

## CHILD CUSTODY DECISIONS IN THE SHADOW OF DOMESTIC VIOLENCE IN INDIA

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### Abstract

This paper explores the complex dynamics of child custody decisions in India, particularly concerning domestic violence. It highlights the significant effects that domestic abuse—whether witnessed or experienced by children—can have on their emotional and psychological development, often resulting in long-lasting consequences. The Indian legal framework, through laws such as the Guardians and Wards Act, the Hindu Minority and Guardianship Act, the Protection of Women from Domestic Violence Act etc. which seeks to prioritize the "best interests of the child." However, obstacles such as systemic flaws, patriarchal influences, outdated legislation, and inconsistent judicial practices often hinder its effective implementation. The article further examines the nuanced effects of domestic violence on children, the evolution of custody laws, and the commitment to prioritizing the child's best interests, advocating for reforms that are trauma-informed and child-centered. It concludes with recommendations for strengthening legal protections and ensuring comprehensive safety for children involved in custody disputes arising from domestic violence.

### Keywords

Child custody, domestic violence, best interests of the child, Guardians and Wards Act, Protection of Women from Domestic Violence Act, child welfare, custody laws in India, psychological impact on children.

### Introduction

In India, child custody frequently becomes a contentious topic during marital disputes, particularly when allegations of domestic violence arise. The challenge lies in balancing the child's welfare with the protection of the victim, usually the mother, placing the judiciary in a sensitive position. While custody laws are designed to prioritize the "best interests of the child," this principle becomes increasingly complicated when domestic violence is a factor. The Indian legal system, guided by laws

such as the Guardian and Wards Act of 1890<sup>160</sup> and the Protection of Women from Domestic Violence Act of 2005<sup>161</sup>, strives to align parental rights with the child's welfare; however, practical implementation reveals significant systemic obstacles.

In situations where domestic violence is alleged or confirmed, courts must look beyond simply identifying and considering the effects of trauma, safety, and psychological health. Although the law acknowledges the importance of factoring in abuse when making decisions, judicial interpretations can be inconsistent, undermining the protective intentions of the legislation.<sup>162</sup> Additionally, fathers frequently face disadvantages in custody cases, as Indian

<sup>160</sup> The Guardians and Wards Act, 1890, (Act no. 8 of 1890).

<sup>161</sup> Protection of Women from Domestic Violence Act, 2005, (Act no 43 of 2005).

<sup>162</sup> Kusum, Family Law Lectures: Family Law I, 4th edn (LexisNexis Butterworths, 2019) 242.

law and judicial interpretations typically assume that mothers are the primary caregivers, particularly for young children, which often leads to a bias in favor of mothers.<sup>163</sup>

### 1.1 Domestic Violence and Its Hidden Impact on Children

Numerous children who are exposed to domestic violence also suffer from physical abuse.<sup>164</sup> Those who either witness domestic violence or are direct victims face significant risks for enduring physical and mental health issues.<sup>165</sup> Additionally, children who observe violent interactions between their parents may be more likely to exhibit violent behaviour in their own future relationships.<sup>166</sup> For parents enduring abuse, finding ways to safeguard their children can be particularly challenging.<sup>167</sup>

Victims of domestic violence endure physical assaults, emotional abuse, and various forms of maltreatment, all of which can severely impact their overall well-being.<sup>168</sup> While the effects of such abuse are evident in the primary victims, children who witness these events also experience profound consequences.<sup>169</sup>

The impact of witnessing domestic violence on children can manifest both immediately and over time. This underscores the critical importance of shielding children from such environments and educating them about healthy relationships and personal boundaries.<sup>170</sup> If you or someone you know is facing domestic violence, it is vital to seek

assistance and consider safe options for leaving the harmful situation.<sup>171</sup>

### Short-Term Effects of Witnessing Domestic Violence in Childhood

Domestic violence is a distressingly common reality in many households.<sup>172</sup> The repercussions of domestic abuse on children can become evident quickly, while other effects may emerge later. Below are some immediate consequences that children may face after witnessing domestic violence:

#### I. Anxiety

Children living in an environment where one parent abuses the other are likely to feel perpetually anxious.<sup>173</sup> They exist under the constant fear of when the next physical or verbal attack might occur, leading to a state of ongoing anxiety.<sup>174</sup>

For preschool-aged children who observe domestic violence, it is not unusual for them to revert to behaviours typical of younger kids. This may include thumb sucking, bedwetting, and an increase in crying and whining as a response to the trauma they witness.

School-aged children may develop anti-social behaviours and experience feelings of guilt related to the abuse they have seen.<sup>175</sup> Often, these children internalize the blame for the abuse their parent endures, which can significantly damage their self-esteem.<sup>176</sup>

#### II. Post-Traumatic Stress Disorder

One of the most severe consequences of domestic violence is the potential development of post-traumatic stress disorder in children exposed to such environments.

<sup>163</sup> The Guardians and Wards Act, 1890, Section 17(2)

<sup>164</sup> Modi, M.N., Palmer, S., Armstrong, A. (2014). *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*. Journal of Women's Health; 23(3): 253-259.

<sup>165</sup> Gilbert, L.K., Breiding, M.J., Merrick, M.T., Parks, S.E., Thompson, W.W., Dhingra, S.S., Ford, D.C. (2015). *Childhood Adversity and Adult Chronic Disease: An update from ten states and the District of Columbia, 2010*. American Journal of Preventive Medicine; 48(3): 345-349.

