

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<sup>18</sup> Al-Jaza'iri A. B., *Minhaj Al-Muslim: A Book of Creed, Manners, Character, Acts of Worship and other Deeds*, Vol 2, (Darussalam: 2001), p.391

<sup>19</sup> Imam ibn Ahmad. Al Fasi. *Sharhul Mayaratu Al-Fasi Ala Tuhfatul Hukkam* Vol. 1. (Dar al-Fikr. (nd) p.269.

<sup>20</sup> *ibid*.

<sup>21</sup> Ibn Juzay. *Qawanin al-fiqhiyyah*. (Dar al-Fikr.) p. 195.

<sup>22</sup> Orire. A. *Shari'a: A Misunderstood Legal System*. (Zaria: Sankore Educational Publishers Ltd. 2007) p. 81.

the other while the son sat between the parents. The son inclined to the mother and the Prophet (SAW) then said: "Oh Allah give him guidance". Then he inclined to the father and the father took him.' Based on this *hadith*, some scholars hold that merely being a disbeliever does not nullify the right of a mother to the custody of her child. Other scholars are however of the opinion that being a Muslim is a precondition for custody of a child.<sup>23</sup> The prophet (SAW) is reported to have said to a mother that reported to him the denial to her of her right to child custody: 'You have more right to him as long as you do not marry.'<sup>24</sup> This right does not, however, extend to a foster mother or foster grandmother.<sup>25</sup> The father, however, is entitled to visit the child frequently, instruct him in polite accomplishments and send him to a teacher. The father has charge of all the child's business affairs and, in his absence, the executor.<sup>26</sup>

However, an interesting case has been recorded in the *Nail al Autar* which was brought before Ibn Taimiyya. In the case, child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted for the custody of the father. The mother asked the court to inquire from the child why he preferred the father. On the court's inquiry the child said, mother compels me to go to the school where the teacher punishes me every day while the father allows me to play with the children and do whatever I like. On hearing this the court gave the custody to the mother.<sup>27</sup> This clearly shows that wishes of the minor while deciding his or her custody has always been

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<sup>23</sup> Imam al- Shaukani, *Nayl Al-Autar*, (Syria: Dar Al-Fik). Vol.7. p.142 as quoted in Rafiq A. *Infra*.

<sup>24</sup> As quoted in Al-Jaza'iri A.B. Op.Cit. p.392. However, it could be said that the first view is more in line with the *Shari'a* because, if it were a precondition, the Prophet (SAW) would not have given the child the option in the first instance. He would have stated categorically that being a non-muslim she had no right to custody as it is in the case of inheritance. *Wallahu a'alam*.

<sup>25</sup> See the case of Mal. Lawal v. Mal. Adamu Yola (Kano) MCA/CV/19. (1960) (unreported) as cited in Orire. A. Ibid. p.83

<sup>26</sup> Russel A.D. and Suhrawardy, A. A. *Manual of Law of Marriage from the Mukhtasar of Sidi Khalil* p.321.

<sup>27</sup> Imam Shaukani Ibid. p.142.

subject to the principle of welfare of the minor even in classical Muslim legal tradition.

On the duration of *hadanah*, there is no uniform opinion among the various schools of jurisprudence. The Hambali and Shafi'i schools do not distinguish between a boy and a girl. They hold that the duration of custody of a child will run from birth to seven years after which the child has the right to choose between either parents and the choice shall be respected.<sup>28</sup> According to Hanafi school, custody ends at the age of seven years for boys and nine years for girls.<sup>29</sup> The custody of a male child in the Maliki School is the mother's until he becomes adult. However, if after maturity it is discovered that he is a hermaphrodite, then his custody shall remain with the mother until his other real position is determined.<sup>30</sup>

For the female child she remains in the mother's custody until she gets married and the marriage becomes legally consummated. This is when her right to *hadana* terminates.<sup>31</sup> This right is derived from a tradition of the Prophet (SAW) where it is reported on the authority of Amr Ibn Shu'aib, who reported on the authority of his grandfather, Abdullahi Ibn Amr that 'a woman had just been divorced by her husband by whom she had a son. She took the child in her arms and went to the Prophet (SAW) visibly affected and said: 'Oh, Messenger of Allah; this child is my son, my womb is the vessel that contained him, my breasts are the vessels whence he fed, my garments form the cover in which I hold him wrapped up and yet his father divorced me and wants to separate me from my

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<sup>28</sup> Ibn. Qudamah, *Al-Mughni*. Vol. 7. (Egypt:1367AH) p.613-616 as quoted in Rafiq. A. 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)'. *International Journal of Humanities and Social sciences*. Vol.4, No. 5, March 2014. p.270.

