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WHO OWNS MY PROGENY: PARENTS AS VISCERAL BELLIGERENTS?

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*In a rapidly evolving era of Hustle Culture and Corporate Darwinism, where every action and decision, whether taken in hindsight or not, has not only been unforgiving but also brutally taxing to an average working person/professional across every major and minor sector – with the **Family**, as a legally recognized social unit, being the only **comforting** factor after an arduous day. Unfortunately, that once soothing space has of late grown highly uncomfortable and incompatible to an ordinary heterosexual couple either working in swanky office spaces or toiling hard on the streets in an exploitative environment with no viable escape, ultimately shattering their physical and mental well-being in an unreasonably unknown manner.*

*The stupefying boredom of the **rise-and-grind mentality** has had a subtle deteriorating impact on the home atmosphere where prolonged heated arguments and destructive brawls have taken a central seat in an otherwise serene setup which for long has been the cradle for recovery, rehabilitation and rejuvenation for most families in a country that has literally and figuratively elevated the concept of a **Family** to higher echelons as part of a divine obligation to be mandatorily fulfilled – an indispensable idea steeped in its profound civilizational history.*

*Be that as it may, the continuum of the marital relationship in whatever way possible is viewed to be more sacrosanct than the quality of the marital relationship itself. As a result, the unasked victims of such unintended consequences of the many inharmonious marriages in India is/are the **“Child/Children”**. The jury is still out on the fact that whether deadlocked marriages need to dissolved*

when viewed from a puritanical perspective or allow those lifeless marriages to persist to uphold family honour and societal infirmities. In such a scenario, the Welfare of the Child attains significant position in Indian Family Law jurisprudence and the purpose of this Essay is to critically delineate the legal battles surrounding Child Custody disputes against the fragmentation of Single and Joint Family Units and its cascading impact on the Child by examining other aggravating and mitigating factors both in domestic and cross-border settings with a special emphasis on the idiosyncratic nature of recent Indian judicial precedents.

INTRODUCTION

India, by and large, is still an enigma in adhering to certain age-old customs and beliefs in personal matters such as Marriage, Relationships and Children. Though pervasive but not inherently wrong, the myriad set of societal rules and expectations come with a heavy baggage of sanctions in case of any known deviation of an individual member in order to rigidly uphold and enforce the societal structure which is delicately and deliberately masked behind the layers of Law, Morality, Politics and Religion. It is almost impossible to isolate selective amnesia of freedom and consent in an ultra-orthodox, conservative and prudish society like India where every passing number in an individual's age is intrinsically linked to a particular activity or phase in a time-bound manner. The unknown script of each individual, if blessed, to be born in an affluent or at least in a decent middle-class Indian family, is pre-decided at birth till the unalterable passage of a ritual called **“Marriage”** which has to subsequently culminate in the birth of a Child or Children, as the case may be – the entire notoriety of the Parents, who themselves are helpless byproducts of an unforgiving societal system, direct their efforts and energy in securing their Child/Children, if cracks do begin to appear in their conjugal relationship, ultimately turning their marital relationship into a soporific ugly battle before the Courts of Law, traumatizing the Child/Children



beyond the measurement of any vocabulary in existence.

What black letter law governs Child Custody disputes in India is subjective depending on each unique set of facts but empirical evidence proves that the derived Family Law legislations so far in vogue in India is either directly or indirectly linked to Religion based on some unquestionable moral conduct which later became the standard template for those legislations exclusively regulating Child Custody disputes in addition to other substratum of interconnected areas of matrimonial rights.

FROM CONNUBIAL BLISS TO CHILD CUSTODIAL BANE: *The Invisible Harm?*

Even words fall short to describe the joy, pomp and celebration that a **Marriage** brings to every Indian family, irrespective of their status and social standing. Cutting across religions, that foundational unit of society is not only considered sacred but also statutory owing to its wide acceptance in maintaining and sustaining social order, and begetting offspring in a safe and secured environment who will be raised as future upstanding citizens. At the other end of the spectrum lies the question of marriage compatibility between the spouses, which at its core, if left unchecked, might trigger an abusive cycle of separation, marriage dissolution, alimony, maintenance and above all, Child Custody rights – which for most spouses encompasses severe emotional turmoil and a loss of self-esteem in their immediate community.

