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Beyond the bench's gaze: The place of the child's voice in Indian custody laws

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Abstract

Even though the structural marginalization of child voices remains a significant issue of Indian custody jurisprudence, the voices of children are still overlooked despite constitutional, statutory and international commitments to participatory justice. The principle regarding the best interests of the child has been officially worked into the Indian family law, but the interpretation of the law and the framework of the procedures are still adult-focused, giving priority to the rights of parents and the discretion of the judge over the involvement of children. In this paper, the critical analysis will be given to the disjuncture between the rhetoric of child welfare and the reality of the exclusionary custody practice in India, where the legal approach developed in India will be discussed in terms of the comparative and international frameworks. Based on developmental psychology, constitutional jurisprudence and the interpretation of the international human rights law it illustrates why the ongoing lack of institutionalized systems of child representation, including trained child advocates, formal interview guidelines and participatory adjudicative models is destructive to both the welfare and principal goals. The research proposes legislative changes requiring organized child involvement, setting up of autonomous advocacy strategies and institutionalized judicial training to bring about that the voices of a child are effectively heard in the course of making custody judgments. The shift in judicial discretion into institutionalized participation is not only a reform procedure, but it is an evolution, a process that must be undertaken to bring the constitutional benefits of dignity, equality and participatory citizenship to the children of India.

Keywords: Child Custody; Best Interests of the Child; Judicial Discretion; Guardianship Law; Constitutional Rights; United Nations Convention on the Rights of the Child (UNCRC).

1. Introduction

1.1. The Marginalisation of Children's Voice in Indian Custody Jurisprudence

The Indian custody law has been significantly transformed since independence but its development has been an imperfect break with the law of colonialism that organised the subjugation of child welfare to the proprietary rights of parents. The history of Indian customs jurisprudence shows how British common law models developed British parental sovereignty as the legal status, and children have been represented and deprived of their rights to be the object of parental rights instead of the subject of their own interests. This colonial history remains to this day in judicial conservatism that applies parental authority over the developmental and psychological needs of children despite the weakening of statutory reforms to redefine custody determinations on grounds of best interests of the child.

The concept of the best interests of the child as formally modified into Indian legislature by Juvenile Justice (Care and Protection of Children) Act, 2015 and the succession law amendments later is an improperly operationalised concept

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that lacks systematic institutionalisation of the way of incorporating the opinions of children into the process of custody judgment. Although the courts in India have formally abandoned the doctrine of the tender year, and the preference of fathers, in favour of a more egalitarian norm, the reality of judicial discretion exercised inconsistently, without any regular reference to child-centred considerations, is supported by empirical research. This legislative framework requires in consideration of children welfare, but offers little on how to use this mandate to act through direct intervention with the affected children with sentences and decisions on custody delivered without involvement or contributions of those children who are mostly affected by such orders.

Article 15 of the Indian Constitution is the source of constitutional guarantees of child rights in that it forbids any discrimination on the basis of age related vulnerability and Article 21, which guaranteed the right to life with dignity going up to developmental protection. Theoretically, such stipulations in the constitutions make the children rights-bearing citizens who have a right to take part in the decisions that will affect their fundamental interests. Nevertheless, the judicial interpretation of the Indians has been to leave an immense gap between the protective constitutional text and the restrictive custodial practice, and these constitutional guarantees have not been thoroughly incorporated into the jurisprudence of custody. The disenfranchisement of child voice echoes more fundamental structural factors: there are no institutions that represent children in family courts, judicial officers are not sufficiently trained on the principles of developmental psychology and child autonomy and the general belief that children are not mature enough or capable enough to assist the court with their voice despite a raft of empirical evidence of children to state their preferences reasonably and in an educated manner.

The gap between statutory duties that best interest's analysis should be considered in the present case and judicial practice that does not consider systematic child participation is a major lacuna in the Indian family law. The case practice of custody in Indian courts is mainly by an adversarial contestation in parent custody with the interests of the children promoted by court appointed guardian's ad litem whose role is ad hoc and ceremonial in nature. This paradigm makes children emerge as unseen during the process of court process which should be about child welfare and custody issues but instead it is the battle of the two adults and the child is not central and the child is also not informed of these court proceedings. The resultant jurisprudence value assigns judicial efficacy and parental privileges over processes of actual child engagement to the increasing global agreement represented by the United Nations Convention on the Rights of the Child which enshrines the right of children to be heard in any case impacting them.