<sup>29</sup> Ibn. Hamman, *Fath Al-Qadir*. Vol.3. (1366H), p. 316 as quoted in Rafiq. A. 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)'. *International Journal of Humanities and Social sciences*. Vol.4, No. 5, March 2014. p.269.

<sup>30</sup> Orire. A. Ibid. p 81.

<sup>31</sup> Ibn Juzay. *Qawanin al-Fiqhiyyah*. Dar al-Fikr. p. 194; Gurin, ibid, p.226. This is also the ratio in *Alhaja Taibatu Aduke v. Alhaji G.A. Mustapha App*. No. KWS/SCA/10/85 (unreported).



son.” To that, the Prophet (SAW) said: “The right to keep that child belongs to you until you marry again and have consummated the marriage.”<sup>32</sup>

It is also reported that a similar decision was given in favour of a wife of *Sayyidina Umar* whom he divorced, and he attempted to deprive her of the right to custody. After giving the custody to the wife, the Prophet (SAW) addressed *Sayyidina Umar* by saying to him: “her scent, her touch, her kiss to him (the child) is better than the best thing you might have.”<sup>33</sup> *Sayyidina Abu Bakr* was also reported to have done the same when *Sayyidina Umar* attempted taking the child away from the grandmother and he added that “the hug and kisses of that old woman is more important and valuable to the child than whatever material wealth you can offer the child.”<sup>34</sup>

All the schools have justifications for their positions however. The position of the Maliki School can be said to be more realistic especially in relation to the female child. The female child always needs the mother especially during the adolescent period. She needs the mother’s guidance and understanding on a lot of issues which only a woman can understand and only a mother can empathize. Therefore, the position of leaving the female child with the mother up to marriage is more in the interest and welfare of the female child. This is because, the most important consideration, in child custody, should be the welfare of the child.<sup>35</sup> Though we have seen in some of the earlier traditions that even in jurisdictions under Hanbali and Shafi’i law, the choice of the child was set aside as it is not in his interest or welfare. Even though, this is subject to the discretion of the judge. As such, the position of the Maliki School should be preferred as it caters for the welfare of the two sexes without leaving it to the discretion of anybody, after all, such discretions could be abused.

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<sup>32</sup> As quoted in Hallaq, M. S.H., *Fiqh According to Qur’an and Sunnah. Translation of Al-Lubab Fee Fiqhus- Sunna wal Kitab*. Vol. 2. (Darussalam: 2008), p.202. (The hadith is considered as Sahih).

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*

<sup>35</sup> Rahim, A. *Muhammadian Jurisprudence According to the Sunni Schools*. (1911) p.344

### 1.5.3 Essential Conditions

For a mother to be given custody of her child or children she must fulfill certain conditions these include sanity(*aqlu*), intelligence, capacity to take charge of the child(*kafa'a*), trustworthiness(*amanah*), moral soundness, freedom from infectious diseases, safe environment for the child (*hirz*), prudence (*rushd*) etc.<sup>36</sup> It should be noted that the *hirz* here refers only to the female child that is physically capable of conjugal relations, even though it is required for all but it shall not be fatal unless in the case of the *mutiqah* (the female capable of conjugal relations). In other words, if the girl is attractive and the conditions are risky, then *hirz* is necessary. Otherwise it is only desirable.<sup>37</sup> The custodian must also be a religious person. This is based on the text of *Muqarrab* that the later Malikis (*al-Muta'akhkhirun*) added a condition to the qualifications of the custodian, i.e being religious in the case of the *muslimah*. As for the *kitabiyah*, she shall keep custody as long as there is no fear that she shall cause them to drink wine or consume pork.<sup>38</sup> It should be noted that these conditions apply to all those entitled to custody of a child whether male or female.

Also, if the person granted custody is a eunuch, he must have a female who will take care of the child. Another condition is that the person must not travel away from the place of custody for a distance of more than 6 *burd* (72 miles) with intention of living there without the child or without the permission of the father if not for mere business.<sup>39</sup>

### 1.5.4 Lapse of Mother's Right

The mother's right to custody will lapse where:

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<sup>36</sup> Russel A.D. and Suhrawardy, A. A. *Manual of Law of Marriage from the Mukhtasar of Sidi Khalil* p.323.

<sup>37</sup> Imam ibn Ahmad. Al Fasi. Op .Cit. p.271

<sup>38</sup> Imam ibn Ahmad. Al Fasi. Op.Cit. p.273

<sup>39</sup> Orire. A. Ibid. p.87; Ibn. Juzay Ibid. p. 194.

