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Queering Guardianship: Moving Parenthood from Status to Care in *Githa Hariharan v Reserve Bank of India* (India)

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Abstract

In *Githa Hariharan v Reserve Bank of India* (1999), a provision of the Hindu Minority and Guardianship Act 1956 was challenged before the Supreme Court of India on the ground that it violated the constitutional guarantee of equality since it stated that the father is the "natural guardian" of a minor, and the mother comes "after him". The Supreme Court held that "after" does not mean "after the death of the father" but rather "in the absence of" the father, including situations where the father is unwilling, incapable, indifferent, or has abdicated responsibility. This holding, however, ironically reiterated the primacy of the father over his children's guardianship and remains the position of law to date. This rewritten judgment re-imagines the case from a queer lens. It highlights the problematic prevalence of the father/mother binary within parenthood laws in India, contests the assumption of a bionormative parental unit, and refutes the idea that guardianship should flow from gendered parental roles. It illustrates how Indian constitutional law has long had the tools to "queer" guardianship and that courts often choose interpretive restraint, not because of doctrinal limits but because of a failure of moral imagination regarding essentialized gender identities and the gendered division of labour. The rewritten judgment envisions an alternative, relational conception of guardianship centred on actual decision-making and caregiving.

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† For the first part, see *Amicus Curiae* 7(1) (2025) 133-339, Special Section: Queer Judgments.

This affirms equality between heterosexual parents while creating space to recognize same-sex parents, non-biological caregivers, and trans parents whose legal gender does not map onto mother/father, and chosen-family structures.

Keywords: guardianship; mother; father; equality; caregiving; discrimination; gendered parental roles; bionormative.

[A] INTRODUCTION

Is only a father a capable guardian of a child? The Supreme Court of India implicitly answered this in the affirmative in *Githa Hariharan v Reserve Bank of India* (1999). A guardian is "a person who has the legal right and responsibility of taking care of someone who cannot take care of himself or herself" (Cambridge University Press (CUP) nd), a duty that lies primarily with parents. Yet, the Court affirmed the rule of preference in section 6(a) of the Hindu Minority and Guardianship Act (HMGA) 1956, which gives "fathers" priority over "mothers" as natural guardians of a minor boy or unmarried girl. A three-judge bench upheld the provision by reading "father, and after him, the mother" to mean "father, and in his absence, the mother"—an interpretation it believed gave both parents equal say and did not offend the constitutional guarantee of equality and non-discrimination.

In this article, we imagine the case reaching the Supreme Court in 2026, and we decide it along with the rest of the original judges by rendering a dissenting opinion. In line with the Queer Judgments Project (Ferreira & Ors 2025), we queer the concepts of mother, father, motherhood, and fatherhood within Indian law and hold that guardianship *vis-à-vis* parenthood should be based on what a parent does, rather than who a parent is, or their gender or sexual identity.

Our rewritten judgment references Indian jurisprudence till date and adopts a critical queer method (Fischel 2019). Such a method does not proceed from a pre-decided ideological position but interrogates how ideas of mother, father, motherhood and fatherhood are constructed, disrupting established cis-hetero-patriarchal norms. Methods are queered when we use the tenets of queer theory to tweak or explode what is possible with existing procedures, "making strange the otherwise commonplace; interrogating alternate possibilities for worldmaking and livability; disrupting ideals of stability, rationality, objectivity, and coherence; rethinking empiricism and our assumptions about data; and deconstructing rather than reifying social constructs" (Ghaziani & Brim 2019: 15; McDonald 2017).

Within this method, it is the process that matters: questioning the discursive ideas of heteronormativity, gendered division of labour, and gendered subjectivity that inform guardianship and parenthood, and recasting these from a lens of gender-inclusive and queer-inclusive equality. Judgments in India rarely name their method explicitly, whether standpoint (socialist, feminist, queer, anti-caste) or interpretive (textualist, originalist, purposive, transformative). Our rewritten judgment departs from this general approach by naming a queer method at the outset. While our judgment is written from a savarna gaze, we acknowledge that class and caste significantly influence queer positionalities and queer parenthood, a gap that deserves more attention in the literature generally.

Deciding this issue in 2026, we rely on scholarship produced till date. We follow the Supreme Court that has itself engaged feminist theory, intersectionality, and queer theory in its reasoning (*Navtej Singh Johar v Union of India* 2018; *Lt Col Nitisha v Union of India* 2021; *Patan Jamal Vali v State of Andhra Pradesh* 2021; *Supriyo v Union of India* 2023). Some of our reasoning may meander into general issues of Indian law and society rather than sticking closely to the question at hand; however, this too is not new to Indian judgments. Judges, especially in the Supreme Court, routinely spend pages behaving like academicians before arriving at the actual legal propositions near the end. Even the marriage equality judgment, in both majority and minority decisions, expends its energy across 100s of pages establishing that (a) queer people and queer families are not "abnormal"; (b) queer persons are already in relationships and have families with children, and how lack of legal recognition affects them; and (c) varied forms of discrimination against queer people and families exist in society and law, which needs to be redressed.

Judges have also not shied away from unique ways of writing on queer issues. Justice Kaul, in his marriage equality dissent, referenced a Jon Bon Jovi song; Justice Anand Venkatesh of the Madras High Court, in a *habeas corpus* petition of a runaway lesbian couple, attached his own therapy report, having sought counselling from a queer-affirmative counsellor to better understand LGBTQIA+ perspectives before adjudicating. Such judgments draw comprehensively on petitioners' anecdotes, stories of queer and alternative families, and news reports and academic pieces chronicling lived realities. Our queer judgment, which incorporates these sources too, is part of this tradition.

