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TOWARDS A CHILD-CENTRIC GUARDIANSHIP FRAMEWORK IN INDIA

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Abstract

Guardianship is a legal means of protecting the rights of minors who are unable to manage their own affairs. In India, there are several different types of personal laws that apply to guardianship. These consist of Hindu, Muslim, Christian and Parsi laws (including the secular Guardians and Wards Act of 1890). These frameworks (based on religious traditions and colonial laws) result in inconsistencies, whereby children get different outcomes depending on where they live.

Varied personal laws concerning guardianship in India result in differences of standards surrounding the rights and welfare of children, which become problematic when it comes to parental authority, custody and decision-making. In contrast to the best interests of children, such differences could result in unequal protection of those based on their professional or personal law background. While some provisions of personal laws do aim to provide protection for children, in practice they could prove discriminatory given the constitutional protections for equality, non-discrimination and right to life and development. These distinctions also make it more difficult for India to uphold its international obligations at the level of describing or identifying a person in relation to their crimes, such as those set forth by the United Nations Convention on the Rights of the Child (UNCRC), which mandates that children's rights be upheld equally and that the best interest creed prevails.

The objectives of this paper are fourfold:(i) to explore the statutory and doctrinal bases of guardianship under personal laws in India;(ii) to analyse their impact on the rights and welfare of children;(iii) to assess how judicial responses upheld constitutional principles and international child rights standards; (iv) to formulate a uniform, child-centric guardianship regime. The study relies heavily on statutes, court-ordered precedents and scholarly commentary; global norms and foreign jurisprudence are taken into consideration as well. It examines guardianship with a view to *parens patriae*, child welfare, feminist critiques of patriarchy, and the supremacy of the Constitution.

Although judges are increasingly interpreting the law in a manner that protects the best interests of children, the fact that there exist different personal law systems maintains differences and strengthens patriarchal norms. is that in many communities, the protection of children comes before their rights, their best interests, religious rules, or parental authority takes precedence. A Uniform Guardianship Code in line with Articles 14, 15 and 21 of the Constitution and India's obligations under the UN Convention on the Rights of a Child is a just and beneficial way to ensure that the best interests of each child will take precedence irrelevant of what religion or social background he/she comes to possess.

Keywords: Guardianship, Personal Laws, Hizanat, Child-Centric, *Parens Patriae*.

Introduction

Guardianship occupies a special niche in family law. It strikes a balance of parental authority, government oversight and the best interests of children. Custody is principally concerned with the day-to-day well-being of the child; guardianship covers legal responsibility for both the child and his property. India does not have a uniform law on guardianship. Instead, it differs across personal laws according to religion. The Hindu Minority and Guardianship Act, 1956 (HMGA) governs the laws of Hindus.

Muslims are guided by unwritten rules of wilayat (guardianship) and hizanat (custody). Christians and Parsis are dependent on colonial era laws and judicial pronouncements. The Guardians and Wards Act, 1890 (GWA) is also a secular addition which applies to all communities. In this blended structure, India is historically the land of accommodation between secular power and religious freedom.

But that creates inconsistencies, disparities, especially when it comes to gender roles and child welfare. For instance, under Hindu law, the fathers are considered the universal guardians and mothers are merely their caretakers. In Muslim law, mothers have the right to custody of young children but no authority over property. Paternal control may also be the model of choice for courts applying Christian and Parsi laws.

The absence of a common guardianship framework often leads to inconsistent interpretation of laws from the courts. Judges have to negotiate multiple sources, some of them written and some based on custom or previous rulings. The result is that children from different communities

receive unequal protection and have limited access to legal assistance, which violates the equality clause of the Constitution. The current system does not keep pace with social realities such as single parenthood, adoption by non-biological parents and guardianship in domestic violence cases. Such cases need courts to consider the child's well-being more and more.

Personal laws differ not only in letter but also, and perhaps more importantly, in spirit; gendered conceptions of parental authority will interfere with a uniform standard being enforced. Telos provides additional justification for legal reform to ensure domestic laws conform with constitutionally guaranteed rights to equality, non-discrimination and the right to life and development. Such a reform should also meet India's commitments to international child rights.

Historical and Jurisprudential Background

Different guardian laws in India are historically, theologically and colonially entrenched. The concept of guardianship itself betrays society's acknowledgment that children, due to their immaturity, cannot fully protect their own interests and therefore need parents or family or the state to do it for them. However, the details of who qualifies as a guardian and what powers are bestowed on them as well as how the interests of the child in question are safeguarded have changed considerably over time.

