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**BREAKING THE GENDERED BARRIERS IN GUARDIANSHIP AND
CUSTODY: A LEGAL AND SOCIETAL ANALYSIS**- Kanishka Kashyap¹**Introduction:**

A guardian is a person who holds legal responsibility for the care of a minor or property or both under the direction and supervision of the court.² The guardian of a minor ward must provide parental support, maintenance, education, health, and welfare to the community unless otherwise directed by the court.³ Guardianship may be of different types, such as natural, testamentary, or appointed by the court, and may also include de facto guardians and guardians by affinity under Hindu law.⁴ A minor is a person who has not attained the age of 18 years as defined by the Indian Majority (Amendment) Act, 1999. As per Section 19(b) of the Guardians and Wards Act, the father is his minor child's primary natural and legal guardian. At the same time, the mother is the secondary natural guardian, particularly in the case of legitimate children. However, the mother is generally acknowledged as the child's custodian, owing to the emotional bond between mother and child.⁵ Understanding that custody and guardianship are separate but interconnected concepts is essential. Custody of a minor is only a part of a guardian's various powers and responsibilities. Guardianship involves a set of controls related to the child, and one of them is custody.⁶

Men have traditionally been expected to be the leading providers and breadwinners, while women have been expected to be the primary caregivers and nurturers. This has given rise to the idea that while fathers can better provide for their families financially, mothers are more

¹ Student at Jindal Global Law School, O.P. Jindal Global University

² *Corpus Juris Secundum* 10-11(39 West Publishing, 2014).

³ Guardianship of Hindu Minor : A Critique of the Law, 63 JILI (2021) 172.

⁴ Guardianship under Hindu Law, PATNA LAW COLLEGE,

<https://www.patnalawcollege.ac.in/econtent/Guardianship%20under%20Hindu%20PDF.pdf> (last visited Apr 19, 2023).

⁵ SUMITA PARMAR, *Women's right to Guardianship and Custody*, DELHI UNIVERSITY,

<https://lc2.du.ac.in/DATA/WomensrighttoGuardianshipandCustody.pdf> (last visited Apr 19, 2023).

⁶ S. 4(2) of the Guardians and Wards Act.

suitable to care for their children. These beliefs and how guardianship and custody are thought of have been questioned as social norms have changed and more women have entered the workforce. Despite this development, gender remains critical in determining who gets custody of children and guardianship.

This paper seeks to provide a comprehensive examination of how the law and society view guardianship and custody through a gendered lens and how this violates the principles of formal equality, which refer to the notion that all individuals should be treated equally under the law regardless of their gender, race, religion, or other characteristics. The author has divided the paper into three chapters for this purpose. In Chapter I, the author begins by examining the concept of guardianship under various legal systems and further draws a contrast between guardianship and custody. Chapter II of the paper examines the gendered asymmetry that has long followed women throughout the years regarding guardianship and then talks about fathers seen as natural guardians. In addition, the author offers a critique within this context. The author's examination of the welfare analysis, the way forward, and the paper's conclusion are compiled in Chapter III, based on the insights derived from the preceding analysis.

Scope and Limitations:

The scope of this paper will be limited to the three most prevalent religions, namely Hinduism, Islam, and Christianity, even though many religions exist in India.

1.1 Interpretation of guardianship under different personal laws:

The relevant provisions recognizing guardianship and custody under the personal laws of Hinduism, Islam, and Christianity, as well as the Guardians and Wards Act of 1890, have been discussed hereunder:

Guardianship and Wards Act, 1890 (from now on, "the GWA")- This Act delineates the procedural framework for the appointment of guardians by the court. It encompasses all minor children, regardless of their caste or religious affiliation, although the court considers the minor's law in appointing a guardian. It shall prevail if the minor's law aligns with the Guardians and Wards Act (GWA) requirements. The Act empowers the District Court to pronounce or designate an individual as a guardian. In instances deemed necessary for the minor's welfare, the District Court may appoint a guardian, considering the child's age,

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gender, preferences, and the provisions of the minor's law.⁷Section 17 of the Guardians and Wards Act (GWA) outlines several principles that guide the determination of guardianship, including:

- (i) The applicable law governing the minor,
- (ii) The specific circumstances surrounding the case,
- (iii) The age, sex, and religion of the minor,
- (iv) The character and capacity of the proposed guardian, as well as their relationship to the minor,
- (v) The wishes of the deceased parents, and

If the minor is of sufficient maturity to express an informed preference, the court may consider that preference.⁸

