



Right of Mother on the Custody and Guardianship of Legitimate & Illegitimate Child under Muslim Law

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ABSTRACT

The personal and general law applicable to every community in India, in the relation to the custody and guardianship of the child, gives paramount importance to the welfare of the child. The burden of physical and mental care of the child rests on the mother in every personal law applicable in India, taking care of a child better than mother is not possible by any other person. Therefore, Muslim law also gives the mother right of custody (hizanat) of the child. Under Sunni school. The mother has the right to the custody of male child till the age of 7 years and female child until she has attained puberty and under Shia law mother is entitled the custody of male child till the age of two years, and the mother is entitled to the custody of her female child till the age of 7 years. In Muslim law, after attaining the prescribed age of the male and female child, the right of custody ceases to be converted into the right of guardianship (wilayat), which is transferred to the father, i.e. the right of custody assume the form of guardianship, the complete responsibility of guardianship lies on the father and father's side. But if the child is illegitimate,

whether the child is male or female, in Muslim law, the burden of bringing up such a child rests only on the mother, if the mother is absent then this burden falls on the maternal side. Therefore, Muslim mother has the right to the custody of both legal and illegal child, but there are many such circumstances described in Muslim law where the Muslim mother is deprived of the right of custody.

KEY WORDS- Legitimate, Illegitimate, Wilayat, Maternity, Walad al- Zina, Hizant.

A. Meaning of Legitimacy and Illegitimacy under Muslim law-

The term Legitimacy is derived from Latin word 'legitimus' which means lawful, in legal terms it means legitimate child born of parents lawfully married to each other. The legal status of a child at birth refers to the marital status of its mother. Legitimate children are those whose parents are married. The marriage (formerly illegitimate) when this is not the case. A child born outside marriage whose mother then marries is said to be legitimized by marriage. In India, our judicial system still allows the practice of personal laws. This means that every religions community or group can practice and follows their own personal laws, one such prevalent law in India is the Muslim law or sharia law. According to Muslim law a child that is born of a married couple called legitimate child. Hence if there is no marriage between the mother and the father of the child then such a child illegitimate and as per Sunni law, such child no paternity and as Per Shia law such a child has neither paternity nor maternity, by conclusion of the parentage under Muslim law is only available only a legitimate child. The status of legitimacy of child is an outcome of the paternity establish by existence of valid marriage. The Shia school of law says that a child who is born outside the lawful wedlock is not related to the father or the mother, called is "Filius-Nullius" which means child of known or a bastard. Therefore no right and duties are imposed on the father or the mother of the illegitimate Law. **According to Tyabji;** "Muslim Law appears to impose no burden upon the natural father of an illegitimate child. There can be no situation where the father accepts and admits of the illegitimate child to be his own but there is no Law which can legally recognize the illegitimate child. The prophet, (phuh) stated the following:

“ The child belongs to the husband
That is the owner of the bed.
The one who commits adultery
Is stoned and deprived”.¹

Islam completely forbids illegal sexual relation, if a Muslim man or women, whether a virgin or married establishes an illegal relationship between them, is called 'zina' in Arabic language. In

simply zina means establishing ‘illicit physical relationship’ which according to Muslim religion are completely forbidden. A child is born on the basis of zina, such child is called ‘haram’ in Islam. In Muslim Shia law such child called ‘filius nullius’ which means a child of no one or a bastard. Therefore no legal liability is impose on the father or mother of such child. The Sunni Hanafi School of law states that the mother of an illegitimate child has an obligatory duty to maintain the child till the illegitimate child attains age of 7 years.

1- How to Maternity established in Muslim law-

Personal law relating to any religion or community enacted in India considered that “MATERNITY” is the only legal relation between child and mother. In each case, the legitimacy/Illegitimacy of a child born out of the mother’s womb depends upon the marital relationship between the mother and the child’s natural father.

2- Meaning & Definition of Custody and Guardianship-

Under Muslim law custody is called “Hizanat” and guardianship is called “wilayat” in Arabic language. Guardianship and Custody are not taken in the same sense under Muslim law, both are completely different from each other. Before we proceed with the detailed study of the research paper related to the subject of Muslim law, before that, it is very important to understand the difference between a word custody and guardianship.

