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Prasanna S,

Chairman of Institute of Legal Education

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 73059 14348 - info@iledu.in / Chairman@iledu.in

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RECONSIDERING THE TENDER YEARS DOCTRINE IN INDIA: CONSTITUTIONAL INCOMPATIBILITY, CHILD RIGHTS, AND THE CASE FOR GENDER-NEUTRAL SHARED PARENTING

AUTHOR – TK ARATHI TANVI & JOHN CALEB

STUDENTS AT SCHOOL OF LAW, CHRIST (DEEMED TO BE UNIVERSITY)

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Abstract

The child custody regulations of India for children who are under five years of age follow Section 6(a) of the Hindu Minority and Guardianship Act, 1956, which establishes a legal presumption that mothers will typically receive custody of their children. The paper presents three related arguments. The first argument proves that Section 6(a) grants mothers preferential custody rights, which violates Articles 14, 15, and 21 of the Indian Constitution because it fails to meet the requirements established by Shayara Bano v. Union of India and the constitutional anti-stereotyping principle derived from Anuj Garg v. Hotel Association of India. The second argument shows that Indian custody decisions disable the constitutional rights of children because judges disregard Article 12 of the United Nations Convention on the Rights of the Child, which India has ratified, and treat child welfare as an unimportant matter instead of their main focus. The third argument establishes that existing laws should create a shared parenting framework because current legal gaps force children from separated families to endure unnecessary harm.

The research develops through three components that include Indian constitutional law the Supreme Court of India and two legal codes from the United Kingdom and Australia and the Uniform Marriage and Divorce Act and the research about attachment in developmental psychology. The research presents a complete reform plan which involves three main elements. The first element requires the elimination of gender-based presumption through the repeal of Section 6(a). The second element establishes a welfare assessment system which follows the guidelines of the Children Act 1989. The third element establishes joint parental responsibility as the standard legal requirement. The fourth element requires all disputed custody cases to include systems that allow children to take part.

I. INTRODUCTION

The field of child custody law exists between three competing forces which include parental rights and child welfare and constitutional equality. In India, the Hindu Minority and Guardianship Act, 1956 (hereinafter "HMGA") governs guardianship and, by implication, the initial allocation of custody for Hindu children. Section 6(a) of the HMGA provides that the natural guardian of a Hindu minor boy or unmarried girl, "in the case of a boy or an unmarried girl—the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."[249] This

[249] Hindu Minority and Guardianship Act, 1956, § 6(a) (India).

legal exception which people commonly refer to as the tender years doctrine has directed custody decisions for almost seven decades. The core objective of this research paper centers on this subject. The tender years doctrine originated in nineteenth-century English common law, where courts developed a presumption that young children were better served by maternal care. The doctrine existed as a judicial establishment which originated from the Victorian English social system that restricted women to household duties and men to work outside their home. The Indian legislature created this presumption as law through the HMGA which it established in 1956 and the presumption has remained unchanged since that time. The United Kingdom which established the doctrine terminated its existence through the Children Act 1989.[250] India maintains what its colonial ancestor discarded which shows how Section 6(a) has both colonial roots and present-day outdated characteristics.

The constitutional issue with Section 6(a) extends beyond its formal structure. The provision establishes a parental rights classification system which uses sex as its basis for determining rights. The Supreme Court of India has declared that laws which maintain gender stereotypes will breach Article 14 equal treatment rights because they fail to meet the standard of obvious unreasonableness. The court found that Section 15 violated the law because it required people to meet specific biological criteria instead of assessing their individual capabilities. Section 6(a) rests on exactly such an assumption: that mothers are inherently better suited to care for infants and toddlers. The assumption exists because it lacks both empirical evidence and constitutional backing. The child rights dimension is equally significant. India ratified the United Nations Convention on the Rights of the Child (hereinafter "CRC" or "UNCRC") in 1992 without reservation.[251] Article 3 of the CRC mandates that the best interests of the child shall be a primary consideration in all actions concerning children.[252] Article 12 guarantees children capable of forming views the right to express those views freely in judicial proceedings affecting them, with those views given due weight according to age and maturity.[253] Article 18 requires States Parties to use best efforts to ensure recognition of the principle that both parents bear common responsibility for child-rearing.[254] Section 6(a) violates all three obligations because it gives priority to a parent's sex when determining child welfare and it prevents children under five from expressing their views and it treats fathers as lesser parents who receive default parental rights.