In India, whenever a Child Custody dispute lands before the Court of Law, a total of six legislations govern the legal framework depending on the religion of both the spouses and the kind of belief either one of them or both of them have agreed to espouse (like in cases of Conversion) before tying the nuptial knot –

1. Guardian and Wards Act, 1890;
2. Muslim Personal Law (Shariat) Application Act, 1937;
3. Special Marriage Act, 1954;
4. Hindu Marriage Act, 1955;
5. Hindu Minority and Guardianship Act, 1956; and
6. Protection of Women from Domestic Violence Act, 2005.

The most glaring lacunae is the absence of a standard legislative definition of the phrase “the best interests of the child”. Though the phrase “*the best interests of the child*” is the cardinal principle for dealing with Child Custody, Guardianship and Adoption of Children in India, most of the discourses on Child Custody has largely been dictated and transformed by judicial precedents due to the undefined and broad scope of what constitutes a Child’s best interests in consonance with the Statement of Objects and Reasons of the above-listed legislations.

Though the debate still rages on the expansive and restrictive scope of interpretation of the phrase “*the best interests of the child*”, its roots can be traced to **Article 3 (1) of the Convention on the Rights of the Child, 1989**¹ (popularly known as “CRC”) which was the most comprehensive statement on the rights of a Child ever made. India ratified the CRC on 11 December, 1992 thus formally becoming a *Member* to the Convention.

It is trite law according to most of the Indian judicial precedents that the Child’s welfare and interest is placed at the centre of the decision-making process as a matter of substantive right in sharp contrast to the absolute legal protection of the legal rights of the Parents. In other words, no law in India bestows an automatic right of Child Custody on either of the Parents. A few decades back, there used to be an assumption among the general public

¹Article 3 (1) of the Convention on the Rights of the Child, 1989 reads “*In all actions concerning Children, whether undertaken by public or private social welfare*

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”



that the Mother used to get Child Custody if the Child/Children were young but that belief was reinforced as a matter of judicial discretion and not as a legal requirement backed by any statute. The Law, over the years, has progressed to giving paramount importance to the concept of *Welfare of the Child*. This paradigm shift of Child Welfare became a focal point where Indian Courts expanded the scope of *Welfare of the Child* principle by holding that *there is a need to provide proper care to a Child's comfort, happiness, health, education and mental growth while simultaneously ensuring that they are in a stable, loving and morally healthy surroundings*.

TO CWTCH MY CHILD OR TO SKIRT THE LAW: *The Twilight Hug that Never Was?*

Lately, the legal process in matrimonial fights in India has miraculously acquired the unique distinction of getting linked to other parallel cases, mostly of criminal nature, especially to settle scores in a Child Custody case involving a family matter which is fundamentally civil in nature. It is a telling fact that in most Child Custody battles, the Husband/Father has acquiesced to fight the false cases that he would be likely implicated by the Wife/Mother if the tide does not turn in her favour. The best example would be slapping Section 498A (Husband or relative of Husband of a Woman subjecting her to Cruelty) under the previous **Indian Penal Code, 1860 ("IPC")** [replaced by the **Bharatiya Nyaya Sanhita, 2023 ("BNS")** which became effective from 1st July, 2024 with Section 85 being the equivalent] by the Wife against the Husband and his entire family including her in-laws. Since the prevailing Indian public sentiment is such that a Woman won't lie in matters affecting her life and dignity, that misplaced belief gave the police a moral boost to simply arrest the Husband/Father without conducting a preliminary enquiry in the first place about the complaint received by them under Section 498A of the IPC. Such blatant misuse of the law to seek vengeance by hook or crook against the uncompromising Husband/Father grew alarmingly high in recent times even before the matrimonial dispute emerged or when such disputes

were already sub-judice before the Family Court. The immunity enjoyed by the Wife/Mother when their case was proved fake before the Court but still allowed them to go scot-free with total impunity reeks of a sinister attitude of majority of the Wives stuck in matrimonial struggles to massage their ego and avenge their humiliation through the blatant abuse of the law without any remorse. **Most Husbands/Fathers have got their lives ruined irretrievably due to the unchecked excesses of police brutality when a wily Wife/Mother shed crocodile tears before the police.**

