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## **Female's right to guardianship: with Special reference to Customary Law in the Punjab during British**

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### **An Abstract**

By adopting customary law the British had opted to protect the tribal structure of Punjabi Society, and base their rule on a social organization that they considered to be central to it. When provisions of customary law of the Punjab are closely examined, it seems that almost all the provisions directly or indirectly witnessed the gender discrimination that was prevailing in contemporary society. The paper deals with female's right to guardianship with reference to Customary Law adopted by British rulers of Punjab. Their right to guardianship was restricted. Even in the presence of a daughter her father could adopt the male child. In case of *Ghar-jamai* not daughter but her son was successor of her father.

### **Introduction**

Punjab was annexed to the British Empire in India in 1849. After the British conquest, peasants in Punjab's villages suddenly became aware of colonial officials recording their folk-tales, ballads, songs and proverbs, investigating their customs and codifying customary law. The nature of property rights, marriage patterns, inheritance, Guardianship customs and collective rights on village commons were all being enquired into. The first set of *wajib-ul-arz* (village administration paper), prepared in the early 1830s, had identified rights and customs in each Punjab village. In the 1860s, the first series of *riwaj-i-ams* of tribal customs, as distinguished from village customs, were prepared. Numerous codes, digests and manuals, as



well as more than forty volumes on the customary law of different districts of Punjab, were soon produced. By adopting customary law the British had opted to protect the tribal structure of Punjabi Society, and base their rule on a social organization that they considered to be central to it. When provisions of customary law of the Punjab are closely examined, it seems that almost all the provisions directly or indirectly witnessed the gender discrimination that was prevailing in contemporary society. The legal status of women under customary law in Punjab was reflected in the fact that the concept of women's right to guardianship rarely existed. She was totally dependent on the husband, and subject to his will, and after his death she became dependent on his male relatives.

**Keywords:** Customary law; Guardianship; Riwaj-i-am.

### **Material and Method**

The Paper is based on *Customary Laws* of Various districts under the British regime. Denzil Ibbetson's *Punjab Caste and Tribes* and C.L.Tupper's *Punjab Customary Laws* in three volumes also provides valuable information of various customs that were prevailing in various districts of Punjab. In this paper interdisciplinary approach have been used.

### **Result and Discussion**

Guardian may be defined as one who has or is by law entitled to the custody of the person or property or both of an infant, an idiot or other person legally incapable of managing his own affairs; a tutor [1] Guardianship is the condition or fact of being a guardian; the office or position of guardians.[2]Guardians were of persons or property. The guardian of the person looked after the personal welfare of the ward and the latter managed his property. Both the functions might be combined in one person. [3] A person below the age of eighteen years was regarded as minor. [4] For the purpose of guardianship, this was also the minority under Hindu Law. Under the Muslim Law too this was the age of minority for the guardianship. [5] In the Modern Law the guardian exists more for the protection and care of the child and to look after its welfare, rather than for the exercise of his own power and rights over the

child as was understood under the old law, when paternal power was considered to be absolute and guardianship was nothing but an extension of that power. Broadly speaking there were two categories of guardians:

- (a) General guardians
- (b) Particular guardians

The general guardians were required to look after the person or the property or both of the minor generally. The general guardians were:

- (1) Natural guardians
- (2) Testamentary guardians
- (3) Certified guardians or guardians appointed by the court.

The particular guardians were required to look after some particular matter relating to minors, such as marriage. Particular guardians were:

- (1) guardian for marriage (a dying out institution with the prohibition of child marriages),
- (2) guardian in litigation appointed under the law procedure, and
- (3) guardian of lunatics appointed under the lunacy law.

Apart from these there were at least two other types of guardians:

- (1) guardian by affinity, for example minor widow's guardian, an institution which existed in India only under Hindu law. It might be his father-in-law or brother-in-law.
- (2) De facto guardian, an institution which had played a significant role in Hindu law as well as customary law--most of the litigation that had arisen related to de facto guardian's power of alienation of minor's property.

