



## NECESSITY OF DA'WA COMMUNICATION FOR REFORMATION IN MUSLIM GUARDIANSHIP LAWS IN INDIA

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**Abstract:** The diversity of religions, cultures, and languages is an inherent feature of Indian democracy. These kinds of legal pluralism arrangements are found in the area of personal laws in India. Since 1985, India has witnessed a direct conflict between Muslim personal law and secular laws. Recently, one of the High Courts in India reaffirmed that the mother of the child has no right to be considered as the natural guardian of her child. The gender disparities with the guardianship laws under Islamic law are being exposed again by this decision. Inadequate understanding and interpretation of religious texts usually lead to these kinds of disparities. Da'wa can help refresh and reform Sharia by encouraging Muslims to think closely about how it is used and understood and to seek better solutions to today's problems. The guardianship laws in India now need to be changed in light of modern da'wa communication. This article explains the importance of da'wa communication and how it should be applied to reinterpret Muslim personal laws in India. This article concludes with a comment that modern da'wa communication is necessary to interpret guardianship laws under sharia from a liberal dynamic and forward-looking perspective without rejecting the value of Islamic jurisprudence and the All India Muslim Personal Law Board should take measures to achieve gender parity in Muslim guardianship laws through efficient da'wa communication.

**Keywords:** Modern Dawa Communication, reformation, Sharia, guardianship laws, natural guardian, legal guardian, custody rights, gender disparity, concept of the welfare of the child.

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### Introduction

THE PRIMARY characteristics of the Indian democratic system are the diversity of religions, cultures, and languages. Religious

diversity is a critical issue that requires special consideration and management to avoid conflict.<sup>1</sup> Religious conflicts are frequently the result of inadequate knowledge and interpretation of religious scriptures. The status of Muslim minorities living in non-Muslim territory has been a source of legal controversy since at least the second/eighth century.<sup>2</sup> On account of numerous historical and doctrinal factors, the stance adopted by these Muslims is problematic.<sup>3</sup>

Legal pluralistic arrangements of this nature were predominantly observed within the domain of personal laws, regarded as the most delicate regarding cultural identity.<sup>4</sup> Since 1985, India has witnessed an explicit clash between Muslim personal law and secular laws.<sup>5</sup> People are always split into their cultural poles by faith and other things, which causes most of the conflicts.<sup>6</sup> For example, Muslim scholars write exegesis of the Qur'an to explain the verses that deal with different problems and do so from a particular point standpoint or method of understanding.<sup>7</sup> Despite their intricate distinctions in language, culture, religion, history, and other areas, this knowledge guides people into harmony and peace.<sup>8</sup> Therefore, better religious

<sup>1</sup> "Interfaith Tolerance and Its Relevance to the Indonesian Diversity: A Study on Ibn 'Āshūr's al-Tahrīr Wa al-Tanwīr," *Ulumuna* 22, no. 2 (December 28, 2018): 333, <https://doi.org/10.20414/ujis.v22i2.301>.

<sup>2</sup> Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1, no. 2 (1994): 141, <https://doi.org/10.2307/3399332>.

<sup>3</sup> El Fadl, 141.

<sup>4</sup> Paolo Sartori and Ido Shahar, "Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain," *Journal of the Economic and Social History of the Orient* 55, no. 4/5 (2012): 641.

<sup>5</sup> *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985 SC 945

<sup>6</sup> Samuel P. Huntington, "The Clash of Civilizations?," *Foreign Affairs* 72, no. 3 (1993): 22 to 49, <https://doi.org/10.2307/20045621>.

<sup>7</sup> Mohseni Hasan, "Interfaith Tolerance and Its Relevance to the Indonesian Diversity: A Study on Ibn 'Āshūr's al-Tahrīr Wa al-Tanwīr," *Ulumuna*, 2018, 335, <https://api.semanticscholar.org/CorpusID:150729453>.

<sup>8</sup> Fawaizul Umam and Mohamad Barmawi, "Indigenous Islamic Multiculturalism: Interreligious Relations in Rural East Java, Indonesia," *Ulumuna*, 2023, 650, <https://api.semanticscholar.org/CorpusID:267316339>.

awareness is essential for people of different religions to live together peacefully.

The systematic juristic positions on gender discrepancy in natural guardianship rights prevailed in contemporary India, and different legal positions were followed in other *Sharia*-following countries. The responses of various jurists showed a dynamic process in which doctrinal sources, legal precedents, juristic approaches, and historical reality interacted to produce various outcomes.

Modern interpretations of the *da'wa* are required to change the guardianship rules in India. The article examines the role of *da'wa* communication and its significance in reinterpreting Muslim personal laws in India. It focused on natural guardianship and gender disparities under Indian *Sharia* rules.

Due to the lack of modern works of literature in this area of study, the article examines the pre-modern juridical literature on the following three primary issues: (1) whether the guardianship laws in India require intra-*da'wa* communication to reform; (2) whether the natural guardianship rights of the mother are discriminatory under Islamic law; and (3) how the concept of child welfare is incorporated into Islamic law and what is the theoretical response of other *sharia* countries.

The study employs the method of doctrinal research, which involves systematically examining existing legal texts on guardianship laws to identify the disparities in guardianship laws in India. We use primary data sources, including statutes and judgments, and an extensive review of secondary legal materials, including articles, textbooks, and scholarly works. We searched legal databases, including manupatra and Indian Kanoon, for the judgment analysis. It helps to systematically examine various judgments to determine the status of a mother's natural guardianship rights in India. The study uses textual analysis to pinpoint legal concepts and principles, such as the *da'wa* communication, the provisions of Indian guardianship laws, and the principles of 'the best interest of the child'. Furthermore, it conducts a comparative analysis to identify the progressive interpretations made in guardianship laws by other *Sharia*-following countries, including Pakistan.