With this opinion, we hope the Court displaces any weight given to the gender identity or sexual orientation of the parent for the purposes of guardianship, and instead asks whether they are fulfilling the responsibilities of what it means to be a parent.

[B] IN THE SUPREME COURT OF INDIA

WP(C) No 489 of 1995 and WP(C) No 1016 of 1991

Appellants: Githa Hariharan and Ors & Anr

v

Respondent: Reserve Bank of India (RBI) and Ors

Hon'ble Judges/Coram: Dr A S Anand, CJI, M Srinivasan, U C Banerjee, J, and Anonymous, J.

Githa Hariharan and Ors & Anr v RBI and Ors

JUDGMENT

ANONYMOUS, J (for themself)

1. Having read the judgments authored by the Chief Justice and Justice Banerjee, I regret my inability to agree with the same. While I understand the importance of judicial consensus, I defer to Justice Hughes's opinion (Hughes 1928) on this:

> A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

2. The question before us is quite straightforward: is section 6(a) of the HMGA 1956 and section 19(b) of the Guardian and Wards Act (GAWA) 1890 violative of Articles 14 & 15 of the Indian Constitution? Since the Parliament amended the GAWA 1890 subsequently in 2010, the lone question surviving is that of the HMGA 1956. The impugned provision states:

> 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.

3. A literal interpretation—as undertaken by the respondents here—would mean that the mother can be a guardian only "after the lifetime" of the father. Learned counsel for the petitioners argue that the provision provides preference and primacy to the father as

compared to the mother for a Hindu minor and violates Articles 14 and 15 of the Constitution. I believe the petitioners' arguments to be meritorious and detail my reasoning as follows.

4. My sibling judges have upheld the validity of the provision by incorrectly reading "after" as "absence" ie, the mother can be the guardian of a child if and only if the father is absent:

> If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognised natural guardian, can act validly on behalf of the minor as the guardian (CJI Anand, paragraph 10).
>
> "after" does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as "in the absence of" — be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word "after" as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation, viz. welfare of the child (Banerjee J, paragraphs 46–47).

I respectfully disagree with the reasoning espoused by the majority, since the interpretation continues to facilitate discrimination and perpetuate stereotypes on the basis of gender and sexuality.

[C] *STATUS QUO*: GENDERED DIVISION OF LABOUR WITHIN CHILDCARE IN INDIA

5. There are three propositions which stem from the majority's interpretation and the (problematic) organization of parental rights and obligations in India more generally:

   i. Within the heterosexual marital dyad (which is the natural family form assumed by the law), the father receives predominance over the mother.

   ii. This legal position arises from the conception of the role of fathers and mothers. The fathers are seen to be the breadwinners, the protectors, and the decision-makers. The mothers are seen to be the nurturers, the caregivers, and the ones undertaking the day-to-day rearing of the child.

iii. This gendered division of labour carries through into other statutes as well. Structurally, the woman is cemented as the one mothering the child, whereas the man does not play an active role in social reproduction.

6. Within Indian parenthood and custody law, it has been made clear that fathers are the legal guardians of their children, but mothers have custody of their children, ie, they are expected to perform the day-to-day responsibilities of caring for their children (Law Commission of India 2015; Bajpai 2017; HMGA 1956, section 6; see also GAWA 1890, section 41). The HMGA 1956 recognizes the primacy of the male parent as the one who exercises power over the child. Similarly, in Muslim personal law (Mulla 2012; *Gulamhussain Kutubuddin Maner v Abdulrashid Abdulrajak Maner* 2000), the father is the guardian of the child while the mother has custody up to a certain age. The mother typically is not the guardian of the child in the lifetime of the father. This is compounded by the fact that the concept of joint guardianship by two parents does not exist in India.

7. This form of reasoning that valorizes the mother as the primary carer of children insidiously finds its way into the overall legal ecosystem. While there is a comprehensive maternity leave regime in India, there is no provision for paternity leave as a matter of right for all workers in India. Only fifteen days of paternity leave is available to government servants, which is anyway applicable to less than 1% of India's population. Further, even if we consider this paternity leave, women are entitled to twenty-six weeks of maternity leave and, in comparison, the fifteen days of leave available to this narrow segment of men is shameful. This sends a message that we do not expect fathers to participate in childcare, and worse, implies that it is certainly not their duty to undertake caregiving responsibilities (*Hamsaanandini Nanduri v Union of India* 2026).

8. Such stereotypical reasoning carries through even into otherwise progressive, well-intentioned judgments that cement the rights, or rather, duties of mothers. For example, recently, the Supreme Court affirmed the mother's constitutional right to breastfeed in public (*Maatr Sparsh, An Initiative by Avyaan Foundation v Union of India* 2025) and ordered that rooms with feeding stations and changing tables must be available in all court complexes to cater to nursing mothers and mothers with infants (*Rajeeb Kalita v Union of India* 2025). While these judgments are important and mandate public infrastructure to facilitate childcare, they once again inadvertently perpetuate the long-standing gendered stereotype that infant care

and nutrition is exclusively a mother's responsibility (Balaji 2025). Fathers would not even be allowed into such feeding rooms which are meant only for mothers, thus also making the process of childcare isolating for women. Judgments such as *Maatr Sparsh* (2025) and *Rajeeb Kalita* (2025) are crucial, but they must be accompanied by structural changes enabling paternity leave, father-led care for children, and symbolic messaging that the duty of childcare must not fall solely on women.

9. While the gendered division of labour is problematic within a heterosexual parental dyad, the structure of the dyad itself creates disadvantages to a range of parental units, especially to queer parents.