1.2. The Legal and Institutional Framework: Gaps Between Rhetoric and Reality

The Indian custody law is run under multiplicity of legislative frameworks that include the Indian Penal Code, the Criminal Procedure Code, the Hindu Marriage Act and the Juvenile Justice Act, which have unrepealable provisions on child participation. All of these laws, however, do not make a mandatory, all-encompassing mechanism of the voice of the child integration. The current school of thought is that of rule-based adjudication which gives preference to judicial discretion over more fixed systemic mechanisms of participation and therefore reflects a wider international trend of movement out of the strongly categorical norms to individualizes consideration and yet leaves a large measure of discretionary power in the courts. Such an incoherent statutory structure creates unequal treatment of child participation in many contexts of custody; the procedures that constitute family-court proceedings under the Hindu Marriage Act are inconsistent with the mechanisms that are used to create legal acknowledgment of the voice of the child in different jurisdictions, leading to a disparate legal standing of child voice in different contexts.

The popular standard which has been adopted as the primary analytical focus of the Indian custody controversies is the so-called best interests of the child; yet it is operationally undefined with respect to the priority given to the views of children against the will of parents and views of experts. In determining the applicability of child evidence and its plausibility, judges have significant discretion, often taking recourse to psychological evaluation of the case by expert witnesses, instead of child opinion; this system can be seen as an efficient way of refining the genuine preferences of the child by professional opinion. This means that the judges can weed out child views by categorizing statements as being too immature or unable to comprehend long term consequences and thus establishing the gate-keeping measures which ensure that the child voice does not find its way into the court proceedings. The lack of presumptive age standards or any kind of set protocols of intercession creates a situation where the same children living in varying jurisdictions have entirely different participation opportunities; in some courts, children are never consulted, and in other areas, their preferences are highly valued during the custody proceedings.

1.3. Comparative Analysis: Statutory Provisions for Child Participation in Indian Custody Law

This comparative model throws normalizing gaps in the participation structure into perspective. The Hindu marriage act lacks a clear requirement of child involvement; it thus provides courts with the discretionary power to declare freely; whereas, the juvenile justice law demands an organized child intervention but excludes its applicability to all types of

custody disputes as opposed to selected type of vulnerable offspring. Differences in age limits are simply staggering in statutes: Juvenile Justice Act introduces seven years as a line of competency, and other systems stay silent on the age affairs, which creates some confusion in offering orderly means of articulation to younger children.

This comparative analysis is provided below in a tabular form:

Table 1 Comparative Analysis: Statutory Provisions for Child Participation in Indian Custody Law

Legislation	Stage of Participation	Age Requirements	Mechanism for Voice Incorporation	Judicial Weight
Hindu Marriage Act, 1955 (Sections 25-26)	Post-custody determination (limited to appeals)	No explicit minimum age specified; judicial discretion determines capacity	Ad hoc judicial questioning or expert psychological evaluation; no formalized child interview protocol	Discretionary; judges may exclude based on perceived immaturity
Criminal Procedure Code, 1973 (Section 125)	Investigation phase and custody determination	Not specified; children below 7 years often deemed incompetent witnesses	Victim-witness testimony; child examination by judge and counsel; subject to competency determination	Evidence-based but subject to credibility assessment by judge
Juvenile Justice (Care and Protection of Children) Act, 2015 (Sections 91-99)	Throughout proceedings; mandatory consideration required	Minimum 7 years (Section 154 defines competency threshold)	Child welfare committees, designated social workers; structured case studies and assessment; child participation in rehabilitation planning	Presumptively significant; statute mandates best interests determination with child input
Indian Penal Code (Sections 125-127)	Limited to assessment phase; primarily through welfare reports	No explicit age threshold; capacity assumed variable by judge	Third-party welfare reports by probation officers or social workers; no direct questioning mandated	Indirect incorporation through expert evaluation
Guardianship and Wards Act, 1890 (Sections 25-41)	Court approval of guardian appointments; limited ongoing review	Child age 7 years onwards may express preferences; no mandatory hearing requirement	Ad hoc judicial inquiry; court-appointed guardians may consult with child but not required to report child's views	Discretionary; judicial determination whether child's stated preference aligns with welfare

