LAW COMMISSION OF INDIA

ONE HUNDRED THIRTY-THIRD REPORT

ON

REMOVAL OF DISCRIMINATION AGAINST WOMEN IN MATTERS RELATING TO GUARDIANSHIP AND CUSTODY OF MINOR CHILDREN AND ELABORATION OF THE WELFARE PRINCIPLE

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LAW COMMISSION
भारत सरकार
GOVERNMENT OF INDIA
शास्त्री भवन,
SHASTRI BHAWAN,
नई दिल्ली
NEW DELHI

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To
Shri B. Shankaranand,
Minister for Law and Justice,
Government of India,
Shastri Bhavan,
New Delhi.

Dear Minister,

The One Hundred & Thirty-third Report of the Law Commission being presented hereby reflects the anxiety of the community to make amends to the 'women' who have not been accorded equal treatment vis-a-vis 'men' in a number of areas so far. The title of the Report speaks for itself : —

"REMOVAL OF DISCRIMINATION AGAINST WOMEN IN MATTERS RELATING TO GUARDIANSHIP AND CUSTODY OF MINOR CHILDREN AND ELABORATION OF THE WELFARE PRINCIPLE"

The exercise culminating in the Report was undertaken *suo motu* in the context of examination of the working of the laws relating to recognition of natural guardianship and appointment by Court of guardians for the person and property of minors. The endeavour of the Commission has been (1) to remove the discrimination against 'women' rooted in the age-old distrust for their ability and capacity and emanating perhaps from the complex that 'women' are inferior to 'men' and (2) to ensure that the over-shadowing consideration of the community as regards the welfare of minor children informs the determination of the issue of guardianship in letter and spirit.

It is hoped that the recommendations made in the Report will be deliberated upon expeditiously in view of the need to redress the just grievances of 'women' and protect the interests of the minor children at the earliest.

With regards,

Yours faithfully,
Sd/-
(M. P. THAKKAR)

Encl : 133rd Report

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CHAPTER I

INTRODUCTION

1.1. It was in the pre-independence and pre-constitution era that women's protest against unequal treatment and social injustice took the form of a cry of anguish-woman, thy name is misery. In the post-independence and post-constitution era, the protest has taken an activist turn and women's organisations have been vigorously demanding equality and clamouring for their rights. The community has responded positively to their just demands in several spheres. The Legislature and the Judiciary have also shown awareness of the problem in their respective domains. The Law Commission of India on its part has been making and is engaged in making endeavours for redressal of the just grievances of women. The present is yet another step in this direction.

1.2. In the field of growth and development of "women's rights jurisprudence" in the post-independence period, even though several legislative measures have been adopted to accord equal rights to a woman vis-a-vis a man, there are still areas where the invidious discrimination continues to exist. According to the existing law in regard to the custody of a minor child (whether a boy or an unmarried girl), the natural guardians are *first* the father and *thereafter* the mother. The question arises whether the preference to the father as against the mother, notwithstanding the welfare principle, is justified in the light of the provisions of the Constitution which ordain the State not to discriminate against any citizen on grounds of religion, race, caste, sex, place of birth, or any one of them. The fact that a woman continues to be treated on unequal terms vis-a-vis a man or inferior to a man in regard to the matter as regards the custody of a minor provides the necessary justification for considering and recommending revision of the law on the subject.

1.3. The law relating to the custody of children, the law according recognition to the 'father' (in preference to the 'mother') as a natural guardian, and provisions which in effect treat the woman as a second class citizen call for close scrutiny. Is it fair to give preference to the father as against the mother, disregarding the basic fact that it is the mother who suffers physical discomfort for nearly nine months even before the birth of the child whereas the father experiences no such discomfort, as also it is the mother who sacrifices her time, other pursuits, and comforts, in bringing up the child for a couple of years during the infancy of the child who demands constant attention and affection? Should a woman, a mother, even so be considered less suitable in the matter of custody or guardianship of the person and property of the minor child merely on account of her gender? There would appear to be no rational basis for according statutory recognition to such invidious discrimination in the law of the land. The explanation to account for this anomaly is traceable to the traditional belief that a female is an inferior being and a male is a superior being. That such a pro-male bias and an anti-female prejudice should have persisted even after the ushering in of the Constitution of India on 26th Jan., 1950, is somewhat unfortunate because the constitutional command etched in article 15(1) frowns upon such gender-based discrimination:

> "15 (1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.".

and, as a matter of fact, by implication approves of making special provisions for reversing the prevalent injustice to women and children *vide* article 15(3) :—

> "15. (3) Nothing in this article shall prevent the State from making any special provision for women and children.".

That is why it has been considered eminently desirable to *suo motu* examine this issue and to make appropriate recommendations in order to unload the dice which is presently loaded against the woman.

1.4. The life-aim of this report is, therefore, to erase the injustice to the woman in this sensitive area in obeisance to the letter and spirit of the Constitution. And to this end, the relevant provisions of the Hindu Minority and Gurdianship Act, 1956, as also the pertinent provisions of the Guardians and Wards Act, 1890, and working of the 'welfare principle' are being scrutinized and suitable recommendations are being made by this report.

CHAPTER II

THE PRESENT LAW

2.1. **Judicial orders as to custody.**—The law relating to custody of Hindu minor children is primarily contained in section 6 of the Hindu Minority and Guardianship Act, 1956, read with section 13 of that Act. Where the court is approached for passing orders as to custody, section 25 of the Guardians and Wards Act, 1890, and a few other provisions of that Act, come into operation.

