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Concept of Guardianship in India: The Unrevealed Gender Bias and Inequitable Laws

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ABSTRACT

India is a secular democratic country in which citizens are free to follow their own religions according to their faith. The Concept of guardianship has diverse aspects while considering the application of different personal laws in India. Each religion relies on personal laws for the purpose of marriage, succession, inheritance and guardianship. In Hindu religion the concept of guardianship of children does not arise in the past as it was governed by joint family system of Dayabaga or Mitakshara schools. When comes to the British colonial governance period the guardianship laws were emerged and later it has been codified. Under Hindu law guardianship gives more prominence to father than mother, it leads to a strong gender bias. In Muslim personal law also, father is given more prominent position when compared to mother in the aspect of guardianship. The position of mother is not at all considered for guardianship of her own children. The guardianship under Christians is governed by The Guardian and wards Act.

The inequality in considering the guardianship of a child is much discriminatory, it has to be gender neutral and which does not oppose to the law of the land. Apart from the gender concept the utmost aim of the guardianship has to be the welfare of the child. The concept which is deep rooted in the mindsets of people is hard to change and only by way of legislative enactments the similar position could be achieved. Be it the laws of Hindus, Christians, Muslims or any other religion the discrimination is same and effective in all senses. All laws places man a predominance over woman in all aspects, this leads to the violation of Article 14, 15 and 21 of the Constitution of India.

Keywords: guardianship, gender, bias, inequitable, minor.

India being a secular democratic republic in the world has different personal laws which governs inheritance, succession and guardianship. Different religions in India made citizens follow diverse concepts of personal laws prevailing in the country. The multifariousness of applications of a bunch of legislations can be seen here at a glance. The term 'Guardian' is defined as "a person having the care of a person of a minor or of his property, or of both his person and his

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property"². Minor is a person who is under the age of 18 years. For the purpose of determining the age or majority, Indian majority Act³ is taken in to consideration. According to the Act someone domiciled in the Republic of India who is below the age of eighteen years, is a minor⁴. Minor in the sense, the individual needs care and protection of guardian as they are not able to taken care of themselves.

In Hindu religion the concept of guardianship of children does not arise in the past as it was governed by joint family system of Dayabaga or Mitakshara schools. The family system formed under a common ancestor was known as the Hindu undivided family system (HUF). When Karta who is the head of the family takes care of the minors as a guardian and the concept of separate guardianship does not arise. He himself guards the entire family as a whole and their education, care, protection is also taken care. When comes to the British colonial governance period the guardianship laws were emerged and later it has been codified, thus The Hindu Minority and Guardianship Act. The Concept of guardianship under the act is envisaged under; Section 6 in The Hindu Minority and Guardianship Act, 1956 states;

- (a) Natural guardians of a Hindu minor. —The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are— in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

Section 7 in The Hindu Minority and Guardianship Act, 1956 states that;

Natural guardianship of adopted son —The natural guardianship of an adopted son who is a minor pass, on adoption, to the adoptive father and after him to the adoptive mother⁵.

In Muslim personal law father is given more prominent position when compared to mother in the aspect of guardianship. The word Guardianship is denoted as 'Hizanat' in Urdu. In all schools of Islam father is the first natural guardian of the minor children, it is his personal right. In the absence of father his executor can also act as guardian of minor child. In Shia law in the absence of father paternal grandfather is considered as the guardian and it excludes the position of executor of father as guardian. Under the Mohammadan Law the mother is entitled to the hizanat of her male child until he has completed the age of seven years and of her female child until she has attained puberty. In Muslim law the position of mother is not at all considered

² The Guardians and Wards Act, 1890, s. 4 (2). (India).

³ The Indian Majority Act, 1875 (India).

⁴ The Indian Majority Act, 1875, s. 3. (India).

⁵ The Hindu Minority and Guardianship Act, 1956, s. 7. (India).

for guardianship of her own children. In *Ghulam Husani Kuttubudin Manner v. Abdul Rashid Razzak Manner*⁶ Court held that the mother can never act as a natural guardian or appointed as a natural guardian under Muslim Law. The honourable supreme court held that the mother cannot be appointed as a guardian of minor for accepting the gift on behalf of the minor during the life time of father.

