GUARDIANSHIP OF HINDU MINOR: A CRITIQUE OF THE LAW

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Abstract

The paper offers a critique of the law pertaining to guardianship of a Hindu minor. Cognisant of the prevailing criticism[1] of the law, the paper seeks to move beyond the narrow confines of the same. It does so by exploring the historical evolution of the very notion of a guardian for a minor in India, dating back to the colonial era indicating its embeddedness in the British concern regarding management of property of minor. It offers a rights-based analysis of the prevailing legal provisions, especially focussing on the gender bias while drawing attention to the contradictions between the guardianship law and other statutes in existence which also brings in focus the treatment of different categories of minors within the same. This critique enables the authors to pave way for a possible reform that envisages doing away with gender bias in favour of father as well as the loopholes and contradictions present in the law and seeks to secure rights of the stakeholders keeping in mind the welfare of child.

I Introduction

GUARDIANSHIP OF a minor under the Hindu law has been subjected to strong criticism on account of its bias in the favour of father as against the mother of a minor. Gender injustice is writ large in the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as HMGA) since it primarily recognizes father as the natural guardian of a Hindu minor (legitimate child) and allocates this position to the mother only secondarily. Though this stark gender-discriminatory aspect of HMGA has been in public glare over the past few years, certain other aspects of HMGA which reinforce gender hierarchy subtly have remained unexplored. On account of the same, this paper attempts to offer a comprehensive critique of the HMGA in terms of the identification of a guardian for Hindu minor and thereby offer a direction for reform in the existing law. For this purpose, the paper begins with the exploration of the concept of guardianship, the historical context in which it emerged and kinds of guardianships with respect to Hindu minors as they prevail under the law in force. Part II of the paper analyses the differential treatment of men and women as woven into the legislation at different levels. Based on the insights emerging from aforementioned analysis, Part III of the paper collates the conclusions.

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1 *See* generally, Law Commission of India, 83rd Report on The Guardians and Wards Act, 1890 and Certain Provisions of the Hindu Minority and Guardianship Act, 1956 (April 1980), Law Commission of India, 257th Report on Reforms in Guardianship and Custody Laws in India (May 2015). They broadly recommend, *inter alia*, for an equal position of the father and mother for the guardianship of the minor or for a joint guardianship.

II Guardianship: Concept, kinds and its historical evolution

Concept and kinds

Guardian may be seen as a person who legally has the care of the person or property or both, of another person, with prescribed fiduciary duties and responsibilities under the authority of the court and direction.[2] Except as otherwise limited by the court, a guardian of a minor ward has the duties and responsibilities of a parent regarding the ward's support, care, education, health and welfare.[3] A person appointed as a guardian of a child has parental responsibility for the child concerned and this will for many purposes, equate the guardian's position with that of a parent.[4] Guardianship, hence, seems to be viewed as a trust, which is brought into existence, to further the well-being of the one who is legally incompetent to act for himself or herself.

Guardians and Wards Act, 1890 (hereinafter referred to as GWA) which is applicable to every person in India and HMGA, which is applicable only to Hindus are the two statutes that govern the issue of guardianship of Hindu minors in India. GWA defines guardian as a person having the care of the person of a minor or of his property or of both, person and property.[5] At the outset, it is also significant to clarify that though HMGA is about guardianship, Section 6 (a) of the legislation also makes a reference to custody of a minor.[6] Custody and guardianship are distinct, though related concepts.[7] Custody of minor is just one of the constituent powers/responsibilities of a guardian. Guardianship implies a bundle of powers *vis-à-vis* the minor, one of which is custody.[8]

Guardians may be classified either on the basis of the kinds of powers they have with respect to the person or property of minor or on the basis of source of their power as guardian. The recognition (both explicit and implicit) of different kinds of guardians in GWA and HMGA is similar in some respects and distinct in others. It is hence advisable to delve into the categories and the nomenclature under the two legislations.

i. Court appointed/declared guardian – The court may make an order, either appointing or declaring a person to be the guardian for the minor's person or property or both.[9]

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

3 *Id. at* 13.

4 *Halsbury's Laws of England* 140 (Vol. 9, 5th edn. 2017).

5 Guardian and Wards Act, 1890, (Act 8 of 1890), s. 4(2).

6 It provides for ordinarily granting custody of a minor to the mother till the age of five.

7 *Supra* note 5, ss. 24 and 25.

8 *Id.*, s. 24. Also see Hindu Minority and Guardianship Act, 1956, No. 32 of 1956, see also, s. 8 (The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do *all acts which are necessary or reasonable and proper for the benefit of the minor* …….)

9 *Id.,* ss. 7 and 19; Hindu Minority and Guardianship Act, (Act 32 of 1956), s. 4.

ii. Deemed guardian: While this term has not been used in the statute, section 19 of GWA states that in the following three situations, the court shall not appoint or declare a guardian for the person or property of minor and thus implicitly recognizes guardianship vested in such persons:

   a. Where the minor is a married female and whose husband is not unfit to be her guardian

   b. Where the minor, other than a married female, whose father or mother[10] is living and is not unfit to be his/her guardian

   c. Where the minor, whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the minor

   (iii) Testamentary guardian:[11] A guardian who has been appointed by will or any other instrument

   (iv) Natural guardian:[12] It is a category exclusively mentioned in the HMGA. Natural guardian, in case of legitimate minor (boy or unmarried girl) is the father and after him the mother; in case of an illegitimate minor, the guardian is the mother and after her, the father; and in case of a married girl, it is the husband.[13] The power of the natural guardian is to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate.[14]

   v. De facto guardian:[15] While the HMGA does not define this category, the term is used as a bar on a guardian who becomes one by virtue of the fact, on disposing of or deal with the property of a Hindu minor.

