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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **INDIAS CHILD CUSTODY AND VISITATION LAWS:** **LEGAL ANALYSIS**

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## **ABSTRACT**

*“In India, the institution of child custody and visitation rights undergoes a very complex intersection of the legal, social, cultural, and psychological dimensions. Rooted in a pluralistic ethos, custody laws in India take their birth from both secular statutes and religious personal laws, each having different assumptions about parental roles and guardianship. This dissertation seeks a critical legal analysis of the evolving landscape of child custody and visitation in India on the increasing focus on the doctrine of the best interest of the child. Traditionally, personal laws have buttressed the patriarchal norms regarding custody, frequently assigning the role of natural guardian to the father and relegating the mother to secondary caregiving. But with the rising acknowledgment of children's rights in their own stead as legal subjects, the Indian courts have gradually drifted from rigid statutory constructions toward the more egalitarian and child-centric approach to adjudication. The research traces the phases of historical development of custody practices in India in which power was shifting from the parents' rights-centered ideology towards the welfare-centered consideration of the child's physical, emotional, and psychological well-being. Key statutory instruments, particularly the Guardians and Wards Act of 1890 and the Hindu Minority and Guardianship Act of 1956, are critically analyzed in relation to constitutional values and international human rights standards, particularly the United Nations Convention on the Rights of the Child to which India is a party. The dissertation demonstrates the judiciary's growing trend toward multidisciplinary assessments, child psychology, and more holistic evaluations of parental capability and behavior considering key case judgments like Gaurav Nagpal v. Sumedha Nagpal; Roxann Sharma v. Arun Sharma; and Shaleen Kabra v. Shiwani Kabra. Certain emerging tools in the terrain of dispute resolution of high-conflict cases will be examined in detail: mediation, counseling, and collaborative parenting plans. The dissertation offers comments on the difficulties in enforcement of visitation rights when these are mixed with issues of parental alienation, domestic violence, or relocation. At the end, this*



*research contends that Indian jurisprudence has jumped a progressive distance towards aligning its child custody laws with modern constitutional and international standards; gaps remain in legislation uniformity, enforcement mechanism, and procedural clarification. The present study concludes with policy recommendations on creating legislation for visitation schedules, endorsing joint custody agreements where feasible, enhancing children's participation in custodial decisions, and institutionalizing child-sensitive procedures in family courts. Re-inducting the child into the legal discourse, this dissertation advocates for a rights-based, emotionally intelligent, and contextually adaptive approach for custody and visitation law in India."*

## **TYPES OF CUSTODY ORDERS AND THEIR LEGAL IMPLICATIONS**

The legal and practical relationship between a parent and their kid, particularly after separation or divorce or when parental rights are contested, is referred to as child custody. It outlines a parent's rights and obligations to make decisions on their child's upbringing, physical care, and supervision. The law aims to strike a balance between the rights of the parents and the child's best interests when determining child custody, considering several variables, including the kid's age, emotional needs, and the parent's capacity to provide a secure and caring environment. The concept of child custody, while rooted in law, is highly influenced by psychological, social, and emotional factors, reflecting the evolving understanding of children's welfare.<sup>1</sup>

### **1 Broadly, custody is categorized into two major types: legal custody and physical custody.**

Within the context of India's child custody laws, legal custody outlines the rights and obligations of parents regarding the important choices that influence a child's upbringing and future course. It essentially grants the designated parent(s) the authority to make crucial choices across various pivotal domains of the child's life. These key decision-making areas typically encompass education, determining the child's schooling and academic path; healthcare, including medical treatments, vaccinations, and overall health management; religion, guiding the child's religious upbringing and practices; and the general welfare of the child, which is a broad category encompassing important life choices and the overall well-

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<sup>1</sup> Patoli, H. "Custody of a Child -Its Legal Aspects", 4(1) International Journal of Law and Social Sciences. Available at: <https://doi.org/10.60143/ijls.v4.i1.2018.54> (Last visited on 18 April 2025).