The paper consists of six sections. The second part of the study examines how the tender years doctrine developed historically before becoming established as an official Indian legal principle. The third part of the study establishes a constitutional challenge against Section 6(a) through the application of Articles 14 15 and 21. The fourth section of the study investigates how the Indian Supreme Court rules on custody cases while uncovering various legal contradictions. The fifth section of the study compares custody laws between three countries: the United Kingdom the United States and Australia. The sixth section of the study shows how Indian law lacks proper regulations for joint custody arrangements. The seventh section of the study presents a comprehensive reform plan. The study ends with the eighth section.

[250] Children Act 1989, c. 41 (Eng.) (abolishing any gender-based preference in custody determinations and establishing the welfare of the child as the paramount consideration).

[251] United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990; ratified by India Dec. 11, 1992).

[252] Id. art. 3(1) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.").

[253] . Id. art. 12(2) ("the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.").

[254] . Id. art. 18(1) ("States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.").

II. HISTORICAL ORIGINS OF THE TENDER YEARS DOCTRINE AND ITS INDIAN CODIFICATION

A. The Doctrine's Common-Law Genesis

The tender years doctrine emerged in mid-nineteenth century English equity jurisprudence as a legal principle. English common law before that time designated fathers as the primary legal guardians of their children because of the paternal supremacy doctrine which considered children as quasi-property of their fathers and allowed courts to only challenge their custody rights in cases of extreme misconduct. The Talfourd's Act 1839 Custody of Infants Act 1839 established a judicial process that allowed the Court of Chancery to grant mothers visitation rights for their children who were younger than seven years old. The judiciary extended this logic in subsequent decades: courts began awarding custody of young children to mothers on the rationale that maternal care was uniquely suited to the formative years. The early twentieth century saw the doctrine develop into an almost unbreakable presumption which spread across many common-law jurisdictions. The ideological foundation was explicit: women were seen as naturally equipped for nurturing roles, while men were public, economic actors. Legal scholars have identified this reasoning as gender essentialism—the attribution of fixed, biologically determined roles to persons based on sex. The legal principle existed as an unchanging doctrine which never permitted exceptions The development of developmental psychology as a scientific field began after this particular research study which established its academic foundations through its empirical findings about child development.

B. Codification in Indian Law: The HMGA 1956

The Hindu Minority and Guardianship Act which the Indian Parliament passed in 1956 established the tender years presumption through Section 6(a) of the Hindu Code Bills. The proviso reads: "provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."[255] The HMGA legislative history does not provide evidence which shows why the five-year age requirement exists or what research exists about child development. Existing practice at the time already included the provision which passed through parliament without significant discussion. The word "ordinarily" in the proviso has been interpreted by courts as creating a rebuttable presumption: maternal custody is the default unless the father affirmatively demonstrates that such custody would harm the child.[256] This burden structure is constitutionally significant. The law treats fathers as legally disadvantaged because they must prove that the standard custodian is unfit instead of participating in a shared assessment of what serves their child's best interests. Mothers who want to obtain custody face no similar responsibility.

The Guardians and Wards Act of 1890 which governs all children irrespective of their religious background does not include any provisions that favor mothers. The GWA mandates that courts determine what serves the "welfare of the minor" according to present evidence. The gendered presumption exists as a specific Hindu personal law practice which Indian family law applies through the HMGA. The constitutional challenge arises from jurisdictional discrepancies because courts reach different custody decisions based on applicable statutes which violates Article 14's requirement for equal protection.

III. CONSTITUTIONAL INCOMPATIBILITY OF SECTION 6(A)

A. Article 14: Manifest Arbitrariness

Article 14 of the Constitution of India guarantees equal legal rights and equal legal protection. The Supreme Court developed the manifest arbitrariness doctrine as a constitutional challenge standard that operates

[255] . Hindu Minority and Guardianship Act, 1956, § 6(a) proviso (India).

