

Gender Bias in Custodial Decisions – A Critical Analysis

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ABSTRACT

This paper critically examines the gender bias inherent in India's custodial jurisprudence, particularly in divorce-related custody decisions. Despite the ostensibly gender-neutral language of statutes like the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956, judicial application often favors mothers by default, under the influence of the patriarchal "Tender Years" doctrine. Fathers, even when equally or better equipped emotionally and financially, are frequently relegated to secondary roles or limited visitation rights, undermining their parental involvement and the child's welfare.

This research analyses key case laws, judicial trends, and constitutional principles under Articles 14, 15, and 21 to highlight systemic biases. It also explores comparative legal frameworks in jurisdictions such as the United States, United Kingdom, Australia, and Canada, which have increasingly adopted shared parenting models to ensure balanced custody arrangements. Through doctrinal legal research and critical analysis, the study underscores the need for legislative and judicial reform in India to reflect contemporary societal roles and uphold the best interests of the child. The findings advocate for codified joint custody norms, gender-neutral legal language, and stronger enforcement mechanisms for visitation aiming toward a more equitable and child-centric custodial system.

Keywords: *Child Custody, Gender Bias, Fathers' Rights, Tender Years Doctrine, Joint Parenting, Judicial Discretion, Best Interest of the Child*

Introduction

While Indian custody laws particularly the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956 do not explicitly discriminate between parents, their application often reflects deep-seated gender biases. Courts are meant to prioritize the "best interest of the child," but this principle is frequently interpreted through a patriarchal lens, wherein mothers are presumed to be the default custodians and fathers are relegated to secondary roles, regardless of their capability or willingness to parent.

The judiciary's assumption that the mother is the "natural" caregiver is not only socially rooted but also finds subtle expression in legal practice. Even in cases where the father is more financially stable, emotionally involved, and logistically available to care for the child, custody is often awarded to the mother. Fathers, in most instances, are limited to restricted visitation rights, which may be sporadic or arbitrarily modified, affecting both parent-child bonding and the father's psychological well-being.

This chapter critically explores this disparity between law and practice. It examines judicial pronouncements where fathers' rights have been overlooked in favor of mothers, even without clear evidence that such decisions serve the

child's best interest. For example, in many custody rulings, courts have failed to explain why shared or joint custody now recognized in several progressive jurisdictions was not considered.

Beyond judgments, societal stereotypes also play a significant role. Fathers are often viewed as financial providers rather than nurturers, a stereotype that influences court attitudes and mediatory recommendations. Family courts, which are supposed to adopt a non-adversarial and gender-neutral approach, often default to assigning primary custody to mothers, citing traditional caregiving roles.

Through a combination of legal analysis, case law, and field practices, this chapter highlights how the systematic marginalization of fathers in custody proceedings represents not only a legal oversight but a broader human rights concern, requiring urgent judicial and legislative attention.

The “Tender Years” Doctrine: A Gendered Presumption

The “Tender Years” doctrine is a judicially created presumption that young children typically under the age of five are best cared for by their mothers. Though this doctrine has no statutory foundation in Indian law, it has deeply influenced the outcome of numerous custody battles. Indian courts have frequently leaned on this principle, often at the expense of evaluating the individual merits and parenting capabilities of the father.

The philosophy underpinning this doctrine is grounded in the belief that a mother is biologically and emotionally more suited to meet the nurturing needs of a young child. For example, in *Jayant Prabhakar Mahajan v. State of Maharashtra*, the Bombay High Court awarded custody of a four-year-old to the mother, stating that “a young child needs the emotional and physical nurture that only a mother can provide.” While such reasoning may seem compassionate on the surface, it reinforces archaic gender roles that portray fathers as emotionally distant or incapable of caregiving.

This approach fails to consider the evolving social fabric of modern Indian families, where gender roles are increasingly fluid. Today, many fathers actively participate in childcare, sometimes even taking on the role of primary caregiver. Yet, the law and judiciary appear slow to acknowledge these shifts. The continued application of the Tender Years doctrine, even in an unwritten form, marginalizes fathers by default rather than examining their individual parenting competence.