1.4. Judicial Practice and the Silencing of Child Voices: Empirical Findings

Indian custody judgment empirical evidence suggests that there is a dearth of reference to the expressed interests of children; judicial decisions are based largely on scrutiny of assessment of parental fitness and psychological professional opuses, rather than articulation of children needs. This trend is an indication of a systemic underestimation of the role of child agency in court ruling, where the priority to decide who has the greater ability to offer material and emotional support throws the preferences of the child to the peripheral outer of the judge. The High courts ruling on the custody cases illustrates that when children are involved they seem to be referred to in the context of the discussions about the expert psychological tests or assessments made by welfare officers and not in the context of the actual positions children have stated. The aim of such interpretive gate-keeping is to make sure that even in cases where children take part in custody proceedings by means of a psychological assessment, their own cognition, expression of preferences, and reasons behind the same preferences do not become a part of the judicial record and instead they are replaced with the expert characterisation and predictors of psychological functioning.

Indian courts often appeal to protectionist causes of why children should not be included in custody cases because court action on the case does harm the psychological balance of children, and it cannot make any significant contribution. This

paternalist approach is based on the assumptions about the vulnerability of children to the parental conflict and is contrary to the studies of developmental-psychology, which shows that child involvement in age-related conversations about custody arrangements do not only result in better adjustment outcomes through allowing children to make their own decisions affecting their lives but also preserve ties with both their parents. The reasoning on a safer sets by courts amounts to a circular justification: the courts pretend to get into a better position to promote the welfare of children by refusing the children to express their own ideas of welfare in their respective situations.

The issue of the psychological damage of courtroom exposition, which is often expressed in Indian custody rulings, is ironically blind to the fact that the absence of children in proceedings that determine their future is, in itself, producing counterproductive psychological impacts, such as the sensation of the lack of control over the life adjustments which are, after all, defined by case rulings. Judges who employ protective justifications hardly distinguish between protection and courtroom struggle and protection and meaningfulness of engaging in judicial thinking but consider child exclusion, instead, as a matter of inherent protection but overlook it as a procedural simplification that marginalizes child-based justice.

The tender-years doctrine and other presumptions codified in Indian custody jurisprudence are used to undermine any attention to the preferences of older children, especially when it comes to presumption that the mother should get custody in cases of early childhood. By adjudicating child input statutory frameworks which technically allow child input, even though the court neglects to embed statutory presumptions against child input in its practices by blocking out childhood as a monolithic construct such that all minors are deemed too immature to voice their preferences upon in disputed custody cases. Indian courts often hold maternal-preference presumptions on cases of young children without any form of re-evaluation of such allocations once the child is old enough to attain adolescence thus continuing with the initial custody placement due to inertial and un-reflective biases that change of custody of children at the point where teenagers express wish to alter child custody or at least spend more time with his father may not be in their best interests.

There have been uneven disseminations in the judicial use of age limits in finding child competency: some courts will consider seven-year-olds as competent to make meaningful preferences, and others incompetitiveness the preferences of teenagers being alienation by their parents or more a consequence of developmental constraint. Such discrepancy indicates a sort of legal ambiguity about whether or not child preferences are actual independent decisions or rather mere causes of parental influence. As a result of such developments, the preferences of older children are often disregarded by many judges because they are not considered independent enough of the parental influence.

The synergistic effect of assumptions in favour of maternal custody and age-based competency reasoning creates a 2-tier regime where young children are privileged against involvement and older children are forced to dismiss their preferences based on credibility reasons, thus guaranteeing that children voices are secondary to the custodial decision-making however high their actual competence to contribute meaningfully is.

