



A Critique on the Legal Framework for ‘Guardian *Ad Litem*’ in India with Specific Reference to the Principle of Participation in Child Custody Disputes

Sugandh Saksena*

Abstract

This paper seeks to highlight the significance of Guardians *Ad Litem* (GAL) with respect to participation of children in judicial proceedings. While GAL in various other jurisdictions is vested with diverse roles and well stipulated qualifications; the Indian model reflects a more limited role and an inherently paternalistic approach towards a child’s participation in judicial proceedings involving his/her interest. Deeply imbibed in the welfare principle, the provisions for a child’s representation through GAL in the legal framework seems inadequate due to the immense importance given to natural guardians and the lack of specialized qualifications in the statutory provisions. The paper further seeks to highlight, that despite of the statutory recognition of a child’s right to legal aid and representation under the Juvenile Justice (Care and Protection of Children) Act 2015 and the Protection of Children from Sexual Offences Act, 2012; the role of a GAL which vests primarily with the guardians of the children might result counter operative when such a guardian itself is guilty of abuse or neglect. Moreover, a near absence of any such provision in the child custody dispute within the legal framework, may seriously impair the right of a child considering the immense trauma a child might have to undergo in a custody battle.

Keywords: Family Courts Act, 1984, Principle of Participation, Representation, Tandem Model, United Nations Convention on the Rights of the Child (UNCRC)

* National Law School of India University, Bengaluru, Karnataka, India;
sugandhsaksena@alumni.nls.ac.in

1. Introduction

The 'principle of participation' is one the general principles, both governing, as well as laid down under the United Nations Convention on the Rights of Child 1989 (hereinafter 'the CRC'). Being a general principle, it becomes an inherent part of each and every provision of the Convention, which implies that no right under a given provision can be applicable in exclusion to the general principles¹. While the Convention affirms that the 'best interests' of the child is the primary consideration in all actions concerning children², Article 12(1) of the Convention specifically provides for a child's right to express his/her views on matters affecting his interest. It states that:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child³.

In terms of Article 12(2)⁴, it places an obligation on State parties to ensure that a child can express his or her opinion freely and that his or her opinion will be taken into account in any judicial or administrative proceedings affecting the child. This provision ensures that the child is given a voice in all decisions that affect them, and this would apply to all actions that concern a child. Article 12 does not use the term child participation but the objective of the provision is to advance child participation⁵. Participation can be categorized in three modes *viz* consultative, collaborative and child

¹ General Comment No. 12, 8 (2009): Committee on the Rights of Child, Geneva. Also available at <https://digitallibrary.un.org/record/671444?ln=en&v=pdf>, (last visited on 27th April, 2024).

² Convention on the Rights of the Child, art. 3 § 1, November 20, 1989.

³ *Id.*, art. 12 § 1.

⁴ "For this purpose, the child shall in particular be provided with the opportunity in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural laws of national law".

⁵ Hodgkin *et al.*, Implementation Handbook for the Convention on the Rights of the Child 150 (UNICEF, 2007).

led⁶. Here the order of this classification is also suggestive of the level of participation by children; where the first involves a children's right to be consulted on matters affecting their interests, the second suggests their involvement to the extent of collaboration with adults, and the third entails leadership role with children where perhaps they can drive the decision-making process⁷. Mostly when it comes to administrative and judicial settings, it is the first two which are significant.

Though 'participation' in the above context is mostly understood as a direct participation of a child; however, when it comes to administration of justice, even an indirect participation can go a long way in ensuring that the welfare and opinions of the child are brought to notice. It is here that representation of children in a legal proceeding involving their interest becomes significant to their 'right to participate' under the aegis of the CRC. This representation can be provided in varied ways, apart from the child's very own direct interview with the judge. Depending on the need of a given case, a child may be represented either through a legal practitioner, or through an evaluator of the child's best interests or through a counsellor who submits a report on the child's welfare coupled with his/her opinions. All such modes may enable participation of children in matters affecting their interest. The various functionaries involved in the process that enable such participation of children through representation in courts, could be known by various names in different jurisdictions. Typically, in common law countries, the next friend and 'guardian *ad litem*' are referred to denote the representatives of children. Depending on the nature of the proceeding and the position of a child in the same, the nomenclature of these representatives may vary. For instance, while a child is a plaintiff, he/she may be represented through a next friend, while on defending a suit, a 'guardian *ad litem*' (hereinafter referred to as GAL), may represent such a child⁸. This paper tends to analyse the scope of the provision and the subsequent role of a GAL within the

⁶ Children's Participation in the Work of NHRIs, 5 (UNICEF 2018). Also available at https://www.unicef.org/eca/sites/unicef.org/eca/files/2019-02/NHRI_Participation.pdf, (last visited on 29th April, 2024).