<sup>166</sup> UNICEF, Behind Closed Doors: The Impact of Domestic Violence on Children, (2006), available at <https://www.unicef.org/media/files/BehindClosedDoors.pdf>.

<sup>167</sup> Protection of Women from Domestic Violence Act, 2005, Section 21 (Act no. 43 of 2005).

<sup>168</sup> National Crime Records Bureau, Crime in India – 2022: Statistics on Domestic Violence, Ministry of Home Affairs, Government of India (2023).

<sup>169</sup> D. Wolfe, C. Crooks et al., The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique, Clinical Child and Family Psychology Review, Vol. 6, No. 3, 2003, at 171-187.

<sup>170</sup> Ministry of Women and Child Development, Government of India, Handbook on Protection of Children from Sexual Offences Act, 2012, (2013) at 6.

<sup>171</sup> National Legal Services Authority (NALSA), Scheme for Legal Services to Victims of Domestic Violence, (2015), available at <https://nalsa.gov.in>.

<sup>172</sup> Supra Note 2.

<sup>173</sup> UNICEF, Behind Closed Doors: The Impact of Domestic Violence on Children, (2006) at 4.

<sup>174</sup> Office on Women's Health. *Effects of domestic violence on children's health*.

<sup>175</sup> Jaffe, P.G., Wolfe, D.A., & Wilson, S.K., Children of Battered Women, (Sage Publications, 1990), at 32.

<sup>176</sup> D. Wolfe, C. Crooks et al., The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique, Clinical Child and Family Psychology Review, Vol. 6, No. 3, 2003, at 179.

Even if they are not physically harmed, the psychological impact of domestic violence can lead to significant alterations in the developing brains of children. These alterations may manifest as nightmares, disrupted sleep patterns, increased anger and irritability, difficulty focusing, and in some cases, the tendency to re-enact the traumatic events they have witnessed.<sup>177</sup>

### III. Physical Challenges

The mental health repercussions of witnessing a parent's abuse often extend to physical health issues. School-aged children may experience headaches and stomach-aches that stem from the stress of their home environment.

### IV. Aggressive Behaviour

Teenagers who witness domestic violence often respond by acting out. They may engage in fighting, truancy, risky sexual behaviour, or substance abuse. These adolescents are also at a higher risk of encountering legal troubles.<sup>178</sup>

### V. Physical Abuse

In many cases, children living in abusive households may also become victims of abuse themselves.<sup>179</sup> An abusive partner can easily transition into an abusive parent or guardian, inflicting physical, verbal, and emotional harm on their children.

### Long-Term Consequences of Witnessing Domestic Violence in Childhood

While distancing oneself from domestic violence can be beneficial, simply relocating does not erase the harm inflicted by witnessing such events.

Children who observe a parent enduring abuse often face repercussions that extend into their adult years. Below are some of the enduring effects these children may experience after witnessing domestic violence.

### I. Depression

A child raised in a harmful, abusive setting may develop into an adult struggling with depression.<sup>180</sup> The trauma associated with consistently witnessing domestic violence significantly increases the likelihood of experiencing depression, feelings of sadness, difficulties with concentration, and other depressive symptoms in adulthood.

### II. Health Issues

Conditions such as heart disease, obesity, and diabetes in adulthood may not always stem from poor diet or environmental factors.

In many instances, these health problems are directly associated with the physical, emotional, and verbal abuse that a child either witnesses or endures.<sup>181</sup>

### III. Reproducing Abusive Behaviours

Although abusive behaviour can be repetitive, it is crucial to understand that abuse does not always follow a predictable cycle. Assuming that violence occurs in a cyclical manner can lead to victim-blaming. Abuse can be erratic, and it is never acceptable.

Experiencing the pain and suffering of witnessing violence does not guarantee that children will choose a different path. In some instances, early exposure to abuse merely paves the way for children to replicate those behaviours in adulthood.

For example, boys may resort to physically abusing their partners after observing their fathers engage in similar actions. Similarly, women who grow up in environments marked by domestic violence are at a higher risk of experiencing sexual assault by their partners later in life.<sup>182</sup>

<sup>177</sup> Herringa RJ. [Trauma, PTSD, and the developing brain](#). Curr Psychiatry Rep. 2017;19(10):69. doi:10.1007/s11920-017-0825-3

<sup>178</sup> Supra Note 15

<sup>179</sup> Ibid

<sup>180</sup> Pang LHG, Thomas SJ. [Exposure to domestic violence during adolescence: Coping strategies and attachment styles as early moderators and their relationship to functioning during adulthood](#). J Child Adolesc Trauma. 2019;13(2):185-198. doi:10.1007/s40653-019-00279-9

<sup>181</sup> Monnat SM, Chandler RF. [Long term physical health consequences of adverse childhood experiences](#). Sociol Q. 2015;56(4):723-752. doi:10.1111/tsq.12107

<sup>182</sup> Supra Note 15



## 1.2 Custody Laws in India: A Child-centric or Parent-centric Approach?

Child custody regulations in India are crucial for safeguarding children's welfare amid parental conflicts. In cases of separation or divorce, determining who will care for the child becomes a significant issue. Indian courts place the child's best interests at the forefront, striving to provide a stable and supportive environment for their development. Parents need to comprehend child custody laws in India as they navigate these complex circumstances.

