"RECENT TRENDS OF GUARDIANSHIP IN INDIA"- AN ANALYSIS

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ABSTRACT

The concept of guardianship in India is an old concept which is stated in the Shastras and also in the Quran but their objectives are different. The guardianship has played an important role for the development of the child. The main objective that is to be taken care is protection and welfare of the child. The concept of guardianship is governed under the legal framework of the provisions present in different personal laws i.e., Hindu Minority and Guardianship Act, 1956 , Guardianship and Wards Act, 1890 , Islamic laws and Parsi and Christian laws. There are many judicial interpretations which sometimes follow the laws and sometime it goes contrary to that which is a main matter of concern of my research work as sometimes they gave importance to the superior position of the Father and sometimes it is a welfare principle. The Muslim law has much emphasis on the Guardianship and wards Act, 1890 and they follow the same act for the guardianship laws as concern. They doesn't have much distinction between the Shia and Sunni Schools on the topic of Guardianship because the original source of the same was found in the Quran itself.

In the facets of the paper we will deal with the custody dispute which arised in the joint custody and how it is a shared parentage system works and how the courts are asserting the role of the parents in the life of the child as a guardian and in which situations the third person will appoint as a guardian and till what extent it would does he/she have the authority on the child and his/her assets.

Keywords- *Quranic Tradition, Hindu laws, Guardianship, Welfare of child, Joint custody, Shared Parentage.*

HISTORICAL BACKGROUND OF GUARDIANSHIP

The traditional mindset of the Guardianship revolves around the patriarchal society, the father was considered the sole guardian of the person and property of the child. The authority of the father in every aspect of the child's life, including his/her conduct, education, religion and maintenance, was considered absolute and even the courts refused to interfere with the same. Mothers did not have any authority over children, since mothers did not have independent legal status; their identities being forged with that of their husbands upon marriage. As divorce became possible and mothers began to have independent legal existence and residence, their claim, if not right, to have custody of the children began to be recognized by the courts.

In Hindu law the broad principle is recognized from the Regime of the kingship where it was said that king is the supreme guardian [parens patrie] of all the minors present in the state[1]. No other sage except Narada who has mentioned parents i.e. mother and father as the guardians[2]. It seems to be that law of guardianship haven't developed due to the reason that in the earlier time the joint family concept is very much in notion and minors of the family are in the guardianship of the Karta of the family then after went to schools/asharams for studies they have their Gurus are the guardians of that time-period till then they get the education.

During British regime they started developing the concept of Guardianship through Courts on the primary stage they relied upon the learning of M/s Strange[3] and Macnaughten[4] they came up with the list of guardians which consist of father, mother, elder brother, other paternal relations and maternal relations.[5] But later on they came up with the concept of the natural guardian that "*Father is the natural guardian of the children and after the death of the father, the mother will be the natural guardian of the children and no one else could be the natural guardian of the child*[6]."On analogy of the core English law and through the medium of the judiciary they come up with the concept of the testamentary guardianship[7] were also comes in the concept of guardianship in Hindu law.

[1]VIII. MANU, MANUSMRITI 27, Gautama, 10, 48.
[2] XIII. NARADA, 28-29.
[3] PARAS DIWAN, MODERN HINDU LAW 72 (2017 Edition).
[4] PRINCIPLES AND PRECEDENTS OF HINDU LAW 172 (4th Edition).
[5]Nathuram v Soma, (1890) 14 Bom 562.
[6]Purshotam v Brundavan, 1931 Mad 537.
[7]The guardianship power conferred through the wills of either of the parents (see S.9 of Hindu Minority and Guardianship Act,1956), statutory sanction was through the Hindu Wills Act, 1870.

In Muslim law the concept of the Guardianship (***WILAYAT)*** means a person who has legally authorized to have the custody and care of the person (Minor) or the property of the minor or both.[8]Although the Guardianship in the Muslim law is divided in the two facets in which first talk about matrimony and second about the Protection and care of the guardianship.

According to Ameer Ali:- The guardianship is the concept which came into springs with the direction or care of the parents of the infants for the nourishment of the infant and a other situation where simple supervisory power over the minor is with the Wilayat and original power vested in the other person. It was totally a method of keeping an administrator of the Minor for him/her as a protection of the Body and the property. Quran also put an emphasis on the Guardianship, It permits a person who is poor to take some share from the property for the service which he give to protect the body and the property of the Minor. Quran also directs the guardian to have complete accounts of the funds he has spent on the protection on or management of the minor's estate and person. This is the duty of the Qazi to exercise a vigilant supervision over the guardian in the management of their wards property.

LEGAL FRAMEWORK OF THE GUARDIANSHIP IN INDIA

Guardianship and wards Act, 1890- The guardianship and wards act, 1890 was a secular act which is answerable to the major issues of the guardianship and custody and it provide provisions irrespective of the religion, it is applicable to all the citizens of India. The Act is a complete Code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion[9]Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890.

The term **'guardian'** is defined by the Guardians and Wards Act, 1890 (hereinafter, GWA) as a ***"person having the care of the person of a minor or of his property or of both his person***

[8]Monijan v District Judge, (1914) 42 Cal. 35.
[9]Section 2 of the HMGA states that its provisions are "supplemental to" and "not in derogation" of the Guardians and Wards Act, No. 8 of 1890.

and property[10]**."**This act authorized the District court to appoint the guardian of minor person or property or both,when the natural guardian as per the minor's personal law or the testamentary guardian appointed under a Will fails to discharge his/her duties towards the minor.

Sec-9. Court having jurisdiction to entertain application[11]**. -** (1) if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

If the application is with respect of the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where he has property.