⁷ *supra* note 6

⁸ Civil Procedure Code 1908, Order XXXII, Rule 3, No.5, Acts of Parliament, 1908 (India)

legal framework of India, following an insight from certain other jurisdictions on the same. Particularly when it comes to the child custody disputes, a near absence of any representation of children other than through an interview with the judge shall be highlighted. Given the unique nature of such disputes, and the fact that a child is placed right at the centre of such dispute; this paper also delves briefly into the other laws involving children *viz* the Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act 2015) and the Protection of Children from Sexual Offences Act, 2012 (POCSO Act 2012) to highlight the inadequacies in the former with respect to their representation.

2. Guardian *Ad Litem*

A 'guardian *ad litem*' literally denotes a guardian for the suit⁹, and it refers to a guardian, usually a lawyer, appointed by the court to appear in a law suit on behalf of an incompetent or minor party¹⁰. Hence, it is an authority appointed by a court to guard the interests of a person unable to do so for himself. This inability may arise due to varied factors *viz* age, infirmity of body and mind *etc.* Therefore, unlike the popular understanding, ideally a 'guardian *ad litem*' (hereinafter referred to as GAL) and so does a next friend, is not meant to act only for a minor. Since a GAL may be vested with a much broader role to perform, its appointment and the legal principles which shape it are of immense significance.

When it comes to children, the appointment of a GAL may be required for a wide range of matters, *viz* cases of conflict with the law, victimization by assault, abuse or neglect, and also guardianship and custody disputes. In all of the above cases, what lies in the best interest of the child, what the child wants and what is conducive for the child looking at his/her mental state *etc.*, are all vital questions which must be examined in order to come to a judicious conclusion. Hence it is important that in each of these scenarios, the child is provided with an opportunity to be heard so that what lies in his/her best interest, may also be determined in

⁹ *Ad Litem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁰ *Id*, Guardian Ad Litem.

consonance with the wishes of the child in question if their age and maturity supports that.

It is in this context that a GAL can play a significant role towards the broader right of a child's participation. 'guardian *ad litem*' is a generic term used for person so appointed by an adjudicatory authority to exercise diversified roles that a given jurisdiction or statute might prescribe. For instance, a GAL may play a vital role in representing the wishes of a child, or he may also be acting as a mental health evaluator, or one to determine the best interests of a child and not to merely speak what the child wishes to say. While some jurisdictions use the term 'guardian *ad litem*' in specific, others may not. Nonetheless, it is the role that makes it one of immense significance due to the reasons mentioned above. Within the United States itself, there are different type of roles a GAL is entrusted with in different States, which shall be discussed ahead. It will be pertinent to note that while some of these appointments are statutorily required, the others may be on request by the parties or simply *sua sponte*, where a judge thinks that such an appointment is in the ward's best interest¹¹.

Though the practice of GAL is not devoid of ethical challenges, yet, looking at the vitality of a GALs role; *i.e.* to help decide the court what is in the best interest of its ward and be a voice for such a ward, it may be inferred without an iota of doubt that the role if performed with diligence can be one of immense significance. If one may only consider the question of a minor in a dispute, a GAL could perhaps be seen as an important link between the child and the adjudicating authority (courts), whereby a great deal of a child's right to participate could be centered around a GAL.