### Legal Framework Regulating Child Custody in India

In India, the laws pertaining to child custody are determined by a range of statutes that vary according to religious backgrounds. These are mentioned below:

#### *I. Hindu Minority and Guardianship Act, 1956 (HMGA):*

The Hindu Minority and Guardianship Act of 1956 applies to Hindus, Buddhists, Jains, and Sikhs, and it outlines the criteria for guardianship of minors. According to Section 6, the father serves as the natural guardian for a minor boy or an unmarried girl, with the mother following in this role. Notably, for children under five years old, the Act stipulates that custody should "ordinarily be with the mother," acknowledging the child's developmental and emotional needs at this young age.<sup>183</sup> Section 13 is particularly significant, as it emphasizes that the child's welfare must be the foremost consideration in all guardianship and custody matters.<sup>184</sup> This provision serves to prevent a rigid interpretation of parental rights, promoting a child-focused perspective that prioritizes the child's best interests over any legal rights or preferences of the parents.

#### *II. Guardians and Wards Act, 1890 (GWA):*

The Guardians and Wards Act of 1890 is a secular law that applies to all Indian citizens,

irrespective of their religious affiliations, and serves as the main legal framework for guardianship and custody in situations where personal laws are either silent or at odds with the child's welfare. This Act grants the court extensive authority to appoint guardians and make custody decisions, with the guiding principle being the "welfare of the minor" as outlined in Section 17.<sup>185</sup> It considers various factors, including the minor's age, gender, religion, the guardian's character and capability, and the child's own wishes if they are mature enough to express them.<sup>186</sup> The language and application of the Act are explicitly focused on the child, ensuring that the child's safety, health, emotional growth, and education take precedence over the legal claims of either parent.<sup>187</sup>

#### *III. Protection of Women from Domestic Violence Act, 2005 (PWDVA):*

While it is not a traditional custody law, the Protection of Women from Domestic Violence Act, 2005 carries significant implications for custody matters in cases of domestic violence. According to Section 21, a magistrate has the authority to award temporary custody of a child to the affected woman and can prohibit the respondent (typically the husband or father) from having contact with the child if such interaction is deemed contrary to the child's best interests.<sup>188</sup> This Act enables the court to prioritize the emotional and physical safety of the child when addressing custody disputes arising from domestic violence. Although the primary focus is on the protection of women, this provision reflects a child-centered approach aimed at shielding children from detrimental domestic situations, trauma, and potential harm.

#### *IV. Muslim Personal Law (Shariat):*

In India, Muslim Personal Law distinguishes between custody and guardianship. Custody (Hizanat) pertains to the physical care of the

<sup>183</sup> Hindu Minority and Guardianship Act, 1956, Section 6 (Act no. 32 of 1956).

<sup>184</sup> Id. at Section 13.

<sup>185</sup> Guardians and Wards Act, 1890, Section 17 (Act no. 8 of 1890).

<sup>186</sup> Ibid

<sup>187</sup> Supra Note 1

<sup>188</sup> Supra Note 8.

child, which is generally awarded to the mother during the early developmental years, up to 7 years for boys and until puberty for girls.<sup>189</sup> Conversely, the father is recognized as the legal guardian, responsible for matters such as property and legal decisions. While personal law favors mothers for the custody of young children, this preference is not absolute; the paramount consideration remains the child's welfare.<sup>190</sup> Indian courts have consistently held that if strict adherence to personal law contradicts the child's best interests, they may deviate from it.<sup>191</sup> In practice, even within the framework of Muslim law, the judicial trend in India tends to adopt a child-focused perspective, ensuring that the child's psychological, educational, and emotional needs are prioritized over a rigid application of religious doctrines.

India's custody laws stem from a variety of legal sources, including religious personal laws and secular regulations, yet they all share a common core principle: the child's welfare is of utmost importance. The Hindu Minority and Guardianship Act, the Guardians and Wards Act, the Protection of Women from Domestic Violence Act, and Muslim Personal Law provide distinct frameworks for custody determinations. However, Indian courts consistently interpret these laws with a focus on the child's best interests. Even in instances where personal laws seem to favor parental rights, such as the natural guardianship granted to fathers or the presumption of maternal custody, the judiciary maintains the authority to set aside these norms to prioritize the child's well-being. Contemporary judicial practices increasingly advocate for a flexible, individualized approach that considers the emotional, educational, physical, and psychological needs of the child. Thus, although there are aspects of parent-centricity within the legal texts, the practical application of Indian custody law is decidedly child-centric, with the child's best interests

serving as the primary guiding principle in custody matters.

**V. Hindu Marriage Act, 1955:** This legislation outlines provisions for child custody in Section 26, granting the court authority to issue orders concerning the custody, maintenance, and education of minor children during ongoing matrimonial disputes, such as divorce, judicial separation, or annulment.<sup>192</sup> The court can provide both interim and final orders, which may be altered or revoked in response to changing circumstances. The primary consideration in all custody decisions is the child's welfare, encompassing their physical, emotional, and psychological health. While the Act does not explicitly favor custody based on the child's age or gender, Indian courts frequently tend to award custody of very young children, particularly those under five, to the mother, unless she is deemed unfit.<sup>193</sup>

In situations where the Hindu Marriage Act does not provide adequate guidance, the Guardians and Wards Act, 1890 applies, serving as a universal law for all communities. This Act emphasizes a child-focused approach, allowing courts to evaluate factors such as the child's preferences (if they are mature enough), the parents' financial and emotional capabilities, and the living conditions each parent can offer. Indian courts have increasingly adopted progressive interpretations, sometimes promoting joint custody or shared parenting arrangements that benefit the child.<sup>194</sup> Notably, the law distinguishes custody matters from issues of marital fault, meaning that a parent's involvement in the marriage's dissolution does not automatically disqualify them from custody. Ultimately, custody decisions under Hindu personal law prioritize the child's well-being over parental rights.