**Natural Guardian:** Under the Punjab Customary Law the father was the natural guardian of his minor children and after his death; the mother was the natural guardian. The mother as a widow retained



her rights of guardianship of the person of the minors if she married a male near relative of her deceased husband or her husband's brother or uncle's son. She lost it if she married anywhere else.[6] In a village Qadarpur Jiwan Dass son of Tulsi Dass, Arora Juneja, died, leaving a widow Mussammat Narain Devi. She remarried and a minor daughter Mussammat Nihal Bai who lived with her grandfather. The mother's claim for the guardianship of her daughter in preference to that of the latter's grandfather was rejected.[7] On her again becoming a widow that right was not revived. [8]

If a widow had neither male near relatives of her husband up to three or four generations and had neither sufficient immovable property from her husband, she might re-marry and yet retained the guardianship of her minor children till they attained majority. She could not however waste their property. [9]

Among some tribes, after the death of both parents, the elder brother was recognized as a guardian. In *Sadhu Ram verses Pirthi Singh* [10] the Lahore High Court held that in the absence of adult male members in the joint family, the mother could be the guardian of the joint family property. But in view of the Supreme Court such a practice was not prevailing. The Supreme Court held that the mother could not be the Karta of her son's interest in the joint family property. Here a question arose that why she could not do so when father could. She was also a part of family. That was a big step which showed that gender discrimination was prevailing.

Hindu law recognized three persons as natural guardian: father, mother and husband. Under Muslim Law the father alone was recognized as natural guardian. The female members of the society were deprived of their right to guardianship which was again a sign of discrimination. [11]

Under the Muslim Law the father was the natural guardian of his minor children. Under the Hanafi law none else could be the natural guardian of the minor children. [12] The Shia Law recognized paternal grandfather as guardian of the minor grandchildren. [13] Under Muslim law the mother was not recognized as guardian under any circumstances. This point under Muslim law was also pointing towards gender discrimination because when a woman could give birth to a child; from birth to adulthood she looked after



him or her, and then why she could not become his or her guardian. The reason seemed to be the Muslim law of custody. The Muslim law givers were categorical that children of the tender years must be in the custody of the mother. The school of Muslim law differed as upto which age the mother was entitled to the custody of her children. The Hanafis hold that mother was entitled to the custody of her female child up to the age of puberty. The Shia's held that mother was entitled to the custody of her male child up to the age of two and of female child up to the age of seven.

Among all Hindu and Muslim tribes unmarried females, whether minors or adults were always under the guardianship of their parents, brother, paternal uncles or paternal uncle's sons. If there was no male agnate they lived under the guardianship of a near relative, male or female, of paternal or maternal side.[14]

Among Mohammadans a married woman after the consummation of marriage, lived under the guardianship of her husband. In case the latter died and the woman was of full age, then according to the Mohammadan law she was independent but according to customs if there were male real relatives of her husband she lived under their care. If the marriage had not been consummated, then whether she was adult or minor, she lived under the guardianship of her father, brother or paternal uncle. [15] Again this pointed towards gender discrimination. Why she could not become her own master. Thus when she could not become her own master how could she become master of her own children and how she could protect her children's rights.

Among Hindus a married girl, after marriage lived under the guardianship of her husband. On her becoming a widow she lived under the care of male near relatives of her husband, but if she was an adult and there was no near agnate of her husband, then she was her own master. [16]

The Punjab Laws Act changed all that in 1872. The court of Wards was to take charge of her property, but if the court felt that she was mature and sensible, no person was to be made her guardian.[17] That was a significant step in recognizing the female as an independent adult, rather than as a mere dependent on male.



However the British administrators and law-makers were not willing to make radical changes due to fear of local reaction. Thus the court decisions of 1875 and 1879 went in favour of infant marriages arranged by the father or the grandfather. The judgement said that the infant on attaining maturity could not break the marriage contract. [18]

However, section 19(a), Guardian and Wards Act 1890 laid down that the court could not appoint any other person as guardian of minor married girl whose husband was not unfit to be the guardian of her person. [19] The provision applied to all communities, including Muslims. This provision of act was also pointing towards the child marriage which was prevailing in the society. When a girl or a boy was not able to take any decision how could one think of his or her marriage.

**Testamentary Guardian:** Under Customary Law the father in his life time had the power to appoint by testament or otherwise a guardian of his minor sons or adult daughters after his death, but the guardian should be one of his near relations. [20] Under the Hindu Law the father had the power to appoint a testamentary guardian. After the father, the mother of the minor children had this right. She could also appoint the testamentary guardian of her minor illegitimate children even during the lifetime of the father. It seemed that the father had no power of appointing testamentary guardian of his minor illegitimate children, even after the death of the mother. The father could not so appoint a testamentary guardian as to deprive the mother of her natural guardianship. This meant that the testamentary guardian appointed by the father would remain in abeyance till the mother was living. If the mother died without appointing a guardian, father's appointee would take over. But if the mother died after appointing testamentary guardian, it would be her appointee who would act as guardian and not the appointee of the father.