As is well known, orders relating to custody of minors and a few other matters concerning the welfare of minors also come to be passed when a marriage is dissolved or parties to the marriage are given some other relief under the Hindu Marriage Act, 1955. Besides this, petitions of *Habeas Corpus* under article 226 or article 32 of the Constitution may also involve questions as to custody. Occasionally, criminal courts may be called upon to issue directions regarding the custody of minor children. However, the present Report primarily focusses itself upon the statutory provisions referred to in the first sub-paragraph of this paragraph.

2.2. **Section 6 of the Hindu Minority and Guardianship Act, 1956.**—Section 6 of the Hindu Minority and Guardianship Act, 1956 reads as under :—

"6. 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)".

2.3. **Section 13, Act of 1956.**—Section 6 of the Hindu Minority and Guardianship Act, 1956 must be read with section 13 of the Act which is quoted below :—

"13. **Welfare of minor to be paramount consideration.**—(1) In the appointment or 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 guardianship by virtue of the provions 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".

2.4. **Qualifications to provision regarding natural guardians.**—It would be seen that although section 6(a) of the Hindu Minority and Gurdianship Act, 1956 declares[1] that in the case of a boy or an unmarried girl, the natural guardians of Hindu minor are—the father, and after him, the mother, that proposition is subject to two qualifications, as enumerated below :—

(i) the proviso to section 6 lays down that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother;

(ii) secondly, section 13 (1) lays down that in the appointment or declaration of any person as guardian of Hindu minor by a court, the welfare of the minor shall be the paramount consideration. By sub-section (2) of the same

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section, it is provided, *inter alia*, that no person is entitled to guardinship by virtue of provisions of this Act, *if the court is of* opinion that his or her guardianship will not be for the welfare of the minor.

It is, thus fairly clear that if the case comes *before the court*, the court must look to the welfare of the minor and not merely to the legal provisions relating to guardianship. In this sense, section 6 is subject to section 13. The extent to which the correct legal position has been appreciated by the courts, particularly the trial courts, is a matter to be examined later in this Report.

2.5. **Guardians and Wards Act, 1890.**—We may now refer to the Guardians and Wards Act, 1890, which is of considerable importance when the matter comes before the court under that Act, particularly in the form of an application for custody. That Act, in section 7, provides that where the court is satisfied that it is for the welfare of the minor that an order should be made (a) appointing a person to be guardian of his person or property or both or (b) declaring a person to be such guardian, the court may make an order accordingly. Section 17(1) of that Act further provides that in appointing or declaring a guardian of a minor the court shall, subject to the provisions of that 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*.

Section 17(2) of that Act enunciates the factors which the court will take into account while considering the *welfare of the minor*. It is needless to state that when exercising jurisdiction under the Guardians and Wards Act, the court will give paramount importance to the welfare of the minor and not to any "right" of a person to act as a natural gardian of the minor.

2.6. **Procedural sections in Act of 1890:**—The actual proceedings before the court functioning under the Guardians and Wards Act can assume a variety of forms. For the present purpose two sections of that Act are of importance from the procedural point of view. These are sections 19 and 25. Section 19 is invoked when the petitioner before the court seeks orders regarding the appointment or declaration of a person as guardian. Section 25 is invoked when the petitioner before the court, while not seeking the appointment or declaration of guardianship as such, desires to obtain from the court orders as to the custody of a minor. As is well known the concept of "guardianship" is much wider than that of "custody". Of course, guardianship includes custody also, an aspect which incidentally is recognised in the Hindu Minority and Guardianship Act in section 4(b) when it provides, *inter alia*, that the word "guardian" means a person having the *care* of the person of a minor or of his property or of both.

2.7. **Sections of the Act of 1890 quoted:**—For ready reference we quote below the relevant sections of the Guardians and Wards Act, 1890 as they stand at present.

"7. **Power of the Court to make order as to guardianship:**—(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian,

the court may make an order accordingly.

(2) 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.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act".

"17. **Matters 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 Court 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) (Omitted by Act 3 of 1951)

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

"**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 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 a married female and whose husband is not, in the opinion of the 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".

"**25. Title of 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.

(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 guardianship".

"41. **Cessation of authority of guardian.**—(1) The powers of the guardian of the person cease—

(a) .....

(b) .....

(c) .....

(d) .....

(e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court."

CHAPTER III

THE NEED FOR SPELLING OUT SOME IMPORTANT CONSIDERATIONS IN THE APPLICATION OF THE WELFARE PRINCIPLE AND FOR AMPLIFICATION OF THE RELEVANT PROVISIONS TO THIS END

3.1. Bringing up of a child, providing the physical and emotional needs of the child, and building up the personality and inner world of the child, to enable the child to bring out his or her potential so as to enable the child to make maximum contribution to the welfare of the community when he or she grows up, and to enable him or her to lead a creative and useful life undeterred by the obstacles that may impede his or her path, is the obligation and responsibility of both the parents. It is as much the 'duty' of the *father* as the 'duty' of the *mother*. It is, therefore, somewhat inappropriate to speak in terms of the 'rights' of the father and the mother when the matter reaches the court and the question of appointing a guardian or entrusting the custody of the minor surfaces. The court, acting on behalf of the community, has to resolve the problem keeping in mind the paramount and over-shadowing consideration as regards the 'welfare' of the child. That is why the welfare principle has been projected in section 13 of the Hindu Minority and Guardianship Act as also in section 17 of the Guardians and Wards Act. Reference to these provisions has been made in Chapter II—*vide* paras 2.3 and 2.7—. It will, however, be expedient to extract the provisions for the sake of ready reference.

3.2. *Section* 13 *of the Hindu Minority and Guardianship Act,* 1956 *provides* :—

"**13. Welfare of minor to be paramount consideration** :—(1) In the appointment or 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".