1. She marries someone not related to the child within the prohibited degrees.<sup>40</sup> But the marriage must be legally consummated for it to end her right to custody.<sup>41</sup>
2. She resides during the subsistence of the marriage at a distance from the father's place of residence. This is because the father has the right of guardianship. i.e. supervision.<sup>42</sup>
3. She is leading an immoral life.<sup>43</sup>
4. She neglects to take proper care of the child.<sup>44</sup>
5. With the exception of the Christian or Jewish mother, a Muslim woman who is entitled to custody may lose it if she apostates.<sup>45</sup>
6. Where she voluntarily waives the right whether for a consideration or not.<sup>46</sup>
7. Some harmful disease on the person of the custodian such as lunacy, leprosy, vitiligo, etc.<sup>47</sup>

However, the mother's right to custody will not lapse in the following situations:

1. where the child will not take to any other person besides the mother. Some jurists restrict this to a suckling child while others take it generally.<sup>48</sup>
2. Where the foster mother will not suckle the child except in the mother's house.<sup>49</sup>

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<sup>40</sup> Gurin A.M. Op. Cit p.227

<sup>41</sup> Orire A. Op.Cit. p. 87

<sup>42</sup> Gurin. A.M. Ibid. p.228

<sup>43</sup> ibid

<sup>44</sup> ibid

<sup>45</sup> Orire A. Ibid. p.87

<sup>46</sup> Russel A.D. and Suhrawardy, A. A. Ibid. p. 330

<sup>47</sup> Ibn Juzay Ibid. p. 194

<sup>48</sup> ibid p.327

<sup>49</sup> ibid

3. Where the child has no other guardian except the mother or only one who is disqualified from acting as being untrustworthy or incapable.<sup>50</sup>
4. Where the father is a slave and the mother a free woman if the father is the next in line of custody.<sup>51</sup>

### 1.5.5 Hierarchy of Those Entitled to Custody

The *Shari'ah* gives preference to those who have the welfare of the child at heart. Therefore, women are preferred over men, and within the women, preference has been given to those who are closer to the child and therefore expected to be more compassionate and merciful. According to Ibn Rushd, women are entitled to custody by two reasons: by being blood relations of the child; and by their being within the prohibited degrees of the child. If they are blood relatives but not within the prohibited classes, such as she being a daughter of maternal aunt (*khalah*) or a daughter of a paternal aunt (*'ammah*) she will not be entitled to custody. On the other hand, if she is within the prohibited degrees, but not a blood relative, such as foster mother or by marriage, she shall not be entitled to custody. However, in the case of men, Ibn Rushd says they are entitled by merely being guardians (*bi mujarradil wilayah*) such as prohibited blood relatives e.g the grandfather, the brother, or son of the brother, or being a blood relation outside of the prohibited degrees such as the son of the paternal uncle or even outside the blood ties such as the freed slave (*maula*) or appointed administrator (*wasiy*) by the father or by the state.<sup>52</sup>

According to the *Mayyarah*, if there are males and females, all competing for custody, then the mother is the one to take priority, then her mother takes priority over all others. It is also said that the father takes priority over the mother at the male child's loss of milk teeth (*ithgar*) and that the rest of the women take priority over the rest of the men. By the statement that 'the

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<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> Ibn Rushd. *Bidayat al-Mujtahid*, (trans.Eng.) Imran Ahsan Khan Nayazee (UK: Garnet Publishing Ltd. 1996).

father takes priority...’ it is meant, as related by Ibnu Habib from Malik, that after the years of *ithgar*, the male child requires his father more as, at that stage, he requires training and knowledge and hence, the hierarchy is thus:

1. The first person is the mother<sup>53</sup>. In the event of the mother losing the right, the following persons will be entitled to the child or children’s custody in order of preference.
2. Maternal Grandmother how high so ever (hhs)<sup>54</sup>. However, she will lose the right to *hadanah* where she lives together with her daughter or granddaughter. i.e the child’s mother when the mother’s right has lapsed.<sup>55</sup> This extends to other female relatives entitled to *hadanah*. Each must be sole occupant to the exclusion of the one whose right has lapsed.
3. Maternal Aunt, whether consanguine or uterine.<sup>56</sup>
4. Mother’s Paternal Aunt.<sup>57</sup>
5. Paternal Grandmother including the father’s mother, his mother’s mother and his father’s mother the nearer excluding the remoter and those on the side of the mother’s mother being more preferred to those on the side of the father’s mother.<sup>58</sup>
6. Father.<sup>59</sup>
7. Paternal Grand Aunt.<sup>60</sup>
8. Child’s Sisters- germaine, consanguine or uterine.<sup>61</sup>
9. Paternal Aunt.<sup>62</sup>
10. Trustee (*wasiyy*) appointed by the court who must have a female in his house who has no husband such as mother or aunt.<sup>63</sup>

<sup>53</sup> Gurin A.M. Op. Cit p.226 and various ahadith of the Prophet quoted earlier; Ibn Juzay Ibid. p.194.

