

"IJBAR": THE RIGHT OF A GUARDIAN TO CHOOSE A HUSBAND OR WIFE FOR HIS WARD: A CRITIQUE

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INTRODUCTION

One of the essential elements of marriage contract under Islamic Law is the presence of marriage guardian. The marriage guardian may either be:

- (i) A guardian with power of compulsion (Wali Mujbir) or
 - (ii) A guardian without power of compulsion (Wali gayr-mujbir).
- The former is the main subject of our concern in this article; the power he exercises is known as 'power of compulsion' (Ijbar). It is the legal authority vested in a guardian to impose the status of marriage on his ward with or without his/her consent; provided the condition calling for it exists.

This topic has been very controversial both in theory and practice. The jurists are not unanimous on the extent and scope of its application. Some group of jurist upheld and recognized its use to all categories of women that have not tested marital life and under-aged male children. While others restricted its use to only under-age children of both sexes. One point that is common to all the jurists however, is their recognition of the legality of the marriage of minors and under-aged children. Since the law did not insist on any age limit for marriage, it follows therefore that somebody must represent those that are under-age and inexperienced in their marriage. Moreover, it is a settled law that minors have no capacity to engage in any contractual transaction either for themselves or on behalf of others but can only do so through their guardians. Likewise at that age they do not have the know-how to the intricacies of life as such they have no consent to give or with-hold. It is thus the guardian that is expected to stand for their interest, perhaps this account for the justification of the exercise of the power of compulsion over minors. What on the other hand account for the application of the doctrine of Ijbar on adult may be lack of experience in matrimonial affairs.

For the purpose of a clear understanding of this concept we have to determine whether it is a right or a duty on the guardian. If we consider it as a right, it imports that the guardian can do whatever he wishes or

pleases; the child's interest notwithstanding. If it is a duty, it means he is to carry it out to the best interest and welfare of the child; disregarding his own personal interest or pleasure. We are of the opinion that the latter was the main intention of the law for institution of guardianship in marriage. In practice, especially in the Northern part of this country, parents delve into the marriage of their children as if it is their own personal interest or rights which they must protect at all cost. They impose marriage on their children without regard to their interest and welfare; giving their own personal wish and interest the paramount consideration. They do this in most cases for some material benefits they gained or are expecting to get from the intending spouse. In some cases the interest of parent conflict with the interest of the child. Sometimes this may lead to the threat of cursing or disowning the child if he/she refuses to accept the parents wishes.

This atmosphere can certainly not be in the interest of the child. However, the above exposition notwithstanding, whether guardianship is considered as a right conferred on or as a duty assigned to the guardian, the fact remains that it is ascribed by law and neither party can terminate it unilaterally so long as the condition calling for it exist.¹

It is our intention in this article to discuss the correct legal position, whether such power exist or not and if it does, how it ought to be used or exercised.

THE NEED FOR MARRIAGE GUARDIAN

There are conflicting views on whether it is necessary for a woman or a man to have guardian to contract her/his marriage for her or him or they can do so independently without a guardian. One view which is the opinion of the majority of jurists upheld by Maliki, Shafii, Hanbali and Zahiri is that any marriage contracted without a guardian is void.

It is therefore clear that there is no valid marriage without a guardian. The persons that are qualified to be guardian according to this opinion are the father and his agnatic male relations, he must be a muslim, male, of sound mind, full age and good character. Thus any marriage contracted by a woman whether for herself or on behalf of another is void.²

The propounders of this opinion supported themselves with the following provisions of the Quran.

"Marry those among you who are single...."³ and another verse of the Quran says: ".... Nor marry (your girls) to unbelievers until they believe..."⁴

and another verse that says:

"When you divorce women, and they fulfil the term of their (Iddat) do not prevent them from marrying their (former) husbands if they mutually agree on equitable terms...."⁵

The jurists interpreted these to be addressed to the marriage guardian, thereby showing the necessity of a guardian in a marriage contract. This position is also supported with so many prophetic traditions. In one of the traditions the Prophet is reported to have said:

"No marriage without a guardian...."⁶

and in another tradition he is reported to have said:

"Any woman who married without the permission of her guardian, the marriage is void."⁷

The Prophet is reported to have repeated this three times.

