
TINY LIVES, SMALLEST VOICES AND FIGHTS THAT LEAVE A DEEP IMPACT – CHILD PARTICIPATION IN CUSTODY DISPUTES

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ABSTRACT

One of the most confidential issues in court are custody cases where legalistic arguments tend to conceal the emotional wrath of the children. Historically, the Indian family law had children as passive subjects whose decisions were made based on parental claims and judicial interpretation of welfare. Nonetheless, as constitutional values and international obligations like “UN Convention on the Rights of the Child” have increased there has been a slow move towards considering children as rights-bearing individuals and their voices ought to be heard. The paper will focus on how Indian courts have started considering the views of children when determining a custody finding even though decisions continue to be based on the principle of welfare in statutes such as the “Guardians and Wards Act, 1890” and the “Hindu Minority and Guardianship Act, 1956.” It brings out the shifting role played by in-camera interactions, counselling mechanisms and child-sensitive procedures through a study of prominent judicial rulings. Simultaneously, it solves such enduring problems as the absence of consistent guidelines, the threat of parental influence, and the inadequacy of the infrastructure in family courts. It takes the position in the paper that a moderated approach ought to be adopted in which the children are listened to without being overburdened with the decision-making process, and recommends institution-level changes to be made so as to have meaningful and consistent child-involvement in the custody process.

Keywords: child participation, custody disputes, welfare principle, family law, children’s rights.

INTRODUCTION AND LEGAL FRAMEWORK

Among the most emotionally charged cases that court is called upon to rule are those involving custody disputes. At the backdrop of the pleadings, affidavits and opposing viewpoints are wrecked homes, relationships and children trapped in the mayhem. Over decades, the children became passive objects of Indian family law, their custody being decided by the statutory presumptions, by the parental claims or by the mind of the court regarding the welfare without necessarily listening to them. With the context of change in constitutional values and increasing human-right practices within India, especially relating to its capacity to live under the international human-right practices, such as the “United Nations Convention on the Rights of the Child (UNCRC)”¹, the courts have been encouraged to consider the children not as those who are dependent, but as individuals who have rights of their own. Such a development creates a very important and very human question, which is, at what age are children mature enough to overcome the senses of their parents that parents should listen to their views, despite the circumstances? and with what weight then should that voice ought to be?

The welfare principle forms the basis of the law determining custody in India as it is clearly laid down in both the “Guardians and Wards Act, 1890”² as well as the “Hindu Minority and Guardianship Act, 1956”. Section 13 of “Hindu Minority and Guardianship Act, 1956”³ is clear that the evolving decision in any appointment or declaration of the situation of the child shall be the supreme factor kept in perceptions when making the determination. According to Asha Bajpai in her article published in the Family Law Quarterly⁴, this principle of welfare is a seismic viewpoint of the literature which has hitherto been based on a proprietary paradigm of guardianship, in which fathers were viewed as natural proprietors of their offspring, towards the formation of a children-centered approach to parental rights where children are encompassed to the predominance of the right to the welfare of the child. This stand took was strengthened by the Supreme Court in the case of “Rosy Jacob v. Jacob A. Chakramakkal”⁵ that the parental rights are fiduciary in nature and that can only exist as long as they can be useful in the child interest. This religious view gives face to custody cases, which do not regard children as appendages of their parents.

¹ United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

² Guardians and Wards Act, No. 8 of 1890 (India).

³ Hindu Minority and Guardianship Act, No. 32 of 1956, § 13 (India).

⁴ Asha Bajpai, *Custody and Guardianship of Children under Indian Family Law*, 39 Fam. L.Q. 443 (2005).

⁵ Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840 (India).

JUDICIAL APPROACH AND CHALLENGES

However, it is not always that easy to calculate welfare. In what ways ought welfare to be considered in terms of physical comfort, access to an educational opportunity, and financial stability, or must a consideration be also taken according to the preferences of the child, psychological and emotional? According to Indian courts, a child and his voice are all the important information that can lead to the comprehension of his welfare. In “Nil Ratan Kundu v. Abhijit Kundu”⁶, the Calcutta High Court had interviewed the child in camera, where the child was in position to form intelligent preference, the choice had to be respected. Similarly, in “Gaurav Nagpal v. Sumedha Nagpal”⁷, the Supreme Court has come up with an interim custody agreement, which tried to provide a balance between rights of both parents yet paying close attention to the comfort and feeling of security of the child. Such cases show that more and more judges are willing to provide children with the presence and the voice in the court that will be examined.