As can be seen above, the definitions in the statutes and encyclopedias and the different categories point towards 'taking care of' and being 'in a responsible role' towards the minor. However, what 'care' means and what roles do the different kinds of guardians mentioned above, under both the statutes play are not clear. It is therefore, relevant to historically explore this 'role' that seems to be governing guardianship over approximately last one century.

10 The term "mother" got inserted into s. 19 of Guardian and Wards Act, 1890 through Personal Laws (Amendment) Act, 2010.

11 *Supra* note 5, s. 28; Hindu Minority and Guardianship Act, 1956, (Act 32 of 1956), s. 9.

12 Hindu Minority and Guardianship Act, 1956, (Act 32 of 1956), s. 4(b)(i).

13 *Id.*, s. 6.

14 *Id.*, s. 8.

15 *Id.*, s. 11.

Evolution

Guardianship Law: Initial grounding in property

The statutory evolution of the notion of guardianship can safely be attributed to the colonial era. Since the main aim of the British Government was to acquire land and subsequently collect revenue from the same, it is argued that it was in the context of administration of property that the idea of guardianship for a minor primarily emerged. Prior to any legislation that incorporated any reference to guardian, the institution of Court of Wards dealt with management of property of a minor.[16] In its initial formation, the primary function of the Court of Wards was to ensure the flow of revenue to the state by appointing a responsible manager – generally a relative or retainer of the ward, to administer the estate.[17] The formation of this institution went in sync with the British colonial interest in acquiring/managing land and collecting revenue therefrom. The institution of Court of Wards later received statutory recognition in 1879.[18] Between the prevalence of the Court of Wards as an institution and its statutory recognition, a number of legislations were passed that engaged with management of property and guardianship of minor in different forms and to different extents, which shall be explained below.

The first ever statutory reference to guardianship was made in Act XXVI of 1854.[19] The reference came in the context of shift of guardianship of the minor, from the former guardian to the guardian appointed under the Court of Wards[20] and thereafter possibly to the Collector.[21] This statutory reference pertained only to those male minors whose property was under the superintendence of Court of Wards.[22] However, the

16 Anand Yang, "An Institutional Shelter: The Court of Wards in Late Nineteenth – Century Bihar" 13(2) Modern Asian Studies 247-264 (1979).

17 *Ibid.*

18 The Court of Wards Act, 1879, (Act IX of 1879). An act to amend law relating to the Court of Wards.

19 An act for making better provision for the education of male minors subject to the superintendence of the Court of Wards.

20 Act XXVI of 1854, ss. V, VII and VIII. s. V reads: 'It shall be lawful for the Court of Wards, on the application of a Collector, to remove from office, any guardian who shall neglect or refuse to obey, or shall evade compliance with any orders passed, or directions given by such Collector under the provisions of this Act…..', s. VII: 'The right to the custody of the person of any male minor, whose property is under the management of the Court of Wards, is hereby vested in the person appointed with the sanction of the Court of Wards, either originally or upon removal of a former guardian, to be the guardian of such minor, or in the absence of any such person, in the Collector of Revenue having the superintendence of the education of such minor under the provisions of this Act', S. VIII: 'All orders and proceedings of a Collector under the provisions of this Act, shall be subject to the revision of the Court of Wards,…..'

21 Act XXVI of 1854, s. VII (repealed 1890).

22 Act XXVI of 1854, s. I (repealed 1890).

subject matter of the legislation pertained to the education of such male minors. This legislation, therefore, placed guardianship at the intersection of three separate notions, *i.e.,* property, education and gender. This intersection offers the background in which the concept of guardianship, statutorily grew in India.

General care of minor that later on emerged as an integral component of guardianship finds reference for the first time in Act XL of 1858.[23] However, even at this stage, guardianship does not emerge as an independent aspect of governance concerning welfare of the minors in general. Act XL of 1858 concerns itself with guardianship only in the context where application is made by a person[24] for the grant of Certificate of Administration[25] of property of a minor not brought under the superintendence of Court of Wards.[26]

Guardianship disjointed from property emerged as a concern for the state only in the context of disputes over guardianship or custody of minors as reflected in Act IX of 1861 which relates to procedure regarding adjudication of such disputes.[27] This legislation expressly excludes those minors under the superintendence of Court of Wards.[28] Building upon the 1858 legislation, Act XX of 1864 was introduced which expanded the scope of care (which was limited to education) to include marriage of minor as well.[29]

Unlike the series of similarly-placed legislations mentioned above, Act XIII of 1874 pertained to guardianship of European minors. It is interesting to note that this legislation gave a systematic treatment to different components as can possibly be envisaged under guardianship of minors as a subject of administration *per se*, whereas all the previous legislations pertaining to care of person (to whatever extent) or property of minors were limited to only those Indian minors who had property. The ulterior motive behind laws pertaining to guardianship of Indian minors therefore does not seem solely to be care and concern for minors but arises incidentally and is peripheral to the primary concern for the British *i.e.,* management of property of minor.

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23 An act for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal.