Section 17 *of the Guardian and Wards Act,* 1890 *prescribes* :—

"**17. Matters 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 Court 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 minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * * *

[Sub-section (4) omitted by Act 3 of 1951]

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

The welfare principle has thus received statutory recognition. Since, however, some of the salient and important considerations have not been spelt out, very often, particularly in the trial court, the welfare principle is not correctly interpreted and applied to the fact situation presented by the case coming up before the court. So often it is only when the matter is brought up to the High Court that the welfare

principle is applied. The result is that the vital and sensitive question regarding the guardianship and custody of the minor remains often in a nebulous state for very many years and the custody of the child continues to remain with a person with whom the custody should not remain in the light of the welfare principle. Besides, the contesting parties in many of the matters may not have the resources to take the matter up to the High Court and the interest of the minor suffers detriment. It is in this background that the issue regarding the need to spell out some of the important considerations in the application of the welfare principle in the relevant statute itself needs to be considered.

3.3. *In order to substantiate the point that welfare principle is often not applied by the trial court, a few of the reported cases may be usefully examined :—*

Andhra Pradesh Case

(1) A very recent case from Andhra Pradesh may be referred to because its facts are peculiar.[1] A Hindu woman obtained divorce *ex parte* on the ground of cruelty and desertion by her husband. Remaining a Hindu, she remarried a Christian (under the Special Marriage Act) after the expiry of 6 months from the decree. The husband got the decree set aside, as passed *ex parte* without notice. The woman petitioned the High Court in revision. While this petition was pending, the husband attempted to take away the children. The woman then sued for an injunction to restrain the husband from doing so and got an interim order maintaining the *status quo*. The husband, *i.e.* the father, then applied for the custody of 3 children (2 boys aged about 13 years and 10 years respectively and one girl aged about 12 years) under section 25, Act of 1890. His application was allowed by the trial court, but the mother appealed to the High Court and succeeded. The High Court held that remarriage with a person from a different religion could not (in itself) be a negative factor against the mother. In the interest and welfare of the minors, they should be allowed to remain with the mother. There was nothing against the mother which prejudicially affected the children.

Earlier Bombay Case

(2) In an early Bombay case,[2] also one finds the trial court ignoring the welfare principle. In this case, the application by the father was for his being appointed the guardian under section 19 of the Guardian and Wards Act, 1890, but the application was treated as one under section 25 of that Act. The boy was aged about 7 years and had been living with the mother for the last 5 years. The father had married a second wife. The trial court allowed the application, ignoring the welfare principle. On the mother's appeal, the High Court reversed the judgement of the trial court. In the view of the High Court, the welfare of the child demanded that its custody should be continued with the mother, as the father had married again and the step-mother cannot be expected to be very much interested in the welfare of the child, and any members of the prior generation who may be living with the father were also not likely to give the child the required attention and sympathy.

Later Bombay cases

(3) In a later Bombay case[3], the father of a boy aged about 2 years applied for the custody of the child under section 25 of the Guardians and Wards Act, 1890. The father had married a second wife and his application was allowed by the trial court, but in appeal, the High Court dismissed it. The High Court held that the paramount consideration should be the interest of the child rather than the rights of the parents and if the mother is a suitable person to take charge of the child, then it is quite impossible to find an adequate substitute for her for the custody of a child of tender years. Besides this, a step-mother is not likely to give the child the required attention, love and sympathy.

(4) In another Bombay case (of 1959)[4] it was the mother who applied under section 25 of the Act of 1890 for the custody of her minor daughter, aged about 2-1/2 years. The trial court applied the welfare principle rather narrowly and dismissed the application. It was left to the High Court, on appeal, to grant the mother's application. The High Court directed the father to hand over the girl to the mother. It took note of the fact that the father (after the divorce) had

remarried, and that, although the father was living with a large family of the prior generation, there was a probability of the child being neglected by the step-mother and by the family. There was nothing to suggest that the mother was unfit to have the custody of the child. Besides this, the mother had stated on oath that she had no intention of remarrying. In these circumstances, it was preferable to give the custody to the mother.

Delhi Case

(5) In a Delhi case[5], the welfare principle was ignored by the trial court but was applied by the High Court in appeal. The mother of a boy, aged about 5 years, applied under section 6 of the Hindu Minority and Guardianship Act for the custody of the child, but the trial court dismissed her application. The view taken by the trial court was that the fact that the child was only 3 years old did not mean that the father could not keep him in his custody; the child was not being suckled. But the High Court, in appeal, awarded the custody to the mother. Discussing in detail the welfare principle, the High Court stressed the fact that such a child needs the most tender affection, the caressing hand and the company of his natural mother, and neither the father nor his female relations, however close they may be, and however well meaning and affectionate they may be towards the minor, can appropriately serve as a proper substitute for the minor's natural mother. The High Court pointed out that in this case the child was of 5 years and the mother had been rightly endowed by the Hindu Minority and Guardianship Act with a preferential claim in regard to custody. In the absence of special circumstances which may suggest that the welfare of the minor demanded that his custody should not be entrusted to his natural mother, the court was not justified in depriving her of the minor child's custody and in entrusting it to the father.

Another Delhi Case

(6) There is another case from Delhi.[6] The mother had applied for the custody of her son aged 3 years, under section 25 of the Act of 1890. The mother's application for interim custody was first granted by the trial court, but later he reviewed his order on the ground that there was not sufficient accommodation with the mother's parents. The High Court, exercising jurisdiction under article 227, awarded custody to the mother. The mere fact that the mother was not having any income of her own was not a ground to deprive her of the custody of her minor child. No amount of wealth is a substitute for the mother's love and the care which she can bestow on her infant child. If the mother has no independent income for maintaining herself and the child, the father can certainly be asked for its maintenance, but he cannot use this as a handle to deprive the mother of the custody of the child.