[256] . Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318, ¶ 17 (India) ("the word 'ordinarily' in Section 6(a) signifies a rebuttable presumption in favour of the mother, which can be displaced if the father establishes that maternal custody would be contrary to the child's welfare").

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through Article 14 without using traditional classification methods.[257] The five-judge constitutional bench in Shayara Bano v. Union of India declared that personal law provisions which reach the "manifestly arbitrary" standard of lawmaking because they produce irrational results without any established basis for decision-making violate Article 14.[258] The Court used this standard to declare triple talaq as an illegal practice. The Shayara Bano framework applies directly to Section 6(a).

Section 6(a)'s maternal preference for children under five exists as an arbitrary rule because of three established reasons. First, the five-year threshold is arbitrary because developmental science has not shown any age at which children require maternal care instead of paternal care. Developmental psychology identifies no such threshold. Second, the presumption applies uniformly regardless of the actual caregiving history of the parents. The law treats a father who has cared for his child since birth as invisible because the statute fails to acknowledge his specific caregiving situation. Third, the presumption operates on the crude variable of the parent's sex, a trait wholly unrelated to caregiving capacity in any particular case. A rule that assigns legal entitlements based on a variable that bears no rational relationship to the rule's stated objective—the child's welfare—cannot survive Article 14 scrutiny. The manifest arbitrariness challenge receives support from the statutory framework. The Supreme Court confirmed that Hindu guardianship law follows one main principle which states that child welfare should always come first.[259] Section 6(a) operates as an exception to that principle by substituting a sex-based default for an individualized welfare inquiry. A provision that defeats the very objective of the statute it inhabits is, by definition, without adequate determining principle. The situation demonstrates complete lack of rationality.

B. Article 15: The Anti-Stereotyping Principle

The article 15(1) of the law prevents the State from making any discriminatory treatment against citizens based on their sex. The Supreme Court has progressively expanded the anti-discrimination mandate of Article 15 to encompass in particular cases all direct sex-based classifications together with laws that maintain harmful gender stereotypes.[260] The Court in Anuj Garg v. Hotel Association of India found unconstitutional a law that banned women from working at hotel bars because the law treated women as needing protection from spaces where men could go, which created a paternalistic view that restricted their freedom.[261] The Court established an "anti-stereotyping principle" because any law which uses cultural stereotypes to define what men and women can achieve violates Article 15 protection despite its stated protective purpose. The legislation in Section 6(a) serves as a primary example of laws that base their foundations on gender-based assumptions. The provision rests on the stereotype that mothers are natural caregivers for infants whom fathers cannot raise. This stereotype functions as two simultaneous beliefs. The assumption establishes the requirement that fathers must prove their ability to care for infants because they have to disprove a presumption which they did not establish. The system forces mothers into caregiving roles which they might not want to take on or which they cannot perform because mothers who

[257] State of Andhra Pradesh v. McDowell & Co., (1996) 3 SCC 709 (India); see also Shayara Bano v. Union of India, (2017) 9 SCC 1 (India) (affirming manifest arbitrariness as a ground of challenge under Article 14 independent of the classification test).

[258] Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶¶ 94–101 (India) (Nariman, J., concurring) (articulating the manifest arbitrariness standard and applying it to strike down instantaneous triple talaq under Article 14).

[259] . Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413, ¶ 52 (India) ("The paramount consideration in any custody matter is always the welfare and interest of the child."); see also Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42 (India).

[260] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (holding that constitutional protection against discrimination extends to actions that perpetuate systemic disadvantage and reinforce harmful social stereotypes); Joseph Shine v. Union of India, (2019) 3 SCC 39 (India) (striking down adultery provision under Articles 14 and 15 as based on stereotypical assumptions about the legal capacity of women).

[261] Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, ¶¶ 45–50 (India) ("The legislation must not be founded on mere sex stereotyping... the Court must examine whether the restriction or classification is premised on stereotype attributes of women devoid of any rational basis.").

wish to separate from their children face social judgments about their ability to fulfill their legal responsibilities as caregivers. The same stereotypical belief system leads to both results. The Anuj Garg standard establishes this matter as unconstitutional.

