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RISING GENDER NEUTRAL CUSTODIAL RIGHTS IN INDIA

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ABSTRACT:

Marriage is considered to be the most sacred institution in our society and divorce was considered to be a socially forbidden thin is past century. But now we can see a rise in the rates of Divorce in our country. This article provides a detailed information of custodial rights available for parents in India along with judgements of High court and Supreme Court. Visitation rights are basically given to the noncustodial parent while the custodial parent gets the custody of the child. It also provides a wide view on the Indian laws that is governing the custody rights of a child. The report will also discuss about the reason for increasing divorce rates. Following this, the article will enlighten the visitation rights of the fathers in India and the gender equality with relevant case laws.

KEYWORDS: *Divorce, Custody, Visitation Rights, India*

INTRODUCTION:

Every time a married couple decides to divorce either mutually or via judicial separation the question of child custody arises and the burden it put on the court to resolve such issues. In such case if one spouse gets the custody rights the other get the visitation rights. Nowadays even the court grants visitation rights to the grandparents of the child. Basically, the custodial parent gets the primary responsibility to take care of the child in their education, medical, emotional and physical well-being, while the non-custodial parent has merely the right to visit and access the child. Mostly if the child is a minor court mostly grants the custodial rights to the mother but both the parents have access to the kid though the physical custody is given to one custody. The court decides mostly on keeping in mind the child's best interest. All these decisions includes if there is any domestic violence, abuse or neglect in any incidence in taking care of the child or if one parent cannot provide for the needs of their child.

DIVORCE IN INDIA:

When compared to other countries India is considered to have the lowest divorce rates¹ which is estimated around 1.1% but in recent years we could see the rise in rates from 50%-60% especially in the urban areas. Marriage is considered to be a sacrament in our country, but in last year's there has been sharp rise in the trend of separation of young married couples. Young couples commonly divorce due to problems with commitment issues, pressure from families, and maturity. After being married, a couple in India customarily has their daughter-in-law move in with their husband's family. After the marriage, the family, which had previously been quite supportive of the girl's career and aspirations, began to change its tune. They start to ridicule the girl, her profession, and her way of life and attempt to entrap her in the web of outdated traditions and social biases.

Lack of communication gap between the couples, financial problems in the family, Emotional break down of relationship, insecurities, erratic work schedule, alcohol and smoking, lack of trust² are the contributing for divorces nowadays. Depression has also been the major reason for divorce in India. Studies shows that depressed people may end their relationship than the normal people. It causes breakdown and leads to create a feeling of anger, neglect, violent and abusive to their partner or even their children. Divorce rates are rising in India. At first view, this would appear to be a bad thing, but it's actually a positive indicator. An increasing number of couples are feeling empowered to take charge of their lives and the discomfort in their relationships, as seen by the increasing divorce rate.

Even though they were unhappy with one another or experiencing problems in their marriage, many couples in the past chose to remain together. This resulted from pressure from family members who regarded divorce to be shameful or unacceptable, and also due to society's norms. Yet, women now have greater access to education and better career possibilities than ever before, making it possible for them to support themselves financially if they choose to end

¹ Why divorce rates are increasing in India? Know it's 5 key points. (n.d.). DNA India. <https://www.dnaindia.com/lifestyle/report-why-divorce-rates-are-increasing-in-india-know-it-s-5-key-points-2991666>

² Nayak, D. B. (2021, December 15). Why divorce rates are increasing in India? Dr. Brahmanand Nayak. <https://www.drbrahma.com/why-divorce-rates-are-increasing-in-india/>

a marriage that isn't working out. Divorce is now considered as a chance to regain personal independence and begin fresh rather than as a failure or something to be embarrassed of. In addition, as women gain more freedom over their life, they don't hesitate to end unhappy relationships when they fear there is no hope of a happy ending. The Indian Divorce Act, 1869 governs divorce among Christians, the Hindu Marriage Act, 1955 governs it for Hindus, Buddhists, Sikhs, and Jains, the Dissolution of Muslim Marriages Act, 1939 governs it for Muslims, the Parsi Marriage and Divorce Act, 1936 governs it for Parsis, and the Special Marriage Act, 1956 governs it for civil and intercommunity marriages. The State of Jammu and Kashmir is not covered by the scope of this divorce Act, however inhabitants of other states who reside in Jammu and Kashmir are still eligible for these guidelines and requirements.