<sup>189</sup> Tahir Mahmood, *Muslim Law in India and Abroad*, 2nd ed. (LexisNexis Butterworths, 2016), at 141.

<sup>190</sup> *Id.* at 143.

<sup>191</sup> *Githa Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228.

<sup>192</sup> Hindu Marriage Act, 1955, Section 26 (Act no. 25 of 1955).

<sup>193</sup> *Ibid.*

<sup>194</sup> *Vivek Singh v. Romani Singh*, (2017) 3 SCC 231.

## Categories of Child Custody in India

In India, child custody is divided into three categories: physical, joint, and legal custody. These classifications are designed to prioritize the child's welfare and offer adaptable solutions that cater to the specific needs of each family. The Indian legal framework emphasizes the child's best interests and overall well-being when making custody decisions, with courts evaluating various factors, including the child's age, emotional requirements, parental abilities, and living situations.<sup>195</sup> The three custodies have been defined below:

**I. Physical custody:** It refers to the situation where the child primarily lives with one parent, known as the custodial parent. This parent is responsible for the child's daily care, upbringing, and overall supervision. The other parent, referred to as the non-custodial parent, usually has visitation rights, allowing them to spend designated time with the child, such as on weekends, holidays, or during school breaks.<sup>196</sup> The goal is to create a stable and nurturing home environment for the child while maintaining their relationship with both parents.<sup>197</sup>

**II. Joint custody:** It enables both parents to share the responsibilities of raising their child. This arrangement may involve the child alternating between each parent's home (rotational custody), or one parent may take on the primary caregiving role while the other remains actively involved in important decisions regarding the child's life.<sup>198</sup> Joint custody promotes collaboration and shared parenting, helping to mitigate the emotional impact of separation on the child. However, it necessitates a high degree of coordination, communication, and maturity between the parents to ensure that the arrangement serves the child's best interests.<sup>199</sup>

**III. Legal custody:** It refers to the authority to make significant decisions regarding a child's upbringing, including matters related to education, healthcare, and religious upbringing.<sup>200</sup> This type of custody can be awarded to one parent (sole legal custody) or shared between both parents (joint legal custody). A parent may hold legal custody even if they do not have physical custody, enabling them to be involved in critical decisions about the child's future.<sup>201</sup> This arrangement ensures that both parents can contribute to the child's development, as long as it serves the child's best interests.

The Indian legal system offers adaptable custody options that can be customized to fit the unique needs of each family.<sup>202</sup> Custody arrangements are not permanent and can be adjusted over time in response to evolving circumstances, such as the child's age, preferences, or changes in the parents' living situations.<sup>203</sup> This flexible approach aims to support the child's emotional, mental, and physical well-being, even amid the difficulties that may arise from parental separation or divorce.<sup>204</sup>

### 1.3 The Concept of "Best Interest of the Child" and its application in Domestic Violence cases

The principle of "the best interest of the child" serves as a cornerstone in family and child protection law, underscoring that a child's overall welfare should be the primary focus in all decisions affecting them. This principle is embedded in international legal frameworks, particularly in Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC), which states that "in all actions concerning children... the best interests of the child shall be a primary consideration."<sup>205</sup> The goal of applying this principle is to safeguard children from harm while fostering their physical,

<sup>195</sup> Supra Note 26.

<sup>196</sup> Supra Note 24.

<sup>197</sup> Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42.

<sup>198</sup> Supra Note 35

<sup>199</sup> R. Lakshmi Narayan v. Santhi, (2001) 4 SCC 688.

<sup>200</sup> Supra Note 33.

<sup>201</sup> Smriti Madan Kansagra v. Perry Kansagra, (2020) 19 SCC 379.

<sup>202</sup> Supra Note 26.

<sup>203</sup> Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673.

<sup>204</sup> Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413.

<sup>205</sup> United Nations Convention on the Rights of the Child, Article 3(1), 1989.



emotional, psychological, and developmental health.

In national legal systems, the best interest standard informs decisions related to custody, visitation, and welfare interventions. Courts typically assess various factors to determine what aligns with a child's best interests, such as their safety, emotional and psychological health, the stability of their living situation, their relationships with parents or caregivers, and, when appropriate, the child's own opinions.<sup>206</sup>

In situations involving domestic violence, the relevance of this principle becomes particularly significant. Domestic violence, whether inflicted upon the child or observed by them, is increasingly acknowledged as a severe risk to a child's well-being. Studies and legal cases have demonstrated that children who are exposed to domestic violence—either directly or indirectly—often experience trauma, emotional turmoil, and developmental setbacks.<sup>207</sup> Consequently, in family law cases that involve domestic abuse, courts must prioritize the child's safety and protection over any assumptions regarding shared parenting or parental rights.

Legal systems are increasingly recognizing that a history of domestic violence should significantly impact custody and visitation rulings involving an abusive parent. In numerous jurisdictions, there exists a rebuttable presumption against granting custody to a parent with a record of abuse, which requires the abusive parent to prove that custody or visitation would still serve the child's best interests. Courts may completely deny custody, limit it to supervised visitation, or impose specific requirements such as mandatory counselling or participation in parenting programs. In severe situations, contact with the abusive parent may be entirely prohibited.<sup>208</sup>

Additionally, courts have the authority to issue protective orders designed to shield both the child and the non-abusive parent from further harm. These orders may include provisions that restrict contact, designate safe locations for visitation exchanges, or even permit emergency relocation if necessary to ensure the child's safety.<sup>209</sup> The primary objective in these scenarios is to provide immediate protection while fostering a secure and nurturing environment for the child's long-term growth.