Nina Wiedl's 'Revival of da'wa' explains the intercommunication of da'wa among Muslims. This study examines the role of internal da'wa communication in redefining Indian guardianship rules. Khalid Masud explains how modern da'wa communication is applied to reform religion and religious practices.<sup>9</sup> The present investigation examined the judicial decisions rendered in both Pakistan and India. This study attempts explicitly to use da'wa communication concerning the reformation or reinterpretation of Indian *Sharia* law.

The Muslim Personal Law imposed its norms of justice and equality in all areas of life, including guardianship, property, and so on. Based on these Quranic injunctions, Islamic legislations enacted more rigorous guardianship restrictions. These *Sharia* injunctions are adequate to prevent the exploitation of children's property, but their patriarchal impact has harmed the rights of certain deserving persons. Recently, the High Court of Kerala pronounced a judgment that reaffirmed again that the mother of the child has no right to be considered as the natural guardian of the child.<sup>10</sup> This judgment sheds light on the gender issues in guardianship rules under Islamic law.

In the context of religious, cultural, and ethnic diversity, Muslim personal laws in India must be capable of being redefined. In light of this, the Quran, which serves as the primary source of guidance for Muslims, must be reinterpreted to address the social issues that arise among people of various faiths. This article seeks to highlight the relevance of intra-da'wa communication among Indian Muslims about their regressive understanding of mothers' natural guardianship rights and their blind adherence to the previous legal position on the subject. This paper analyses the guardianship under Islamic law and how the judiciary has intervened in these issues. Moreover, it analyses modern da'wa communication's role in reforming guardianship laws in India.

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<sup>9</sup> Muhammad Khalid Masud, ed., *Travellers in Faith: Studies of the Tablighī Jamā'at as a Transnational Islamic Movement for Faith Renewal*, Social, economic, and Political Studies of the Middle East and Asia v. 69 (Boston: Brill, 2000), 29.

<sup>10</sup> C Abdul Aziz & Ors. v Chembukandy Safiya & Ors., 2022LiveLaw(Ker)332

## Importance of Da'wa Communication in Reformation

Da'wa, firmly rooted in Islamic scripture and classical tradition, has been significantly reappropriated in contemporary Muslim society.<sup>11</sup> As explained in several scholarly articles, the literal meaning of the Arabic word da'wa is "invitation" or "call." Radical Islamists who practice da'wa use a lot of different methods to help them reach their goal of putting Islamic law (*Sharia*) on everyone. This extends beyond mere proselytizing. In earlier times, the ultimate objective of da'wa was to dismantle and substitute for political institutions that existed in a free society.

Da'wa refers to both internal and external missions. According to Larry Poston, the traditional Islamic strategy for proselytization has been the 'external institutional approach'.<sup>12</sup> Mathew J Kuiper classified two types of da'wa: bottom-up da'wa and top-down da'wa.<sup>13</sup> Bottom-up da'wa, also known as "Islamization from below," is work that is done at grassroots levels to make Muslims more religious and improve their faith. It also includes spreading Islam to people who are not Muslim. Movements that start from the bottom up tend to be quietist (not political), voluntarist, and gradualist. Top-down da'wa movements, on the other hand, aim to further Islamization from above by seizing political power.<sup>14</sup> Scholars and the media pay much attention to top-down movements, but the bottom-up da'wa movements are more common and have a more significant impact on the daily lives of Muslims around the world.

Da'wa is not just a way to spread spiritual teaching or do good deeds; it is also a political action whose primary goal is to reform and revive Islam so that an Islamic state can be established in the future.<sup>15</sup> Furthermore, da'wa is not confined to preaching; it also attempts to establish the rule of Islam and its law, requiring

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<sup>11</sup> Matthew J Kuiper, *Da'wa: A Global History of Islamic Missionary Thought and Practice* (Edinburgh University Press, 2021), 1.

<sup>12</sup> Larry Poston, *Islamic Da'wah in the West: Muslim Missionary Activity and the Dynamics of Conversion to Islam* (New York: Oxford University Press, 1992), 49.

<sup>13</sup> Kuiper, *Da'wa: A Global History of Islamic Missionary Thought and Practice*, 3.

<sup>14</sup> Kuiper, 3.

<sup>15</sup> Nina Wiedl, "Dawa and the Islamist Revival in the West," *Current Trends in Islamist Ideology* 9 (2009): 120.

societies to follow *Sharia*. One may either impose this kind of society or use gentle preaching as a means of achieving it.<sup>16</sup>

Da'wa can be adequately understood only in their local contexts.<sup>17</sup> Prophet Muhammad was very contextual in his preaching, meaning he changed based on the people he talked to and their social situations.<sup>18</sup> It claims that da'wa has been significantly shaped by intra- and interreligious awareness, encounter, and debate both historically and significantly in the modern era.<sup>19</sup>

Da'wa, on the other hand, refers to all the ways that Islamism is spread.<sup>20</sup> Da'wa is not the same thing in Islam as religious proselytizing, but it often looks like it is by combining political subversion with acts of humanity.<sup>21</sup> In the 1990s, Shaykh Yusuf al-Qaradawi<sup>22</sup> introduced a bold new vision for Islamic da'wa.<sup>23</sup> He developed a European interpretation of Islamic law within the classical framework of Islamic jurisprudence in 1997.<sup>24</sup> Unfortunately, no such movement or interpretation of personal laws exists in India.

The reformation of Islamic law, or *Sharia*, can also benefit from da'wa in several ways. A few potential positions are as follows: Da'wa can serve as a source of inspiration and motivation for Muslims to learn about the goals and principles of *Sharia*, apply them to their social and personal life, and study the law.<sup>25</sup> It can also assist Muslims in appreciating the diversity and adaptability of *Sharia* and in avoiding literal and strict interpretations that could go against the intent and spirit of the law.

<sup>16</sup> Patrick Sookhdeo, *Dawa: The Islamic Strategy for Reshaping the Modern World* (BookBaby, 2014), 8.