Furthermore, this doctrine contradicts the principle of gender neutrality in parenting a concept gaining global recognition. Countries like the United States and the UK have moved toward shared parenting models, recognizing the psychological and developmental benefits of children having strong relationships with both parents. India, however, lags in this regard. The Law Commission of India, in its 257th Report (2015), also acknowledged the unfairness of custody presumptions based on gender and recommended adopting joint parenting frameworks.

The danger lies not just in outdated perceptions, but also in the institutionalization of these perceptions within the legal system, leading to a systemic bias against fathers who are equally, and sometimes more, capable of providing emotional stability and care for their children.

Judicial Inconsistency and Discretionary Overreach

Another significant challenge in Indian custody jurisprudence is the over-reliance on judicial discretion. While discretion is necessary to adapt to the unique facts of each case, the absence of standardized guidelines often results in inconsistent rulings. This issue is particularly apparent under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956, where the “welfare of the child” is left open to subjective interpretation.

In *Roxann Sharma v. Arun Sharma*, the Supreme Court made an important observation: "Custody cannot be decided solely on the basis of gender; rather, it must depend on the child's best interests." This ruling seemed like a progressive step toward gender-neutral custody determination, yet lower courts often fail to apply this guidance consistently.

Instead, judges may fall back on personal biases, social conditioning, or the aforementioned Tender Years doctrine, leading to decisions that favor the mother as a default. Such inconsistency creates a climate of uncertainty for fathers, who are unsure how courts will treat their custody claims even when legal precedent and statutory law may favor their position.

Moreover, this discretionary overreach can result in highly variable outcomes in similar cases, eroding public trust in the legal system. Fathers who seek shared or full custody are often required to prove themselves in ways mothers are not. The law, as applied, appears to place a higher burden of parenting proof on fathers, creating an unequal playing field.

This inconsistency also delays justice. Prolonged custody battles and unpredictable rulings not only affect parents but also cause emotional distress to the children involved, contradicting the very goal of securing their welfare.

The need of the hour is to establish clear, gender-neutral, and child-centric guidelines for custody decisions, ensuring uniformity in judgments and minimizing the scope of arbitrary interpretations.

Visitation Rights: A Mere Formality?

In most custody arrangements where the mother is granted primary custody, fathers are generally allowed visitation rights. However, in practice, these rights often amount to little more than a formality. The implementation and enforcement of visitation orders remain a significant challenge in the Indian legal system. Fathers frequently face non-cooperation from custodial mothers, who deny access to the child on trivial or fabricated grounds.

What exacerbates this issue is the judicial reluctance to enforce visitation orders strictly. Courts tend to be cautious in initiating contempt proceedings or imposing sanctions on non-compliant custodial parents, especially mothers. As a result, fathers often find themselves making repeated rounds of the courtroom without any tangible remedy.

A notable example is seen in *Shehla Bano v. State of Maharashtra*, where the father had to approach the court multiple times after being denied access to his child, despite having a valid visitation order. The court's inaction in compelling compliance effectively rendered the father's rights meaningless.

This situation raises an important concern: What good are visitation rights if they are unenforceable? Fathers who are already marginalized in custody decisions are further disempowered post-divorce, making it difficult for them to maintain a meaningful relationship with their children.

Such systemic lapses not only violate the father's right to parenthood, but also negatively impact the child's emotional well-being, depriving them of the love, care, and support of both parents. A stronger enforcement mechanism is essential to ensure that visitation rights are not reduced to mere paper declarations.

Stereotyping Fathers as Secondary Caregivers

One of the most deep-rooted challenges that fathers face in custody battles is the persistent stereotype that they are less capable caregivers compared to mothers. This stereotype is not only prevalent in societal attitudes but also subtly influences judicial decision-making in custody cases. Even when fathers demonstrate emotional investment, involvement in day-to-day parenting, and a stable lifestyle conducive to raising a child, courts often continue to favor mothers, citing their "natural nurturing role."