C. Article 21: The Right to Family Life and Child Autonomy

The Supreme Court has interpreted Article 21 which protects the right to life and personal liberty to include the right to dignity and the right to privacy and the right to family life.[262] The nine-judge bench of K.S. Puttaswamy v. Union of India established that the right to privacy includes the right to make personal and family decisions about family formation and structure.[263]A legal system which prevents a parent from raising their child because of a gender-based rule which lacks specific assessment of individual cases violates Article 21 rights to maintain family relationships. The rights established by Article 21 protect the constitutional identity of the child. The Supreme Court of India established in ABC v. State NCT of Delhi that children possess rights which Article 21 allows them to enforce including the right to establish their identity and the right to know both parents and the right to grow up in a supportive environment which helps their development.[264] The custody system which restricts a child from seeing one parent based only on that parent's gender without considering the child's unique situation violates the child's Article 21 rights. The child is not an object to be allocated between parents; the child is a rights-bearing constitutional subject whose interests must be independently assessed.

The Article 21 argument gains strength through CRC Article 12 which grants children the right to take part in legal processes that involve them. India's ratification of the CRC without reservation creates an obligation to interpret domestic law consistently with treaty obligations where possible. Section 6(a) of the law establishes custody distribution through parental sex which blocks any detailed examination of the child's connections with others and personal choices and their well-being and protection needs. The statutory provision which establishes a fundamental barrier that stops treaty commitments from being met does not meet the standard of Article 21 which demands that all restrictions on liberty must follow just and fair procedures.

D. The Doctrinal Inconsistency Created by Githa Hariharan

The constitutional problem requires closer examination because it shows a fundamental conflict between Section 6(a) custody presumption and the Supreme Court Githa Hariharan v. Reserve Bank of India guardianship decision.[265] The Court interpreted Section 6(a) through its "after him the mother" wording because it established that the mother shared equal rights with the father to act as a natural guardian. The Court established this interpretation based on Articles 14 and 15 which declared any guardianship rule that favored fathers over mothers to be unconstitutional. The doctrinal inconsistency is obvious. Githa Hariharan proved that both parents share equal constitutional rights to guardianship. Section 6(a)'s custody provision establishes constitutional discrimination because it assumes that mothers make better custodians for children under five. The Githa Hariharan decision stopped short of directly addressing the custody provision which resulted in equal guardianship rights between sexes but different

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[262] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India) (expanding Article 21 to encompass the right to live with dignity and the right to personal liberty interpreted broadly); Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608 (India).

[263] . K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 127 (India) (Chandrachud, J.) ("Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.").

[264] ABC v. State (NCT of Delhi), (2015) 10 SCC 1 (India) (recognizing that children have independent constitutional rights including the right to identity and the right to know both parents, and that custody determinations must independently account for the child's constitutional interests).

[265] Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228 (India) (reinterpreting Section 6(a) of the HMGA to recognize mothers as concurrent natural guardians with fathers, grounding the interpretation in Articles 14 and 15 of the Constitution, and holding that any reading subordinating maternal to paternal guardianship was constitutionally impermissible

custody rights for the same age group. The constitutional equality standard requires that mothers and fathers share equal rights to guardianship which means that fathers need to maintain equal custody rights with mothers. The Court established an unresolved doctrinal inconsistency by not applying its reasoning to Section 6(a)'s custody provision which needs resolution through future constitutional adjudication.

IV. INDIAN SUPREME COURT JURISPRUDENCE ON CUSTODY: DOCTRINAL ANALYSIS

A. Roxann Sharma v. Arun Sharma: The Reinforcement Problem

The Supreme Court dealt with a custody battle between two influential parents who were fighting over their four-year-old child in the case of Roxann Sharma v. Arun Sharma.25 The Himachal Pradesh High Court had awarded interim custody to the father. The Supreme Court overturned this decision by giving back custody rights to the mother because Section 6(a) establishes a rebuttable presumption that mothers should have custody of children under five years old which remains valid until proven otherwise by evidence showing maternal unfitness. The academic literature has largely treated Roxann Sharma as a case that qualified the presumption by affirming its rebuttability. This interpretation of the text shows excessive generosity. The judgment, when analyzed properly, establishes three constitutionally problematic elements. The first part of the law applies sex-based presumptions in all cases without verifying their constitutionality through Articles 14 and 15 examination whereas HMGA provisions serve as permanent legal standards. The entire burden of proof falls exclusively upon the father because the father needs to demonstrate maternal unfitness which creates an unfair evidentiary system that would fail an Article 14 examination according to the Court's assessment. The Court avoids performing any independent investigation of the child's preferences and attachment patterns and best interests because it only uses the statutory presumption as evidence. The "welfare" principle exists in the text but it does not function because the statute already establishes its requirements.

