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INDIAN LEGAL FRAMEWORKS PROTECTING CHILD RIGHTS IN DIVORCE

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1. Constitutional Provisions and Fundamental Rights Relevant to Children in India

During the Constitution of India, it provides a comprehensive framework to ensure the protection and promotion of children's rights for all, through a plethora of provisions leading to the welfare of children in India. There is no separate provision of even a single article solely meant for children in the Constitution, yet it effectively ensured their well-being by means of direct and indirect constitutional guarantees providing for the specific needs of children¹. These constitutional provisions build up the legal framework for child welfare in India-including the special protection against exploitation, neglect, and abuse. One such major constitutional provision relating to children is Article 15(3), whereby the state is empowered to make special provisions for children.¹⁴ This part is very important

because it is the constitutional authority on positive discrimination in Favor of children: states can then make laws and policies under which the specific needs of children will be catered for and their protection ensured. Thus, laws like compulsory education, prohibition of child labour, and regulation of child marriage are all discoveries rooted in this provision. It emphasizes that children have been recognized as a part of society needing additional safeguards against disadvantageous and exploitative situations.²The right to life and personal liberty, as guaranteed by Article 21, has been widely interpreted by the Supreme Court of India as conferring on several rights that actually benefit the children. The right to life under this article has been broadened, and it now includes the right to live with dignity; and, for children, it entails the right to a healthy and safe childhood, free from all forms of abuse, neglect, and exploitation. Furthermore, the article has been extended to include the right to education, a significant milestone in child protection, codified specifically under Article 21-A. This was a transformative move of recognizing education as a fundamental right through which every

¹ Veeramuthu, P., “ Child Labours in India Constitutional and Legislative Framework” , 22, 200-209(2019).

² Kamalakar, G., “ The Right of Children to Free and Compulsory Education Act, 2009”, 56 The Indian Journal of Public Administration, 717 – 746(2010) Available at: <https://doi.org/10.1177/0019556120100327>. (Last visited on 10 April, 20205).

child irrespective of his socio-economic status has a right to access free and compulsory education until the age of 14.

Articles 39(e) and 39(f) indicate the Directional Principles of State Policy indicating the need for child protection by stating that children should not be abused or exploited by the State. These provisions actually constitute the frame of child protection in India concerning making the children free from any kind of exploitation like economic or sexual exploitation or from emotional harm. These articles also bring forward the protection of children from moral and material abandonment, so that they grow in an environment with a secure and healthy surrounding. These articles remind the judiciary and the State that in terms of divorce, the best interests of the child should remain paramount, and any sort of legal- or administrative- related custodianship or guardianship decision should ensure that children are not harmed-exploited because of the family breakdown. The principle of best interests of the child is deeply enshrouded in these constitutional provisions. Best interests of the child derivation as per Article 15(3) and Article 21 enjoins upon the judiciary to prefer welfare of children over everything else in matters affecting them, including divorce and child custody.³The courts in India frequently accentuate that custody orders must be consistent with that very same paradigm that relates to the child's emotional, psychological, and physical well-being. With children finding themselves in an emotional blender between warring parents when it comes to divorce proceedings, the courts have held that decisions must ensure that the children are not allowed to suffer due to any negative impact that dissolution of the marriage may cause in their well-being.

The Supreme Court has reiterated this principle on several occasions, stressing that children are not mere objects of custody but are rights-holders with a voice and respect for dignity inherent in them. In *Githa Hariharan v. Reserve Bank of India* (1999), the Supreme Court held that a child's welfare should be treated as the principal consideration when determining custody and guardianship, even when there is a conflict with parental rights. So too, in *Lakshmi Kant Pandey v. Union of India* (1984), the Court emphasized that children should not be treated as passive objects in custody disputes but as active participants in matters concerning their lives. Under the framework of the Constitution, the state and judiciary are empowered to provide that in divorce situations, the rights of children shall never be bartered away during custody disputes, child support, or visitation arrangements. Thus, it is the duty of the State and the

³ Ranga, P., "Legal Provisions Regarding Child Labour in India: To protect the Rights of Children" 5 International Journal of Research, 1381-1387(2018).