There are certain grounds³ under which a divorce is filed under Hindu Marriage Act, 1955 such as adultery, cruelty, desertion, conversion, mental disorder, leprosy, venereal disease, renunciation, not heard alive and no resumption of co-habitation. Adultery is always considered as a criminal offense and substantial proof which is required to be established. In 1976 an amendment was made implying that one single act of adultery is enough for the wife to get a divorce. There are also certain ground under which only the wife can file divorce against her husband as when if the husband had indulged in rape, bestiality and sodomy. If she was got married before the age of fifteen and renounces before attaining the age of majority. If there is no co-habitation for one year and the husband rejects the judgement of maintenance awarded to the wife by the court then she can approach the court for divorce. If the marriage is solemnized under the Hindu Marriage Act and the husband has again married another woman though the first wife is alive.

CHILD'S CUSTODY:

Custody is generally a legal term regarding the guardianship of a child after his/her parents' divorce. Custody can be claimed by both mother and father. The custody cases are decided according to the laws of the Guardian and Wards Act, 1890. As said earlier these are certain based upon which the court grants the custody right to the a partner those are on the basis of who can keep the child safe, ethically bring up a child by teaching values, discipline and customs

³ Joshi, K. (2019, May 14). What are the Grounds of Divorce under the Hindu Marriage Act, 1955. IPleaders. <https://blog.ipleaders.in/grounds-divorce-the-hindu-marriage-act/>

if the child is brought up in a unethical background then they may act against the societal norms and go in wrong path. The court also decides on the basis of good education to be imparted and the is concerned about the economic well-being of the guardian. In India, people prefer joint custody to sole custody. If the parents are unable to come to an agreement regarding joint or sole guardianship, the court will decide who will have primary custody of the kid. If the parents cannot agree, the court will typically ask both of them what they want.

Physical custody, joint custody, special guardianship, partial custody, guardianship of minor children, custody right of children who can claim it are the types of custody in India. But the most prevalent custodies are physical custody, joint custody and legal custody⁴. Physical custody is basically awarded to a parent who will take care of the minor child and who will be under the protection of that parent while the other parent is provided with periodical interaction and visitation rights. The reason for providing such custody is to award a better life to the child in a safe and peaceful environment and also to make sure that child is not deprived of love and affection of the visiting parent during his or her formative age.

Joint custody doesn't actually mean that the parents have to live together to take care of the child it means that both the parents will take care of the child on turn basis. The courts also believe this to be the best for the welfare of the minor child as the child will get the care of both the parents and still the parents get to be a part of their child's life. When a divorce gets ugly the spouses go for legal custody where the court decides who gets the custody of the child whether the mom, dad or grandparents such as legal guardians.

INDIAN LAWS GOVERNING CHILD CUSTODIAL RIGHTS:

The custody of the child is governed by a number of laws. The best interests of the child are taken into consideration when the court chooses who will receive custody of the child. The parent who has been given custody is in charge of the child's welfare. If the courts think it appropriate, the other parent (noncustodial parent) is given visitation rights. We all know that

⁴ Child Custody in India : Types, Laws governing child custody. (n.d.). Rest the Case. Retrieved March 25, 2023, from <https://restthecase.com/knowledge-bank/child-custody-in-india>

India is a secular nation that consist of several communities so India has different laws⁵ to deal with issues that arise in society. The Hindu Minority and guardianship act 1956 states that in case of divorce a mother has to file for custody of the minor as she is not assumed to be the natural guardian. Section 13 of the Hindu minority and guardianship act also states that father also have the right to be a guardian of a minor child provided for the child's welfare but if the minors age is 5 and less than 5 then it is automatically assumed that the mother is the natural guardian of the minor child. In the case Surinder Kaur Sandhu v. Harbax Singh Sandhu,⁶ it was held that the father is the son's natural guardian according to Section 6 of the Hindu Minority and Guardianship Act, 1956. Nonetheless, that clause cannot supersede over the crucial factor of what is in the minor's best interests.

There are also other acts that governs the custody of divorces they are Hindu Marriage Act 1955 where in section 26 it is given that child's maintenance and education only if both parents follow Hinduism. Within 60 days after the day the notice was served, the orders can be made at any moment and supersede the current decree. granted visitation rights and the special marriage act 1954 says that the right to custody of the child if the parents are divorced or follow different religions then the court may issue orders, judgements, revisions, etc. regarding child support at any time and may decide whether to issue the final decree within 60 days after the date of service these are the Hindu laws that regulates the transfer of custodial rights after a separation.