<sup>17</sup> Masud, *Travellers in Faith*, xxix.

<sup>18</sup> [1-ahmad-faqih-110-123.pdf](https://www.scribd.com/doc/110123/1-ahmad-faqih-110-123.pdf), p111

<sup>19</sup> Kuiper, *Da'wa: A Global History of Islamic Missionary Thought and Practice*, 2.

<sup>20</sup> Ayaan Hirsi Ali, *The Challenge of Dawa: Political Islam as Ideology and Movement and How to Counter It* (Hoover Institution Press, 2017), 15.

<sup>21</sup> Ali, 15.

<sup>22</sup> the Muslim Brotherhood's spiritual leader

<sup>23</sup> Wiedl, "Dawa and the Islamist Revival in the West," 128.

<sup>24</sup> Wiedl, 128.

<sup>25</sup> Ali, *The Challenge of Dawa: Political Islam as Ideology and Movement and How to Counter It*, 27.

Da'wa can be a tool for engaging in conversation and discourse with both Muslims and non-Muslims, exchanging ideas and viewpoints on a range of *Sharia*-related topics, and attempting to find common ground and understanding. It can also remove myths and misunderstandings about *Sharia* and show its beneficial and compassionate qualities to the general public.

Da'wa can help refresh and reform *Sharia* by pushing Muslims to think deeply about how it is being used and interpreted and look for new and better ways to deal with today's problems and challenges. Furthermore, da'wa can encourage Muslims to use *ijtihad*, or independent thinking, and support the role of scholars and experts in creating and improving *Sharia*.<sup>26</sup>

These are some potential roles for da'wa in the reforming of Islamic law. However, they are only partial and exclusive. Da'wa is a flexible and dynamic exercise that can change depending on the circumstances and the moment's requirements.<sup>27</sup> Despite this, da'wa should always be done with knowledge, kindness, patience, and truthfulness, and it should always honor everyone's freedom and worth.<sup>28</sup>

"*Fiqh al-aqalliyat*," or jurisprudence for Muslim minorities, is a new approach to understanding Islamic law. This legal theory promotes using *ijtihad* based on traditional principles like *maslaha* (common interest) and *darura* (necessity or hardship). So this means that Muslims living in non-Muslim countries can have the *Sharia* interpreted more loosely than Muslims living in Muslim countries. *Fiqh al-aqalliyat* proponents still need to address several complicated issues.<sup>29</sup> Additionally, it relates to problems that arise between the traditional interpretation of Islamic law and the demands of the Islamic movement and its da'wa activities.

The central perspective used in this article to examine da'wa is interreligious connections. Da'wa encompasses both internal

<sup>26</sup> Matthew J. Kuiper, "Da' wa," Oxford Bibliographies, June 18, 2018, <https://www.oxfordbibliographies.com/display/document/obo-9780195390155/obo-9780195390155-0252.xml>.

<sup>27</sup> Muhammad Khalid Masud, "Islamic Law and Muslim Minorities," *Isim Newsletter* 11, no. 1 (2002): 17.

<sup>28</sup> Masud, 17.

<sup>29</sup> Masud, 17.

initiatives aimed at improving Muslim behavior and exterior initiatives aimed at persuading non-Muslims to convert to Islam.<sup>30</sup> The rulings and decisions of pre-modern Muslim jurists may not uniformly resolve contemporary Muslim dilemmas in India.

Da'wa is the process of asking Muslims in a group or society to change how they understand and practice Islam so that it fits with the religion's goals and spirit. To do this, Muslims might need to be taught, persuaded, and inspired to take a more accurate, adaptable, and dynamic view of *Sharia* and to deal with the issues and challenges they face in their situations. Intra da'wa for the reformation may mean several things depending on the speaker's perspective and the situation. It could be viewed as an endeavor that is feasible or unfeasible, positive or negative, or necessary or needless.

Muslim Minorities usually do not let things change from the way things were before. According to this interpretation of Islamic law, the community must be organized in a certain way, and legal professionals must be hired to help. Without the assistance of the vast majority of Muslim nations, this is frequently not feasible.<sup>31</sup> Therefore, we investigate the many *Sharia*-following nations to eliminate the differences in guardianship laws in India. Pakistan and Bangladesh were parts of India before it became independent, and the *Shariah Application Act* was made before Independence, and it applies to Muslims in Bangladesh, Pakistan, and India. However, the situation in Pakistan differs from that in India. Pakistani Muslim women are in a better situation than Indian Muslim women because of the progressive interpretation and updating of their laws.

### **Guardianship laws in India:**

The legal system in India acknowledges several personal laws that pertain to family concerns and apply to persons based on their religion. Three stages of minor guardianship are described in India. A minor is defined as a person under the age of fifteen. Under the Indian Majority Act, a minor is defined as one who is

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<sup>30</sup> Kuiper, *Da'wa: A Global History of Islamic Missionary Thought and Practice*, 2.

<sup>31</sup> Masud, "Islamic Law and Muslim Minorities," 17.

eighteen years old. A minor is defined as a person under twenty-one with a guardian appointed by the court or under the supervision of the Courts of Wards Act. These legislations describe guardianship and the protection of minors' property in India. Further explicitly addressing the guardianship of Hindu minors and their belongings is the Hindu Minority and Guardianship Act, 1956. In the absence of a codified regulation, Muslims in India are generally governed by personal laws based on the Quran and Hadith regarding guardianship concerns.

The welfare of the minor is always the guiding principle. When the individual laws of Christians and Parsis do not address specific issues, the secular Guardians and Wards Act of 1890 provides a common legislative framework that can be applied to various communities. All applications for the appointment of guardians, whether for persons or property, must be made by the Guardian and Wards Act of 1890.