Neither the father nor the mother had any power of appointing a testamentary guardian in respect of undivided interest of the minor in the coparcenary property. The testamentary guardian of the minor girl had no power to continue to be her guardian after her marriage.

Among the Muslims under the Sunni Law the father had absolute power of appointing a testamentary guardian. No one else had that power. Under the Shia Law also the father had the power of



appointing a testamentary guardian and after him, the grandfather had that power. No one else had the power of appointing a testamentary guardian. But under the Shia Law father could not appoint a testamentary guardian so as to deprive the grandfather of his guardianship. If father died after appointing a testamentary guardian and then the grandfather died after appointing a testamentary guardian then it would be grandfather's appointee who would act as testamentary guardian.

Under all schools of both sects of Muslims, the mother had no power of appointing a testamentary guardian. Thus the mother was discriminated because the right of guardianship was passed from father to grandfather and other male collaterals and was a step towards gender bias.

**Certified Guardian:** With respect to all children belonging to any community, the appointment of guardian by the court took place under the Guardian and Wards Act 1890. The guardian appointed by the court was known as certified guardian. The High Courts had inherent power of appointing guardians and custodians, but that power was used sparingly. The High Court's power was extended even over the undivided interest of the minor in the Hindu joint family property. [21]

It was the District Court which had the jurisdiction to appoint or declare as guardian any person whenever it considered it was necessary in the welfare of a child. [22] In appointing a guardian, the court took into consideration various factors, such as the age, sex, wishes of the child, the wishes of the parents, if any and the personal law of the child. The District Courts had the power to appoint a guardian of the minor's person, or property, or both, but it had no power of appointing a guardian of the minor's undivided interest in the Mitakshara joint family property. [23] However, if all the coparceners were minors, then the court had the power to appoint a guardian in respect of the entire property. Such an appointment would come to an end the moment any one of the coparceners attained majority.

#### **Power and rights of the guardian of the person of the minor**



A natural guardian had the general power of looking after the upbringing of the child. This was also his responsibility. Generally the natural guardian has the following rights in respect of the person of the minor

- (a) Right to custody: It was the Hindu mother's right to custody of the child upto the age of five, Sunni mother's right of custody over male child upto the age of seven and over female child till she attained puberty and of Shia mother's right to custody over female child up to the age of seven and of male child up to the age of two.
- (b) Right to determine the religion of the child.
- (c) Right to control education.
- (d) Right to control movements.
- (e) Right to reasonable chastisement.

These rights had been conferred upon the guardian in the interest of the child and welfare of the child was paramount consideration.

A certified guardian from the date of appointment was under the supervision and guidance of the court. Both, the testamentary guardians and the certified guardians had virtually all the power, subject to the terms of deed of appointment or terms of the order of court respectively. Under the right to custody mother's right to custody was a big step towards her right. It also raised a point that when she could be the guardian upto five years old children why she was deprived of that right when the child was above five or seven.

#### **Powers and rights of the guardian of the property of the minor**

Under the Punjab Customary Law the legal guardian had power to alienate the minor's property for necessary purposes. It seemed that the guardian could alienate minor's property for the secured debts of the minor's father, but he could not do so if debts were unsecured.





At one time the guardian of the property of the minor had very large powers. These powers were available not only to the natural guardian but also to the de facto guardian. Under the Hindu Minority and Guardianship Act 1956 these powers and rights had been curtailed. Section 8(1) laid down the general power of the guardian. Generally, he might do all which were necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of minor's estate. The generality of the power would exclude fraudulent, collusive, colourable, speculative, unnecessary or unreasonable transaction.

Under the old Hindu law it was the accepted position that the natural guardian had the power to alienating minor's property for legal necessity or for the benefit of estate. But Section 8, Hindu Minority and Guardianship act had greatly restricted the natural guardian's power of alienation. Section 8(2) laid down that the natural guardian could not without the previous permission of the court, mortgage or change or transfer by sale, gift, exchange or otherwise, any immovable property or lease any part of such property for a term exceeding five years or for a term exceeding more than one year beyond the date on which the minor would attain majority. Sub-section (4) of section 8 laid down that the court should not grant permission to the natural guardian to do any act mentioned in sub-section(2) except in case of necessity or for the evident advantage of the minor. Any alienation made by the guardian without prior authorization by the court was voidable the option of the minor. It seemed that where the guardian acquired property for the benefit of the minor, no permission of the court was necessary. It also seemed that for the welfare of the minor, the guardian could alienate movable property and enter into contract without the prior permission of the court. Waghela verses Masludin and Sarwarjan verses Fakhruddin laid down that the guardian had no power to bind the minor personally by his contracts. This had been enacted in section 8(1) of the Hindu Minority and Guardianship Act. But the estate of the minor was liable for the debts incurred, or contracts entered into for the benefit or the need of the minor, if the guardian was personally liable for the debts.