24 Act XL of 1858, s. III. Person here includes 'every person who shall claim a right to have charge of property in trust for minor under a will or deed, or by reason of nearness or kin, or otherwise'

25 *Ibid.* Certificate of Administration is applied for, by the person to claim a right over the property of the minor, to institute or defend any suit connected with the property.

26 *Supra* note 21, s. II and III (repealed 1890).

27 Act IX of 1861. The preamble to the Act runs as 'Whereas it is expedient to amend the Law for hearing suits relative to the custody and guardianship of minors'

28 Act XXVI of 1854, s. VII. 'Nothing in this Act shall be taken to interfere with the jurisdiction exercised under the Laws in force by any Supreme Court of Judicature or the Court of Wards;…..'.

29 *Id.,* s. XXIX.

Lastly, the then British Government in India learnt that there were defects relating to the administration of minor's estate under the 1864 and 1858 legislations.[30] These defects exclusively pertained to the management of the property of the minor and not care of the person of minor. To address these defects, GWA was enacted to consolidate and amend the law relating to guardians. It is only in 1890 that guardianship of the person of the minor got disjointed from management of minor's property and received comprehensive treatment from the legislature.[31]

Guardianship law: Circuitously regulating female sexuality

If the colonial conception of guardianship remained embedded in property, the conception of the same in independent India lies at the intersection of religion and sexuality. This is because the codification of Hindu law was pursued in a comprehensive manner soon after independence. Further, the notions of purity of religion and purity within Hindu religion intertwines religion with sexuality. Both these aspects find clear manifestation in post-independence legislations relating to guardianship. Sexuality, however, was also a concern reflected in the colonial legislation of 1874 pertaining to Europeans.[32] The colonial legislation vested power in the father for the appointment of guardian in case of a legitimate minor while the same power stood vested in the mother in case of an illegitimate minor.[33]

This distinction between legitimate and illegitimate minors in 1874 is important because it existed neither in any of the previous legislations nor was it taken up in GWA. Interestingly, it gets mentioned only years later in the post-Independence era, in HMGA.[34] This leads us to an interesting insight on how the sexuality of a woman in general as well as sexuality in marriage also played an important role in perceiving a statute for guardianship – not specifically in the colonial era (with respect to Europeans), but even in the independent era. Varsha Chitnis and Danaya C. Wright[35] argue that the civilising

30 A letter dated Dec. 7, 1881 from the Government of Bombay, No. 8028 which laid down the difficulties experienced in the administration of minor's estates under the Minor's Act, XX of 1864. It laid down the following three difficulties so experienced: (i) The question regarding the effect of the provisions of s. 2 of Act XX of 1864 (application to obtain CoA) as a bar to the operation of the provisions of chapter XXXI of Act X of 1977 (the chapter dealt with suits by and against minors and persons of unsound mind); (ii) The inconvenience felt in appointing an administrator to a minor's estate under s. 2 of Act XX of 1864 when the relatives of the minor refuse to take out a certificate of administration; and (iii)The proposal to appoint government pleaders as administrators.

31 Act VIII of 1890, s. VIII '….. (c) The Collector of the district or other local area within which the minor ordinarily resides …….' (colonial legislation).

32 Act XIII of 1874 (repealed in 1890).

33 *Id.*, s. 3 (repealed in 1890).

34 Hindu Minority and Guardianship Act, 1956, (Act 32 of 1956).

35 Varsha Chitnis and Danaya Wright, "The Legacy of Colonialism: Law and Women's Rights in India" 64(4) *Wash. & Lee Law Rev.* 1315 (2007).

mission of the British was not just confined to the British males, but also spread to British women who felt that they had a greater authority to speak on behalf of their Indian sisters than British men.[36]Viewing Indian women to be the focus of civilising mission of the British empire, thereby deploying nationalist and imperialist rhetoric to bolster their activist roles within England, was the unsaid agenda that British women followed.[37] British feminists acted in paternalistic and protectionist ways and sought to impose the constraints of Victorian femininity[38] (which surprisingly, they were fighting against, at home). They opined that women should be respectable wives, dedicated to their families, guarding their chastity at all times.[39]

In independent India, one of the many developments that occurred during that time was discussions on the Hindu Code Bill. Hindu law as personal law was politicized.[40]This politicization of the personal law reached its apogee in the years after independence, as Hindu personal law came to be entangled in issues of community, identity and politics. Reba Som, in one of her writings lucidly explains, inter alia, the hurdles that the Hindu Code Bill had to pass through to finally get enacted into legislation.[41] The efforts to pass Hindu Code Bill were constantly heckled for the need to perpetuate the patriarchal customs,[42] having violated the religious foundations of Hindu society,[43] including Sikhs

36 Antoinette Burton, *Burdens of History: British Feminists, Indian Women and Imperial Culture* 1865-1915 at 17 (University of North Carolina Press,1994).

37 Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 12 (Oxford University Press, 1999).

38 *Supra* note 35.

39 *Ibid.*

40 Since Hindu laws were never codified, the priests assumed their knowledge was correct. When British began establishing their clout in India and included administration of justice as a vital element, they had troubles with respect to interpretation and disparities in the scriptures. Hence, they were codified, which is commonly known as 'brahmanization of laws'. *See* Timothy Lubin, Donald R. Davis Jr. and Jayanth K. Krishnan (eds.) *The Creation of Anglo – Hindu Law* 78 (Cambridge University Press, 2010) and Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights In India* 12 (Oxford University Press, 1999). A specially formed Committee, called the Hindu Code Committee was set up in 1941 under the chairmanship of B. N. Rau which submitted its report advising the government to frame legislations on this issue. In 1944, a Draft Code comprising of Succession, adoption and maintenance, marriage and divorce, minority and guardianship. Even though this draft was introduced in the Legislative Assembly in 1947, it was temporarily suspended. The Bill was reintroduced in the Constituent Assembly only to be withdrawn. Finally it was passed in 1955.

