

Matrimonial Guardianship

Wilayah in marriage implies the legal authority granted to a competent guardian to be exercised over one under a legal disability for his or her advantage. This discussion comprises the following issues:

Wilayah over a Mature and Sane Girl

The Shafi'i, the Maliki and the Hanbali schools are of the opinion that the *wali* (guardian) has the sole authority with respect to the marriage of his sane and major female ward if she is a maiden. But if she is a *thayyib* (that is, a girl who has had sexual intercourse), his authority is contingent on her consent. Neither he can exercise his authority without her consent, nor she can contract marriage without his permission. It is *wajib* that the *wali* take the responsibility of concluding the contract, which would not conclude if the woman recites it, though it is essential that she consent.

The Hanafis regard a sane, grown-up female as competent to choose her husband and to contract marriage, irrespective of her being a maiden or a *thayyib*. No one has any authority over her, nor any right to object, provided she chooses one her equal and does not stipulate less than a proper dower (*mahr al-mithl*) for the marriage. If she marries someone who is not her equal, the *wali* has the right to object and demand the annulment of the contract by the *qadi*, and if she marries her equal but for less than the proper dower, the *wali* has the right to demand annulment if the husband does not agree to a proper dower. (Abu Zuhrah, *al-Ahwal al-shakhsiyyah*)

Most of the Imamiyyah scholars are of the view that a sane girl of full age, on maturing, is fully competent to decide her contractual as well as non-contractual affairs and this includes marriage, regardless of her being a maiden or *thayyib*. Therefore, it is valid for her to contract for herself or on behalf of others, directly or by appointing a deputy, by making an offer or giving her acceptance, and irrespective of her having or not having a father, a grandfather, or other relatives. It is of no consequence whether the father agrees or not. The social status of the girl, higher or lower, and whether she marries a respectable or an abject person, is of no consequence. No one has a right of objection in this regard. Thus, she is in all respects on a par with a male, without any difference whatsoever. The scholars

support this argument by quoting the following verse of the Qur'an:

فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ

... ***Then do not prevent them from marrying their husbands...*** (2:232)

The following tradition of the Prophet(S) narrated by Ibn al-'Abbas also supports their view:

الأيّم أحق بنفسها من وليها

An aym has more authority over him/herself than his/her guardian.

'Aym' is one who is without a mate, man or woman; a maiden or *thayyib*.

The scholars have also put forth a rational argument and observed that reason dictates that every human being has total liberty regarding his own affairs and no other person, regardless of his being a near or distant relative, has any authority over him. Ibn al-Qayyim has well observed when he says: "How can it be legitimate for a father to marry his daughter without her consent to anyone of his choice, while she disapproves such a marriage and regards him as the most detestable person in the world, and yet he should forcefully marry her and hand her over as a captive to him!..."

Wilayah in Cases of Minority, Insanity and Idiocy

The legal schools concur that the guardian is authorized to contract marriage on behalf of his minor or insane ward (male or female). But the Shafi'i and the Hanbali schools have limited this authority to the case of a minor maiden, and as regards a ward who is minor *thayyib*, they do not recognize any such authority for the guardian. (al-Mughni, vol. 6, Chapter on Marriage)

The Imamiyyah and the Shafi'i schools consider only the father and the paternal grandfather as competent to contract marriage on behalf of a minor ward. The Malikis and the Hanbalis further limit it to the father. The Hanafi School extends it to other relatives, even if it be a brother or an uncle.

The Hanafi, the Imamiyyah, and the Shafi'i schools regard a contract of marriage with an idiot as invalid without the consent of his guardian. The Maliki and the Hanbali schools consider it valid, and the consent of the guardian is not required. (al-Tadhkirah, vol. 2; al-Mughni, vol. 2, chapter on *hijr*)

The Order of Priority in Guardianship

The Hanafis give priority to the son as regards *wilayah* over his mother, even if he be an illegitimate one. After the son, his son is given the right to *wilayah* and then follow: the father, the paternal grandfather,

the full brother, the half-brother (paternal), the full brother's son, the half-brother's son, the paternal uncle, the paternal uncle's son, and so on.

