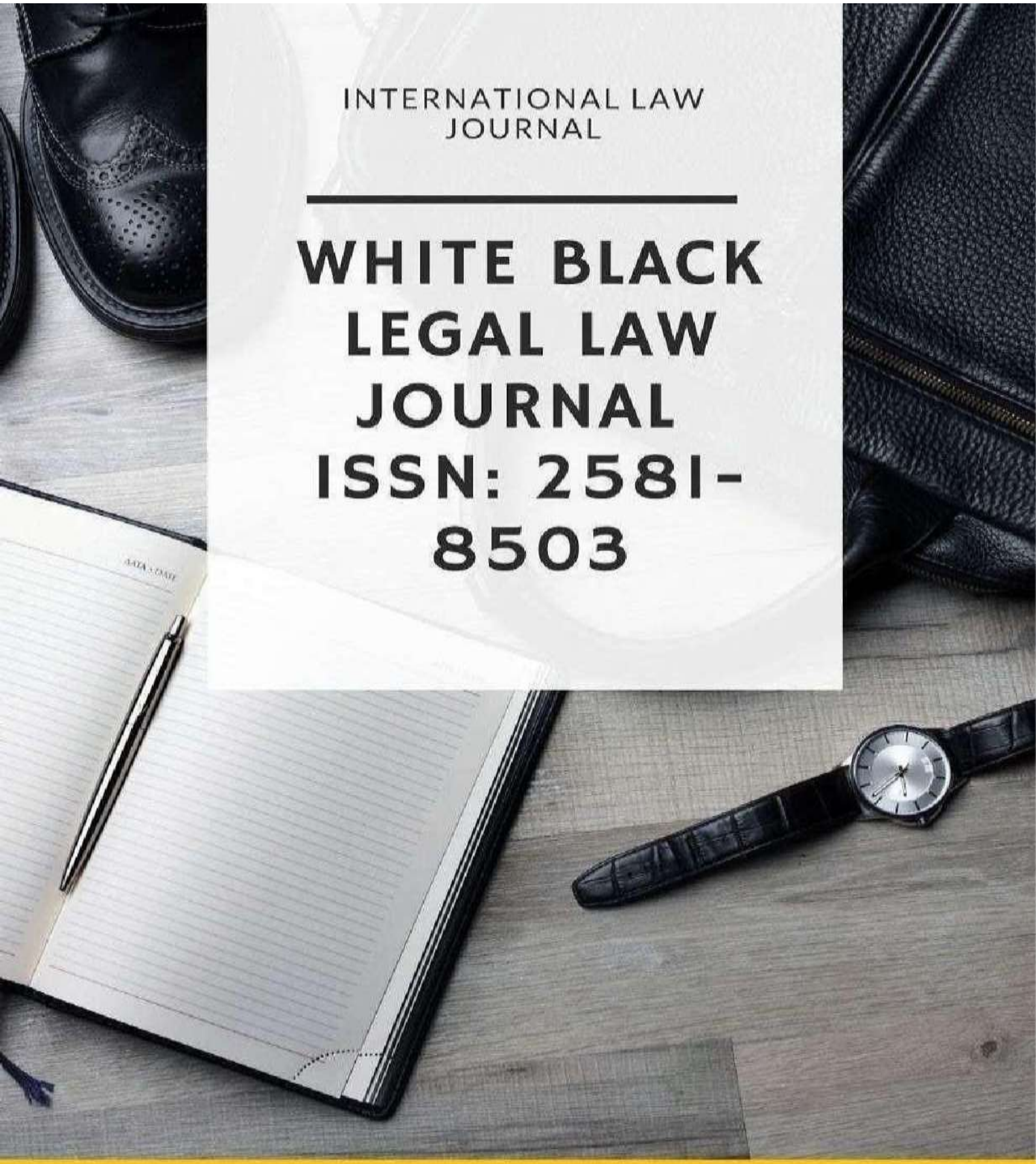

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

BIAS IN INDIAN GUARDIANSHIP LAWS

AUTHORED BY - YASHASHVI AGRAWAL

1. Introduction

In India, family laws are evolving rapidly. It must not be forgotten, however, that the family laws once established during and after the colonial rule were only manifestations of the patriarchal society. These laws were inspired by common law in England and it was believed that men had more knowledge of the world and could take better decisions in comparison to women. Decisions relating to guardianship being one of them. This understanding also stemmed from the fact that since men were the breadwinners of the family. They would be at the liberty of taking decisions for the welfare of their children. As opposed to women who would then be expected to only follow what their husbands decide. Guardianship is the legal right of the legal guardian of a child to make decisions on the child's behalf and look after the child's welfare.

The 2022 Bollywood film *Gangubai Kathiawadi* has a scene where the protagonist 'Gangubai' (who was sold to a brothel) takes the girls born to her fellow sex workers to a nearby school for admission. She offers her name as the mother's name and is forced to give a father's name. Upon which she nonchalantly declares 'Dev Anand' as their father's identities. After much deliberation does the school accept her children. However, the fact that there is no name for a father only shows how patriarchal the current society is. The children in this case bear their mother's identities and not their father's, which is considered to be unacceptable. Children usually inherit their father's name and social identities. It does not matter that a woman bears the child for 9 months and further continues to take care of the child. It is still not enough to impart their identities to their children. In fact, a lot of official document still requires the father's name unless there is a court order or affidavit held by the mother stating otherwise. Such a requirement perpetuates the patriarchal family model. Since, legal parenthood has been defined by the gender roles prevalent in society. It can be said that motherhood is a biological responsibility and fatherhood is a social one. This paper will analyse various legislations governing guardianship and discuss judgements that made significant breakthroughs in combating gender biasness.

