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Original Article

Legal Capacity of Marriage and Guardianship of Disabled Person in Pakistani, Islamic, and International Law

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ABSTRACT

Recently, a bill was passed by the National Assembly of Pakistan regarding the rights of disabled people in Pakistan, and there are many developments in international law to protect the rights of disabled people. In this study, I will discuss all the family rights of disabled persons in Islamic, Pakistani, and international law. Unfortunately, people on various levels of the handicap spectrum face many problems, and one of the greatest among these is financial difficulty. In this context, the study targets several objectives, such as critically analysis the role of society and government in working together to pursue a coordinated approach towards ensuring family and individual security according to Islamic law; evaluating the existing position and improvement in institutional mechanisms for disabled persons; examining existing laws in other countries regarding disputes and issues arising in families of disabled persons; constituting a mechanism to prevent conflicts between families and individuals by addressing the problems of disabled persons and suggesting progressive solutions; and promoting a supportive family culture for disabled persons in Pakistan. The research is descriptive and qualitative in nature, based on the theoretical framework of UN Articles, constitutional rights, Quranic verses, and Ahadith related to family matters. Provincial and regional enforcement procedures will be comparatively reviewed. An analytical and critical approach will be adopted to examine issues related to loopholes in legal and social systems. Relevant books will also be consulted. The research includes official and secondary sources such as law magazines, journals, articles, commentaries, blogs, general comments, international jurisprudence, and human rights documents. Internet sources will also be used for data collection. Together, these form the secondary sources of the thesis. Although Pakistan has signed various conventions passed by the United Nations for human rights, the government has not yet formed a ministry for differently-abled persons to manage and supervise their affairs, even though they constitute a prominent portion of society.

Keywords: Legal Capacity; Marriage, Guardianship, Disabled Person, Pakistan, Islamic & International Law

Introduction

Disability is not a curse by God. A disabled one has not taken it by himself to be handicapped or mentally retarded or blind so that he could not live an easy life. It is the Almighty's choice. Preferably we need to live in a decent and sophisticated society where we have the certainty and regard to express our real thoughts and have the chances everybody has. The notions communicated and the option to be treated with respect and to have similar freedoms as other individuals from the general public ought not to be an excessive amount to be requested. However, many disabled and their families and companions are yet to encounter separation in the general public. Segregation by the general public against people with disabilities depends on insight and generalizations instead of on the presence of real, practical constraints. That is alluded to as "social crippling." Hence, the disabled are helpless against social debasement. To impact an adjustment, we need to improve their abilities since social worth is generally agreed to by individuals who are seen as capable and gifted. Every last exertion can have a huge effect, and expectation can conquer skepticism. Determination can beat material if residents of the general public can tackle the most impressive energy in the requests of the 21st century. Human civilization has consistently tried to wrestle with the horde difficulties of handicap at different phases of its turn of events. A Probe into the historical backdrop of the situation of the disabled in the general public and the mentality of the general public towards them through the ages won't just assist us with understanding the inability in legitimate viewpoint yet additionally illuminate the changing demeanor of the general public towards them.

Hukm of Marriage in Islam for Disabled Person

Marriage is another illustration of people's social equality. The Qur'an states that this right is for all Muslims: *"Among His signs is that He created for you spouses from among yourselves so that you may find tranquillity in them."* (Al-Rum, 30:21) There has been an outstanding discussion between Islamic researchers and doctors over whether the mentally incapacitated ought to be permitted to get married. For instance, in the principal meeting held in 2002 by the Mental Retarded Society under the management of Al-Azhar University in Egypt, a few researchers contended that it is worthy and is the right of individuals handicapped in this manner to get married. That is because sex is a natural drive and ought to be met. They proposed that marriage will help control any sexual conduct that may be polished and shown improperly by such people. Also, an Egyptian senior legal adviser, Ali Juma'a, expressed that individuals reserve the option to get hitched and have their own families. It may be insightful to show that his decision depended on the right of fairness inside Islam for all individuals to gather their necessities. Likewise felt that marriage should be under certain conditions and with a guardian's oversight.¹

There are seven categories mentioned by the Pakistan Census Organization while publishing data on the national population of Pakistan in the census of 1998, which are crippled, insane, mentally retarded, multiple disabilities, blind, deaf, mute, and others (Ahmed, Khan, &

¹ Morad, Mohammed, Yusuf Nasri, and Joav Merrick. "Islam and the person with intellectual disability." *Journal of Religion, Disability & Health* 5, no. 2-3 (2001): 65-71 & Hiam Al-Aoufi, Nawaf Al-Zyoud, and Norbayah Shahminan, "Islam And The Cultural Conceptualization Of Disability," *International Journal Of Adolescence And Youth*, 2012, doi:10.1080/02673843.2011.649565

Nasem, 2011).² Pakistan Bureau of Statistics has given disabled population data for the year 2020 with the categories mentioned earlier, which are as under (PBo, 2012):³