What drastically changed in a matter of few months or in a few years even after begetting children between the spouses when the issue concerned divorce, alimony, maintenance and most importantly, Child Custody, that the Wife takes complete advantage to harass the Husband in every possible manner is beyond legal scrutiny, if viewed solely from the angle of cultural, religious and social context. Except the higher judiciary, most of the Family Courts have also been indifferent to comment on the irreverent attitude of Wives/Mothers who are needlessly complicating and escalating matters when the spouses have been together for a decade or longer.

In purely domestic cases where the spouses married and resided in India, another problematic trend began to grow, completely eradicating the trust that spouses at least used to repose between themselves a few decades back – filing vague and baseless cases under the **Protection of Children from Sexual Offences Act, 2012 ("POCSO")**. *The impact of POCSO has been so controversial and crude that the Indian Courts and the law enforcement agencies have been left hanging in the balance between rehabilitative accommodation and desensitized recovery.* The modus operandi employed by the Wife/Mother against the Husband/Father using the Child/Children as pawns is baffling to say the least. The common allegations include the rape attempt of the Husband/Father against his minor daughter, aggravated sexual assault and other such similar ones. Irrespective of whether those allegations are true or not, the Wife usually has an upper hand than the



Husband in POCSO matters as POCSO is a Strict Liability Statute and operates on the “Reverse Onus Clauses” (Sections 29 and 30) where the burden to prove their innocence shifts to the Accused once the foundational facts are established by the Prosecution. As a result, the probability of the Reverse Onus Clauses being misused by the Wife/Mother has mushroomed into a high number of frivolous cases arising out of Child Custody choking the effective functioning of the Courts. Though the higher judiciary in India has time and again reiterated that the application of Reverse Onus Clauses in POCSO especially for Child Custody disputes has to be nipped in the bud, the ground reality proves otherwise, leading to polarized views in legal academia and the judicial fraternity.

JUDICIAL DELINEATION OF CHILD CUSTODY: *Striking a Balance or Stifling the Ballgame?*

A plethora of Indian judgments have conclusively established that in Child Custody disputes, the *“Welfare of the Child”* takes primacy over all other insinuating factors but unabashedly relying only on the Welfare of the Child principle to determine outcome in Child Custody cases would be an understatement. The idea of Welfare, in a more practical vein, does not mean economic benefit alone but also emotional security, proper education, continuity in life, psychological well-being, etc. This reasoning has been emphatically highlighted in *Gaurav Nagpal v. Sumedha Nagpal*². In *Nil Ratan Kundu v. Abhijit Kundu*³, the Court went a step higher and held that the doctrines of Equity, Justice and Good Conscience take precedence when the Statute is silent on legal remedies because judicial fairness becomes quintessential in Child Custody disputes where it is impossible for the Courts to fit familial relationships into water-tight compartments, owing to differing individual circumstances.

Rightly or wrongly, the legislative intent has directly and indirectly favoured the burden of raising the Child/Children to the Mother and it has widely come to be believed and acknowledged that such a skewed approach of preferring one gender over the other is due to the special significance attributed to Motherhood by substantially elevating the status of a Woman to that of a demigoddess in the Indian subcontinent. What was once an unblemished strong moral view held in high reverence by the Indian society since eons was strategically codified into law granting greater autonomy and agency to the Woman/Wife than to the Man/Husband. Hence, the Courts too underlined the idea that Child Custody literally belongs to the Wife unless expressly denied by the Wife herself or if the Husband can oppose the same by showing evidence of concrete harm that may befall the Child due to the Wife's lifestyle in addition to showing his active involvement in raising the Child.