From these authorities, it is clear that a woman needs guardian to contract her marriage for her. It is also clear that the emphasis on the need of a guardian is placed more on the women than on the men, all the verses and Hadith mentioned women and girls not men or boys. It has been submitted that the reason may be due to the fact that men are generally believed to be relatively more experienced than women and tend to marry their juniors, in which two basic reasons for guardianship i.e. minority and inexperience, are eliminated. That the women lack experience in practical affairs and hence may be intrigued into commitments contrary to their interests. Moreover if she contracts marriage in her own behalf, she may give the impression of being inconsiderate, presumptuous and inclined to intermingle with men unnecessarily, actions which would customarily stigmatise her character. For such reason, it is argued, that a guardian is required to protect the women's interest, to safeguard her moral integrity and to take all reasonable precautions to maximise the probability of a successful marriage.⁸

Another tradition in support of the need for a guardian in marriage contract is the tradition where the Prophet is reported as saying:

"A woman should neither contract herself in marriage nor contract the marriage of another woman. The adultress who contracts herself in marriage."⁹

On the other hand according to Abu Hanifa and Abu Yusuf the need for marriage guardian is a condition for the validity of the marriage of minors insane and slaves only. Where a woman of full age and legal capacity contracts herself in marriage, the marriage is valid whether she is a virgin or a matron; provided she gives herself in marriage to one who is equal to her in status. If the husband is not equal to her in status, the marriage is still valid except that the guardian is entitled to object.¹⁰

In support of their views the propounders of this opinion supported themselves with the same Quranic provisions as relied by the majority jurists. They differ only in matters of interpretation. According to this opinion the addresses in all these verses are directed to the women thereby implying that the women can act on their own. They submitted further that if a woman is allowed to deal in all commercial transaction herself.¹¹ There is no difference between one contract and another. That all the traditions cited by the majority jurists are referring to minors not matured women.

It is therefore clear that under the Hannafi law it is legally possible for a woman who is an adult and sane to contract her marriage on her own or to even contract marriage on behalf of another. They however agreed with the majority jurists on the need and necessity of the guardian in case of the marriage of minors and insane persons. Thus two points are deducible from here i.e.

1. The general view is that minors, insane, and inexperienced irresponsible persons of either sex must have marriage guardians; any marriage contracted by this category of people is invalid without the consent and participation of the guardian.
2. Marriage contracts generally are invalid unless the woman involved has a guardian to represent her. She cannot give herself or anyone in marriage. This applies to all categories of women irrespective of their age, physical condition, and marital status.¹² This is according to the majority jurists. But according to Hannafi law once the woman is matured and of full legal capacity irrespective of her marital status she may independently negotiate marriage contracts and give herself or others in marriage.¹³

COMPULSION IN MARRIAGE

Whether a guardian has the power of compulsion (ijbar) over his ward or not depends on the condition of the ward i.e. minor, virgin, adult, insane or matron. The general view is that the power of ijbar is exercisable only on a virgin, a minor or an adult and the insane but not on a matron (a woman that has married but has divorced or her husband died). The role of the guardian here may be defined as a right conferred on him by law, empowering him to act on his ward's behalf with or without regard to her wish. It may also be considered as a duty assigned to him by law by virtue of his responsibility for the ward's welfare.¹⁴

We thus infer from the above proposition that the intention of the law for the institution of compulsory guardianship in marriage is to protect the interest of the ward against any match that may bring dishonour to

either the ward or the family. In case of the minor because of their age and for the adult virgin because of her lack of experience in matrimonial affairs. it was not intended for the guardian to derive any personal benefits, advantages or exercise the power arbitrarily.