judiciary to ensure that children's best interests are not just recognized in theory but actually honoured in practice. This involves providing immunity for the children from the emotional trauma arising from conflicts between their parents, providing access to appropriate education, financial support for the child's upbringing, and safe living conditions after the divorce.⁴

2. Personal Laws and Child Custody

Almost always, the existence of such pluralistic systems establishes the difference in personal laws of the community for all the religious marriages, divorces, and even issues of child custody. Communities with their personal laws differ in terms of customs, practices, and traditions relating to conflicts in family law. However disparate personal laws may be, they will always fall within the all-encompassing constitutional principles to jure, equality, and feed- Ing a child. The pluralism, however, creates very intricate legal situations, particularly on divorce and child custody, in balancing traditional practices and modern constitutional values. Let's examine what the laws on custody create in the context of Hindu Law, Muslim Law, Christian Law, and Parsi Law.

● **Hindu Law:**

Dating from the provisions of the Hindu Marriage Act, 1955, and the Hindu Minority and Guardianship Act, 1956, the relationship between marriage, divorce, and child custody is governed under Hindu personal law. These laws say that the child's welfare is the supreme consideration when custody and guardianship are decided. The father would usually be the child's natural guardian. However, there are cases where mother's custody may be granted, especially where it is found to be in the best interest of the child, during issues of very small children, versus cases where the father was presumed to have the greater nurturing role.

Indian courts have shown a consistent willingness to depart from models of personal law in which the overriding consideration is one of legal right, preference, and evidence. Instead, the courts are liberating, giving due regard to the peculiar conditions of an individual case, and ensuring that every decision with respect to custody and guardianship will be aligned not only as to who is the "natural guardian," but as to whom responds best to the child's emotional, psychological, educational, and developmental requirements. It is, therefore, said, that judge allocates custody on whether that parent is fit enough to look after the child's welfare

⁴ Halima, A., " Indian Constitutional Provisions, Laws, Case Laws, And Legislations Regarding Gender Discrimination". International Journal For Multidisciplinary Research(2025). Available at: <https://doi.org/10.36948/ijfmr.2025.v07i01.34651>. (Last visited on 10 April, 2025).

irrespective of gender. Even the father would have been the natural guardian; however, there are cases where regardless of law, the custody was granted to the mother, as the court adjudged that her nurturing had more to offer to the child's needs. Therefore, the evolution of the said law has been child-centred and placing child welfare above everything else.

● **Muslim Law:**

Islamic law or Hasnaat governs the custody of children. Under Islamic law, in most situations, the mother will have custody of small children, boys up to 7 and girls up to puberty. This right of custody is, nevertheless, not unqualified. The right of hizanat says custody must always be for the child's interest: therefore, courts will take into consideration the situation in which the best interest of the child warrants the custody being granted to the father, or another suitable guardian. While the mother has the right to custody, the father retains his natural guardian status, particularly with respect to financial contributions and decisions regarding the child's education and welfare. He is, in fact, generally responsible for maintenance and care for the child, albeit with the mother holding custody. In all the opinions expressed by courts in India, personal laws of religion should take a back seat to the welfare and interests of the child. Therefore, whatever the traditional tenets or interpretations of Islamic Law that may favor maternal custody, they can be disregarded in favor of a more advantageous ruling for the child. For example, in cases where a mother's custodial care is regarded to be hazardous to a child's emotional or physical well-being, the court may assign custody to the father or another guardian.

● **Christian Law:**

The Divorce Act, 1869 relates to the dissolution, custody, and maintenance rights of a Christian in India. It confers the power to courts to order custody, maintenance, and education to be provided to children arising out of or in that case for a divorce or judicial separation. Section 41 of the Act grants the powers to courts for interim child custody arrangements during the proceedings so that children are not kept in a climate emotionally deprived or manipulated by either parent.

In Christian law, while the interest of the child remains central to the concepts of child law, both mother and father have obligations and rights in respect of the child, especially with regard to providing upbringing, emotions, and finances. Much depends on the exercise of judicial discretion because courts must determine which of the two would cater better to the child's needs in the growing and well-balanced environment. Welfare principle applies uniformly

in all cases under Christian law where the court not only considers material needs but also gives importance to the emotional and psychological well-being of a child. The courts usually observe the dynamics between the child and the parents to ensure there is no compromise on his overall growth on account of severance in parenthood.