B. The Welfare Principle in Tension: Sarita Sharma and Mausami Moitra

The statutory presumption conflicts with the welfare principle which creates doctrinal inconsistencies that affect different cases. The Supreme Court ruled in Sarita Sharma v. Sushil Sharma that Indian courts must evaluate welfare matters independently because valid foreign custody orders lack authority to supersede this obligation. The principle that welfare supersedes formal entitlement is correct, but its application in Sarita Sharma continued to favor the mother without explicit constitutional analysis. The Court awarded custody of a ten-year-old boy to his father in Mausami Moitra Ganguli v. Jayant Ganguli because the child preferred to live with his father who provided a stable home environment. The case is notable for its engagement with the child's own perspective, though the child in question was well beyond the Section 6(a) age threshold. The Court's decision to hear a ten-year-old's opinion stands in contrast with its refusal to accept a four-year-old's choice in Roxann Sharma, which demonstrates how Section 6(a) establishes an unjust age limit for child involvement in decision-making.

C. Shaleen Kabra: Judicial Creativity Within Legislative Constraints

The Court established its ability to create shared custody systems despite lacking legal authority within Nil Ratan Kundu v. Abhijit Kundu and the informal arrangements which followed the Shaleen Kabra proceedings.[266] The Court established a comprehensive time-sharing plan which assigned time between both-parent

266 . Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413 (India); see also the arrangements described in the Supreme Court's continuing supervision of custody orders involving sibling bonds, including the informally designated Shaleen Kabra proceedings, in which the Court fashioned a detailed joint custody arrangement allocating residence between parents to preserve sibling relationships.

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households because the children's need to maintain sibling relationships and parent connections outweighed any default to single-parent custody. The judicial system created this solution to address child welfare needs through its child-centered method, which highlights the law's need for judicial innovation because it fails to deliver results that judicial statutes currently prohibit. The current judicial exception needs to become statutory law through necessary legislative changes.

V. COMPARATIVE PERSPECTIVES

A. United Kingdom: The Children Act 1989 Model

Roxann Sharma demonstrates her support for the tender years doctrine through her research work. The Court fails to uphold child welfare as its primary principle because it refuses to perform the welfare assessment that this principle requires. Indian custody law contains its main doctrinal defect because courts establish welfare as their primary guideline but then use a legal presumption which prevents them from assessing welfare in actual cases.[267] Section 2(1) of the Act establishes that when parents of a child marry before their child birth their parental responsibility begins at the same time for both parties. The law establishes no presumption of sex and no priority for mothers and there is no matching provision to Section 6(a)'s exception. The Children Act 1989 Section 1(1) introduces the paramountcy principle which states that "When a court decides any matter related to the upbringing of a child . . . the court must prioritize the child's welfare above all other factors.[268] The court must use Section 1(3) statutory welfare list to evaluate the case because it specifies which elements to examine: (a) the ascertainable wishes and feelings of the child, considered in light of age and understanding; (b) physical, emotional, and educational needs; (c) the likely effect of any change in circumstances; (d) age, sex, background, and any characteristics the court considers relevant; (e) any harm suffered or at risk of being suffered; and (f) the capability of each parent in meeting the child's needs.[269] The checklist is mandatory: courts must consider each factor, and the child's own wishes appear first. No factor exists which determines a person's sex. India lacks a statutory welfare checklist which creates a legal requirement for judges to follow but courts must operate under the abstract paramountcy principle without any legislative instructions.