A father is regarded as the minor child's natural guardian under Muslim law, regardless of whether they belong to the Shia or Sunni sector. Even after her husband's passing, the mother is not accorded the title of natural guardian. This indicates that, following a divorce, even if the mother has custody of the minor, a father will have guardianship under Islamic law. After a divorce, the mother may have custody of the child, but the father continues to be the child's guardian since he can make decisions regarding the child's movement, education, religion, and other significant issues. According to Christian law The Divorce Act of 1869's Section 41 governs a child's custody rights after the divorce of a Christian parent. The welfare of the child is essential because the parents must demonstrate that they are capable of raising the child.

⁵ LIMITED, M. T. P. (n.d.). Child Custody Laws in India. MyAdvo.in. <https://www.myadvo.in/blog/child-custody-laws-in-india/>

⁶ Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698

The court may deny custody if it is unsatisfied with the parents' capability. These are the laws governing the custody of child of different religion in India. In *Gaurav Nagpal v. Sumedha Nagpal*,⁷ it was held that Children are not their parents' mere chattels or toys. The guardian court is expected to strike a fair and just balance between the needs of the minor children's welfare and the rights of the parents in the event of a dispute between the mother and the father. In the modern, changed social conditions, parents' absolute control over the destinies and lives of their children must yield to considerations of their welfare as individuals so that they may grow up right away balanced to be useful members of society.

The Guardians and Wards Act, 1890 also governs the custody of child in India which states that this act is a secular law that regulates the questions of guardianship and custody for all the children who are living within the territory of India irrespective of their religion. According to the case *Athar Hussain v. Syed Siraj Ahmed*,⁸ the Court may order interim custody and protection of the minor's person or property under Section 12 of the Guardians and Wards Act of 1890. As Section 12 gives the court the authority to issue any order it sees fit, the court must be led by the welfare of the children while deciding the issue of interim custody. The same considerations that must be used when deciding on guardianship also need to be made when deciding on interim custody. In situations of custody, the strict guidelines for an interim injunction do not fully apply.

VISITATION RIGHTS OF FATHER:

Our country basically run by the principle of Doctrine of *Parens Patriae*. According to the principle, the court must make a decision prioritising the welfare of the child. Visitation rights are therefore considered as being of utmost importance because they enable the child to build a bond with both parents. In general terms visitation rights may be awarded to a noncustodial parent after the divorce or in during the child custody proceedings. Visitation rights are granted to the non-custodial parent to protect the child and also to avoid conflict between both the parents. If not equally, the child has a right to spend a substantial amount of time with the non-custodial parent. The parents or even the court will make an effort to allow the parents to mutually decide on a visitation schedule and the rights granted to the noncustodial parent.

⁷ *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42

⁸ *Athar Hussain v. Syed Siraj Ahmed*, (2010) 2 SCC 654

Visitation must be seen as something that is done for the child's benefit. Grandparents can be granted visitation rights in addition to a biological parent. When a child is less than age 5 the court usually gives the custody of the child to the mother as it is the crucial age that the child needs the care and affection of the mother more than the father.

The Supreme court in a landmark judgement held that if the visitation application is attached along with the custody case then the court must take cognizance of it as soon as possible. The court should also make sure that the child is getting to meet the father or the grandparents after getting the visitation rights. The court shall also order the mother to bring the child to any public institution to meet the father. *Roxann Sharma Vs Arun Sharma*⁹ In the said case, Hon'ble Supreme Court of India has held that on account of dispute between husband and wife over the custody of the minor child the custody the child below the age of 5 years, was given to the mother, who was highly qualified than husband and had regular income from salary. But visitation rights were given to the father. In case of instability of the mother in regard of financial issues the court may ask the father to provide the mother with maintenance. A court generally passes a visitation order in favour of the noncustodial parent establishing rules regarding the visiting time and place.

Not only the noncustodial parent gets to custody rights but also the grandparents are allowed to get the visitation right from the court. Sometimes the mother refuse to show the children to their grandparents when creates mental agony to the them. So, the law has given visitation rights for the grandparents. In *Neelam Vs Mann*¹⁰ Singh court held that Welfare and interest of the child is paramount. A child who is residing with grandparents for the last several years become emotionally attached to them. In such circumstances custody of the child should remain with grandparents. Visitation rights to the mother also declined. In a 2022 case a grandfather filed petition for visitation rights of his grandson through his son in the Bombay High court. By considering the fact that his health has been declining since June 2021 and that he likely won't be able to wait for the custody issue to be decided. In light of the fact that children have a right to receive love and attention from their parents and grandparents, the High Court gave him the right to visitation at regular intervals. It is very crucial for the children's general wellbeing and personal growth.

