

Welfare of A Child in Indian Custody Laws: A Namesake

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ABSTRACT

This article provides a holistic examination of the notion of welfare of the child that the courts apparently give the paramount consideration while deciding matters on child custody. It discusses the basic difference between custody and guardianship as a groundwork to later establish various religious laws on the same. The paper discusses at length about the setbacks of the subjectivity of the welfare principle used for the determination of the custody. As a result of subjectivity in the standard, the paper further discusses the Parental Alienation Syndrome (PAS) that the child suffers in such situations. This problem is later associated popular culture to increase relatability with the readers. In an attempt towards equality, the paper finally discusses the discriminatory nature of father's rights in custody and the solution to the same via joint custody are discussed with an aim to strive for the true welfare of the child.

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INTRODUCTION

A divorce is a truly upsetting and difficult process, not only for the married parties but also for those who are related to them. While a divorce requires a lot of emotional strength for the parents, one must not forget that a child adopted or born out of such a marriage suffers beyond imagination. A difficult time like this, where a child is forced choose one parent over the other can truly leave a traumatic scar in the child's life, hindering their growth. Even though it is realized that a child's welfare is of utmost importance in child custody cases, it is observed that the approach taken by courts to resolve the same is not adequate. In this paper, we attempt to establish how a legal-positivist interpretation of Indian custody laws hurts the ultimate welfare of the child. We explore the inconsistencies in the Indian Child custody laws and how they ultimately affect the welfare of the child. We also aim to show these issues with the help of case laws and popular culture. In the end, we will explore the solutions to this problem that ensure the best outcome for both the parents and the child.

Before moving on, it is imperative to understand what legal positivism signifies. According to Kenneth Himma of the IEP-

“Legal positivism emphasizes the conventional nature of law, i.e., socially constructed. According to legal positivism, the law is synonymous with positive norms, norms made by the legislator, or common law. Formal criteria of law's origin, enforcement, and legal effectiveness are sufficient for social norms to be considered law. Legal positivism does not base law on divine commandments, reason, or human rights”.⁶

THE DISSIMILARITY BETWEEN CUSTODY AND GUARDIAN AND THE SAME UNDER VARIOUS RELIGIOUS LAWS

Before we delve deeper into the source of the complications, it is crucial to recognize the dissimilarity between the concept of custody and guardianship. Child custody refers to the legal and hands-on relationship between a parent and their child.⁷ Child custody is divided into two parts: physical and legal custody. Physical custody refers to the decisions related to the daily life of the child, like the food they eat, the places they visit, etc. While legal custody refers to the major decisions about education, extra-curricular, etc. of the child. The term guardianship refers to the rights and powers that an adult has concerning the person and property of a minor and is defined under Section 4 of the Guardians and Wards Act, 1890. It states that ‘Guardian’ refers to a person having to care for the person of a minor or his property, or both.⁸

Owing to the secular nature of India, each religion has its own set of laws on child custody. According to Section 2 of the Hindu Marriage Act; Sikh, Buddhist, and Jain follow the Hindu Minorities and Guardianship Act, 1956. Section 6 of the HMGA, 1956, lists the guardians of a Hindu child; for a legitimate child, the father is the primary guardian and then the mother, while for an illegitimate child, the mother is the primary guardian and then the father.⁹

⁶ Kenneth Einar Himma, *Legal Positivism*, Internet Encyclopedia of Philosophy, (Oct. 29, 2020), <https://iep.utm.edu/legalpos/>.

⁷ Kailyn Champlin, *Child Custody*, Legal Dictionary (Feb. 21, 2015), <https://legaldictionary.net/child-custody/>.

⁸ The Guardians and Wards Act, 1890, § 4, No. 8, Acts of Parliament, 1890, (India).

⁹ Hindu Minority and Guardianship Act, 1956, § 6, No. 32, Acts of Parliament, 1956 (India).

Christian Law states guardianship and custody under Section 41 of the Indian Divorce Act, wherein the powers to decide for children of the divorcing couple are stated,¹⁰ following which a judicial decree is passed for the final custody of the children under the GWA. Parsi follows Section 7 and 17 of the GWA for custody of the child which firmly supports the welfare of the child.¹¹

The Muslim Law is very vast due to the personal laws that support the mother's rights to the child. Hanafis law states that a mother can care for her son till he reaches the age of 7 and daughters till she reaches puberty. According to Shia law, she is the custodian of the son till he is weaned off, while the daughter stays with the mother till, she is married off. In Maliki's law, the mother has custody of the daughter till she is married off, while the son is to stay with the mother till, he reaches puberty. The Muslim Law, under Section 6 of Shariat Law¹² supported by Section 7 and 17 of the GWA,¹³ backs the mother's claims to the child over the fathers, as the father gets custody of his children only after the child has stayed with the mother for the required time under the law, or when no other female family member is entitled to the custody of the daughter. If the father gets custody of the child, he must also fulfill the requirement of being of sound mind, having a moral character, and should live in a place that is safe for the child.