The Children Act 1989 establishes rules that govern how children should take part in legal decisions. Section 1(3)(a) requires courts to ascertain the child's wishes and feelings regardless of age, though weight given will vary with maturity. English family courts routinely appoint Children and Family Court Advisory and Support Service (CAFCASS) officers to represent children's interests independently, ensuring that the paramountcy principle is applied through a structured evidential process rather than judicial intuition.[270]

B. United States: Constitutional Equality and Best Interests

State laws govern child custody cases throughout the United States because all fifty states have replaced the tender years doctrine through legislative actions and judicial decisions. The constitutional terminus of the doctrine came through equal protection jurisprudence under the Fourteenth Amendment which courts held was violated by presumptions that favored one parent over the other on the basis of sex.[271] The National Conference of Commissioners on Uniform State Laws has established the Uniform Marriage and

[267] . Id. § 3(1) (defining parental responsibility as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property").
[268] Id. § 1(1).
[269] Id. § 1(3)(a)–(f).
[270] Children and Family Court Advisory and Support Service, https://www.cafcass.gov.uk (last visited Mar. 9, 2026) (describing the role of CAFCASS officers in English family proceedings as independent advocates for the child's welfare and interests before the court).
[271] See, e.g., Ex parte Devine, 398 So. 2d 686, 695 (Ala. 1981) (holding that the tender years doctrine violated the Equal Protection Clause of the Fourteenth Amendment as an unconstitutional sex-based classification in custody adjudication); see also Orr v. Orr, 440 U.S. 268 (1979) (establishing that sex-based classifications in family law must satisfy heightened equal protection scrutiny under the Fourteenth Amendment).

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Divorce Act which requires that custody decisions should be made according to what serves the child's best interests by evaluating these specified factors: the preferences of both parents and their child, the child's ability to adapt to home and school and community environments, the physical and mental health status of all involved parties, and the capacity of each parent to enable their child to connect with the other parent.[272] The United States model is significant for two reasons. The tender years doctrine fails to meet constitutional requirements for equality which exist in Indian Constitution Articles 14 and 15. The requirement for each parent to facilitate their child's interaction with the other parent creates a practical method for enforcing CRC Article 18 shared responsibility principle through judicial processes which allow courts to impose penalties during custody determinations against parents who try to keep their children from spending time with their other parent.

C. Australia: Presumptive Shared Parental Responsibility

The Family Law Act 1975 (Cth) of Australia which received amendments from the Family Law Amendment (Shared Parental Responsibility) Act 2006 establishes shared parenting as the legal standard that all common law systems must follow.[273] The Family Law Act establishes a presumption which judges must use when deciding parenting matters, stating that equal shared parental responsibility should be assumed to benefit the child. The presumption is rebuttable by evidence of family violence, child abuse, or other circumstances making equal sharing contrary to the child's best interests.[274] The Australian system fulfills the requirements of CRC Article 18(1) which states that "[b]oth parents have common responsibilities for the upbringing and development of the child." The presumption benefits the child because it operates in his interests, rather than supporting either parent. The system presumes equal parental responsibility because it benefits the child most, rather than granting fathers and mothers individual rights to this responsibility. The correct constitutional and ethical basis for reform begins with a child-centered approach instead of a parent-rights-centered approach.

D. Comparative Synthesis

The comparison shows that India exists as a nation which has both constitutional and legal systems that keep it separate from other countries. All major common-law systems which adopted the tender years doctrine have since rejected it through either constitutional rulings or legislative changes or both methods. The UK abolished it through the Children Act 1989 which created a statutory welfare checklist that required child participation. The United States abolished it through equal protection jurisprudence. Australia replaced it with a presumption of shared parental responsibility. India alone keeps a legal system which gives mothers the right to care for their young children. This situation represents more than a legal tradition distinction because it creates an institutionalized situation which violates India's promises to protect equality rights and child rights through its constitution and international treaties.

VI. THE LEGISLATIVE VACUUM ON JOINT CUSTODY

The HMGA 1956 and the Guardians and Wards Act 1890 do not establish any regulations about joint or shared custody. The Law Commission of India, in its 257th Report (2015), explicitly recognized this gap, stating that "joint custody is not specifically provided for in Indian law" and recommended legislative reform to empower courts to make such orders where

[272] Uniform Marriage and Divorce Act § 402, 9A U.L.A. 561 (1998) (providing that custody shall be determined in accordance with the best interests of the child, with reference to factors including the wishes of parents and child, the child's adjustment to home and community, and the mental and physical health of all parties).