1.5. Comparative Frameworks and International Human Rights Obligations

The fact that India signed the United Nations Convention on the Rights of the Child is binding and sets up international commitments that require that the systemic incorporation of the child voice into the custody processes. The Convention under Article 12 provides children with the ability to make choices a fundamental right by granting children who can express their views the right to do so on all decisions that impact them and this is a formative principle under which determinations on custody shall employ child involvement instead of children being passive parties around whom parents fight. Article 3 provides that the best interest of the child must be a key factor in any action taken concerning the children by the public institutions, and Article 9 points out that a child should not be removed without some compelling reason to address the welfare of the child, and therefore the custody ruling must reflect a keen consideration of the children themselves on the topic of family breakups. Although these are direct international undertakings the jurisprudence of Indian family law has not attempted to juristically to operational ownership of these commitments via rational domestic strategies, consequently resulting in a treaty compliance gap between treaty duty and judicial court. Genos on the Rights of the Child Category General Comment 12 specifically indicates that the best interests cannot be properly determined without a considerable weight or learning to which the views of the children should be incumbent and whenever custody decisions are being taken to deprive the children of family surroundings, then the views of these children have to be sought and viewed. The systematic failure of India to comply with this standard implies not only the lack of judicial goodwill but also a more structural inability to enlarge and apply participatory structures in various jurisdictional locations.

Comparative study of the western jurisdictions reveals that there are institutional models that, systematically, operationalize child voice integration by expressing a mechanism of structural representation and formal processes of making decisions. England and Canada have guardian ad litem or child advocate schemes in which nominated representatives who have the express purpose of representing the wishes of children undergo specific training in child development and are actively engaged in custody matters. Although these systems are imperfect and always prone to criticism on the distinction between the representation of best interests and child preferences coming out through communications, these systems present presumptive duties requiring the voice of the children to be considered instead of letting the individual judicial discretion decide whether children should participate or not. The United States has over time been adopting methods that emphasize the role of children by using special child interview procedures, whereby children are given psycho safety in their authentic expression, and it has been noted in the research of development that properly organized child involvement actually promotes better adaptation results and not harm. The use of trained child interviewers instead of being adversarially cross-examined by counsel is an insightful development in many Western jurisdictions, which judges that children would be best heard when placed in a context that suits their developmental abilities rather than under adversarial cross-examination in a courtroom context. Certain jurisdictions have been introduced to place such thresholds in statutory ages where the children will gain presumptive rights of participation whereby judicial officers need not inquire of the opinion of children on whether their voices should be sought or not but instead leave such it to their own judgment. These relative patterns demonstrate that the operationalization of child participation rights by institutions would need: assignment of particular persons tasked with child engagement; training criteria such personnel in the field of developmental psychology and communication; formal procedures of decision-making that outline that at which point and how child preferences are introduced into the reasoning of the judge; and presumed responsibilities that children over identified developmental levels could be afforded organized means of speaking out.

The concept of progressive actualization of the international children rights paradigms acknowledges that proper development of the mechanism in relation to the rights to participate goes beyond legal principles provided through the legal amendments and includes the development of the institution, distribution of resources, and investment of human capitals. In India, the ability of the judicial system to enact extensive child participation models is limited due to high structural impediments that include judicial workload that is not sufficient to individually engage children in cases of contested cases, gross resource deficits in specialized child protection systems outside large urban areas and lack of universally recognized training programme on child sensitive custody processes by judicial officers. Numerous Indian courts do not even have physical facilities such as separate child interview areas and thus children are left to attend custody hearings and take part in court infrastructures meant to conduct adversarial, as opposed to supportive, child evaluation, hearings. The lack of trained child psychologists and social workers, who have knowledge in developmental assessment, implies that most of the Indian children, undergoing custody determination process, have never met professionally trained participants that can allow them to experience voice-communication that is age-sensitive. These limitations are not just technical issues that can be solved by legislative recodification but they indicate more systematic failures of resource levels in the judicial system, professional training frames of action, and institutional commitment to child-focused justice. Indian realization of progressive realization would thus not only entail take-over of the statutory mandate of child voice incorporation but also investment in: increase in specialised family court capacity; child advocacy or guardian ad litem programme development; child-sensitive facilities infrastructure development; and full judicial education on developmental psychology and participatory interview practices. The trend in India on the compliance with international child voice obligations is eventually determined not by the legal texts but by the willingness of institutional authorities to provide the resources necessary to initiate more than rhetoric respect of the child rights to actual systems of operation to allow children to truly engage in the any given custody adjudication systems.