Table 1: Disabled Population in Pakistan by Nature of Disability (2020)

Administrative Unit	Total Disabled Population	Blind	Deaf/ Mute	Crippled	Insane	Mentally Retarded	Having Multiple Disability	Others
Pakistan	3,286,630	8.06%	7.43%	18.93%	6.39%	7.60%	8.23%	43.37 %
Rural	2,173,999	7.92%	7.53%	20.52%	5.94%	7.32%	8.23%	42.55 %
Urban	1,112,631	8.32%	7.24%	15.81%	7.28%	8.15%	8.22%	44.97 %

Source: Pakistan Bureau of Statistics (PBS). *Disabled Population by Nature of Disability*, 2021. Retrieved from <https://www.pbs.gov.pk/>

Pakistani society doesn't give a lot of consideration to disabled people. They are not heard, seen, or tallied. They don't track down any positive climate in the field of abilities improvement, instruction, and day-by-day schedule. Presently, significance is given to kids more than grown-up disabled people. They face troubles in each circle of life, whether legitimate, practical, social, or political. Disabled people are not given any blessing concerning measurable information about their populace, special principles and guidelines, treatment focuses, and mainstreaming specific administrations for them.

Surprisingly, the government of Pakistan has not set up any ministry or department so that the issues disabled persons face in their daily routine can be focused on and solved in the first instance. That also causes a lack of policies at the national level for the welfare of disabled ones, & they remain out of focus. The government has worked somehow for the rights of disabled persons as certain legislations and laws are made specifically for their rights and welfare. Pakistan signed and approved the UN Convention on the Rights of Persons with Disabilities in 2011. Still, the government has made proper legislation to ensure the rights be given to the disabled as described in the Convention by the UN. The government of Pakistan introduced the first law to protect the rights of the disabled in 1981, but it was not as proper as it should be. Though the law ensured that the disabled were an equal part of the society, and they were given a job quota of 1%, which later was increased to 2%, this law did not address the issues faced by disabled persons in Pakistani society. This law was not enforced by the government wholeheartedly.

This law lacked a proper strategy to tackle the issues disabled ones were facing in Pakistani society. Under this law, all provinces were bound to make legislation at the provincial level for the betterment of disabled persons. The national council was made to pave the way toward policymaking for rehabilitation and the well-being of disabled ones. This law proved

² Ahmed, Mughees, Abdul Basit Khan, and Fozia Nasem. "Policies for special persons in Pakistan: Analysis of policy implementation." *Berkeley Journal of Social Sciences* 1, no. 2 (2011): 1-11 & *National Policy For The Persons With Disabilities* (Government of Pakistan, 2002).

³ Hussain, Sajjad, Akhtar Munir, and Muhammad Ibrar. "Children with disability: Problems and challenges in Pakistan." *The Journal of Humanities & Social Sciences* 28, no. 1 (2020): 87-99.

inefficient in addressing the issues, i.e., employment and rehabilitation of disabled persons. There have been two significant judgments by the Supreme Court of Pakistan to ensure the rights of the disabled, which gave to every citizen of Pakistan through its constitution of 1973.

Unfortunately, the traditions of Muslim families in looking after a disabled child are not so impressive, and they are not the way they should be keeping in view the teachings of Islam. A disabled child is considered the wrath of God, or God punished the family by giving them this kind of child. The teachings of Islam are not like that. And the child suffers because of this attitude of his family towards him, and he cannot get proper medical treatment. When the Almighty gives a Muslim family a disabled child, it is considered a source of shame and sorrow. They tried to keep it hidden from the eyes of society to avoid what people would say when they looked at disabled children. The Holy Prophet PBUH has guided us through his behavior towards disabled ones, how they should be treated and that they are an equal part of society.⁴

Looking at the world population, we can see that almost 10% of the world population is disabled in terms of any of the disabilities mentioned earlier. Among these 600 million, there are 66% belong to developing countries. That is because the way the disabled are looked upon by the developed and developing nations is different. Also, developed nations have more health care facilities compared to developing countries. At the International level, there was no proper legislation to make states bound to provide the disabled with equal opportunities and rights till 1975. In the year, a bill was passed by the United Nations for the protection of the rights of disabled persons. Though this law was introduced, it did not impact member states of the UN to legislate locally in this regard.

In Islamic Law, a person's eligibility to perform certain duties and be entitled to rights is considered under the term "ahliyyah." This term means the capacity of a person to perform actions or duties. Furthermore, it divides into two categories, "wujoob & ADA" which can be translated as "passive legal capacity, active legal capacity." Islamic law gives rights and obligations to every human being, even in their mother's womb. In other words, every Muslim is entitled to rights and obligations. Active legal capacity would come where a person needs to fulfill his duties. Disabled persons are entitled to all rights given by Islam and are bound to perform their duties as well as they can.