   First, if mothers and fathers are thought of as performing different functions, this gives rise to the incorrect assumption that you need one of each kind for the complete, holistic development of a child. This jeopardizes the chances of single parents having children by adoption, assisted reproduction, or surrogacy, which is only allowed in a restricted manner in India (PTI: 2020). This is especially so in the case of queer individuals, who can only adopt children individually and not as a couple. Normatively, this claim poses a threat to the claims of joint adoption, assisted reproduction and surrogacy by queer couples as well.

   Second, creating gendered roles within parenting is problematic for men and women who are boxed into certain categories, but there are far more damaging consequences for transgender, non-binary, or gender-fluid individuals who may simply not be legible to the state as parents.

10. The stereotype that fathers are breadwinners and mothers are the caregivers, and that there is a hierarchy between them affects all individuals who wish to be parents, not just heterosexual individuals.

Father	Breadwinner, Protector
Mother	Caregiver, Nurturer
Child	Subject of parenthood

Status quo in law in India.

The problem with this construction is that when it is embedded into family law, it automatically casts suspicion on any parental unit

that does not look like this. This is because if it was a single mother or a single father raising a child, there is automatically a notion of deficiency attached to such parenting. Because the parent (assuming they are cisgender) would be thought as of only being able to fill either the role of father or mother. Thus, the law would automatically not prefer individual parental units, and this assumption is reflected throughout in family laws in India dealing with parenthood. In India, the Central Adoption Resource Authority (CARA) Guidelines lay down the criteria of persons who can adopt children and the order of priority among them. The Guidelines indicate that even though single men and women can adopt, the ideal parental unit would be the able-bodied, financially well-off, middle-aged heterosexual married couple, who had at least two years of marital stability (Adoption Regulations 2017). Similarly, with respect to surrogacy, it was proposed that only heterosexual, married couples could avail of surrogacy to have a child before severe public criticism. This led later to the inclusion of widows and women divorcees as possible commissioning mothers within the law but did not open it up to other parental units. The implication relating to the unfitness of single parents is normatively problematic, unfair, and does not practically reflect the lived realities of many children in India who are effectively brought up anyway only by a single parent, or even alone by an aunt, uncle, or grandparent.

11. Similarly, with respect to queer parents, the same issue would arise. The Supreme Court of India decided in *Supriyo v Union of India* (2023) that the CARA Guidelines were not unconstitutional for excluding queer parents as prospective adoptive parents. While the Union of India also had moral issues with queer parenthood, one of the arguments they made related to the competence of two male or female parents to raise a child:

> Both the father and the mother have a significant and unique role in the upbringing of children. In non-heterosexual unions, the child born out of surrogacy or artificial reproductive technology or adopted by the couple would feel the absence of either a father or a mother. The State does not grant legal recognition to homosexual unions in the form of marriage to protect the interest of the children. This is a legitimate State interest. The petitioners have not submitted sufficient data to back their claim that the interest of a child brought up by a non-heterosexual couple is protected. (CJI Chandrachud, paragraph 42(j), reproducing the Union's argument).

This is the fear of the state, that a child will either have two fathers who do not provide adequate caregiving, or two mothers who will not be able to provide for or protect the child adequately. Further, since mothers are not assumed to be capable enough to be the legal guardians of their child, this is the outcome imagined by the state:

(No breadwinner/protector)			
Mother 1	Caregiver, Nurturer	**Mother 2**	Caregiver, Nurturer
Child			

(i) If a child has two mothers.

or

Father 1	Breadwinner, Protector	**Father 2**	Breadwinner, Protector
(No caregiver/nurturer)			
Child			

(ii) If a child has two fathers.

This outcome appears unsatisfactory because the child is seemingly deprived of one of the facets of parenthood. However, this is only the case if we assume that men and women are indeed independently incapable of fulfilling the multiple, complex requirements of being a parent.

12. Thus, the reasoning in *Githa Hariharan v RBI* and in the laws relating to parenthood continue to perpetuate stereotypes that harm everyone. Firstly, while the dominant construction ...

Father	Breadwinner, Protector
Mother	Caregiver, Nurturer
Child	Subject of parenthood

... harms mothers *vis-à-vis* being legal guardians of their child, it also harms fathers in custody battles, paternity leave, and generally affects structured opportunities for them to care for their children and spend time with their children. Secondly, this logic harms queer couples wishing to have children. A similar logic regarding gender roles was (and in many places, is) used to delegitimize queer

relationships, as it was inconceivable that two people of the same gender could love each other, be in a relationship and start a family together. Finally, this logic harms single parents. Although the law provides for them to have legal parenthood in a limited capacity (unless it is their own biological child birthed naturally), they will also be thought of as inferior to a heterosexual married couple and are not prioritized in legislations that provide alternative routes to parenthood (adoption, surrogacy, etc).

[D] DECONSTRUCTING MOTHER, MOTHERING, FATHER, AND FATHERING

13. The way to challenge this construct is to challenge the notion of the gendered division of labour. We need to deconstruct the narrative that there is something inherent to parenthood *vis-à-vis* the gender of parents that necessitates a "father" and a "mother". In this regard, let us examine the linguistic and logical construction of "mother" and "father". In the English language, the terms "mother" and "father" are not just nouns. They are verbs as well. (To) *mother* (verb) is defined varyingly as:

    i. "to treat a person with great kindness and love and to try to protect them from anything dangerous or difficult" (CUP nd);

    ii "to care for somebody/something because you are their mother, or as if you were their mother" (Oxford University Press (OUP) nd);

    iii. "to care for or protect like a mother" (Merriam-Webster nd); and

    iv. "If a woman mothers a child, she looks after it and brings it up, usually because she is its mother" (Collins nd).