2. Legislation

There are various legislations in India that deal with the guardianship of minors according to their personal laws.

2.1 Hindu Minority and Guardianship Act (HMGA), 1956

The HMGA regulated the guardianship of a minor child in Hindu law (under the age of 18)[1]. There are certain provisions under this act which prescribe the guardianship for a minor child. Firstly, S. 6 expands on who a natural guardian of a child would be. Under this section, subclause (a) discusses that the natural guardian of an unmarried minor child would first be his or her father and only after the father, the mother. However, subclause (b) of the same section states that the first guardian of an 'illegitimate' child would be his or her mother and only then the father. Further, S. 7 states that the father will be the natural guardian of and adopted son and the mother after him.

On a bare reading of the statue, one can decipher that the father is given the first right to make decisions for the welfare of his child. In the context of a single mother, this legislation could prove to be a hassle while applying for official documents for a child. However, various High Courts like the Delhi[2], Madras[3] ,Kerala[4] High court allowed single mother's to obtain certain necessary documents without the disclosure of the father's name. Such cases kept in mind the right of privacy which was held in the case of *K.S Puttaswamy v. UOI*[5]. Personal choice which governs the way of life and personal choices are all part of the right to privacy. All these cases emphasised that authorities cannot insist on single mothers disclosing the name of the father. These cases were a step towards eliminating the gender bias which is present in the current legislation.

The 257th law commission report of India suggested the central government to add mother as the natural guardian of the child.[6] It pointed out the problematic nature of the language present in the HMGA. In 2019, a PIL was filed in the Supreme Court challenging the constitutionality of S. 6, S. 7 and S. 9 of HMGA.[7] A bench led by Arun Mishra J wrote to the centre seeking response on