In several landmark judgments, including *Gaurav Nagpal v. Sumedha Nagpal*, the Supreme Court reiterated that the welfare of the child is paramount. However, the Court ultimately granted custody to the mother, emphasizing the

"natural bond" she shares with the child without presenting compelling evidence that the father was unfit or that the mother's custody was substantially better. This decision, like many others, highlights how the emotional and moral contributions of fathers are frequently downplayed in favor of traditional gender roles.

Such bias can have long-term implications. When courts default to mothers as custodians, they risk reinforcing outdated norms that limit the role of fathers to financial providers rather than emotional caregivers. This view is misaligned with contemporary family dynamics, where many fathers are equal, if not primary, caregivers. Moreover, perpetuating these stereotypes contradicts the principle of gender-neutral parenting, which the Indian legal system claims to uphold.

To move toward a more equitable model of child custody, it is crucial for courts to evaluate the parenting capabilities of both parents on an individual basis rather than defaulting to generalized gender roles. Judges must consider the quality of care, emotional stability, involvement in the child's life, and ability to foster a healthy upbringing irrespective of the parent's gender.

Comparative Perspective: How Other Jurisdictions Address Gender Bias

A comparative look at how other countries handle custody can offer valuable insights for India to consider reform. Several international jurisdictions have moved beyond gendered assumptions and are making a conscious effort to ensure equality in parenting roles post-divorce.

- **United States:** Many U.S. states have embraced the idea of joint custody as the starting point in family law cases. Courts presume that it is in the child's best interest to maintain an active relationship with both parents. Laws in states like Kentucky, Arizona, and Florida encourage equal parenting time unless evidence shows that such an arrangement would be detrimental. The legal system has also introduced mechanisms like parenting plans, where both parents jointly decide on education, healthcare, and other important aspects of the child's life.
- **United Kingdom:** Under the Children Act, 1989, the UK mandates that the child's welfare is the court's paramount consideration. While the Act does not provide an automatic right to shared custody, it explicitly encourages the involvement of both parents unless there are risks involved. Courts are guided by a "presumption of parental involvement", which assumes that it is beneficial for the child to have both parents in their life, regardless of the parent's gender.
- **Australia:** The Family Law Act, 1975 in Australia promotes the concept of equal shared parental responsibility. This does not necessarily mean equal time but requires that both parents participate in major decisions concerning the child. Courts must consider shared custody as a viable option, unless there is a history of abuse, neglect, or violence. This framework pushes for a balanced approach, ensuring that neither parent is marginalized without reason.

These international models show how progressive laws, when combined with evolved judicial attitudes, can lead to custody outcomes that are both fair and beneficial for children. They underscore the importance of shared parenting as a norm, rather than an exception, and challenge the outdated assumption that one parent typically the mother is inherently better suited to custody.

For India, drawing inspiration from such frameworks could pave the way for legal reforms that actively challenge gender stereotypes. Encouraging joint custody, improving enforcement of visitation rights, and fostering a culture where both parents are seen as equal stakeholders in a child's upbringing are necessary steps toward a more just and balanced custodial system.

Case Study: Ground-Level Realities of Fathers in India

Apart from academic and judicial critiques, anecdotal evidence further underscores the plight of fathers. Interviews with non-custodial fathers reveal feelings of alienation, helplessness, and emotional trauma stemming from prolonged litigation and limited access to their children.

In a 2021 survey conducted by the NGO *Fathers' Rights Movement India*, over 68% of respondents claimed that their visitation rights were denied or obstructed, with little to no support from family courts to enforce them. Many also reported false accusations being used strategically during custody battles further complicating their position.

This disconnect between judicial theory and lived experience indicates a serious gap in how family law functions on the ground.

Conclusion

The chapter demonstrates that while the Indian legal framework may appear gender-neutral on its face, judicial practice continues to reflect deep-rooted gender biases. Fathers are often treated as peripheral figures in their children's lives post-divorce, regardless of their willingness or ability to take an active caregiving role.

To truly uphold the principle of the child's welfare, courts need to shed gendered assumptions and evaluate each case on its individual merits. This includes recognizing that fathers can be just as nurturing, responsible, and emotionally invested in their children as mothers.

The next chapter will explore comparative jurisprudence in detail, looking at international approaches to custodial rights and how India can learn from these systems to develop a more balanced, equitable approach.