Gujarat Case

(7) A Gujarat case illustrates the same situation.[7] The father had applied for the custody of a minor boy aged about 6 years through his sister, and the application was allowed by the trial court. But the mother's appeal to the High Court was allowed. The High Court pointed out that where the question is about the custody of a minor, the expression "right" is altogether out of place, unless one were to proceed on the assumption that the child is a chattel or a property of the parents. Here, the expression is used in the sense of the obligation cast by the society on the parents. In its formative years, the child needs better care, love, and affection which can be ignored only at the point of doing great psychological damage to the personality of the child. Even if the welfare of the child demands sacrifice of the feelings and emotions of the father or the mother, the court would not swerve from its destination.

Mysore Case

(8) In a Mysore case,[8] the father applied under section 26 of the Hindu Marriage Act for the custody of a girl aged about 3-1/2 years (in the course of proceedings for restitution). The trial court allowed the application, but, on appeal by the mother, the High Court awarded the custody to the mother. The High Court held that under section 26 of the Hindu Marriage Act, in so for as it relates to the custody of a minor child, the primary and paramount consideration (though

not the sole consideration for the court) must be the welfare of the minor child. The question was not so much of the rights of the parents, as of the child's welfare. To take away the child from the mother would place mental strain on the child.

A case from Peshawar

(9) Reference may be made here to a Peshawar case because the facts are unique.[9] The mother had applied for the custody and guardianship of a girl aged about 16 years. The girl, it seems, had been abducted by a Muslim and had embraced Islam. The girl's father was dead. She was placed in the custody of a Muslim gentleman by the order of the court, after she was traced. The trial court dismissed the mother's application, but the High Court allowed her appeal. The sole question for determination was whether her alleged conversion to Islam was a valid reason for refusing to appoint the mother as her guardian. In the view of the High Court, welfare of the minor is the first consideration. The term *"welfare" includes* both material and spiritual welfare. In the present case, the alleged conversion of the child did not appear to have been based on any religious conviction arising out of serious study by the girl but was based on her wish to throw her lot with the man who was, at that time, undergoing a sentence for having abducted her. The appellate court therefore saw no justification for refusing the mother's request for custody and guardianship of the child.

Punjab Case

(10) The contest in a Punjab case[10] was between the uncle of a minor boy and the mother. The uncle (presumably after the death of the father of the boy) had applied for appointment of guardian of the person and property of the minor. The judgment was in favour of the mother in the trial court and, in appeal also, the High Court upheld the order on the reasoning that section 6 of the Hindu Minority and Guardianship Act, 1956 provides that in the absence of the father, the mother is the natural guardian of the minors. Accordingly, the custody of the child was retained with the mother though she had married a second husband. The High Court pointed out that remarriage is not one of the disqualifications under the Hindu Minority and Guardianship Act.

Rajasthan Case

(11) More recently, we have a Rajasthan case[11] in which also the trial court applied the welfare principle narrowly and its decision had to be corrected by the High Court in appeal. The father had applied for the custody of two children, a son aged about 11 years and a daughter aged about 14 years. Partly allowing the application, the trial court awarded the custody of the son to the father. The mother appealed to the High Court and succeeded. According to the High Court, the father's fitness has to be considered, determined and weighed predominantly in terms of the child's welfare. If the custody of the father cannot promote the welfare of the minor equally as, or better than, the custody of the mother, then he cannot claim an indefeasible right to the minor's custody under section 25 of the Act of 1890 merely because there is no defect in his capacity to look after the minor.

Allahabad Case

(12) In **Smt. Bindo** *v.* **Shyamlal,** (1907) ILR 29 Alld. 210, the dispute for the custody of a minor girl about 10 years of age was between the father of the minor and the maternal grand-mother of the minor. The mother of the minor had died when the minor was about 5 years of age and since then the minor was living with her maternal grand-mother. An application was made by the father for the custody of the child. The said application was opposed by the maternal grand-mother on the ground mainly that father had remarried and he was not well off and that the minor was happy to live with her grand-mother and did not wish to go to her father. The District Judge, by holding the father's right to be paramount, passed an order appointing him as gauardian of the minor girl. On appeal to the High Court, the order of District Judge was set aside and the High Court directed that the minor girl be restored to the maternal grand-mother. The High Court held as under :—

> "There is no suggestion that the maternal grand-mother is in any way unfit to continue to be a guardian of the ward. She is a Hindu lady in good circumstances, and it is obvious that if she had not cared for the child she would not

have kept the minor so long under her charge. It is true that there is nothing against the father, but again it is an admitted fact that he has married a second time and the girl will have to go under the control of a step-mother, of whom probably she knows nothing. We cannot think that the girl, under these circumstances, will be so happy as she is in the house of the maternal grand-mother. What we have to consider is what will really be for the welfare of the minor. Weighing all the circumstances we think that it will be more for the welfare of the minor to live with the maternal grand-mother than with the step-mother".

It is thus evident that the welfare principle has quite often not been properly appreciated or has been overlooked by the trial court and the mother has had to approach the higher court at considerable time-cost and money-cost. The need for spelling out some important considerations in the application of the welfare principle and for amplification of the relevant provisions to this end has, therefore, been clearly established.

CHAPTER IV

'WHAT' CHANGES ARE REQUIRED TO BE MADE IN THE EXISTING LAW AND 'WHY'?

Mother to have same and equal rights (and not inferior to the father) in respect of the custody of minor's person as well as property.