Nonetheless, challenges remain in effectively applying the best interest standard in cases involving domestic violence. Issues such as underreporting of abuse, potential biases within the judicial system, and inadequate methods for considering the child's perspective—particularly for very young children—continue to pose difficulties. Furthermore, the societal and legal focus on shared parenting can sometimes clash with the critical need to protect a child from further exposure to violence.

In cases of domestic violence, prioritizing the best interest of the child requires a perspective that emphasizes their safety and emotional health as the foremost concerns.<sup>210</sup> It is essential for legal and judicial systems to implement protective measures effectively, avoid downplaying abusive conduct, and create conditions that allow children to recover and flourish in a safe, violence-free setting.<sup>211</sup> As legal standards progress, our comprehension of what genuinely benefits the child in contexts affected by domestic abuse must also advance.<sup>212</sup>

#### 1.4 Recommendations

***1. Establishment of Child-Centric Guidelines in Custody Cases Involving Domestic Violence:*** The government should develop a thorough legislative framework

<sup>206</sup> UNICEF, The Best Interests of the Child in Family Law Proceedings, 2016.

<sup>207</sup> Holt, S., Buckley, H., & Whelan, S. (2008). The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature. *Child Abuse & Neglect*, 32(8), 797–810.

<sup>208</sup> American Psychological Association. (2010). Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family.

<sup>209</sup> The National Council of Juvenile and Family Court Judges (NCJFCJ), Custody and Visitation Decision-Making When Domestic Violence Is a Factor, 2014.

<sup>210</sup> Supra Note 8.

<sup>211</sup> UNICEF, Behind Closed Doors: The Impact of Domestic Violence on Children, (2006), at 6, available at <https://www.unicef.org/media/files/BehindClosedDoors.pdf>

<sup>212</sup> Supra Note 42

that explicitly details how courts should assess claims and evidence of domestic violence when making custody determinations. It is essential to acknowledge domestic violence as a critical factor in deciding both legal and physical custody.<sup>213</sup> A framework modelled on international best practices, such as the UN Convention on the Rights of the Child, which India has ratified, can enhance this child-centric approach.

**II. Revision of the Guardians and Wards Act, 1890:** This antiquated legislation from the colonial period requires revision or replacement with a modern law that aligns with contemporary understandings of family dynamics, gender issues, and child psychology. The new law should clearly define various forms of abuse (including physical, emotional, and financial) and mandate their consideration in custody evaluations.<sup>214</sup>

**III. Mandatory Trauma-Informed Training for Judicial Personnel:** Judges, family court staff, and child welfare officials should participate in ongoing training to grasp the impact of domestic violence on children. This training should include recognizing trauma, understanding non-physical forms of abuse, and applying child development principles in custody decisions.

**IV. Involvement of Child Welfare Experts and Mandatory Custody Assessments:** Courts should be required to consult with qualified child psychologists and welfare professionals during custody disputes that involve allegations of abuse. An unbiased, expert-led evaluation of the child's mental and emotional health should be incorporated into the judicial decision-making process.

**V. Supervised Visitation and Enforcement of Protective Orders:** In cases where some parental contact is necessary, courts should mandate supervised visitation in safe

environments. Furthermore, protective orders should include enforceable visitation restrictions to mitigate any potential risks.

**VI. Centralized Record Management and Data Gathering:** Creating a centralized database dedicated to custody decisions in domestic violence cases is crucial for several reasons. It allows for the systematic monitoring of trends over time, which can reveal patterns in judicial decision-making. This consistency in outcomes is vital for ensuring fairness and equity in the legal process, as it holds judges accountable for their rulings.<sup>215</sup> Furthermore, the data collected can serve as a valuable resource for informing future legal reforms, ensuring that policies are based on empirical evidence. Additionally, this information can support academic research, providing insights into the intersection of domestic violence and custody issues, ultimately leading to more informed practices and policies.

**VII. Public Legal Education and Awareness Initiatives:** To enhance legal literacy, it is important to implement targeted educational initiatives aimed at parents, legal professionals, and the broader community. These programs should emphasize the profound impact of domestic violence on children and the various legal protections that exist to safeguard their well-being. By raising awareness and understanding of these issues, such initiatives can play a significant role in reducing the societal stigma that survivors face when seeking custody. This, in turn, encourages more individuals to come forward and seek the help they need, fostering a more supportive environment for those affected by domestic violence.

## 1.5 Conclusion

Child custody decisions in India, especially in cases involving domestic violence, reveal a profound conflict between the principles of

<sup>213</sup> United Nations Convention on the Rights of the Child, 1989, art. 3.

<sup>214</sup> Law Commission of India, 257th Report on "Reforms in Guardianship and Custody Laws in India" (2015), pp. 10–11.