3. Position in the U.S. and the U.K. - A Brief Overview

In the United States, the practice of GAL appointments reflects minor differences in the approach adopted by the respective State laws. For instance, Arizona's statutes do not refer to GALs in the context of family law, however; the court may appoint an attorney

¹¹ See, Boumil, Marcia M, *et al.*, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 (1) *Journal of Law & Family Studies* 43, 45 (2011).

to represent a child in a family law case¹². Here a GAL is expected to be trained or have experience in the type of proceeding for which he is being appointed¹³. Only an attorney licensed to practice in Arizona can be a GAL, and he may be appointed not only for minor but even incapacitated adult. He is authorized to meet and communicate with the subject person. If the subject is under any treatment or care, then such a GAL may also meet and communicate with those in charge of such person¹⁴. In the State of California, by and large the GAL is appointed by the Court to determine the best interests of the child, mostly as an independent evaluator¹⁵, but there is also some support towards his role being that of a therapist¹⁶. It is pertinent to note that in California, particularly for Child custody disputes, the court may also appoint a private counsel to represent the interests of the child¹⁷. In Florida, a GAL is supposed to be an attorney, and is to act as a 'next friend' of the child, or his investigator or evaluator, but not as his/her advocate¹⁸. It is interesting to note that the statutory provision¹⁹ also leaves open the room for any appointment of a legal counsel but not the same person to be appointed for the two roles. Any such appointment is certainly to be made at the discretion of the

¹² Kevin E. McCarthy, OLR Research Report (2013),
<https://www.cga.ct.gov/2013/rpt/2013-R-0099.htm>, (last visited on 20th December, 2023).

¹³ *Id.*

¹⁴ Rules of Family Law Procedure 2021, Rule 37.1 (Arizona),
[https://govt.westlaw.com/azrules/Document/N8617B8E07E3911EC81888F16E1FB6D3E?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/azrules/Document/N8617B8E07E3911EC81888F16E1FB6D3E?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)) (last visited on 29th April, 2024).

¹⁵ Code of Civil Procedure 1872, § 372, added by Stats. 1992, (California). Also available on
https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=3.&part=2.&chapter=3.&article=, (last visited on 29th April, 2024).

¹⁶ McCarthy *supra* note 12.

¹⁷ Family Code 1992, § 3150, enacted by Stats. 1992, (California),
https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=FC&division=8.&title=&part=2.&chapter=10.&article=, (last visited on 29th April, 2024).

¹⁸ Florida Statutes 2020, § 61.401,
<https://www.flsenate.gov/Laws/Statutes/2020/61.401>, (last visited on 29th April 2024).

¹⁹ *Id.*

court when it deems necessary in the best interest of the child²⁰. In Maryland, an attorney can be appointed to act as either a ‘best interest attorney’ or an ‘advocate attorney’ or a ‘privilege attorney’ for the minor²¹. While the role of a ‘best interest attorney’ centers around determination of best interest of the child, an advocate attorney is to act as an independent legal counsel. A privilege attorney on the other hand is to decide which privilege of the child is to be asserted or waived²². It must be noted that these positions are equivalents to GAL and so are the varied roles.

In England and Wales, guardian *ad litem* can be appointed under the Children Act, 1989²³ and also under the Family Proceeding Rules, 1991²⁴. Ordinarily such a guardian is usually an officer of the *Children and Family Court Advisory and Support Service* (CAFCASS) or the *National Youth Advisory Service* (NYAS)²⁵. The U.K. follows a tandem model when it comes to the representation of children in both private and public law matters. In *Mabon v Mabon* (2005), this model was highly criticized by Thorpe, LJ. calling it a Rolls Royce model²⁶. In this mode of representation, a guardian is appointed for a minor by the court, who is to instruct a solicitor, who then instructs a family barrister. Pertinent to mention, he also refers to this model as ‘essentially paternalistic’ in approach. Despite the prevalence of this model, it is interesting to note that in the U.K. it is possible for a minor to sue or defend him/herself without the assistance of any

²⁰ Florida Statutes 2020, § 61.401,
<https://www.flsenate.gov/Laws/Statutes/2020/61.401>, (last visited on 29th April 2024).

²¹ MD Rules 2007, Rule 9-205.1 (Maryland),
[https://govt.westlaw.com/mdc/Document/NE1B07D000EBD11DCB2009220F1CF0138?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/mdc/Document/NE1B07D000EBD11DCB2009220F1CF0138?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)), (last visited on 29th April, 2024).