In India, all personal laws grant a person the privileged right to natural guardianship of a minor or to protect or maintain the minor's assets. The term "natural guardian of the child" refers to the person legally entitled to guardianship over the child and can make choices in the child's best interests. As long as the father is still living and in good health, he is the natural guardian under all personal laws. After his death, the role of guardianship differs according to religion.<sup>32</sup> Regarding guardianship, property, and other spheres, the Muslim Personal Law enforced its principles of justice and equity. Quran and Sunnah are the ultimate sources of authority for all Islamic legal rulings. The revelation of Quranic injunctions to safeguard the property of minors occurred during the prophet's lifetime. Subsequently, Islamic laws incorporated stricter guardianship regulations based on these Quranic teachings. The patriarchal effect of *Sharia* law has affected the rights of some deserving individuals, yet these injunctions are sufficient to eradicate the exploitation of children's property.

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<sup>32</sup> Asha Bajpai, "Custody and Guardianship of Children in India," *Family Law Quarterly* 39, no. 2 (2005): 17.

## Guardianship under Muslim Personal Laws in India

In Islamic tradition, "guardianship" or "wilayah" is complicated, involving social, religious, and legal issues. To understand the theoretical basis of guardianship or "wilayah" in Islam, one must first examine the fundamental sacred books and concepts that guide Islamic philosophy. The idea has solid foundations in the Qur'an, Hadith, and Islamic jurisprudence.

Before the emergence of Islam, minors' property was protected and overseen by a few selected family members. As a result of the lack of control by the public authorities, property belonging to children is often stolen or misappropriated.<sup>33</sup> This necessitates the implementation of the most strict rules for the protection of minors' property in Islamic law.<sup>34</sup>

An explanation of certain fundamental elements of Islamic law is required to comprehend the idea of guardianship and custody under the law. It is the parents' responsibility to care for their children and raise them to be responsible and God-fearing individuals.<sup>35</sup> The child's responsibilities are borne equally by all families, Muslim and non-Muslim alike. The nature of parental contribution and responsibilities alters as a child develops. The three types of guardianship—guardianship over children, guardianship in marriage, and guardianship of an orphan—were explained in the Quran. The significance of the guardian's obligation to safeguard the orphan's belongings is explained in the Quran. In cases when guardianship authorities are responsible for safeguarding the property of orphans, whether inherited or gifted to them, they must protect both the orphan and the property. Another verse clarifies that people who look after children should give them their property.<sup>36</sup> This emphasizes the just treatment of orphans and the safeguarding of their rights.<sup>37</sup>

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<sup>33</sup> Syed Ameer Ali, *Mahomedan Law*, 5th ed., vol. II (English Book Store, 1985), 539.

<sup>34</sup> Jamila Hussain, *Islamic Law and Society: An Introduction* (Annandale, New South Wales, Australia: The Federation Press, 1999), 79.

<sup>35</sup> Hussain, 79.

<sup>36</sup> Surah Al-Baqarah (2:220)

<sup>37</sup> Surah Al-Nisa (4:2)

A few passages within the Quran clarify the guardianship obligations for the marriage of a minor or orphaned child.<sup>38</sup> In Islam, the concepts of protection, welfare, and responsible caregiving are fundamental to the concept of guardianship over a child. The rights and obligations of both parents about a child's upbringing are emphasized in the Quran. It says how long a woman should breastfeed her child and stresses that the father is responsible for caring for the mother and child during this time.<sup>39</sup>

The lack of written guardianship rules for Muslims in India led to their adherence to *Sharia* law, which derives from the Quran, Hadiths, and other Islamic legal sources. Under Muslim personal laws, custody (*hizanat*) and guardianship (*Wilayah*) are separate legal rights and concepts. According to Mahomedan law, guardianship can be classified into three categories: (i) personal, (ii) property, and (iii) marriage.<sup>40</sup>

### **Guardianship of Property**

Property guardianship has been separated into *de facto*, *de jure*, and court-appointed guardians.<sup>41</sup> *Injure* Legal guardians of a minor's property include the father, the executor designated in the father's will, the father's father, and the executor designated in the grandfather's will. Nothing on this list mentions the mother. If her father or maternal grandfather named her an executor or executrix, she may be a guardian of her child's property. Only in that situation is the mother regarded as her child's legal guardian.

Islamic law distinguishes three types of guardianship: natural guardian, testamentary guardian, and court-appointed guardian. Although all Islamic legal schools acknowledge that a father is a child's legally recognized guardian, they do not use the term "natural guardian."<sup>42</sup> The father has a general responsibility to

<sup>38</sup> Surah Al-Nisa (4:3), and (4:25)

<sup>39</sup> Surah Al-Baqarah (2:233)

<sup>40</sup> Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law*, 4th ed. (New Delhi: Oxford Univ. Press, 1999), 197.

<sup>41</sup> Tanzeema Fatima, *Islamic Law and Judiciary: Trend Setting Judicial Pronouncements in Islamic Law since 1950* (New Delhi: Deep & Deep Publications, 2001), 151.

<sup>42</sup> Dr. Paras Diwan, *Muslim Law in Modern India*, 6th ed. (Allahabad:

provide for his child's necessities. He has to wait until the child reaches adulthood—or, in the case of a daughter until she gets married. The paternal grandfather assumed guardianship upon the father's demise or incapacity to assume responsibilities. Some Sunni groups hold a different view, believing that the father is the child's only natural guardian and that his executor becomes the child's guardian upon his death. The Shia faith, on the other hand, believes that the grandfather is the next guardian after the father.<sup>43</sup> This is true even if the father is named executor; in that case, the executor becomes the guardian while the grandfather is not present.<sup>44</sup>

Guardianships are the responsibility of the grandfather's executor in his absence. Guardians of property are infrequently appointed under Islamic law; instead, an executor (wali) serves as the property guardian.<sup>45</sup> If there is no close guardian, Qazi takes over guardianship. Under the Guardianship and Wards Act, this right over the minor's property may only be used with the court's approval.<sup>46</sup> The court may appoint the mother or someone else not on the legal guardian's list to be the child's guardian. Appointing the mother as guardian does not constitute a disqualification.<sup>47</sup>

A de facto guardian looks after a minor's property without being an official or court-appointed guardian. De facto guardians have no legal rights—only the responsibility to act as the minor's custodian of their person or property.<sup>48</sup> They are not authorized to sell a minor's property; such a sale is void.<sup>49</sup>

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Allahabad Law Agency, 1993), 116.