According to Islamic Law, there has been another division of "ahliyyah" or "eligibility," In that division, there are three types of eligibility: complete, deficient, and imperfect. Complete eligibility is full-fledge eligibility to attain rights and fulfill duties. Deficient capacity comes when there is no proper basis for an entity to get rights or fulfill duties like a minor. Insufficient capacity is when a situation refrains an entity from enjoying its rights and duties like an insane mind. Many causes have created a hurdle for people to be entitled to complete active legal capacity like minority, insanity, idiocy, etc.

In the eyes of Islam, all human beings are equal, as it has been stated by the Holy Prophet PBUH in a hadith that no one has any superiority over others. Likewise, all disabled and bodily abled are equal according to the teachings of Islam. Disabled people should be treated well by society because they are dependent upon others due to some situations. There should be taken care of, and their needs should be fulfilled. Islam considers disabled people an integral part of

⁴ Ahmed, Mughees, Abdul Basit Khan, and Fozia Nasem. "Policies for special persons in Pakistan: Analysis of policy implementation." *Berkeley Journal of Social Sciences* 1, no. 2 (2011): 1-11.

society and is given every opportunity to perform their duties if they can. For example, a blind person can be an Imam of a mosque, lead the prayer, become a judge, etc. When he left Madinah, the Prophet PBUH gave an important responsibility to Hazrat Abdullah Ibn Umme Maktoum.⁵

Every disabled who can perform some duties on his own is given the authority to do so. Islamic Law only distinguishes an insane person with an unsound mind from others. A blind can perform all verbal tasks on his own except writing, for which he would need a guardian. Similarly, the deaf can speak in his favor and read if he knows how to read except what his opponent is saying, and for that, he would need a guardian who would expound to him what was being uttered in front of him. An insane need a proper guardian, who would need 24-hours care and attention. His guardian will do all his tasks and be responsible for managing what he owns. An insane idiot cannot perform their financial tasks and would need a guardian. Their guardian appointed by the state or his family members would do that all for them. Another important point is that an insane and an idiot are similar to a minor in Islamic Law provisions for them. Like a minor, all their financial transactions would be considered void because there could be a risk of loss for them as they are unaware of what is good or bad for them.⁶

Every disabled person is entitled to pay Zakah as this is mandatory by the Almighty for every Muslim with wealth that comes under Zakah's bottom line to be paid. Islamic jurists say that every person, either disabled or bodily abled, is under the obligation to pay Zakah if he holds an amount throughout the year, fulfilling the criteria for Zakah to be paid. A minor, an insane, and an idiot are also under this obligation, and their guardian would pay Zakah from them by taking it from their wealth. Only Ahnaf has a different point of view, stating that when a person cannot perform financial activities for his benefit, he is not entitled to pay Zakah.

Education is considered a basic human right in modern times. Many international laws and covenants have been passed stating that all human beings are entitled to an education, and every state must provide its citizens with the best education facilities. When it comes to disabled ones, it becomes more important as they lack some physical characteristics, and education can enhance their capabilities and live better life. The Pakistani government has somehow worked in this regard. The government made a policy in 2002 after consulting all the ministries and taking all stakeholders on board for the welfare and well-being of the disabled. This policy aimed to include all disabled in every aspect of life and make things easy for them in this regard. There was a fund for the welfare of disabled ones and to educate them and make them skilled through vocational training to run daily affairs of life on their own.

When the medical rights of disabled people are discussed, it becomes more evident that they need more care and attention than physically and mentally fit others. The international community has recognized that every disabled person should be entitled to the highest possible standard of medical treatment. The UN has asked every member state to take steps in this regard. The UN suggests that disabled persons should be provided with medical facilities freely, and there should be some specific medical services and treatments for them, keeping in mind the nature of

⁵ Dr. Muhammad Fawzy Hasan Abdel-Hay, "Mental Disability In Islamic Jurisprudence From A Moral Perspective," *Journal Of Faculty Of Languages And Translation*, no. 15 (2018): 56-62.

⁶ Ibid.

their disability. It is sought that there should be no discrimination in providing medical facilities to disabled and physically fit persons.⁷

Marriage is a social contract. It is a contract through which humanity has developed for ages. It is a sign of social equality. Disabled persons are given equal rights; hence they are free to form a marriage contract, and there are no restrictions upon them in this regard. A meeting conducted at Al Azhar, Egypt, argued that the right to marriage should be given to disabled ones as sex is a natural desire. If they are restrained from doing so, it can result in some criminal activity to fulfill this desire. A blind who cannot sign his marriage documents can take the help of his Wali or Wakeel. Deaf can perform Ejaab and Qubool by writing.⁸

The exception is the case of an insane idiot. If their guardian thinks marriage can bring any good to their lives, he can get them married even to a woman like them. At the same time, the guardian has the right to end this marriage if he is of the viewpoint that this marriage can be a bad practice for them and there can be any harm to them. There is a question about the free will of a developmentally disabled person, how they will show their consent for marriage and if not, would that marriage be legal. The answer to that is a mentally retarded one cannot give his consent. He cannot even run his daily affairs of life. That's why there needs a guardian for him to take care of him and give him the attention he wants. So, a person who cannot show his free will for doing some act is exempted from doing so. His guardian has the authority to perform acts that he thinks are good for him.⁹