being of the minor. At its core, legal custody is about the allocation of decision-making power over those aspects of a child's life that have a lasting impact on their development and future. It's about Who is legally able to choose the child's educational path, consent to medical procedures, guide their religious instruction, and make other significant choices related to their upbringing. Indian courts often grant joint legal custody particularly when both parents are deemed capable and willing to cooperate in the best interests of the child. In such arrangements, both parents are legally obligated to consult with each other and make these major decisions together. This fosters a sense of shared responsibility and encourages parental cooperation in raising the child, even after separation or divorce. The underlying principle of joint legal custody is to ensure that both parents remain actively involved in the significant aspects of their child's life and that decisions are made through mutual agreement, ideally reflecting a unified approach to the child's upbringing. Conversely, in situations where parental conflict is high, or one parent is deemed unfit or incapable of co-parenting effectively, courts may award sole legal custody to one parent. In this scenario, the parent with sole legal custody has the exclusive right to make all major decisions concerning the child's education, healthcare, religion, and general welfare, without the legal requirement to consult or obtain the consent of the other parent. This arrangement is typically implemented to ensure timely and necessary decisions can be made in the child's best interest, The fundamental tenet of joint legal custody is to guarantee that both parents continue to play an active role in the important facets of their child's life and that choices are reached amicably, preferably representing a cohesive parenting style. On the other hand, courts may grant one parent sole legal custody in cases when there is a significant level of family conflict or where one parent is judged unfit or unable to co-parent successfully. In this situation, the parent who has exclusive legal custody is the only one with the authority to decide on all significant matters pertaining to the child's general welfare, healthcare, education, and religion. The other parent is not legally required to confer with them or get their approval. Usually, this arrangement is put in place to guarantee that prompt and essential decisions may be made in the child's best interests, particularly when co-parenting is not a viable option due to significant discord or other detrimental factors. The award of sole legal custody does not necessarily preclude the other parent from having physical custody or visitation rights, but it does vest the ultimate decision-making authority in one parent.

**Physical Custody:** Physical custody deals with the day-to-day reality of a child's life, particularly their regular care and principal residence, as opposed to legal custody, which focusses on the power to make important decisions about a child's upbringing. In essence, it

establishes the child's permanent residence and manages the practical elements of their daily routine. Physical custody determines who the child spends the most of their time with, as well as how they manage their daily activities, bedtime, mealtimes, and surroundings as they develop.

There are two main ways that Indian courts can grant physical custody: sole custody and shared custody.

When a kid has sole physical custody, they live primarily with one parent, who also serves as the primary carer for their everyday needs and living situation. Visitation rights, which specify precise times and possibilities for the other parent to spend time with the child, are usually awarded to the other parent, referred to as the non-custodial parent. The purpose of these visiting plans is to make sure that, despite living with one parent most of the time, the child continues to have a meaningful relationship with both. Depending on the case's circumstances and the child's best interests, visitation details can differ significantly, ranging from regular weekend visits to more extended periods during holidays and school breaks.

Alternatively, courts may award **joint physical custody**, which signifies that the child spends substantial periods of time residing with both parents. This arrangement aims to ensure that both parents have a significant and ongoing role in the child's daily life and upbringing. It's important to note that joint physical custody does not necessarily imply an equal division of time (a 50/50 split). Instead, the time-sharing arrangement is tailored to what the court deems most suitable for the child's welfare, considering factors such as the parents' living arrangements, work schedules, the child's school commitments, and the overall practicality of the arrangement. The goal of joint physical custody is to maximize the child's contact and involvement with both parents in a meaningful way, fostering a sense of co-parenting in the daily lives of the child, even though the parents no longer live together. The specific schedule and logistics of joint physical custody are carefully crafted to minimize disruption for the child and to provide a stable and predictable routine across both households.

### **1.1 Sole custody and dual custody are two further categories of custody:**

Sole custody represents a custodial arrangement wherein one parent is vested with both the child's physical and legal custody.

This means that the parent designated as the sole custodial parent holds the ultimate authority and responsibility for making all significant decisions concerning the child's upbringing, encompassing crucial areas such as education, healthcare, religious instruction, and overall welfare. Furthermore, the child's primary residence is also with this parent, making them the primary caregiver responsible for the child's day-to-day needs, routines, and living environment.