41 Reba Som, "Jawaharlal Nehru and the Hindu Code – A Victory of Symbol over Substance" in Sumit Sarkar and Tanika Sarkar (eds.), *Women and Social Reform in Modern India – A Reader* 243 (Indiana University Press, 2008)

42 Hindu fundamentalists opined that monogamy was a good practice and in case of dearth of children, polygamy ought to be allowed. *See supra* note 41.

43 The Hindu Mahasabha and its women's wing vehemently opposed the Bill. In their opinion, it was against the foundations of the Hindu society. *See supra* note 41.

in the broader framework of reform,[44] not framing a UCC in its place,[45] ignoring customs for a deliberate urge to have codification,[46] being exclusionary,[47] latent regional prejudices[48] and even political slur.[49] It is in this background that HMGA provisions were discussed and enacted. As such, religious texts were not used during the debates of HMGA, but proviso[50]to section 6, HMGA highlights how important a role it played in determining guardianship. An implication of the importance of religion on the identification of guardian can be found out in section 6, where the distinction (from 1874) between legitimate and illegitimate minors is reintroduced. Uma Chakravarty lucidly explains how caste and gender hierarchy are the organising principles of the Brahmanical social order, which emphasized the need for effective sexual control over women to maintain not only patrilineal succession but also caste purity, an institution unique to Hindu society.[51] Hence, it can be inferred that purity of race (1874) and religion (1956) also played an important role in determining the provisions of guardianship.

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44 The Sikh group resented being clubbed with the Hindus in the broader framework of codification. They considered the Bill to be a dubious attempt on the part of Hindus to absorb the Sikh community. *See supra* note 41.

45 Hindu taking a reverse turn. N. C. Chatterjee (describe who he is) :'Why not frame, if you have the courage and wisdom to do it, a Uniform Civil Code. Why are you then proceeding with communal legislation?' Further, the representatives of the Hindu Mahasabha, took a reverse turn and asserted that a Uniform Civil Code should have been made to give effect to the secular ideals of the country instead of introducing a communal measure. *See supra* note 41.

46 Many parliamentarians tried to ridicule the whole effort of codification as being an unwise, unnecessary exercise, 'a simple intellectual pastime; Codification for the sake of Codification'. In fact, Rajendra Prasad put it 'tremendous changes have come about without any legislation and are legalized under the sanction of custom which is ever-changing and ever-growing.' *See supra* note 41.

47 There was a feeling that the intended codification would lead to the furtherance of the progressive ideas of a small, if not a microscopic minority. See *supra* note 41.

48 The debates at various occasions took a turn to the north-south divide of the country in terms of culture, practice and customs. Certain discussions mention that the customary laws of South India permit the practice of divorce. Pandit Mukut Behari Lal Bhargava commented that in North India, 'the father or mother will not even take water in the house of the daughter, whereas the South with its more liberal customs seemed like an outside country'. *See supra* note 41.

49 Certain conservative hardliners, for instance, Vallabhbhai Patel, Rajendra Prasad, etc. fought tooth and nail against the bill. Rajendra Prasad even went to the extent of threatening refusal of Presidential assent to the Bill, if passed. *See supra* note 41.

50 'Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section— if he has ceased to be a Hindu, or ……'

51 Uma Chakravarty, "Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State" 28 (14) *Economic and Political Weekly* 579-585 (1993).

III Law relating to guardianship of Hindu minors: An assessment

What is 'natural' about natural guardian

The qualification of guardian with the term 'natural' under the Hindu law is intriguing. The question that arises from this qualification is the connotation of the term 'natural' in the context of guardianship. Does the term natural mean in accordance with the 'order of nature' or is it merely used in contradistinction to other kinds of guardianship that are mentioned in the statute. The reading of the law together with the implications that the two distinct connotations hold it may be argued that the law uses the term natural in the latter sense.

Firstly, the law variably vests natural guardianship in persons biologically,[52] socially,[53] conventionally,[54] or both biologically and socially[55] related to the minor in different contexts. If the term natural was used only as connoting order of nature or something that occurs naturally without human intervention then it is difficult to encompass within its fold people who are only socially or conventionally related.

Secondly, natural guardianship as embodied in law varies with the marital status of the parents,[56] sex of the minor,[57] marital status of minor girl,[58] adoptive status of minor,[59] change of religion[60] or renunciation of the world by the guardian.[61] Here, again naturalness swiftly shifts its course with variable decisions made by human beings socially.

Apart from these analytical reasons, the third reason why the term natural should not be interpreted as indicating order of nature emanates from the social implication of such an interpretation and feminist critique of the same. By designating something as natural (in strict sense of the term) the human made law seeks to posit a legal construct beyond challenge. This is similar to how a woman-man union is seen as natural and how this argument of naturalness of heterosexuality is used to delegitimise any sexual orientation that is not seen as heterosexual[62] and was also at some point of time designated as mental illness.[63]

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52 Hindu Minority and Guardianship Act, 1956, (Act 32 of 1956) s. 6(b).

