

# OF MEN'S RIGHTS, MOTHERHOOD AND MINORS: CRITICAL FEMINIST REFLECTIONS ON SHARED PARENTING LAWS IN INDIA

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*In May 2015, the Law Commission of India drafted its 257th report titled 'Reforms in Guardianship and Custody Laws in India', in which it suggested several modifications to the custody framework in India. Within this report, the Law Commission also suggested the possible incorporation of shared parenting as a post-divorce custody model within India. This paper attempts to analyse the principle need as well as the practical ramifications of implementing such a model. In doing so, this paper contextualises the demands for shared parenting made by men's rights groups and provides a feminist jurisprudential critique to the underlying basis of these demands. Finally, this paper recommends modifications to the report, suggesting mandatory child support orders and a rebuttable presumption model against shared parenting in cases of domestic violence. In doing so, the paper attempts to provide tangible suggestions in order to ensure that such a model meets the goals of justice and care in laws related to parenting in India.*

## I. INTRODUCTION

The terrain of custodial disputes has been a majorly demanding and largely unpleasant area for Indian judicial bodies to navigate. Disputes within this terrain are characterised inherently by a discord between divorced couples around questions of custody, access, maintenance and guardianship. The concerns of custody, in particular, are the subject of a lengthy debate within courts across the country. The evolved judicial consensus on the matter is represented in the 'best interests of the child' threshold.<sup>1</sup> This threshold stipulates that the child's holistic welfare is unanimously considered to be the primary consideration on the basis of which a determination of custody is made between parents after a divorce.

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<sup>1</sup> *Mausami Moitra Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673; *See also* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (November 20, 1989), Art. 3.

Seemingly with this paradigm in mind, in May, 2015, the Law Commission of India ('Law Commission') drafted its 257<sup>th</sup> report titled 'Reforms in Guardianship and Custody Laws in India' ('Report').<sup>2</sup> In the course of this paper, we respond to the suggestions made by the Law Commission in its Report and use the Report as the basis for extensive discussion on the possible incorporation of a shared parenting model in India. We employ both doctrinal and interdisciplinary approaches in this paper – by first analysing the reforms in the doctrines suggested in the Report and then providing a critique of parts of the Report through an interdisciplinary analysis. We find it important to specify, at the outset, that this paper provides a largely feminist critique of this system – rooted in gender-based jurisprudence and a masculinity theory critique of the law and legal systems that regulate issues of custody.

We divide the paper into three parts. In Part I, we contextualise the background in which the Law Commission drafted its Report and analyse the contents of the Report itself. In this part, we outline the areas of the Report that we support and consider to be positive developments towards creating fair shared parenting rules. However, we traverse beyond the limited reasoning given by the Report in certain areas to substantiate why we position ourselves against the presumption of shared parenting in custodial disputes. In this part, we rely on the feminist critique of law to tackle the underlying rhetoric behind shared parenting, that is, the demands of men's rights groups against the existence of alleged 'reverse-patriarchal' bias within the courts and furthermore, within society. Within this, we first outline the grievances advanced by men's rights collectives and subsequently, argue against an articulation of these grievances that blames women or the feminist movement for taking away rights from men. We locate the cause of the problems faced by men in the allocation of strict gender roles onto men as well as women in patriarchal setups. In doing so, we rely on masculinity theories of law to argue for a responsible and empathetic articulation of grievances faced by men due to either the existence, or application, of certain legal rules.

In Part II, we provide a critique of certain areas of the Law Commission Report, in particular, the brief clause on child support and the cursory mention of domestic violence based situations of post-divorce familial units. In this part, we argue for the importance of mandating that child support will be equally divided in cases of shared parenting. The calculation of child support on a mandatory basis with attention to the income of the two parents and the quantum of access is important in any system of shared parenting. Further, we argue for a model in which there is a rebuttable presumption against joint custody in situations of domestic violence. We elaborate on the

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<sup>2</sup> Law Commission of India, *Reforms in Guardianship and Custody Laws in India*, Report No. 257 (May, 2015), available at <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf> (Last visited on August 4, 2016).

nature of domestic violence in India and the need for a strong presumption against joint custody arrangements with an abusive parent.