    Thus, inbuilt into the definition of mother as a verb is the act of caring, protecting, or nurturing another individual.

    On the other hand, (to) *father* (verb) is defined as:

    i. "to become the father of a child by making a woman pregnant" (OUP nd);

    ii. "beget; to be the founder, producer, or author of" (CUP nd); and

    iii. "to procreate or generate (offspring); beget" (Merriam-Webster nd).

    Here, inbuilt into the definition of "father" is to produce, and to beget; the action attached to the verb form of father ends there.

14. Two implications arise in the context of section 6(a) which states that the "father, and after him, the mother" shall be the guardian of the

child. The first is that the mother is always considered subordinate to the father because she has no independent existence in law. Under section 6(a), the mother is *fathered* as a guardian only *through* the father, in his shadow, in his absence. The first step of this test is to always look for a father; the mother is rendered invisible, unbirthed at that point. Only when the father is not there, is absent, is dead, or inept or unable to take care of the child, does the second step kick in—he *fathers* the mother as the legal guardian. The mother-guardian does not exist on her own, she comes into being and is begotten *by* the father. Section 6(a) thus makes the mother's existence logically, chronologically, and discursively conditioned upon the father's existence (actually, the lack thereof). So, within the dyad itself, the positioning of the mother and father is discriminatory because of the hierarchy between them.

15. The second implication is that law considers women as mothers and men as fathers. But is "mothering" something that can only be done by women? Is "fathering" something that can only be done by men? Firstly, the existence of single parents directly challenges this notion. Barbara Risman's seminal article in 1986 titled "Can Men 'Mother'?" based on a research study conducted on a sample size of almost 150 single fathers concluded that:

> Most men did not depend on mother, girlfriend or housekeeper to perform the stereotypically female tasks of cooking or cleaning. Over 80% of all fathers reported that they were personally responsible for the varied tasks of housekeeping. Social-psychological theorists (e.g., Chodorow, 1978) often suggest that a core attribute of mothering, but not fathering, is the ability and desire to develop intensely intimate relationships with young children … [But] in general, these men believe their children share almost all of their emotions … The situational demands of role requirements influence adult behavior and lead men to mother when they have no wives to depend upon. Despite male sex role training, fathers respond to the nontraditional role of single parent with strategies stereotypically considered feminine (Risman 1986: 95-102).

Single fathers represent just the first bastion of the attempt to challenge gendered associations of "mothering" and "fathering". When we study the experiences of queer parents in other jurisdictions and even in India, it is clear that having two parents of the same gender or having parents who are not cis-heterosexual does not in any way present a lack of mothering or fathering. Rather, to put it simply, parents take up the role of being parents (ie, according to the *Cambridge Dictionary* (CUP nd), "to raise a child as their parent"). Timothy Biblarz and Judith Stacey noted that, while in lesbian

couples children seemed to receive a "double dose of motherhood", for the parents themselves, the women took on both the nurturing and the economically providing role—thus fulfilling the presumed role of both the father and the mother. The more important conclusion drawn by the authors in the case of gay fathers is that: "The slim body of research on gay male coparents suggests they do not provide a double dose of 'masculine' parenting. Instead, they also appear to adopt parenting practices more 'feminine' than do typical heterosexual fathers" (Biblarz & Stacey 2010: 3-22).

Anecdotal evidence from queer couples in India suggests the same. In India, before the Surrogacy (Regulation) Act 2021 was enacted, queer couples could have children through commercial surrogacy. Even now, a queer person can singly adopt a child *de jure*, but *de facto* the child may be raised not only by their legal parent but the parent's queer partner as well. Snippets of conversations with queer parents in India break down the association of woman with mother/ing and men with father/ing:

> Sougata and Mayank from Bangalore state, "Two men who had never held infants suddenly learned about feeding, burping, and spent sleepless nights over it … Even relatives who had once been distant began to see us simply as parents, and no different from other fathers and mothers they had known" (Subramanian 2025).

Two sets of gay dads raising their kids in India were interviewed by *India Today*. When asked about the differences between traditional versus gay parenting, they all echoed the same first principle that it is the act of loving the child and not the gender of the parent which matters for parenting (*India Today* 2023).

> "The gender is not so important"; "You know, there is this notion that a mother and father are needed for the child, but many parents in India are brought up by their aunts or grandparents"; and "A child needs a loving set of parents. In our case there are two fathers, but a single mother or a single father and a baby is also a happy family right" (*India Today* 2023).

In Pooja Pande's book *Momspeak*, where she chronicles the stories of mothers in India (queer mothers, hijra mothers, sex worker mothers etc), she speaks to a lesbian couple who jokingly state that one mother is the more "hospitaly one" whereas the other is not (Pande 2020). This shows that perhaps, within queer families, divides can happen along more practical lines such as the "hospital" parent or the more "strict" parent (Bhayana 2026), which are pretty removed from the concerns of the gendered division of labour within parenting.

16. The lines of mothering and fathering are even more blurred when it comes to trans parents. Kate Henley Averett asks:

> When a parent transitions gender, does their parenting transition as well, from "mothering" to "fathering" or vice versa? What role does reproductive capacity play, such as in cases where transgender men carry, give birth to and/or chest-feed their children (Walks, 2017; Lee, 2018), experiences that "[encourage] us to rethink the legal and social definitions of what it means to be a father" (Ryan, 2009: 139)? How do genderqueer and non-binary parents experience their parenting in relation to the binary terms "mother" and "father"? How do their children experience being parented? (Averett 2021: 284-304).

