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## Avinash Kumar



*methodology and teaching and learning.*

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# **INDIAN CUSTODY LAWS AND THE PRAVALENT GENDER DISPARITY**

Authored By - Devika Tiwari

BA LLB 3<sup>rd</sup> year

Jindal Global Law School

## **TABLE OF CONTENTS**

INDEX OF AUTHORITIES.....	
Statutes Referred.....	
Cases Referred.....	
INTRODUCTION.....	
AIM AND OBJECTIVE.....	
FACTORS IMPORTANT FOR DECIDING THE CUSTODY OF A CHILD.....	
EFFORTS TO ELIMINATE GENDER BIAS.....	
APPROACH OF SHARED CUSTODY.....	
GENDER BIAS UNDER MUSLIM LAW.....	
CONCLUSION.....	

## **INDEX OF AUTHORITIES**

### **Statutes Referred**

- Hindu Minority and Guardianship, 1956.
- Guardians and Wards Act, 1890.
- Indian Divorce Act, 1869.
- Matrimonial Causes Act, 1857.
- The Muslim Personal Law Application Act, 1937.

### Cases Referred

- *Surya Vandanan v State of Tamil Nadu*, (2015) INSC 179.
- *Carla Gannon v. Shabaz Farukh Allarakhia*, (2009) Criminal Writ Petition No. 509.
- *Nil Ratan Kundu v. Abhijit Kundu*, (2009) SC 732.
- *Bholaram v. Parwati Sahu*, (2011) CHH 38.
- *Githa Hariharan v. RBI*, (1999) SC 1149.
- *Vishnu Ubale vs Mrs. Archana Tushar Ubale*, (2016) ALL MR 8.
- *Nighat Firdous v. Khadim Hussain*, (1998) SCMR 1593.

## Introduction

India is a diverse country which is home to numerous religions and cultures. Muslims, Hindus, Sikhs, Christians, Parsis, India's population has mixed set when it comes to religious communities. Since they all follow different set of rituals and practices it is very challenging to form laws that can be universally applied to everyone, especially with regard to family issues. All communities have their own set of traditional beliefs and practices relating to matters of marriage and consider it to be a very sacred and important matter. It is only in recent times that the rate of divorces and separations have increased and as a result the problems relating to the custody of children has become a huge challenge. And it is important for the courts to have a good set of laws that can help in dealing such a sensitive issue.

The term child custody is used under family law, for defining legal guardianship of a child who is under the age of eighteen. This guardianship gives the parent the right to make decisions for the child as well as the responsibility of raising them. The concept of custody under Indian law can be traced back to English law. In India, the primary statutes governing custody of children are the Hindu Minority and Guardianship Act of 1956<sup>1</sup>, Guardians and Wards Act of 1890<sup>2</sup> and Indian Divorce Act of 1869<sup>3</sup>.

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<sup>1</sup> Hindu Minority and Guardianship Act, 1956.

<sup>2</sup> Guardians and Wards Act, 1890.

<sup>3</sup> Indian Divorce Act, 1869.

## Aims and Objections

This paper aims to highlight the different considerations that the court takes into account while determining custody. This paper further seeks to analyze the inherent gender biases in the Indian laws relating to child custody.

### Factors important for deciding custody of a child

When custody is concerned it is important that the court does due diligence and deliberates over numerous factors before reaching a final decision about who should be awarded the custody. And these factors are, namely, welfare of the child, parent's wishes, child's personal wishes and the child's sex. Earlier the basic belief about the mother and child was usually ignored as the father was always the one who earned more. Even under Hindu law, it is a customary practice that the father is considered as the natural guardian and has the right of custody unless the child is of a tender age and the care of a mother is extremely essential<sup>4</sup>. In 1857, mothers in England got independent recognition after divorce was given statutory recognition by the Matrimonial Causes Act of 1857<sup>5</sup>. Soon divorced women started challenging the natural guardianship of their husbands and the English courts starting giving judgements in accordance with the child's wellbeing. This further allowed India to start considering the welfare of the child as the supreme criterion in selecting the custody. In India, the section 13 of the Hindu Guardianship and Minority Act states the during divorce proceedings, paramount importance must be given the welfare of the child. The Supreme Court held the same in the case of *Surya Vandanan v State of Tamil Nadu*<sup>6</sup>. Thus, the most important factor which needs to be considered by the courts is the welfare of the child. It is necessary to pay attention to the child as at a tender age there should not be any compromises made. The focus should be on the child's upbringing i.e., education, health, etc. Recently, on 20<sup>th</sup> October 2021, the Punjab and Haryana High Court has rejected to grant the custody of the child to the mother. Justice Sehgal said that "Though in normal circumstances, when a child is below five years of age, his/her custody deserves to be handed over to the mother, who is the best person to take care of the child. Yet, the welfare of the child is the paramount consideration and the court has to keep in