Finally, in Part III, we suggest modifications to the Report in pursuance of our argumentation in the previous parts of the paper. We suggest certain precise legislative additions that would be required and prescribe how they can be worded to ensure that the goal of creating a model of shared parenting that is fair and equitable in the Indian context is achieved.

## II. A CRITIQUE OF A PRESUMPTION-BASED MODEL OF SHARED PARENTING

The debate on 'shared parenting' within the Indian context began with an increased momentum when the Law Commission drafted a consultation paper on 'Adopting a Shared Parentage System in India'<sup>3</sup> ('Consultation Paper') in November, 2014. This marked the onset of a debate amongst several interested collectives and groups on the soundness and practical viability of adopting a model of shared parenting within the Indian framework. Several Indian newspapers reported about the growing demands from men's rights groups for shared parenting in the Indian familial context.<sup>4</sup> The cumulative effect of these developments was the drafting of the 257<sup>th</sup> Law Commission Report<sup>5</sup> that forms the focus of this paper.

The Law Commission Report makes a plethora of suggestions to amend various provisions in several family law statutes.<sup>6</sup> Amongst these, the Report deals specifically with the issue of joint custody parenting.<sup>7</sup> The Report states that there are two types of shared parenting models in contemporary family law jurisprudence. The first is shared responsibility parenting and the second is shared access parenting.<sup>8</sup> In the former, the non-custodial parent shares economic and decision-making responsibility and participates to a greater extent in the child's life.<sup>9</sup> Each parent retains the same powers, responsibilities and authority over the child, though the child lives with the custodial

<sup>3</sup> Consultation Paper, *Adopting a Shared Parentage System in India*, Law Commission of India, November 10, 2014.

<sup>4</sup> Ananya Sengupta, *Push for Shared Parenting*, August 17, 2014, available at [http://www.telegraphindia.com/1140818/jsp/nation/story\\_18731035.jsp#.VzyBr2h9600](http://www.telegraphindia.com/1140818/jsp/nation/story_18731035.jsp#.VzyBr2h9600) (Last visited on August 4, 2016); Payal Gwalani, *Men's Rights Activists Demand Gender Neutral Laws*, TIMES OF INDIA, November 19, 2015, available at <http://timesofindia.indiatimes.com/city/nagpur/Mens-rights-activists-demand-gender-neutral-laws/articleshow/49837430.cms> (Last visited on October 2, 2016).

<sup>5</sup> See Law Commission of India, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, 26-34.

<sup>8</sup> FRANCINE DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* 9-10 (1999).

<sup>9</sup> See Law Commission of India, *supra* note 2, 31.

parent.<sup>10</sup> As both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child, the system allows for the parents to share the guardianship of the child, although one parent retains custody. In the latter model, however, the non-custodial parent is granted physical access to the child. In this model, the child will live at alternative intervals with both parents. The responsibility for the child's welfare falls solely on the parent in custody at the prevalent time. The focus of this model is on sharing 'access' i.e., the amount of time the child spends with each of the parents; and not sharing 'responsibility' i.e., the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.

The Law Commission Report outlines three approaches to joint custody,<sup>11</sup> related to the two models of shared parenting discussed above. The first is 'joint legal custody',<sup>12</sup> where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child, even though the child's primary residence may only be with one parent. The second model is 'joint physical custody', where both parents share physical and custodial care of the child. Finally, the third model is any combination of joint legal and joint physical custody, which the court deems to be in the best interest of the child.<sup>13</sup> The Report finally and conclusively then defines shared parenting models as systems of joint physical and legal custody wherein both the parents share physical custody of the child and also equally share the joint responsibility for the care and control of the child and joint authority to take decisions concerning the child.<sup>14</sup> Therefore, shared parenting appears to be the broader term used to define these types of custody arrangement.