In the 21st century, many rights have been given to disabled ones on a national and international level that one cannot think of in the 20th century. There are many international and national legislations, covenants, and conventions to safeguard the rights of ones who are a bit different from others, and that's why they are called special ones. All international laws for the welfare of disabled persons assure that they should not be discriminated from others and should be given equal opportunities compared to others. They should be given more care and attention than others. So, there is no single act disabled persons are restricted from doing. Since they cannot perform some acts, they are allowed to have a guardian who would take care of their matters.

The only exception is insane, who cannot understand what is good and bad. Law makes his guardian responsible for all his affairs. Since an insane is not in a sound state of mind, some acts cannot be performed by his guardian, like adopting a child. That is because the person who is developmentally disabled is himself a responsibility of his guardian; how can he take responsibility for anyone else? When a mentally retarded is married to a woman who is of sound mind, and they have children, the woman should be responsible for taking care of them, and in case of any dispute, a court would give her custody of her children. If she demands any financial aid from her husband, the guardian would be responsible for paying that amount as decided by the court when and how.

A few researchers considered marriage an obligation above a sexual practice. They felt that, along these lines, 'intellectually debilitated' people are not fit for dealing with this duty, even

⁷ Ahmed, Mughees, Abdul Basit Khan, and Fozia Nasem. "Policies for special persons in Pakistan, 8-9.

⁸ Morad, Mohammed, Yusuf Nasri, and Joav Merrick. "Islam and the person with intellectual disability, 67-70.

⁹ Ibid.

with guardianship. This discussion is progressing, and legal advisers have various translations and feelings. Miles expressed that the discussion among Muslim researchers and legal scholars over intellectually debilitated people's social liberties had existed in Islamic history for quite a long time, sometime before Europe existed.¹⁰

Discussions about the consent of individuals with significant mental disabilities are constantly raised. People with mental disabilities can't communicate their free will. In the present circumstances, their guardians must settle on their genuine individual undertakings and deal with their different necessities. Like this, if they have any hint of thinking and can communicate their view, the guardian ought to counsel them. In all cases, it will ensure a reasonable and helpful choice. Under Islamic law, a mentally hindered individual is viewed as a minor (Abdel-Hay, 2018).¹¹

According to the Ḥanafī and Shafī'i legal experts, a guardian may truly lead the marriage agreement for an individual with a mental disability under his guardianship, regardless of whether his mental disability is inherent or procured. As per the Shafī'i noticeable mufti Ibn Ḥajar al-Haytami, a grandfather's father is so attached to his little girl/granddaughter that they are quick to do what is good for her greatest advantage, so their assent is a condition for her marriage.¹²

Indeed, even a mature child may truly direct the marriage of his mentally hindered mother on the off chance that he finds that she needs marriage in the wake of being empty or separated. Notwithstanding, without a nearby guardian, the adjudicator or the ruler will embrace the obligation of thinking about the well-being of a lady with a mental disability, including her marriage. In other words, the guardian is approved to consider the advantages of a lady with a mental disability under his guardianship to get her well-being. A similar decision is pertinent to men with mental disabilities; their guardians will think about their conditions and do what is good to their greatest advantage.¹³

Then, permits the marriage of a man with any mental disability to any lady with a similar illness. But it is invalid concerning the guardian to give a lady with mental disability in union with a eunuch, feeble man. If a normal individual weds a lady with a mental disability, he should treat her reasonably and sympathetically, giving her due portion of arrangement, garments, home, and intimacy. Here, the Sharia is quick to promise her due to marital and monetary rights in the event of marriage.¹⁴

Islamic law has no distinction between a physically abled and a disabled one. They both can enjoy equal rights given to them by the Shari'ah, except those who have an impairment causing to create hurdles in doing some actions like a handicapped who cannot write. Or deaf who cannot hear what's happening around him, blind who cannot see, or mentally retarded with

¹⁰ Disabled Population By Nature Of Disability | Pakistan Bureau Of Statistics, " *Pbs.Gov.Pk*, 2021

¹¹ Dr. Muhammad Fawzy Hasan Abdel-Hay, "Mental Disability In Islamic Jurisprudence From A Moral Perspective," *Journal Of Faculty Of Languages And Translation*, no. 15 (2018): 56-62.

¹² Ibid.

¹³ Ibid.