<sup>54</sup> Russel A.D. and Suhrawardy, A. A. Ibid. p. 321

<sup>55</sup> Russel A.D. and Suhrawardy, A. A. Op.Cit. p.321. this is the view attributed to Imam Malik by the *mashhur*.

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

<sup>58</sup> *ibid*

<sup>59</sup> Orire A. Op.Cit. p. 83; Gurin A.M. Op. Cit p.227

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> *ibid*

11. Child's brother whether, uterine, consanguine or germaine.<sup>64</sup>
12. Great Grandfather how high so ever.<sup>65</sup>
13. Son of the child's brother whether, uterine, consanguine or germaine.<sup>66</sup>
14. Son of the Grandfather.<sup>67</sup>
15. *Maula* (i.e person who freed the child) if any. If he dies, custody goes to the *maula's* relations. Full blood takes priority over others and the mother's side takes priority over the father's side.<sup>68</sup>

For the relatives, those equal in relationship will be preferred according to their respective reputation and compassionate disposition towards the child. Older relatives are also preferred to younger ones.<sup>69</sup> However, where there are no relatives willing and able to look after the child, the mother who has become disqualified by marrying a stranger may be appointed by the court as the custodian of her minor child.<sup>70</sup>

Where the *hadanah* has lapsed owing to the mother marrying a non-relative of the father, it will not revert to her on her divorce nor on the husband's death nor even on the event of the marriage being annulled for invalidity according to the preponderant view.<sup>71</sup> Nor will it revert after she has waived it to the father or some other relative, unless the waiver was on justifiable grounds such as illness, or her milk ceasing or going on *hajj* etc.<sup>72</sup> A mother may reclaim custody in the event of the death of the grandmother where she is free from any disability such as that arising from a marriage, such as where she is

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<sup>63</sup> Orire A. Op.Cit. p. 85

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

<sup>68</sup> Orire. A. *Ibid*. p. 85

<sup>69</sup> Russel A.D. and Suhrawardy, A. A. *Ibid*. P. 323

<sup>70</sup> Gurin, *Ibid*. P.228

<sup>71</sup> Russel A.D. and Suhrawardy, A. A. *Ibid*. P. 330

<sup>72</sup> *ibid*.

divorced or widowed before the relative on whom the right would devolve, becomes aware of the lapse.<sup>73</sup>

The person having custody is entitled to receive the child's maintenance<sup>74</sup> for the purpose of the child but will not be entitled to anything for the custody. However, where she is poor and the child is wealthy, she may maintain herself out of them.<sup>75</sup> The reason being that, she receives on account of her poverty and not on account of *hadanah*.<sup>76</sup> However, her lack of entitlement to claim a fee relates only to a case where she has no other duty upon her except watching over the welfare of the child. Therefore, where she performs services such as cooking, washing his clothes, etc. she is entitled to payment from the father.<sup>77</sup> Hence, the maintenance of the child lies on the father or his executor and not the custodian where the custodian and the father are different while the custodial guardian is charged with the responsibility of ensuring the general wellbeing of the child under the supervision and guidance of the father.

#### **1.6 Guardianship of Person for Marriage.**

Marriage guardianship (*wilayatu al-nikah*) is the legal authority vested in a person who is fully qualified and competent to safeguard the interest and rights of another who is incapable of doing so independently.<sup>78</sup> Hence, *wali* in marriage means the person who is authorised by law to make a valid contract of marriage of a minor or a person of unsound mind who lacks the competence of entering into contractual transaction.<sup>79</sup>

The basis for such a guardian is traced to the following verses of the *Qur'an* by some jurists: '...nor marry (your girls) to unbelievers until they believe...' <sup>80</sup> and 'when you divorce women and they fulfil the term of their *iddah*, do not prevent them from marrying their former husbands...' <sup>81</sup> and some

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<sup>73</sup> *ibid.* p. 330-331

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> Imam Ibn. Ahman Al-Fasi *Ibid.* p.269.