Women in Hindu law Ancient Hindu law did not recognize guardianship as a separate legal category; it was understood as part of parental authority. The Dharmashastras uniformly depicted the father as the natural protector, provider and ruler of the household even over minor children. His authority was predicated not only on familial obligation but also religious duty (dharma). The father was seen as the custodian of the person and property of his children, but this power structure was highly hierarchical. She was in fact fulfilling herself as a mother and hence, her role as the nurturing female was acknowledged more rather than her importance in terms of legal rights. The father's primacy reflected the patriarchal ethos of classical Hindu society, in which lineage, inheritance and authority passed down the male line.

Whereas Islamic law developed a distinction between custody (hizanat) and guardianship (wilayat). Guardianship, which involved authority over the person and property of the minor, was concentrated in the father or male relatives. On the other hand, custody used to be filed in favor of the mother when the child was still in his tender years or until a son during about seven

ages and also during a daughter before entering puberty. This division reflected an early effort to reconcile paternal power with maternal nurture. But it also reinforced gendered hierarchies, because mothers were stripped of power regarding property and long-term matters. Both Hindu and Muslim traditions thus adhered to patriarchal ideas of guardianship where the child was mostly seen as an extension of parental rights and not an independent rights-bearing person.

The colonial period brought with it a more profound shift, importing the English doctrine of *parens patriae* — literally “parent of the nation.” This doctrine made the sovereign ultimately responsible for protecting minors, especially as concerns their property interests. This principle was subsequently imported into the Indian legal system, as decisions of the Privy Council and High Courts came to supervise and regulate guardianship/custodial arrangements. An important judgement in this line was *Hanuman Prasad Singh v. Bhagwati Prasad Singh* (1856), in which the Privy Council laid down that all alienation of a minor’s property must be shown to be for the benefit of the estate when done by a guardian. This judgement is important as it heralded the welfare principle, which would later come to play a dominant role in the guardianship jurisprudence of India. It reframed guardianship, from its previous interpretation as an unqualified parental prerogative, to a fiduciary obligation based on the child’s best interests.

The colonial judiciary thus became the bridge between traditional religious norms and emerging modern principles of equity and welfare. By invoking *parens patriae*, the courts implicitly recognized that the state had an obligation to protect the interests of children even against their own parents or guardians. This introduced the idea that the child was not merely the property of the father but an individual whose welfare had an independent value in law.

Jurisprudentially, these developments can be understood through multiple lenses. From a **natural law perspective**, children were increasingly seen as possessing inherent rights to protection and welfare. From a **sociological jurisprudence viewpoint**, guardianship laws evolved to reflect society’s need to protect vulnerable members and balance family authority with state responsibility. From another perspective, the emphasis on paternal guardianship reflected entrenched patriarchy, while the limited recognition of maternal custody reinforced gendered hierarchies. Through the lens of **constitutional jurisprudence**, which would later dominate post-independence cases, the shift toward prioritizing welfare laid the foundation for equality and dignity to eventually supersede patriarchal personal law provisions.

Therefore, the historical and jurisprudential background of guardianship in India reveals a gradual but significant transition: from ancient patriarchal authority rooted in religious texts, to a bifurcated model under Muslim law distinguishing custody and guardianship, to colonial judicial interventions emphasizing *parens patriae* and the welfare of the child. These layers continue to shape contemporary guardianship law, creating tensions between tradition and modern constitutional values. The cases of *Hanuman Prasad Singh* remain critical milestones, as illustrated by the emergence of judicial supervision and the early articulation of welfare as a guiding principle. Ultimately, this background underscores why guardianship in India remains contested terrain, reflecting centuries of evolving legal, social, and philosophical thought.

Interpreting through Case laws

Section 4 of HMGA, 1956 defines different types of guardians: natural, appointed by a will, appointed by the court, or acting as guardians in practice. Likewise, section 6 states that the father is the natural guardian, and after him, only the mother. This law originally gave priority to fathers, reflecting a patriarchal approach, but over time, courts have reinterpreted it to align with constitutional principles. In *Githa Hariharan v. Reserve Bank of India*, the Supreme Court clarified that “after him” does not mean after the father’s lifetime but rather “in the absence of,” thereby expanding mother’s rights as natural guardians and bringing the law closer to the equality mandate under Article 14 of the Constitution.¹ Similarly, in *Jajabhai v. Pathankhan*, the Court recognized the mother as the guardian where the father was estranged², emphasizing that the welfare of the child overrides paternal authority. In *Roxann Sharma v. Arun Sharma*,³ the Court reinforced the maternal caregiving role by holding that custody of children below five years ordinarily rests with the mother. Yet in *Essakkayal Nadar v. Sreedharan Babu*⁴, it was clarified that the father remains the guardian unless disqualified, underscoring the statutory rigidity that still privileges paternal authority. Thus, Hindu law reflects a gradual judicial shift away from patriarchal statutes toward a welfare- and equality-oriented interpretation, but the statutory text continues to embody gender bias, requiring judicial activism to neutralize its discriminatory effect.