<sup>215</sup> National Commission for Protection of Child Rights (NCPCR), "Annual Report 2022–23", p. 56.



gender justice, parental rights, and the welfare of children. While the judiciary tries to maintain that the welfare of the child is paramount<sup>216</sup>, the existing legal framework inadequately addresses the complex and often long-lasting effects of domestic violence on children. The Protection of Women from Domestic Violence Act, 2005 (PWDVA) allows for temporary custody orders under Section 21<sup>217</sup>; however, it lacks comprehensive guidelines for evaluating the child's best interests in abusive situations. Furthermore, the Guardians and Wards Act of 1890, which continues to govern custody issues, is outdated and ill-equipped to tackle modern challenges, particularly those involving emotional abuse and coercive control.<sup>218</sup>

The scenario in some cases is further complicated by a patriarchal bias that can sway judicial outcomes, where the rights of the abusive parent may be weighed equally against the child's safety and mental well-being. Although there is a growing body of legal precedent acknowledging the emotional and psychological harm caused by such situations,<sup>219</sup> the implementation of these principles varies widely across different courts. The lack of trauma-informed training for judges and the minimal involvement of child welfare experts in legal proceedings further obstruct the quest for justice in these sensitive cases. Therefore, a thorough systemic reform is crucial—not only to protect children from immediate harm but also to alleviate the indirect consequences of witnessing or experiencing abuse.

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<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

<sup>216</sup>Supra Note 38

<sup>217</sup>Supra Note 8.

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## IMPACT OF BHARATIYA NAGARIK SURAKSHA SANHITA ON UNDERTRAIL PRISONERS: WILL IT REDUCE JUDICIAL DELAYS?

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### ABSTRACT

The Indian criminal justice system has long been criticized for its inefficient and protracted delays which disproportionately affect undertrial prisoners. According to NCRB 2022 figures, 75% of the prisoner's population comprises of undertrial prisoners. Article 21 of the constitution which safeguards the rights to life and personal freedoms is violated by the fact that these individuals are regularly imprisoned for years without being proved guilty. The Bharatiya Nagarik suraksha sanhita (BNSS), 2023, aims to solve these systemic problems by enacting procedural reforms including time-bound investigations, default bail arrangements, adjournment constraints and technological integration in judicial processes.

This article critically investigates whether these reforms can lessen judicial delays and the crisis that undertrial inmates face. Although BNSS brings about some encouraging reforms, it mostly ignores systemic issues like judicial vacancies underfunded legal aid programs, overcrowding in prisons, and a lack of strong institutional accountability. Additionally the law loses the chances to institutionalize fair access to justice and does not codify progressive bail jurisprudence.

This article highlights the significance of enforceable custody limits, effective prosecutorial oversight, strong public defender frameworks in preventing arbitrary detention and accelerating justice, drawing on comparative insights from the US and UK. These global models demonstrate how undertrial populations can benefit from significant outcomes when procedural innovations are combined with structural and institutional reforms. The article concludes by making that BNSS represents a substantial procedural change, full implementation, institutional strengthening and addition to judicial reform are necessary to achieve its full potential.

**Keywords:** Bharatiya Nagarik Suraksha Sanhita (BNSS), undertrial prisoners, criminal justice reform, judicial delay, right to speedy trial, bail provisions, default bail, legal aid in India, plea bargaining, summary trials, prison overcrowding, judicial infrastructure, Section 193 BNSS, Section 187 BNSS, technological integration in trials, video conferencing in courts, Speedy Trial Act (USA), Prosecution of Offences Act (UK), human rights, institutional accountability, comparative criminal justice.

### I. Introduction

Indian criminal justice system has come under fire for its excessively long wait times and structural inefficiencies which disproportionately impact convicts awaiting trials. According to the NCRB's 2022 reports states that over 75% of the prison population

comprises under trails prisoners<sup>220</sup>. Many are imprisoned for years without being found guilty. The delayed in justice not just violate the Article 21 of the constitution which guarantees the right to life and personal liberty<sup>221</sup> but also raises a

<sup>220</sup> Nat'l Crime Records Bureau, *Prison Statistics India 2022*, Ministry of Home Affairs (2023).

<sup>221</sup> INDIA CONSTITUTION article. 21.



serious question about the efficiency and fairness of our justice system.

The enactment of Bharatiya Nagarik suraksha Sanhita aims to address there systemic concerns by updating the procedural code. This article analysis whether these reforms are capable of delivering the justice, especially for under trail prisoners.

## II. Undertrail Crisis in India: Understanding the Problem

Undertrails prisoners are those who have been charged with a crime and are awaiting trail are known as undertrail inmates. These people are frequently detained for periods of time that exceed the maximum penalty for the committed offence. The main causes are:

- Shortage of judges
- Frequent adjournments
- Delays in investigation and filing of charge sheets
- Lack of accessing in quality legal aid

These are the main reasons for systemic delays have led to severe overcrowding in prisons. Deteriorating mental and physical health of undertrail prisoners and erosion of public faith in the judicial process.<sup>222</sup>

## III. Key Reforms in BNSS Pertaining to Undertrails

### A. Time-bound Investigation

According to section 193(1) of BNSS the investigation should be completed on time without any delay.<sup>223</sup>

According to Section 193(2) time bound the investigation for offence under section 64,65,66,67,68,70,71 of the Bharatiya Nyaya Sanhita, 2023 or under sections 4,6,8 or section 10 of the protection of children from sexual offences Act, 2012 (32 of 2012) shall be completed within two months from the date

on which information was recorded by the officer in charge of the police station.<sup>224</sup>

Section 193(3) of the BNSS mandates the police to inform the informant or victim about the progress of the investigation within 90days. Segment 193 diagrams the time restrain for completion of examination. But there's no particular results is said in the event that this timeline is breached which raised an address almost the commonsense pertinence of this area. In the case of Hussainara Khattoon v. State of Bihar (1979) the Supreme Court held the every undertrail prisoner is entitled for speedy trial under article 21 of Indian constitution which guarantees right of life and personal liberty. The court states the importance of free legal aid for the poor, stating it as a essential for a "reasonable, fair and just" procedure.<sup>225</sup>

### B. Default Bail or statutory Bail Provision (Section187)

BNSS retain the structure of section 167(2) of CrPC default bail or statutory bail is applicable if the investigation not been completed in 60 or 90 days custody of the accused over then the magistrate does not have any further competency to keep the accused custody therefore he will be realse him on bail provided the accused furnishes bail bond. This is called as bail bond.<sup>226</sup> That is bail due to police in non-completing the investigation.