● **Parsi Law:**

Parsi Marriage and Divorce Act, 1936, controls all matters such as marriage, divorce, and child custody, which Parsi people may have. Under this act, Courts were empowered to pass orders regarding custody and maintenance for children in the case of divorce or judicial separation. Custody provisions available under Parsi law are not so detailed as in other personal laws. Hence, Courts often refer to common law principles and the Guardians and Wards Act, 1890. Under Parsi law, the mother has the right to custody regarding younger children and in case where the child is not old enough to take decisions. However, the child's welfare is the principal guiding factor in reaching any decision in custody matters.

In many such cases, the family court considered factors such as emotional attachment of the child with each parent and the capacity of parent to take care, and stability of the home environment. Like the other personal laws, Parsi law allows flexibility in meeting the best interests of the child, even if it means going against traditional interpretations or practices. Human Language Conversion Since the Parsi Marriage and Divorce Act, 1936, governs marriage, divorce, and custody of children among Parsi persons, it empowers Courts to make orders regarding such children's custody and maintenance in the event of divorce or judicial separation.

The provisions, however, regarding custody under Parsi law are not so exhaustive as those under other personal laws, and thus, courts have to refer to the common law principles and the Guardians and Wards Act, 1890, while dealing with issues relating to custody.

Under Parsi law, although the primary right of custody has been granted to the mother in respect of younger children, especially when the child can be said to be unable to make a decision, the best interest of the child is always the guiding principle in any conflict regarding custody. In such cases, the family court often considers the emotional attachment of the child with each parent, the capacity of the parent to take care, and stability of the home environment. Just like the other personal laws, Parsi law provides for flexible interpretation even going against the traditional sense or practice to meet the best interests of the child.

3. Secular Laws: The Guardians and Wards Act, 1890

Being one of the most consequential and persistent pieces of legislation in India with respect to custodianship and guardianship of a child, the Guardians and Wards Act, 1890 (GWA) occupies a position of prominence in the Indian legal firmament. As a secular and umbrella law, it is, however, meant to apply to all religious groups within India, thereby becoming especially important in those instances in which personal laws conflict with, overlap with, or fall short of adequately protecting the child. Unlike personal laws which are confined to the adherents of a specific region, the GWA is uniform and applies to all populations engaged in status, with the overriding consideration being that the needs of the child must be advanced above the entitlement or putative rights of biological parents or guardians. Section 7 of the Act empowers a competent court for the appointment of a guardian either for the person or property of the minor if the court is convinced that such an appointment is necessary for the protection of the child. This prerogative is therefore not self-executory and needs to be exercised with circumspective judicial discretion and safeguard against becoming an arbitrary or mechanical act but to become a conscious choice through judicial reasoning and analysis in utmost interest of the child.⁵

The concept of "Welfare," as interpreted under the Act, is broad and inclusive with an innovative paradigm for imperial legislation. It means not only a child welfare in regard to the physical aspects but also to emotional development, moral and ethical upbringing, educational pursuits, and general comfort. The essence of this wide interpretation is that it enables the courts to roam freely, neither fettered by the narrow framework of the legislation itself nor by the constraining biases impinging upon its legitimacy within the metanarrative of collectives or societal norms; rather, with a broad comprehension of truly useful and supportive mechanisms equipping the child's overall advancement. The very elaborateness of Section 17 of the GWA adds further weight along a pro-welfare axis, in that a child's welfare will always be prioritized over a statutory right or claim by the parent or guardian. Thus, notwithstanding the position of the law as it may exist under personal law, wherein a parent may have been entitled to custody or guardianship, the court may reject that right in the interests of the child's present or future welfare. The GWA becomes especially predominant in interfaith marriages, guardianship conflicts with a third party (grandparents or relatives), or situations wherein one parent would not belong to the same religious community as the child. In those complex cases

⁵ Govindaraj, V.C., "Law Relating to Children: Custody of Minors and the Role of Courts as *Parrens Patriae* Private International Law: A Case Study" Oxford Academic, 94-113 (2019).