¹ *Githa Hariharan v. Reserve Bank of India*, (1999) 2 S.C.C. 228

² *Jajabhai v. Pathankhan*, (1971) 2 S.C.C. 821

³ *Roxann Sharma v. Arun Sharma*, (2015) 8 S.C.C. 318

⁴ *Essakkayal Nadar v. Sreedharan Babu*, AIR 1992 Ker 200.

Muslim law presents a distinct structure by differentiating between guardianship (*wilayat*) and custody (*hizanat*). The father or his male relatives have legal authority over the child's person and property, while the mother has preferential custody during tender years, generally until seven for boys and until puberty for girls. In *Imambandi v. Mutsaddi*, the Privy Council drew a firm distinction between guardianship and custody, reinforcing paternal primacy over property. The case reinforced the principle of paternal primacy in matters of guardianship, holding that the father (or paternal male guardian) retained ultimate control over the child's property and legal interests, even if the mother had custody for nurturing and caretaking purposes.⁵ Similarly, in *Gulam Husaini v. Fida Ali*, the father's right to guardianship was affirmed irrespective of who had custody of the child. Yet in *Athar Hussain v. Syed Siraj Ahmed*⁶, the Supreme Court emphasized that welfare remains the paramount consideration in custody and guardianship disputes, softening the rigidity of classical law. The tension between personal law and child welfare was further highlighted in *Shabnam Hashmi v. Union of India*, where the Court recognized the secular right to adopt under the Juvenile Justice (Care and Protection of Children) Act,⁷ reflecting how statutory reform can override personal law constraints in the interest of children. Muslim law's rigid separation of guardianship and custody thus undermines maternal authority and often jeopardizes child welfare, with courts increasingly compelled to rely on the welfare principle to override archaic rules, though comprehensive statutory reform remains absent.

In the case of Christians and Parsis, guardianship lacks a codified statute comparable to the HMGA. Instead, courts rely heavily on the Guardians and Wards Act, 1890, supplemented by customary personal law influences. In *Philips Alfred Malvin v. Gonsalves*,⁸ the Bombay High Court recognized paternal guardianship but emphasized that the welfare of the child is the controlling factor. Similarly, in *Bimla v. Anita*, the Punjab and Haryana High Court applied the welfare principle to a Christian custody dispute, granting custody to the mother.⁹ In *Selvaraj v Revathi*, the Madras High Court granted custody to the mother despite the father's reliance on ecclesiastical claims, affirming that religious arguments cannot trump the child's best interests. Judicial discretion under the GWA, therefore, dominates guardianship disputes for Christians and Parsis, with the welfare principle often overriding religious prescriptions. Yet the absence

⁵ *Imambandi v. Mutsaddi is (1918) AIR(PC) 11*

⁶ *Athar Hussain v. Syed Siraj Ahmed, A.I.R. 1957 S.C. 599*

⁷ *Shabnam Hashmi v. Union of India, (2014) 4 S.C.C. 1*

⁸ *Philips Alfred Malvin v. Gonsalves, A.I.R. 1999*

⁹ *Bimla v. Anita, A.I.R. 2015*

of codified reforms leaves courts to navigate cases through patriarchal presumptions embedded in older traditions.

The Guardians and Wards Act, 1890, serves as a secular framework applicable across communities, empowering courts to appoint guardians where necessary. Under Section 17, it directs that the welfare of the child shall be the paramount consideration, but the Act operates in a supplementary role; personal laws frequently take precedence, perpetuating inconsistency. In *Rosy Jacob v. Jacob A. Chakramakkal*,¹⁰ the Supreme Court clarified that guardianship is not about asserting parental rights but about ensuring the welfare of the child. In *Gaurav Nagpal v. Sumedha Nagpal*, the Court elaborated that welfare encompasses not only material comfort but also moral, emotional¹¹, and educational well-being. Similarly, in *Kumar v. Jahgirdar*, the Karnataka High Court allowed joint custody, signalling a shift toward more flexible and modern arrangements. Thus, while the GWA establishes a welfare-based secular guardianship regime, its role as a supplementary statute means that divergent personal laws continue to dominate the field, producing uncertainty and unequal treatment.