In case of Uday mohanlal acharya v. state of Maharashtra (2001) the court held that after the completion of 60 or 90 days the default bail application has been moved out but it has been wrongly rejected by magistrate if the chargesheet is filed when the appeal is pending then the right to default bail will not be defeated if the appellant court set aside the order of lower court.<sup>227</sup>

<sup>224</sup> Id. § 193(2).

<sup>225</sup> *Hussainara Khattoon v. State of Bihar*, (1979) 3 SCR 532.

<sup>226</sup> BNSS § 187; See also Code of Criminal Procedure, § 167(2), No. 2 of 1974 (India).

<sup>227</sup> *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453.

<sup>222</sup> Ibid.

<sup>223</sup> Bharatiya Nagarik Suraksha Sanhita, § 193(1), No. 45 of 2023, India Code.

### C. Limiting Adjournment (Section 346)

Concurring to area 346(1) of there are a few particular offenses beneath segment 65,66, 67,68,70,71 of the Bharatiya nyaya sanhita, 2023 the request or path must be completed inside two months from the date of recording the chargesheet. This confine the number of suspension pointed to dodge the delay within the path.<sup>228</sup>

### D. Use of technology (Section 530)

A major change under BNSS is the digitization of the criminal procedure. Under section 530 of the BNSS Allowed to follow changes in Trail and Proceedings:

- Audio-video recording of evidence
- Issuance, Service and execution of summons and warrant in electronic mode.
- Examination of complainant and witness may be held in electronic mode.
- All appellate proceedings or other proceeding may be held in electronic mode.

The changes in the vittles could significantly reduce logistical detainments, especially the detention which is caused due to transporting Undertrails captures between the jail and courts. Still, the effectiveness is grounded on the vacuity of the digital structure in the courts.

In the specific case of the state of Maharashtra v. Dr. Praful b Desai( 2003), the court made a ruling that videotape conferencing can be used to record substantiation in court, furnishing support for the use of technology in legal proceedings.<sup>229</sup>

## IV. Bail as a fundamental Right

Indian law after the judgment in Satender Kumar Antil v. Central Bureau of

Examination, (2022) 10 SCC 51 emphasizes that the safeguard ought to be standard and the imprison as exemption.<sup>230</sup> In this case the Supreme Court acknowledged the failings of the country bail system in recognizing the issue of under trail and granting bail. Supreme Court gives guidelines regarding the bail and it is necessary for other courts to follow to the guidelines given by SC in this case along with other landmark judgment related to bail. However the BNSS does not codify this principle. The new criminal law misses the opportunity to institutionalize progressive bail jurisprudence.

## V. Plea Bargaining and Summary trail

### A. Plea Bargaining

It would be ideal if you when a litigant in a criminal case chooses to argue blameworthy to a lower charge or reduce their sentence in trade for a more favorable result, like a littler discipline or the expulsion of the charging, usually known as bartering. On January 11, 2006, it was presented by amendment within the CrPC and was kept within the BNSS.<sup>231</sup>

Due to shame, obliviousness and deficiently lawful help, supplication bartering is still underutilized. Pendency may be diminished with a solid structure that advances supplication assentions for little infractions.

### B. Summary Trail

Sections 238 to 288 of the Bharatiya Nagrik suraksha sanhita (BNSS) regulates summary trails, which are intended to give some sorts of offenses a quick and efficient trail procedure.<sup>232</sup> These trails are designed for situations where the maximum penalty is three years in prison or situations that the law deems to be of a summary nature. The goal of summary trails is to guarantee

<sup>228</sup> BNSS § 346.

<sup>229</sup> *State of Maharashtra v. Dr. Praful B. Desai*, (2003) 4 SCC 601.

<sup>230</sup> *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51.

<sup>231</sup> Code of Criminal Procedure (Amendment) Act, 2005, No. 25, Acts of Parliament, 2005 (India).

<sup>232</sup> BNSS §§ 238–288.

prompt justice delivery while upholding the values of natural justice and a fair trial. Additionally, it guarantees that cases with greater potential penalties are handled through regular trials and those only offenses of a particular security and tried summary.

The right of appeal in summary trials is limited compared to ordinary trials. An accused can only appeal the judgment but not the decision of the Magistrate to try in a Summary fashion. This assists in speeding the appellate procedure and reduces delays in the disposal of cases.

