CUSTODY AND GUARDIANSHIP (2)

Guardianship of women(Hindu Law)

Manu, one of the ancient Hindu law givers, in *Manu Smiriti*, stated that a woman should be guarded throughout her lifetime and the duty is of the male member of the family. In the every _new phase' of the woman, the author appoints a _guard'.

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116 Para 2.3.8 of 2015

117 Id.

118 The Laws of Manu Penguin Classics, 197

Women are not guarded when they are confined in a house by men who can be trusted to do their jobs well; but women who guarded themselves by themselves (sic) are well guarded[119].

Similarly, another law giver, *Narad,* considers the wife to be the property of the husband and stipulates that if a person takes in the widow of a sonless dead man, he also becomes liable for his debts (even if he is dead)[120]. Thus, for every valid transaction on her behalf, prior consent of the husband is deemed necessary in this text.[121]

Kamasutra also depicts the character of the women in line with its contemporary literature. The content of the text is considered to be advance in nature,[122] but there are many instances where the character of the woman is woven on the same lines as those in *Laws of Manu* and *Narada*. Chapter five of the book five[123] illustrates a list of women who can be ‗taken' by the men in power. One of the

categories indicated by the author is that of **the woman who are not guarded** by anyone or **who wander around without *claim* of any man** to her[124]. Such a statement emphasises women are not to be left

unguarded and unclaimed and their agency and autonomy is not only undermined but demolished in this writing.

Section 6 of the Act, 1956 seems to have been constructed on the above understanding. A plain reading of the section indicates that

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[119] Id. 9.12

[120] Julius Jolly, Translator. Naradiya Dharmasastra; or, the Institutes of Narada (1876)

[121] Ibid.

[122] See, Wendy Doniger, *On the Kamasutra,* 131 On Intellectual Property 126-129 (Spring, 2002).

[123] Wendy Doniger and Sudhir Kakkar, Vatsayan Kamasutra, 108(2002)

[124] Id. 122

> *the man in charge of threads may take **widows, women who have no man to protect them**, and wandering women ascetics; the city police-chief may take the women who roam about begging, for he knows where they are*

vulnerable, because of his own night-roaming‟s ; and the man in charge of the market may take the women who buy and sell.

a woman does not have authority on herself. She is to be under the guardianship throughout her life. A father and after him mother, is to be the guardian of an unmarried daughter and a husband to be the guardian of his wife.[125] Relevant portion of the said sections are:

> (a) in a case of a boy or ***an unmarried daughter***-the father and after him, the mother…
> (b) in case of illegitimate boy or ***illegitimate unmarried daughter***: the mother, and after her the father;
> (c) in the case of ***married girl***- husband;…
> (emphasis added)

One of the ideas behind bringing a codified Hindu Law was to do away with the discrimination against the women[126]. While the law has now recognised certain rights, it has, at the same time either bluntly or latently, kept women at the lower pedestal than men. The notion, men being superior and thus in control, still persists.

The section comes in conflict with other laws as well. One such example is the right to adopt by unmarried woman. Section 8, of the Adoption and Maintenance Act, 1956 (after amendment of 2010) gives right to an

unmarried woman to adopt a child[127]. However, if according to section 6, of the Act, 1956, the woman is under the guardianship of her father/mother can she be declared as the guardian of another person? If she does not have autonomy of self, can she accept the responsibility of a minor?

While the Act, 1956 considers women to be under the guardianship of another, the Indian Courts have repeatedly

[125] Report of High Committee on the Status of Women, Government of India, Ministry of women and Child Development, New Delhi, June 2015

[126] The BN Rau Committee Report, 1947.

[127] Section 8 Capacity of a female Hindu to take in adoption. –

> Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.".

emphasised that once a girl attains majority she has the full autonomy of herself. In *Lata Singh* v. *State of Uttar Pradesh*[128], the Supreme Court observed that two consenting adults could marry the life partner of their choice, or even a ‗live in relationship' if they choose. A major girl is free to marry anyone she likes or *-live with anyone she likes*||.[129]

In *S. Khushboo* v. *Kannimaal*[130], the apex Court held that two willing adults engaging in sexual act outside the institution of marriage is not an offence, though the society might not approve of the same, but that does not make it an offence. The Court ruled that morality and criminality are not co-extensive, and recognised the autonomy of a major girl. A close reading of the judgment, reflects that once an individual attains majority, irrespective of their sex, they are free to make their own choices and not be ‗guarded' by anyone. While deciding the case *Shakti Vahini* v. *Union of India*[131], the Supreme Court held that two contesting adults could marry the person of their choice. The right is vested on them by the Constitution of India and any

infringement of the right is a violation of the Constitution.