53 *Id.,* s. 6 (c).

54 *Id*., s. 7.

55 *Id*., s. 6 (a).

56 *Id.,* ss. 6(a) and 6 (b).

57 *Id.,* ss. 6(a) and 6 (c).

58 *Ibid.*

59 *Supra* note 54.

60 *Supra* note s. 6 proviso (a).

61 *Supra* note s. 6 proviso (b).

62 *Suresh Koushal* v. *Naz Foundation* (2014)1 SCC 1; Indian Penal Code, 1860 (Act 45 of 1860), s. 377.

63 *Naz Foundation* v. *Government of NCT of Delhi* 2009 (111) DRJ 1; *Suresh Koushal* v. *Naz Foundation* (2014)1 SCC 36.

Some arguments based on order of nature may also be made in the context of guardianship to argue in favour of guardianship of primarily a mother over the child on account of the fact that she is the one who bears direct biological/natural bond with the child and is therefore naturally in a better position to be the guardian as compared to anyone else. Mothers or females generally, on account of their biological function of giving birth are viewed as naturally endowed with love, care and affection. Cultural feminists like Luce Iragaray[64] and Carol Gilligan[65] in fact through their researches have tried to establish that women are different from men and think differently. This difference is something that must be celebrated rather than dismissed. The problem according to cultural feminists lies in the hierarchy between values that are associated with men and ones that are associated with women, rather than the fact that differences exist. For instance, liberal feminists maintain the hierarchy between different values like reason/ emotion, public/private, but reject the sexualisation of these values whereas cultural feminists maintain sexualisation and reject hierarchy between these aspects.[66] However, the problem with both liberal and cultural feminists is that by focussing on what women are or they are not, they *essentialise* the category of women. *Essentialisation* is problematic as it is exclusionary and attempts to offer grand theorisation which falls short of taking into account specificities of different women placed in different contexts. Essentialisation has been one of the major critiques of the first and the second wave feminism as it resulted in advancements made in the field of women's rights getting restricted to few women.

It is therefore undesirable to view 'natural-ness' in a guardian, since it takes a fixed view of mother (women) and father (man) resulting in a legal exclusion of many behavioural aspects and situations. Furthermore, as is apparent from the distinction between custody and guardianship dwelled in Part I, guardianship involves not just care of the minor but also decision making for the minor in order to secure his/her future. Hence, guardianship requires something more than just care or affection towards the minor.

On account of the above stated reasons it may be said that 'natural guardian' is rather a legal construct. The term 'natural guardian' seems to have been used in HMGA merely to re-emphasise that it stands in contradistinction to other kinds of guardianships which get created either through testament or through the intervention of the court or the one that exists only by fact. In other words, those identified as 'natural guardians' under the law are the ones where guardianship in their favour is presumed by law and the same is not required to be proved through any testament or declaration or

64 See Luce Irigaray, 'Sexual Difference', in *French Feminist Thought*, Toril Moi (ed.) 118-30 (Oxford: Blackwell, 1987), translated by Séan Hand in Hilaire Barnett, Introduction to Feminist Jurisprudence (1998).

65 *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1st edn. 1982)

66 Nicola Lacey, Feminist Legal Theory and the Rights of Women, in Karen Knop (ed.) *Gender and Human Rights* (Oxford University Press, 2004).

appointment effected by the court. In that sense, the term 'natural' appears to have been used as a residuary term and since there is nothing natural behind the identification as embodied in law, the usage of the term; natural guardian, may be substituted with any other term without any fundamental change in the consequences and will add to the clarity of law.

It is therefore suggested that use of the term 'natural' be abandoned in favour of terms like presumed or deemed to qualify the term guardian in HMGA. This change in the nomenclature has the capacity to partially contribute to eliminate the 'natural' inclination of statutorily granting guardianship to the father (male).

Guardianship of a legitimate minor – Hierarchy among guardians

In case of a legitimate boy and a legitimate unmarried girl, HMGA states that 'the father, and after him, the mother' is the 'natural guardian'.[67] It is the same in case of an adopted son who is minor.[68] The provision establishes a clear hierarchy between the father and the mother of the child with respect to guardianship rights where primacy is given to father and purportedly the mother is viewed as the natural guardian only 'after' the father. So, the issue to be considered is whether the said provision in Hindu law, constitutes discrimination and if so, what has contributed to prevalence of the same, despite international normative order calling for elimination of discrimination against women to which India is a party. The Convention on the Elimination of all Forms of Discrimination against Women, 1979 (hereinafter referred to as CEDAW) seeks to eliminate all forms of discrimination against women and seeks to establish equality between sexes in all arenas of life. It specifically mandates the state parties to eliminate discrimination against women in all matters pertaining to marriage and family relations.[69] It specifically enjoins the states to ensure, on the basis of equality between men and women 'same rights and responsibilities with regard to guardianship'.[70] Section 6 of the HMGA differentiates between parents on the basis of their sex in recognition of their guardianship rights. The provision recognizes the rights of mothers only to a limited extent *i.e.,* 'after' father. Since it restricts the guardianship rights of mothers, on account of distinction maintained on the basis of sex, it impairs the enjoyment of human rights and fundamental freedoms of women in the social field and thus, falls within the definition of discrimination as embodied in article 2 of the Convention.[71] The legal

67 *Supra* note 55.

68 *Supra* note 54. It is perplexing to find no mention of adopted minor daughter.