⁹ *Roxann Sharma v. Arun Sharma*, (2015) 8 SCC 318

¹⁰ *Neelam v. Man Singh*, 2014 SCC OnLine P&H 25034

The non-custodial parents are entitled to visitation rights such as through the order of the court of law, dealing with the custodial matter at hand. Then the order which is granted by the court should make sure that the child is having frequent contact with both parents also to ensure the welfare of the child. Since the non-custodial parents should also have an equal opportunity to spend quality time with the child on vacation, weekends and festive holidays. During the child visits the noncustodial parents is responsible for the care and safety of the child. The timing and other rights are determined by the court by considering certain details such as age of the child, distance between the homes of custodial and the non-custodial parent. Generally, the holidays are mostly preferred for child visits.

It's important to be highlighted that the court has full authority to determine how, when, and where to enforce the noncustodial parent's visitation rights. Occasionally, the noncustodial parent is only permitted to see the child in the family court's children's complex. If the court finds that the noncustodial parent has violated his or her right or disobeyed the court's orders, it may cancel the visitation privileges granted. In case the custodial parent files a complaint or an injunction in the court to deny the visitation rights of the noncustodial parent the court on the basis of the complaint may grant so. The court may hold a hearing to determine if the noncustodial parent is unfit to have visitation privileges because of his or her inappropriate behaviour towards the kid or propensity to have an immoral impact on the child. If the custodial parent refuses the visitation rights granted to the noncustodial parents in that case the noncustodial parents has all right to approach the court to receive their right.

In Respect to relocation of custodial parents from one place to another the court can't refuse the relocation but will prescribe few measures to the custodial parent deciding to relocate. Such as the noncustodial parent must get a copy of the custodial parent's notice to the court indicating the custodial parent's intention to relocate. The following information must be included in the notice: the address where the custodial parent plans to move, a reliable mobile number, a brief statement of the reasons for the move, and a proposed new visiting schedule. The relocation of the kid to live with the custodial parent is subject to the noncustodial parent's ability to object in written. The noncustodial parent may submit a petition to change child support, parenting time, or custody. According to the court's ruling in *Rajan Jairath v. Mrs. Monita Mehta* 2013¹¹

¹¹ *Rajan Jairath v. Monita Mehta*, 2012 SCC OnLine P&H 21051

under Award of Visitation Right under Hindu Marriage Act, 1955, S.26, it is necessary to consider the wishes of the minors. While the father is a Senior Manager in a PSU and resides in Faridabad, both parents are claiming custody of the minor children and are living with their mother in Chandigarh. Father would not be able to spare enough time to care for the children's maintenance, education, and health. Due to their extended absence from their father, the children, who are of legal age, stated in front of the Lok Adalat that they are not prepared to accompany him. Mother is given custody, and the father is given visitation rights.

A noncustodial parent may abduct the child from the custodial parent's home or during school hours in order to obtain custody of the child, as has been seen in child custody battles. In *Dr. V. Ravi Chandran Vs Union of India & others*¹², a US court granted an Indian couple's divorce and granted them joint custody of their child. In order to prevent the father's joint custody, the wife took the child to India. The wife was ordered by the Supreme Court of India to return to the USA so that her husband could share custody of their kid with her; if she didn't, her passport would be confiscated, and the child would be in the exclusive care of the child's father in the USA. A Father has all right to get Visitation rights to meet his child. The father has all legal right to file case against his wife.

CONCLUSION:

Whenever the problem custody arises Often, the paternal side was forbidden from meeting the child if they were with the mother. Also, mostly the court was favourable for not giving the visitation right. Nonetheless, as long as the custody dispute is still pending, any father and the grandparents can now request visiting privileges from the court. All that need to be done is to attach the necessary documents for visitation rights along with the custody papers. The objective of the reform of the custody laws is to make decisions regarding cases while bearing in mind the welfare of the children who are affected by parental separation. This article makes an effort to assess the visitation rights given to one and custody granted to another parent, as well as the equality rights available to both parents considering the wellbeing of the child's life.

¹² V. Ravi Chandran (Dr.) (2) v. Union of India, (2010) 1 SCC 174