4.1. The most serious infirmity in the existing law is revealed by section 6(a) of the Hindu Minority and Guardianship Act of 1956. It is provided by the said provision that the natural guardian of a Hindu minor in respect of his person as well as his property, in the case of a boy or an unmarried girl, will be "the father and after him, the mother". Thus, statutory recognition has been accorded to the objectionable proposition that the father is entitled to the custody of the minor child in preference to the mother. Apart from the fact that there is no rational basis for according an inferior position in the order of preference to the mother vis-a-vis the father, the proposition is vulnerable to challenge on several grounds. In the first place, it discloses an anti-feminine bias. It reveals age-old distrust for women and feeling of superiority for men and inferiority for women. Whatever may have been the justification for the same in the past, assuming that there was some, there is no warrant for persisting with this ancient prejudice, at least after the ushering in of the Constitution of India which proclaims the right of women to equality and guarantees nondiscrimination on the ground of sex under the lofty principle enshrined in article 15. In fact, clause (3) of article 15, by necessary implication, gives a pre-vision of beneficial legislation geared to the special needs of women and children with a pro-women and pro-children bias. It is indeed strange that in the face of the said constitutional provision, the discrimination against women has been tolerated for nearly four decades. As the law stands today, if the father as well as the mother are equally fit persons to have the custody of the child, the father will secure the custody of the child in preference to the mother, unless the child is of the troublesome and inconvenient age of less than 5 years. It is interesting to realise that the British Parliament woke up to this problem 25 years before the Constitution of India came into force, and enacted the Guardians and Infants Act of 1925 to eradicate this injustice at their end. The preamble reads :

> "Whereas Parliament, by the Sex Disqualification (Removal) Act of 1919 and various other enactments, have sought to establish equality in law between the sexes and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby :
>
> Be it enacted ....".

Section 1 of the said enactment provides that the court shall decide the questions regarding the custody of infants without regard to concepts regarding father's superior right to custody from the common law standpoint. And like power is given under section 2 to the mother as the father, to move the court for the custody of the infant. The status of the mother was improved from time to time under the British law and finally in 1973, the mother and the father were given equal rights and authority in relation to the custody, upbringing and administration of the property of the children. Section 1 of the Guardianship Act of 1973, which was enacted to amend the law of England and Wales as to the guardianship of minors so as to make the rights of a mother equal with those of a father, provides :—

> "In relation to the custody and upbringing of a minor and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, *a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other*". (Emphasis added).

4.2. The history of the law in United Kingdom relating to the custody of a child, particularly in its later stages, would go to show two important trends. The first is the gradual equalisation of the parental status of the mother and father of a child born in wedlock. In the second development, the parental rights of both mother and father have become less important as the welfare of the minor has

reason to be the first and paramount in any litigated issue relating to the custody or upbringing and administration of the property of the child.

4.3. It is thus manifest that the provision contained in section 6(a) of the Hindu Minority and Guardianship Act is extremely unfair and unjust and has become irrelevant and obsolete with the changing times. The concerned provision, therefore, deserves to be amended so as to constitute both the father and the mother as being natural guardians 'jointly and severally', having equal rights in respect of a minor and his property. The provision according preferential treatment to the father vis-a-vis the mother has to be deleted and has to be substituted by a provision according equal treatment to the mother on the lines indicated hereinbefore.

The custody of a minor child who has not completed 12 years of age shall ordinarily be with the mother.

4.4. As per the proviso to section 6(a) of the Hindu Minority and Guardianship Act, "the custody of a minor who has not completed the age of five years shall ordinarily be with the mother". Till what age the custody of the minor should ordinarily be with the mother was the question which came to be examined by the Law Commission of India (LCI) in its 83rd Report presented in April 1980. After examining the matter closely and carefully, the LCI recommended that the concerned provision should be amended so that the age up to which the custody should ordinarily be with the mother is raised from 5 years to 12. It appears that for one reason or the other, this recommendation has not been accepted and acted upon so far. We are of the opinion that the recommendation made by the LCI in its 83rd Report deserves to be implemented without any further delay. We, therefore reiterate the recommendation. We do not propose to give additional reasons of our own for reiterating the recommendation as we feel that the reasons articulated in the 83rd Report cannot be bettered. We, therefore, rest content by reproducing paragraph 6.50, 6.51 and 6.53 of the 83rd Report :—

'Recommendation for amending the Act of 1956, section 6.

6.50. Taking up the fourth question, we are of the view that section 6 of the Hindu Minority and Guardianship Act, 1956 should also be amended so as to allow the mother the custody of the minor, ordinarily till he or she completes the age of 12 years. We may state in brief our reasons for this view. The period upto the age of twelve represents the formative years in the life of a child. It is in these formative years that a child develops such qualities as patience, modesty, honesty, readiness to help and respect for others. The education that the child receives in these years should be designed to make him or her a healthy individual of high intellectual and moral standard, capable of playing an active role in the development of the State and society. Now, it cannot be disputed that it is the mother's influence which moulds the character and qualities of a child. Men are what their mothers make them; no fondest father's fondest care can fashion the child's heart or shape his life. It was Napolean who said "The future destiny of the child is always the work of the mother".

Need for amendment as to custody.

6.51. Legislative history of the provision in the Act of 1956 relating to custody is of interest. Though the mother, in regard to her position as a natural guardian, is postponed to the father, yet the Act lays down, as already stated, that the custody of a minor upto five years shall ordinarily be with the mother. In the original Bill, the age proposed was three years, but the Select Committee raised it to five years. Even this enhancement did not satisfy all persons. Some Members of Parliament felt that the age should be further raised. A lady member of the Select Committee wanted the custody of the minor to be with the mother till the minor attained majority. Another lady member wanted it to be raised to twelve. The two other male members wanted it to be raised to ten and thirteen respectively. Our proposal that the age of custody should be raised to twelve is, therefore, not new.