THE ILLUSION OF THE WELFARE OF THE MINOR

In the above laws, one objective common among the criteria for determining the custody of minor children was the importance given to the "welfare of minor". It has been determined by the courts that they are bound to give due importance to the ultimate welfare of the child. In furtherance of that, it was noted in *Santhini vs Vijaya Venketesh*¹⁴ that "it is to be borne in mind that in a matter relating to the custody of the child, the welfare of the child is paramount and seminal". In this sense, the child's comfort, contentment, health, education, intellectual development, moral and ethical values, ties of affection, and favorable surroundings. The factors listed in the hierarchy of importance are: i) the welfare of the child, ii) the wishes of the parents, iii) the wishes of the child, and iv) the age and sex of the child. Such a hierarchy is derived from Section 13 of The Hindu Minority and Guardianship Act which states that in the appointment or declaration of any person as a guardian of a Hindu minor by a court, the **welfare of the minor** is to be the paramount consideration¹⁵. Section 17 of the GWA and Section 26 of the HMA state that the Courts must give due **importance to the preferences of the child** if the child is old enough to form an intelligent judgment¹⁶. However, if such a preference of the child will be of little value if it transpires to reflect the wishes of one parent.

Though these provisions are sufficient for a child's welfare, it is argued that it is to the contrary. The problem arises due to the ambiguity of the notion of "welfare of the child". The family courts lack an objective assessment to determine the welfare of a child. Even though

¹⁰ The Indian Divorce Act, 1869, § 41, No. 4, Acts of Parliament, 1869, (India).

¹¹ The Guardians and Wards Act, 1890, § 7, 17, No. 8, Acts of Parliament, 1890, (India).

¹² Muslim Personal Act, 1937, § 6, No. 26, Acts of Parliament, 1937, (India).

¹³ The Guardians and Wards Act, 1890, § 7, 17, No. 8, Acts of Parliament, 1890, (India).

¹⁴ *Santhini v. Vijaya Venketesh*, Transfer Petition (Civil) No. 1278 Of 2016, 422 of 2017.

¹⁵ Hindu Minority and Guardianship Act, 1956, § 13, No. 32, Acts of Parliament, 1956,

¹⁶ The Guardians and Wards Act, 1890, § 17, No. 8, Acts of Parliament, 1890, (India).

the laws state that the decision must be taken in “the best interests of the child” there are no standards or guidelines to determine the same. As a result, the cases are left to the subjective perception of the judges. Judges, who have different backgrounds such as orthodox or liberal, will give different judgments on a similar case. Courts usually interpret child custody through a paternalistic discourse, whether the talk is of “welfare,” or “best interest” of the child. The problem arises as it is adults who interpret this¹⁷.

Asha Bajpai’s article on Custody and Guardianship of children in India talks about the problem of the ambiguity of the welfare of the child. The author argues that due to the indeterminate nature of the standards, the welfare principle is not applied properly or overlooked by the trial courts¹⁸. The appellate courts have found errors by the trial courts and must be approached at a considerable cost, in terms of time and money. An obvious conclusion to this is that the child’s interest suffers¹⁹. A long legal battle not only violates a child’s right to a speedy trial, but it also results in the child remaining in custody with a person with whom he/she should not remain²⁰. As a feasible solution to this, Asha Bajpai argues that the trial courts must be sensitized to the rights of the child and need to become more child friendly²¹. She also proposes that multidisciplinary opinions by various experts and organizations should be encouraged and must be provided to the judge to arrive at a “truer determination of the best interest of the child”.²²

To get a better grasp on this issue, it is preferable to look at case laws. In *Carla Gannon v. Shabaz Farukh Allarakhia*²³, the court held that the child’s welfare was the supreme consideration, irrespective of the rights and wrongs that the parents contend. They observed that what constitutes “welfare” has had widely different interpretations, as the standards are subjective²⁴. The court noted that “the best interests of the child’ is a vague rule that enables judges to decide based on the facts presented²⁵. Similarly, in *Sachin Narayanan Pillai v. The State of Kerala*²⁶, the court observed that the judgments are passed purely on the subjective satisfaction of the Judges, and the ‘interests of the child’ become a **casualty**. A consequence of this was observed in *Faruq Mulla v. Karishmabanu Hussain Qureshi*²⁷ and *Purushottam Deshmukh v. Radhika Shrirang Deshmukh*,²⁸ where the issue at hand was about the ability to spend time with the child. Even with similar facts, the courts gave different judgments solely because there is no objectivity to ensure that the judgment is in the best interests of the child. Therefore, there needs to be some sort of standardized and objective guidelines for the determination of child custody.