The jurisprudence has further acknowledged the fact that even mothers can be equal natural guardians and so this has enhanced a child continuity of care towards the parent that he feels closest to. In “Githa Hariharan v. Reserve Bank of India”⁸, the Supreme Court interpreted the meaning of the term “after” in “after the father” differently by reading Section 6(a) of the “Hindu Minority and Guardianship Act”⁹ to indicate that after does not mean “after the life of the father”, but “in the absence of the father” and as such mothers can be natural guardians until the lifetime of the father. The case became a vital move towards a, healthier, gender and child-focused realm of, guardianship wherein the parent most in line with the child’s best interests (either sex) can intervene.

Nevertheless, the courts are hypersensitive. More importantly, they are highly cognizant of the fact that children and especially those who are in high-conflict divorces are prone to parental influence and coaching. The judges have to determine whether a child expressing the choice seeks his or her desire in the true sense or it is an outcome of coercion by one of the parents. That is why in-camera interviews and friendly interaction with children are preferred by the court compared to questioning in open court. In “Aakansha Roy Rasmussen v. Adwait Anil

⁶ Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413 (India).

⁷ Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42 (India).

⁸ Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228 (India).

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

Dixit”¹⁰, the Bombay High Court noted that it was essential to provide the children with the environment that would not scare them or intimidate them in any way because only under these conditions, children could speak freely without fear of punishment. This sensitivity of the procedure is a sign of a human attitude: the judiciary listens, but not the whole part of the decision on the child goes on her head.

It is also notable that there are currently counsellors, mediators and even psychologists in most family courts in India especially in light of Family Courts Act¹¹ which permits counsellors to aid the judge in resolving a dispute. They are supposed to give the child the protection it needs the child against being over-exposed to the negative aspects of the proceedings appropriate and they are her to offer an independent and professional evaluation of the psychological well-being of the child. Nevertheless, the quality of the system is unequal, and some family courts have the proper counsellors and child rooms whereas others are underequipped which means that their employees are overworked and there is not much child-specific training. There are occasions when the reports can turn perfunctory but this robs the child of knowing more about themselves, inspiring them to live in a full-bodied world of emotions. To encourage such a dream, counsellors must be required to receive a continuous training on child psychology, trauma-informed care, and non-distressing interviewing methods. They should also be independent in their role not just advisory to the judge as their voice must be faithfully conveyed without any of the institution fuzzing it up.

The approach further is enhanced by international law. In India, in Article 12 of UNCRC which the country has ratified, children have rights to express their opinions freely on all that concerns them thus the right established provides that the views of children receive the weight as dictated by age and maturity. The General comment no. 12 of the UN Committee¹² urges states to put in safe, effective mechanisms of hearing children, provisions of child-sensitive atmospheres, facilitated by trained facilitators, and the availability of independent representation to the children. Although in “ABC v. State (NCT of Delhi)”¹³, Indian courts have referred to the UNCRC, stating that the determination or omission of procedural safeguards in relation to the father of a child varies unevenly within and between jurisdictions that permitted such levels of

¹⁰ Aakansha Roy Rasmussen v. Adwait Anil Dixit, 2015 SCC OnLine Bom 558 (Bombay H.C.).

¹¹ Family Courts Act, No. 66 of 1984, § 6 (India).

¹² Comm. on the Rights of the Child, General Comment No. 12: The Right of the Child to Be Heard, U.N. Doc. CRC/C/GC/12 (July 20, 2009).

¹³ ABC v. State (NCT of Delhi), (2015) 10 SCC 1 (India).

discretion to be applied to an unwed mother to enable her to decide not disclosing the father's identity to her child. Many family courts are deprived of trained counsellors or psychologists and therefore judges have to make-up and improvise. Such inconsistency may have arbitrary and unequal results, also to mention Asha Bajpai as well cites guardianship proceedings in her criticism.