Need of mother's care for child of tender age.

6.53. The child under twelve years of age needs a tender affection, a caressing hand and the company of his mother, and neither the father nor his family relations, however close, well meaning and affectionate towards the minor, can appropriately serve as a proper substitute for the minor's mother. It should

also be borne in mind that physical needs and comforts alone are not enough for the proper and healthy development of a child. Parental affection is indispensable for this purpose and in the case of a conflict between the parents when the child is under twelve years of age, the mother should have a preferential claim in regard to the child's custody. It is for these reasons that we have recommended an amendment of the Act of 1956 as to the age upto which custody should ordinarily be with the mother'.

We fully and entirely concur with the reasoning reflected in the above-quoted passages and accordingly reiterate the recommendation that sub-section (a) of section 6 of the Hindu Minority and Guardianship Act should be amended so as to provide that the custody of a minor who has not completed 12 years of age shall ordinarily be with the mother.

Amplification of the welfare principle

4.5. In Chapter III, the need for spelling out some important considerations in the application of the welfare principle and amplification of the relevant provisions to this end has been sufficiently made out. In this context, the welfare principle in section 13 of the Hindu Minority and Guardianship Act and section 17 of the Guardians and Wards Act needs to be amplified by incorporating four considerations for being required to be taken into account by the concerned court whilst applying the principle :—

4.5.1. Ordinarily a minor not to be obliged to stay with his or her step-mother.— Where the father of a minor child has obtained a divorce and has remarried, it is desirable that the custody of the minor irrespective of his or her age shall ordinarily be with the mother. If the custody of the child is awarded to the father, the child would be obliged to live with the step-mother. In the first place, the child will have to undergo the trauma of separation from his or her natural mother. In the second place, the child will have to make psychological adjustments in order to live with the step-mother. While it is somewhat unfair to be sceptical about the treatment that a step-mother might mete out to the step-child, it has to be realized that a psychological fear has come to be associated with the status of a step-mother. Some step-mothers might be capable of treating the step-children with kindness, compassion and consideration. But many others may not be able to do so. In fact, treatment which a child may accept without much protest from the natural mother, the child may not be prepared to accept from a step-mother. To oblige a minor to live with the step-mother is to make a child undergo a traumatic experience and to make him or her suffer from a feeling of being oppressed. It is, therefore, necessary to provide that ordinarily the custody of a minor child should be entrusted to the natural mother and the child should not be obliged to live with his or her step-mother when the father has remarried.

4.5.2.1. Ordinarily a minor female child shall not be made to live with her step-father.—Where the mother has remarried, to entrust the custody of a minor female child to the mother would entail the consequence of the minor being made to live with her step-father. While she would be able to avail of the natural love and affection of the mother, she would also be facing the possibility of damaging consequences. The step-father cannot ordinarily be expected to have any real affection and emotional attachment to the child. More often than not, the step-father is likely to consider the child as a necessary evil or nuisance arising on account of his marriage to the natural mother of the child begotten by her previous husband. Reports emanating from the western countries recording instances of the step-father perpetrating cruelty on the child are too numerous and too frequent to be disregarded. Apart from the physical punishment meted out to the child, so often the child is subjected to sexual harassment. The helpless mother is so often rendered a mute witness to such treatment meted out to the child. What is happening in the western countries on a large scale is also likely to happen in India if it is not already happening. Under the circumstances, it is desirable to make a provision to the effect that ordinarily a female minor child shall not be made to live with her step-father. The court may consider whether the paternal or maternal grandparents should be entrusted with the custody of the female minor child in such cases. It is, therefore, necessary, to provide accordingly,

4.5.2.2. Where the mother alone has remarried.—In such an event, it would be desirable to provide that 'ordinarily' the minor, even if a male child, should not be made to live with the 'step-father'. For, instances have been noticed where the step-father ill-treats the child or virtually treats him as an errand boy.

4.5.2.3. Where both 'father' and 'mother' have remarried.—The court may determine who shall have the custody of the minor as between the father and the mother or the paternal or maternal grand-parents depending on the assessment of the court as to what is considered to be conducive to the maximum welfare of the minor taking into account all the relevant circumstances of the particular case.

4.5.3. A mother not to be denied custody of the minor mainly on economic considerations.—It is no doubt true that in urban areas, there are more and more working women in the middle class Indian households. But in a large number of households, the woman plays the role of a house-wife, more so in non urban areas. The fact remains that by and large the husband is economically better placed in the sense that he is employed in a position where this economic rewards are far in excess of the income of the wife even in cases where the wife is a working woman. The husband is ordinarily in more affluent circumstances than that of the wife. In applying the welfare principle, the mere fact that the father is in more affluent circumstances vis-a-vis the mother cannot be allowed to outweigh the sum total of the other circumstances. Besides, the court can always direct the husband to pay maintenance allowance to the children. The factor regarding the superior economic circumstances of the father should not, therefore, be accorded undue weightage. A provision in this behalf is, therefore, required to be made so that the paramount consideration regarding the welfare of the minor does not get distorted in favour of the father's claim to the detriment of the mother's claim on account of the superior economic circumstances of the father.