1.6. Mechanisms for Child Voice Integration: Proposed Reforms and Implementation Challenges

Creating institutionalized mechanisms of child advocacy in the Indian courts will demand statistical modification that would reorganize the face of the custody proceeding in which trained child representatives are appointed to the disputed cases. The existing Indian laws have no presumed requirements of that type of representation and child advocacy remains purely discretionary and subject to the initiative of that particular judge or the request of parents.

The use of court directed child psychologist consultations, which are being applied in Indian custody cases to determine parental fitness, needs to be reshaped to involve direct structured interviews on parental tastes, relationship, and welfare issues, instead of merely expert evaluation on parental potential. In current practice, psychologists are mainly used as an evaluation of the psychological functioning, stability, and child-rearing capability of parents with little to no direct assessment of the experience and the quality of relationships of the children with each parent. The reforms in clinical training should shift psychological assessment into child-focused assessment that includes articulation of relationships by children, coping patterns, emotional reaction to family separations, and overt preferences on custody. The re-formulation of such would involve the creation of protocols in which psychologists will have interviews

separately with each child, using trauma-informed procedures, age-based communication strategies, and interviewing structures in place to extract the true views of children and not conclusions about the best interests of children based on clinical judgement. It requires implementation by making psychological assessments verbatim recording the expressed preferences and explanations of children so that the court would be able to hear their own words and not interpretations by the professional.

1.7. The Non-Governmental Organisations and the Civil Society in Child Voice.

The civil society organisations in India, especially those serving street children and other marginalized groups, have been the first to establish structures of participation that predict the agency of children in the structure of programmers and advocacy campaigns. These programs provide empirically-based models, which can be directly used to reform custody law. One such program is the Butterflies Program of Street and Working Children in Delhi that, under programmatic involvement, has proven that meaningful involvement demands institutional arrangements that enable children to reflect on their experiences and express their opinions and organize effective programs and demand their rights.

Through these types of civil society interventions, they provide an environment in which the experience and perception of children are regarded as being a key element of developmental action, not marginal. They allow the children to go against the existing perceptions on their location and influence in society by incorporating participation frameworks within a paradigm of strength. The practice of specialised child-rights organisations underlines that to train adults to listen to young children requires a conscious capacity building to deal with the power inequity and the various perceptions that all parties involved - parents, state and service providers - need to have. The models of the NGO-led participation confirm that the models of the scale structures of the child voice integration need to be effective and based on the approaches to the children's self-esteem and the organized access to the decision-makers instead of presuming that it is the formal legal changes that would provide effective integration of children into the process.

However, the NGO interference in the mediation of custody cases as well as supporting the involvement of the child is geographically concentrated in large urban centres and is inappropriately integrated into official judicial procedures. This restricts the systemic influence on the development of the custody laws and sustains the exclusion of children concerning mainstream custody determinations. Civil society organisations have established some successful participatory methodologies by working on programmes with marginalised children, however, the innovations have not found their way into the family court systems that still work under archaic legislative frameworks that do not acknowledge or embrace principles of child participation.

1.8. Policies and Constitutional Prerequisites to Child Voice Recognition.

In the constitutional and policy architecture of India, there are fundamental provisions on the concept of child voice integration in the process of custody; these provisions are, nevertheless, lacking in their operationalisation in terms of judicial interpretation and legislative elaboration. Indian Constitution provides various normative foundations of promoting child participation rights which opens the possibilities of strategic litigation and legislative amendment to modernise the custodial law. These policy and constitutional layers create powerful models when strategically instigated by legal advocacy and require the effective incorporation of child voice throughout the process of child custody determination.