These inconsistencies come into sharper focus when guardianship provisions are tested against constitutional principles. Under Article 14, guarantees equality before the law, yet patriarchal provisions privileging fathers clearly undermine this guarantee and Article 15 prohibits discrimination, which is violated when mothers are denied equal guardianship rights or when illegitimate children are excluded from statutory recognition. Through Article 21, it guarantees the right to life with dignity, encompassing a child's right to welfare, dignity, and autonomy. In *ABC v. State (NCT of Delhi)*¹², the Supreme Court upheld the rights of an unwed mother to guardianship without requiring the father's consent, thereby affirming constitutional values of dignity and equality. In *Shayara Bano v. Union of India*, though dealing with triple talaq, the Court confirmed that personal laws are not immune from constitutional scrutiny.¹³ Thus, courts increasingly interpret guardianship laws through a constitutional lens, but in the absence of legislative reform, this constitutional supremacy relies heavily on case-by-case adjudication, leaving outcomes unpredictable.

¹⁰ *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 S.C.C. 840

¹¹ *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 S.C.C. 42

¹² *ABC v. State (NCT of Delhi)*, (2015) 10 S.C.C. 1

¹³ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1

At the international level, India is bound by the U.N. Convention on the Rights of the Child (CRC), which requires that the best interests of the child be the primary consideration in all matters affecting children. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption also shapes Indian jurisprudence in custody and guardianship matters. In *Sheela Barse v. Union of India*, the Supreme Court incorporated CRC principles into Indian child protection jurisprudence. In *Lakshmi Kant Pandey v. Union of India*¹⁴, the Court applied Hague Convention safeguards in inter-country adoption, underscoring the paramountcy of welfare. Although courts invoke these international standards, personal law provisions remain largely unreformed, creating a gap between India's global commitments and its domestic practices.

Taken together, guardianship jurisprudence in India reflects a deep conflict between competing traditions and principles. On the other hand, the welfare principle, now entrenched in judicial reasoning, demands that the best interests of the child take precedence in all cases. Yet patriarchal personal laws, privileging fathers, continue to resist this evolution, producing a structural tension. In cases such as *Githa Hariharan*, *ABC v. State*, and *Gaurav Nagpal* illustrate the judiciary's efforts to advance child welfare and gender equality, but judicial innovation cannot fully substitute for statutory overhaul.

A comparative perspective highlights how India lags behind jurisdictions that have embraced uniform, secular guardianship laws. In the United Kingdom, the Children Act of 1989 applies uniformly across communities and makes the welfare of the child paramount. In the United States, courts universally apply the "best interests of the child" standard, with increasing recognition of joint custody. Scandinavian models go further by emphasising shared parenting and active participation of children in decision-making. These comparative examples demonstrate that uniform secular frameworks better protect child welfare than fragmented personal law regimes.

The ancient patriarchal model viewed guardianship as an incident of parental power, predominantly vested in the father. The colonial period reframed guardianship as a fiduciary duty, introducing the doctrine of *parens patriae* whereby the state assumed supervisory authority. The constitutional era, especially post-1990s, has infused guardianship jurisprudence

¹⁴ *Lakshmi Kant Pandey v. Union of India*, (1984) 2 S.C.C. 244

with values of equality, dignity, and autonomy. Critiques highlight the persistence of patriarchal bias in statutory texts, while sociological jurisprudence emphasizes the need for law to reflect social realities in which mothers increasingly play equal roles in caregiving and decision-making. Natural law perspectives reinforce the recognition of inherent rights of the child, independent of parental or religious claims. The jurisprudence of guardianship thus represents an ongoing negotiation between tradition and modernity, private autonomy and state intervention, religious pluralism and constitutional supremacy.

The overall analysis shows that India's personal law guardianship regimes perpetuate inequality, ambiguity, and patriarchal bias, often subordinating child welfare to parental authority or religious tradition. Judicial interventions have progressively infused welfare and constitutional principles into the interpretation of these laws, but reliance on case-by-case adjudication creates inconsistency and uncertainty. Reform is therefore essential. A Uniform Guardianship Code should be introduced, harmonizing Hindu, Muslim, Christian, and Parsi laws into a single secular and welfare-centric statute. It should enshrine gender neutrality by removing presumptive paternal primacy and recognizing equal parental authority. Most importantly, it must adopt a child-centric approach, institutionalizing mechanisms for hearing children's voices, incorporating psychological assessments, and permitting flexible arrangements such as joint custody. Only through such comprehensive reform can India reconcile its religious diversity with its constitutional and international commitments, ensuring that the welfare and rights of children are truly paramount.