The other parent is referred to as the non-custodial parent in a sole custody agreement. The custodial parent bears primary responsibility for the kid's welfare, including making important choices and providing day-to-day care, even though the non-custodial parent may be awarded visitation rights, which let them to spend scheduled time with the child to preserve a parent-child bond. Depending on the particulars of the case, the age and needs of the kid, and the general dynamics between the parents, the non-custodial parent's visitation schedule can vary significantly. It is designed to allow for continued contact while ensuring the stability and primary care provided by the custodial parent. Sole custody is typically awarded by Indian courts in situations where one parent is demonstrably deemed more capable of providing a stable, consistent, and nurturing environment that best serves the child's overall well-being. This arrangement may also be deemed necessary and appropriate when the other parent has been found unfit or poses a risk to the child's safety and welfare due to serious concerns such as a history of abuse (physical, emotional, or sexual), neglect of the child's basic needs, or problems with substance misuse that impair their ability to provide responsible care. The court's decision to grant sole custody is always guided by the paramount principle of the child's best interests, prioritizing an environment that offers the greatest stability, safety, and opportunity for healthy development. It signifies a judicial determination that placing both decision-making authority and primary physical care with one parent is the most conducive arrangement for the child's welfare under the specific circumstances presented.

Joint Custody represents a modern and increasingly favored custodial arrangement in India, where the responsibilities of both legal custody and physical custody are shared between both parents. This model acknowledges the significant and often equal contributions that the contribution of both parents to a child's total development and strives to foster a continued, meaningful connection with both, despite the separation of parents. Joint legal custody, a key component of joint custody, explicitly grants both parents the right and the responsibility to collaboratively make major decisions concerning the child's upbringing. This necessitates

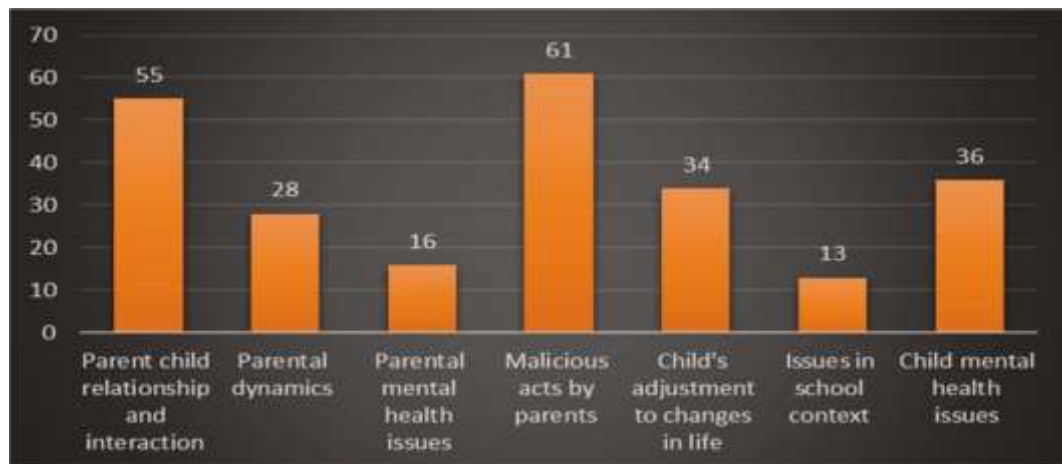


communication, cooperation, and mutual agreement on critical aspects such as the child's education, healthcare, religious instruction, and general welfare. The underlying principle is to guarantee that both parents continue to play an active role in influencing these important facets of their child's upbringing, encouraging a sense of shared accountability and a unified approach to raising the child.

Complementing this, joint physical custody involves the child living with each parent over extended periods of time. It's crucial to understand that "significant time" does not necessarily mandate an exact 50/50 time split. Instead, the residential schedule is tailored to what the court determines to be in the best interests of the child, considering factors such as the parents' living arrangements, work schedules, the child's school commitments, and the overall practicality of the arrangement. The primary goal is to ensure that the child has regular and meaningful contact with both parents and experiences the daily care and nurturing from both. While joint custody is a relatively new concept in the traditional landscape of Indian family law, it has been gaining increasing recognition and acceptance in recent years. In recognition of the growing knowledge of child development and the advantages of preserving solid relationships with both parents, Indian courts have taken a more progressive and child-centric stance, which is reflected in this change. The judiciary increasingly recognizes that both parents typically play vital and often equally important roles in a child's emotional, educational, and psychological growth. Therefore, the ideal custodial arrangement, in many cases, is one that reflects this reality and actively promotes the child's well-being by fostering an active and meaningful relationship with both parents, ensuring they continue to benefit from the love, guidance, and support of both their mother and father. The transition towards joint custody in India is evolving, as Indian society witnesses a shift toward more equitable parenting. Traditionally, Indian courts have favored sole custody arrangements, often awarding the mother sole physical custody, particularly when the child is younger or if there are issues related to the father's ability to care for the child. However, with the growing recognition of gender equality, father's rights, and the importance of both parents in a child's life, joint custody arrangements are becoming more frequent, especially in cases where both parents are competent, cooperative, and capable of providing an equal and supportive environment for the child.