69 Convention on the Elimination of all Forms of Discrimination against Women, 1979, art.16.

70 *Id.,* art. 16 (1) (f).

71 For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

provision is a reflection of the patriarchal structure of society where father is considered the head of the family and therefore entrusted with the responsibility to take all the decisions regarding the same, including decisions regarding the children. The Supreme Court in *Mausami Moitra Ganguli* v. *Jayant Ganguli*[72] also pointed out that the presumption in the statutes regarding the suitability of the father to look after the welfare of the child emerges on account of the fact that the father is 'normally the working member and head of the family'. The provision, rather than countering the subordination of women within family that prevails in the traditional social set up, merely sustains the same and this perpetuates discrimination by embodying it in the legal norm. It is pertinent to note here that CEDAW requires states to "embody the principle of the equality of men and women" in their legislations[73] as well as to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[74] Viewed in the light of CEDAW's mandate, the continuation of such a provision in HMGA, which treats mothers unequally as compared to fathers, seems intriguing in the first instance, especially on account of the fact that India is a party to CEDAW. The explanation for the same lies in the fact that India accepted its obligations under CEDAW after proclaiming a declaration with respect to the same. The consideration of the declaration, its implications and the role of the Supreme Court of India with regard to the same in the context of guardianship rights of mothers unravels a complex narrative pertaining to gender justice in India which is now sought to be engaged with.

A glimpse into the narrative must begin with the decision of the Supreme Court in *Githa Hariharan* v. *The Reserve Bank of India*[75] where in the court considered a challenge to section 6 of the HMGA which is discriminatory towards women. In this case, the mother applied to RBI for Relief Bonds in the name of her minor son, along with the intimation that she, being the mother, would act as the natural guardian for the purposes of investments. She was asked to reconsider the application by the RBI authority, advising her to either submit the application signed by the father or in the alternative, obtain a certificate of guardianship from a competent authority in her favour, so that her request may be considered by the bank. It is against this act of the bank, that the mother filed a writ petition challenging the validity of section 6.[76] Bound by the legislative intention, the apex court, conscious of the discriminatory nature of the provision gave a progressive interpretation to the same. It held that the term 'after' not only implies after the death of the father, but includes, *inter alia*, a condition where the father is deemed absent "by

72 (2008)7 SCC 673.

73 Convention on the Elimination of all Forms of Discrimination against Women, 1979, art. 2(a).

74 *Id.,* art. 2(f).

75 (1999)2 SCC 228.

76 *Id.* at 233

virtue of mutual understanding between the father and mother that the latter is put exclusively in charge of the minor".[77]

The court also recognised India's commitment to women's rights since India is a party to CEDAW,[78] which as mentioned earlier requires state parties to "modify the social and cultural patterns of conduct of men and women… to eliminate prejudices and practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women."[79] "This recognition of the role of ideology and social values in conditioning individual action is an outstanding contribution of CEDAW"[80] which essentialises the need to address structural causes of discrimination rather than merely treating individual action as the underlying cause and thus remaining the only focus of change and redress. As mentioned earlier there is no denying the fact that attribution of guardianship to father as against the mother is based on social and cultural norms based on stereotyped roles of men as bread winners and decision makers and women as care givers at home and as such not being entrusted with the decision making authority within the patriarchal social set up. The persistence of the same as well as the court's reluctance in striking it down completely on account of being discriminatory however needs to be examined.

With respect to the mandate of the state to modify social and cultural norms that are discriminatory, it may be argued that India has made a declaration with respect to article 5 (a) and 16(1) entailing that "it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent."[81] This declaration which apparently seems to sustain the persistence of discriminatory practices pertaining to personal affairs of any community needs to be understood in a more nuanced manner. Nuances emerge from the fact that community is not an undifferentiated or monolithic whole with a single voice. Communities have groups, sub-groups as well as individuals and this multiplicity of voices may exist within any community. The question is what is recognised as 'initiative and consent' of the 'community'. Is it the voice of the dominant within any community or it could also be any minority within the community adversely affected by certain practices prevailing in the community? It is difficult to operationalise any opinion of any community referred to, in the declaration. Hence, the change in law with the purpose

77 *Id.* at 235. The other conditions being (i) father's absence from the care of the minor's property or person for any reason whatsoever; (ii) father's indifference to the matters of minor; (iii) physical incapacity to take care of minor.

78 *Id.* at 239.

79 Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 5 (a).

80 Madhu Mehra and Amita Punj, *CEDAW: Restoring Rights to Women,* UNIFEM and Partners for Law in Development 45(2004).

81 *Available at*: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en#EndDec, (last visited on Apr. 13, 2021).

of bringing about gender equality should not be seen as an insurmountable hurdle, solely in the light of existence and nature of declarations and reservation made with respect to CEDAW. It may be argued that judiciary, an institution which is not representative of people should not overturn legislative will and as such it did not do so in *Githa Hariharan*. However, in keeping with the goal of gender equality, the legislature, as it has progressively done in the past ought to efface gender discrimination writ large on the face of guardianship law.