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[1] Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1992 (India)
[2] *Mother's name sufficient for passport: HC* (2016) *The Indian Express*. Available at: https://indianexpress.com/article/india/india-news-india/mothers-name-sufficient-for-passport-hc-2812494/ (Accessed: April 18, 2023).
[3] Sanand S, "Name of Fathers Need Not Be Disclosed in Birth Certificate" (*The Financial Express* July 17, 2018) <https://www.financialexpress.com/india-news/good-news-for-single-mothers-name-of-childs-father-need-not-be-disclosed-in-birth-certificate-madras-high-court/1247775/> accessed April 18, 2023
[4] *X v. State of Kerala* WP(C) NO. 13622 of 2021
[5] *K. S Puttaswamy And Anr. Vs. Union of India* (2017) 10 SCC
[6] Law commission, *Reforms in Guardianship and custody laws in India* (Law com report no. 275, 2015) para 6.35
[7] *Sakshi Bhattacharya v UOI* W.P.(C) No. 001290 - / 2019

this, and yet no changes were made. This matter has been pending ever since.

2.2 Muslim Personal Law

Under Muslim law, the term guardianship is also known as '*Wilaya'*. The guardian of a minor means one who holds the right to supervise the child throughout his or her minority. This right is usually given to the natural father of the child, or in his absence the paternal grandfather of the child. Only the custody of the child belongs with the mother. The decision making powers rests in the hands of the minor's father. Not only this, in case of remarriage, the step-father of the child would be handed over the guardianship responsibilities.

Recent High Court judgements have questioned the constitutionality of the rules of guardianship under the Muslim Personal law[8]. The Kerala High Court in the case of *C Abdul Aziz & Ors. V Chembukandy Safiya & Ors*, held that since the personal laws were silent on the guardianship status of the mother, they could not allow the mother to be the guardian of her child.[9] It further contended that the constitutionality of Muslim Personal law cannot be tested since it is held to be uncodified. [10] The only exception to this rule is that if the children are 'illegitimate', the guardianship of them will be handed to the mother. Unless she decides to remarry.[11] Which in case will be given to the step-father.[12]

2.3 Guardians and wards act.

The Guardians and Wards Act (GWA), 1890, is an umbrella legislation which was enacted to govern the welfare of a minor and protect his or her property rights. This act is in supplement to the personal laws existing in the country and is substantive in nature. Therefore, it does not have an overriding effect on the personal laws in India. It is also governs the guardianship of Christian minors.

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[8] Pratap G, "Muslim Personal Law/ Shariat Can't Be Tested on Anvil of Article 14 Due to Binding Supreme Court Precedents: Kerala High Court" (*Bar and Bench - Indian Legal news*) <https://www.barandbench.com/news/muslim-personal-law-shariat-cant-tested-anvil-article-14-due-binding-supreme-court-precedents-kerala-high-court> accessed April 19, 2023

[9] *C Abdul Aziz & Ors. V Chembukandy Safiya & Ors* RFA No.40/2012

[10] TNN / Updated: Jul 7 2022, "No Bar in Quran, Hadith on Muslim Woman's Right to Be Child's Guardian: HC: Kochi News - Times of India" (*The Times of India*) <https://timesofindia.indiatimes.com/city/kochi/no-bar-in-quran-hadith-on-muslim-womans-right-to-be-childs-guardian-hc/articleshow/92713300.cms> accessed April 19, 2023

[11] Atul Verma, Right of Mother on the Custody and Guardianship of Legitimate & Illegitimate child under Muslim Law (2022), JETIR <https://www.jetir.org/papers/JETIR2206215.pdf> accessed 19 April 2023

[12] *D. F. Mulla, Principles of Mahomedan Law (Gurgaon: LexisNexis, 2013, 20th ed.),*

3. Evolution of jurisprudence

The sex inequality in guardianship laws has been a prominent one throughout history. There is a history of jurisprudence which questions the same.

In 1991 there was a case of a woman named Vandana Shiva who was fighting a custody battle of her minor son against her former husband. Since the law, prior to this case stated that the natural guardian to a minor is his or her father, the respondent's argument revolved around it. He contended that legally, since the natural guardianship is his right, the custody should belong to him[13]. This argument was only a manifestation of the already existing belief that fathers were the natural guardians of the child.