If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly on conveniently by any other District Court having jurisdiction.

GWAct, 1890 authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the **'welfare of the minor**". It provided as; - ***Power of the Court to make orders as to guardianship***[12]**-** Where the Court is satisfied that it is for the welfare of a minor that an order should be made- Appointing a guardian of his person or property or both, or declaring a person to be such a guardian the Court may make an order accordingly.

An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

Where a guardian has been appointed by will or other instrument or appointed or declare by the Court, an order under this section appointing or declaring another person to be guardian in his stand shall not be made until the powers of the guardian appointed or declare as aforesaid have ceased under the provision of this Act.

[10] S. 4 (2), Guardians and Wards Act, No. 8 of 1890.
[11] S. 9, Guardians and Wards Act, No. 8 of 1890.
[12] S. 7, Guardians and Wards Act, No. 8 of 1890.

Section-17. Matter to be considered by the Court in appointing guardian. - (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2)-In considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3)-If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4)-The Court shall not appoint or declare any person to be a guardian against his will.

ANALYSIS OF THE PROVISIONS[13]

Section 17 lays down factors to be considered by the court when appointing guardians. **Section 17(1)** states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the "welfare of the minor".

Section 17(2) clarifies that in determining what is for the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing or previous relation of the proposed guardian with the person or property of the minor.

Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court 'may' consider his/her preference.

Section-19. Guardian not to be appointed by the Court in certain cases.- Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor

[13]Guardian and Wards Act, No. 8 of 1890, S. 17(2).

whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person

(a) of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person, or

(b)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

(c)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.

ANALYSIS OF THE PROVISIONS[14]

Section 19 of the GWAct, 1890 deals with cases where the court may not appoint a guardian.Section 19(b) states that a court is not authorized to appoint a guardian to the person of a minor, whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian. The earlier Section 19(b) prevented the court from appointing a guardian in case the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.

Section-15. Appointment or declaration of several guardians[15].- (1) If the law to which the minor is subject admits of his having two or more joint guardians of his person or property or both, the Court may, if it thinks fit, appoint or declare them.

(2)[*****]

(3)[*****]

(4)Separate guardians may be appointed or declared of the person and of the property of a minor.

[14]PARAS DIWAN, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY 15 (Universal Law Publishing Co. New Delhi, 2012 Edition).
[15]file:///E:/gw%20act%20.pdf.

(5)If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

Section-16. Appointment or declaration of guardian for property beyond jurisdiction of the Court[16]. - If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian accept him as duly appointed or declared and give effect to the order.

Section-21. Capacity of minor to act as guardians. - A minor is incompetent to act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.

Section-25. Title and guardian to custody of ward. - (1) if a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardian.

HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Classical Hindu law did not contain principles dealing with guardianship and custody of children. In the Joint Hindu Family, the Karta was responsible for the overall control of all dependents and management of their property, and therefore specific legal rules dealing with guardianship and custody were not thought to be necessary. However, in modern statutory

[16]Julie Poehlmann, *Representations of Attachment Relationships in Children of Incarcerated Mothers, Child Development*, 3 76.

Hindu law, the Hindu Minority and Guardianship Act, 1956 (hereinafter, HMGA) provides that the father is the natural guardian of a minor, and after him, it is the mother.

Section-6. Natural guardians of a Hindu minor.- The natural guardians 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- (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-

(a) If he has ceased to be a Hindu, or

(b) If he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation.- In this section, the expressions '**father**' and '**mother**' do not include a **stepfather** and a **step-mother.**

Analysis of Section-6[17]-In Clause (a) of Section 6 affirms the well-established rule of Hindu Law that the father is the natural guardian of the person and the property of a minor son and minor unmarried daughter, and that after him, the mother is the natural guardian of such a person.

The Section also recognizes the well-established principle that in the case of guardianship, the paramount consideration is the welfare of the minor, and therefore, it provides that the custody of a child who is under five should be with the mother. This would be so, unless there are serious considerations which require that the mother should not have the custody of the child.

[17]Hindu Minority and Guardianship Act, No. 32 of 1956, S. 6.

This rule of Hindu Law should not be interpreted as meaning that as soon as a child completes five years, it should be taken away from the mother, and immediately handed over to the father. In fact, the sole consideration in any such case would be the welfare of the minor. It is interesting to note that if a Hindu widow remarries, she does not lose her preferential right of guardianship over her minor children by the deceased husband.

The right of the mother to act as the natural guardian of her children after the father is absolute and unconditional. Clause (b) of Section 6 also affirms the rule of Hindu Law that, in the case of illegitimate children, the mother is the lawful guardian. Clause (c) above also lays down the well-established rule of Hindu Law that the husband is the lawful guardian of his minor wife.

Section 6 also provides four disqualifications, which would prevent a person from acting as a natural guardian of a Hindu minor. These four disqualifications are– 1) if such person has ceased to be a Hindu. 2) If he has completely and finally renounced that world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). 3) If such person is the step-father. 4) If such person is the step-mother. It may be noted that under the Act, if a person ceases to be a Hindu, he cannot act as a natural guardian.

Section-7. Natural guardianship of adopted son. "*The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother".*

Analysis of Section-7-Section 7 of the Act lays down the rule of Hindu Law, that guardianship of an adopted son, who is a minor, passes on his adoption, from the natural father and mother to the adoptive father and mother. This section speaks only of an adopted son, but makes no mention of an adopted daughter. The uncodified Hindu Law also did not recognize the adoption of a daughter. However, it may be noted that the Act came into force before the passing of the Hindu Adoptions and Maintenance Act, 1956, which now recognizes adoption of a daughter also, and confers that right both upon a male and female Hindu. Section 12 of that Act[18] provides that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption.