<sup>78</sup> Abd. Ati. H. *Ibid.* p.70

<sup>79</sup> Gurin, *ibid.* p.64

<sup>80</sup> *Qur'an* 2:221

<sup>81</sup> *Qur'an* 2:232

traditions of the prophet thus: 'there is no marriage without a marriage guardian and the ruler is the guardian for those who have no guardian.'<sup>82</sup>

The role of the marriage guardian is considered by some jurists as a right, hence the power of *ijbar* and to the others, it is a duty assigned by law and by virtue of his responsibility towards the welfare of the child. whichever it is, the protection of the welfare and interest of the child is common to both and paramount and hence, a synthesis of both.<sup>83</sup>

According to all schools, in the case of a minor or insane woman, no valid marriage without a *wali*. But they disagree in the case of an adult woman with Imam Abu Hanifa dissenting.<sup>84</sup> However, as stated by Ibn Rushd, neither Imam Malik nor Imam Abu Hanifa have clear evident proof from a text for their positions. Both relied on Qur'anic verses and traditions which may be understood either way and it is a matter of probability.<sup>85</sup>

### 1.6.1 Classes of Marriage Guardians

There are two classes of marriage guardians *wali mujbir* and *wali ghair mujbir*.

1. *Wali Mujbir* is the *wali* who may impose his powers regardless of the child's wishes. He is first and foremost the father and, in his absence, the executor i.e testamentary guardian appointed either verbally or by bequest. According to Malik, the right is not extended to other relatives and hence, the father's father not being the same as the father, is not entitled.<sup>86</sup> The father may marry off his virgin daughter (by way of compulsion to whomever he pleases even upon a *sadaq* that is below

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<sup>82</sup> Reported by Ahmad and Ibn Majah

<sup>83</sup> Abd. Ati. H. Ibid. p.75

<sup>84</sup> El-Imairi. M. T. *Personal Status in Islamic Law (According to Maliki System)* (nd) (unpublished lecture notes). p. 78

<sup>85</sup> Ibn Rushd. *Bidayatul Mujtahid*, (trans.Eng) Imran Ahsan Khan Nayazee (UK: Garnet Publishing Ltd. 1996) Vol.2, p9

<sup>86</sup> Gurin A.M. Ibid. p.69; Hamilton. C. *The Hedaya or Guide. A Commentary on the Musulman Laws (Translated)*, (Lahore: Premier Book House. 1963). Vol.1 p.361



that of her equals) without her consent even if she is adult on the condition that the marriage is not detrimental to her. If it is detrimental to her, he may not compel her.<sup>87</sup> However, there seems to be a *takhyir* (right of option) without preponderance in the matter as other sources have shown that it is commendable if the father consults her.

On the powers of the executor (*wasiy*), it should be known that he possesses the full authority to compel when he is appointed to do so by the father. In the words of the author of the *Kifayah al-Talib*, except if the father had expressly given authority to his executor (*wasiy*) to compel, then he shall step into the shoes of the father upon two conditions that apply alternatively: (1) if the father had selected a husband or (2) if the father had instructed him to marry her off (this second condition is construed in this way because the author had earlier on stated 'He shall not marry off the minor girl unless the father had instructed him to marry her off.' The executor cannot impose his power unless the father has pointed out to him the bridegroom and whether the marriage may take place before or after puberty.<sup>88</sup> Those subject to such powers are: the adult (*thayyib*) who lost her virginity outside wedlock, whether by accident, illness or by illicit relations; the adult but insane even if previously married; the virgin minor daughter; the young son if there is some benefit,<sup>89</sup> the adult but virgin provided she has not become old (*anisa*), the jurists differ as to the age. Some maintained 30, 33-40 years and others 33-60 years.<sup>90</sup>

2. *Wali Ghairu mujbir*- he is the one who represents the woman in the marriage contract. He is a mere legal representative for concluding the contract upon the

<sup>87</sup> Al- 'Adawiy, *Hashiyatul 'Adawi Ala Sharh Abil Hasan al-Musamma al-Kifayah al-Talib, Ar-Rabbani li Risalati ibni Abi Zaidin al-Qairawani fi Madhhabil Imami Malik. (R.A.)*, Vol.2, ((Beirut: Dar al-Fikr, 1994) pp.41-42.

<sup>88</sup> El-Imairi M. T. Ibid. p. 79.