Secondly, in 1995 the case of Githa Hariharan, where a mother was forbidden from buying bonds in her son's name. Her application was returned on the grounds that the natural guardian of the child did not sign it. Thereby implying that the mother is not considered to be a natural guardian[14].

In 1995, the Supreme Court deliberated upon these two cases together since they both addressed the same issues. The judges refused to strike down the entire clause. Instead they chose to go with a different interpretation of S6. As per Anand CJ and M. Srinivasan J. According to them, there was no difference between the title of 'natural guardian' and 'guardian'. The court also held that 'after him' meant that if the father was absent for whatever reason, the mother would then be the natural guardian.[15]

Initially, in society, having a child implied that a father was present. However, over the years, recognition was given to single mothers with 'illegitimate children'. Despite this, the case of ABC v. The State arose. In this case, an unwed woman was faced with a rejection in an attempt to nominate her son as a beneficiary of her assets and insurances. The documents required her to furnish the details of the biological father of the child which she refused to reveal. In furtherance of which, she was asked to submit a court order that named her the sole guardian of her child due to which she filed this case under the GWA. Initially the lower court rejected her petition om the grounds of S11(1)a and S19(b) of the GWA that required the court to serve notice to both parents

[13] *Vandana Shiva v. Jayanta Bandopadhyay AIR 1999 SC 1149*
[14] *Githa Hariharan v. Reserve Bank of India AIR 1999 SC 1149*
[15] Agnes, *Family Law* (Oxford University Press 2011)

before appointing guardian and not appointing a guardian if the father was alive and fit to play the role of a father. She appealed this decision in the Delhi High Court which dismissed her petition stating that 'a natural father could have an interest in the welfare and the custody even if there was no marriage'[16] and hence, her decisions were still being ruled by the fact that the biological father of her child who was no longer in contact with her for years was alive. Finally, she appealed this decision in the Supreme Court which granted her this petition and made her the sole guardian of her child.

The problem with above mentioned cases is that they did not solve the issue of gender bias. The reason why these mothers petitioned for guardianship was so that they could make decisions regarding their children. Especially single mothers where the biological father is not present. It is argued by the courts that nothing but the child's welfare is important[17]. However, when the mother nurtures the child and tries to take a decision for her own child's welfare, she is expected to do so only with the child's father's consent. Despite these rulings, mothers are mandated to get a court order stating that she is the sole guardian of her child and she will be making decisions on his/her behalf. The entire process is a tedious and time consuming one. As it was in the case of *Mathumitha Ramesh v. The chief Health Officer* where a mother conceived a child through intrauterine insemination (a process where the sperm is placed in the uterus of the ovulating woman). And while giving birth, a male acquaintance happened to be present at the hospital with her and his name was added to the birth certificate as the father. The mother approached the authorities multiple times until she had to file a second writ petition before the high court, where the problem was finally rectified. From this, it can be concluded that no matter what, officials and the society needs to attach a male when it comes to important decisions in the life of a female. However, this requirement was modified for women who went through artificial insemination methods and gave birth to children with sperm from anonymous donors. The 'father' column in birth certificates could be left blank.[18]

In 2022, the case of *C Abdul Aziz & Ors. V Chembukandy Safiya & Ors* reiterated that the Muslim Personal Law is silent on the guardianship rights with mother. Countries such as Pakistan and UAE where the official religion followed is Islam, do not allow mothers to hold guardianship of

[16] *Special Leave Petition (Civil) No. 28367/2011, The Supreme Court of India, judgment dated 6 July 2015, para. 3.*

[18] *Clarification issued by Office of Registrar General of India vide letter no. 1/37/2004 VS CRS dated 23-02-2009*

their child, unless they are illegitimate. It also reiterated the point that Muslim Personal law cannot be tested for its constitutionality since it is not codified.[19]

Although single mothers are empowered by the fact that they have raised a child outside the patriarchal sphere of the society, they are still reminded everyday of what may be considered "normal". Guided by these court rulings, various government departments have made changes in their documental requirements. Ministry of External affairs amended the passport rules which allow single mothers including divorced, separated, deserted and parents of children born through surrogacy apply for passports for their children.[20] Even the ministry of finance now either requires the name of both the parents or only the single parent if the other one is not present. However, in this case, the mother must be single for just her name to be on the PAN card. It requires the name of both parents only if the mother is not single. It does not consider situations where mothers may be in judicial separation from their husband.