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<sup>4</sup> Choudhary A, "Custody of Minor Shall Be with Mother: SC: India News - Times of India" (*The Times of India* March 4, 2015) <<https://timesofindia.indiatimes.com/india/Custody-of-minor-shall-be-with-mother-SC/articleshow/46450506.cms>> accessed October 27, 2021.

<sup>5</sup> Matrimonial Causes Act, 1857.

<sup>6</sup> *Surya Vandanan v State of Tamil Nadu*, (2015) INSC 179.

mind all attending circumstances before passing any such order.”<sup>7</sup> It is essential that the child’s development is in a conducive environment so that he or she is able to grow into a good member of the society. Therefore, every decision should be in the best interest of the concerned child. It is the court’s job to assess whether the parents will be able to take proper care of the child, and if they do not believe so, they can award the custody to the close relatives of the child. However, this primary consideration of the child’s welfare has often been differently interpreted. In the case of *Carla v. Shabaz Farukh Allarakhia*<sup>8</sup>, the Bombay High Court held that the welfare of the child is supreme irrespective of the rights and wrongs contended by the parents. It was further held that money or physical comfort is not enough to assess the welfare of the child, rather it should include the emotional bond and affection between the child and parent<sup>9</sup>. There have also been many instances where welfare was not taken into consideration as the primary factor because of the prevailing stereotypes about gender roles in our society. Over the years, the approach of law has become more inclusive and has stopped treating children as chattels. Section 26 of the Hindu Marriage Act<sup>10</sup>, says that if the minor is capable enough to form a judgement, then their wishes are to be made consistent with the decision regarding custody, but these wishes are taken subordinate to the primary factor i.e., welfare and are small in nature and should have no link whatsoever to the wishes of either of the parents.<sup>11</sup>

## Efforts to eliminate gender bias

The court also has the right to give visitation rights to the other parent, who does not have the custody rights. In the case of *Vikram Vohra v Shalini Bhalla*<sup>12</sup>, the Supreme Court allowed the mother and the child to relocate to Australia and thus modified the visitation rights. In such a situation, it is essential that the relocation is in the best interests of the child and not to affect the other parent. Hindu law relating to custody has a lot of gender bias and has been reviewed with the view of uplifting women. The section 19(b) of the Guardians and Wards Act and the section 6(a) of the Hindu Minority and Guardianship Act are discriminatory in nature as they

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<sup>7</sup> Malik S (ed), “Child’s Welfare Paramount in Custody Cases, Says Punjab and Haryana High Court” (*Tribune India News Service* October 20, 2021) <<https://www.tribuneindia.com/news/punjab/childs-welfare-paramount-in-custody-cases-says-punjab-and-haryana-high-court-327245>> accessed October 27, 2021.

<sup>8</sup> *Carla Gannon v. Shabaz Farukh Allarakhia*, (2009) Criminal Writ Petition No. 509.

<sup>9</sup> *Nil Ratan Kundu v. Abhijit Kundu*, (2009) SC 732.

<sup>10</sup> *Bholaram v. Parwati Sahu*, (2011) CHH 38.

<sup>11</sup> Ashutosh Mookerjee, *Marriage Separation Divorce and Maintenance*, 652 (5<sup>th</sup> ed., 2015).