The Report then notes that although joint custody is not specifically provided for in Indian law, it is reported by lawyers that Family Court judges do use this concept at times to decide custody disputes.<sup>15</sup> Further, the Report notes two examples of attempts to institutionalise shared parenting in India in recent times – first, a set of guidelines on 'child access and child

<sup>10</sup> *Id.*, 29 (The right to make major decisions for a child, such as decisions involving education, medical and dental care, religion, and travel arrangements are decisions that are to be taken jointly under a model of joint legal custody.)

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, 29. See also Vernon's Annotated Missouri Statutes, 452.375 (1)(2) ("Joint legal custody" means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority.").

<sup>13</sup> In contrast to systems of joint custody, the intuitive opposite systems are 'sole legal custody' and 'sole physical custody'. Sole legal custody implies vesting the right and the responsibility to make the decisions relating to the health, education, and welfare of a child, with one parent only. Sole physical custody denotes that a child shall reside with one parent, subject to the power of the court to order visitation. However, the focus of the Report lies on joint custody which shall form the subject of critique of this paper as well.

<sup>14</sup> Law Commission of India, *supra* note 2, 70.

<sup>15</sup> *Id.*, 30.

custody' prepared by the Child Rights Foundation, a Mumbai-based NGO;<sup>16</sup> and second, a 2011 judgment of the Karnataka High Court in which a joint custody arrangement was instituted between the parents.<sup>17</sup> In the former, the minor child's time was to be divided on a weekly basis between the two parents.<sup>18</sup> In the latter, the minor child was directed to be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year.<sup>19</sup> In addition to the above examples, the Report notes that there has been a growing demand to institute shared custody in India, from 'father's rights' groups, who argue that the Indian family laws, including the law of custody, are biased towards mothers.<sup>20</sup> The Report responds towards these demands by first, arguing that the position of the men's rights groups is unacceptable; and second, that there should be no presumption of joint custody in custodial disputes, though it can be provided for in certain situations.<sup>21</sup> This two-fold position is an interesting one and we argue that the Law Commission has commendably noted the nuance in the matter by outlining the distinction between a blanket presumption and certain circumstances that allow for a system of joint custody. However, in the course of this part of the paper, we argue that the reasons given by the Law Commission for arriving at this two-fold position are inadequate and lack the depth that is necessary to combat existing rhetoric from men's rights groups.

Hence, we first, argue that the Law Commission has correctly positioned itself against a presumption in favour of joint custody arrangements. The rationale provided in the Report, however, is that women have not reached a stage of 'substantive equality' in Indian society yet.<sup>22</sup> We add to the analysis in the Report in two ways. *First*, we argue that women and men have not even a stage of complete 'formal equality' with respect to laws yet. *Second*, through theoretical instruction, we elaborate on the Report's premise on substantive equality by analysing the lack of substantive equality in private and public spheres of functioning. However, we traverse a step further and note that there is a need to engage with the demands of men's rights groups. The Report itself notes that "[...] it is important to consider the potentials of the shared parenting model in India."<sup>23</sup> Hence, in this part of the paper, we provide a model of engagement with men's rights groups and their demands, wherein we suggest that these groups have to undertake more responsible processes of articulating their legitimate grievances. Drawing from feminist legal theory and masculinity theory of law, we argue for engagement with grievances that men face in a

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<sup>16</sup> *Id.*

<sup>17</sup> K.M. Vinaya v. B.R. Srinivas, 2013 SCC OnLine Kar 8269.

<sup>18</sup> Law Commission of India, *supra* note 2, 30, ¶ 3.2.2

<sup>19</sup> *Id.*, 31, ¶ 3.2.3.

<sup>20</sup> *Id.*, 31.

<sup>21</sup> *Id.*, 32.

<sup>22</sup> *Id.*, ¶ 3.2.4.

<sup>23</sup> *Id.*, ¶ 3.2.5.

manner that is meaningful, thereby furthering the discourse between feminist theorists and men's rights activists.