¹⁴ Fawzia Afzal-Khan and Kalpana Seshadri-Crooks, *The Pre-Occupation Of Postcolonial Studies* (Durham [NC]: Duke University Press, 2000), 66-69.

the option to have a guardian who can run their affairs instead of them. So, on marriage papers, a guardian can sign for a handicapped or blind as his guardian.¹⁵

Ibn Ḥazm even states 'Umar's explanation that if a lady, after fulfillment, is demonstrated to experience the ill effects of madness, uncleanness, or elephantiasis, she is yet qualified to accept her mahr (a required conjugal settlement that a man pays for a woman). This Sharia-based disposition is even shown if there should arise an occurrence of closeness outside marriage. For instance, if a rational man has sex with a mentally hindered lady, she isn't just liberated from fault, yet he should pay for her a mahr equivalent to that normally given to her peers. Al-Bukhari has a part named "la Yurjam al-Majnūn wall Majnūna [A crazy man or lady isn't rebuffed by stoning]." He alludes to their being excluded from discipline in ḥudūd, for example, recommended punishments.¹⁶

Divorce of Disabled Person

After marriage, the guardian might think it is destructive to the individual under his authority. Then, at that point, the guardian can again end the marriage on the ground of getting the well-being of those under his care. On the off chance that an individual with mental capacity recuperates and holds mental forces, she/he has the alternative to proceed with this marriage or end it, yet the choice whatever possibly will influence the economic privileges of the other accomplice. In all cases, it is important to guarantee that the individual with a mental disability is tranquil; there is no normal damage to the next accomplice in marriage. The guardian ought to likewise consider their requirements for sexual longing and their right to happiness.¹⁷

A blind or handicapped can give a divorce to his wife through his guardian like a mentally retarded one. The difference is that a mentally retarded one is wholly dependent upon his guardian in all his routine works while a blind is only dependent on having a look upon something or a handicapped in the sense that he cannot sign a legal document. So, their guardians would perform these kinds of actions upon their will and intention to do so. A mentally retarded one will depend on his guardian and be responsible for all his affairs to be done carefully and attentively.¹⁸

The Muslim marriage is a common agreement, and it emerges rights and obligations to both husband and wife. If the husband has neglected to perform, without sensible reason, his conjugal obligations for a time of three years, it gives a reason for the activity of faskh to the wife. Jurists have properly argued that giving a comprehensive rundown of the husbands' commitments to marriage is truly challenging. Nonetheless, Jurists have recognized a portion of the significant commitments of the husband and wife, which might be supposed to be illustrative. In short,

¹⁵ Imran Ahsan Khan Nyazee, *Outlines Of Islamic Jurisprudence* (Islamabad: Advanced Legal Studies Institute, 2005), 88.

¹⁶ Dr. Muhammad Fawzy Hasan Abdel-Hay, "Mental Disability In Islamic Jurisprudence From A Moral Perspective," *Journal Of Faculty Of Languages And Translation*, no. 15 (2018): 56-62.

¹⁷ Dr. Muhammad Fawzy Hasan Abdel-Hay, "Mental Disability In Islamic Jurisprudence From A Moral Perspective," *Journal Of Faculty Of Languages And Translation*, no. 15 (2018): 56-62

¹⁸ Imran Ahsan Khan Nyazee, *Outlines Of Islamic Jurisprudence* (Islamabad: Advanced Legal Studies Institute, 2005)

'marital commitments' is a term of more extensive importance and will incorporate pretty much all that which is fundamental for the duration of the cheerful wedded life.¹⁹

The wife can look for faskh if the husband is experiencing craziness, sickness, or venereal infection. The Muslim law specialists have not separated the kinds of mental problems and have utilized "Janun" from a comprehensive perspective to incorporate a neurotic, a numbskull, or an individual of a shaky brain. A crazy child isn't of the rational brain and experiences a confused state of the psyche, so he can't control his activities. This condition might occur because of illness, mishap, shock, etc. Further, the change from motivation to craziness might be gradual. So, in an English case, *White v. White*, it has called proper attention that the child's light might blur progressively and subtly so that individuals may not know or understand his condition until the obscurity ends up unmistakable.²⁰

Under the Shafi School, the life partner has the right to ask when the other companion is crazy or has some comparable infection, whether previously or after the marriage. The culmination of the marriage will not influence the right at all. This standard is dependent upon the condition that the gathering ought to be ignorant of the state of the other mates who experienced the illness before marriage. Under Hanbali School, a companion is qualified for the task when the other life partner experiences craziness or other similar genuine infection irrespective of the reality, whether the sickness was at that point present before the marriage or had shown up hence and regardless of the reality whether the marriage had or had not been fulfilled.²¹(Mehrajuddin, 1985)

This comes under the *United Nations Convention on the Rights of Persons with Disability*, which stresses in article 1 the full and equivalent delight in every basic liberty and fundamental opportunity by all people with inabilities, including the individuals who have long haul physical, mental, scholarly or tangible disabilities while article 23 gives that.