<sup>89</sup> ibid 80

<sup>90</sup> ibid 79. The *anisa* is the female that has tarried at her family home after attaining adulthood.

consent of the woman.<sup>91</sup> His powers are limited and hence:

a. Such a *wali* cannot conclude a marriage contract without the consent of the woman and the husband is her equal and the dower is that of her equals.

b. In the event of conflict between the *wali* and the woman, the matter is referred to the court and if the court is satisfied with the decision of the woman, the *wali* will be ordered to conduct the marriage or the court takes over and appoints another *wali* or conduct the marriage itself.

c. The wishes of the woman in the absence of any fault in the chosen partner, overrides the wishes of the *wali ghairu mujbir*.<sup>92</sup>

Persons who may be represented by *wali ghairu mujbir* are:

a. the adult *thayyib* who has lost her virginity as a result of marriage whether valid or invalid;

b. the adult daughter who has been treated as discreet by her father;

c. the young orphan on condition that there is fear on her morals or property, she is fit for intercourse and she consent and the husband is equal and her dowry is that of her equals and the court has approved;<sup>93</sup>

d. the young girl whose father is either absent or has not been maintaining her and there is fear of harm to her morality or property.

### **1.6.2 Those Competent to be *Wali*:**

1. Agnates- the son and his descendants, the father, the brother (paternal germaine then consanguine) and his

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<sup>91</sup> ibid83

<sup>92</sup> ibid 86

<sup>93</sup> ibid 85

descendants, the father's father (paternal side), the uncle and his descendants (paternal), the father of the father's father, the father's uncle (paternal) in order of priority.<sup>94</sup> However, Ibn Rushd is reported to have said Imam Malik gives priority to the father over the son.<sup>95</sup>

2. *Kafil* (the supporter) the man who has taken care of the woman up to marriageable age. She must have lived with him for a period of 4-10 years.<sup>96</sup>
3. The Ruler/Judge.<sup>97</sup>
4. The general *wali* which is any Muslim in the absence of 1-3 above based on the verse which provides thus: 'the believers men and women, are protectors, one of another. They enjoin what is just and forbid what is evil; they observe regular prayers, pay zakat and obey Allah and His Messenger. On them will Allah have mercy; for Allah is Exalted in power.'<sup>98</sup>

The marriage guardian according to majority of the schools must be adult, sane, Muslim, free, male and *non-mahram*.

### 1.6.3 *Khiyar al-bulugh*

Should a guardian's religious conscience fail him, or should he act against the interest of the minor, the minor, upon attaining puberty, has a religio-legal right to override the decisions. He/She may request the annulment of the marriage contract by the court and hence, the option of puberty.<sup>99</sup> However, some jurists have not recognised the said option where the father or grandfather is the guardian and this is based on the assumption that a father would, normally, do what is in the best interest of

<sup>94</sup> ibid 83

<sup>95</sup> Hamilton. C. *The Hedaya or Guide. A Commentary on the Muslim Laws (Translated)*, (Lahore: Premier Book House. 1963). Vol.1 p.362

<sup>96</sup> ibid

<sup>97</sup> Al-Asqalani H. H. *Bulugh Al-Maram Min Adillatil Ahkam* (Riyadh: Dar-us-Salam (nd). Hadith No. 836 p.347

<sup>98</sup> Gumi. A. M. *Raddul Adhhan ila Ma'anil Qur'an*. (Translated) Vol 1. (Kaduna: Iqra'a Publishing House). Suratul Taubah :71 p.578.

<sup>99</sup> Ali. M. *The Religion of Islam. A Comprehensive Discussion of the Sources, Principles and Practices of Islam*. (New Delhi: S.Chand and Company Ltd. (nd) p.634

his child. The authority for the legality of the option are traditions of the Prophet (S.A.W) where he is reported to have said: ‘When a man gives his daughter in marriage and she dislikes it, the marriage shall be repudiated.’<sup>100</sup> Likewise, the *Hadith* where it is reported that the Prophet (S.A.W) repudiated a marriage when the virgin girl went and complained that her father had married her against her wishes and the Prophet (S.A.W) gave her the right to repudiate the marriage.<sup>101</sup>

The basic idea underlying the doctrine is to protect a minor from an unscrupulous exercise of authority by the marriage guardian. In respect of a female, the option is lost if she does not exercise it immediately after attaining puberty or on being informed of the marriage, if she was not aware of it. In the case of a male, the right continues until he ratifies the marriage, expressly or impliedly.

### 1.7 Guardianship of Property

There are several categories of interdicted persons: the minor; the lunatic; the foolish; the slave; the woman; and the bankrupt. However, the scope of this paper is restricted to the minor.

A living child in the womb of its mother is a person in the contemplation of the law and is therefore possessed of inherent legal capacity though of a defective nature. Hence it is recognised as being capable of acquiring rights such as inheritance, legacy etc. such rights could lead to acquisition of property by the infant and, therefore, the need for a protector of such properties in the form of a guardian. The guardian is responsible for managing the child’s property honestly and in his best interests.