Hinduism-Under the provisions of the Hindu Minority and Guardianship Act, 1956 (from now on referred to as "the HMA"), a guardian can be categorized into three distinct classifications: natural guardian, testamentary guardian, or court-appointed guardian. Under Section 6(a) of the act above, the mother assumes the position of the natural guardian after the father for a male child or an unmarried female child. Until the child reaches age five, custody is predominantly entrusted to the mother. In the case of an illegitimate son or an unmarried illegitimate daughter, the mother is recognized as the primary natural guardian, followed by the putative father.⁹

Islam- Islamic guardianship and custody laws are derived from specific verses in the Quran and Hadiths (the words and actions of Muhammad and his family), which constitute the foundational sources of Islamic jurisprudence. Across all schools of Muslim law, the mother does not hold the status of a guardian, whether natural or otherwise, even in the event of the father's demise. On the other hand, the father is recognized as the rightful guardian and assumes the role of the natural guardian within this context. It is important to note that the father's claim to guardianship remains valid even if the mother or another female is granted custody (hint) of the child. Among Sunnis, the father is the sole natural guardian of young

⁷ ASHA BAJPAI, *Custody and Guardianship of Children in India*, 39 FAMILY LAW QUARTERLY 441 (2005), <http://www.jstor.org/stable/25740499> (last visited Apr 19, 2023).

⁸ Arun Kumar, *Guardianship and Custody of the Person of A Minor Child-Conflicting Claims*, SCC ONLINE (1975), <https://www.scconline.com/Members/SearchResult.aspx>.

⁹ *supra* note 4.

children, while in the event of the father's passing, the executor assumes the role of guardian. Among Shias, the grandfather is considered the subsequent guardian after the father, and the executor takes the position of guardian only in the absence of the grandfather, even if the father had previously designated an executor.

Christianity–Unlike Hindus, Christians in India do not possess a distinct personal law specifically governing matters of guardianship and minors, despite codified laws governing marriage, matrimonial remedies, and succession. Consequently, the regulations about control and custody remain uncodified. Under this uncodified law, the father assumes the role of the natural guardian for his legitimate minor children. In the event of the father's absence, the mother takes the position of guardian. The mother is the primary natural guardian for illegitimate children, and in the mother's absence, the putative father is granted guardianship. In cases where natural guardians are unavailable, the authority to appoint, remove, and declare guardians lies with the Guardians and Wards Act (GWA), which functions as a comprehensive law governing such matters.¹⁰

1.2 Contrasting custody and guardianship:

Although guardianship and custody are often used interchangeably and presumed to be synonymous in everyday language, they are legally separate concepts closely linked within parental care and control over children.¹¹ It is crucial to comprehend the contrast between the two terms because it illustrates the gendered hegemony that follows women, as the status of women is typically relegated to a secondary position in guardianship. In contrast, women are recognized as the primary custodians in custody. A guardian is an individual who bears legal responsibility for protecting and controlling a minor's person or property. This responsibility encompasses decision-making authority concerning matters such as the child's upbringing and disposition of their property. The term "care" describes the duties and obligations of a guardian and denotes a broader set of responsibilities than the term "custody," which refers only to physical safekeeping. The term custody refers to a child's physical care and oversight, including the right to make daily decisions concerning their upbringing, medical care, and

¹⁰SUMITA PARMAR, *Women's right to Guardianship and Custody*, DELHI UNIVERSITY, <https://lc2.du.ac.in/DATA/WomensrighttoGuardianshipandCustody.pdf> (last visited Apr 19, 2023).

¹¹*Id.*

mobility. This right of bodily presence is included within custody.¹² Custodianship often denotes a short-term arrangement for personal care, while guardianship is typically understood as a permanent or long-term right.¹³ The issue here is that gendered disparity has a part to play in both, regardless of whether men or women are given preference. If a man is given priority, as the personal laws and the GWAdo, it is because fathers are the breadwinners of the family and are better equipped to ensure the safety and well-being of their children. If a woman is given preference, it is because women are presumed to be the natural caregivers of society and are hardwired to be nurturing.