There is more that exists beyond statutes and case laws and that is the profound human dimension. A custody battle is a process that does not technically amount to a legal issue to a child, it is the breaking of their sense of home and belonging. Children also complain of feeling guilty (Did I cause their separation?), of not knowing who to love (One day I may feel better than the other), and feeling abandoned. The invitation to appear in court may intensify these fears so that they believe that they are determining the destiny of their family. In “Vivek Singh v. Romani Singh”¹⁴, the Supreme Court recognized the emotional concern associated with the length of time that a planned case might take and urged the case to be solved as swiftly as possible. Courts then have to assume a stance of silent listening/authenticate the child in his/her feelings, devoid of attempting to plunge them into the final solution. This is supposed to be with the objective of making the child feel heard and not heavy.

REFORMS

Modal jurisdictions are educative examples. In the UK, publishing the Children Act¹⁵ was with the notion of the role that wishes and feelings can play in the welfare of the child. This was legalized under the provisions of the British Common Law, and national jurisdictions such as Canada¹⁶ often now assign appointed “*guardians ad litem*” or child advocates to represent the interests of the child in a court of law process. Similar mechanisms have been occasionally employed by Indian courts, think of appointing amicus curiae or using child welfare committees; however, those mechanisms are created based on an exception. Such representation in its institutionalized form would protect children against the possibility of direct confrontation, though they would be heard.

The Supreme Court in the case of “Lahari Sakhamuri v. Sobhan Kodali”¹⁷ laid down a good example of a contextual adjudication. The Court ruled the principle of repatriation was not

¹⁴ Vivek Singh v. Romani Singh, Civil Appeal No. 3962 of 2016 (India).

¹⁵ Children Act 1989, c. 41, § 1(3)(a) (UK).

¹⁶ Nicholas Bala, *Child Representation in Canada: The Perfect Storm*, 46 Fam. Ct. Rev. 672 (2008).

¹⁷ Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 (India).

mechanically used; it considered the schooling of the child, emotional stability and that this child was comfortable in the current surrounding. The judgment is an epitome of a move between fixed presumptions to a child safe, situation in which both acknowledge the reality lived in by the child through the division by the crime of formalistic parental propositions.

Yet, challenges remain. No standardized approach is used to ascertain the opinions of children in the country prompting diversity in practice, with a small number of courts taking time to interview their children at length, while the rest just seem to take as their word reports espoused by the guardians. Overworked courts can have no time or facilities to hold any meaningful child hearings. Child-friendly rooms, trained personnel, and a regular process are all required especially without limiting the right to be heard to a mere formalistic process instead of actual opportunities to participate.

According to critics this prominence of the voice of a child may render a parental authority useless or at least unsettling to the family systems. Children should not however have a veto over the conclusion of the judicial proceedings, although their opinion must be respected. This is to be done to bring the child in a holistic welfare analysis as opposed to its determinacy as argued by Asha Bajpai. One method that courts can balance these considerations is paying more care towards judgments of older, mature children when they are relevant to their long-term welfare and paying closer attention to where preference is perhaps due to an act of manipulation.

CONCLUSION

Listening to children should not merely be a law that is to be followed, but it must be a form of care that heals them. Research revealed that children who feel listened to through a litigation process develop a higher post-litigation adjustment and resilience psychologically. Many of them are disempowered, but their empowerment is restored by letting them talk. In the case of children, who at times wish they were helpless spectators amid the crumble of their own family, getting listened to may be one way of regaining confidence in adults as well as institutions.

The future should be a road that brings together both idealism and expediency. Courts and legislators must come up with national guidelines on the ways to hear children in disagreements concerning custody that have minimum age, well established interviewing guidelines and the usage of trained counsellors. The family courts need to be child friendly; they should hire

psychologists to interpret the emotional responses imparted by a child in meaningful suggestions and create a special kind of rooms which are easy to understand, but not frightening like the regular court rooms. High-conflict cases should be a habitual appointment of independent child representative so that the voice of a child is heard without assuming compulsion on juvenile parents. Lastly, the court procedures must be limited in time to avoid a situation of uncertainty taking place, most of which prove to be the worst to a child. These are bold reforms, though not idealistic. India already possesses the legislative and institutional framework, the only thing needed is a consistent implementation, capacity building as well as a cultural inclination towards a real sense of child-centered justice.

Courts have one of the hardest decisions to make when the children disagree, either with their parents or even between themselves. Without knowing the ultimate way, a justice system that pays due attention to the children, listens attentively, and thus treats them with empathy runs nearer to administering justice. It is not the broken families that can be made healthy by the law, but the law can make sure that the smallest voices should not be drowned by the noise.