Judicial Developments, Challenges, and Way Forward

Over time, Indian courts have increasingly emphasized the welfare of the child over parental rights. Early decisions focused on protecting a child's estate, laying the foundation for the welfare principle. Judicial interpretations have gradually strengthened this approach, recognizing children as independent subjects of rights. While these developments are progressive, they remain case-specific and do not address the broader structural inequities embedded in personal laws.

The fragmented personal law system continues to favor fathers, perpetuate gendered assumptions, and create inconsistent outcomes for children across communities. India's obligations under international law, including the UN Convention on the Rights of the Child (CRC) and the Hague Convention on Intercountry Adoption, mandate that the welfare of the

child be a primary consideration in all decisions. Although courts have referenced these instruments to guide their interpretations, personal laws remain largely unreformed, leaving a gap between domestic practice and international standards.

To address these challenges, a multi-pronged approach is necessary. First, a **Uniform Guardianship Code** should be enacted, replacing fragmented personal laws with a secular, welfare-oriented framework applicable to all children, while harmonizing with existing laws where appropriate. The Juvenile Justice Act provides a useful model for uniformly protecting children's rights. Second, guardianship laws must be **brought into alignment with constitutional guarantees** under Articles 14, 15, and 21. Equal guardianship rights for both parents, elimination of gender bias, and statutory prioritization of a child's emotional, psychological, and educational well-being are essential. Legal recognition of the rights of children born outside marriage must also be ensured.

Third, the approach must be **child-centric**, giving children a voice in guardianship matters in accordance with Article 12 of the CRC. Courts should be empowered to conduct psychological assessments, mediate between parents, and implement flexible custody arrangements such as shared or joint custody. Finally, **social and cultural reform** is necessary to challenge entrenched patriarchal attitudes. Legal reform must be complemented by judicial training, public awareness campaigns, and educational initiatives to ensure guardianship is understood as a fiduciary responsibility centred on the welfare of the child, rather than a parental privilege.

India's guardianship framework is fragmented, inconsistent, and gender-biased. Judicial interventions, though progressive, cannot substitute for comprehensive statutory reform. A Uniform Guardianship Code, aligned with constitutional values and international obligations, is urgently needed. Such reform would place children at the centre of all guardianship decisions, recognise them as rights-bearing individuals, and ensure their welfare is paramount, fulfilling India's constitutional promise of equality, dignity, and justice.

Conclusion

Guardianship in India is a complicated area of law, influenced by history and the legacy of colonialism along with changes in legal philosophies. Unlike many countries that have moved toward a uniform framework to ensure child welfare, India still operates under a fragmented system of personal laws. Because these laws draw from religious and cultural traditions, they

often contain patriarchal assumptions and hold different standards in recognizing children's rights." Under Hindu law, for example, the father is often assumed to be the primary guardian while the mother is viewed in a more secondary role, giving her little authority over legal and property issues despite being involved as the child's primary caretaker on a day-to-day basis. Muslim law upholds the mother's rights to custody during early childhood years but limits her power over property and other legal matters. Christian and Parsi guardianship laws, also driven by judicial interpretation, similarly privilege paternal authority, which reinforces entrenched gender hierarchies that place decision-making power in the hands of fathers. This patchwork system generates disparate, even conflicting results for children, allowing the monitoring of their welfare through their protection from abuse and access to property rights, among other things in addition to their legal status, to vary according to religious or community affiliation.

In India, the approach to guardianship has evolved over the years in favor of a principle that accords significance to ensuring the welfare of children as opposed to absolute parental right; this is based on the recognition that guardianship entails protection of not only a child's physical well-being but their emotional and social well-being as well. Although courts have attempted to interpret laws in a manner that advances justice and protects children, these interventions are case-specific and the broader structural inequities inherent in personal law regimes cannot be addressed through them.

A comprehensive reform is therefore necessary. The establishment of a Uniform Guardianship Code would provide a consistent, secular, and welfare-oriented framework applicable to all children, replacing the fragmented personal laws while accommodating cultural sensitivities. Such a code would ensure that parental responsibilities are shared equally, that decisions regarding guardianship and custody are guided by the child's best interests, and that all children, including those born outside marriage, receive equal protection and recognition. Beyond legislative reform, social and cultural change is essential to challenge entrenched patriarchal norms and promote the understanding that guardianship is a duty focused on the child's welfare rather than a privilege reserved for one parent.

Only through this holistic approach combining uniform legal standards, child-centred principles, and societal awareness can India create a guardianship system that consistently protects all children, recognises them as rights-bearing individuals, and ensures that their well-being is the central priority in every guardianship arrangement.