Though India's Child Custody laws legally recognize the equal rights of both the Parents, there is a visible discrimination in practice against Fathers on account of societal notions rather than any preordained legal framework. The following are a few instances where the Court vociferously expanded the scope of Child Custody Laws in India by absorbing a lot of other indiscernible connecting threads into the legal lexicon.

Visitation and Meaningful Access: The Courts have laid down that *“Access is not a privilege granted to the non-custodial Parent rather a right of the Child to maintain contact with both the Parents.”* It involves making arrangements for phone or video calls, involvement in school activities, and if possible, overnight stays and holiday access. The decision in *Vikram Vir Vohra v. Shalini Bhalla*⁴ categorically stressed the right of Child to be with both the Parents as an inalienable right since it involved Joint Custody and such a right should be protected by the Courts at

²*Gaurav Nagpal v. Sumedha Nagpal* (2009) 1 SCC 42

³*Nil Ratan Kundu v. Abhijit Kundu* (2008) 9 SCC 413

⁴*Vikram Vir Vohra v. Shalini Bhalla* (2010) 4 SCC 409



all times. If there are continuous obstructions of access by the Custodial Parent, the Courts may alter custody if it harms the interests of the Child. ***The Court noted that the gender of the Custodial Parent is NOT important in determining Access Rights.***

Parental Alienation: Parental Alienation, which entails influencing the attitude of the Child in favour of or against one Parent, is a kind of psychological harm of the highest order caused to the Child, leaving the Child in a confused and vulnerable state with mental damage lasting for a lifetime. Even though there are no statutory provisions to redress this issue, the Courts usually resort to their welfare jurisdiction powers to counter the problem. In the classic case of *Vivek Singh v. Romani Singh*⁵, it was held that Children should not be alienated from either Parent and if proof exists that such an alienation had been done through manipulation by the erring Party/Parent to the Parent-Child relationship, **structural orders** may be passed by the Court taking into account all immediate incidents to grant Custody to the innocent Parent to uphold the Child's Welfare.

Under Section 25 of the **Guardian and Wards Act, 1890**; the Courts in India continue to exercise their jurisdiction over modification of Guardianship and Custody Orders depending upon whether there is a change in state of affairs justifying the same. No vested right is granted to either of the Parents in Guardianship or Custody but the emphasis is always on future benefits or the current needs of the Child. The case of *Mausami Moitra Ganguli v. Jayant Ganguli*⁶ best explains this interpretation where the Court ruled that the passage of time or satisfaction with the current arrangement of Custody will never act as a bar for judicial intervention and the option for modification of Custody arrangements is always possible in situations where the Custody arrangement was unstable, unhealthy, or not according to the developmental needs of the Child. **Strangely, what precisely constituted the developmental needs of**

the Child has been left open-ended and undefined by the Court, owing to specific assessment of the merits and demerits of each Custody case.

Personal Life and Moral Conduct: There is a clear ambiguity in the law pertaining to Personal Life and Moral Conduct of a Parent battling a Child Custody case. The Parent's romantic relationships after divorce, or allegations of Infidelity cannot automatically decide the character of a Parent, even by interference, for handing over their Child to them or not. If such a line of thought is encouraged, it would tantamount to the Court unnecessarily infringing on a Parent's private life and deriving preconceived conclusions devoid of any legal merit. The law does not allow the Court to take on the role of a jury to judge an adult's Parent behaviour. The Court will only take cognizance of the fact whether the environment affecting a Child is emotionally stressful, harmful physically or psychologically damaging or not.

The Child's Preference: The choices of the Child during his formative and later years, although crucial, however do not remain static. The Judges generally conduct an intimate and empathic conversation with the Child referred to as **In-Camera Proceedings** to comprehend the wishes of the Child without any undue influence. The Court also evaluates whether such a wish of the Child is voluntary or made under external influences.