¹⁷ Asha Bajpai, *Custody and Guardianship of Children in India*, 39 Family Law Quarterly, 441-457 (2005).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Carla Gannon v. Shabaz Farukh Allarakhia*, Criminal Writ Petition no.509 of 2009.

²⁴ *Supra* note 17.

²⁵ *Id.*

²⁶ *Sachin Narayanan Pillai v. State of Kerala* (2017), KHC 6799 (India).

²⁷ *Faruq Ibrahimhai Mulla v. Karishmabanu Anwar Hussain Qureshi* (2016), SCC OnLine Bom 10582 (India).

²⁸ *Shrirang Purushottam Deshmukh v. Radhika Shrirang Deshmukh* (2016), SCC OnLine Guj 2656 (India).

Various aspects of the judgment delivered by the supreme court on *ABC v. the State (NCT of Delhi)*²⁹ highlights how personal biases of the judge can affect the judgment, potentially compromising the welfare of the child. In this case, the appellant had applied under section 7 of The Guardians and Wards Act, 1890³⁰ (hereinafter, GWA) to declare her the sole guardian of her son. The courts of Delhi dismissed her application because courts cannot decide without a necessary party and she was not willing to reveal the name of the biological father of the child.

The Supreme Court dealt with the issue on interpretation of Section 11 of GWA, considering the question that ‘whether an unwed mother must specify the name of the father in her petition for her appointment as the guardian of her child’. The court allowed the appellant to apply for her child’s guardianship without giving notice to the father. In this case, the court gave more importance to the assumption that the child might face some controversies regarding his biological father rather than the issue that the child will most probably grow without knowing his biological father. Thus, the absence of objective guidelines allowing the judge to decide the case based on what he thought was in the best interests of the child by hearing only from the mother could have most likely jeopardized what would have been best suited for the child. In many cases, where custody of a minor is at stake, one parent might try to alienate the child from the other parent and as a result, the child develops a psychological condition called Parental Alienation Syndrome.

CHILD CUSTODY AND PARENTAL ALIENATION SYNDROME

Parental Alienation Syndrome is a sort of disorder in which a child insults the targeted parent having no justification.³¹ It causes post-traumatic stress, depression, insecurity, fear of abandonment, etc., which is on the impressionable minds of children.³² Countries like the United Kingdom and the USA moved to deal with this issue. ‘UK’s Children and Family Court Advisory and Support Service, which represents children in family court cases to safeguard their rights announced a trial project aimed at tackling PAS’.³³ ‘The project aims at imposing severe restrictions on parents that try to alienate children during family disputes and such parents will be warned against any action that might alienate children from their mothers or fathers. Where the syndrome is established, the agency puts the erring parent through a 12-week intensive therapy; if the parent continues, the child could be removed from their custody for a few months or even forever where the alienation process does not end.’³⁴

In contrast to the abovementioned countries, there is barely any acknowledgment of PAS, in the Indian legal system. Family courts in India regularly hear cases of one parent being kept away from the child either forcibly or through violation of visitation orders and as proceedings in family courts go on for years, one parent gets enough time to alienate the child

²⁹ *ABC v. The State (NCT of Delhi)* (2015), SCC OnLine SC 609 (India).

³⁰ The Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890, (India).

³¹ Saurabh Gupta, *Parental Alienation Syndrome: Analysis in India*, Socio-Legal Review (Apr. 10, 2019), <https://www.sociolegalreview.com/post/parental-alienation-syndrome>.

³² Sanjay Pinto, *Justice for all: Parental Alienation makes mockery of visitation rights*, Deccan Chronicles (Aug. 28, 2015).

³³ Sruthisagar Yamunan, *What Indian Law says when a parent attempts to brainwash a child into hating the other parent*, (Nov. 22, 2017).

³⁴ *ABC v. The State (NCT of Delhi)* (2015), SCC Online SC 609 (India).

from the other and as a result of all the “finger-pointing” by the warring parents, the real focus i.e., the welfare of the child is lost.