The guardianship under Christians is governed by The Guardian and wards Act, it is a secular law. Under the Act guardian is appointed for the child, for the property by considering certain factors which constitutes for the welfare of the child. The court may not appoint a person as guardian against the child's will. Section 17 of the act in detail states about the factors of consideration for appointment of a guardian for the child.

The inequality in considering the guardianship of a child is much discriminatory, it has to be gender neutral and which does not oppose to the law of the land. Apart from the gender concept the utmost aim of the guardianship has to be the welfare of the child. The child who by its very nature needs care and protection of others and our legal system provided many welfare laws for the benefit of child under 18 years of age. Every step forward to the welfare and paramount interest of the child and not towards gender biased.

In different personal laws the position which provides for father is well versed while comparing to the position and recognition of mother. The social stigma of prevailing concept of males which is comparatively higher than the females. The concept which is deep rooted in the mindsets of people is hard to change and only by way of legislative enactments the similar position could be achieved. Be it the laws of Hindus, Christians, Muslims or any other religion the discrimination is same and effective in all senses. All laws places man a predominance over woman in all aspects, this leads to the violation of Article 14, 15 and 21 of the Constitution of India.

Article 14 states, The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.⁷

Article 15 states Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them⁸

⁶ *Ghulam Husani Kuttubudin Manner v. Abdul Rashid Razzak Manner*, 2000

⁷ INDIA CONST. art. 14

⁸ INDIA CONST. art. 15 cl. (1)

Article 21: Protection of life and personal liberty, no person shall be deprived of his life or personal liberty except according to procedure established by law.⁹

These Articles clearly envisages the concept of equality, personal liberty and non-biased approach in our constitution which is the grundnorm for all the legislations. Isn't this time to rethink about the decade old laws which were enacted according to the old social system. Our Constitution itself safeguards rights of women and children under Article 15(3), the state shall make laws for the welfare of children and women, and it does not come under the purview of discrimination stated in Article 15.

Even after the clear-cut article which lays down in the law of the land still the Acts like Hindu Minority and Guardianship Act¹⁰ standing against the constitution. A law which is in derogation with fundamental rights has to be considered as void, and illegal. The doctrine of eclipse can be applied to a law which is in derogation with the fundamental rights of the constitution and if the law is a pre-constitutional law, it can be made enforceable after removing such inconsistency. In case of a post-constitutional law Article 13(2)¹¹ states that any new law which becomes void in the very moment it comes in derogation or violation of fundamental rights. These provisions are directly in consonance with the doctrine of severability. This doctrine states any provision of a statute which is against the Constitution will be severed from that Act and will be considered void to that extent only. Thus, the courts can declare that provision void instead of the entire act. However, Article 13(4) states that Article 13 does not apply to constitutional amendments. This implies that if any constitutional amendment law gets passed that takes away certain fundamental rights or is in violation of them, those laws, although inconsistent with the rights, is not void.

It's abominable to treat the guardian in consensus of gender, if the mother has a prominence over the child because of the biological aptness of bearing a child and giving birth it can be waived. But here without considering the aspect of mother as the sole warrior, the mentors of the future generation and the transformation stage of a women who passes over is to be very difficult, and it need to be considered in the other hand. This inequality creates the hardship over the divorced, deserted, separated, or single mothers who sacrifice many of their rights and bear the burden of the inequitable laws. The gradual breakdown of the patriarchal outlook of Indian society and the rising status of women as independent and capable beings, the balance

⁹ INDIA CONST. art. 21

¹⁰ The Hindu Minority and Guardianship Act, 1956 (India).

¹¹ INDIA CONST. art. 13, cl. 2.

has been tilting in favour of the mothers who are both breadwinners for their households and able caretakers of their minors thereby placing them on a par with their male counterparts.

Our Constitution itself safeguards women and children through Article 15(3), the state shall make laws for the welfare of child and women, and it does not come under the purview of discrimination in Article 15 and it is an exception to the Article. Even after the clear-cut article which lays down in the law of the land still there are Acts like Hindu Minority and Guardianship Act provides that the natural guardian of a Hindu minor boy or unmarried girl is the father, and only after him, the mother¹². Section 7 in The Hindu Minority and Guardianship Act, 1956 states natural guardianship of adopted son. —The natural guardianship of an adopted son who is a minor pass, on adoption, to the adoptive father and after him to the adoptive mother¹³. The harmonious construction of the fundamental rights enshrined under the constitution is at stake while considering the impugned sections vis-a-vis concept of fundamental rights. This anomaly itself is taken towards the hands of justice and there are some judgements and interpretations in which our courts of judicature have provided a hoping hand towards the light and equality which is enshrined in the constitution.