Article 15 of the Constitution that outlaws discrimination due to sex etc. (children, age, social status, caste etc.) constitutes a constitutional basis to challenge a law within the area of custody procedures that have a disproportionate effect on the silent children due to categorical competency decision-making based on age. Categorical exclusion of children in custody proceedings based on age is a type of discrimination based on age in itself in the context that, where such a discrimination is performed, it is essentially to deprive younger children the right to engage in voice processes despite their evidence of capability of understanding their preferences which are age-appropriate. The unequal treatment of competency standards, i.e., when the preferences of boys are presumed to have a higher value than the parallel but different preferences of girls and the further treatment given to homosexuality in the forms of increased distrust, contravenes Article 15, the division of the family-law system into gender patterns, is unconstitutional. Caste-based discrimination is practiced in custody courts when tribal children are undermined in preferential custody arrangements based on community-based traditions of karma through normative Hindu-law frames and marginalised indigenous strategies to child protection. The legal precedents could be created through strategic constitutional litigation contesting such discriminatory uses of custody law and thereby creating the precedent that child voice integration as an inevitable aspect of rights to non-discrimination that were constitutionally guaranteed. Litigation strategies regarding Articles 14 and 15, perhaps, may show that the different aspects of the law regarding custody at

the exclusion of the voices of children on the basis of their age, gender, or socioeconomic status are a violation of the provisions of equal protection in the constitutional framework

Other constitutional bases to incorporate the child voice in custody determination entail articles 21, 24 of the Constitution that safeguard the fundamental rights to life, liberty, and freedom against exploitation. The guaranteed life and liberty in Article 21 includes psychological health, correct association and agency in choices that shape the life course of an individual to their most basic, such as child custody patterns after separation. The psychological injury reported by the research of developmental-psychology, which is the consequence of depriving the children of being the subject of custody determination, i.e., being confused, feeling powerless, being deprived of stable relationships and adequate adaptation, is violation of constitutionally guaranteed rights to the psychological integrity and relational liberty. The ban on child exploitation and the use of child labour as mandated in article 24 creates a wider framework around child voice exclusion in the custody proceedings is conceptualisable as the withdrawal of protections as a result of the fundamental-rights architecture. Interpreted in a broad judicial approach, which appreciates the changing conceived perceptions of basic rights, these constitutional provisions affirm that the concept of integrating child voice in custody cases, is a constitutional obligation, as opposed to a judicial comfort. Litigation that would be used to contest the practice of custodial exclusion of children may appeal to these fundamental-rights provisions, by arguing that the practice of compelling children to be silent through the course of custody proceedings offends the constitutionally-guaranteed right to be involved in the process of making decisions that would formulate fundamental life interests.

2. Conclusion

The inclusion of children voice into the Indian custody law must proceed beyond mere rhetoric committance to the principle of best interests to institutionalized mechanisms of assuring the systematic use of child involvement in all the stages of determining custody decisions. Present practice has allowed courts to make use of language of best interests even as it avoids giving children any substantive voice in power to decide what the actual consequences of such an action are, producing an inherent contradiction between the proclaimed judicial practice and the reality of its procedure. The change will require a rewritten law providing a system of mandatory child participation, a full course of judicial education that covers the aspect of developmental evidence that prescribes child involvement, considerable resource allocation that provides institutional capacity to advocate on behalf of the child mechanisms, and the cultural shift, which will fundamentally challenge the paternalistic understanding of childhood and decision-making capability within the framework of the family law traditions. It must be implemented with acknowledgement of the fact that discretionary judicial systems, based on the willingness of the individual judge to listen to the voice of children, have proved ineffective and thus children have continued to be left out over the decades despite the growing developmental knowledge on the psychological and cognitive abilities of children. Statutory provisions that define non- discretionary child participation provisions abolish judicial gate-keeping that allow continued voice exclusion based on protective discourse or competency decisions that are vitiated by developmental studies. The institutional supports such as statutory appointment of professionally trained child advocates, court-directed psychological evaluations that incorporate child perspective and parental evaluation, and procedural accommodations of allowing written child statements, all are important elements of systematic participation infrastructure which replaces haphazard judicial discretion with procedural rights.

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