[18]Hindu Adoption and Maintenance Act, 1956, S. 8.

The effect of this Section would be that the adoptive father and mother would be regarded as the natural guardians of the adopted child, in keeping with the rules relating to the law of adoption laid down in that Act.

Power of a Natural Guardian (Section 8):- Section 8 deals with the powers of a natural guardian, with special reference to immoveable property. Prior to the passing of the Act, a natural guardian of a minor had very wide rights, and he could sell, mortgage, charge or otherwise dispose of the minor's property, without the sanction of a Court, provided such an alienation was in the minor's interest.

After the passing of the act, it is now provided, by Section 8 of the Act, that the natural guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper–

1) For the benefit of the minor; or

2) For the realization, protection or benefit of the minor's estate. Because we come across many cases where the guardian wishes to mortgage or charge, or transfer by sale, gift, exchange (or otherwise), any part of the immoveable property of the minor; and

3) Cases where that guardian wishes to lease any part of the immoveable property of the minor–
a) for a term exceeding five years; or

b) For a term exceeding more than one year beyond the date on which the minor would attain majority.

The Act expressly provides that any disposal of immoveable property of a minor by his natural guardian in contravention of what is stated above, is voidable at the instance of the minor or any person claiming under him. This rule is obviously for the protection and benefit of the minor. Such a transfer, it may be noted, is not void, but merely voidable at the minors instance, which means he can repudiate it, or adopt it, if he so chooses.

Section 8 also clarifies that in no case can the natural guardian bind the minor by a personal covenant. The position under the Guardians and Wards Act is also the same. It may also be noted that although the Court's permission is necessary for an alienation of the minor's property, no such permission is necessary for purchase of property for a minor

Section-9. Testamentary guardians and their powers.- (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 not 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.

Analysis of Section-9-Section 9 of the Act has introduced some important changes in the law relating to testamentary guardians of a Hindu minor. Prior to the passing of the Act, a Hindu father could nominate a guardian of his children, so as to exclude even the mother from guardianship. Even in cases where the father was dead, the mother did not have the power to appoint a testamentary guardian, i.e., a guardian appointed under a will.

Section 9 now provides that a Hindu father, who is entitled to act as the natural guardian of his minor legitimate children, may, by will, appoint a guardian for the person or property (or

both) of such children. However, no such testamentary guardian can be appointed by the father of the undivided interest of the minor in joint family property.

An appointment of a testamentary guardian under the above provisions has no effect if the father dies before the mother (because, in that case, the mother automatically becomes the natural guardian under Section 6). However, such an appointment would revive if the mother dies thereafter, without appointing a guardian under her will. Thus, the Act ensures that a father cannot appoint a testamentary guardian, so as to exclude the mother from her right to act as the natural guardian of her children under Section 6.

Under the earlier uncodified law, the mother had no right to appoint a testamentary guardian. However, the present Section also confers the right to appoint a testamentary guardian of minor children on the mother in certain circumstances. It provides that a Hindu widow, who is entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother, who is 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 the natural guardian), may, by will, appoint a guardian for the person or property (or both) of such minor children, but not in respect of the undivided interest of the minor in the joint family property.

Likewise, a Hindu mother who is entitled to act as the natural guardian of her minor illegitimate children, can also, by will, appoint a guardian for the person or property (or both) of such children. It will thus be seen that the father does not have the right to appoint a testamentary guardian of his illegitimate children, as the mother is the natural guardian of such children, and it is only after her death that the father can act as the natural guardian of his illegitimate children. It has also been expressly provided that when a testamentary guardian is appointed in the case of minor girl, the rights of such a guardian cease when the girl gets married. This is so because after her marriage, her husband would become her natural guardian.

13. Welfare of minor to be paramount consideration.- (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) 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.

ANALYSIS OF SECTION-13

Section 13 of the Act does not lay down any new rule, but merely reiterates the well-established principle that when the Court appoints any person as the guardian of a Hindu minor, the welfare of the minor will be the paramount consideration. This salutary rule forms the key-stone of the whole law on this subject. In this context, the term, "**welfare**" is to be understood in a very wide sense, and includes, not only the material and physical well-being of the minor, but every factor connected with the moral and religious welfare, education and upbringing of the minor. It is further expressly provided that if the Court is of the opinion that a particular person's guardianship will not be for the benefit of the minor, such a person shall not be entitled to be the minor's guardian, even if he or she is otherwise entitled to do so under the provisions of the Act, or any law relating to guardianship in marriage among Hindus.

On the concluding part of the Legal framework where, the father continues to have a preferential position when it comes to natural guardianship and the mother becomes a natural guardian only in exceptional circumstances, as the Supreme Court explained in Gita Hariharan Case[19]. Thus even if a mother has custody of the minor since birth and has been exclusively responsible for the care of the minor, the father can, at any time, claim custody on the basis of his superior guardianship rights. **Gita Hariharan case**, therefore, does not adequately address the original problem in Section 6(a) of the HMGA. Second, all statutory guardianship arrangements are ultimately subject to the principle contained in Section 13, that the "**welfare of the minor**" is the 'paramount consideration.' In response to the stronger guardianship rights of the father, this is the only provision that a mother may use to argue for custody/guardianship in case of a dispute.