The right of guardianship of a child’s property belongs, in the first instance, to the father and on his death to his executor if he

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<sup>100</sup> Reported by Bukhari 67:43; also in Wali al-Din al-Khatib, *Mishkat al-Masabih*, (Delhi: 1932), p. 271 cited in Ahmed, K. N., *The Muslim Law of Divorce*, (New Delhi, India: Kitab Bhavan, 1978) p. 138

<sup>101</sup> Reported by Abu Dawud 12:25; Ahmed, K. N., *The Muslim Law of Divorce*, (New Delhi, India: Kitab Bhavan, 1978) p. 139

has appointed any<sup>102</sup> and on the latter's death, to his executor. In their absence, the guardianship of property belongs to the father's father and then his executor and, in their absence, the court.<sup>103</sup>

It is not lawful for the child to dispose of his property. However, if it is for a consideration (*iwad*) then the transaction is suspended upon the pleasure of his guardian. If he pleases he may nullify the transaction, or if he pleases, he may ratify it and the other party shall have no say.<sup>104</sup> When the guardian nullifies a transaction of a child such as where he sells his property, the purchaser shall not be in a position to claim his purchase money except the transaction is of the sort that is wholly agreeable to the interests of the child and it is of necessity to such minor. It is only then that the *waliy* shall be compelled to remit the purchase price to the buyer.<sup>105</sup> However, if the child had made a disposition without consideration such as a donation (*hibah*) or manumission (*itq*) the transaction is void (*mardud*).<sup>106</sup>

Whatever, the father disposes out of the wealth of his child, such a transaction is enforceable (*nafidhun*) in his capacity as his guardian except what he donates or gives out in charity. If he manumits his child's slave, the disposition is enforceable but he shall pay the value.<sup>107</sup> It is lawful for the guardian to purchase for his minor child something out of his own wealth, just as he may purchase something for himself out of the minor's wealth if that is in the interest of the minor child.<sup>108</sup>

All admissions against the interests of the minor which are within his powers as a guardian to ratify are lawful. However, admissions as to usurpation or trespass (*ghasb*) or other criminal actions are not admissible except in his position as a witness.<sup>109</sup>

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<sup>102</sup>Abdurrahim. M. A. Ibid. p.345

<sup>103</sup> Ibid p.345

<sup>104</sup> Ibn Juzay. Ibid. p. 274

<sup>105</sup> Ibid

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Ibid

<sup>109</sup> Ibid

When the minor attains adulthood, if he is a male, there are three scenarios, thus<sup>110</sup>:

1. Where his father is alive, he shall be discharged from his interdiction by his adulthood so long as he is not found to be a *safih* (spendthrift) and his father places no further interdiction on him.
2. Where his father is deceased and an executor supervises over him, he shall not be discharged by mere adulthood until he has attained *tarsheed* i.e prudence. If the *wasiy* had been appointed by the father, then he may deem him *rashidan* without making recourse to the court. However, if he was appointed by the court, then he has no option but to make recourse to the court in declaring his attainment of *rushd*. The court can declare him *rashid* with or without the *wasiy*.
3. Where he attains adulthood without a father and without a *wasiy* or any other restriction, he shall be assumed to be possessed of *rushd* except his feeble-mindedness becomes manifest.
4. Where the minor is a female, the same categorisation applies except that the female minor whose father is still alive shall remain under his control and interdiction until she marries and her husband consummates the marriage and she remains so interdicted for a time after the consummation of her marriage. The jurists have differed over the length of such period between one year and seven years. Some have even held that her interdiction remains until her father declares her attainment of *rushd* or testifies to it. According to al-Shafi'i and Abu Hanifah, when she attains adulthood, she attains freedom from interdiction (*malakat amraha*).

For the female who is under a *wasiy*, she shall not be relieved from her interdiction except by *tarsheed*. As for the one that is free from any restriction (*al-muhmalah*), it has been held that she shall possess her own rights when she attains puberty, and

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<sup>110</sup> Ibid p.275

others have held until her marriage is consummated or she becomes *anis*.

## **1.8 Problems and Prospects**

### **1.8.1 Problems/Observations**

1. According to sections 83 and 84 of the Child's Right Act, first the parents shall have guardianship of the child and in the event of death of either, the surviving parent becomes the guardian. And the surviving parent can, by deed, appoint another guardian for the child in the event of his/her death. Secondly, the court may appoint, upon application to so do, in the absence of the parents or jointly with the parent of the child where the parent is found to be unsuitable and, in the event of conflict between the joint guardians, on questions affecting the welfare of the child, the final decision lies in the court. Such a guardian appointed jointly with the parent, may, where he considers the parents unfit to have the custody of the child, apply to the court for an order appointing him the sole guardian of the child.