The Supreme Court while delivering the judgment in *Vivek Singh v Romani Singh* dealt extensively with the phenomenon of PAS which children of separated parents often go through.³⁵ The judgment sheds light on some psychologically detrimental effects that the alienation process can have on the tender mind of the child. “First, it puts the child in the middle of a contest of loyalty. Choosing a parent is very likely to end up feeling painfully guilty and confused because in most cases, what the child wants and needs is to continue a relationship with each parent, as independent, possible from their conflicts”.³⁶ “Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone devoid of many positive characteristics”.³⁷

The court highlighted how some parents would resort to even strategic flouting of visitation orders by brainwashing or coercing the child. Their fraudulent attempts cause the other parent to lose their position as a parent in the child’s life and are ultimately denied custody when the court goes by the child’s wishes because that the child no longer feels attached to them. Keeping this in mind, the court mentioned that one party “cannot be a beneficiary of their wrongs”³⁸ and decided that a continuous company of the mother would be better for the child for some time as the child was separated from the respondent for a long time and deserved a chance to have the custody of the child at least for one year. The court also stated that an assessment of a child’s welfare for custody is possible only after a fair competition is given to both parents. Thus, the court in its decision advocated for joint custody as the most relevant jurisprudence for dealing with parental alienation in children.

CHILD CUSTODY IN POPULAR CULTURE

Child custody is one topic that has been explored on the big screens several times. The movies establish an emotional tone throughout to woo the viewer towards a particular character or idea. The most noticeable work being the 1979 hit, *Kramer vs. Kramer*.³⁹ It portrays a child custody battle from a father’s perspective. It depicts how a mother abandons her husband and their six-year-old son with no warning, comes back a year later, and files for sole custody of the child. During this period, the father had balanced his professional and personal life to take care of his son, and just when the relationship between the father and son appeared to have stabilized, the father finds himself in court fighting for custody. It highlighted the biased attitude in family courts in the US in the movie when the mother was granted custody of the child, although she had abandoned her son before. Legally no law favors mothers over fathers in court as under the Guardians and Wards Act of 1890, the court has the discretion to choose the guardian of a child in each case.⁴⁰ But due to a wide number of precedents set in court, the law views the mother as the ‘primary caregiver’ of the child.

³⁵ *Vivek Singh v. Romani Singh*, (2017) 3 SCC 231 (India).

³⁶ The Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890, (India).

³⁷ The Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890, (India).

³⁸ The Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890, (India).

³⁹ *Kramer vs Kramer*, 1979, [film] Directed by R. Benton, Hollywood: Columbia pictures.

⁴⁰ Guardians and Wards Act, 1890 (India).

Interestingly, almost all movies dealing with child custody often receive positive feedback. This is because these movies are often made with a strong emotional foundation that resonates with reality to a large extent. “*I am Sam*” (2001)⁴¹ shows how if the father is suffering from a disability, it becomes practically impossible for him to win the custody of his child. “*Mrs. Doubtfire*”⁴² and “*Chachi 420*”⁴³ are also some movies that illustrate the lengths to which fathers might go after losing custody, just to maintain relationships with their child.

Apart from the individual rights of the parents, cinema has also attempted to display a lack of legal infrastructure to put the welfare of the child as the primary concern during child custody. The movie “*Gifted*” (2017)⁴⁴ shows how the court often arbitrarily decides the best interests of the child. The child is put through severe trauma just to fit the expectations of the court’s view of the “best interests of the child”. “*What Maisie Knew*” (2012)⁴⁵ showcases how acrimony between divorced couples often have long-lasting psychological effects on the child. The child growing up with her mother and father is often equally attached to each parent. A sudden separation results in the child being forced to choose between one parent and drift away from the other. Sometimes, as portrayed in “*What Maisie Knew*”, child custody battles turn into battling ground for the parents, with each one hurling obscenities and allegations at the other, making the entire process doubly strenuous for the child. Although movies are majorly produced for entertainment; they often mirror reality. The reality, in this case, being quite simple: courtrooms, even family courts, are not child friendly, something which needs urgent attention.