²² Boumil, *supra* note 11.

²³ Children Act 1989, Part IV, § 41 (United Kingdom),
<https://www.legislation.gov.uk/ukpga/1989/41/section/41> (last visited on 29th April 2024).

²⁴ The Family Proceedings Rule 1991, Part IX, Rule 9.5 (United Kingdom). Also available at <https://www.legislation.gov.uk/uksi/1991/1247/part/IX/made>, (last visited on 29th April 2024).

²⁵ Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes*, 49, (New York: Oxford University Press 2008).

²⁶ *Mabon v. Mabon* [2005] EWCA Civ 634, para 25.

next friend or a guardian and to discontinue with the leave of the court, any such assistance of a next friend or a guardian²⁷. A child is entitled to instruct a solicitor, even in a case where a guardian is appointed for such a child. Such a guardian instructs as long as the child does not possess sufficient understanding, but on attaining such maturity it is the child who instructs and the solicitor is expected to conduct the proceedings in accordance with the instructions of the child²⁸. A noteworthy illustration is of a case involving a 16-year-old girl who along with her siblings was in a care facility for long. In furtherance of the same, she was represented through a guardian who was to instruct the solicitor. However, over a period of time when she no longer wanted to be in the care facility, her interests came into a conflict with that of her guardian in suits. Accordingly, she was allowed to proceed in her appeal without her guardian²⁹. Nonetheless, it is also opined that even in the U.K., the representation of children through an appointment of a guardian *ad litem* or otherwise, remains fairly limited³⁰.

4. Position In India

India being a common law country with great deal of influence from the English legal system, is not too far from the U.K. when it comes to following the English model on GAL. Much similar to the tandem model noted above³¹, is followed in India. This is due to the fact that in India too, the guardian appoints a lawyer for the representation of the child in question. The principle behind this model finds its basis in the popular presumption under law, that a guardian is best suited to determine the best interest of the Child. In other words, a guardian always takes a decision which is best suited to protect the interest of the minor. While for most of the cases this presumption may stand true, there is a likelihood that it might not be so in every

²⁷ Family Proceeding (Amendment) Rules 1992, Rule 9.2 A, (United Kingdom).

²⁸ Family Procedure Rules 2010, Rule 16.29 (2), (United Kingdom).

²⁹ *In re W (A Child)* (Care Proceedings: Child's Representation) [2017] 1 WLR 1027.

Also see, David Burrows, *Child's involvement in proceedings: 'child's perspective'*,

Family law: A child's view, a child's set of court rules (6th February, 2025)

<https://www.iclr.co.uk/blog/commentary/family-law-a-childs-view-a-childs-set-of-court-rules/>

³⁰ Patrick, *supra* note 25 at 50.

³¹ *Mabon v. Mabon* [2005] EWCA Civ 634

instance. Also, as it has been already noted above; it paves way for more paternalistic approach towards decision making and determination of best interests of child(ren) in question particularly when it comes to adolescents, or children with a reasonable maturity and prudence.

In India as in England, a representative of a minor in a legal proceeding is referred to as his next friend when he initiates a suit on behalf of the minor³², and as a guardian for the suit while he defends it³³. On the question as to who may act as a 'next friend' or as a guardian for the suit, reference may be made to the relevant provision *vis* Rule 4 to Order XXXII, Civil Procedure Code 1908. Apart from the general condition for eligibility³⁴, it states that no person other than a guardian can act as a next friend or guardian for the suit if such guardian is one appointed or declared by a competent authority (court). The exception to this restriction could be only when the court deems it necessary in the interest of the minor that some other person than the guardian be appointed in this regard³⁵. In order to act a guardian for the suit, a person must provide his consent in writing³⁶. Further, where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian³⁷.

It may be clearly deduced from the above provision, that when it comes to a guardian for the suit *i.e.* 'guardian *ad litem*' in popular understanding; there is not just an absence of any qualification under the law, but also the statutory intent is to give primacy to the very guardian who has been so recognized by the authority of law. This guardian in all likelihood, will be the natural guardian. The Guardians and Wards Act 1890, being the statute governing the questions of guardianship limits the power of the court to appoint any person other than the father or mother in ordinary

³² Civil Procedure Code 1908, Order XXXII, Rule 1, No.5, Acts of Parliament, 1908 (India).