17. There are three interesting cases in India which shed some light on this. The first refers to a divorce in India on grounds of gender dysphoria, as the partner assigned female at birth within the marriage, having birthed two children, being known as their "mother" for the first few years of their life, finally came out as a trans man at the age of 34. Fred says:

> Coming out reshaped every relationship. But the harder question was personal: what about his children? They grew up alongside his transition, supported by family and therapists who explained gender in age-appropriate ways. "They would often correct my parents," Fred recalls. "'Call him Fred. Don't call him daughter.'" Today, his nieces and nephews call him "Fred Papa." His children call him "Appa (father)" (Chandra 2026).

Fred's journey of parenting did not change with his gender identity—he continues to cook, pick his children up from school, play with them, and nurture them in the same ways. Is this mothering, fathering, or neither and something completely unique?

18. The second case is of the hijra mothers in India. The hijra community is a traditional, particular socio-economic trans-feminine presenting cultural community in India. There are several instances of hijra women adopting abandoned children, runaway or excommunicated transgender children, and caring for them in ways that their natal family could not or did not.

A reported interview with a Hijra woman about her hijra guru:

> "Your guru had adopted a child?"
>
> "Yes. A boy."
>
> "Was that what you meant when you called her an 'honest mother'?"
>
> "Yes … One day, a woman walked into our home with a baby boy and handed it over to Rano. It was a baby born out of infidelity. I

> think she knew she wasn't fit to raise a child when she said Yes. After everything you go through as a transgender in this society, you become too obsessed with independence and freedom in the Hijra community here that it is difficult to let go of the self-centered lifestyle and be responsible for another human. But she also knew what she was doing. A homeless child needed affection, and she was financially capable of providing for him. The soft side of her that not many had seen was what brought her to terms with motherhood. She was a proud parent who proved no law could keep a passionate mother away from a child who needed love."
>
> "What happened to the child after [your guru] died?"
>
> "He was taken care of by a sister-chela of mine in the family I sought after Rano was gone … He graduated from university and is a Physical Education teacher today. He is married, and the family lives together in Paharganj. Their home is full of photo albums from his childhood and their memories as a family."
>
> I smiled through tears. Madhuri smiled back.
>
> "It was all because of Rano that an unwanted baby did not meet the disastrous fate of being killed. He is a well-educated gentleman with a happy family: him, his wife, and a Hijra mother." (Gulati 2022).

This further complicates the idea of mothering as not only does it separate the idea of mothering from the biological mother, it further removes it also from the legal parent undertaking the mothering. This kind of love and nurturing of a child arises solely from the bond with the child—in law, the hijra guru will not even be seen as the parent of the child. Does this not say something about *what* parenting is, rather than *who* a legal parent is?

Even within the adult hijra community, which is organized both like a family and a business setup, with inter-generational hierarchies but also teacher–disciple hierarchies, one can observe a matriarchal organization of households. Within the hijra community, members "call one another *nani* (grandmother), *dadnani* (great-grandmother), *mausi* (mother's sister) … or *amma* or *ma* (mother)" (Saxena 2011: 55). "By claiming motherhood, hijras have re-appropriated the gender of the term mother by making it trans-inclusive, third-gender inclusive, and non-binary inclusive" (Goel 2018). Further, the hijra gharana setup also offers a space for the shelter and livelihood of trans children and minors (Patel 2024), which makes it an important institution to consider in the context of guardianship.

19. Finally, the third case is of a trans couple from Kerala (*Zahhad & Ors v State of Kerala* 2025), Zahhad (a trans man) and Ziya (a trans

woman), who had a baby naturally, carried and delivered by Zahhad. The authorities had initially registered Ziya as the father and Zahhad as the mother. They petitioned the authorities to get this changed "due to the unique circumstances where the child's biological mother identifies as 'male' and the biological father identifies as 'female'" (Gahatraj 2023). Upon denial, they approached the court and their prayer was to both be registered on the birth certificate simply as the "parents" of the baby. The Kerala High Court granted them relief, following *National Legal Services Authority (NALSA) v Union of India* (2014) (the Supreme Court judgment recognizing the rights of transgender persons in India) and the consequent Transgender Persons (Protection of Rights) Act 2019, *Deepika Singh v Central Administrative Tribunal (*2022) (where the Supreme Court held that law must be inclusive of atypical families), and *Badshah v Urmila Badshah Godse* (2014) (where the Supreme Court introduced the concept of "social justice adjudication").

> The concepts such as, the transgenders leading a life together as a family as we normally understood, having their own children, getting the names of their children registered under the provisions of the Registration of Births and Deaths Act etc., were something the law makers probably not anticipated at the time of its enactment. Therefore, these are the changes that occurred in the Society, post enactment of Act, 1969, which has got the statutory recognition and also their gender based individual status, identity and rights were upheld by the Hon'ble Supreme Court as well. … If a certificate as sought by the petitioners, advances the welfare, interests and the rights of the petitioners or the class/category they fall in, particularly when their rights originate from the Articles of the Constitution of India, without offending any of the rights of the 3rd parties and without doing violence to any statutory provisions, this court need not hesitate to step in and to issue appropriate directions to issue a certificate to the petitioners (Justice Rahman; paragraph 24).

Here, Ziya and Zahhad challenge the biologically presumed role divisions of a mother and a father.