INDIAN CUSTODY LAWS AND FATHER’S RIGHTS

The Indian law pushes for mothers to be the primary custodians of the child irrespective of the age due to the historical significance that considers them as primary caregivers and fathers as the earners of the family. In the case of *Jajabhai v Pathankhan*,⁴⁶ the custody of the young minor was handed over to the mother as she could provide the child with the required care and protection due to the young age. The court did not provide the father with a chance to fight for the custody of the child, as the child would require the mother more than the father. In the case of *Munnodiyl P. v. K. Chalil V.*⁴⁷, the father was considered as a financier for the child and due to the economic stability and welfare, that he provided, the child’s custody was given to him since the mother was dead. The father in this case is given custody merely due to his being the bread-earner of the family. A general prejudice is always drawn that he is considered having no time for the child, thus pawning off the child to the mother, who lives on maintenance can look after the child, while the father earning for them cannot do the same.

The dynamic nature of society is clear as the public opinion is changing, gender roles are changing, etc., and visibly family law hasn’t caught up in this aspect. As discussed above,

⁴¹ *I am Sam*, 2001, [film] Directed by J. Nelson, Hollywood: The Bedford Falls Company.

⁴² *Mrs. Doubtfire*, 1993, [film] Directed by C. Columbus, Hollywood: 20th Century Fox.

⁴³ *Chachi 420*, 1997, [film] Directed by K. Hassan, Bollywood.

⁴⁴ *Gifted*, 2017, [film] Directed by M. Webb, Hollywood: TSG Entertainment.

⁴⁵ *What Maisie Knew*, 2012, [film] Directed by D. Siegel, Hollywood: Dreambridge Films.

⁴⁶ *Jajabhai v. Pathankhan*, AIR 1971 SC 315, (India).

⁴⁷ *Munnodiyl P. v. K. Chalil V.*, AIR 1992 Ker 290 (India).

the courts are still open to interpretation, which reflects subjectivity because of a lack of standards. Patricia Smith, on reviewing Deborah Rhode's *Justice and Gender*, observed that "*Law is largely a servant of public opinion and not a generator of it*"⁴⁸. Though perhaps that law can influence public opinion, as society changes there is a need for the law to evolve. Smith also argues that the attitudes of judges reflect the attitudes of the public at large, thus the subjectivity is harmful to the aggrieved parties and the child⁴⁹.

In pursuance of the discussion on the father's right above, it is imperative to point out the criticism of cultural feminism. Cultural feminism is a type of feminism that emphasizes essential differences between men and women, based on biological differences in reproductive capacity⁵⁰. Cultural feminism highlighting those differences are distinctive and superior virtues in women⁵¹. However, such an ideology hurts not only the men but also the interests of the women themselves. Cultural feminism creates a hierarchy above men and implies that men lack a full connection to the earth, and reproduction, and nurturing⁵². It not only stigmatizes women for a certain type of behavior but also, contrary to the universal nature of women it claims. It ignores that men can adopt feminine traits too⁵³. Therefore, the court practice of binding women to the roles in a way of cultural feminism is inappropriate and discriminatory. It needs a change by realizing that the subjectivity of legislation is not helpful anymore.

IS JOINT CUSTODY A DISTANT DREAM AGGRANDIZING TO CHILD ABDUCTION?

Examining the question of why the welfare of the child cannot align with the provision of awarding joint custody in different countries, if it so furthers the best interest of the child, brings out interesting nuances to dwell upon. Many a time, the participation of both parents in the upbringing of the child renders a preferable outcome in the lives of children. The Consultation Paper issued by the Law Commission in November 2014, on adopting a shared parenting system, investigated the systems and the understanding of the term in countries across the globe like the US, the UK, Thailand, etc.⁵⁴ The State of Virginia defines Joint custody as (i) joint legal custody where both parents keep joint responsibility for the care and control of the child and joint authority to decide concerning the child even though the child's primary residence maybe with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of the above which the court deems to be in the best interests of the child.⁵⁵

However, the ambiguity of what constitutes the best interests of the child and the uncertainty of joint custody to facilitate the former remain dubious. A presumption of delegating

⁴⁸ Patricia Smith, "*Discrimination and Disadvantage in Feminist Legal Theory: A Review of Deborah Rhode's Justice and Gender*" 11 *Law and Philosophy* 431 (1992).

⁴⁹ The Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890, (India).

⁵⁰ Jone Johnson Lewis, "*Cultural Feminism: What Is the Essence of Being a Woman?*" *Cultural Feminism*, (May 30, 2019), <https://www.thoughtco.com/cultural-feminism-definition-3528996>.

⁵¹ The Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890, (India).

⁵² *Supra* note 38.

⁵³ *Id.*

⁵⁴ Law Commission of India, *Reforms in Guardianship and Custody Laws in India*, Report No.257, 2014.