2.1 Stereotyping women as caregivers:

During the 19th century and the early 1900s, prevailing law granted men custody of their children following divorce, mainly when the mother was held responsible for the marriage's dissolution. The rationale behind this law was supported by several factors, such as the husband's property interest in his family's labor, the societal view of women as property, and the husband's inherent obligation to provide for his children. However, even during this era, when women were expected to be the primary caregivers for children, this norm lacked significant justification. As a result, this practice was abolished in the 20th century. By 1950, it became nearly universal that a mother was favored for caring for young children if deemed a fit parent.¹⁴

In India, the notion of females being considered as caregivers has mostly been done away with except in cases where the child is less than five years of age under Section 6 of the HMGA. The primary premise here was that, in general, a child's attachment to their mother will be greater than that with their father at a younger age. Babies and toddlers naturally gravitate towards their mothers, but this does not necessarily indicate inadequate co-parenting on the part of the father. The mother is commonly responsible for breastfeeding the child, and this initial physical proximity establishes a distinctive connection between the mother and the child. Mothers are more likely to forego paid employment to care for their children full-time

¹² *supra* note 6.

¹³ *supra* note 4.

¹⁴ Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE LAW & POLICY REVIEW 168 (1984), <http://www.jstor.org/stable/40239181> (last visited Apr 19, 2023).

than fathers. So, children typically rely more on their mothers than their fathers for their day-to-day requirements and emotional support.¹⁵

However, while contemplating why this occurred, it is essential to remember that India has not yet eradicated gendered asymmetry by making men the natural guardians of minor children. In India, traditional family structures are primarily influenced by masculine-centric notions and power dynamics. The causes for this can be divided into two levels. Firstly, India lacks official measures to ensure equality and has discriminatory laws. Secondly, discrimination exists in public and private spheres, leading to a lack of “substantive equality.”¹⁶ Due to the absence of legal provisions guaranteeing equal rights for women in society, their implementation has been questionable at best, failing to achieve substantive equality. The concept of substantive equality was not thoroughly explored in the Law Commission's Report. Still, the current approach demonstrates that gender inequality is not only present but actively pervasive in India. We illustrate the lack of equality in public and private domains as gender stereotypes continue to be reinforced through institutionalized and culturally accepted practices.¹⁷

2.2 Introduction to the concept of natural guardianship – Fathers seen as natural guardians and presenting a critique regarding the same:

Section 6 of the HMGA, 1956, identifies the natural guardian of a minor in different cases, as mentioned earlier. However, it should be noted that the expression "father" and "mother," as defined in this section, do not encompass a stepfather or stepmother.¹⁸ The qualification of a guardian with the term ‘natural’ under Hindu law is intriguing. The question arising from this qualification is the connotation of the term ‘natural’ in guardianship. ‘Natural guardian’ is instead a legal construct than “an order of nature.” The term "natural guardian" appears to have been employed in the HMGA solely to emphasize its contrast with other forms of guardianship established through various means, such as by testament, court intervention, or

¹⁵Rachit Garg, *Why family law courts favour mothers in modern society : the tragedy of fathers in custody battles*, IPLEADERS (2021), <https://blog.ipleaders.in/family-law-courts-favour-mothers-modern-society-tragedy-fathers-custody-battles/#:~:text=Mothers%20are%20more%20likely%20to> (last visited Apr 19, 2023).

¹⁶ Ira Chadha-Sridhar & Aratrika Choudhuri, *OF MEN'S RIGHTS, MOTHERHOOD AND MINORS: CRITICAL FEMINIST REFLECTIONS ON SHARED PARENTING LAWS IN INDIA*, SCC ONLINE (2016), <https://www.sconline.com/Members/SearchResult.aspx> (last visited Apr 18, 2023).

¹⁷*supra* note 12.

¹⁸ Devika Sharma, *Custody of Children*, SCC BLOG (2019), <https://www.sconline.com/blog/post/2019/11/25/custody-of-children/> (last visited Apr 18, 2023).

simply by the facts of the situation. Therefore, individuals designated as "natural guardians" under the law are those whose guardianship is presumed by law and does not require any formal declaration, appointment, or testament.¹⁹ Generally, the father is the natural guardian by default under all personal laws, provided he is healthy and alive. However, depending on the religion, another person may take his place. Furthermore, despite the father being the child's natural guardian, the mother is typically regarded as the preferred custodian of very young minors under Hindu and Muslim law.²⁰ It can safely be concluded that the existence of a "fit" father will bar the court from appointing any other person as the guardian of the minor. A father may be declared unfit if he lacks financial stability, is mentally incapacitated, displays abusive tendencies, is estranged from the child's mother and has been residing apart from her for an extended period without evincing any interest in the child's welfare, or has contracted a second marriage.