³³ *Id*, Rule 3.

³⁴ Civil Procedure Code 1908, Order XXXII, Rule 4(1) No.5, Acts of Parliament, 1908 (India).

³⁵ *Id*, Rule 4(2).

³⁶ Civil Procedure Code 1908, Order XXXII, Rule 4(3) No.5, Acts of Parliament, 1908 (India)

³⁷ *Id*, Rule 4(4).

circumstances³⁸. Resultantly, any appointment of a GAL under the provisions of the civil procedure code as mentioned above would be of a natural guardian first, and in exceptional cases, a court appointed guardian under the provisions of the said Act. The position adopted by the above provision on one hand is based on the presumption of the law, that a natural guardian is the person best suited to determine the welfare of the child; while on the other hand to uphold the primary entitlement of a natural guardian to guard the interests of his/her ward. This only furthers the paternalistic approach towards the determination of the interest of the minor.

The above provision may also be read to understand the 'tandem' model adopted in India similar to England, as here, the guardian who is defending his ward is to appoint and instruct a lawyer, who in turn becomes a representative of the minor before the court. The reason of inclination towards adopting a tandem model, can be best described in the words of Wall LJ as he notes in *Mabon v. Mabon*³⁹ -

...The child has the input of expertise from the different disciplines of lawyer and guardian, who are able, with the court's permission, to call on additional expertise and advice where necessary.... At the same time, the child concerned is protected from the corroding consequences of adversarial litigation. Children are not required to give evidence and be cross-examined: they do not have access to the sensitive documentation generated by the case. This system is, of course, paternalistic in approach, but it usually works well, in my experience, even in cases where the child has sufficient understanding to participate in the proceedings concerned without a guardian.

The tandem model may certainly be useful in most of the cases, nonetheless, the approach as entailed in the Indian law is not yet free from criticism. In public law proceedings when a guardian itself is guilty of abuse or neglect, this approach fails, until and unless the

³⁸ Guardians and Wards Act 1890, § 19 (b), No.8, Acts of Parliament, 1890 (India).

³⁹ *Mabon v. Mabon* [2005] EWCA Civ 634, para 40.

court takes a due cognizance of such a neglect and appoints a suitable guardian for the ward.

As will be noted ahead, there could be instances where even an appointment of the other person as a guardian for want of care, are questioned by the court or even rejected due to the natural guardian being alive. Further, even in the case of an appointment by court, the absence of specialized qualifications *vis* ability to act as a counselor for the child, or to determine his/her best interests and to act as a mental health evaluator etc., a GAL in India might not equal the responsibilities of their global counterparts.

4.1. Judicial approach on GAL in India

The judiciary has been fairly progressive on the appointment of a guardian *ad litem*, though a substantial clarity on the qualifications and role etc. of GAL has only been brought to light as recently as in 2015, in the case of *Arsheeran Bahmeech v State*⁴⁰. The instant case involved a rape of a minor by her own kin, after which she was assigned to a shelter home at the behest of the Child Welfare Committee. The present petition was brought by the natural guardian of the victim claiming that she was in a wrongful confinement and being her natural guardian, he must be given the custody of the child. Considering the background of the case, and also that the minor victim was willing to go home, the Hon'ble Delhi High Court while granting the petitioner her custody, appointed the Child Welfare Officer as her guardian *ad litem*⁴¹. While coming to this order, the Hon'ble High Court took due notice of the 'UN Model Law on Justice in matters involving Child Victims and Witnesses of Crime' and reiterated the guidelines stated there in for the appointment and duties of a guardian *ad litem*⁴².

It is interesting to note that the anomaly surrounding the appointment of a guardian *ad litem* got further established not much later to the above decision, in the case of *Smt. Lavanya Anirudh Verma v State of NCT of Delhi*⁴³. This case brought to light an apparent lapse on the part of an Additional Sessions Judge (hereinafter referred to

⁴⁰ *Arsheeran Bahmeech v State* (2015) 224 DLT 13.

⁴¹ *supra* note 40 at para 12.