The point of difference between the GWA and the HMGA lies in the emphasis placed on the welfare principle. Under the GWA, parental authority supersedes the welfare principle, while under the HMGA, the welfare principle is of paramount consideration in determining guardianship. Thus, for deciding questions of guardianship for Hindu children, their welfare is of paramount interest, which will override parental authority. But for non-Hindu children, the

[19]Gita Hariharan v Reserve Bank of India, (1999) 2 SCC 228.

court's authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural guardian.[20]

ISLAMIC LAW

In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. Islamic law is the earliest legal system to provide for a clear distinction between guardianship and custody, and also for explicit recognition of the right of the mother to custody. The concept of **Hizanat**[21] provides that of all persons, the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.[22]

In judicial decisions under the GWA involving Muslim children, courts have sometimes upheld the mother's right to custody over children under Islamic law and on other occasions have given custody to the mother out of concern for the welfare of the child. These cases are discussed below:

PARSI AND CHRISTIAN LAW

Similar to Section 26 of the Hindu Marriage Act, 1955, under Section 49[23] of the Parsi Marriage and Divorce Act, 1936 and Section 41 of the Indian Divorce Act, 1869, courts are authorized to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts. Guardianship for Parsi and Christian children is governed by the GWAct, 1890.

[20]Guardian and Wards Act, No. 8 of 1890, S. 17(1) ("In appointing or declaring the guardian of a minor, the court shall . . . be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.").
[21]Child custody.
[22] Law Commission of India, 133rd Report, August (1989), 4.1 (Feb. 20, 2018), http://lawcommissionofindia.nic.in/101-169/Report133.pdf.
[23]Parsi Marriage and Divorce Act, No. 3 of 1936, S. 49.

JUDICIAL INTERPRETATIONS OF THE COURT

There are well settled notion of the legal framework but as the times passes we saw a changing trend in the interpretations of the court and we found that on the basis of judicial activism[24] the courts are going beyond the scope of law to settle the case, our core analysis to the research is to examine the changing trend in the judiciary regarding guardianship.Inthe older cases under the GWA unequivocally hold that the father can be deprived of his position as the natural guardian only if he is found to be unfit for guardianship, there are many cases where the courts have made exceptions to this notion.

ABC v. The State of NCT of Delhi*: - [Arising out of SLP (Civil) No. 28367 of 2011]-**On 6th July 2015 the Supreme Courtdelivered a path breaking judgment on gender equality and ruled that even an unwed mother must be recognized as legal guardian of her child without forcing her to disclose the name of the child's biological father. The above judgment is a reflection of the dynamic thinking of the Apex Court which wants to keep company with the changing time. The GWA was passed by parliament way back in 1890. Thereafter the Indiansociety experienced many upheavals, as a result of which the S.C. wanted to turn GWA in favour of the child's utmost welfare. That is why this ***novel judgment.

BIMALA AND ORS v. ANITA[25]

FACTS- Anita averred that her marriage with Rajesh (since deceased) was solemnized on 18.04.2006 as per Hindu rites and ceremonies. The marriage was consummated and out of the wedlock, a son, namely, Aryan was born on 08.11.2007. Her husband Rajesh died on 30.09.2009 under suspicious circumstances and a criminal case under **Section 306 read with Section 34 of the Indian Penal Code** was registered against her on wrong facts. She stood trial and was acquitted by Learned Sessions Judge vide judgment dated 18.10.2011. Prior to that, a compromise had taken place in the presence of Sarpanch of Gram Panchayat of Village Ghilot Khurd on 15.09.2011 by virtue of which the custody of her son Aryan had been given to her mother-in-law Bimla**.**

[24]Judicial activism refers to judicial rulings that are suspected of being based on personal opinion, rather than on existing law. It is sometimes used as an antonym of judicial restraint.
[25]2015 (3) RCR (Civil) 153 (SC).

CONTENTION OF THE PETITIONER-

Since birth of the child, the respondent never took care of him. She would often go missing from the house without any intimation to her husband, leaving the minor with the grandmother. Her husband committed suicide on 30.09.2009 due to her cruel act and conduct. A first information report No.456 was registered at Police Station, Civil Lines, Sonipat, against her on 01.10.2009.

They did not pursue the trial under pressure of the co-villagers and on an apology tendered by her. According to them, the compromise dated 15.09.2011 was effected in the presence of the Panchayat without any pressure from any quarter whatsoever and by way of compromise, the respondent had agreed to handover the custody of the minor son to them as she was not interested to keep him.

The appellants further submitted that they are respectable persons of the society and are earning well. They have a house of their own in village Ghilot Khurd and the minor is being brought up in the best possible manner. He is studying in Manav Bharti High School in village Sanghi, District Rohtak, and his custody in their hands is safe. The respondent on the other hand is not earning anything and is likely to remarry. Alleging that the respondent has no interest in the welfare of the minor son and the petition had been filed by her to coerce them to pay her.

CONTENTION OF THE RESPONDENT:-

The respondent alleged that she was made to consent to the compromise under pressure of her in-laws and other respectable of the village. Infact, the compromise was arrived at with regard to the criminal case only and the custody of her son was wrongly given to her mother-in- law. She pleaded that she is a matriculate and is in a position to provide better education and care to her minor son, being his mother. The appellants on the other hand are careless and rigid kind of persons and if the minor remains in their custody, his mental and physical growth will be adversely affected. As such, she prayed that the custody of her son be delivered to her,

ISSUES OF THE CASE:-

1. Whether the petitioner is entitled to the custody of minor Aryan on the grounds mentioned in the petition?

2. Whether the petitioner is estopped from claiming the custody of the minor as alleged?

3. Whether the petition is liable to be dismissed as alleged?

JUDGMENT OF THE TRIAL COURT:-

Learned trial Court finding that the respondent is entitled to take custody of the minor son Aryan, decided issue No.1 in her favour. Similarly issues No.2 and 3 were answered against the appellants and the petition was allowed directing the appellants to handover the custody of minor Aryan to the respondent, his mother, within two months from the date of order.