"State Parties will take viable and suitable measures to dispose of oppression people with handicaps in all issues identifying with marriage, family, parenthood, and relationships."²²

Right of Disabled Person to Become Guardian of a Child

The Guardians and Wards Act 1890 utilizes the term 'guardianship of individual' for authority and the term 'guardian' for overseer. In 1972 in *Juma Khan v Gul Ferosha*, the Peshawar High Court characterized guardianship as genuine or valuable belonging with the end goal of security. In 1988 in *Sultana Begum v Mir Afzal*, the Sindh High Court characterized guardianship as the 'childhood of a minor youngster by the mother or by somebody legitimately qualified for it. Furthermore, the mother might lose her right to guardianship in exceptional conditions.²³

¹⁹ Mir Mehrajuddin, "Divorce Under Islamic Law," *University Law Review* 9 (1985): 315-349

²⁰ Ibid.

²¹ Rafiq Zakaria, "Status Of Women In Islam," *Muslim India* 8 (1983): 307-368.

²² Claudet, Joachim, Diva J. Amon, and Robert Blasiak. "Transformational opportunities for an equitable ocean commons." *Proceedings of the National Academy of Sciences* 118, no. 42 (2021): e2117033118.

²³ Sabreen, Mudasra. "Custody in Islamic Law." *Islamic Studies* 56, no. 3/4 (2017): 223-244.

In *Mst. Imtiaz Begum v Tariq Mehmood*, the court held that during breastfeeding, the mother has a special right of guardianship, and if the mother doesn't feed the kid, she will lose her right to authority. To this end, the court turned to the accompanying sections of the Qur'an: 'No spirit will have a weight laid on it more prominent than it can bear. No mother will be dealt with ridiculously under her youngster, nor a father because of his kid' and 'Let the lady live (in 'iddah) in a similar style as ye live, as indicated by your means: disturb them not, to limit them...'. The court deciphered these refrains as implying that neither of the guardians ought to be troubled or treated unreasonably because of the youngster. This implies that the mother can't leave the youngster or decline to nurse the kid as it would add to the weight on the father to employ a medical caretaker for his kid.

Moreover, a father prevents a willing mother from caring for the kid. In this situation, the court interprets breastfeeding as a justification for granting authority to the mother. In any case, this decree conflicts with the usual Islamic law standards. Thus, if a mother, after separation, won't nurse the youngster, the father is obliged to connect with a wet medical caretaker, and the mother can't be denied guardianship based on her refusal to nurse the kid.²⁴

For the most part, a mother has an option to the authority over her child till the age of seven, while she holds the little girl's care till her adolescence, in *Mst. Imtiaz Begum v Tariq Mehmood*, the Lahore High Court permitted the mother to keep the youngster till it had achieved the age to get formal instruction. As indicated by the court, this age would be resolved by the custom of the space of the parent's home. The court expressed that setting the age at seven or nine isn't a prerequisite of Islamic law. If the age at which a kid begins school is made the norm for end of care, a mother will be permitted to keep the youngster till the kid becomes three and a half years old as that is the age at which a kid begins going to class in the vast majority of the Pakistani urban areas. In a town, likely this age will associate with five years which is not exactly the age fixed by the legal advisers. In any case, most courts have not followed this approach and consider the mother qualified for guardianship of a kid till seven years and a young lady till pubescence. The previously mentioned case is a model where the adjudicator strayed from Islamic law, and such choices influence the privileges of the caretaker too. Be that as it may, had laws identifying with the time of guardianship been set down, judges would not have had the option to practice their carefulness.²⁵

Per the case law, there are certain capabilities for overseeing a youngster. In *Imtiaz Begum v Tariq Mehmood*, the Lahore High Court, while talking about the capabilities of the overseer, proclaimed that the caretaker ought not to be *fāsiq* (miscreant) and *Khā'in* (exploitative). The court characterized *fāsiq* (delinquent) as the opposite of *ādil* (just) and *khā'in* (exploitative) as the converse of *amīn* (fair). Individuals will be precluded if the court is motivated to accept that they were miscreant or exploitative. There is no requirement for conviction of the court. The personality of the caretaker is imperative in deciding guardianship issues.²⁶

²⁴ Sabreen, Mudrasa. "Custody in Islamic Law." *Islamic Studies* 56, no. 3/4 (2017): 223-244 & Sabreen, Mudrasa. "Law on the Custody of Children in Pakistan: Past, Present and Future." *LUMS LJ* 4 (2017): 72.

²⁵ Ibid.

²⁶ Sabreen, Mudrasa. "Law on the Custody of Children in Pakistan: Past, Present and Future." *LUMS LJ* 4 (2017): 72.