⁴² *Arsheeran Bahmeech v State* (2015) 224 DLT 13,

⁴³ *Lavanya Anirudh Verma v State of NCT of Delhi* (2017) 239 DLT 390.

as ASJ) in not acknowledging a guardian as one, who was appointed by the Child Welfare Committee (hereinafter referred to as CWC). This too was a case of a sexually abused and abandoned minor girl who was victimized by her own father. While the Director of the shelter home was appointed as a 'guardian' by the CWC, the ASJ did not acknowledge her as one. Though the instant case involved question of interpretation of the law (JJ Act 2015) post amendment; the primary reason for such failure to acknowledge the guardianship was the fact that the Director was neither a family member nor a natural guardian of the minor, nor one appointed by the court under the *Guardian and Wards Act, 1890*⁴⁴. Hence the Hon'ble Delhi High Court again reiterated its earlier decision in *Arsheeran Bahmeech* case, stating the guidelines for the appointment of GAL and also pointed out the serious lapse on the part of the ASJ by not appointing a guardian who could also act as a GAL in this case⁴⁵.

It is pertinent to note that, though the Indian law is not completely devoid of the scope of such an appointment by the courts, as has been discussed in the earlier segment; the bias in favor of appointing a guardian as one 'for the suits' exists. The cases mentioned above only highlight a possible consequence of such provision, which shall not be so much in furtherance of the welfare of children. Despite the courts upholding the model law in the above decisions, and prescribing for the same to be taken into consideration while appointing the GAL; the legal framework pertaining to the qualifications, power and authority of GAL still remain a matter of concern as it has yet not paved its way into the statutory provisions.

The Juvenile Justice (Care and Protection of Children) Act 2015, lays down certain general principles which are the corner stone of the legislation. Amongst others; it explicitly makes a note of the principle of participation, the principle of best interest and the principles of natural justice, under section 3 in clauses (iii), (iv) and (xvi) respectively. Further, the Protection of Children from Sexual Offences Act, (POCSO) 2012, also lays down under section 40, the right to legal aid and assistance. However, when it comes to a public law proceeding, either under the POCSO or the JJ Act 2015; despite

⁴⁴ *Id.*, at para 5.

⁴⁵ *Lavanya Anirudh Verma v State of NCT of Delhi* (2017) 239 DLT 390.

of the recognition to the right to participate and being heard and to legal aid and assistance, the tandem model as contained in the statute does not technically go beyond the primary entitlement of a guardian recognized in law. A guardian for the suits of a minor in all probability would be a natural guardian or one appointed by the court or in exceptional cases like the above, a welfare officer or other person. Unlike certain foreign jurisdictions which have been noted in the earlier segment, there is apparently little to no scope within the Indian legal frame work for appointing a specialist person eligible for the role.

4.2. Private family law proceedings with respect to Child Custody Disputes

The phrase 'matters affecting the child'⁴⁶ under the aegis of the CRC is not confined only to public law proceedings. Perhaps equally, if not more serious, could be the child custody disputes arising out of parental separation or otherwise. The trauma suffered by such a child who is a subject of dispute can be immense. It is pertinent to note that unlike the public law proceedings as illustrated above, the child custody disputes are those where the dispute itself is between the parents and therefore to be able to protect the interests of the child cannot be expected by contesting parties. The nature of these disputes itself is such, that there is bound to be a conflict of interest between the guardian and the child. Therefore, in such disputes it is important for a child to have his/her views heard, and an involvement of a specialized person to guard his/her interests and determine what lies in the welfare of such a child becomes necessary.

Child custody being one attribute of 'guardianship of person' is more likely to be governed primarily by the respective personal laws with the overarching general principles of the Guardians and Wards Act 1890. The respective personal laws vary on the question of custody and on matters where they are silent, they are to be supplemented by the provisions of the aforesaid statute⁴⁷. The relevant provisions determining the question of custody therefore are section 7 and section 17 of the said Act. The former authorizes

⁴⁶ Convention on the Rights of the Child, art. 12 § 1, November 20, 1989.