JUDGMENT OF THE HIGH COURT:-

The dominant matter for consideration before the Court is the **'welfare'** of the child which cannot be measured by money or by physical comfort alone and Respondent being the mother is the best person to bring up her minor son and to effectively take care of his interest. Indeed, the welfare of the child lies with his mother. Thus, finding no adversity or perversity in the findings recorded by the learned trial court the appeal is dismissed.

ANALYSIS OF THE JUDGMENT:-

The court has given the judgment which is not upto the concept of guardianship because in this case they are violating Section-13 of the Hindu Minority and Guardianship Act,1956 which clearly mentions that on the matter of custody of the minor the "best interest doctrine" will apply and welfare of the child will be given paramount importance but in this it is evident from the fact that the respondent is not in the condition to serve the child because she was just acquitted from the case and she has no other source of income to survive and I disagree with the reasoning of the High court of Punjab and Haryana that welfare doesn't include money and physical comfort because at this minor age he need proper nourishment and education and proper livelihood[**Beata Agnieszka Sobieraj v. State of Himachal Pradesh]**[26] and it should not be compromised as per law but in this case it was seen that changing trend appears in the judicial interpretation.

SURYA VADNAN v. STATE OF TAMIL NADU[27]

FACTS OF THE CASE- The appellant (hereafter referred to as Surya) and respondent No.3 (hereafter referred to as Mayura) were married in Chennai on 27th January, 2000. While both

[26] Criminal Appeal No. 787 of 2016.
[27] 2015(2) SCC (Civil) 183.

are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.

On 23rd September, 2004, a girl child Sneha Lakshmi Vadanan was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21st September, 2008 another girl child Kamini Lakshmi Vadanan was born to the couple in U.K. and she too is a British citizen by birth. The elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age. It appears that the couple was having some matrimonial problems and on 13th August, 2012 Mayura left U.K. and came to India along with her two daughters.

Before leaving, she had purchased return tickets for herself and her two daughters for 2nd September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them. According to Surya, the reason for the purchase of round-trip tickets was that the children's schools were reopening on 5th September, 2012 and she had intended to return to U.K. before the school reopening date.

Be that as it may, on her arrival in India, Mayura and her daughters went to her parents' house in Coimbatore (Tamil Nadu) and have been staying there ever since.

On **21st August, 2012** Mayura prepared and signed a petition under Section 13(1) (i-a) of the Hindu Marriage Act, 1955, seeking a divorce from Surya. The petition was filed in the Family Court in Coimbatore on 23rd August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other.

On or about **23rd August, 2012** Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27th August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him.

Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent.

Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6th September, 2012. About a month later, on 16th October, 2012 he received a summons dated 6th October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29th October, 2012.

JUDGMENT OF THE CASE:-

The case was decided in the favour of Mayura and the custody was given to her but the court will remain in supervisory position till the two daughter attains the majority and monetary responsibility was given to the husband it was like a system of **Shared Parentage**. The court has posed some guidelines on the Mayura for the nourishment of the children and if she doesn't follow that she will have to surrender her guardianship and it will shift to father.

As per the facts, the high court of justice, U.K. has decided in the favour of husband for the custody of child but the Indian Court ignored the order of the foreign Court.

ANALYSIS OF THE JUDGMENT:-

In this case Court has gone beyond the law and decided the matter on the concept of "Shared Parentage" which is contrary to the law provided in the Statutes which was clearly mentioned that Father is natural guardian of the children and welfare of the child is of the paramount importance. In this case both the provisions were ignored because as per the facts "Surya Vadanan" i.e. father of the Children were in better position to take care of the daughters and he was more vigilant towards their education and other resources and I also disagree with the total monetary weightage is on the Father and the mother has just to nourish the daughter. This is not a good implementation of the "**Shared Parentage Principle**[28]".

[28]Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, 12 JOURNAL OF DIVORCE 2-3 (1989).

SHARED PARENTAGE v. SOLE CUSTODY ARRANGEMENT:-

The literature on shared parentage appears to indicate that shared parentage arrangements fare better for the child concerned than sole custody arrangements (assuming no harmful effects from one or both of theparents as well as in keeping with the best interests of the child standard).

In a 1989 study of intact families, shared parentage agreements and sole custody arrangements, children in shared parentage families fared better in regard to family relationships and self-understanding. Similarly, a study in 1991 found that children in shared/joint custody families had lower incidents of misbehavior than children in single maternal custody families.

In a 1996 study, researchers found that children in shared parenting arrangements had higher grades, more school efforts and decreased prevalence of depression in comparison to sole custody families. More recently, a study on the adjustment of children in joint-custody versus sole-custody arrangements found that children in joint physical or legal custody were better adjusted than children in sole custody arrangements. On the other hand, several studies have shown competing information with regard to whether children (and families) fare better in sole or joint custody homes. First, the concept of a presumption for either sole or joint custody is inimical to the best interests of the child standard. Such presumptions ignore the fact that the best interest standard is conceived of as a case by case application, not a categorical assumption for either such arrangement. Second, the child‘s interest may be further supplanted by laws requiring a presumption for joint custody. Parents may engage in bargaining and agreeing to a poor joint custody arrangement for fear that they would lose in court against a single parent pushing for joint custody. This may be particularly detrimental in the case of battered women who may feel pressured into bargaining into a joint custody arrangement due to the mental repercussions of such violence at the hands of the other parents.