Guardianship of a married female: Inconsistency with Prohibition of Child Marriage Act, 2006

The second form of gender hierarchy that emerges in the recognition of natural guardian under HMGA is with regard to minor married male and minor married female. The guardianship of minor female shifts from the father to the husband, who may at the relevant moment also be a minor. Interestingly, the guardianship of a minor who is a married male is not specified, implying thereby that the natural guardian for him continues to remain with father and after him the mother. It is strange to consider how incapacity of a minor to take decisions regarding himself is overridden by the presumption of taking decisions regarding his minor wife. The transfer of guardianship in such a context is also questionable especially in the light of the legislative decision to prohibit child marriage through the Prohibition of Child Marriage Act, 2006. Unlike the Child Marriage Restraint Act, 1929, which sought to impose limitations on child marriage, after 2006, child marriage stands prohibited by the above mentioned law. In certain cases, it is null and void[82] and in certain cases, it is voidable at the option of the contracting party being a child.[83] Since law seeks to guide human behaviour, it is a well settled principle that it must be consistent and clear.[84] In this case, inconsistency arises out of the fact that on the one hand the legislature stands for prohibition of child marriage and on the other seeks to validate the same by transferring the guardianship of a minor married female to her husband. Law thus fails to take a clear and consistent stand with respect to child marriage on account of its stance with respect to guardianship of minor married female. The Prohibition of Child Marriage Act, 2006 also envisages return of valuables, gifts, etc. exchanged between the parties at the time of avoidance of marriage. For this purpose, a duty is imposed on the district court to direct "both the parties to the marriage and their parents or guardians to return to the other party, his or her parents

82 The Prohibition of Child Marriage Act, 2006, no. 6 of 2006, s. 12.

83 *Id*., s. 3.

84 *See* generally, H. L. A. Hart, *The Concept of Law* (Oxford University Press, 3rd edn. 2014), Hans Kelsen, *Pure Theory of Law* (Trans. M. Knight) (Lawbook Exchange 2009), Lon L. Fuller, *The Morality of Law* (Yale University Press, Revised Edition, 1969), Ronald Dworkin, *Taking Rights Seriously* (Universal Law Publishing, 5th edn. 2015). Positivists also support the same, for instance both Kelsen and Hart mention how within a system there must be norms/rules which must provide resolution if inconsistency exists. Ronald Dworkin also views law as an integrated whole.

or guardian, as the case may be, the money, valuables, ….”[85] Here, the term guardian is used interchangeably with parents which seems contrary to the identity of guardian of a married minor daughter under HMGA.

Guardianship of an illegitimate minor: Guardianship, sexuality and the best interest of the child.

As discussed in Part I of the paper, the law pertaining to guardianship emerged in peculiar contexts and was used to address specific needs. The trajectory of its development indicates various shifts in the focus of the law. To begin with, it was the context of the need of a manager of minor's property to ensure regular flow of revenue to the British administration[86] and thereafter the need to impart education to minor Indian males[87] whose property was under the supervision of Court of Wards possibly to solicit their services for minor administrative work by the British, followed by the need to clearly identify guardian of a person born out of illicit unions in case of Europeans[88] and finally into the best interests/welfare of the child being recognised as the paramount guiding factor.[89] The best interest of the child rightly guides not only the law but adjudication of matters before the court,[90] even to this day. Such an approach is in tune with the internationally recognised principles that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”[91] Not only the Convention on the Rights of the child, 1989, but even CEDAW recognizes the interest of the children as paramount consideration in cases of guardianship, wardship, trusteeship and adoption of children.[92] As in the international arena, the domestic law pertaining to guardianship of Hindu minors, HMGA also recognizes ‘welfare of the minor’ as the overriding consideration in matters of guardianship. Section 13 of the HMGA provides that “no person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

85 The Prohibition of Child Marriage Act, 2006 (Act 6 of 2006), s. 3(4).

86 *See* generally, the task of the institution of court of wards.

87 Act XXVI of 1854 (repealed 1890).

88 Act XIII of 1874 (repealed 1890).

89 Guardian and Wards Act, 1890 (Act 8 of 1890), s. 17.

90 *Vikram Vir Vohra* v. *Shalini Bhalla* 4 SCC 409 (2010), *Mausami Moitra Ganguli* v. *Jayant Ganguli* 7 SCC 673 (2008), *Sheila B. Das* v. *P. R. Sugasree* 3 SCC 62 (2006), *Nil Ratan Kundu* v. *Abhijit Kundu* 9 SCC 413 (2008), *Kumar V. Jahgirdar* v. *Chethana Ramatheertha* 2 SCC 688 (2004).

91 Convention on the Rights of the Child, 1989, art.3 (1). India ratified UNCRC on Dec. 12, 1992.

92 Convention on the Elimination of all forms of Discrimination against Women, 1979, art. 16(1)(f).

In this way, HMGA recognizes 'welfare of the minor' as its guiding principle. The Supreme Court in *Surinder Kaur Sandhu* v. *Harbax Singh Sandhu*[93] also held that section 6 of HMGA constitutes father as the natural guardian but also recognized that this provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. Similarly, in *Mausami Moitra Ganguli*[94] also, the court went on to observe that "indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (section 17) or the Hindu Minority and Guardianship Act, 1956 (section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor."