<sup>12</sup> *Vikram Vohra v Shalini Bhalla* (2010) 4 SCC 409.

consider the father to be the natural guardian without providing any specific reason for the inferior position of women. This clearly highlights how there exists an age-old anti-feminine bias and strong patriarchy in our society. Article 14 and 15 of the Indian constitution provides the right to equality and prohibits any kind of discrimination. It is strange that despite clause (3) of article 15 which gives a pre-vision of beneficial legislation geared to the special needs of women and children, women have been subjected to discrimination. In 1989, the Law Commission in its report proposed the amendment of the laws in a way that the right to equality is not violated.<sup>13</sup> Thus, section 19(b) of the Guardians and Wards Act was amended and the custody rights of the father and mother were made equal. There was no amendment made to the Hindu and Minority Act. Another effort of eliminating gender bias can be seen in the case of *Githa Hariharan v. RBI*<sup>14</sup>, which recognized gender equality as one of the essential principles of our constitution. The court held that both the father and mother are natural guardians of a minor child and calling the mother the natural guardian only after the death of the father is discriminatory as well as against the welfare of the concerned child. It was concluded that the natural guardian should be the one who is capable of taking proper care and will take decisions that are in the best interests of the child.

## Approach of Shared Custody

The concepts of shared custody was always ignored by Indian custody laws until the landmark case of *Vishnu Ubale vs Mrs. Archana Tushar Ubale*<sup>15</sup>. In this case, exclusive custody of a eight year old girl was denied, giving shape to the concept of shared custody. Instead of awarding sole custody to one parent, Justice P L Palsingankar gave equal rights of custody to both the parents and formed a shared parenting plan for the child's upbringing. Despite the father's wish to not take any contribution from the mother and keeping in mind the financial stability, the court ordered that since both parents are earning, they must share all the expenses of the child. Thus, the court recognized the mother's ability to take care of the child at the same level as the father. In my opinion, this new arrangement of shared parenting will always be better for the child as he or she will be less affected. A collaborative effort from the parents ensures that the child will have a healthy upbringing. Sadly, till date Indian courts usually appoint a prime guardian and rarely prefer to award a shared custody.

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<sup>13</sup> Law Commission of India, *Reforms in Guardianship and Custody Laws in India*, (2015) Report No.257.

<sup>14</sup> *Githa Hariharan v. RBI*, (1999) SC 1149.

<sup>15</sup> *Vishnu Ubale vs Mrs. Archana Tushar Ubale*, (2016) ALL MR 8.

## Gender bias in Muslim law

Under Muslim Law, personal law and the custody of a child and the Guardians and Wards Act deals with the issue of custody of a child. Unlike Hindu Law, there is no religious law statute for Muslims but there are certain practices present which are considered to be fundamental. The Muslim Personal Law Application Act of 1937 provides the application of Shariat law in matters of custody of Muslim children. It states that the mother has the foremost right to custody of minor children and she cannot be deprived of this right unless she is guilty of misconduct. This is known as the right of 'Hizanat'.<sup>16</sup> The mother's custodial rights are terminated once the son is 7 years and over and the daughter has attained puberty and then the father has an absolute right to hizanat<sup>17</sup>. It is only recently that the courts in India have acknowledged the importance of equality and have started making more fair judgements without blindly following the prevalent gender bias.

### Conclusion

It is true that India is slowly becoming more and more gender-neutral in the field of custody laws but we are still far from what is ideal. The cases mentioned above are outcomes of certain conditions which may not arise in every situation. The courts should aim to bring in more gender neutrality as well as a compatibility between the laws of the past and present. Custody of children is a sensitive issue and our laws should not compromise the future of the upcoming generation. To bring in true change, it is necessary to modify and refine the mindset of the judiciary so that they can identify the deep problems in matters of custody and can prevent the children from facing the brunt during divorce proceedings.

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<sup>16</sup> M. Hidayatullah & Arshad Hidayatullah, Mulla's Principles of Mahomedan Law, 19th edn. (1990).

<sup>17</sup> *Nighat Firdous v. Khadim Hussain*, (1998) SCMR 1593.