ROMAN SHARMA v. ARUN SHARMA[29]

FACTS OF THE CASE- Order dated 2nd August, 2014 passed by the High Court of Bombay at Goa in Writ Petition No. 79 of 2014, which in turn questioned the Order dated 31.1.2014 passed by the IInd Additional Civil Judge, Senior Division at Margao, Goa (hereafter also referred to as the Civil Judge) in Matrimonial Petition No. 15/2013/II filed on 18.5.2013 before

[29] AIR 2015 SC 2232.

us, by the Respondent, Shri Arun Sharma (hereafter referred to as 'Father') Under Section 6 of the Hindu Minority and Guardianship Act, 1956. In this petition the Father has prayed inter alia that (a) the custody of the minor child, Thalbir Sharma be retained by him and that (b) by way of temporary injunction, the Appellant before us (hereinafter referred to as the Mother) be restrained from taking forcible possession of the minor child Thalbir from the custody of the Applicant in the High Court in the same case.

JUDGEMENT OF THE CASE:-

The Supreme Court has transfer the temporary custody of Thalbir to the Appellant/Mother with the direction that both of them shall reside in the address given by her, viz., House No. 80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa and will not leave that territorial jurisdiction of the Trial Court without prior leave and without notifying the Court. We further direct that the Respondent/Father shall have visitation rights between 2.30 p.m. and 6.00 p.m. on every Tuesday and Thursday, and from 2.30 p.m. to 9.00 p.m. on Saturdays. These Orders are purely temporary in nature.

ANALYSIS OF THE JUDGMENT:- The Supreme Court has taken a keen focus on the circumstances in which the custody was shifted it was very much evident in the new trend that focus is given more on the moral principles than on the legal principles, because in this case the high court has cancelled the custody of the father because of the reason that he left the city with child without any notice or leave to the court and this hindered the visitation right of the mother, which is violative of section-26 of the GWAct,1890[30] but if you go through the earlier precedent it was a historical judgment which consist of such kind of shift in the custody of child and it was new interpretation to statutory laws.

TASTENENI v. EDARA BALDEV[31]

FACTS OF THE CASE:-

[30] Removal of ward from jurisdiction – (1) A guardian of the person appointed or Declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.
The leave granted by the Court under sub-section (1) may be special or general and may be defined by the order granting it.
[31]MANU/SC/0397/2016.

The Appellant filed a petition before the Family Court for divorce. The Family Court allowed the petition and granted decree of divorce. Permanent custody of the child was given to the Appellant-wife and the Respondent husband was given visitation rights during weekend. Aggrieved, the Respondent-husband approached the High Court. By impugned judgment, the High Court allowed the appeals and remanded the matters to the Family Court with a direction that the arrangement as to the custody of the child would be continued purely as an interim measure, during the pendency of the matters before the Family Court. Aggrieved, the wife has come up before the Supreme Court in appeal due to the apprehension of the Husband in the nourishment of the child, due to the rigorous fight between the husband and wife due to which child livelihood get affected and by this she has put an appeal for the modification of the impugned order of the high court.

JUDGMENT OF THE SUPREME COURT:-

The High Court in the impugned judgment has directed that the arrangement made by the Family Court will continue as an interim measure. We are informed that the said arrangement has been subsequently varied by order dated 29.4.2015 after interacting with the child and thereafter the arrangement is that the child would be given in custody of father once in a fortnight from 10.00 a.m. to 5.00 p.m. which was earlier to be available with the father on first three Saturdays of the month between 10.00 a.m. to 8.00 p.m. that is to say, from the 1st week of April, 2016 onwards. As far as the other times like vacations are concerned, it will be open to the parties to file application before the Family Court. We also make it clear that this is purely a temporary arrangement and it is for the Family Court to pass appropriate orders as the situation warrants and this was happen due to apprehension on the livelihood of the child, the Supreme Court has made an modification in the direction to the make an amendment in the visitation rights of the Father.

ANALYSIS OF THE CASE-

In this case also there is emphasis on the moral question and nourishment of the child not on the laws of the statutes because they clearly provide Father to be the legal guardian of the child but here in this case primarily the custody was given to the Mother and the visitation right was given to the father but later on due to the conflict between the mother and father, the court has reduce visitation period of the Father. Which shows that nowadays the legal provisions has lower values than the moral obligation which is more keenly evaluated by the court in the

deliberate manner, sometime it may be good for the child but for the proper nourishment of child there should be equal cooperation of father and mother.

MAUSAMI GANGULY v. JAYANT GANGULY[32]

Facts of the case- In the instant case it was love marriage against the wishes of the parents and after two years they got a child with their wedlock named, satyajeet, in few years the wife realized that the husband told her lie about his employment and he doesn't have any permanent source of income affected by that she filed a divorce along with the custodial right of the child.

The Supreme Court of India and almost all of the High Courts have held that, in custody disputes, the concern for the best interest/welfare of the child supersedes even the statutory provisions on the subject outlined above in the legal framework.While the older cases under the GWA unequivocally hold that the father can be deprived of his position as the natural guardian only if he is found to be unfit for guardianship, this is the case which change the notion of the courts in guardianship per se.

SURABHI v. D.MOHAMMED[33]

Where the father objected to the mother's custody of the one-and-a-half year-old daughter on the ground that she was poor although he has forcibly removed the daughter from the mother and later he was contending the custody on behalf that she is poor, the Kerala High Court held that the mother was authorized to have custody of a daughter of that age under Islamic law.