⁴⁷ Law Commission of India Report 257 on *Reforms in Guardianship and Custody Laws in India*, 13 (2015).

the court to appoint a guardian for the person or property or both, of a minor while the later lays down factors to be considered by the court while appointing guardians. It is appreciable that both these provisions in principle uphold the welfare of the minor. The Guardians and Wards Act 1890 also contains some scope for the participation of children *vide* section 17 (3), which states – “if the minor is old enough to form an intelligent opinion, the court may consider his/her preference”. Here, an inclination towards the opinion of the minor may be noted, but the use of the word may indicate that it is neither necessary to consult the wishes of the minor nor to give effect to the same even if consulted⁴⁸. Considering the factors of age and maturity, this provision and a scope for judicial discretion to decide whether a child is capable of forming an opinion, is centered around the paternalist role the court plays while exercising its *parens patriae* jurisdiction⁴⁹.

Therefore, due to their protective approach, they may often undermine the very need for giving any opportunity to the minors to have a say. This is also a significant drawback to the welfare principle. To mention a few instances, the Hon’ble Bombay High Court in *Kiran v Anmol*⁵⁰, took note of the failure on part of the District Judge to cause appearance of the child and to hold interview which could have been vital in determining some relevant facts⁵¹. In *Vikas Agarwal v Geeti Mathur*⁵², the Hon’ble Delhi High Court noted the failure of the Family Court to appoint counsellors in seeking enquiries into sudden hostile attitude of the child towards the other parent.

However, coming to the question of appointing any GAL in child custody disputes as a representative or to evaluate the welfare of the minor, or to extend his/her support by way of counseling *etc.*, is totally absent within the realm of the aforesaid law. As in the case of public law proceedings discussed above, so is also with the custody disputes, that the limitations imposed on the power of the

⁴⁸ K.R. Ramaswamy Iyengar, Commentary on the Guardians and Wards Act 1890, 211 (4th ed. 2021).

⁴⁹ *Id.*, at 166.

⁵⁰ *Kiran v Anmol*, 2014 (3) Mh.L.J. 720.

⁵¹ *Id.*, at para 6.

⁵² *Vikas Agarwal v Geeti Mathur*, 2017 (238) DLT 317.

court to appoint any person other than the father or mother under section 19 are likely to come in the way of an appointment of a GAL⁵³. Therefore, when it comes to child custody disputes, not just there is legislative silence and ambiguity towards the appointment of GAL but also the legal framework which prefers natural guardian as a guardian for the suits, coupled with the nature of such disputes *vis* natural guardians fighting a custody battle of the child; does make the question of a minor's representation very complex.

4.2.1 The Family Courts Act 1984

It is pertinent to note that the question of a child's representation/participation in custody disputes is not limited to only the above-mentioned law, but the Family Court Act 1984 also becomes relevant in this context. The Family Courts Act 1984, is an Act to establish the Family Courts and to provide for speedy resolution of family disputes, particularly matrimonial and child custody disputes⁵⁴. It provides for a mechanism designed to resolve private disputes in a manner free from the hassles of complex legal procedures. This has been done by the removal of any legal representation as a matter of right, between the parties and the judge to advocate for their client⁵⁵. Any such support if at all the court may consider necessary in the interest of justice, may be provided by an *amicus curiae* appointed in this regard⁵⁶. In addition to this, the Act also entails provision for *in-camera* proceedings⁵⁷. The purpose of the law is appreciable to the extent that it provides room for a convenient and hassle-free dispute resolution duly preserving the privacy of the litigants, but it must also be noted that for a child there is *per se* no provision closer to appointment of a GAL comparable to the well accepted international standards of being an evaluator of child's welfare or to act as a child's representative.

Particularly in the matrimonial disputes, the role of marriage counselors which the Act provides for, become immensely important as most of the family courts provide it as a matter of norm

⁵³ Civil Procedure Code 1908, Order XXXII, Rule 4(3), No.5, Acts of Parliament, 1908 (India).

⁵⁴ The Family Courts Act 1984, Preamble, No.66, Acts of Parliament, 1984 (India).

⁵⁵ Family Courts Act 1984, § 13, No.66, Acts of Parliament, 1984 (India).