2(a) Custody (Hizanat)-

Custody right is known as ‘Hizanat’ in Muslim Jurisprudence. The word Hizanat derived from the in Arabic root “Hadhana”. Arabic Hadhana means “The distance between the armpits to the lions, the chest and the two arms and what include in between the can be summed up as Embrace or Hug”. In Sharia Hizanat means raising up or bringing or nursing of child². In other words, custody means complete care for a minor child i.e. his/her all round development like, physical, mental, economic etc. Nutrition in relation to a custodial infant is defined during that period when the child remains as a legitimate possession of a women of prohibited degree³. Under all Muslim school, generally the mother is only entitled to physical possession of the child until a certain age. It is natural that she obviously the best person to give that natural love and affection, which is very essential for a child during his infant Stage. Imambandi v. Mustsaddi⁴ Court observed that- in this case it is perfectly clarified that under Muslim law, a mother can keep a minor infant in her custody till a certain age. The age of girl and boy has been described in Muslim law of custody. Therefore, the mother can take the child under her custody. She cannot become his guardian-mother. Only the father can get a guardian, if he is not present, his executor is the legal guardian.

2(b) Custody (Hizanat) of Legitimate Male and female legitimate-

Hizanat in the case of male child appertains to mother until he become capable of eating, drinking and performing the other natural functions without any assistance, this rule apply on legitimate and illegitimate child⁵. The Shia, Malki and

Hanbali School, the custody of mother continues until she is married. But the Sunni Jurist believes that the custody of the mother ceases when the girl attains puberty⁶. There are some differences regarding the age of male child and female child in Shia and Sunni School relation to the custody of male child and female child by parents under Muslim law, which is as follows:-

2(b) (i) - Male Childs' custody under Shia and Sunni School-

- **Sunni School-** Mother is entitled the custody of male child until he has completed the age of seven years, father is entitled the custody of a male child over the seven years of the age.
- **Shia school-** Mother is entitled the custody of male child till the age of two years, Father is entitled the custody of a male child over two years of the age.

2(b) (ii) – Female Childs' custody under Shia and Sunni School-

- **Sunni School-** The mother is entitled in Hanafi law to the custody of her female child until she has attained puberty. In the Hanafi law father is entitled to the custody of female child who attained puberty.
- **Shia School-** The mother is entitled in Shia law to the custody of her female child till the age of 7 years. In Shia law the father is entitled to the custody of an unmarried girl of 7 years or more.

2(c) - Custody (hizanat) of illegitimate child Male and Female child-

Walad al- Zina, This is Arabic word which means illegal i.e. a child whose mother and father had no legal matrimonial relationship, in other words a child born by fornication. And natural father of the child has refused to accept him/her. Because father's disagreement related to the child, which declares to be void the legal obligation arising between the father and the child such as the rights of inheritance and succession⁸. The prophet (S.A.W.) said- "If a Muslim Man commits a physical relationship with a woman or a slave woman without marital relationship, he has committed fornication, the child born of such relationships the products of fornication. Such a child is not considered to belong to anyone and has not right in ancestral property⁷. The guardianship and custody of the illegitimate child transferred only to the mother's favour. Therefore, she is entitled the only natural guardian of her male and female illegitimate child. In the absence of the mother custody goes to mother's relatives. In the case Gauhar Begum v. Suggi⁹.

Facts – Gahur Begum was a women of dancing and singing, who lived without marriage with a Hindu male named Trivedi. She gave birth to a daughter, Anjum, acknowledged by Trivedi as his daughter. Anjum was sent to live with a women named Najma Begum. After some time Najma Begum refused to send anjum back. Gahur Begum made an application under sec. 491 of

the code of criminal procedure for recovery of the child from the respondents. The refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of sec. 491 of the criminal processes code 1973.

Decision-

In this case the Mumbai High Court had given a decision in favor of respondents, but the supreme court said that when analysis, come to the conclusion that the discretion was not legally exercised. The Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not Judicially Exercised. The Supreme Court overturned the judgment and saying that under Muslim law, the mother of illegitimate girl is entitled to custody of her child and the refusal to restore the child to its mother was illegal detention. Also the Supreme Court held that, the court should look prima facie at where the child's interest lies. Thus by the mother has the right to that she can enforce such right by habeas corpus writ.