Another condition for an overseer is that s/he ought to be mahram to the youngster. If the overseer is the mother, she ought not to be hitched to a more particular individual to the kid, particularly where she has guardianship of a female youngster. It can't be said that the subsequent husband draws near the denied degrees by proclivity when marriage between him and the mother has culminated. The subsequent husband should be identified with the minor inside the restricted degree by affiliation. The purpose of a guideline of preclusion of the mother on remarriage is that during get-togethers, her consideration will be redirected to her new family & kids from the subsequent marriage.²⁷

In *Muhammad Bashir v Ghulam Fatima and Amar Elahi v Rashida Akhtar*, the Lahore High Court saw that the standard of the mother's exclusion upon remarriage did not depend on the Qur'an. Instruction and monetary status of the gatherings are thought of, and guardianship is given to the parent who is more taught and is monetarily steady. The courts likewise give due significance to the factor that the minor is genuinely connected to one parent when contrasted with the other, in 2004 in *Sardar Hussain and others v Mst. Parveen Umar*, the Supreme Court gave guardianship of the minor of seven years to the mother notwithstanding her remarriage because the minor was sincerely connected to her and viewed his father as an outsider despite living with him for fifteen days.²⁸

The mother is qualified for the custody of her youngster. Notwithstanding, on account of her demise or preclusion, the maternal grandmother keeps up with the right to custody until the child is seven years old. On account of the death of the mother, custody of the youngster might be given to the father if the welfare of the kid requests that. In *Fatima Bibi v District and Sessions Judge Mandi Baha-ud-Din*, the Lahore High Court gave custody of the youngster to the father because the maternal grandmother had six kids to take care of, and the court thought about it the welfare of the kid to be with the father. On the off chance that the father of the kid fails, custody goes to the mother. Fatherly grandparents are not qualified for custody within sight of the mother. On the off chance that the court considers it in the welfare of the kid, it might offer custody to the grandparents because of the mother's exclusion.²⁹

Taking everything into account, custody isn't typically granted to them. The climate and culture of a foreign nation are not considered helpful for an Islamic childhood. In *Christine Brass v Dr. Javed Iqbal*, the Peshawar High Court wouldn't offer custody to a Canadian mother because Canada is a non-Muslim nation and isn't in light of a legitimate concern for the youngster to live in an un-Islamic climate. The courts consider how the mother ought to be a Muslim and the climate where a Muslim youngster needs to live ought to likewise be Islamic.³⁰

Parents Already Decided a Wali at the Time of Death

²⁷ Law On The Custody Of Children In Pakistan: Past, Present, And Future," *LUMS Law Journal* 4 (2021), <https://sahsol.lums.edu.pk/law-journal/law-custody-children-pakistan-past-present-and-future>

²⁸ Ibid.

²⁹ Ibid.

³⁰ Law on The Custody Of Children In Pakistan: Past, Present, And Future," *LUMS Law Journal* 4 (2021)

The parental arrangement of a guardian is for a parent to designate somebody to deal with their youngster if the parent dies or becomes incapable of focusing on the kid while the kid is under

18. The parental arrangement becomes successful when the parent fails or can't deal with the youngster. Guardians don't need to go to court before they designate a guardian of a minor. The parent or guardian designates the guardian of a minor recorded as in writing. They sign the arrangement before two observers. If somebody consents to be a guardian, they should acknowledge the arrangement recorded in writing. The guardian arrangement becomes viable when the first of the accompanying occasions occurs: The delegating guardian or guardian passes on. A court concludes that the designating guardian or guardian is debilitated. Or on the other hand, A specialist who has inspected the delegating guardian or guardian says in writing that the parent or guardian is not ready to focus on the youngster.³¹

The parental arrangement of the guardian remains essential until the first of the accompanying occasions occurs: The court designates a guardian. The parent or past guardian who selected the new guardian renounces the arrangement. A minor who is the subject of the parental arrangement and is more than 14 years of age records a composed complaint in court. The other parent can do this if they have not lost their parental rights. An individual had other than parent custody of the youngster or with whom the kid lived during the past 60 days. The minor, the other parent, or the individual other than a parent can forestall the arrangement by the court. They can likewise cause the arrangement to end by documenting their composing issue with the appointment: before it is acknowledged or within 30 days in the wake of getting notice of its acknowledgment.³²

Case Laws

Rights for disabled ones are, though, not worked upon properly. They are getting guidelines through court orders. A Supreme Court judgment has significance in this regard. The Supreme Court set aside some rules for the social treatment of disabled persons through its judgment dated 9 July 2020.³³

Brief facts of the case are that a disabled mother filed a suit for custody of her son named Muhammad Rayyan, born in October 2012, for his father. The lower court gave her custody based on available evidence and circumstances, but when the father appealed against it in Peshawar High Court, it gave the child's custody again to his father. Upon this, the mother filed a petition before the Supreme Court of Pakistan.

The lady, i.e., the child's mother, was a disabled one. She was married to a person, and they both had a son. Later, the lady got "Khula" based on her husband's bad character and agreed between them that the son would remain with his father. Some sort of document was also signed between both parties. Later, the mother sought custody of the child because the son's father could not take care of him because of his bad habits and character. She was given a decree in her favor, but Peshawar High Court reversed it, pointing out that she was a crippled lady despite the

³¹ Parental Appointment of A Guardian – Mass legal help," *Masslegalhelp.Org*, 2021

³² Parental Appointment of A Guardian – Mass legal help," *Masslegalhelp.Org*, 2021

³³ Mst. Beena vs. Raj Muhammad (The Supreme Court of Pakistan 2019). Available at 1

fact she had invested a handsome amount in a business to earn his livelihood and her being disabled was not favorable for her to take custody of the child.