The word 'welfare' used in section 13 of the Act "has to be construed literally and must be taken in its widest sense."[95] The Supreme Court has also held that in exercising its *parens patriae* jurisdiction, the moral and ethical welfare of the child must weigh along with the physical well-being of the child.[96] It has also held that the "doctrines of comity of courts, intimate connect, orders passed by the foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc. cannot override the consideration of the best interests and welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child."[97]

Firstly given the commitment of the legislature to the welfare of children ever since independence and its incorporation in HMGA as well, it is mystifying that while identifying the natural guardian of a child, the legislature preferred father over the mother and thereby, in accordance with the prevailing stereotypes presumed father to be the 'natural guardian'. It indicates how the legislature presumed that the only person who is capable to and effective in securing the best interest of the child will in all the cases be the father and not the mother to begin with. *Secondly,* capability and effectiveness of a parent to secure the best interests of the child also vacillated according to the marital status of the parents. In case of the so-called illegitimate child, natural guardianship in the first place is vested in the mother.[98] Is the best interest of the child the driving force here or the certainty of biological connection of the mother and child, which seems to be neglected in case of children born within the wedlock, the deciding factor? Even in case of children born within the wedlock, fatherhood is socially as well as legally construed/presumed, whereas biological motherhood is absolutely

93 (1984)3 SCC 698.

94 (2008)7 SCC 673.

95 *Gaurav Nagpal* v. *Sumedha Nagpal* (2009) 1 SCC 42.

96 *Ibid.*

97 *Lahari Sakhamuri* v. *Sobhan Kodali* (2019) 7 SCC 311.

98 *Supra* note 52.

certain. The question that then arises is whether clear determination of guardian considering the best interest of the child was the only driving force behind such vacillation or regulation of sexuality was also being secured through the same. As has already been mentioned above in Part II,[99] feminists have argued that this type of surveillance over feminine sexuality to maintain religious, caste, class, purity and hierarchy is given importance of varying degrees, to the extent that legal determination of rights also get influenced.

The provisions pertaining to guardianship of so called illegitimate child also falls foul of the letter and spirit of the Convention on the Rights of the Child, 1989 which provides that the state parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members'.[100] However, the very recognition of a child as 'illegitimate' violates human rights of the child as well as constitutes discrimination against women under CEDAW. In all cases of conflicts with respect to guardianship, the basic principle of the best interest of the child ought to be the guiding principle.

As in the case of interface between guardianship and child marriage, the laws regulating guardianship and maintenance of a Hindu minor respectively also hold divergent guidance for human behaviour. The Hindu Adoptions and Maintenance Act, 1956 does not distinguish between legitimate and illegitimate minors as far as their right to claim maintenance from either parent is concerned.[101] However, HMGA (as was first done in Act XIII of 1874 with respect to Europeans) maintains a distinction between legitimate and illegitimate children for determining guardianship of Hindu minor. It is intriguing to note the divergence of stands pertaining to legitimacy of relationships between a minor and his/her parents in the two legislations framed at the same time and claiming to be based on personal law governing Hindus.

IV Conclusion

Apart from ideology of gender informing the legal determination of guardianship of a Hindu minor, the analysis of historical evolution of the notion of guardianship in general reveals the influence of varied other aspects. The trajectory of evolution under such influence may be traced back to the colonial era. The concerns have spanned from administration of property, regulation of sexuality, perpetuation of gender-based stereotypes and finally to the concern for the best interest of the child. These concerns have variably influenced the construction of the idea of guardianship at different points of time. The process of evolution was marked by phases reflecting recognition, de-

99 *Supra* note 51.

100 Convention on the Rights of the Child, 1989, art. 2(2).

101 Hindu Adoptions and Maintenance Act, 1956 (Act 20 of 1956), s. 20.

recognition and re-recognition of certain concerns in determination of the notion of guardianship. The case in point being the role of female sexuality in the same. Even though the initial need for statutory identification of guardian for a minor in the colonial era emerged out of the requirement to ensure uninterrupted flow of revenue from his estate, the identification of the guardian while meandering through varied other concerns finally got embedded in the best interest of the minor. The final concern, *i.e.,* the best interests of the child offers a legitimate rights-based ground for state's intervention in terms of regulating guardianship of minors.

The evolution of law, pertaining to guardianship of minors indicates gradual move towards a rights-based approach, especially as far as realization of rights of child are concerned. Even though the state interest in administration of property has completely been overridden by the notion of the best interest of the child, the other two concerns, *viz.*, regulation of sexuality and stereotyped roles of men and women still continue to prevail in the law regarding guardianship of Hindu minors irrespective of their effect on the best interest of the child as well as women's rights. The assumption that the best interest of the child can only be secured by recognising father as the "natural guardian" is based on gender stereotype and discriminatory traditional social norms and practices. This calls for an urgent need to reform the law pertaining to guardianship of Hindu minors in a way that makes it gender just, upholds the best interest of the child as well as the subtle control over female sexuality contributing to perpetuation of hierarchy must be addressed.

Hence, providing for a guardianship that sees the mother and father as equal could be one way of reforming the provision, thereby best interests/welfare of the child being the one and only guiding factor in determining the guardianship of the minor. For the same, it is necessary that the law recognizes both mother and father as deemed/presumed guardians jointly as well as severally. This 'joint as well as several' clause would provide a complete responsibility on the part of parents, where the best interests of the child are not put on hold for the lack of availability of either parent, for any reason whatsoever. Further, it would see both the parents as responsible to the best interests of the child in their individual capacity as well as jointly, reasonably leaving the choice on the parents, while taking decisions regarding the child. Moreover, in case of dispute between the parents any such act may be challenged by the other party in the court, leaving it upon the court to determine the best interest of the child in that specific case rather than presuming that the best interest of the child can solely be protected and promoted by the father. The distinction between legitimate and illegitimate child must give way to a law that does not differentiate among children, stigmatise them and even their parents. Finally, vesting of guardianship of minor married female in the husband of that female must be done away with.