⁵⁵ *Jajabhai v. Pathankhan*, AIR 1971 SC 315, (India).

the best interests of a child to lie within the ambit of awarding joint custody would be preposterous as seen in countries like Australia.⁵⁶ This could be problematic, as agreeing to a joint custodial arrangement would be a repercussion to domestic violence or abuse.

The commission approached a method of relocating and sharing in a post-divorce custodial system.⁵⁷ The commission not only investigated the existing laws in the country and found a ground in the evolution of joint parenting, but also gave glimpses to the right way of post-custodial arrangement that would work through a well laid down set of guidelines.

The concept of joint custody has not yet been consolidated into statutory laws in India. However, instances culminating into a shared parenting arrangement have been evident in some cases. A custody dispute of a twelve-year-old boy in *K.M. Vinaya v B Srinivas* was resolved by bringing in a groundwork that advanced the child to be with the father for a certain amount of time and then with the mother alternatively.⁵⁸ The education and other expenditure were to be shared by the parents equally directing each to contribute their part of value-oriented lessons in the pupil's life.⁵⁹ Similarly, the landmark case of *Vishnu Ubale v Mrs. Archana Tushar Ubale* eliminated the need for sole custody of the child and put forth, giving both parents equal rights.⁶⁰

A situation wherein one of the parents does not gain a right to custody of the child or even worse, not eligible for visitation, aggrandizes into a situation where he or she must abduct the child. This trend is seen in many countries, including India. The Hague convention in the year 1980 established to secure the prompt return of children who are wrongfully removed or kept in any of the Contracting States and to ensure the right of custody and access.⁶¹ Child abduction is termed wrongful when its removal is in breach of rights of custody of a person or an institution, jointly or solely under the law of the State where it was residing.⁶² Though none of the Indian statutory provisions provide for a definition of child retention and the country remains detached to the convention, there is no alternative position in the law that furnishes for the same agenda. India should be an anchor to such a convention particularly so it could have a uniform precedent to decide on inter-parental child custody disputes out of the Indian mainland. To associate the global citizen and render uniformity in deciding inter-continental custody issues, be it Indian court orders in a foreign land or foreign court orders in India, the signing of the convention deem to solve the disparity in deciding cases. Such a global phenomenon can be tackled only if India could be a signatory to the Abduction protocol to link with international waters and adhere to a universal principle.

CONCLUSION

The adoption of a shared parenting model as an option in Indian custody disputes forms a potentially favorable outcome. The reasons are many. This ensures the tackling of complexities in familial and conjugal relationships as a result of social and economic changes.⁶³ The concept

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Vishnu Ubale v. Mrs. Archana Tushar Ubale*, AIR 2016 Bom. H.C. 88 (India).

⁶¹ Anil Malhotra *To Return or Not to Return: Hague Convention vs. Non-Convention Countries*, 48 JSTOR 297-318 (2014).

⁶² *Jajabhai v. Pathankhan*, AIR 1971 SC 315, (India).

⁶³ *Sachin Narayanan Pillai v. State of Kerala* (2017), KHC 6799 (India).

of custody, instead of being vested with either of the parents, must now provide for a broader framework such that the preferable custodial arrangement can be decided upon by the parents and children.⁶⁴ Agnes notes that in custody disputes, neither of the parents though the father is the natural guardian by law or the mother being the biologically equipped parent are routinely awarded custody.⁶⁵ The living environment, social, educational, and overall well-being of the child is to be considered before awarding child custody. A mutual agreement leading to an association of both the parents simultaneously should be considered as a significant option in the matter. Such an association could be done by perfectly laying down parenting plans that scrutinize various aspects of the parents' personal and professional life, also considering a joint bank account solely for the child's expenses.⁶⁶ Even though some exceptional custody matters have been resolved using a joint parenting formula as mentioned previously, a clear distinction has not yet been made that could designate a proper shared parenting arrangement in India.

A child needs both their parents for overall personality development. It should be given the chance to learn and grow seeing both the mother and the father, and both should be given opportunities to bond with the child. A shared parenting model amalgamating legal and physical custody would lead to less bitterness in a post-divorce structure owing to the equal ability of both parties to be with the child.

⁶⁴ *Jajabhai v. Pathankhan*, AIR 1971 SC 315, (India).

⁶⁵ Flavia Agnes, *Family Law Volume 2: Marriage, Divorce and Matrimonial Litigation*, Oxford University Press: New Delhi, 255 (2011).

⁶⁶ *Jajabhai v. Pathankhan*, AIR 1971 SC 315, (Indian).