[273] Family Law Act 1975 (Cth) (Austl.), as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (Austl.).

[274] Family Law Act 1975 (Cth) § 61DA (Austl.) (establishing a presumption that it is in the best interests of the child for parents to have equal shared parental responsibility, rebuttable by evidence of family violence, child abuse, or other circumstances making equal sharing contrary to the child's best interests).

they serve the child's welfare.[275] The Parliament has not taken any action to implement this recommendation. The judicial system in India established joint custody as a legal concept which judges now develop through their case decisions because there are no existing laws or official procedures or methods to implement this system. The absence of a joint custody framework has concrete harmful consequences. Separated parents' children lose access to their father during their entire childhood because parents need the law to establish default shared parenting arrangements which should apply in their situation. The CRC's recognition in Article 9(3) that a child separated from one parent has the right to maintain personal relations and direct contact with both parents on a regular basis imposes an obligation on India that the current legislative vacuum prevents it from fulfilling.39

The political reasons for parliamentary inaction are multiple. Judicial conservatism has treated single-parent custody as the natural equilibrium since it has shown little interest in recognizing this issue. The enforcement complexity of shared-parenting orders includes both their state-based monitoring systems and their enforcement procedures which apply to international relocation situations. The legal profession's knowledge of adversarial single-parent custody litigation creates structural obstacles that prevent any attempts to change current practices. The legislative culture has developed patriarchal assumptions which lead to social neglect of fathers' custody rights. The political facts which exist in this case do not serve as legal justifications because they fail to provide sufficient reasons for ongoing violations of constitutional equality and child rights obligations.

VII. A COMPREHENSIVE REFORM MODEL

A. Statutory Reform: Repeal and Replacement of Section 6(a)

The basic reform requires the elimination of Section 6(a)'s maternal preference provision. The HMGA should be amended to delete the words "provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother" in their entirety. The statute should replace existing text with the following statement: Custody and parenting arrangements in respect of a Hindu minor shall be determined solely on the basis of the best interests of the minor, without any presumption based on the sex of either parent. Both parents shall be regarded as equally capable of providing care and nurturing to their child regardless of the child's age. The amendment removes the constitutional violation that existed under Articles 14 and 15 because it eliminates the sex-based assumption. The HMGA now matches GWA's welfare-based standard because the current jurisdictional imbalance has been resolved. And it brings Indian law into compliance with CRC Article 3's best interests requirement.

B. Codification of a Statutory Welfare Checklist

The repeal of Section 6(a) needs an established legislative framework that will act as its replacement. The absence of such a framework will result in courts exercising welfare discretion without any available directives which will create the currently observed inconsistent and unpredictable pattern of Indian custody decisions. The reformed HMGA should require courts to consider the following non-exhaustive factors whichale based its requirements on Section 1(3) of the Children Act 1989. The ascertainable wishes and feelings of the child existing at his current age with understanding assessment through a qualified professional or guardian ad litem. The

[275] Law Commission of India, Report No. 257: Reforms in Guardianship and Custody Laws in India 14–18, 41–45 (2015) [hereinafter Law Commission 257th Report] (recommending legislative amendments to provide for joint custody, codify the welfare principle with a structured checklist, and establish mandatory mechanisms for child participation in custody proceedings).

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emotional bond between the child and each parent which exists based on their history of caregiving and attachment evidence. The physical emotional psychological and educational requirements essential for the child's development. The ability of each parent to fulfill the essential requirements of their child. The impact that any change in living arrangements will have on the child. The potential danger that exists for the child which includes situations where domestic violence or abuse occurs. The willingness of each parent to support the child's relationship with the other parent. The child has the right to stay in contact with both parents through meaningful interactions.

The checklist operationalizes welfare through its implementation which leads to its practical application because it addresses the doctrinal weakness identified in Roxann Sharma which failed to apply the welfare principle despite its invocation.