<sup>43</sup> Diwan, 116.

<sup>44</sup> *Syed Shah v. Syed Shah*, 1971 SC 2184

<sup>45</sup> Fyzee, *Outlines of Muhammadan Law*, 197.

<sup>46</sup> B.M. Gandhi, *Family Law*, first, vol. II (Lucknow: Eastern Book Co, 2013), 345.

<sup>47</sup> *Mst Johara Khatun v Amina Bibi*, (1957) 62 Cal. W.N 357

<sup>48</sup> Fyzee, *Outlines of Muhammadan Law*, 203.

<sup>49</sup> *Jamadar Mian v Amir Hassan*, AIR 1957 Pat 213, *Musali Khan v Nazir Ahmad*, PLD 1952 (W.P) Peshawar 1

## Guardianship of the person: Custody

In Muslim law, the right of custody is called "*Hizanat*." The *hizanat* privilege of the mother does not impact the father's guardianship. The mother's right to care for her children in their early years is distinct from the father's duty to support his children until they reach adulthood or, in the case of a female until she marries. As per Schacht's analysis of general principles in the *Sharia*, the mother of a young infant possesses more substantial parental rights than the father.<sup>50</sup> According to Islamic law, the *hizanat* principle presumes that it is in the best interests of a small child to remain with his mother.<sup>51</sup>

Generally speaking, the mother is only allowed to have physical custody of the child until a specific age in all Muslim schools. She is the most qualified person to bestow that innate love and affection, which is crucial for a child's childhood. Under Hanafi law, a mother has custody of her male child until he reaches the age of seven years and of her female child until she reaches puberty. In contrast, under Shia law, she has custody of her male child until the age of two years and custody of her female child until the age of seven years. Even if she gets separated from the child's father, she still has the right unless she gets married again, in which case the father gets custody, as was decided in *Hashmat Ali v. Suraya Begum's Case*.<sup>52</sup>

The principle of *hizanat* encompasses two distinct rights: the right to child custody and the right to rear (or take care of) a kid.<sup>53</sup> There exists a need for more consistency in establishing the minimum age requirement for determining the duration of guardianship. Along with the child's gender, it differs throughout Sunnis's four schools. Some schools prefer seven-year-olds, while others prefer nine-year-olds, etc. A child may decide whose parent they want to live with once they have attained the age of majority.

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<sup>50</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford [Oxfordshire]; New York: Clarendon Press, 1982), 167.

<sup>51</sup> Hussain, *Islamic Law and Society: An Introduction*, 81.

<sup>52</sup> AIR 1961 All.260

<sup>53</sup> Raj Bhala, *Understanding Islamic Law (Shari'a)* (San Francisco: LexisNexis, 2011), 993.

Suppose the mother passes away before the kid reaches the applicable cutoff age or becomes unable to provide for the child at that age due to a physical or mental disability. What happens to the right of *hizanat*? The *hizanat* would not pass to the father. Instead, the closest female relative of the mother would receive that right; if there are none, the closest female relatives of the father would. Imam Ibn Juzayy, an early Islamic thinker, described the hierarchy of custodians in his book Comparative Jurisprudence of the Sunnite School. They include the mother, maternal grandmother, maternal aunt, paternal grandmother, great-grandmother, sister, paternal aunt, brother's daughter, and the best of the parents' relatives.<sup>54</sup> If any person in this order is deemed unfit for custody, they may be omitted. Once the specified age is reached, the *hizanat* right shifts to the child's father.

Scholars have differing viewpoints on whether custody is the custodian's right.<sup>55</sup> Raj Bahla<sup>56</sup> said that *hadana* (*hizanat*) might be correctly classified as a forfeitable right from a legal standpoint. However, in practice, there is a correlative proper duty set, which means a responsibility corresponds to the mother's right to care, and she is obligated to provide such care.

### **Guardianship in Marriage:**

By Islamic jurisprudence, the authority to enforce matrimonial status on minor children rests with the father. The guardian endowed with such authority is called a *wali*, and this imposing power is called *jabr*.<sup>57</sup> The father's guardianship rights were acknowledged in pre-Islamic Arabian marriages. However, guardians appointed by the court are not permissible to act as a guardian in guardianship in marriage. It permits both property and person guardianship only. However, the Qazi himself may serve as a guardian for the marriage in certain situations; the court cannot name a *wali* for a marriage.<sup>58</sup> The priority in the

<sup>54</sup> Bhala, 997.

<sup>55</sup> Schacht, *An Introduction to Islamic Law*, 167.

<sup>56</sup> Scholar in Islamic Law

<sup>57</sup> Syed Khalid Rashid, *Muslim Law*, 4th ed. (Lucknow: Eastern Book Co, 2004), 208.