Figure 1. shows how frequently quotes about family and other psychological difficulties appear in child custody disputes. It shows that the most common topic was that of parents acting

maliciously, which was followed by problems in parent-child interactions and relationships.



*Figure 1. Frequency of quotations mentioning the themes of familial and other psychosocial issues in child custody cases.*

*Source:* “Psychosocial Perspectives on Child Mental Health in Custody Disputes: A Qualitative Study from Urban Bengaluru”

This progressive shift towards joint custody raises questions about the logistical and emotional implications of shared parenting. The practical aspects of joint custody arrangements can be challenging, especially in situations where parents live in different cities or have conflicting lifestyles. Joint custody requires active collaboration between parents in making decisions for the child and can place demands on the parents’ communication and cooperation skills. Custody arrangements must prioritize the child’s emotional stability and make sure that their divided living arrangements don’t expose them to stress or conflict. The implications of custody arrangements on a child’s well-being cannot be understated. Legal and physical custody directly affect the child’s emotional and psychological development, their relationship with both parents, and their overall sense of security. Whether a child is in sole or joint custody, the nature of the custody decision must reflect the child’s best interests, which may include considerations of the child’s age, health, emotional needs, and the parents’ ability to support the child’s growth. A careful legal and psychological evaluation of the parents and the child is essential to ensure that the chosen custody arrangement contributes positively to the child’s overall development and welfare.<sup>2</sup>

<sup>2</sup> Nambiar, P., Jangam, K., & Seshadri, S. et.al., “Psychosocial Perspectives on Child Mental Health in Custody Disputes: A Qualitative Study from Urban Bengaluru.” Indian journal of psychological medicine (2024). Available at: <https://doi.org/10.1177/02537176241254515> (Last visited on 18 April 2025).

## **CONCLUSION & SUGGESTIONS**

### **CONCLUSION**

In India, there seems to be an evolving jurisprudence of child custody and visitation rights with a radical departure from the traditional patriarchal yardsticks toward a more egalitarian view that consists of considerations for the child's welfare. The central theme in this transformation happens to be the Best Interests of the Child (BIC) principle, which has found a firm footing in Indian judicial discourse and now finds resonance with international human rights standards like the UNCRC.

Replete with pluralistic avenues, laws in India formally permit the traditional personal laws to prevail in family matters; increasingly, Indian courts are willing to circumvent rigid religious or statutory norms to avert potential harm to child welfare. It is in this area of judicial flexibility that progressive doctrines such as joint custody, liberal visitation rights, and child participation in custody decisions have found emergence.

The challenges nevertheless prevail. Enforcement of visitation rights is often compromised by confrontational parental conduct, lack of institutional support, and emotional backlash that accompany protracted public litigation. Visitation rights, while recognized in law, often become a matter of practice with further alienation and psychological distress to children, hampering the development of natural bonds between the child and the parent. Furthermore, there is a failure of uniformity and consensus in applying visitation laws among the courts having competent jurisdiction.

Thus, while there have been significant advances in the Indian legal system, it is also important to call for more systematic, consistent, and child-sensitive reform concerning custody and visitation adjudication.

### **SUGGESTION**

#### **○ Codification of Visitation Guidelines**

It would present clarity and uniformity to custody contest procedures by drafting a comprehensive statutory framework solely for the visitation rights including but not restricted to regular visitation, supervised, liberal and virtual kinds of visitation.

#### **○ Establishment of Visitation Enforcement Mechanisms**



There should be stringent enforcement mechanisms by the courts regarding visitation orders. There should be clear penalties for noncompliance, and nonhostile, child-friendly redresses such as parenting coordinators should be introduced.

- o **Encouragement of Joint Custody and Shared Parenting**

Encourage joint custody as a default to appropriate cases, recognizing that both parents have equal and active roles in a child's development, especially when both parents are competent and willing to cooperate.

- o **Mandatory Mediation and Counseling**

Mediation and psychological counseling should be the mandates of family courts in all custody and visitation disputes to reduce conflicts and settle parenting matters collaboratively.

- o **Digital Visitation Tools**

Facilitate in the face of possible electronic visitation stipulations when distances, conflicts, or hassles make access impossible.