4.5.4. The minor's need for the emotional support and the warmth of the mother should be accorded prime consideration.—A mother is by nature endowed to impart love and affection to her minor child without having to make any effort. There is a physical bond between the mother and the child right from the time the child was conceived. The child lives on the flesh and blood of the mother till its birth. After its birth, the child is sustained by the mother who feeds the child and tends to it. When the child is in physical discomfort or agony, it is ordinarily the mother who looks after and comforts it. The mother is ordinarily better-equipped than the father to impart such emotional support and warmth as are essential for the building up of the balanced personality of the child. The father is ordinarily engrossed in his profession or employment or in his economic pursuits. A father would scarcely have the time for the child or be in a position to build up that emotional relationship with the child which the mother can build even if the mother is also a working woman. In order to enable the child to develop a well-oriented and balanced personality, it is essential that the child is not starved of emotional support and warmth which are essential for its growth. Under the circusmtances, this factor deserves to be accorded prime consideration in resolving issues regarding custody of the child and a provision in this behalf needs to be made whilst spelling out the ingredients of the welfare principle.

4.6. In considering the claim of grand-parents, whether they are paternal grand-parents or maternal grand-parents is a matter of no consequence.—Very often the courts are confronted with the question as to whether the paternal grand-parents should be appointed the guardians of the person and property of the minor or the maternal grand-parents should be so appointed. Just as in considering the claim between the father and the mother, a preferential treatment was being accorded to the father vis-a-vis the mother, the pro-male bias was often projected in considering the question in the context of the grand-parents as well. It would appear that there is a psychological complex that the paternal grand-parents should be preferred to the maternal grand-parents. In considering the rival claims, whilst applying the welfare principle, weightage is often accorded to the 'paternal' grand-parents and

they are often preferred to the 'maternal' grand-parents[1]. There is no rational basis for doing so[2]. It is, therefore, desirable to make it explicit that the 'paternal' and 'maternal' grand-parents shall be treated at par having equal claim to be appointed as guardians subject to the overriding consideration regarding the welfare of the minor.

4.7. The pro-male bias and anti-female prejudice has been projected in section 19(b) of the Guardians and Wards Act of 1890 as well. It provides :—

> "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 whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—
>
> (a) * * * ; 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) * * * ."

The Legislature, in its wisdom, has provided that so long as the father of a minor is living and is not, in the opinion of the court, unfit to be the guardian of the person of the minor, the court shall not appoint or declare someone else as a guardian of the person of the minor. But then there is no reason why the same principle should not apply when the mother of a minor is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. If when the father of a minor is not unfit, no one else can be appointed as guardian of the person of the minor, why should someone else be appointed as guardian of the minor when the mother is alive and is not unfit in the opinion of the Court. The interest of the minor can be safeguarded with as much vigour and sincerity by the mother as by the father. It, therefore, stands to reason that so long as the "father or the mother" of a minor is living, and, in the opinion of the Court, is not unfit to be the guardian of the person of the minor, the Court shall not appoint someone else as the guardian of the person of the minor. Section 19(b), therefore, requires to be amended on the aforesaid lines. A consequential amendment will also be required to be made in section 41(e) of the Guardians and Wards Act pertaining to cessation of authority of the guardian. The words "father or mother" should be substituted in place of the word "father" wherever it occurs in the said provision.

4.8. **Natural guardian of an adopted son and adopted daughter** :—In the Hindu Minority and Guardianship Act of 1956, a provision has been made for the natural guardianship of an adopted son who is a minor. Subsequent to the enactment of the said Act, the Hindu Adoptions and Maintenance Act of 1956 for the first time has enabled the adoption of a daughter. Till then, a Hindu could adopt only a son and not a daughter. In view of the change brought about by the Hindu Adoptions and Maintenance Act of 1956, it has become necessary to provide for the natural guardianship of both an adopted son and an adopted daughter. As at present, section 7 of the Hindu Minority and Guardianship Act, 1956, provides :—

> "7. Natural guardanship 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."
>
> (Emphasis added)

There is, therefore, a lacuna in section 7 as it is presently worded. In order to apply the principle of section 7 as regards natural guardianship of an adopted child, it would be appropriate to amend the provision so as to apply to an "adopted son" as also to an "adopted daughter" who is a minor. It is also necessary to bring the section in line with the first recommendation in order to accord an equal treatment both to the father as also to the mother. In place of the expression "to the adoptive father and after him to the adoptive mother", it would be in the fitness of things to provide "to the adoptive father and to the adoptive mother jointly and severally".

4.9. In the light of this discussion, we now proceed to make the recommendations in the next Chapter.

CHAPTER V

RECOMMENDATIONS

FIRST RECOMMENDATION

'Mother' should have same and equal (and not inferior) rights vis-a-vis 'father'.

5.1. The provision contained in section 6(a) of the Hindu Minority and Guardianship Act of 1956 ("HMG Act" for short) constituting the father as a natural guardian of a Hindu minor's person as well as in respect of his property in 'preference' to the mother should be amended so as to constitute both the father and the mother as being natural guardians 'jointly and severally" having equal rights in respect of the minor. Because, there is no justification for according a superior and preferential treatment to the father vis-a-vis the mother of the minor and because it violates the spirit and conscience of article 15 of the Constitution of India.

(See para 4.1.)

SECOND RECOMMENDATION

The custody of a minor who has not completed 12 years of age shall ordinarily be with the mother.

5.2. The proviso to sub-section (a) of section 6 of the HMG Act deserves to be amended so that the custody of a boy or an unmarried girl who has not completed the age of 12 years (instead of the age limit of 5 years as prescribed at present) shall ordinarily be with the mother.

(See para 4.4.)

THIRD RECOMMENDATION

Spelling out some important considerations in the application of the welfare principle.

5.3. The welfare principle projected in section 13 of the HMG Act and section 17 of the Guardians and Wards Act needs to be amplified and spelt out so as to make it explicit that—

(1) where the 'father' has remarried, the custody of the minor, irrespective of the minor's age, shall ordinarily be with the mother. The minor should not be obliged to live with his or her step-mother unless there are exceptional circumstances which shall be recorded in writing.