where there is likely to be conflict between religious personal laws or these may offer too little direction, family courts use the GWA as a fallback legal framework for resolving custody issues. This affords the court a certain amount of flexibility and discretion which personal laws tend to disallow, allowing the court to focus more on the interests of the child than on religious precepts. In addition, the Act gives the courts the power to take into account the preferences of the child, particularly where a child is deemed sufficiently matured to make a reasonable and informed choice. This builds recognition of an evolving capacity for a child in deciding matters affecting his or her life. It is a rights-based approach resonating with international child rights standards, including the United Nations Convention on the Rights of the Child (UNCRC).⁶

The Act has been enacted during the 19th century but has not lost its Vigor as a 21st century legal document as it, by its very philosophy, contains a child-centred approach with its flexibility and neutrality. It links the different religious laws of the country to the constitutional mandate that protects children's rights and thus becomes an integral part of Indian family law. While retaining such relevance, it continues to care for individualized justice, which entails that in each and every decision regarding guardianship or custody, emotional security and stability education, and development of the child are of paramount importance. When the structures of the society change with inter-religious, inter-caste, and many more types of nontraditional families, such flexible and inclusive legal frameworks will find an increasing importance for asserting GWA's position as one of the best shields to prevent and promote rights and welfare of children across India.⁷

4. Key Legal Principles in India: Best Interests of the Child, Parental Responsibility, and Child's Preference

The Indian judiciary has moved away from the traditional, regal entitlement view of custody and guardianship toward a socio-economy-positive, rights-based childcentric setting. This transition has brought its wake with articulation and application of the three basic legal principles. These principles now form a fundamental part of the Indian custody or guardianship design into: "best interests of the child," parental responsibility, and child's preference. Each of these signifies a severe departure from prior frameworks most often biased by orders' claims

⁶ Firdous, I., & S., et.al., "Best Interest or Religious Laws- The Paramount While Deciding Child Custody in India" . 6 International Journal For Multidisciplinary Research, 1-10 (2024).

⁷ Siddiqi, Fahad, "Law of Appointment of Guardian Under the Guardian & Wards Act 1890" 1-12 (2017). Available at SSRN: <https://ssrn.com/abstract=3357793> or <http://dx.doi.org/10.2139/ssrn.3357793> (last visited on 10 April, 2025).

in terms of sex, religion, or custom; it includes changing to a model that is wholly focused on the needs, rights, and dignity of the child. Foremost in this doctrine is the "best interests of the child," which becomes the mainstay of judicial reasoning when it comes to custody cases. Derived from international law notably, Article 3 of the UN Convention on the Rights of the Child Domestic jurisprudence, the principle empowers the courts to consider custody not just in legal aspects but in terms of the child's emotional stability, psychological well-being, educational continuity, and safety. Today, courts also consider the mental condition of the parents, the capacity to nurture the child, the home atmosphere, and possible neglect and abuse before proceeding with judgment, which translates into a holistic and multi-dimensional reflection in the best interests of the child.

Complementing this is the relatively modern incorporation of the concept of "parental responsibility," which shifts the framework from parental rights to parental duties and obligations. Traditionally, child custody was often viewed through a proprietary lens- where parents, particularly fathers under some personal laws, were seen as default guardians or custodians. However, Indian courts have steadily emphasized the increasing notion- not that which will drive tapering judgement into the rights of parents but will fulfil their duty to support and protect the child while guiding the child's development-gaining convictions based on world practices and rules. This conceptual shift transforms custody from a personal victory of one party over the other to an ongoing term shared between the two parents for the purpose of realizing the interests of the child in a healthy and loving environment. Courts have also discouraged the use of custody as weapons to punish or vindictively manipulate spouses who are estranged from each other, indicating that such forms of conduct are in themselves contrary to the interests of the child. The third pillar of this child-focused framework is the growing recognition of the child's voice in proceedings regarding custody. While there is no fixed legal provision in India that mandates the hearing of a child in every case, the courts have been increasingly asking for the child's views where the child is at an age to form an independent opinion—which is usually between 9 and 12 years of age and can vary according to the maturity in other instances. The child's preference is not conclusive, though, as the courts remain cautious of undue influence on the child by one parent or the other. Yet, when the court is satisfied that the child's views are genuine and informed, they weigh significantly in the balance of the final ruling. This method ensures that the autonomy and dignity of the child are respected and substantially improves the psychological outcome of the child, who feels acknowledged and valued in the decisions that profoundly impact his or her life. All three principles-the best interest, parental responsibility, and child preference witness a different paradigm for the

