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A STUDY OF 'MINORITY' UNDER HINDU PERSONAL LAWS — A COMPARATIVE ANALYSIS OF THE VARIOUS PERSONAL LAWS.

AUTHORED BY - SARTHAK CHUGH

ABSTRACT:

A minor is not only below the age of majority and consent, across all jurisdictions, but also someone who is emotionally, physically and financially dependent on the adults around them to ensure that their basic human rights and social welfare is well taken care of and also maintained. In India, the laws dealing with the rights and consequently, the safeguarding of the rights of the minors are manifold. These are mostly divided on the fine line of religious personal laws.

The main aim of this paper is to inform and inquire into the concept of 'Minority' as envisaged under the Hindu Personal Laws— primarily the fundamental Hindu Minority and Guardianship Act of 1956. This legislation was a part of the Hindu Code Bill that aimed to legislate the many unwritten laws of Hindu marriages, divorce, guardianship, adoption, et. al. Minors need protection and safety and the ones who offer them this are known as Guardians. These Guardians may be natural (i.e., the mother and father of the child) or testamentary or appointed by the Court. In either of these cases, the most pivotal consideration is that of the minor child's welfare and their safety to be kept in the highest regard.

No analytical study is ever complete without comparison with its contemporary laws and this paper aims to do so by introducing and analysing the processes and procedures of minors' rights under the Muslim and Christian personal laws, too, with an added comment on the need to have a uniformity in personal laws.

Keywords: Minor, Dependent, Personal Laws, Minority and Guardianship Act, welfare, uniformity.

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1. INTRODUCTION

- **AN UNDERSTANDING OF THE CONCEPT OF MINORITY**

The Oxford Dictionary of Law[1] defines a minor (an infant) as a child under the age of 18. Certain rights such as those of parental responsibility, right to make a child a ward of the Court and the right to withhold the consent to marriage only apply to such minors. These also have a limited capacity to contract. Further, it defines minority[2] as the state of being a minor, i.e., up to the age of 18 years. A minor is thus any person who is yet to be of an age of majority. This age is not an objective term rather a subjective one which differs from one country to another. In the realm of law, minority is concerned as much with the need for protection as it is with the age as it is believed that a minor is someone who is intellectually and physically dependent upon a guardian, a parent or any other competent adult. This ubiquitous dependence laid the foundation for several laws governing the rights of the minors and at the same time preventing the ambit of certain provisions to apply to them.

The concept of minority has its roots in the ancient times when the children were seen and considered as people who needed protection from the State owing to their dependence. It was held that the supreme guardianship of the minor shall be vested in the monarch under the Doctrine of *parens patriae*[3]. This doctrine serves a two-fold purpose. Firstly, it proclaims the monarch as the protector and guardian of all citizens and especially the children and secondly it is extended to the current democratic system to mean that all those children who are unable to take care of themselves and have no one else to safeguard their body and rights, are under the safety and protection of the State.

From the medieval era to the Pre-Industrial Period in world history, the rights of children and minors has been a subject of almost no concern and debate. Societies around the world considered the children to be a product and a responsibility of their biological parents without any concern toward the state or surroundings of such dependants.[4]

[1] 9 JONATHAN LAW, A DICTIONARY OF LAW 350 (Oxford University Press 2018)
[2] Id. at 438
[3] SHRUTI EUSEBIUS, PARENS PATRIAE AND ROLE OF STATE UNDER JUVENILE JUSTICE LAW IN INDIA 74-75 (National Judicial Academy India 2021)
[4] S.N. Hart, From Property to Person Status: Historical Perspective on Children's Rights, 46(1) American Psych. 53, 53-54 (1991)

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It was due to the technological and socioeconomic changes of the early 20th century resulted in a change in the conceptualisation of childhood. Children were considered to be endangered by conditions of immigration, industrialisation and urbanisation in ways that would create undesirable behaviour and threaten society. This brought about a new agenda in regard to children's status and led to the emergence of the idea of protecting children and providing them rights.[5]

Owing to the manifold, and rather abrupt, changes made in the early 20th century, the the Wars did not do any favours to the cause of helping and uplifting the lives of affected children and minors. After the War, the harrowing reports of several minors enlisting themselves in the army and consequently losing their lives made it more necessary and pertinent to have a stronger and stringent guideline in place to regulate the rights of a minor.