## VI. Deficiencies in Infrastructure and Institutions

Even with procedural changes BNSS fails to tackle fundamental structural issues:

- (i) Judicial vacancies: The BNSS lacks measures to boost the number of judges or expedite court processes. The Supreme Court and the Law commission have consistently emphasized that India's judge-to-population ratio is significantly lower than global benchmarks with countless cases awaiting resolution, no procedural changes will be effective without a substantial increase in judicial personnel.<sup>233</sup>
- (ii) Legal aid systems: BNSS lacks dedicated mechanisms to enhance the national legal service authority (NALSA) or guarantee quality legal representation for the impoverished, Legal aid continues to face underfunding and lack of personnel, resulting in lawyer frequently being overwhelmed and ill prepared to manage intricate criminal cases.<sup>234</sup>
- (iii) Prison infrastructure: The BNSS neglects the significance of

reforming prisons addressing issues like overcrowding, sanitation, healthcare, and mental health assistance overload facilities compromises the objectives of compassionate detention, rehabilitation, and equitable trial. Reforms should be mention in BNSS.<sup>235</sup>

- (iv) Oversight and Accountability: The BNSS does not include measures for creating an independent oversight organization or database to track undertrial detentions and guarantee regular evaluations. Undertrial Review Committees (URCs), as suggested by the Supreme Court in *In Re-Inhuman Conditions in 1382 Prisons* (2016), need legislative support and consistent reporting to be impactful.<sup>236</sup>

- (v) Collaboration among Agencies: The success of BNSS reforms relies on smooth cooperation between law enforcement, prosecution, courts, and prison management. Nevertheless, the legislation lacks institutional structures to promote this collaboration, resulting in a fragmented and inconsistent approach.

In conclusion, unless these foundational institutional gaps are not fulfill or addressed in tandem with procedural updates, the promise of reforming Indian judicial system for under trail prisoners will remain largely unfulfilled.

## VII. Comparative Analysis of undertrial prisoners with UK and US

A global viewpoint provides important insights for India's criminal justice reform, especially in addressing undertrial detention

<sup>233</sup> Law Comm'n of India, *Report No. 245: Arrears and Backlog*, Ministry of Law & Justice (2014)

<sup>234</sup> National Legal Services Authority, *Annual Report 2022–23* (India).

<sup>235</sup> Ibid.

<sup>236</sup> *In Re-Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700.



## UK

In the UK, legal custody time limits are defined by the Prosecution of Offences Act, 1985.<sup>237</sup> For example, an individual accused of an offense should be tried within 182 days unless the court grants an extension of the custody time limit for valid reasons. If the timeline is breached, the defendant is eligible for unrestricted bail. The may improve the focus on timely prosecution guarantees responsibility from investigative bodies and the prosecuting authorities.

Furthermore, entities such as the Crown Prosecution Service (CPS) oversee and govern prosecutorial discretion; guarantees prompt submission of charges and trials. Lesson from the UK demonstrate that robust institutional structures and enforceable deadlines serve as safeguards against arbitrary or extended detention.

## United States

The US Constitution's Sixth Amendment promises a right to speedy trial. The Speedy Trial Act of 1974 enforces that by mandating that there be a trial commencement within seventy days following indictment or appearance in court.<sup>238</sup> If a government does not prosecute a defendant within this timeframe (certain exceptions aside), the charge could be dismissed. Additionally, public defender systems in the U.S. guarantee that impoverished defendants obtain prompt and skilled legal counsel. The United States illustrates how merging legal deadlines with institutional responsibility (such as judicial oversight and adequately funded public defenders) can greatly reduce injustices faced by those awaiting trial

Lessons for India which can be implemented

- Enforceable the custody limits which stop the arbitrary and extended detention.

- Committed regulatory agencies which do not delay in investigation (e.g., CPS or prison administrative agencies) can enhance accountability.
- Legally required legal aid and public defender schemes ensure equitable representation of both the parties in court.
- Setting time frames for the trials through legislation and allowing courts to dismiss delayed cases promotes deterrence and procedural order.

India's BNSS lacks such robust accountability frameworks which allow enforceable protections. International experiences show that without legislative authority and institutional commitment, procedural reforms may not ensure justice for undertrial prisoners.

## VIII. Conclusion

Bharatiya Nyaya Sanhita, 2023 represents a major attempt to reform India's criminal procedural system. The new code does provides a complete solution to the undertrial detention, even though it introduces a number of procedural reforms, including the digitizing of trial process, requiring time bound trials, and updating bail standard. The continuation of arbitrary detention, overcrowding in prisons and draw out of legal proceedings in indicative of deeper institutional inertia as well as legal shortcomings. The lack of enforceability, infrastructure preparedness and statutory accountability mechanisms limits the effectiveness of provisions like section 530 (technological integration) and section 193(3) (time bound trials) despite the fact that they offer hope. Success with undertrial reform relies on institutional capability and political will as much as on procedural innovation, in accordance with comparative lessons from states such as the US, UK, and South Africa. There are also democracies beyond what India

<sup>237</sup> Prosecution of Offences Act, 1985, c. 23, § 22 (U.K.).

<sup>238</sup> Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (U.S.).

has embraced so far in terms of a robust legal aid system, supervisory bodies, enforced limits of custody time, and innovative public defender models. In addition, the BNSS overlooks basic issues that are critical to the administration of justice, including interagency coordination, prison conditions, and judicial vacancies. In short, the BNSS is a framework that can be transformative, but its impact on pretrial inmates will depend heavily on how it is implemented, how institutions are transformed, and how judges continue to oversee it. The new act has the potential to be just another good-intentioned act that gets translated incorrectly if these infrastructural and systemic shortcomings are not addressed. The BNSS must move beyond procedural amendment to structural reimagining to fulfill its vision of ensuring India's most vulnerable citizens receive justice without obstruction or delay.

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