<sup>58</sup> Faiz Badaruddin Tyabji, *Muslim Law*, 4th ed. (Bombay: N.M. Tripathi Pvt

inheritance laws grants the father, the father's father's h.h.s., the brother, and the collateral the right to act as the minor's guardian. If none of these guardians are present, the mother and any maternal relatives may serve as the child's guardians when they are married. in the absence of all these guardians, the minor may have a guardian appointed by the Qazi or the court. It was illegal for a child to get married with the permission of a distant relative but not with the permission of a closer relative. The marriage was still illegal even after it was consummated.<sup>59</sup>

As puberty is reached, Jabbr's right comes to an end. The Hanafi and Ithna Ashari minors can get married without a guardian after that age. However, the schools of Maliki, Shafi, Fatimid Shi'ite, Daudi, or Sulaymani Bohra forbid a woman who has reached majority from being married without a guardian. Her only option is to convert to the Hanafi school and wed by its rules.<sup>60</sup> <sup>61</sup>

## **Mother Status in the Muslim Guardianship Laws in India**

### *The status of a natural guardian*

In all schools of Islamic law, a mother is not acknowledged as her minor children's natural or legal guardian. Many of the decisions held that the mother is not the natural guardian even of her minor illegitimate children, but she is entitled only to custody of that child.<sup>62</sup> Only if the child has no male relatives does the burden of maintenance shift to the mother.<sup>63</sup> The matter concerning the mother's natural guardianship during the father's lifetime is not considered. The father is the only and most crucial guardian of his minor children for the duration he lives.<sup>64</sup> Abdur Rahim asserts that the father, the father's father, and the individuals named in their will are the only guardians of the

Lt, 1968), 65.

<sup>59</sup> *Ayub Hasan v Akthari*, AIR 1963 All.525

<sup>60</sup> *Muhammed Ibrahim v Gulam Ahmed*, 1864 Bom. H.C.R., O.C.J 236

<sup>61</sup> *K. Abubakker v Marakkar*, AIR 1970 Ker 277

<sup>62</sup> *Gohar Begum v Suggi*, (1960) 1 SCR 597

<sup>63</sup> *Bhala, Understanding Islamic Law (Shari'a)*, 993.

<sup>64</sup> *Imambandi v Suggi*, (1960) 1 SCR 597

minor's property.<sup>65</sup> Even when the mother or any other female has a right to custody of the child, the father still has the right of guardianship.<sup>66</sup>

*The status as Legal Guardian:*

Furthermore, the mother is not the minor's legal guardian and has no power to engage in a contract to alienate the minor's property.<sup>67</sup><sup>68</sup> In the *Johara Bibi* case, the court determined that although the mother may serve as a de facto guardian, she is not authorized to do so legally and is not permitted to submit the case to arbitration without permission from the court.<sup>69</sup> Throughout the child's childhood, the father serves as the legal guardian.<sup>70</sup> If no one is willing to step forward as a legal guardian for a minor, an Islamic judge known as a Qazi will be appointed to do so.

*The Status as Custodian of the Child:*

The mother is entitled to custody of her male child until the child reaches the age of seven and her female child until the child reaches puberty. In addition, it states that just because a mother is granted custody of the child does not mean that the father has no rights. In the case of *Imambandi v. Mustsaddi*<sup>71</sup>, the court remarked and clarified that under Muslim law, a mother may keep a minor infant in her custody until a specific age. The age of a girl and a boy has been defined under *Sharia* law. Consequently, the mother can claim custody of the child. She can take on the role of minor custodian but cannot become his legal guardian. The father is the only one who can become a guardian; in his absence, his executor takes on the role of legal guardian.

<sup>65</sup> Abdur Rahim, *The Principles of Mohammedan Jurisprudence and Mohammedan Law* (Kolkata: Kamal Law House, 2016), 557.

<sup>66</sup> Diwan, *Muslim Law in Modern India*, 116.

<sup>67</sup> *Fatima Bi v Sadhakautalla*, 1977 Mad 251, and *Gurbux v Rafia*, 1979 HP 66

<sup>68</sup> In the *Mahboob Saheb v Syed Ismail* (1995)3SCC 693, the court held that the mother cannot act as guardian or be appointed guardian over the minor's property. Moreover, she has no right to act as a legal guardian for her minor children.

<sup>69</sup> AIR 1951 Mad 997

<sup>70</sup> AIR 1951 Mad 997

<sup>71</sup> (1960) 1 SCR 597

According to Muslim personal law, a mother is entitled to custody of her baby child. However, there are four circumstances under which she may lose this right. The first is apostasy, which violates the mother's freedom of religion. In the second instance, the mother marries a man who is not the child's mahram. The term "*Maharam*" refers to a near relative of the child who falls within the prohibited degrees of matrimony about that child. This ground is based on concerns that a stepfather may abuse the child. The mother does not get back her right to custody of her child from the first marriage even if she gets married again and then gets divorced later.<sup>72</sup>

These two reasons for relinquishing custody are potent barriers to divorce and remarriage. It has adverse effects on a woman. A woman has to decide whether to stay in an abusive marriage to keep her right to care for a child or to leave the abuse by giving up that right.<sup>73</sup> However, if the husband initiates the divorce, the wife retains custody and the duty to care for the child.

The judiciary intervened in this matter and interpreted it progressively in Musst's judgment. *Rahima Khatoon v Musst. Saburjanessa And Ors*<sup>74</sup>, the Honourable Court affirmed that the mother does not lose custody of her infant children simply because she is no longer the wife of her former husband; however, if she marries a second husband who is not related to the child within the prohibited degree, custody of such children belongs typically to her former spouse.

The other two grounds for forfeiting the custodial proper aim to preserve the child's best interests. The third ground is the mother's mistreatment of the child. It is appropriate to take away her rights to custody and care if she is abusive. The fourth involves taking off with the child. The mother forfeits her right to care for the child if she relocates from the father's residence without obtaining his consent, thereby preventing the father from communicating with the child.

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<sup>72</sup> Abd Ar Rahman I. Doi, *Shari'ah : Islamic Law*, 2nd ed. (London, England: Ta Ha Publishers Ltd, 2008), 332.

<sup>73</sup> Bhalia, *Understanding Islamic Law (Shari'a)*, 997.