- Against this background two opinions featured i.e
- (1) All the jurists agreed that a father has the right to compel his minor daughter to marry with or without consulting her. According to Hannafi law this power subsist even if the minor has married and was divorced or she lost her husband so far as she is still a minor, but according to Maliki law; once she married, the power of compulsion ceased even if she happened to be separated from the husband when she is still a minor.
 - (2) With regard to the marriage of virgin adult of sound mind opinion differs. There is a consensus of opinion in the maliki school of law that a father has a right to compel his virgin daughter in marriage without her consent and even if she has attained puberty.¹⁵ Hanbali and Shafi i share this view. But according to Hannafi law one of the conditions in marriage is the consent of the woman, when she has attained purberty whether she be virgin or matron and that the guardian has no authority of compelling her to marry, i.e. of giving her in marriage without her permission or consent.¹⁶

It has been submitted that, though the Quran lays down the rule that the guardian of a girl must have a say in the matter of her marriage, the mandate as interpreted by the Holy Prophet in words and practice make it clear that it does not seek to give the woman no say in deciding this vital affair of her life. It was submitted further that the consent of the woman is an indispensable condition in her marriage.¹⁷

In effect it means that the guardian has no power to compel his daughter or to exercise power of *ijbar* over her. It is our opinion however that this view seems to be too narrow in approach, it failed to addressed the possibility of the marriage of minors whom it is generally accepted has no consent to give or with-hold. Since marriage in minority is legally acceptable, this view cannot be wholly justified.

So many authorities have been cited by all jurist in support of their opinions. One of the traditions quoted is the one that reported the case of a girl who approached the messenger of Allah with the complaint that her father has married her against her will. His reply was that she had the option of accepting or rejecting her father's choice.¹⁸

Another tradition quoted is the one concerning one Khansa the daughter of Khaddan who made the same complain to the prophet and received the same answer.¹⁹

Likewise in another tradition reported from Jabir the Holy Prophet separated a couple because the girl had been married against her will.²⁰ In another tradition reported from Aisha "A woman came to the Holy Prophet complaining that her father had married her to his nephew against her will. He told her that she was free to accept or reject her father's choice. At this she exclaimed "messenger of Allah". I accept my father's choice I just wanted to make it known to other women that their fathers did not have the final say in this matter."²¹

It was also reported that the Holy Prophet said, a woman who has already had a husband has a greater right than her guardian to decide about her marriage. As for the virgin her consent must be obtained.²²

In yet another narration reported from Abu Hurairah, the messenger of Allah said "a woman who has a husband before should not be married without her permission and a virgin should not be married without her consent."²³

In yet another narration reported from Ibn Abbas "one girl came to the Holy Prophet and informed him that her father had married her against her consent and she had rejected it. The Holy Prophet gave her choice either to accept or reject it."²⁴

From the preceding authorities, it is settled that matrons or women who had married before are not subject to the exercise of the father's power of compulsion. With regard to matured virgin daughters we are inclined to assert that the principle of Islamic Law is to the effect that their consent is indispensable condition in their marriage contract. This is so only for matured daughters like university students or graduates who presumably know what is good or bad for them, and as such can make a wise choice for themselves. However, according to Maliki, the seeking of the consent is not mandatory but commendable, it is thus dispensable.

Under the same principle one may be tempted to pose a question as to the application of the principle to the marriage of minors, whom we have already seen lack the legal capacity to engage in any transaction without the participation of their guardian. since marriage of minors is legally permissible and a minor does not have mental capability of forming a rational opinion. What should be the guiding principle of determining their consent in marriage.

It has been submitted that there is no yardstick of determining their consent, their interest and welfare in the issue is determined and upheld by the father who is expected under normal circumstances to have their interest at heart. Perhaps that accounts for the unanimity of all the sunni

schools of jurisprudence on the fathers power of compulsion regarding his minor virgin daughter. Thus they upheld that any marriage in minority will be invalid if contracted without the consent and participation of the guardian. The only possible yardstick for determining the minor's consent is the recognition by many jurists of the minor's option of 'puberty' whereby after attaining majority, the minor may either uphold or annul the marriage that was concluded on his or her behalf.²⁵

If this principle is upheld it will ensure that at the end of the day consent is generally sought since the minor may decide to opt out if on attaining puberty he or she discovered that he or she is not interested.