Muslim law-givers did not make any distinction between the power of testamentary guardian and natural guardian. The fact of the matter was that the Muslim Law-givers first prescribed the powers of the

testamentary guardian and then said that the natural guardian had the same powers. A guardian had the power of sale of minor's property in the following cases:

- (1) When the guardian could fetch double its value,
- (2) When the sale was for the manifest advantages of the minor,
- (3) When sale was necessary for the payment of legacies,
- (4) When there were debts of the testator and the income of the property was not sufficient to discharge them,
- (5) When the income of the property was less than the cost of its up-keep,
- (6) When it was in imminent danger of being lost or destroyed by decay,
- (7) When the property was in the hands of a usurper and there was no hope of its recovery,
- (8) When the sale was necessary for the maintenance of the minor.

Of these (3) and (4) were not applicable to the natural guardian. It was necessary that the guardian must sell minor's property for adequate consideration. An improper alienation by the guardian was voidable at the instance of the minor. The Muslim Law-givers empowered the guardian to sell minor's movable property on the basis of its conservation. Thus, wherever sale of movable property was made for adequate consideration and guardian invested the sale proceeds in a profitable undertaking, the sale was justified.

Muslim Law-givers were not in favour of giving any power to guardian to lease out minor's property.

It appeared that the guardian has power to carry on trade or business on behalf of the minor, provided the business was not of speculative or hazardous nature. Whenever there was an urgent need, the guardian could also incur debts: but a debt without necessity was not binding on the minor.

In *Mir Sarwarjan verses Fakhruddin* the Privy Council held that it was not within power of the guardian to bind the minor's estate by contract for the purchase of immovable property, since then, a view has been propounded that the guardian has no power to enter into a contract on behalf of the minor.

The powers of the certified guardian of minor's property were regulated by the Guardian and Wards Act 1890. A certified guardian was required to deal with minor's property in the same manner as a man of ordinary prudence would deal with his own property.[24] The guardian also had the general power to do all things necessary for the realization, protection and benefit of the minor's property. But he had no power to charge or transfer by sale, mortgage, gift, exchange or otherwise, or to lease any part of property for a term extending more than one year beyond the date on which the minor would cease to be minor, without prior permission of the court. [25] The court would accord permission for alienation only if it found that the proposed alienation was for necessity or for the evident advantage of the minor. [26] The court had the power to define, restrict and extend the power of the guardian from time to time.[27] Apart from alienation of minor's property, his other powers were governed by the general provision of Section 27 that was that he should deal with the minor's property as a prudent owner would deal with his own property.

**Removal of Guardians:** Under Hindu Law no person could continue to be the natural guardian, if he had finally and completely renounced the world. Under Muslim Law also a non-Muslim could not continue to be a guardian. The court had the power to remove any person from the guardianship if it comes to the conclusion that to do so would be for the welfare of the minor. But it seemed that religion was no longer a bar in respect of guardianship of minor's property.

**De Facto Guardian:** A de facto guardian was a self-appointed guardian. A de facto guardian was a person who voluntarily took some continuous interest in the welfare of the minor's person or in the management of minor's property, any authority if law. A mere inter-meddler was not a de facto guardian. An isolated or fugitive act of a person in regard to child's property did not make him a de facto guardian. Some continuous course of conduct with respect to management of minor's property was necessary to



constitute a person a de facto guardian. In short, a de fact guardian was a person who was not a legal guardian, who has no authority in law to act as such, but nonetheless assumed the management of the property of the minor as though he was a guardian. De facto guardianship was thus a concept where past act resulted in present status.

Hindu jurisprudence recognized the principle that if liability was incurred by one on behalf of another in a case where it was justified, then the person on whose behalf the liability was incurred or in any case his property was liable notwithstanding the fact that no authorization was made for incurring the liability. The de facto guardianship provided a solution to two difficult situations; one a child who had no legal guardian would have no one to handle and manage his estate and thus without a guardian the child would not receive any income and two a person having no title could not be allowed to inter-meddle with the child's estate so as to cause a lose to him. The Hindu law found a solution to these difficult situations by according recognition to de facto guardian.