<sup>74</sup> AIR 1996 Gau 33

These grounds are discriminatory and unacceptable in the present day. The simple reason is that caring for a child does not lie with the mother if the child's father or other guardian lives far away from the city where the mother does not reside. Based on this rule, if the father moves and the mother wants to stay put, the father will likely get custody of the child.<sup>75</sup>

### **Judicial approaches to the Application of the principles of Welfare of the Child**

To eliminate these discriminatory clauses in guardianship laws, the judiciary intervened and interpreted the Indian guardianship laws. The judiciary implemented the principle of the child's welfare or the child's best interests. Several laws specify that the father is the child's natural guardian. Furthermore, the same acts state that custody of minors until a certain age shall be with the mother. These elements are now less significant, and "Welfare of the Child or Best Interests of the Child" has become the primary consideration when determining child custody.

General legal principles state that the appointment of a guardian or custodian must be considered and resolved in the child's best interests.<sup>76</sup> The court is responsible for safeguarding the child's interests and considering their welfare.<sup>77</sup> In another decision, the Supreme Court ruled that when an issue about custody of a minor arises, the primary and significant factor is what is best for the kid, not the parties' legal rights.<sup>78</sup>

In *Jijabai v Pathankhan*<sup>79</sup>, the court considered the child's welfare when interpreting the law for the first time. According to Hindu law, the mother only becomes a natural guardian after the father, who is the natural guardian while he is still living. However, the mother was recognized by the High Court as a natural guardian based on fact. The Supreme Court ruled that although the phrase "father and after him, mother" is accurate, the

<sup>75</sup> Doi, *Shari'ah :Islamic Law*, 332.

<sup>76</sup> Rahim, *The Principles of Mohammedan Jurisprudence and Mohammedan Law*, 556.

<sup>77</sup> *Thirty Hoshie Dolikuka v Hoshiam Sharaksha Dolikuta*, AIR 1982 SC1276

<sup>78</sup> *Elizabeth v Arvind* , AIR 1987 SC 3

<sup>79</sup> AIR 1971 SC 315

father was still living and did not show any concern for the affairs of the child. In that case, the Supreme Court ruled that it was incorrect to regard the father as non-existent for the welfare of the child.

In the long-awaited *Githa Hariharan v. Reserve Bank case*<sup>80</sup>, the Supreme Court decided to interpret section 6(a) of the Hindu Minority and Guardianship Act. The word "after" in the section was found to have no meaning. That does not imply that following the father's lifespan. When deciding on a minor's custody and guardianship issue, the Court primarily focuses on the minor's best interests and welfare in the broadest sense. Once more, the Supreme Court ruled that an unmarried mother has the right to act as her child's natural guardian when it comes to Hindu guardianship laws.

According to traditional Islamic law, the father retains supervisory guardianship over his children, while the mother is the custodian of her children.<sup>81</sup> When it came to issues concerning the custody rights of a Muslim individual, the court occasionally departed from the traditional perspective. Personal law states that a mother's claim to custody is forfeited if she remarries someone who is not in one of the forbidden relationship levels. However, in *Irfan Ahmad Shaikh v Mumtaz*<sup>82</sup>, the court upheld the mother's custody rights since the child wished to remain with the mother. The case of *Poolakkal Ayisakutty v. Parat Abdul Samad*,<sup>83</sup> brought up the question of giving custody of a 4-year-old child to the father instead of the maternal grandmother. The Personal Law of Muslims, the child has to be in the custody of the mother's mother and then the father's mother, how high so ever. The court ruled that the child's welfare was of the utmost concern and granted custody to the father. It departs from the general rules of *Sharia* law. However, Muslim law does not just spell out the rules for everything. It also has special rules for specific situations. It has

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<sup>80</sup> AIR 1999 2 SCC 228

<sup>81</sup> David Pearl and Werner Menski, *Muslim Family Law*, 3. ed (London: Sweet & Maxwell Thomson Reuters, 1998), 425.

<sup>82</sup> AIR 1999 Bom 25

<sup>83</sup> 2005 AIR KER 68

never disregarded the views of a minor child of discretionary age regarding custody.<sup>84</sup>

It is a well-established legal principle that custody orders are never final by nature; a challenge should be presented solely when it is in the child's best interest to do so.<sup>85</sup> Maintaining the well-being of the minors is of utmost significance, but it must be balanced with the parties' attachments and sentiments towards the minor children. The provisions of the Guardians and Wards Act cannot be viewed in isolation and detached from the principles exported by Personal Law and the clauses mentioned before. The child's welfare is the primary concern, and the Guardians and Wards Act's requirements would be derived from personal law.

The custody orders are not final by nature; instead, they are interlocutory and can be changed at any point in the future upon proof of a change in circumstances that necessitates a change in custody; however, the change in custody must be demonstrated to be in the child's best interests.<sup>86</sup>

### **Guardianship Laws in Other Islamic Countries**

Guardianship in Islam is a complex subject that combines theology, law, and social practice. Despite its roots in religious texts and customs, its modern interpretation is influenced by several social, legal, and cultural variables. The ongoing discourse on its interpretation and implementation indicates the dynamic character of Islamic philosophy and society. Modern scholars have challenged and reexamined the traditional understanding of guardianship, arguing for a more just implementation. The intersection of contemporary social and political contexts with traditional Islamic guardianship principles has given rise to new obstacles and opportunities for interpretation—an examination of how the legal systems of certain Muslim-majority nations have incorporated the idea of guardianship.