While emphasising the right to freely marry and condemning the offence of honour killing, the Court deliberated the importance of the _individual liberty, freedom of choice and one's own perception of choice‘.

> The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid

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128 AIR 2006 SC 2522

129 *Lata Singh v. State of Uttar Pradesh*, AIR 2006 SC 2522

130 AIR 2010 SC 3196

131 AIR 2018 SC 1601

> provisions of law, the life of a person is comparable to the living dead ... The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. ... life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

The Law Commission of India, in its 242nd report: _Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework', (2012), while emphasising on the importance of self-autonomy, was of the view that:-

> The autonomy of every person in matters concerning oneself - a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open

> society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well-being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary[132].

There is one other related aspect of child marriage that has to be examined. To curb the evil of the child marriage, the first Act was enacted in the year 1929 i.e. the Child Marriage Restrained Act, 1929, followed by the Act of Prohibition of the Child Marriage, 2006 (the Act, 2006). But, still the desired prohibition on child marriage is not yet accomplished. Child marriages are still common, and near about 46% of the female children are married before attaining the age of majority[133]. The Act, 2006 does not deal with the situation where the

[132] Para 4.1

[133] National Family Health Survey-3 (2005-2006) referred in *Independent Thought v. Union of India*, AIR 2017 SC 4904; *see also*: United Nations Children's Fund, Ending Child Marriage: Progress and prospects, UNICEF, New York, 2014, in the

husband is also a minor. Section 6(a) declares that guardianship of a minor boy is with his father and after him, with his mother; at the same time under sub-clause (c) he is given the guardianship of another person i.e. his wife, in case a marriage is being solemnised. The question does arise as to how a minor can have the guardianship of another minor? Giving responsibility of a person to another, who himself is not legally responsible for his own conduct, is contradictory. It is therefore, suggested that Section 6 (c) be deleted and word unmarried be omitted from the section.

Natural Guardian of Adoptive son(Hindu Law)

Even in the year 2018 section 7 of the Act, 1956 provides only for the guardianship of adoptive son only. It is silent about the guardianship of an adoptive girl. The Law Commission of India in its 257th report _Reforms in Guardianship and Custody Laws in India' (2015) recommended the desired change in the language of the section, and to include _adoptive girl' as well.

Section 7: This section provides that the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. The language of this section is incongruous in that it refers only to the natural guardianship of an adopted son, and does not refer to an adopted daughter. … The Commission merely corrects this by amending the Hindu Minority and Guardianship Act, 1956 to be in consonance with the Hindu Adoptions and Maintenance Act, 1956.

It is further recommended that the language of the law be changed and shall read as recommended for section 6 (a) and recommendations of the 257th report be given affect.

MUSLIM LAW

The Shariat Application Act, 1937, provides that in the matter of custody and guardianship, the Muslim personal law shall be applicable.[134] The rules governing the matters of custody and guardianship under Muslim Law, however, are not expressly codified and are thus governed according to the prevailing customs and usages.

The custody and guardianship of a minor though varies among different schools of Muslim personal law, but the common thread running under the is application of the principle of best interest. For example, Shafai jurists observes that:

> —The right to custody is not for an imbecile person, nor for those indulging in immoral acts. For this right is essentially about protecting the interest of the child. It is not

in the interest of a child to put him/her under the care of a debauched person.||[135]

According to *Hanafi* law, the mother will take care of her daughter until she comes of age i.e. has her menses. Son will be under his mother's care until he is able to eat, drink, dress and

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[134] The Muslim Personal Law (Shariat) Application Act, 1937 Section 2:-

> *" Application of personal law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."*

[135] See: Al-Majmu, 18, 320, Kitab Al- Nafgat, Bab Al-Hizana; see also, Hashiya Al- Sawi ala Al-Sharah Al-Sagir, 2,759, Bab Wujub Nafqa ala Al-Ghair, Al-Hizana, Sharah