Children are nation's wealth. Future of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said, "Child shows the man as morning shows the day". The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, the need for such special safeguards has been stated in the Geneva declaration of the rights of child of 1924, and recognised in the universal, declaration of human rights.[6]

- **THE MEANING OF THE CONCEPT IN PRE-INDEPENDENT INDIA**

India has had a fair understanding of minority and the necessary safeguards required by a minor regardless of their condition of being an orphan. Although the Hindu religious texts did not mention the minors or the provisions for their protection in great detail, it was first greatly expounded by the great sage Narada that a minor must have the safety and protection that they require from both the father and the mother. However, it would be amiss not to mention the variations in the understanding and conceptualisation of minority amongst and within the various religions in India. The Hindu personal laws are primarily what this paper aims to deal with but it shall be viewed in the light of a comparison between the Hindu and Muslim personal laws on minority and guardianship.

[5] HANITA KOSHER ET. AL., CHILDREN'S RIGHTS AND SOCIAL WORK 9-10 (Springer 2016)
[6] Dr. Anisa Shaikh, Guardianship of a Minor in India and Western Countries: A Comparative Exploration, 1(4) Journal of Legal Analysis and Research 22, 23 (2014)

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Under the Hindu religious texts, the law of minority protection and guardianship rights are vert few and far between. The broad principle is that the child mostly lived in big joint-families and was always under the safety and protection of the *Karta* even after the death of the father and the mother. If the child was outside the warmth of the natural home, they received abundant safety and protection at their *Guru's Ashrama* for study and the daily conducts of life.[7]

- **THE HINDU CODE BILL AND THE LEGISLATION OF MINORITY PROTECTION RIGHTS COUPLED WITH RIGHTS OF GUARDIANSHIP.**

Post-Independent India witnessed the rise of a written legitimisation of the Hindu Personal Laws. For centuries and millennia before this, the only sources to adjudicate the authenticity of marriages, adoption, guardianship, et. al. was possible through the religious texts and no ordered legal process. This gave rise to the Hindu Minority and Guardianship Act, 1956[8] and applied to all Hindus within the territory of India.

It is under this Act that the definition of minority is first explored. It[9] states that a person who has not completed the age of 18 years is considered to be a minor. This statute solely deals with those citizenries of the nation that identify as Hindus and must not be misconstrued as a national legislation to protect and safeguard the rights of all minors, irrespective of their religious identities. No study of minors and their rights is ever complete without understanding the role of those who are either inherently or empowered to protect and safeguard the aforementioned rights. Such a person/set of people are called as guardians and are either the birth parents, or any close relative of the child, or a court-appointed able person, or failing all the State itself. In the modern context, the welfare of the child is the most supreme and paramount consideration. The liberal understanding of the statute has further proclaimed that welfare amounts to both physical as well as mental welfare.

In the following pages of this paper, the concept of minority will be understood and studied through the provisions under the vide Act and later compared to the other systems existing in the country, given its religious segregation. Finally, a comment on the importance of regularisation

[7] 26 DR. PARAS DIWAN, MODERN HINDU LAW 270 (Allahabad Law Agency, 2023)
[8] Hindu Minority and Guardianship Act § 3, No. 32, Acts of Parliament, 1956 (India)
[9] Id. at §4(b)

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of the rights of the minors shall conclude the paper.

2. PROVISIONS OF THE HINDU MINORITY AND GUARDIANSHIP ACT WITH ILLUSTRATED CASE LAWS.

- **THE RIGHTS OF THE MINOR WITH REGARDS TO THE DUTIES OF THE NATURAL GUARDIAN.**

Section 6 of the Act deals with Natural Guardians, which is defined as:

a) 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;
b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;
c) in the case of a married girl—the husband

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

i. if he has ceased to be a Hindu, or
ii. if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

These interpretations are not set in stone, as nothing usually can be fixated merely to the letter of the law in familial and personal matters where the subject matter of the case is as important as the intention of the legislator. In Githa Hariharan vs. Reserve Bank of India,[10] it was held that under certain circumstances, the mother can be considered to be the natural guardian of the minor child. The word "after" as mentioned under Section 6(a) must be interpreted as "in the absence of" and not necessarily as "after the lifetime of" the father. It also held that 'absence' as understood in the vide Section must refer to the instance where the father is incapable to take care of the minor.