These provisions clearly contradict the provisions of Islamic law in relation to guardianship, especially the Maliki school where guardianship belongs to the father and, in his absence, his executor but not the mother - with the exception of custody. But by the provisions of the Act, both parents share the right to guardianship and in the event of the death of either of them, the surviving partner automatically becomes the guardian whether jointly or severally with a court appointed guardian. In fact, by the provision of S83(5)(a), the court can appoint someone different from the parents (while they are still alive) as the sole custodian and guardian of a child. Such a person may, by virtue of the provision of S84(3), by deed, appoint another person to be the guardian of the child in the event of his death and this person can be completely outside the family of the child. The only consideration being the interest of the child. This is a perfect opening for Non-Governmental Organisations

and other proxies of the international community to be appointed as *guardians ad litem* of Muslim children.

2. By the creation of family courts in Sections 149-162 the jurisdiction of *Shariah* courts in all cases relating to children has been ousted and vested in the High Court and Magistrate Courts, which has resulted in some shariah courts, within jurisdictions where such courts have been created, declining jurisdiction on matters of guardianship and referring same to the family courts.<sup>111</sup> This is clearly unconstitutional based on S262 of the Constitution.
3. According to Sections 21-23, any person who marries off or betroths a child, whether a parent or a guardian has committed an offence and is liable, on conviction to a fine of N500,000.00k or imprisonment for a term of five years or both. And according to the Act a child is person below 18 years. This clearly contradicts the Islamic law position where marriageable age depends on the attainment of puberty and it puts the guardian/father who betroths or marries off his minor child or who attains puberty but below 18years, in danger of being convicted and sentenced.
4. The decision of some courts clearly contradicts the Maliki school of jurisprudence but gives more consideration to customary practices and this helps in fueling the insults of the so called human right activists and provides them with easy recruits from disenchanted mothers.<sup>112</sup>

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<sup>111</sup> ILIYASU SHAIBU V. JANET ILIYASU (unreported) as quoted in Muhammad Z.I., 'the role of shari'a and area courts in the determination and execution of award of maintenance in cass involving children' (18<sup>th</sup> Annual Judges' Conference, CILS ABU Zaria, 13th-14th December 2017)

<sup>112</sup> RAKIYAT SADIQ V. SADIQ ANIMAKUN (SCA, 2004). Kwara State Shari'ah Court of Appeal Annual report (2005). p.89; INUSA MUHAMMAD V. ZAINAB HAQILU (SCM, 2015). The original handwritten manuscript was utilised hence unreported; RABI



5. Reports of cases/instances of connivance between the guardians and the court to deprive the minors of their properties.
6. Apathy of northern Muslims towards the court especially in cases of inheritance and the failure of Muslims to uphold the practice of leaving bequests has greatly allowed for selfish interest of family members to override the Islamic law provisions hence leaving the guardianship of the minor and his property to persons not recognised as such by Maliki laws e.g. the uncles, elder brothers, the mother etc. (de facto guardians) who solely assume the powers of a *waliy mujbir* in most instances and completely squander the property of the minor or marry them off to persons detrimental to them.

### 1.8.2 Prospects/Recommendations

1. The courts should give judgments in conformity with the law applicable in their courts which is Islamic law according to the Maliki School of jurisprudence and not customs or the position in other schools of jurisprudence.
2. In applying the laws, the courts should consider the peculiar circumstances of each case in line with justice and equity. For example, a father who abandons (for no justifiable reason) his child's maintenance completely to the mother, should have no power of *ijbar* over the child.
3. Muslim organisations and Institutions should organise special lectures to sensitise the Muslims on the importance of leaving bequests in order to avoid the *lacunae* created by the absence of the *wasiy* which encourages the existence of de facto guardians.
4. Parents should discharge their duties towards their children especially in relation to maintenance as such failure provides the proponents of the Child's Right Act with available children upon whom they can act.

Example the situation of children abandoned to the society in the name of *almajiranci*.

5. The National Judicial Council should sanction any judge found to have applied a law different from the law applicable in his court as per the enabling laws of the court.

The Muslim community should strongly oppose the domestication of the Child's Right Act and where already domesticated, they should demand for the restriction of its scope of application to exclude Muslims. While at the same time discharging the rights of our children according to Islamic law in our family relations.