2(c) (i) Islamic Presumption about legitimacy:-

Under Muslim law following presumption are mentioned about child legitimacy-

- A child born before 6 months of a marriage is considered illegitimate. However the father can acknowledgement such a child to change the legitimacy status.
- A child born after 6 months of the marriage is legitimate unless the father disclaims it by accessing his wife for adultery.
- A child born after the dissolution of marriage is legitimate if he/she born within 10 months of the dissolution (Shia Law); within 2 years of dissolution (Hanafi Law).

3. Guardianship (Wilayat) –

The Arabic word Wilayat derived from wila, guardianship is called in Arabic term Wilayat which means protector, helper, to embrace, authority or supervision. According to classical Muslim Jurists Wilayat has four dimension-

- (a) **Wila-e- Muhabbat-** the right of love and devotion
- (b) **Wila-e- imamat-** authority in spiritual guidance
- (c) **Wila-e- Zi'amat-** Authority in Socio and political guidance.
- (d) **Wila-e- Tasarruf** – Authority of the universal nature

But the purpose of Wilayat and its prescribed four dimension in legal term to provide physically, spiritually and mentally i.e. an overall supervision of the child's personality. According to Holy Quran-“Father is the legal guardian of the child, since he is head of the family. This will be true in all support according his income and means¹⁰. Legally the term guardianship is defined in the guardian and wards Act, 1890, section 4(2) of this act held that- Guardian means a person having the care of the person of a minor or his property or of both his person and property. And section 4 (3) define that ward means a minor for whose person or property or both there is a guardian. A guardian is legally defined as the care of a minor child or his property. According to Muslim

Jurist, a father is considered to be a natural and legal guardian, therefore, the father has been entrusted with the responsibility of maintenance of his child.

Now becomes clear that there is a difference between both guardianship and custody. **Custody is the entitled mother, which she can only get to a minor till a certain age, and the guardianship transferred after the child attained a certain age in favor of the father.** The holy Quran and other prominent sources of Muslim Jurisprudence also show that the parents are entitled only to a certain age till the guardian of the minor child.

4. Grounds which deprives a Muslim mother of custody

4(a) – On completion of the period of custody-

On completion of the period of custody, the mother herself is deprived of the right of custody. After the completion of the custody period, the Muslim boy and girl does not give the option before having a majority that they should be the guardianship of either of the parents, rather it becomes necessary for them that after completing the certain age of custody the should remain in the father's guardianship¹¹. And in the absence of the father, this right goes in the following order in to relatives of the father ancestral-

- (i) Grandfather;
- (ii) Full brother;
- (iii) Half-brother;
- (iv) Full brother's son;
- (v) Half-brother's son;
- (vi) Father's full brother;
- (vii) Father's half-brother;
- (viii) Father's full brother's son;
- (ix) Father's half-brother's son;

Shia Law- If mother is absent and disqualify by any Laws, the children's custody will be handed over the father and in the absence of the father, and the father's is entitled to the custody of the children.

4(b) - Forfeiture of the mother's right of custody-

The mother and other women relatives class are deprived of the right to custody of a child if she-

- (i) Negligent in taking proper care of the child.
- (ii) Leads are immoral life.
- (iii) Converts in other religion.
- (iv) Marries a man who not comes n relationship of prohibited degree of minor childlike if the child's mother remarries with the child's father's brother. So she is not deprived

of custody rights. Because the marriage of uncle and niece is forbidden in Muslim Law.

- (v) During the subsistence of marriage, she goes and resides at a distance from the father's place.

In judgment of *Rahima Khatoon v. Saburjanessa*¹² the honorable Court said that- mother loses the custody of her minor daughter, if she remarries with a person, who comes in child's prohibited degree. Then the court granted the certificate of guardianship to the paternal grandmother with regard to the minor's person and property. Due to above prescribed default in other female relative of mother or mother the right of custody will go the following persons according to the order:

- (i) Father
- (ii) Grand father
- (iii) Full brother
- (iv) Consanguineous brother
- (v) Full brother's son
- (vi) Consanguineous brother's son
- (vii) Father's full brother
- (viii) Father's consanguineous brother