C. Presumptive Joint Parental Responsibility

The reformed statute should establish that both parents share equal rights to make essential decisions about their child's education and healthcare and religious instruction and international travel until a court decides to revoke this arrangement based on welfare considerations. Parents who separate from each other should start with joint parental responsibility because this legal status exists without the need for court approval. The implementation of shared parental responsibility follows CRC Article 18 requirement for shared parental responsibility to be implemented. The reformed statute should direct courts to encourage parenting plans that maximize the child's involvement with both parents, consistent with the child's welfare, because it addresses residential arrangements which determine the child's primary living situation. Courts should receive authorization to establish shared residence orders that define how parents will divide parenting time together with holiday schedules and transportation duties and methods for solving disputes. All contested custody proceedings must use a standard-form parenting plan template which the Ministry of Women and Child Development developed together with family courts.

D. Mandatory Child Participation Mechanisms

The Indian family courts need to establish official procedures which enable them to gather and evaluate children's perspectives during all custody disputes according to CRC Article 12.Three specific reforms are required. The first requirement mandates that all child custody disputes involving children under twelve must have a guardian ad litem or child advocate assigned to represent their interests. The guardian ad litem should be a qualified child psychologist or social worker whose function is to independently assess and report to the court on the child's attachment patterns emotional wellbeing and where age permits expressed preferences. This approach follows the CAFCASS model which exists in England and Wales.[276] The second requirement establishes a legal obligation for courts to document their methods of evaluating a child's opinion during the decision-making process. The court must provide detailed explanations when it chooses to disregard the child's stated preferences. The accountability system requires child participation to be meaningful instead of being used for show. The third requirement needs judges to receive training about child-friendly interviewing methods and attachment evaluation methods which the National Judicial Academy provides. Judges should use professional child assessments as standard evaluation methods instead of depending on their informal interactions with children and unplanned expert evaluations.

E. Addressing the Non-Hindu Population: Uniform Reform

The HMGA reform creates new inequality because it establishes two different standards for Hindu and Muslim children. The Hindu

[276] Children Act 1989, c. 41, § 1(3) (Eng.).

standard will be based on welfare and the Muslim standard will follow classical Islamic law, which dictates that mothers receive custody of young children until they reach the age of discretion while fathers act as guardians. The GWA 1890 already provides gender-neutral welfare standards for the Christian and Parsi children. A truly uniform solution would require either a Uniform Civil Code addressing custody, or parallel amendment of applicable personal laws.[277] The Law Commission's 257th Report recommended custody law unification through personal law consolidation, which Parliament must urgently address.

VIII. CONCLUSION

The 1956 Hindu Minority and Guardianship Act Section 6(a) functions as a colonial relic which infringes constitutional equality rights while maintaining gender biases and violating children's rights and preventing Indian families from implementing joint custody arrangements. The manifest arbitrariness doctrine from Shayara Bano and the anti-stereotyping principle from Anuj Garg make this constitutionally untenable. The guardianship equality established by Githa Hariharan conflicts with this statement. The treaty requires India to follow all obligations under the CRC. Common-law jurisdictions which once practiced this legal doctrine have now abandoned it which makes this law an exceptional case in family law comparison. The proposed reform model which this paper presents has the ability to achieve its objectives through existing legal frameworks which include constitutional and legislative systems. The legislative program consists of three parts which include the repeal of Section 6(a)'s proviso and the creation of a legal welfare checklist and the introduction of presumption-based joint parental responsibility and the establishment of compulsory child involvement methods. The Law Commission's recommendations in its 257th Report provide a parliamentary foundation. The only aspect that needs resolution now is whether political will exists.

The child whose custody is contested does not experience the law as a set of statutory provisions. She experiences it through three main aspects which control her daily existence: the presence or absence of parents she loves and the stability of her home and school environment and her relationships. Indian custody law should be designed around that child's experience and interests. The current system fails to meet this requirement. The need for reform exists because it has become essential to fulfill constitutional obligations.

[277] See Law Commission 257th Report, supra note 38, at 48–53 (discussing the divergence between Hindu, Muslim, and Christian personal law regimes on custody and recommending harmonized legislative reform consistent with constitutional equality provisions and India's CRC obligations).