In practice, in this part of the country we find parents forcing their wards, especially the daughters to marry even against their wish. The wish of the parents is the paramount consideration and in some case materialism is used as the yardstick for determining who marry the daughters. Likewise the parents do allow as many suitors as possible to be courting their daughters. This found justification on the stand taken by the maliki law on the legality of so many suitors courting a lady. Some parents mostly among the educated class do give their daughters the right to make a choice while some may give their daughters in marriage without even according them the privilege of consultation. This again may not be unconnected with the Maliki stand on the father's power of compulsion which under that school does not admit of any option of puberty. The practice is in vogue in most areas of the Northern part of this country and in some few instances some ended up in the court rooms. For example in the case of *Karimatu Yakubu & I or Vs. Alhaji Tafida Paiko & I* or²⁶

The first Appellant who is a 19 years old daughter of the first Respondents had three suitors. The first Respondent succeeded in convincing the first Appellant to drop one of the three suitors and choose the second respondent but she later changed her mind to the second appellant. Despite her outright rejection of the second respondent the father went ahead and contracted her in marriage to him. Hence the suit, seeking for the dissolution of the said marriage on the ground that it was conducted against her consent. Both lower courts dissolve the marriage but on appeal to the Sharia Court of Appeal it was held that under the strict interpretation of the law under Maliki School a father has the right to marry his virgin daughter without seeking her consent irrespective of her age; but if he wishes he may consult her; and that the father had rightly exercised his power of compulsion in marrying the first appellant to the second respondent. On further appeal to the court of Appeal it was held that the father after disuading the first appellant from marrying one of her three suitors, permitted her to choose between the second respondent and second appellant. It shows that he had given her independence to choose

the person she liked. And that under Islamic Law if a father does that, he has lost his power of Ijbar.

This is a commendable decision, it has brought out the rule and its limit on the power of compulsion. The fact that a father has the power on his virgin daughter has been upheld, but if he on his own volition decided or considered the daughter matured enough to decide things for herself accorded her the privilege of making a choice then he would not be heard to say that he is exercising his power of Ijbar.

WHO CAN EXERCISE THE POWER OF COMPULSION (IJBAR):

One of the measures taken to protect the minor's interest and prevent misjudgement is in curtailing the persons that may exercise such power. Thus it is not all those who are qualified to be guardian that have the power of compulsion. This power is a special power and to curtail its abuse according to Maliki Law it was vested on the father or his executor only. Even the executor cannot impose the power unless the father has pointed out to him the bride groom and has stated when the marriage is to take place and the sadaq must be equivalent to that of her equal. According to shafii it is only the father and the father's father and if the daughter lost her virginity either by accident or through illicit relation the power ceased. According to Hannafi law, the power vest on the father and other agnatic relations. While under the Hanbali law the power vest on the father only.

CATEGORIES OF WOMEN SUBJECT TO POWER OF COMPULSION (IJBAR):

As discussed earlier, opinion of the jurists differ on the classes of women that are subject to the application of this power. It is however agreed by all that a father has the power to give out his virgin and under-aged daughter in marriage with or without her consent. This power according to Hannafi law still remains even if the daughter has married provided she is still a minor. The same principle applies where she lost her virginity before marriage; but according to Shafii law the power lapses once the daughter lost her virginity; According to maliki once she married the power ceased even if she is still a minor. What accounts for the differences in this regard is that while under the Hannafi it is the age and maturity that matters, under the maliki law it is the marital experience.

The next is adult virgin daughter, according to maliki, shafii and Hambali, the power can be exercised on her until she become old like around the age of 33 - 40 years.²⁸ This power is still exercisable even on an adult daughter who lost her virginity outside wedlock, but shafii dissented.

It is also exercisable on adult daughter who is insane agreed by all, even if she married and delivered. But according to Hannafi law, the power is limited to minors only and cannot be exercised on matured daughters.²⁹ The power may also be exercised on young sons.

The jurists do not deny the tradition of the prophet where he said that consent of virgin is to be sought and her silence is evidence of her consent. But they interpreted it to mean that it is only commendable not mandatory to seek the girl's consent.

By and large all the schools agree that if it is feared that a woman will engage in sexual misbehaviour, the guardian or the leader may force her to marry to protect her and the society.³⁰

LAPSE OF THE POWER OF COMPULSION

The power of compulsion vested on the guardian will lapse in the following circumstances:- under maliki law anytime the ward marry whether she is still a minor or adult. According to Hannafi law the power still remains in case of minor even if she had married but it lapse at the attainment of puberty or when she become matured whether she has married or not; the guardian has no authority to marry her without her consent. Likewise, the power will lapse where a father considers his daughter matured enough to make choice for herself accorded her the privilege of choosing the person she liked to marry. In these circumstances the father is said to have waived his power of compulsion.

