

EXPLAINERINDIA

Explained | On guardianship and adoption of minors

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What are the multiple laws on adoption and custody of minors? What has the panel recommended with respect to the LGBTQI community?



The story so far: A Parliamentary panel has recommended conferring equal rights on mothers as guardians under the Hindu Minority and Guardianship Act (HMGA), 1956 instead of treating them as subordinates to their husband, and has called for joint custody of children during marital disputes. It has also proposed allowing the LGBTQI community to adopt children.

What are the recommendations of the Parliamentary panel on guardianship and child custody?

The department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice tabled its report on August 8, 2022, in both Houses of Parliament on the 'Review of Guardianship and Adoption Laws'. In its report the committee has said that there is an "urgent need to amend the HMGA (Hindu Minority and Guardianship Act, 1956) and accord equal treatment to both mother and father as natural guardians as the law violated the right to equality and right against discrimination envisaged under Articles 14 and 15 of the Constitution."

In cases of marital dispute, the panel says there is a need to relook at child custody which is typically restricted to just one parent where mothers tend to get preference. It says courts should be empowered to grant joint custody to both parents when such a decision is conducive for the welfare of the child, or award sole custody to one parent with visitation rights to the other.

On adoption, the Committee has said that there is a need for a new legislation that harmonises the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Hindu Adoptions and Maintenance Act (HAMA), 1956 and that such a law should cover the LGBTQI community as well.

What does the law say on guardianship? How do courts grant child custody?

Indian laws accord superiority to the father in case of guardianship of a minor. Under the religious law of Hindus, or the Hindu Minority and Guardianship Act, (HMGA) 1956, the natural guardian of a Hindu minor in respect of the minor's person or property "is the father, and after him, the mother: provided the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."

The Muslim Personal Law (Shariat) Application Act, 1937 says that the Shariat or the religious law will apply in case of guardianship according to which 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 though the father's right to general supervision and control exists. The concept of Hizanat in Muslim law states that the welfare of the child is above all else. This is the reason why Muslim law gives preference to the mother over the father in matters of custody of children in their tender years.

The Supreme Court's landmark judgment in *Githa Hariharan vs Reserve Bank of India* in 1999 challenged the HMGA for violating the guarantee of equality of sexes under Article 14 of the Constitution of India and the court held that the term "after" should not be taken to mean "after the lifetime of the father", but rather "in the absence of the father". But the judgment failed to recognise both parents as equal guardians, subordinating a mother's role to that of the father. Though the judgment sets a precedent for courts, it has not led to an amendment to the HMGA.

The panel's proposals on guardianship have been made by the Law Commission of India in its 257th report on "Reforms in Guardianship and Custody Laws in India" in May 2015 as well as its 133rd report in August, 1989 on "Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle"

What about cases of marital disputes?

In cases of marital disputes, some courts such as the Punjab and Haryana High Court and Bombay High Court have framed rules to grant joint custody or shared parenting. But senior lawyer Anil Malhotra says instead of this “patchwork” there is a need to amend the law, including the Guardians and Wards Act, 1890 to introduce concepts such as joint custody.

Can queer and transgender people adopt children in India?

The Adoption Regulations, 2017 is silent on adoption by LGBTQI people and neither bans nor allows them to adopt a child. Its eligibility criteria for prospective adoptive parents says that they should be physically, mentally and emotionally stable, financially capable and should not have any life-threatening medical condition. Single men can only adopt a boy while a woman can adopt a child of any gender. A child can be given for adoption to a couple only if they have been in a marital relationship for at least two years. The HAMA which applies to Hindus, Sikhs, Jains and Buddhists allows men and women to adopt if they are of sound mind and are not minors. Activists say LGBTQI people who seek adoption face institutional discrimination because of stigma. Therefore, the law should be amended to include them as eligible candidates including when they apply as non-single parents such as when they are in civil unions or married for which there is no legal recognition in the country as yet even though the Supreme Court legalised gay sex in 2018.

THE GIST

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