20. It is very often High Courts in India that act as a beacon of light for even the Supreme Court. We have much to learn from this High Court's approach, as we do from the lives of queer parents themselves. All these examples of parenthood show us that social reality is far ahead of the law. It is now the law's turn to catch up. Especially in alternative families, which are already vulnerable in society, an added axis of vulnerability comes from the lack of legal protection. Further, it might become doubly difficult to address issues of harm

and safety that might arise within these alternative families (Moudgil 2022), unless they are *a priori* recognized by the law.

21. To conclude this discussion, it seems to me that deconstructing mothering and fathering and focusing instead on the action of parenting, when it comes to guardianship, is useful in three ways: (i) it opens the door to gender-neutral references to parents, which matters for trans parents; (ii) it opens the door to the recognition of queer couples and single parents as equally capable parents; and (iii) for the purpose of the case at hand, it supports the conclusion that guardianship should turn on the doing of parenting rather than the being of a parent, ie, supporting the feminist-egalitarian argument that mothers are in no way lesser than fathers and should not be treated as such within the law. Deconstructing mothering and fathering thus directly impacts the legal construction of a "mother" and a "father". Focusing on the care required for a child lets guardianship attach to whoever actually performs the parenting, regardless of a parent's gender or sexual identity. This then helps us answer the issue at hand relating to section 6(a) of the HMGA 1956. Just as gender should not determine parental fitness or capacity for queer and trans parents, it should not determine it for mothers within heterosexual marriages either.

[E] CONSTITUTIONAL VIOLATIONS OF THE EQUALITY GUARANTEE

22. Now that we have taken this reasoning to its logical conclusion, the Article 14 and Article 15 tests below independently confirm this reading, that for the purposes of this case, mothers are in no way lesser than fathers.

Violation of Article 14

23. Article 14 places an obligation on the state not to deny to any person "equality before the law and equal protection of the laws". This translates to treating equals equally, and those who are not equal, unequally. The primary test under Article 14 is the reasonable classification test (*Anwar Ali Sarkar v State of West Bengal* 1952; *EP Royappa v State of Tamil Nadu* 1974; *Association for Democratic Reforms v Union of India* 2024). The reasonable classification test states:

> (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation. There must, in other words, be a causal connection between the basis of classification

> of people into different groups with different treatment and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable" (per Chandrachud J in *Navtej Singh Johar v Union of India* 2018: paragraph 59).

It is surprising and, at the same time, concerning that both the majority and concurring judgments do not undertake an in-depth examination of the violation of Article 14 and its tests.

24. According to me, section 6(a) creates an unreasonable classification between fathers and mothers, which is not founded on any intelligible differentia. The phrase "father, and after him, the mother" creates a hierarchy between parents based on their gender and affords preference to the father over the mother. The classification herein between parents based on their gender is not premised on any intelligible criteria, as discussed in depth above. Rather, the classification presumes a discriminatory assumption that fathers are better-equipped or, worse, *prima facie* entitled to be guardians than mothers and, thus, must get primacy in the order of guardianship. Further, the majority judgments—by reading "after" as "absence"—subject a mother's guardianship to the indifference of the father who continues to be retained as the "primary" guardian. A woman can thus be considered a guardian, only if men seemingly reject such a role, which is out of her control.

25. Moreover, this classification does not have a rational nexus to the objective sought to be achieved by the legislation. It is imperative to discern the ostensible purpose, that is the purpose claimed by the state and the real purpose that is the true purpose identified by courts. The true purpose behind this provision of guardianship is to ascertain and appoint a "reasonable manager" to administer the estate and take care of a minor's person and property till they are able to do it themselves. This provision can be traced to the colonial times when the British wanted to acquire/manage land and collect revenue from owners who might be Hindu male minors. Guardianship was comfortably "placed at the intersection of three separate notions, i.e., property, education and gender" (Punj & Samarnath 2021).

26. This classification between fathers and mothers has no rational nexus to this objective. Women are as competent as men to administer estates and take care of a minor's person and property till they are able to do it themselves. There can be no argument mounted either questioning the competency or comparing the efficiency between

women (ie, mothers) handling estates or being effective guardians as compared to men (ie, fathers) (Halder 2005). Halder identifies that:

> Following the British regulations for guardianship, these provisions had recognized mother's right to keep custody of the child only when the child was below five years … This had created an impression worldwide that whereas women can be custodians for minors in the pre-puberty age, men must be given the priority for deciding about the welfare of the children when they cross the puberty age (Halder 2005: paragraph 5).

27. This provision reflects patriarchal norms which consider women incapable of acting as decision-makers and rendering male children to be seen as an extension of the paternal family name and wealth. This discriminatory strain has permeated to the reasoning espoused by Trial Courts and High Courts which have denied mothers the right to become the primary custodians of their minor children (*Rosy Jacob v Jacob A Chakramakkal* 1973; *Raj Rani v Subhas Chander* 1982; *Prabhati Mitra v DK Mitra* 1984). It is high time that such a strain is ended by the Supreme Court.

28. The test of "manifest arbitrariness" *vis-à-vis* Article 14 dictates the invalidation of legislation on the ground of being capricious, irrational, without adequate determining principle (ie, if the purpose is not in consonance with constitutional values), or something which is excessive and disproportionate (*Shayara Bano v Union of India* 2017; A*ssociation for Democratic Reforms v Union of India* 2024). This provision lacks an adequate determining principle since it is against the constitutional values of dignity and equality by placing mothers at a secondary level without any reasonable or adequate explanation. Mothers cannot be effective caregivers if they cannot correspondingly legally take decisions for their children. Thus, I hold that the impugned provision violates Article 14. Further, as a matter of general principle, any ascertainment of guardianship merely based on the gender and sexual identity of the individual would be considered a violation of Article 14 as it would be manifestly arbitrary to do so.