(See para 4.5.1.)

(2) (a) Where the 'mother' has remarried, a female child should not be made to live with her step-father in order to guard against possible sexual harassment. The Court may consider whether the paternal or maternal grand-parents should be entrusted with the custody of the female child.

(See para 4.5.2.1.)

(b) Where the 'mother' has remarried but the 'father' has not, ordinarily the minor, even if a male child, should not be made to live with the 'step-father'.

(See para 4.5.2.2.)

(c) Where both 'father' and 'mother' have remarried, the court may determine whether to entrust the guardianship and/or custody to the father, the mother or the grand-parents, depending on what the court considers to be conducive to the maximum welfare of the minor in the light of the facts of each case.

(See para 4.5.2.3)

(3) A 'mother' shall not be denied the custody of the minor merely on the ground that the father is in more affluent circumstances or that the mother's economic circumstances are not as good as those of the father.

(See para 4.5.3.)

(4) In applying the welfare principle, the court shall have due regard to the fact that the minor needs emotional support and warmth of the 'mother' who is ordinarily better equipped than the 'father' to impart such emotional support and warmth which are essential for building up a balanced personality.

(See para 4.5.4.)

FOURTH RECOMMENDATION

Grand-parents shall have equal claim in the matter of appointment of guardian of a minor irrespective of whether they are paternal grand-parents or maternal grand-parents.

5.4. In considering the question of appointment of guardian of the person and property of a minor and entrustment of the custody of a minor, the circumstance whether the grand-parents are from the 'paternal' side or 'maternal' side should be disregarded. The paternal grand-parents on the one hand and maternal grand-parents on the other hand shall be treated at par having 'equal' claim to be appointed in this behalf subject to the paramount consideration regarding the welfare of the minor.

(See para 4.6.)

FIFTH RECOMMENDATION

Recognizing that not only a 'father' but also a 'mother' has a claim to the exclusion of others to be appointed a guardian of a minor unless considered unfit by the court.

5.5. Section 19(b) of the Guardians and Wards Act of 1890, which *inter alia* provides that the court will not be authorised to appoint the guardian of the person of a minor whose 'father' is living and is not, in the opinion of the court, unfit to be the guardian of the person of the minor, deserves to be amended so as to accord equal treatment to the 'mother' by incorporating a reference to 'mother' along with that of the 'father'. It should be provided that the court will not be authorised to appoint the guardian of the person of a minor whose *'father or mother'* is living and is, in the opinion of the court, not unfit to be the guardian of the person of the minor, for there is no rational basis for discriminating between the 'father' of a minor on the one hand and the 'mother' of a minor on the other in the context of this provision. A consequential amendment also needs to be made in section 41(e) by substituting the words "father or mother" in place of the word "father" wherever it occurs therein.

(See para 4.7.)

SIXTH RECOMMENDATION

Section 7 of the Hindu Minority and Gurdianship Act relating to guardianship of an adopted son to be amended.

5.6. As at present, section 7 of the Hindu Minority and Guardianship Act, 1956, is applicable in the context of natural guardianship of an adopted son. In view of the enactment of Hindu Adoptions and Maintenance Act which now enables a daughter also to be adopted, the aforesaid provision requires to be recast so as to be made applicable also to the guardianship of an adopted daughter who is a minor. So also the phrase "to the adoptive father and after him to the adoptive mother" needs to be substituted by the phrase "to the adoptive father and the adoptive mother jointly and severally" for the sake of removing the discrimination against women.

(See para 4.8)

5.7. We recommend accordingly.

(M.P. THAKKAR)
Chairman

(Y. V. ANJANEYULU)
Member

(P. M. BAKSHI)
Member

(G.V.G. KRISHNAMURTY)
Member Secretary

New Delhi, Dated the 29th August, 1989.

NOTES AND REFERENCES

CHAPTER II

1. Para 2.2, *supra*.

CHAPTER III

1. *Sheela* v. *Jeevanlal*, AIR 1988, A. P. 275, 277, 278 (August) (Mrs. Amareswari & Bhaskar Rao, JJ).
2. *Bai Tara* v. *Mohanlal*, AIR 1922 Bom. 405.
3. *Saraswati Bai* v. *Shripad Vasanji Ved*, AIR 1941 Bom. 103.
4. *Munnibai* v. *Dhanush*, AIR 1959, Bom. 243.
5. *Chander Prabha* v. *Prem Nath Kapur*, AIR 1969 Del, 283.
6. *Narinder Kaur* v. *Parshotam Singh*, AIR 1988 Delhi 359, 361, paras 5 to 7 (Wadhwa J.).
7. *Sarala* v. *Anandrai*, 17 Guj LR 581.
8. *Radha Bai* v. *Surendra K. Mudaliar*, AIR 1971 Mys 69, 70, 71, paras 6—8 (Malimath J).
9. *Mansa Devi* v. *Makhar*, AIR 1936 Peshawar 207 (Middleton, J.C.).
10. *Bakshi Ram Ladha Ram* v. *Shila Devi*, AIR 1960 Punjab 304, 305 (D. K. Mahajan J.).
11. *Gangabai* v. *Bherulal*, AIR 1976 Raj 153, 155, 156 (V. P. Tyagi, Actg. C. J.).

CHAPTER IV

1. *Nirode Barani Debya and Another* v. *Bholanath Sarkar and Another*, AIR 1915 Cal. 435; In Re. *Gulbai and Lilbai, Minors*, ILR 32 Bom. 50.
2. *Satyendra Nath Maitra* v. *Balram Chakraborty*, AIR 1961 Cal. 206.

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