Although the Act only pertains to Hindus, in a landmark ruling on the issue of whether the conversion of religion of the mother to any other religion negates her claim as a natural guardian

[10] AIR 1999 SC 1149

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on the minor in the absence or incapacity of the father, the Court ruled that in the negative and opined that her right of guardianship is not lost on her conversion to another religion so long as the mother is able to provide a congenial, comfortable and happy home.[11]

However, the most contentious issue has been that of the guardian of a married minor girl being her own husband. This is not only immoral but also starkly violative of the provisions of the Child Marriage Act[12] and delves not bode well, especially in the current contemporary world. To this extent, the Madras High Court surmised in Paragraph 35 of the ruling of T. Sivakumar vs. Inspector of Police, Thrivaliur Town Police Station[13] that:

"A law cannot be interpreted so as to make it either redundant or unworkable or to defeat the very object of the Act. Thus, by committing an offence under Section 9 of the Act, the adult male cannot acquire the legal status of natural guardian of female child. Section 6(c) of the Hindu Minority and Guardianship Act must be held to have been repealed impliedly by the Prohibition of the Child Marriage Act.

Therefore, an adult male who marries a female child in violation of the Act shall not become the natural guardian of the female child."

Thus, it can be understood from the aforementioned provisions and case laws that the most pivotal and primary right of the minor is that of their welfare, due consideration and goodwill. 'Welfare', unless defined, remains a vague word and an even vaguer policy to implement. However, it has been maintained that the education, social awakening, health and hygiene and access to cleanliness are the basic prerequisites which need to be provided by the guardian. The consideration of the minor child will be placed above any other variable.

The Court had held that in determining the nature of the natural guardianship of the minor child, the only touchstone is that of the upcoming interest and welfare of the child and nothing else. Convenience and pleasure of the parents is totally immaterial. Courts can facilitate or pass any orders with regards to the welfare of the child.[14]

[11] Sheela vs Soli, 1981 Bom. 175
[12] Prohibition of Child Marriage Act §3, No. 6, Acts of Parliament, 2007 (India)
[13] AIR 2012 Mad. 62
[14] Harshita Bhasin vs. State of West Bengal, 2017 SC 117

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- **THE RIGHTS OF THE MINOR WITH REGARDS TO THE DUTIES OF THE TESTAMENTARY AND COURT-APPOINTED GUARDIANS**

Section 9 of the Hindu Minority and Guardianship Act deals with the concept of Testamentary Guardians. It says thus:

1. A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.
2. An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.
3. A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.
4. A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may; by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.
5. The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.
6. The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

The rights of the minor in relation with the testamentary guardians is the same as that of the natural guardians where the consideration and welfare of the minor child is of the utmost importance. The most pertinent point of note is that a testamentary guardian can only be appointed by the will of the natural guardian and not in the lifetime of either of the natural guardians.

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It is with regards to the procedures and processes of the appointment of a guardian by the Court of Law that the rights of the minor become much more crucial. This is still regulated by the old legislation[15] having the provisions for a scenario where there is no natural or testamentary guardian present or able enough to protect and safeguard the rights of the minor child.

The Guardians and Wards Act of 1890 forms the pivotal statute of conferring the rights of the minor child upon the District Court to appoint a fit and able person to safeguard the minor child. This Act basically authorises the district court and high court in exercising their original and inherent jurisdiction upon guardian or the minor child if the natural guardian or guardian by will are unable to work for the welfare of child or his property. While appointing the guardian under section 7 of the act court has to take into consideration some factors as stated under section 17 of the act which are necessary for the welfare of child.[16]

Lastly, there is a process of ensuring the protection of minor's rights by Guardianship of Affinity or Guardian of Widow. This is a novel concept in the statute and arises from the much divisive clause of assigning a guardian to a minor married woman.

In early times the concept of child marriage was prevailing and before the marriage girl was under the guardianship of his natural parents but after her marriage husband was assumed to be her natural guardian. But if the situation arise that his husband died then the minor widow will be maintained by relatives of her husband Before 1956 there was the existence of guardian of minor widow called guardian by affinity. The guardianship of minor girl is same as that of guardianship of minor wife, the only difference is that on marriage guardianship of parents passes to husband and she gets the name and Gotra of her husband. If she becomes minor widow, then the eldest among nearest relatives of the husband becomes her guardian.[17]

In the case of Paras Ram vs. State[18] where the minor girl was aggressively taken by her father-in-law and was married with man who was not fit for the sake of money. The question which came before the court was that whether father-in-law was guilty of removing the girl by force? The court held that he was not guilty of separating the girl from her house as father is her natural guardian.