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<sup>84</sup> *Irfan Ahmad Shaikh v Mumtaz*, AIR 1999 Bom 25

<sup>85</sup> *R.V Srinath Prasad v. Nandamuri Jayakrishna and Others*, 2001 SCC 4 71

<sup>86</sup> *Rosy Jacob v. Jacob A. Chakramakkal*, 1973 1 SCC 840

In the case of *Rashida Begum v. Shahab Din*<sup>87</sup>, the Pakistan Court upheld the mother's guardianship right. A brief fact about this case is that the mother of two girls married someone else who was not related to the children. A petition was submitted by a brother of the children's father, who had passed away, asking to be appointed guardian of the girls' property. Using the "best interest of the child" as an argument, the mother opposed the petition to control the minor child and take care of their property. *Afzaal Ahmad Buttar and Ors v. Muhammad Yousaf*<sup>88</sup>, the court recognized the mother's restricted guardianship rights over her minor child's property. The Lahore High Court often decided that the children should not be separated from their mothers. Consequently, in Pakistan, the mother also has the right to care for the child and their property like a father. *Mirza Waqar Ahmad and Ors v. Ayesha Zeeshan and Ors*<sup>89</sup>., the Lahore Court held that "no one can be a better guardian and custodian of a minor girl than the real mother." This progressive interpretation has just happened in India today. Indian judiciary sticks to the traditional law that excludes the mother from the status of natural guardian to take care of the minor's property.

In Indonesia, the codified civil law mentions the guardianship provisions, and there is also no exclusion of the mother from the status of guardianship like in India. The Indonesian Civil Code specifies who can be appointed as a guardian and what conditions must be met before placing someone under guardianship. Family members are usually preferred in this regard. The family members who can apply for guardianship are defined as "blood family members in the vertical line of the PPD" and "family members in the horizontal line until the fourth degree" under Article 434 of the Code. The term "vertical" or direct line refers to persons descended from one another, such as children, Fathers, and mothers. <sup>90</sup> Uncles and aunts, brothers and sisters, and nephews and nieces are examples of family members that do not directly belong to the vertical family line; they are considered to be in the "horizontal line." When people with impairments do not

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<sup>87</sup> PLD 1969 Lah. 1142

<sup>88</sup> LEX/LHPK/0021/2022

<sup>89</sup> LEX/LHPK/0066/2023

<sup>90</sup> Article 291 of the Civil Code, Indonesia

have spouses or family members, the district prosecutor can file for guardianship.<sup>91</sup>

In Morocco, the proposed legislative reform has minimal impact on male advantages related to guardianship, inheritance, marriage, and other matters. Morocco revised its law in 1993 to allow adult women whose fathers have passed away to choose their guardians during marriage. Later, it was amended to permit adult Moroccan women to enter into matrimony independently, with the proviso that they may still request the presence of a male guardian if necessary.<sup>92</sup>

The mother is granted natural guardianship of her child under the Iranian Civil Code, which places her on par with a paternal grandfather.<sup>93</sup> The patriarchal laws give preference to the father, but after the role of the father, it legally acknowledges the mother's status as guardian. However, India follows the same regressive interpretation and unthinkingly follows the traditional *Sharia* practices among the Muslims.

## Conclusion

The existing legal framework in India blindly follows traditional Islamic guardianship laws. Based on an analysis of various judgments discussed in this article about Muslim guardianship laws in India, it is clear that explicit gender disparity provisions continue to be enforced in the country. Even though women are a child's natural guardian by birth, Islamic law does not acknowledge the mother's natural guardianship rights. Furthermore, Islamic law is ambiguous when protecting a minor's property in the absence of a father, grandfather, and executors named in their will.

In 2018, the Law Commission of India recommended that the reformation of guardianship laws in India be necessary. Moreover, Indian guardianship laws have been progressively interpreted by the judiciary in matters of Hindu guardianship laws and Muslim

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<sup>91</sup> Article 435 of the Civil Code, Indonesia

<sup>92</sup> Jan Michiel Otto, "Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present," *Sharia Incorporated*, 2012, 115.

<sup>93</sup> Article 15 of 1975

custody laws. Neither the legislature nor the judiciary has taken any initiative to redefine Muslim guardianship laws in India. Unfortunately, recently, in the case of *C Abdul Aziz and Ors. v. Chembukandy Safiya and Ors*<sup>94</sup>, one of the High Courts in India reaffirmed the traditional Sharia position, which excludes mothers from the status of natural guardianship in India. However, in other Islamic nations, including Pakistan, Islamic guardianship laws have been gradually interpreted to acknowledge the mother's right to natural guardianship over her minor child's property. In the judgment of *Gul Mina Afridi v. Rana Abdul Kareem and others*<sup>95</sup> The Pakistan Court upheld the mother's guardianship right based on the child's best interest principle.

During the reformation and codification attempts made by the legislature and judiciary in India, Muslim conservatives were always opposed, arguing that it was against their fundamental right to religion enshrined under Article 25 of the Constitution of India. These incidents create the belief that the Sharia laws are static, rigid, and unamendable. This apprehension continues today, and the legislature and judiciary have taken a hands-off attitude toward certain personal matters even today.

The previous decisions and rules of the Muslim jurists may not solve modern Muslim problems in India. In this context, da'wa communication among Muslims is necessary to eliminate gender disparities and solve the ambiguities in guardianship provisions under *Sharia* law. The da'wa process is adaptable and ever-changing. It encourages Muslims in a society or group to change how they understand and practice Islam so that it aligns with the religion's values and objectives. Furthermore, da'wa is not just preaching; it can help to renew and change Sharia by making Muslims think deeply about how it is being used and understood right now and seek out new and better ways to handle today's issues and problems.

In India, how does da'wa communication work? Ulama and Islamic scholars are important in promoting da'wa communication within the Muslim community. The All India Muslim Personal

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<sup>94</sup> 2022LiveLaw(Ker)332

<sup>95</sup> C.P. No.S-411 of 2022

Law Board is a non-governmental institution in India that represents Muslims' interests in matters of personal law. It should take initiatives to eliminate the gender disparities in Muslim guardianship laws through effective da'wa communication. Furthermore, da'wa can encourage Muslims to use *ijtihad*, or independent thinking, and support the role of scholars and experts in creating and improving Sharia. Sharia-compliant countries, such as Pakistan, are crucial in revising classical Islamic family law in changing conditions through judicial *ijtihād*. It is essential to educate Indian Muslims through da'wa communication for them to recognize and acknowledge contemporary interpretations of Islamic law, which includes guardianship laws.

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