Thus in the case of Alh. Isa Bida Vs Baiwa Alh. Isa Bida³¹

It was held inter alia: that there can be no right of ijbar, after the father having considered his daughter to be matured enough to decide things for herself, allowed her to choose a husband.

This decision was followed in the case of Karmatu Yakubu & 1 or Vs Alh. Yakubu Tafida Paiko & 1 or³²

Where it was held that the father after persuading his daughter against one of her three suitors, permitted her to choose between the other two. It shows that he had given her independence to choose the person she liked. And that under Islamic Law if a father does that, he has lost his power of ijbar.

THE DESIRABILITY OF CONSULTATION

Where it is ascertain that the father has the power of compulsion, the question of the desirability to consult the daughter then becomes material.

From the authorities cited so far, it is very clear that the need for the consent of the woman in her marriage is either an indispensable condition³⁴ or at least a desirable one. It has been submitted that, one conclusion on which there is a consensus of opinion in the maliki school of law is that a father has a right to compel his virgin daughter in marriage without her consent and even if she has attained puberty, but if he consults her that would be most desirable.³⁴

In the above case reference was also made to Risala where it provides:

"A father has the right to give his virgin daughter in marriage without her consent, even if she has attained puberty, but he may consult her if he so wishes"³⁵

It is thus desirable for the father to consult his daughter, if she reaches the age of puberty generally accepted to be 14 years in order to find whether she is agreeable to the marriage and such consultation is regarded as a rewarding exercise.

It is thus stated:-

It is desirable for a father to seek the consent of his daughter who has attained puberty when he is giving her out in marriage. Such consultation should be through a person the girl does not feel shy of."³⁶

From our discussion so far all the jurists agree that it is at least commendable, though some hold it necessary for the father to seek the consent of his maiden daughter before he gives her in marriage. This was the practice of the Prophet and it was submitted would please the girl and cultivate congeniality between the parties.³⁷ It would also prove that the father is not exercising the power for his personal interest but for that of the ward.

CONCLUSION

From the foregoing discussion we venture to conclude that compulsion in marriage to a great extent is more imaginary than real or a mere academic or mental exercise. This is because there is neither Historical nor Textual evidence nor any provision in the Qur'an or Sunnah that unequivocally supports the coersive authority.³⁸ Instead all textual authorities from the Hadith points to the fact that the consent of the girl is an indispensable condition in marriage. This means that the mandate given to the guardian is not meant to be exercise arbitrarily. He is only needed to be present and participate in the marriage to safeguard the

interest of the ward. It was certainly not intended to give him a right of disposition as he wishes as if she is his personal property or chatel.

This conclusion may not be completely justified when considered in terms of the marriage of minors which is a recognised and acceptable practice under Islamic Law and the same law recognised the fact that a minor is incapable of transacting on his or her own right but through a guardian. This presumably is because the minor at his or her age has no consent to give or with-hold. By implication it is the guardian that makes the consent for them, thereby acting in dual capacity. This in other words amounts to imposition of the will of the guardian on the minor; moreover, at that age the minor does not have the right of accepting or rejecting the guardians actions. This therefore buttresses the fact that to this extent compulsion in marriage is recognised.

By and large this conclusion may also be faulted when considered from the views of those jurists that recognise the 'option of puberty' which accord the minor an opportunity of either accepting or repudiating the marriage by the time he or she attain puberty. This implies that under this doctrine the marriage would subsist at the discretion of the minor. If that is so it clearly supports their stand of no compulsion in marriage.

From these divergent opinions we submit that it is safer to adopt the view of no compulsion in marriage, especially considering the fact that marriage is a very important aspect in a persons life and is expected to last for life. It is therefore only fair and just for them to be given a say or opportunity to make their choice in this important aspect that affects their lives. Moreover, it is presumed that the guardian has no personal interest to protect in the matter but that of the ward. We therefore find it absurd and hardly justified for the guardian to insist on any particular individual for the marriage of his ward, especially in cases of adults. In the case of minors however, the guardian may insist on a particular person but the ward should be given the benefit of ratifying or repudiating the marriage at the attainment of puberty.

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