From this it is clear that the executor of the ward's father's will does not have matrimonial guardianship even if he has been explicitly given this authority.

The Malikis give priority to the father and after him the *wilayah* goes to the executor of his will. Then comes the turn of the son, even if he be an illegitimate one. Thereafter come the brother, the brother's son, the paternal grandfather, the paternal uncle... and so on. On this order being exhausted the *wilayah* will finally lie with the *hakim*.

The Shafi'i scholars give the father priority in exercising *wilayah*. After him, the paternal grandfather, the full brother, the half-brother (paternal), the brother's son, the paternal uncle, the paternal uncle's son, and so on, will exercise *wilayah* in the descending order till it finally reaches the *hakim*.

The Hanbalis regard the father, and after him the executor of his will, as those competent to exercise *wilayah*. After these two, the order follows the pattern of inheritance till it finally reaches the *hakim*.

According to the Imamiyyah, only the father and the paternal grandfather—and on some occasion, the *hakim*—are those authorized to exercise *wilayah* with respect to marriage. Both the father and the grandfather are independent in the exercise of their *wilayah* over a minor (girl or boy) or over an adult whose lunacy or idiocy precedes his adulthood. That is, when he/she has been a lunatic or an idiot when a minor and this state has continued into adulthood. But if lunacy or idiocy has resulted after maturity, the father and the grandfather have no authority for contracting marriage on behalf of such an adult. In this case the *hakim* will exercise his *wilayah* despite the presence of the father and the grandfather.

When the father chooses one mate and the grandfather another, the latter's choice shall prevail.

The marriage contracted by the *wali*—be it the father, the grandfather or the *hakim*—comes into effect if it is not against the interests of the ward. If it is, the ward has the option of dissolving the marriage on attaining maturity.

The Hanafis have observed; When the father or the grandfather of a minor girl marries her to a person who is not her equal or for less than *mahr al-mithl*, the marriage will be valid unless it is evident that there has been a misuse of authority. But if such a marriage is concluded on behalf of a minor girl by her *wali* who is neither her father nor her grandfather, the marriage will be considered void *ab initio*.

The Hanbali and the Maliki schools have said: The father may give his daughter in marriage for less than *mahr al-mithl*. The Shafi'i school says that he may not, and if he does so, the daughter has the right to claim *mahr al-mithl*.

The Imamiyyah have said; If the *wali* gives his minor female ward in marriage for less than *mahr al-mithl* or contracts marriage on behalf of his minor male ward for more than such *mahr*, the contract and the

mahr will both be valid on there being a good reason for doing so. In the absence of such a reason, only the contract will be valid and the validity of the *mahr* will depend upon the ward's agreeing to it after maturity. If the ward does not agree the *mahr* will be reduced to the *mahr al-mithl*.

There is consensus among the schools that a just ruler (*hakim*) can contract marriage on behalf of a lunatic, male or female, if he/she has no wait from among their relatives. This consensus is based on the following tradition:

السلطان ولي من لا ولي له.

The ruler is the wali of him who has no wali.

The Imamiyyah and the Shafi'i schools do not consider the *hakim* competent to exercise *wilayah* over a minor girl. The Hanafi School gives this authority to the *hakim*, but does not consider the contract so concluded as binding. Therefore, the girl can set it aside on maturity. Thus the position of the Hanafis is in fact similar to that of the Imamiyyah and the Shafi'i schools because the *hakim* becomes redundant in this matter. According to the *Maliki* school, the *hakim* is competent to contract marriage on behalf of a minor or a lunatic (male or female) with their equals on their not having any relative to act as *wali*. The *hakim* is also given competence to conclude marriage on behalf of a sane grown-up girl, with her consent.

The schools concur that it is necessary for a *wali*: that he be an adult Muslim male. As to the condition of *'adalah* (justice), it is required in the *hakim* who is acting as *wali*, not for a relative acting as such, except by the Hanbali school which considers *'adalah* as necessary for every *wali* regardless of his being a relative or a *hakim*.

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