[15] Guardians and Wards Act, §7, No. 8, Acts of Parliament, 1890 (India)
[16] Ravneet Kaur, Legal Aspect of Guardianship under Hindu Jurisprudence: An Analysis 20(1) 1953, 1955 (2021)
[17] Ibid
[18] AIR 1960 All 479

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A question came before the court that whether the nearest blood relatives of the husband become a natural guardian of a widow or whether he is merely preferentially entitled to guardianship and therefore he cannot perform as guardian unless he is appointed? The Ratio seems to subscribe to former view.

3. COMPARATIVE ANALYSIS OF 'MINOR' UNDER THE VARIOUS PERSONAL LAWS IN INDIA

- **'MINOR' AS PERCEIVED AND UNDERSTOOD BY THE MUSLIM PERSONAL LAW IN COMPARISON WITH THE HINDU MINORITY AND GUARDIANSHIP ACT**

The Muslim Personal Law is a big mix of different schools of thought but almost all the schools and sub-schools hold that the father must be the sole natural guardian of the minor child. The leading case law on this regard is that of Imambandi vs. Mustaddi[19] which propounded that until the father is alive, he shall remain the sole and absolute guardian of the minor child. The mother, even after the death of the father, does not get any right to become the guardian. Rather, it passes on to the grandfather or to the executor as mentioned in the will of the deceased father. The mother may have the custody but will not be the guardian.

The person entitled to be the guardian of the property of the minor are father, executor appointed by father's will, father's father, executor appointed by the will of father's father. The guardian has the power to sell immovable property of the minor, and it is required for maintenance. The legal guardian can deal with the minor's property in the following conditions-

1. When there are debts of the deceased and no other means of paying and the sale is absolutely necessary for livelihood and maintenance
2. When double the price of the property can be obtained, expenses exceed the income, property falls into decay
3. Where property has been usurped and the guardian has reason to fear that there exists no chance of fair restitution.

The question that begets is whether the mother can be the guardian of a minor and ensure the safeguarding of the rights of the minor in the event of incapacity on the part of the father, or

[19] 1918 45 (Cal) 887

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grandfather or the executrix? The Court answered in the negative in its ratio on the landmark ruling.[20]

- **‘MINOR’ AS PERCEIVED AND UNDERSTOOD BY THE CHRISTIAN PERSONAL LAW IN COMPARISON WITH THE HINDU MINORITY AND GUARDIANSHIP ACT**

The Guardians and Wards Act, 1890, being a secular Act applies to all those who recognise as Christians within the country. The welfare of the child is considered to be paramount, under Section 17 of the Act and no action can be taken by a natural guardian, which can be either the mother or the father, or by the Court of Law which is contrary to the best interests of the minor child.

In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka[21] it was held that the principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility, and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor.

These regulations are governed by Section 19 of the Principal Act which talks of the instances where a person cannot be adjudged as the guardian of the minor:

1. Of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person. Or
2. Of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or
3. Of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

[20] Ghulam Husani Kuttubudin Manner v. Abdul Rashid Abdul Razzak Manner (2000)8 SCC 507
[21] AIR 1982 SC 1276

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4. CONCLUSION

Ensuring that protection and safety is extended to the most vulnerable class of society— the children who are not only minor but also dependant on adults around them for support and guidance— is a crucial aspect for any State. India, although, witnesses several different ways of ensuring this safety is guaranteed and given due to the existence of the personal laws. These personal laws have for years been governing the most sensitive issues of a person's life not necessarily in a manner that places equity, justice and good conscience at a higher pedestal than but rather a system that provides for greater emphasis on the religious processes and practices. Whilst this was possibly needed in the epoch of sectarian ties to be affected in order to curb excessive violence in bring order and peace, however the country now needs to regulate such matters in the same way it does other civil matters, without being swayed or swooned by the religious practices, rather understanding the importance of the supremacy of the law.

In the words of the great author and academician Vikram Singh Slathia, "Without a Uniform Civil Code, labelling India be Secular nation is just an illusion. Uniform Civil Code is necessary for India so that t same laws r valid for every citizen without taking religion into consideration." This paper aims to instil in the reader a sense to support and propagate the need to have a Uniform Civil Code, one which places the Secularist State equidistant from all religions and schools of thought, allowing literalistic and traditional freedoms but bringing to the sphere a semblance of generalised justice, for all.