The case of *Lahari Sakhamuri v. Sobhan Kodali*⁷ throws light on the issue of Child's Preference but with some reservations. The Court in the instant case evaluated the interest of the Child independently without considering the choice of the Child where the happiness, security and emotional stability of the Child with the Custodial Parent remain top priorities for the Court at any point of time. The Courts have realized much later that there should be prompt enforcement of Interim Orders, particularly those of Interim Visitation since the relationship between the

⁵*Vivek Singh v. Romani Singh* (2017) 3 SCC 231

⁶*Mausami Moitra Ganguli v. Jayant Ganguli* (2008) 7 SCC 673

⁷*Lahari Sakhamuri v. Sobhan Kodali* (2019) 7 SCC 311



Parents and the Child/Children will get permanently damaged whenever access is hindered for a considerable time. The **Family Courts Act, 1984**; though only a **procedural legislation**, was a right step in this direction to enforce a Parenting Plan negotiated by both the Parents which will be beneficial for the Child than having an abstract judicial decision made against one of the Parents.

Joint Custody: Joint Custody, wherein the two Parents exercise joint control and decision-making with respect to the upbringing of the Child is being granted *judiciously* in India despite its legal recognition. Joint Custody can only be practiced if both the Parents can communicate amicably and co-exist peacefully to provide stability to the Child—with the Court expressing fear that such an arrangement could collapse anytime like a pack of cards with the tiniest hint of a misunderstanding or hasty analysis of an unpredictable situation.

If the Parents are engaged in constant conflict, Joint Custody is usually not granted by the Courts because *the discord causes far more harm than being left with one Parent alone*.

There are numerous legal ways open to a Parent whose right to Child Custody or Access has been denied, viz., applying for or reopening an application for Custody or Guardianship under the **Guardian and Wards Act, 1890**; seeking urgent Interim Orders of Access pending the resolution of the issue, filing a Petition for Execution or moving a Motion for Contempt on the Breach of the Order of the Court, arguing Parental Alienation as a reason for Modification, and filing a fresh Petition for Modification in light of changed circumstances, etc.

Jurisdiction Follows the Child: In international Child Custody disputes, in some complex cases where the Parents' place of solemnization of marriage, last residence, citizenship of a foreign country, marriage registration in a foreign

jurisdiction, etc., play a key role in assessing the right of Child Custody when Private International Law principles are unequivocally invoked by either of the Parents. In India, jurisdiction cannot be claimed by virtue of a marriage place or a place where the legal proceedings were commenced originally because the Indian Courts rely on the doctrine of “*parens patriae*” to claim complete jurisdiction with regard to any Child who is physically within India regardless of the parallel proceedings that may be underway abroad. This is mainly because India has neither ratified or acceded the **Hague Convention on the Civil Aspects of International Child Abduction, 1980** till date. Therefore, there is no obligation for the return of a Child to their habitual country.

In *Arathi Bandi v. Bandi Jagadrakshaka Rao*⁸, the Supreme Court held that an Indian Court has the jurisdiction to take cognizance of the matter under the **Guardian and Wards Act, 1890** insofar as the Child concerned was present in India. It further asked that there was no reason why the concurrent action taken by a Foreign Court should interfere with the jurisdiction of an Indian Court when the child is physically present in India. Further elaborating on the same, it went on to debunk the logic of importation by laying down that the importation of a minor into India by one of the Parents against the wishes of the other may not immediately persuade the Indian Court to consider such an importation as *abduction* requiring punishment and return.

In the landmark judgment of *Surya Vadanam v. State of Tamil Nadu*⁹, the Supreme Court made a meaningful observation on the legal status of a Child who had not taken up residence in India and the ruling abroad was relatively new. In such a setting, the Indian Court can make a summary return so that the Foreign Court could look at what would be in for the Welfare of the Child. Where the Child is now part of the community within India, being schooled and having built psychological roots, the Indian Court can make

⁸*Arathi Bandi v. Bandi Jagadrakshaka Rao* (2013) 15 SCC 410

⁹*Surya Vadanam v. State of Tamil Nadu* (2015) 5 SCC 450



an independent inquiry about the Welfare of the Child. Under the guardianship of Non-Resident Indians (NRIs), the affected Parents can even resort to issuing a Look-Out Circular by the Ministry of Home Affairs for preventing a re-abduction of their Child.