These are some instances when the first natural and legal guardian is deprived of his right.²¹ In the case of *Kamalamma v. Laxminarayana*, the Mysore High Court held that determining whether a father is qualified or disqualified to assume the role of a minor's guardian is a matter of factual examination. The limitation imposed on the court's power to appoint a guardian for the minor person when the father is alive and deemed suitable to be the guardian in the court's perspective cannot be circumvented by a mere assertion that the mother is more competent than the father to safeguard the interests of a Hindu minor. It was the court's understanding that they lacked jurisdiction to appoint a guardian for the person of a minor whose father is alive and not considered unsuitable to fulfill the duties of a guardian for the child.²² In the case of *Jijabai v. Pathankhan*, the Supreme Court recognized the mother as the guardian of the minor ward despite the father being alive. The court acknowledged that the father displayed disinterest in the affairs of the minor, rendering him virtually non-existent in the eyes of the minor appellant. The court was of the view that they were inclined to agree with the High Court's determination that, given the unique circumstances of this case, the mother can be regarded as the natural guardian of the daughter.²³ So, it can be concluded that if the natural guardian of a minor is alive and capable of fulfilling their

¹⁹ *supra* note 5.

²⁰ *supra* note 6.

²¹ *Vivek Singh v. Romani Singh*, (2017) 3 SCC 231.

²² *Kamalamma v. Laxminarayana Rao*, 1971 SCC OnLine Kar 30.

²³ *Jijabai Vithalrao Gajre v. Pathankhan*, (1970) 2 SCC 717.

responsibilities towards the child's well-being, the court lacks authority under Section 19 of the Guardians and Wards Act (GWA) to appoint a different individual as the guardian. In such cases, the child's welfare is paramount, which takes precedence over all other factors, including parental rights.

Considering the provision in Section 6(a) of the Hindu Adoption and Maintenance Act (HAMA) that denies a woman statutory entitlement to be the guardian of her child in the presence of the child's father in conjunction with other personal legal provisions establishing the father as the natural guardian as long as he is alive and qualified, is a biased law that discriminates against women and has garnered significant criticism.²⁴ When author Githa Hariharan petitioned the Supreme Court to address this provision's legality, a reform movement emerged in 1999. The Supreme Court, while not invalidating any aspect of Section 6, interpreted the term "after" in a broader sense, clarifying that it should be understood as "in the absence" of the father rather than strictly meaning "after the father's demise." This interpretation acknowledged that "absence" encompassed situations where the father was frequently away from the child, displayed no affection, or was physically incapacitated due to illness. However, the Supreme Court maintained that the father preferred natural guardianship, and the mother could assume such a role only in exceptional circumstances.²⁵ This case's significance in recognizing mothers' honest custody rights cannot be denied. However, there remains a desire for the Supreme Court to go beyond and declare Section 6(a) of the 1956 Act unconstitutional. The existing laws continue to restrict the rights of mothers while granting fathers complete authority, akin to conferring natural guardianship upon the father's demise. Consequently, it would have been preferable for the Supreme Court to declare Section 6(a) as invalid and in violation of the Constitution, thereby ensuring equal rights to natural guardianship for both mothers and fathers based on the principles enshrined in Article 14, which advocates for equality, and Article 15, which prohibits discrimination based on gender.²⁶

²⁴ *supra* note 14.

²⁵ *Id.*

²⁶ Bhumika Indulia, *Rights of Mothers as Natural Guardians in the Changing Indian Society* Githa Hariharan v. RBI and ABC v. State: Case comments, SCC BLOG (2022), <https://www.sconline.com/blog/post/2022/09/08/rights-of-mothers-as-natural-guardians-in-the-changing-indian-society-githa-hariharan-v-rbi-and-abc-v-state-case-comments/> (last visited Apr 19, 2023).

3.1 The welfare of the child should be given paramount consideration:

The child's welfare is the primary consideration in determining the appointment of a guardian.²⁷ The welfare principle encompasses two key objectives. Firstly, it emphasizes the need to provide the child with the optimal environment for their development and well-being. The child's best interests have traditionally been accorded priority over other factors in custody disputes, reflecting a commitment to ensuring the child's healthy growth and flourishing. Additionally, the principle of human dignity serves as a fundamental cornerstone for protecting children's rights. The second justification for the welfare principle is the societal benefit derived from fostering the healthy growth of children. Recognizing that children are the nation's future, the notion that they must be allowed to grow correctly has laid the foundation for establishing child-centric human rights laws.²⁸

The term "welfare" carries a comprehensive meaning and should be interpreted to encompass the child's overall well-being, including their material, physical, educational, emotional, and moral welfare. The Guardians and Wards Act does not prescribe specific criteria or guidelines for determining the child's best interests, placing the onus on the court to carefully evaluate all relevant facts and circumstances to make this determination. The court must consider all pertinent evidence when deciding who should be appointed as the child's guardian. The paramount consideration in this decision-making process is the child's welfare, which holds the utmost significance. The court is not obligated to favor the father over the mother when appointing a guardian under Section 6. Additionally, Section 13(2) grants the court the authority and jurisdiction to refuse the appointment of a guardian if it determines that such an appointment would not serve the child's best interests, further governing this provision.²⁹