4. Constitutional validity

The main contention in all these cases is that the mother's right to privacy and dignity is being violated.

Firstly, by compelling the woman to disclose the name of the father of their child, even though the father is estranged. The requirement for a court order to apply for documents must be removed because it still holds fathers as first guardians.

Secondly, a mother's right to bodily autonomy allows her to make decision regarding her body and reproductive functions. By denying guardianship to mothers, this right is being taken away and a direct violation to their right to privacy. Since it is a fundamental right, it is the state's duty to eliminate such discrimination.

Finally, this is a direct violation of Article 15 where the state is prohibited from discriminating based on sex. It is allowed to make positive discrimination to uplift women and children and this is the opposite of this. There is no reasonable classification behind this distinction in contemporary

[19] *Shayara Bano v. The Union of India AIR 2017 9 SCC 1 (SC)*

[20] "Passport Relief for Single Parents, Orphans, Divorcees and Sadhus" (*The Wire*) <https://thewire.in/government/passport-relief-single-parents-orphans-divorcees-sadhus> accessed April 19, 2023

India today. Keeping such a distinction keeps the gendered understanding of legislations.

5. Approaches of the court

Among the various cases of guardianship that are litigated in India, there different types of orders which are passed by the courts

5.1 Joint guardianship orders

Joint guardianship orders have been a new form of remedy given to women fighting for the guardianship in India. This concept was first seen in English Common Law. This decree would be granted to parents who "could cooperate or reasonably contended to cooperate for the benefit of the child."[21] It allows both parents to make decisions for the benefit of their minor children. The Punjab and Haryana High court directed towards the adoption of this remedy for the 'benefit of the child'[22]. It was done in furtherance of the law commission report from 2015 which recommended this solution. This is a step towards achieving equal rights for mothers in India. This concept is also commonly known as shared parenting. It was also clarified in a Bombay High Court judgement from 2014, that joint guardianship is different from joint custody.[23] Both parents, despite their separation were given the right to make decisions for their child but the custody remained with only one of them. This allowed mothers an equal right in parenting.

5.2 "Best interest of child"

The courts frequently use this phrase while deciding case of guardianship and custody. The definition of which is mentioned in the Guardians and Wards Act, 1890. The financial statues morality, and religious welfare. If the child is old enough to form decisions then their preference is always taken into account.

The constitutional validity of such provisions have been challenged repeatedly. However the courts have repeatedly interpreted such provisions differently such as in the case of Githa Hariharan. The rationale behind judgements like this was the "welfare of the child". However, interpreting the phrase 'after the father' as 'in case the father of the child is not present', upholds

[21] *Jussa v. Jussa* (1972) 2 All ER 600
[22] Service TN, "Punjab and Haryana High Court Suggests 'Shared Parenting' for Estranged Couples" (*Tribuneindia News Service*) <https://www.tribuneindia.com/news/punjab/punjab-and-haryana-high-court-suggests-shared-parenting-for-estranged-couples-357141> accessed April 19, 2023
[23] *Mr. Tushar Vishnu Ubale vs Mrs. Archana Tushar Ubale* wp.5403.2015(R)

the judicial patriarchy which was enforced in the 19th century. Or calling natural guardianship for mothers ‘a privilege’ in cases like *ABC v The state*. The impact of which is still prominent in the judiciary and their interpretations. In fact, it gave mothers a tokenistic right of equality. Where their decision would still stand second to their children’s father’s while decision making. The only way that any of these problems can be fixed is by making mothers equal natural guardians as their husbands for their children.