⁵⁶ *Id.*

⁵⁷ Family Courts Act 1984, § 11, No.66, Acts of Parliament, 1984 (India).

to first resort to mediation or to the counselor before initiating any proceedings in the court⁵⁸. The objective intended to be served here again is limited to enabling the estranged couple resolving their disputes, and not extending to provide children with participatory opportunities. It must be noted that the role of these counselors could be of immense significance with respect to a child's participation in a custody dispute; provided the counselors are appointed and utilized for the purpose as a matter of norm with their due qualifications. Within the present legal framework, the representation of a child of mature understanding is possible only through a direct interview with the judge. However as noted above, it becomes subject to the discretion of the judge whether such a child is found possessing sufficient maturity. Moreso, when it comes to younger children; their representation, and consequently their right to participate could be seriously impaired. This is so, because the counsellors provided under the Act are primarily to provide counselling in a matrimonial dispute and not to children subject to custody disputes. Moreover, not just their role is confined as mentioned above, but there has also been a noted disparity in their qualifications, the number of appointments and their roles among various states⁵⁹. Apart from this, the judge who is otherwise the sole arbiter to decide on a child's maturity is not an expert from the field like a child psychologist, and thereby, basing a child's potential solely on the judge's perspective might certainly impair a child's right to be heard.

5. Conclusion and Suggestions

In the light of the above, it may be inferred that the law in India on the appointment of a guardian *ad litem* stands inadequate, in so far as it does not provide for specific qualifications for such an appointee nor well stipulated duties within the statutory framework. This serves little purpose for a better participation of children even through representation in matters falling under public law proceedings where the statutes otherwise provide for a right to legal aid and representation. When it comes to a private dispute like the

⁵⁸Sriram, Sujata & Chetna Duggal, *The Family Courts Act in India: Perspectives from Marriage Counsellors*, Indian Journal of Socio Legal Studies 4 (1), 97-99, (2015).

⁵⁹ *Id.*

one of a child custody; despite of it being a 'matter affecting the interest of a child' under the CRC⁶⁰, such an appointment becomes difficult within the statutory framework applicable. The primacy to a 'natural guardian' to act as a 'guardian for suits' in a tandem model is likely to impair the interests of the child, as has been noted above.

In the absence of explicit guidelines and clarity on the qualifications and functions of persons appointed to serve as guardians for the suits, there is not just a possibility of inadequate opportunity of being heard to the children, but even the determination of their welfare can be compromised. The guidelines laid down by the judiciary in all likelihood would serve little purpose as long as the statutes do not imbibe them. When it comes to private family law proceedings, a representation of a child only through a direct judicial interview may turn futile in case of a denial to the same due to the minor not being considered enough mature; leaving no recourse available towards that end. Glimpses from certain foreign jurisdictions also suggest a wide array of role a GAL may be vested with. On this note, a brief comparison with the legal framework in India stands quite inadequate.

Therefore, it is suggested that the present legal framework is reviewed with respect to the appointment of GALs. Taking clue from certain foreign jurisdictions and the model law guidelines reiterated by the Hon'ble Courts in India should pave way for a more comprehensive set of rules and procedure to proceed with the GAL appointment by the Indian courts. The Indian law may incorporate explicit provision laying down qualifications and duties of GALs and allow more scope for appointments of specialized persons to act as guardian *ad litem* in cases where needed. On need bases, an independent appointment of GAL or a similar functionary, particularly in child custody disputes could avoid an absolute disregard to the interest of child in question. This needs to be done without compromising on the benefits a child might avail through a direct representation. Since the judge would continue to be the sole arbiter of the child's welfare as well the ultimate decision following the same, any support from the GAL in determining the welfare of the child can always be of persuasive value, and need not bind the

⁶⁰ Convention on the Rights of the Child, art. 12 § 1, November 20, 1989.

court in any way. Hence, an apprehension of any possible harm on the child's welfare may always be mitigated. Very importantly, the role of counselors within the Family Courts Act 1984, too need to be reviewed from the perspective of participation and representation to children in custody disputes. As the variance between different Family courts in India pertaining to the role and qualifications of the counselors is possible, a comprehensive framework laying down a minimum standard of required qualifications, duties and functions in furtherance to better child participation and in turn their welfare, will help reaching an amicable and inclusive dispute resolution.