Under Punjab Customary Law in some cases it has been held that a de facto guardian could alienate minor's property for necessary purposes. In Choghatta verses Asa Malthe court held that alienation by a de facto guardian was not binding on the minor. [28]

The de facto guardian's power of alienation was held to be almost at par with natural guardian. In Srimuler's case, Mahajan, j propounded the broad proposition thus: if the estate of a person whether a minor or absentee, or a joint proprietor, has been benefitted by the act of a person who did not hold proper authority but who was in the management of the estate, then that act must be respected by the true owner and should not be repudiated merely on the ground of want of authority. Section 11 of the Hindu Minority and Guardianship Act 1956 laid down that no person should be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian.

Under Muslim Law the Privy Council put a damper on the development of the institution of de facto guardian as early as 1912. The Supreme Court also put its stamp on it in Md. Amin verses Vakil



Ahmed. [29] Thus the possibility of the institution of de facto guardian developing in Muslim Law was put to an end.

It seemed that as to Hindus, Section 11, Hindu Minority and Guardianship Act 1956 would apply and the de facto guardian's alienation would be void. But it would be wrong to assume that the de facto guardian had no place. Under the Hindu Adoption and Maintenance Act 1956 a de facto guardian of a minor had power to give the child in adoption. In *Jijabai verses Pathan*, the Supreme Court said that if the father refused to act as guardian and mother had been in management of minor's property for several years, and then she had the power to bind the minor by her acts of alienation beneficial to minor. This was nothing but according to de facto guardian's status to mother.

### **Conclusion**

From the above discussions some points came into light. Firstly, generally, a woman could be guardian of a child as a mother but only in absence of the father. In the presence of the father she did not have any such right. Secondly, under some Muslim Laws also she as a mother did not have any such right but only had right to custody. When both father and mother were equally important for family then they must have equal rights. But it was not so. Only in some cases female as mother had some limited right to be guardian of her minor children but not full right or equal to that of father. The provisions of Punjab Laws Act made some positive changes towards making female as an independent master of her own. But on the other hand child marriage was a restriction in her path. But it could not be denied that she had a few rights. Even under Hindu and Muslims Law also she had a few rights in exceptional cases, but these were limited. There was a need to make some radical change by the British administrators but because of political expediency they hesitated to do so.

### **Reference**

- 1 J.A., Simpson and Weiner, E.S.C., *The oxford English Dictionary*, Vol. VI, Clarendon Press, Oxford, 1989, p.917.
- 2 Ibid., P. 918.
- 3 *Riwaj-i-am of the Jhang District*, Government printing press, Punjab, Lahore, 1929, p.12.



- 4 ParasDiwan, *Modern Hindu Law: Codified and Uncodified*, Allahabad Law Agency, Allahabad, 1981, pp.120-30.
- 5 Ibid., Section 3(2), p. 120-30.
- 6 *Riwaj-i-am of the Jhang District*, p.13.
- 7 Ibid., p.13.
- 8 Ibid., p.13.
- 9 Ibid., p.13.
- 10 *All India Reporter* 1936, Lahore Series, Lahore, 1936, p. 220.
- 11 ParasDiwan, *Customary Law*, Publication Bureau, Panjab University, Chandigarh, 1978, p. 135.
- 12 Ibid.,P.135.
- 13 Ibid.,P.135.
- 14 *Riwaj-i-am of the Jhang District*, p.14.
  
- 15 Ibid.,p.15.
- 16 Ibid., p.15.
- 17 DushkaSaiyid, *Muslim Women of the British Punjab: From Seclusion to Politics*, Macmillan Press Ltd. London, 1988, p.11.
- 18 Ibid.,p.12.
- 19 ParasDiwan, *Customary Law*, Publication Bureau, Panjab University, Chandigarh, 1978, p.136.
- 20 *Riwaj-i-am of the Jhang District*, P.12.
- 21 *Riwaj-i-am of the Jhang District*, P.12
22. ParasDiwan, *Modern Hindu Law: Codified and Uncodified*, 'Guardians and Wards Act, Section 12.
- 23 *Ibid.*,Section 17.
- 24 *Ibid.*, Section 12.
- 25 *Ibid.*,Section 29.
- 26 *Ibid.*,Section 31.
- 27 *Ibid.*,Section 32.
- 28 ParasDiwan, *Customary Law*, p. 137.
- 29 *All India Reporter* 1952, All India Reporter Limited, Nagpur, 1952, SC 358.