4(c) – After the death of mother-

The right of custody automatically ceases after the death of mother, in the absence or incapacitation of the mother, the custody of minor child until he attains the age of puberty belongs to the following female person in the order of priority-

- (i) Mother's mother how high so ever;
- (ii) Father's mother how high so ever;
- (iii) Full blood sister;
- (iv) Consanguine sister;
- (v) Uterine sister;
- (vi) Full sister's daughter;
- (vii) Consanguine sister's daughter;
- (viii) Maternal aunt
- (ix) Paternal aunt

Under Shia law- When the mother dies before the son attains 2 years age and the daughter attains 7 years age custody goes to the father and in the absence of father, the grandfather is entitled to the Muslim legitimate child only.

4(d) - Custody after divorced and widow Muslim women belongs to the-

Underlying principle in the Holy Quran is that parents should not suffer their children when they are divorced with each other¹³, when they are divorced with each other¹³, is that divorce occurs due to the failure of the parents' marriage whether Kula, Mubarat or any other kind of divorce. The custody of the children should be pre-disposed so that the children can avoid to the mental and physical harassment, because the word custody means not only the care of the child like mental, physical and financial care. The right of custody is absolutely different from the right of guardianship, custody right goes towards the mother's favour till the certain age of the child as soon as the child attained the age of puberty, this right naturally transferred to the father's favour as a guardian. In case *mst. Haid v. Javed Ali*¹⁴, Court said that mother is entitled to the custody of her child even if she has been divorced by the husband or has become widow provided she remains unmarried. In *S. Rehan Fatima v. Syad Bdinuddin Perviz*¹⁵, in this case the dispute between the parents was in relation to the custody of the child of 3 years 6 months. The father wanted to separate the mother from the child and take her into custody. The Andhra Pradesh Court held that Muslim divorced women have full & foremost right to keep the child in their custody, even her marriage broke down by Khula, mubarat or any other kind of divorce, and she will not be denied the right of custody, provided she remains unmarried. Further, the Court said that in the absence of any other alternate guardian's arrangement under the Guardian and Wards Act 1890 too her right to the custody of child continues even after the divorced.

5. Devolution of custody and guardianship where mother is disqualified-

The mother or any other female disqualified from the minor's custody on the following grounds, if she-

- (i) Has become a prostitute.
- (ii) Has become a professional singer or dancer.
- (iii) Has committed adultery.
- (iv) Unable to take proper care of the child.

In Case- *Poolakkal Ajisakutty v. Parat Abdul Samad*¹⁶ in this case the minor's mother committed suicide, child lived with his maternal grandmother, who was suffering from serous diabetic disease and completely depended on her second daughter. The Court held that grandmother's condition is completely not well. She is not able for the custody. Hence the child's custody is entitled to the father, even if he has remarried.

- (v) Marries with a person who does not come in the prohibited relationship of the child. In case *Rahima Khatoon vs. suburjanessa*¹⁷, the natural father of a minor child has dies. The child's mother got married with another person, who not related to the child within prohibited degree of relationship. The Court held that mother has remarries with a person who not comes under the child's prohibited degree. Therefore, the court granted a certificate of minor's property and guardianship with reference to his paternal grandmother.

(vi) During the marriage, she goes and resides at a distance from the husband's place.

Conclusion and suggestion-

Every established law considers that is welfare of the child is paramount which cannot be ignored under any situation, and no one can do better of child then mother or father. When the child is in infancy stage, he/she needs complete nutrition and care. Therefore, the right to care for a certain age in infancy is entrusted to the mother rather than the father. The law also entrusts the right of custody in favor of the mother. Similarly, when a child attains the certain age prescribe by law, the right of custody naturally changes in guardianship, which becomes inherent in the father's favor. The law consider the father more suitable then the mother for taking mental, social and entire care of child. Muslim law gives the right to the custody of a legitimate child, Muslim law is completely silent except in the Hanafi School regarding of an illegitimate child by mother. The question of the legality of an illegitimate child always comes to the fore because such a child lives whole life without the identity or legal rights of the father. There is no existing procedure established to legitimize a child. Whereas Illegality creates a hindrance in the mental and emotional development of the child. Therefore, there is urgent need to pay attention to the illegitimate subject so that the development of illegitimate child can be done.

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