judiciary in India. It marks a conscious step away from adversarial win-and-lose custody struggles to a more sensitive, childfirst approach to dispute resolution that places value upon empathy and respect for the evolving capacities of the child. This movement, as expressed in both emerging constitutional values and in accordance with international child rights norms, establishes Indian family law on the course toward more humane and just solutions in the deeply personal and complicated arena of divorce and custody.

5. The Role of Family Courts and the Judiciary in India: Upholding Child Rights in Divorce Cases

Family courts in India, established under the Family Courts Act of 1984, have gained a very important status in the judicial framework of this nation, particularly in contexts such as divorce, custody of children, custody for children, guardianship to those children, and general child welfare. Unlike regular civil courts, family courts are not, to begin with, adjudicatory forums; they are, however, supposed to function as facilitative institutions purposely planned to deal with family feuds purely as per child sensibility and non-adversarial development with reference to them. The purpose of the birth of Family Courts is to create a space for justicegoing-a-launch-that strays from the rigidity and technicality of civil procedure, making the entire process accessible, humane, and most especially, friendly for litigants, especially children, caught up in the soul-struggling realities of their parent's battle. They were given this unique empowerment so that the procedure on welfare of the child would thus be placed above procedural technicalities, appointing for that purpose mediators, counsellors, child psychologists, and welfare officers so that the best interests of the child may be determined. The roles these professionals perform include evaluating emotional bonding, the fitness of parents, and understanding psychological and developmental needs of children-within the context of custody disputes.

The Indian judiciary, especially through its progressive interpretations and landmark rulings, has significantly expanded the child rights jurisprudence within the fold of family law. Courts have emphasized that children are not pawns or property to be divided or fought over, but autonomous individuals whose interests must supersede those of the disputing parents. In several instances, courts have condemned the misappropriation of custody as a tool of vengeance or compulsion between separated couples. Indian courts relate to the fact that emotional abuse, psychological manipulation, and parental alienation could treat as serious issues and that in some cases would merit a revision or complete reversal of custody orders. In

view of the changing dynamics of present-day families, which include dual-career parents and cross-border separations, courts have advocated for progressive remedial measures like shared parenting, virtual visitation via video calls, and structured parenting plans that provide continuity and stability in a child's life after divorce. Such progressive approaches are indicative of an evolving judicial sensitivity to the complexities of how divorce permanently touches the lives and futures of children. These advancements notwithstanding, a plethora of systemic and infrastructural challenges still hampers the implementation of child-focused justice in Family Courts. Procedural delays are a major impediment, extending the time of uncertainty and emotional torture often faced by children. Many Family Courts do not have sufficient in-house mental health professionals or child welfare officers and, as a result, judges sometimes have to depend on old reports or hastily put-together evaluations when deciding on issues and matters that are likely to affect a person for the proverbial life. There are no national uniform guidelines for custody evaluations, mediation, or child interview protocols, and therefore, practices vary from jurisdiction to jurisdiction. These diversions may sometimes result in arbitrary outcomes or decisions that are not fully in sync with the psychological and emotional doings of the child's situation. Nevertheless, the continuing efforts of Indian Family Courts and the higher judiciary evoke the substantial institutional commitment to the philosophy that children are not mere subjects of litigation but the most vulnerable and central stakeholders in family disputes. In doing so, an increasing infusion of therapeutic jurisprudence, rights-based frameworks, and expert interdisciplinary collaboration is slowly but surely turning the Indian legal system's treatment of custody and guardianship into one that is more affectionate, fairer, and child-focused. This is more than just about settling a legal dispute; these Family Courts are bridging futures, healing fractured relationships, and reaffirming the constitutional promise of dignity, protection, and justice for every child within this nation.