The Supreme Court's landmark decision in *ABC v. The State (NCT of Delhi)* has been lauded for recognizing an unmarried mother's ability to assume sole legal guardianship of a child without the father's consent.³⁰ The Supreme Court emphasized that the court's paramount consideration is the child's welfare, prioritizing it over any procedural irregularities, including

²⁷ *Santhini v. Vijaya Venketesh*, (2018) 1 SCC.

²⁸ *supra* note 19.

²⁹ *supra* note 3.

³⁰ *ABC v. The State (NCT of Delhi)*, Arising out of S.L.P. (Civil) No. 28367 of 2011.

those that do not contravene the law.³¹ While the GWA primarily focuses on the "wellbeing of the minor" in appointing a guardian, the Supreme Court, invoking Section 7 of the Act, adopted a more permissive approach aligned with the legislative intent. In doing so, the court embraced a comprehensive interpretation of the statute, acknowledging the case's unique circumstances and the necessity for a different application of this provision. Alongside personal laws, the GWA protects the child's best interests, wherein the child's welfare precedes strict statutory requirements. Nonetheless, it is noteworthy that laws about guardianship often exhibit instances of inequality between parents.

3.2 Way Forward:

Article 14 of the Indian Constitution ensures equality before the law, requiring similar treatment for those in like situations and different treatment for those in unlike cases while also emphasizing equal administration of the law among those who are equal. The preference given to fathers over mothers in natural guardianship under Hindu, Muslim, and other personal laws fails to meet the test of intelligible differentia as envisaged by Article 14. This is because the prioritization of fathers as natural guardians cannot establish a rational connection to promote the child's "welfare" in every instance. Similarly, Article 15 explicitly prohibits discrimination based on sex, asserting that no legislation should discriminate based on gender. The 257th Report of the Law Commission of India, released in 2015, highlights the imperative for equitable natural guardianship laws for parents.³² It recommends amending Section 6(a) of the 1956 Act to abolish the superiority of one parent over the other, aligning it with the principles enshrined in Article 14 of the Constitution. The proposed amendment aims to confer simultaneous guardianship rights to both parents, always prioritizing the minor's best interests.³³ Similarly, the Commission suggests amending Section 7 of the 1956 Act to establish joint legal custody for both parents in adoption cases. Furthermore, the Ministry of Women and Child Development has stressed the importance of granting natural guardianship rights to all mothers ahead of fathers, irrespective of personal laws.³⁴In a

³¹*Society of Sisters of Charity St. Gerosa Convent v. Karnataka State Council for Child Welfare*, AIR 1992 Kar 263.

³²Law Commission of India, Report No. 257 on Reforms in Guardianship and Custody Laws in India (August 2015).

³³*Id.*

³⁴Shalini Nair, *Mother should be natural guardian, not father, says WCD ministry*, THE INDIAN EXPRESS (2017), <https://indianexpress.com/article/india/mother-should-be-natural-guardian-not-father-says-wcd-ministry-4768786/> (last visited Apr 19, 2023).

previous recommendation, the National Commission for Women (NCW) has also advocated for maternal preference in natural guardianship laws, regardless of marital status (married, divorced, separated, or unmarried). The need for women to achieve equal levels in society has long been recognized. As women challenge societal stereotypes and fight for their rights, the landscape of women's groups has experienced significant transformations over time. However, family laws within different communities impede women's progress in various domains, including natural guardianship, necessitating reform.

3.3 Conclusion:

Gender bias continues to be a feature of the Indian legal and socio-cultural system. Women are treated unequally on both fronts when using the lenses of formal and substantive equality. The word "natural" appears to have been used in that sense as a residuary term. Since the identification as embodied in law is not based on anything natural, the term "natural guardian" may be replaced with any other term without substantially altering the outcomes and improving the clarity of the law. Without a doubt, the judiciary has attempted to strike a balance between the scale of gender equality and this hierarchy within the family through interpretation, leaving it up to the legislative to enact it as legislation. It's time to acknowledge both parents as guardians equally, as the Personal Laws (Amendment) Act of 2010 did in the adoption case. With the number of single mothers increasing, it makes sense that the law would shift to give mothers equal and joint rights to natural guardianship.