Zad Al-Mustanqa li Al-Shinqiti, 9,344, Bab Al-Hizana, Maney Al-fisq, cited in the reply submitted by the All India Muslim Personal Law Board [*AIMPLB*]

attend to the call of nature on his own. After this, his father will have the right to bring him up. Since there could be some difference of opinion about the stage when son could accomplish the above basic necessities on his own, jurist have the fixed the age of 7 years. So, mother is entitled to bring up her son until he is 7 years old.[136] While examples such as:

> —The important point is that if the carer (mother) is engrossed in immorality or sinfulness in a way that may adversely affect the child, she will lose her right. Otherwise, she has a greater right to bring up her child until he/she develops some understanding.‖(Radd Al- Mukhtar, 3,557 Bab Al-Mizana, see also Hidaya, 2,284).

This also highlights the welfare of the child as the under lying concern, but these can also be easily biased against the mother such that if mother marries someone who is not child's mahram, she will lose her right to custody. This deserves to be reconsidered. Before going into the principles of custody and guardianship, it would be important to recognise the definition of a minor under Muslim personal law.

Who is a Minor?(Muslim Law)

The Indian Majority Act, 1875, (the Act, 1875) as a general rule, under section 3 declares that a person of eighteen years of age is a major. At the same time, giving enough space to the communities to practice their personal laws, section 2 of the Act, 1875, specifies an exception, to the said rule under section 3. Section 2 stipulates that provisions contained in the Act, 1875, are not to affect the capacity of a person to act in the matters of marriage, dower, divorce and adoption[137] and it shall also not interfere with the religion or religious

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136 (Al-Durr Al-Mukhtar 3,566, Bab Al- Hizana See also. Al-Hidaya 2,284, Al- Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm Al-Walad ind iftiraq Al-Zawjayn.) in Ibid.

137 The Indain Majority Act, 1875, Section 2 (a)

rites of the citizens of India[138]. The Muslim Personal Law (Shariat) Application Act, 1937, also states that Muslim personal law shall govern the matters relating to marriage, divorce, dower, guardianship and others[139].

Under Muslim personal law, the age of majority is calculated based on the attainment of puberty. The moment a child attains puberty he/she is said to be major in the eyes of the personal law and is considered competent to perform independently in case of marriage, divorce and dower.[140] The age prescribed for determining majority differs among the various schools of Muslim law. For example, the Shias consider a boy to attain puberty at the age of fifteen years and a girl at the age of nine or ten years.[141] Whereas, the Hanafi school consider it to be fifteen years of age for both the sexes.[142] Syed Ameer Ali also states that the age of majority for the Shia and Sunni schools should be same, and be fifteen years of age[143]. In line of the Ameer Ali, Mulla also writes that the age of puberty, where the evidence of puberty is not available, would be based on

the completion of the fifteen years of age.[144] Therefore, the common agreement is, a person is said either to be major when he/she attains puberty or on completion of the age of fifteen years.

Puberty is considered only for the purposes of contracting a marriage, or determining dower and deciding divorce. In the matters related to the property, the provisions of the Indian Majority Act, 1875, governs the person and one is said to be major after attaining

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138 Id. Section 2(b)

139 The Muslim Personal Law (Shariat) Application Act, 1937 Section 2

140 Mulla on Mohammedan Law, Dwivedi Law Agency

141 Mulla on Mohammedan Law Chapter 15 Guardianship pp 406, Dwivedi Law Agency

142 Id.

143 Syed Ameer Ali, Mohammedan Law.

144 Mulla's Principles Of Mohammedan Law Article 251(3) explanation

Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

the age of eighteen (18) years.[145] However, given that the age of attaining puberty may be contingent on diet, genes, region, maturity among many other factors, it may be more beneficial- for the purposes of law to recognise a common age for majority at 18 years.

Although such a recommendation may also compromise on the agency or freedom of teen-aged children in choice of partners, and this is exacerbated by the fact that parents even after their children acquire majority, frequently deny their children their partners of choice; it is equally important to understand that marriage between minors even by consent is regressive because children may not fully comprehend, understand the consequences of their choices.[146]

145Mulla on Mohammedan Law, pp 407

146 (Recommendation with regard to the concept of age of minority is discussed in the chapter on the marriage and divorce.)

To be continued….