The Foreign Custody Order will not be automatically recognized by Indian Courts as an equivalent to an Indian domestic decree but would be considered only as a document with influence, rather than as a **binding judgment** in the eyes of the Indian Court and it is pertinent to note that such an approach allow the Indian Courts to modify Orders whenever the position changes dramatically. If a Parent wants to either uphold or challenge the Foreign Custody decision in India, then the Parent will need to make a Guardianship or a Custody Application under the **Guardian and Wards Act, 1890**. The Court will be able to treat the Foreign Judgment as evidence, undertake its own welfare inquiry, assess the present situation, and deliver Orders relevant to the circumstances of the Child. *The second Parent can use the Indian Courts even if the other Parent is fighting the case in a foreign country.*

Constitutional Stretches to Child Custody: Recognizing the remarkable strides the country has made in the past few decades, the Courts, especially the higher judiciary in India, have begun extending the elasticity of the constitutional principles to subjects like Child Custody by charting out focused remedies to the aggrieved. One such glowing example of that exercise is the Writ of Habeas Corpus, a quick constitutional relief made available under Articles 226 and 32 of the Constitution of India, for dealing with illegal detention, now has under its ambit Child Custody disputes as well, to provide recourse mainly for NRI Parents trying to secure an immediate Order to safeguard their Child. The parameters of this form of relief have been laid down by the Supreme Court of India in *Nithya Anand Raghavan v. State (NCT of Delhi)*¹⁰, where it was ruled that Habeas Corpus is not

a fit forum for determining ordinary Custody disputes or giving effect to the Custody Orders made in a foreign jurisdiction. The Writ of Habeas Corpus is only available in circumstances where the Child is actually being held in illegal custody or is faced with an imminent peril because ***the sanctity of foreign judgments should not come in the way of the mandatory welfare investigation.***

CONCLUSION

The shifting family dynamics and materialistic obsession to acquire and dominate in emotional relationships is just the tip of the iceberg in matrimonial clashes. In India and elsewhere, things have come to a standstill where any recouping mechanism to fix fractured marital bond is frowned at not just by the warring Couple but also by their own families and relatives. The adjudication processes involving persistent matrimonial conflicts should be made more transparent and sophisticated from cultural, political and social outlook. Most legislations in India are framed from the myopic standpoint of **deterrence** and that approach might become improper and defeat the purpose of matrimonial reconciliation when addressing the elephant in the room. **Legislative and Policy Reforms introducing Mandatory Welfare Assessments with a periodic review, upgrading frameworks based on Counselling Responses, and Harmonized Judicial Guidelines to redress burning issues on Child Custody and its interrelated problems while respecting Parents evolving capabilities is the need of the hour to empower broken Parents caught in protracted Child Custody tussles.** To bring comprehensive reforms across the Child Custody conflict lifecycle, *Parent Collaboration* should by default become the starting point of resolving marital discord and then move on to rigorously train and induct Qualified Assessors apart from Mediators who can help susceptible Children and Parents articulate themselves without any repercussions. In toto, a holistic approach

¹⁰*Nithya Anand Raghavan v. State (NCT of Delhi)* (2017) 8 SCC 454



needs to be devised by integrating legal, psychological and social perspectives to overcome Child Custody wars and provide a feeling of credibility to the Parents caught in the never-ending web of legality.

It is not to be underestimated that the Child/Children look up to Parents as a source of venerable support and inspiration during ideal and turbulent times. The collective consciousness of not just the Courts and the Law but of the Civil Society and more importantly, the intent of the Parents and their families need to be pure and must include non-negotiable feelings of love and affection to the fullest, lest those Child/Children become sacrificial lambs at the altar for no fault of theirs due to the laxity of Parental egos and a widening emotional vacuum creating a dull, lifeless and soulless future, and if implanted successively, the human touch, persona and understanding would forever evaporate to be greedily replaced by ruthless, heartless and unmoving command following machines.