MD. JAMEEL AHMED ANSARI V. ISHRATH SAJEEDA[34]

The matter regarding the custody of the child born on October 1, 1970 whose name is Aquil Ahmed he is studying in the VIth standard in the Standard Public School, Hyderabad his mother has married to someone else after the divorce so the father sought the custody of the child, although father also married but the second wife Alia is willing to have the custody of the child. The Andhra Pradesh High Court awarded the custody of an eleven-year-old boy to the father, on the ground that Muslim law allowed the mother to have exclusive custody only until the age

[32]Mausami Ganguli v Jayant Ganguli, (2008) 7 SCC 673.
[33]AIR 1988 Ker 36.
[34]AIR 1983 AP 106.

of seven in case of male children, and there was nothing to prove that the father was unfit to be a guardian in this case.

ANALYSIS OF THE CASES:-

In Muslim law we have seen that the court are very much strict to the customary laws of the Muslims although they also follow GWAct,1890 for their major operation of law of guardianship, in both of the above cases the Courts may come to other conclusion if go on a moral basis but they are totally legal in this case because the main source of the concept which is mentioned in the above two cases was not of statutory provisions but come from the Muslim School of thoughts, which contains more accuracy and sanctity.

JOINT CUSTODY IN INDIA

Although in earlier times the judges are inclined to the welfare principle but slowly they are trying to evolve the new concepts so that they can serve the better interest of the parties in claim, by this reason they come across a concept of "shared parentage" which is a foreign concept and now the Joint custody has evolved which is helpful in giving the proper support to the child because in Shared parentage there is always a hindrance of the interest of either of the parties, Although joint custody is not specifically provided for in Indian law, it is reported by lawyers that Family Court judges do use this concept at times to decide custody disputes.Human Rights and many other NGO's through the P.I.L. tried to get the guidelines from the court but the judiciary fails to examine much about Joint Custody but in 2011 they come across the case where they applied the concept of joint custody.

In KM Vinaya v. B Srinivas[35]

A two judge bench ruled that both parents are entitled to get custody "***for the sustainable growth of the minor child.***" Joint custody was effected in the following manner:

1)-The minor child was directed to be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year.

[35]MFA No. 1729/ 2011, Karnataka High Court, Judgment dated Sept. 13, 2013.

2) - The parents were directed to share equally the education and other expenditures of the child.

3)-Each parent was given visitation rights on Saturdays and Sundays when the child was living with the other parent.

4) - The child was to be allowed to use telephone or video conferencing with each parent while living with the other.

ANALYSIS OF THE CASE- This concept is progressive concept because in India we have seen a face where the superior position of father was there in deciding the Guardianship but later there is another face where the "welfare principle" where we have seen that judiciary is going out of the scope of law and decided the case on the basis of moral obligation and this create a superior position of the mother and ultimately the rights of the child get hindered and he/she is the most sufferer so on saving the interest of the child they used the concept of **"Joint Custody**".

The rapid social and economic change, conjugal and familial relationships are becoming more complex and so are the conditions of their dissolution. As these social changes that affect family life escalate, we need to update the laws governing the family relationships, during and after the marriage. At present, our legal framework for custody is based on the assumption that custody can be vested with either one of the contesting parties and suitability is determined in a comparative manner.[36] But, just as the basis for dissolving marriage has shifted over time, from fault based divorce to mutual consent divorce, we need to think about custody differently and provide for a broader framework within which divorcing parents and children can decide what custodial arrangement works best for them. But despite this development in judicial attitude, we have ignored the idea that under certain favorable circumstances, the best interest of the child could also result from simultaneous association with both the parents. Since there is no inherent contradiction between pursuing the best interest of the child and the concept of shared custody, the law needs to provide for this option, provided certain basic conditions are met.

[36]Swati Deshpande, *Divorced Dads Unite for Custody Rights*, TOI Sept. 9, 2009, http://timesofindia.indiatimes.com/india/Divorced-dads-unite-for-custodyrights/articleshow/4988614.cms.

COMPARATIVE ANALYSIS

As we know that India tries to evolve the concept by relying on the foreign laws and they are only source of the development of new concepts in India but Judiciary only tries to apply it on the basis of circumstantial condition of the case as well as the Country because in India while applying any interpretation or a new concept we have to take care of lots of legislation that it should not derogate the other.

1) -THAILAND:-

There are generally two procedures for securing child custody arrangements in Thailand. The first is by mutual consent and the second, by the court.[37] Mutual consent is an option for previously married parents who have divorced by mutual consent, previously married parents who had an uncontested divorce, or unmarried couples in which the child is registered as the legitimate child of the father and the unmarried parents agree on the custody arrangement. The court decides custody arrangements when, there was a contested divorce. In such cases, the court can award custody to the parents or to a third person as a guardian in lieu of the parents if it is in the happiness and interest[38] of the child.

2) -SINGAPORE:-

Singapore family law requires the court to consider the best interests of the child. According to the Women's Charter[39], the court may not make, any judgment of divorce or nullity of marriage or grant a judgment of judicial separation unless the court is satisfied, that arrangements have been made for the **welfare of the child** and that those arrangements are satisfactory or are the best that can be devised in the circumstances or that it is impracticable for the party or parties appearing before the court to make any such arrangements. The welfare of the child‖ is the paramount consideration‖ however, subject to this, the court shall consider the wishes of the parents and the wishes of the child. The court may issue an injunction restraining the other parent from taking the child out of Singapore where any matrimonial proceedings are pending or where, under any agreement or order of court, one parent has custody of the child to the exclusion of the other.

[37]Thailand Civil and Commercial Code (Part III), Book IV, Section 1520.
[38] Thailand Civil and Commercial Code (Part III), Book IV, Section 1547.
[39]Singapore, Women's Charter (1961).