Violation of Article 15(1)

29. Article 15(1) states that discrimination cannot take place against any citizen on grounds of "sex". Article 15(1) reads as follows:

> 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

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

30. In the case of *NALSA v Union of India* (2014), the Supreme Court has interpreted "sex" to mean:

> Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity (paragraph 59).

31. There is no set test for direct discrimination in India. Courts have varyingly applied multiple tests, relying on several aspects such as intention to discriminate (*Lt Col Nitisha v Union of India* 2021) and suspect classification and strict scrutiny (*Anuj Garg v Hotel Association of India* 2008). The common denominator for these tests (if used at all) or any other analysis of discrimination is that the state's justification, if found reasonable by the court, can be allowed to trump a finding of discrimination. Equality scholar Shreya Atrey argues:

> the supervenience of justifications in India is perplexing. But it shows exactly how — despite the technical distinctions between direct and indirect discrimination, and individual grounds in terms of the justifications and standard of review they attract — justification can be all-pervasive … (Atrey 2019: 182).

32. Here, no matter what test I apply, the test for direct discrimination would be met. *Prima facie*, there is intention to discriminate as evident in the text of the statute which explicitly prefers only fathers as the guardians of the child. This is a suspect classification as well, since it is based on the ground of gender, which is a prohibited ground of discrimination under Article 15 of the Indian Constitution. The next step of the analysis would be to ascertain if there is a justification and if it is reasonable in this regard. There has been no justification offered by the Reserve Bank of India, which falls within the ambit of the "state" against whom fundamental rights can be claimed (*M/s Pearson Drums & Barrels Pvt Ltd v The General Manager, Consumer Education & Protection Cell of Reserve Bank of India* 2017), and neither has been one offered by the Union of India in defence of this provision. Thus, given that there exists no reasonable justification for such discrimination, I hold that section 6(a) of the

HMGA 1956 is violative of Article 15 of the Constitution, since it directly discriminates against women on the ground of gender.

33. Additionally, this provision fails to pass the constitutional guarantee under Article 15 since it is grounded in and perpetuates stereotypes about a class constituted by the grounds (ie, sex) prohibited in Article 15(1). Justice Chandrachud observed:

> A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1) (*Navtej Singh Johar v Union of India* 2018: paragraphs 438–439).

34. In India, "guardianship is an extension of paternal power" (Diwan & Diwan 1995). Guardianship dictates a preference of fathers over the mothers to be the primary decision-maker for the children. This can be attributed to age-old Hindu mindset that required men to be dominant within hierarchical family set-ups marked by their propensity to carry on the family names, undertake the last rites for their parents, and be the sole successors of parental properties. Section 6(a) implies that women are economically, intellectually and above all physically incapable as compared to their male counterparts in taking decisions for their children. The provision clearly perpetuates sex-based stereotypes. This was even observed in the 133rd Law Commission Report titled *Removal of Discrimination Against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle*, as far back as in 1989:

> 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. (Law Commission of India 1989: paragraph 1.3)

35. Thus, based on the stereotyping test explicated in *Navtej Singh Johar v Union of India* (2018), I hold that section 6(a) is unconstitutional as it perpetuates discrimination through stereotyping against women on the ground of gender, which is impermissible under Article 15(1) of the Constitution. Further, such a scheme may not even be equipped to handle claims from queer parents or single parents, as it currently operates within the binary. Any such provision therefore, if it references the gender or sexual identity of an individual, would automatically be considered a suspect classification and is likely to violate Article 15(1).

[F] CONCLUSIONS AND DIRECTIONS

36. In light of aforementioned observations, I conclude as follows:

(a) section 6(a) of the HMGA 1956 suffers from the vice of unconstitutionality, as it violates Articles 14 and 15 of the Indian Constitution, 1950;

(b) section 6(a) of the HMGA 1956 is accordingly read down and is to be interpreted as "in the case of a boy or an unmarried girl, the parent";

(c) as is the case even now, when it comes to disputes over custody or guardianship, the Family Court should decide them on a case-by-case basis;

(d) the petitions are accordingly dismissed.

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References

Atrey, Shreya. *Intersectional Discrimination*. Oxford: Oxford University Press, 2019.

Averett, Kate Henley. "Queer Parents, Gendered Embodiment and the De-Essentialisation of Motherhood." *Feminist Theory* 22(2) (2021): 284-304.

Bajpai, Asha. *Child Rights in India: Law, Policy, and Practice*, 3rd edn. Delhi: Oxford University Press, 2017.

Balaji, Jwalika. "Infant Care Policies Need to Be Gender Neutral." *Hindustan Times* 16 April 2025.

Bhayana, Neha. "Discussions on Same-Sex Families Need to Move Beyond the Bedroom." *Times of India* 8 March 2026.

Biblarz, Timothy J & Judith Stacey. "How Does the Gender of Parents Matter?" *Journal of Marriage and Family* 72 (2010): 3-22.

Cambridge University Press. "Father." *Cambridge Dictionary*, nd.

Cambridge University Press. "Guardian."*Cambridge Dictionary*, nd.

Cambridge University Press. "Mother." *Cambridge Dictionary*, nd.

Cambridge University Press. "Parent." *Cambridge Dictionary*, nd.

Chandra, Shalini. "Fred: A Trans Man's Journey of Gender Identity." *Mathrubhumi English* 21 June 2026.

Collins. "Mother." *Collins Dictionary*, nd.

Diwan, Paras & Piyushi Diwan. *Modern Hindu Law: Codified and Uncodified*, 10th edn. Allahabad: Allahabad Law Agency, 1995.