Two honorable judges, Mr. Justice Mushir Alam and Mr. Justice Qazi Faiz Isa heard a petition. Mr. Justice Faiz Isa wrote the judgment and Mr. Justice Mushir Alam agreed to it wholly. It was stated by the honorable Mr. Justice Faiz Isa that through the agreement, the mother got relieved from her matrimonial bond by leaving her dower (Haq Mehr) and acquiring khula. Muslim individual law endorses rules of hizanat (custody); a mother in whom hazmat vests can't be constrained to give it up nor can such acquiescence comprise thought for an arrangement of khula. The custody of a youngster or rights to his/her custody cannot give up obtaining khula, nor can the husband request such acquiescence. The Constitution orders that all laws adjust with the Injunctions as set down in the Holy Qur'an and Sunnah and no law will be sanctioned hostile to such Injunctions. The Holy Qur'an, which empowers khula, doesn't examine giving up a youngster's custody to get khula, nor can it establish considerable thought for it. To embed such a condition in an understanding of khula is in opposition to the law and the Injunctions of Islam.

In the agreement, the viable candidate to acquire khula not only gave up her dower (Haq Mehr) but also consented to forego the custody of her child. The agreement to the degree that the mother gave up the custody of her youngster or halted the mother to guarantee his custody is not lawful thought; it is in opposition to the Islamic standards overseeing hizanat and the law deciding the custody of minors and subsequently taboo. It additionally torments us to express that the High Court was not exceptionally delicate in managing the case. By alluding to the solicitor as a 'crippled/disabled lady with no income source. In deciding the welfare of the kid and his custody, neither the mother's state of being nor her pay was determinative. It was likewise unseemly to allude to the mother as crippled or disabled. The applicant has an actual inability; she ought not to be known as a handicapped person or disabled. The mother has not depended on the beggary; she works and makes money. To slander such a woman was entirely unseemly. Rather she ought to be admired for exhibiting striking assurance and constancy.

It was approved by the honourable Supreme Court that words that may cause discrimination and harm to self-esteem should not be used by the courts. It was stated that the use of such words violates the guarantees given to every individual under the umbrella of the constitution of the Islamic Republic of Pakistan.

Another petition filed before the Lahore High Court against a decree by the additional session judge makes it important as it also addresses the issue of disability. The honourable Lahore High Court has given a remarkable judgment in this regard.³⁴

Earlier, a suit was filed before the family court by a woman along with her children for maintenance for her children against her ex. Husband. While the proceedings were continued, one of the woman's children reached puberty, and due to this, his petition was dismissed, keeping in view that the law protected the right of maintenance of a child by his father only till the age of 18. *It is important to mention that the aggrieved child was blind.*

³⁴ Ali Akbar vs. Additional Session Judge, Malkwal and Others, PLD 2017 Lahore 787 (The Lahore High Court 2017), 88.

The aggrieved one filed an appeal before Session Court, and upon not getting what he ought, he filed the petition before the Lahore High Court. Honorable Justice Mudassir Khalid Abbasi heard the petition and decided the case in favor of the petitioner, stating that in normal circumstances, it could be a rule that a child was entitled to maintenance till the age of puberty, but in this case, the child was blind and he was unable to earn for himself. Therefore, he was entitled to maintenance from his father.

The honorable Justice mentioned a decree passed by the apex court setting a rule for special circumstances. The decree stated that:

"From the above, it emerges that subject to the conditionalities mentioned therein, a father in the normal course is bound to maintain his son only till the time he attains the age of puberty. However, there is an exception to this rule, and that is the disability of the son by infirmity or disease, in which case the father's obligation is extended for his adult son as well."

This judgment played a significant role in maintaining and protecting the rights of disabled persons and did not let them get helpless concerning the maintenance of their routine life. This judgment made it compulsory for parents to care for their disabled children after 18.

Conclusion

Disabled persons have been given the right to marriage. If they cannot contract marriage, their guardian can do this for them. Also, they have been entitled to divorce if they feel it is good for them. The point is that Islam has given all kinds of rights to them for their welfare and well-being. The problem is that society does not see them as Islam wants. They are not treated equally and properly. Often, they are not allowed to leave the house because they could be a victim of bullying by people around them. Islam's spirit must be implemented among them in its true sense. This is another issue that, although Islam has given certain rights to disabled ones, people do not accept them. For example, if a handicapped earns good for his livelihood and wants to marry a woman, no one will be ready to accept his proposal. This attitude towards disabled persons needs to be changed. They are humans like all of us and should be treated like humans. Mere rights are not enough for them to live normal lives.

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