3) – KENYA:-

The Children Act governs child custody disputes in Kenya. Kenyan law draws the distinction between actual custody and legal custody. Actual custody is the actual possession of a child, whether or not that possession is shared with one or more persons. Legal custody is so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order. The Kenya family courts consider several factors in awarding child custody such as:

1)-The conduct and wishes of the parent or guardian of the child 2) The ascertainable wishes of the relatives of the child. 3)-The ascertainable wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the order is not made, the customs of the community to which the child belongs, the religious persuasion of the child.[40]

The circumstances of any sibling of the child concerned, and of any other children of the home, if any and the best interest of the child It is important to note that Kenyan law does not place the **best interest of the child** necessarily as paramount and instead includes this as one factor to consider in the section describing child custody orders. However, in Part II of the Act, the law requires 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.

LAW COMMISSION RECOMMENDATION

1) - There must be an amendment in the **Section-6(a) of the Hindu Minority and guardianship Act, 1956** which talk about the natural guardian of the Child. This section lists the natural guardians of a Hindu minor, in respect of the minor's person and property (excluding his or her undivided interest in joint family property). In the case of a boy or an unmarried girl, this section clearly states that the natural guardian of a Hindu minor is the father, and after him the mother. Even after the Supreme Court's judgment in ***Gita Hariharan v Reserve Bank of India***[41] the mother can become a natural guardian during the lifetime of the

[40]The Children Act, Part VII, 81 (1) (c) & (d).
[41](1999) 2 SCC 228.

father only in exceptional circumstances. This is required to be changed to fulfil the principles of equality enshrined in Article 14 of the Constitution.

2)- There must be an alteration in the **Section-7 of the Hindu Minority and Guardianship Act, 1956**in which the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. The language of this section is incongruous in that it refers only to the natural guardianship of an adopted son, and does not refer to an adopted daughter. The Hindu Minority and Guardianship Act, 1956 came into force at a time when the general Hindu law as administered by the courts did not recognize the adoption of a daughter. Thus, at the time of passing of the Act, the adoption of daughters was only allowed under custom and not under codified law. This explains the reason why the drafters of the Act included the guardianship of only adopted sons and ignored the adoption of daughters.

3) -In the appointment or declaration of a guardian, the welfare of the minor must be paramount, and everything else must be secondary to this consideration. In determining welfare, however, the court may give due regard to the laws to which the minor may be subjected which accordingly suggest the amendment in the **Section-17 of the Guardians and Wards Act, 1890.**

4) -Section-19 of the Guardianship and Wards Act, 1890- This section provides for the preferential right of certain persons to be regarded as natural guardians. It provides that the court may not appoint a guardian, if the husband of a minor who is a married female is not unfit to be the guardian of her person, or if the father or mother (who are living) of a minor other than a married female is similarly not unfit to be the guardian. Here, too, the Commission reaffirms the 83rd report[42] regarding the importance of the welfare principle, and recommends that in determining whether a person is unfit to be a guardian in these circumstances, the welfare of the minor under Section 17 shall be the paramount consideration.

5) - Section-25 of the Guardianship and Wards Act, 1890- This section provides for the arrest of a ward if the ward leaves or is removed from the custody of his guardian, if such arrest is for the welfare of the ward. The Law commission recommends that a substitute section,

[42]Law Commission of India, 83rd Report, April (1980), 6.40, (Feb. 21, 2018), http://lawcommissionofindia.nic.in/51-100/Report83.pdf.

replacing '***arrest'*** with the requirement to return the ward to the custody of his or her guardian. Again, the Commission reiterates the necessity of placing the welfare of the minor as the paramount consideration.

CONCLUSION

The Guardianship and custody has a very key role in the life of the children because it protect their life and property and it ensures proper life coverage from the hindrance of their right and it give them a proper nourishment and it was under the authority of the court then it will become an obliged duty of the parents to take care of the child. It was seen from the earlier time to the modern era there is shift in the interpretation, it was seen that the Judiciary are interpreting the cases of guardianship on the principle of "**Fathers Superiority**" but as the times passes the court started relying on the "**Best Interest Doctrine**" which envisaged as the welfare of the child is of the paramount consideration and it should not be invade at any cost but in some cases the judiciary has interpreted the concept in some other manner and ruled out in any other way then we come across very much of the exception of the general rule.

Then we have encountered the concept of "**Shared parentage**" where the responsibility get distributed among the parents of the child but it was seen that in these case mostly the monetary responsibility was inculcated in the hands of the Father and original care and protection and custodial rights are in the hands of the mother which seems to be very discriminatory approach by the court and that cases also circumstantial evidence are in the favour of the Father then also the court for the sake of moral obligation tried to figure out mother in good position than of the father.

Then a concept of **"Joint Custody**" came into terms of the interpretation. **"Joint custody**" means (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.

This came under the practical application from the year 2011, which created a huge shift in the interpretation of the cases of the custody and this formula has been serving the interest of the parents in this situation the children get sandwiched between the parents and it may sometime better for their nourishment but sometime has adverse effect too. Our Constitution and the legal framework direct the state to pursue substantive equality. Substantive equality recognizes the difference in the socio-economic position of the sexes within the home and outside of it, and aspires to achieve equality of results. We therefore reject the position of the father's rights groups on shared parenting based on the rhetoric of equal rights over children.

So, In modern world we should have proper methods and parameters to obligate the both parents via legal provisions to serve the interest of the child and considering the welfare of the child we should also take the circumstances of the cases. We need some amendment to inculcate this new concepts into actions and I totally agree with the recommendation mentioned by the law commission the government should bring this amendments and Courts are have to take care of the needs of the modern era and how the society changes we should deal the interpretation in that way only.

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