In *Githa Hariharan v. RBI*¹⁴ – this Case mainly dealt with the issues and inequalities in guardianship and the Acts which are expressly provided a burden and hardship over mothers. The case was on the question of natural guardianship rights of mother. The constitutional validity of S.6(a) of the Act of 1956 and S.19(b) of Guardians and Wards Act, 1890¹⁵, was challenged. The word “after” which is used in the section 6(a) of the Act was interpreted as “in the absence of” in the light of equal gender concepts and upheld the constitutional validity of Section 6(a) the Act of 1956. The consequential difficulties they create for mothers are not too short. In this case, it was held that both father and mother are natural guardians of a minor child. The position of mother before the case was little pathetic and mother was only considered as natural guardian after father. Now also the achieved rights are very minimal and still it restricts to special circumstances, it would have been much better if the Honourable court had struck down the section and there by ensured the same recognition to mother as well. The rights have to be more specific and real if it were given rightly a same position to mother without stating in the absence of father.

In *ABC v. State (NCT of Delhi)*¹⁶ the concept of “welfare of the minor” was given much broader

¹² The Hindu Minority and Guardianship Act, 1956, s. 6(a). (India).

¹³ The Hindu Minority and Guardianship Act, 1956, s. 7. (India)

¹⁴ Ms. Githa Hariharan & Anr v Reserve Bank of India & Anr. (1999) 2 S.C.C 228 (India).

¹⁵ Guardians and Wards Act, 1890, s. 19 (b). (India).

¹⁶ *ABC v The state (NCT of Delhi)*, (2015) S.C.C 609 (SC) (India).

aspect. Court held that welfare does not only cover the material and physical well-being of the child but also includes education, happiness, health, and moral welfare of the child. Factors which constitute the welfare of the child differs from case to case, depending up on the circumstances of the case. In most cases, custody is given to either of the parents after considering the welfare of the minor. Through this judgement the Honourable court made open its wide ambit of outlook towards the changing scenario of the current society and made clear that even an unmarried mother can be recognized as a natural guardian without disclosing the name of the biological father.

In *Bimala and ors v. Anita*, 2007¹⁷ it was held that on the matter of the custody of the minor, the best interest doctrine will apply and the welfare of the minor child should be paramount consideration before passing any judgment.

The Hindu Minority And Guardianship Act, 1956 under section 4 (b) defines “guardian” (major) means a person having the care of the person of a minor or of his property or of both his person and property and includes-

- a natural guardian,
- a guardian appointed by the will of the minor’s father or mother,
- a guardian appointed or declared by a court, and
- a person empowered to act as such by or under any enactment relating to any court of wards.

In *Roxann Sharma v. Arun Sharma*, 2014¹⁸ it was held that moral principles were given more importance than legal principles. The Court transferred the custody to the mother from the father because the father left the city with the child without any notice and made it difficult for the mother to meet the child.

The need for having equal and joint guardianship laws for married couples, and preferential natural guardianship for single mothers has emerged as a need of the decade. The legislations governing family matters in India is very peculiar in nature. It’s evident from the consideration of all the relevant sections that they are not promoting equality and voices are raised against them through the court of law. Somehow our Judicature has intervened and made a difference even it is minimal, was really appreciable. Law is not a constant mechanism and it cannot be still and always grown by adapting the changes in the society. As a way forward we can depend

¹⁷ *Bimala and Ors v. Anita*, (2015) 3.R.C.R (Civil) 153 (SC) (India).

¹⁸ *Roxann Sharma v. Arun Sharma*, 2015 8 S.C.C 318 (India)

on the upcoming legislative enactments which may vanish the unequal personal laws and also at the same time make sure to hold the diversity of our country. The laws which are standing against the constitution will be levelled if they are replaced by new enactments or has been substituted with required amendments. This will vanish the inequality by wiping out the shadow of gender bias and results in radiance of new horizon of light to emerge.

“A word is not crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.”

- The American Supreme Court Justice, Oliver Wendell Holmes Jr.