Ferreira, Nuno, Maria Federica Moscati & Senthorun Raj, eds. *Queer Judgments*. Coventry: Counterpress, 2025.

Fischel, Joseph. "Social Justice for Gender and Sexual Minorities: A Discussion with Paisley Currah and Aeyal Gross." *Critical Analysis of Law: An International and Interdisciplinary Law Review* 6(1) (2019): 82-101.

Gahatraj, Diwash. "The Remarkable Journey of India's First 'Natural' Trans Parents." *Fairplanet* 22 August 2023.

Ghaziani, Amin & Matt Brim, eds. *Imagining Queer Methods*. New York: New York University Press, 2019.

Goel, Ina. "What Does It Mean to Be a Hijra Mother?" *Economic and Political Weekly (Engage)* 52(8) (24 February 2018(.

Gulati, Shifali. "The Hijra Mother(s): Breaking All Barriers to Motherhood and Family" *Likho* 25 May 2022.

Halder, Debarati. "Who Wins the Battle for Custody? An Analysis of the Nature of Modern Judicial Understandings of Women's Rights in Cases of Custody of Minor Children in Matrimonial Disputes under the Hindu Laws in India." SSRN Working Paper, 2005.

Hughes, Charles E. *The Supreme Court of the United States*. New York: Columbia University Press, 1928.

India Today. "Interview with Gay Fathers in India." YouTube 28 June 2023.

Law Commission of India. *133rd Report on Removal of Discrimination Against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle*. New Delhi: Government of India, 1989.

Law Commission of India. *257th Report on Reforms in Guardianship and Custody Laws in India*. New Delhi: Government of India, 2015.

McDonald, James. "Queering Methodologies and Organizational Research: Disrupting, Critiquing, and Exploring." *Qualitative Research in Organizations and Management: An International Journal* 12(2) (2017): 130-148.

Merriam-Webster. "Father." *Dictionary*, nd.

Merriam-Webster. "Mother." *Dictionary*, nd.

Moudgil, Manu. "No Place Like Home." *Queerbeat* 21 November 2022.

Mulla, Dinshah Fardunji. *Principles of Mahomedan Law*, 20th edn. Gurgaon: LexisNexis India, 2012.

Oxford University Press. "Father." *Oxford Advanced American Dictionary*, nd.

Oxford University Press. "Mother." *Oxford Advanced Learner's Dictionary*, nd.

Pande, Pooja. *Momspeak: The Funny, Bittersweet Story of Motherhood in India*. New Delhi: Penguin Random House India, 2020.

Patel, Sejal. "How a Trans Woman Found Herself through Her Chosen Families." *Queerbeat* 12 March 2024.

PTI. "Cabinet Nod to Surrogacy Bill; Now Widows and Divorcee Women Can Benefit as Well." *Live Mint* 26 September 2020.

Punj, Amita & Nikita Samarnath. "Guardianship of Hindu Minor: A Critique of the Law." *Journal of the Indian Law Institute* 63(2) (2021): 172-189.

Risman, Barbara J. "Can Men 'Mother'? Life as a Single Father." *Family Relations* 35(1) (1986): 95-102.

Saxena, Piyush. *Life of a Eunuch*. Mumbai: Shanta Publication House, 2011.

Subramanian, Tejaswi. "Queer Parenting in India Is More Common (and Transformative) than You Think." *The Established* 15 October 2025.

Legislation, Regulations & Rules

Adoption Regulations 2017

Constitution of India 1950

Guardian and Wards Act 1890

Hindu Minority and Guardianship Act 1956

Registration of Births and Deaths Act 1969

Surrogacy (Regulation) Act 2021

Transgender Persons (Protection of Rights) Act 2019

Cases

Anuj Garg v Hotel Association of India (2008) 3 SCC 1

Association for Democratic Reforms v Union of India 2024 INSC 113

Badshah v Urmila Badshah Godse (2014) 1 SCC 188

Deepika Singh v Central Administrative Tribunal, Civil Appeal No 5308 of 2022 (SC, 16 August 2022)

EP Royappa v State of Tamil Nadu AIR 1974 SC 555

Gulamhussain Kutubuddin Maner v Abdulrashid Abdulrajak Maner (2000) 8 SCC 507

Hamsaanandini Nanduri v Union of India 2026 INSC 246

Lt Col Nitisha v Union of India (2021) 15 SCC 125

Maatr Sparsh, An Initiative by Avyaan Foundation v Union of India 2025 SCC OnLine SC 576

M/s Pearson Drums & Barrels Pvt Ltd v The General Manager, Consumer Education & Protection Cell of Reserve Bank of India WPA No 21710 of 2017 (Cal HC)

National Legal Services Authority (NALSA) v Union of India (2014) 5 SCC 438

Navtej Singh Johar v Union of India (2018) 10 SCC 1

Patan Jamal Vali v State of Andhra Pradesh 2021 SCC OnLine SC 343

Prabhati Mitra v D K Mitra (1984) 25 DLT 186

Raj Rani v Subhas Chander 1983 SCC OnLine Del 480

Rajeeb Kalita v Union of India 2025 SCC OnLine SC 2320

Rosy Jacob v Jacob A Chakramakkal (1973) 1 SCR 918

Shayara Bano v Union of India (2017) 9 SCC 1

State of West Bengal v Anwar Ali Sarkar AIR 1952 SC 75

Supriyo v Union of India 2023 SCC OnLine SC 1348

Zahhad & Ors v State of Kerala & Anr WP(C) No 23763 of 2023 (Ker HC, 2 June 2025)