### A. *MEN'S RIGHTS GROUPS IN INDIA AND THE RHETORIC OF REVERSE PATRIARCHAL BIAS*

Men's rights movements, or in particular, fathers' rights movements, have grown in number and size in the recent past.<sup>24</sup> These movements found their inception in the United States during the 1980s, and at the same time, grew in a similar manner in Canada, the United Kingdom, Sweden, and Australia.<sup>25</sup> Fathers' rights movements have now become characteristic of the Indian familial litigation systems as well, particularly of the custodial dispute paradigm.<sup>26</sup>

Jocelyn Elise Crowley, in 'Taking Custody of Motherhood: Father's Rights Activists and the Politics of Parenting' has summarised the criticisms of the custody adjudication procedures advanced by most fathers' rights groups.<sup>27</sup> These criticisms are first, that the adjudication process is anti-child; second, that the process is excessively interventionist; and third, that the process is extremely biased against men and favours women's interests.<sup>28</sup> The final criticism is of most relevance from the feminist standpoint and urges us to ask ourselves whether it is true that the custodial disputes system favours women to the disadvantage of men. If such a claim is a true and reasonable description of the custodial disputes framework, is this problematic? Furthermore, if so, how must this be dealt with and what theoretical basis should these grievances employ?

At the outset, it is crucial to understand the nature of men's rights movements and the context of the shared parenting demands made by these groups, which were a consequence of a complex matrix of factors.<sup>29</sup> There was an increasing participation of women in the paid workforce in India as well as in the West.<sup>30</sup> This was accompanied by a feminist questioning of the gendered division of labour in India as well as a strong, united movement by women to

<sup>24</sup> Jocelyn Elise Crowley, *Fathers' Rights Groups, Domestic Violence and Political Counter-Mobilisation*, SOCIAL FORCES (2009).

<sup>25</sup> Law Commission of India, *supra* note 2, 31.

<sup>26</sup> *Id.*

<sup>27</sup> Jocelyn Elise Crowley, *Taking Custody of Motherhood: Father's Rights Activists and the Politics of Parenting* in EXPLORING MASCULINITIES: FEMINIST LEGAL THEORY REFLECTIONS (2013).

<sup>28</sup> *Id.*

<sup>29</sup> K. Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 14 INT'L J. OF LAW, POLICY & THE FAMILY 184 (2000).

<sup>30</sup> DEEPIA CHAKRAVARTY & ISHITA CHAKRAVARTY, *WOMEN, LABOUR AND THE ECONOMY IN INDIA: FROM MIGRANT MENSERVANTS TO UPROOTED GIRL CHILDREN MAIDS* (2015) (This book traces the increase in women's participation in the workforce in parts of India, particularly in Bengal, within sectors that were primarily in the unpaid labour or domestic work domain.).

end domestic violence and dowry based demands in India.<sup>31</sup> Indian legal systems were forced to sit up and take notice of the grave violations of the rights of the women that were allowed, and often endorsed, by familial units. Hence, there were a certain amount of legal reforms within the familial system in India in order to alter laws that were originally only in favour of the father and to also allow women certain basic rights after her divorce.<sup>32</sup>

With the advent of the 21<sup>st</sup> century, the cumulative effect of these changes sparked the growth of the men's rights movement in India.<sup>33</sup> Several men's rights groups were seen emerging across the country<sup>34</sup> with a clear campaign against "pro-women" laws that were the cause of the feminist movement. Such a campaign against discrimination because of "pro-women" laws is the clear motivation behind the recent shared parenting demands as suggested in the Consultation Paper of the Law Commission.<sup>35</sup> The men's rights-based demands for joint parenting laws were also based on the underlying perception that the existing legal norms had benefited women at men's expense due to the insurgence of the feminist movement in India.<sup>36</sup>

This motivation can be seen directly in the demands made by a similar equality rights-based rhetoric of fathers' groups in Australia, who complained that "the pendulum has swung too far" in favour of women in family law, and who argued that "equal rights (for men and women) have to be straight down the line."<sup>37</sup> In submission to the parliamentary inquiry that preceded the Australian reforms in 2006 within the terrain of familial disputes, men were critical of courts for preferring mothers when making custody orders and advocated a legal presumption that would give them a more equal share of their

<sup>31</sup> RADHA KUMAR, *THE HISTORY OF DOING 2* (1993).

<sup>32</sup> See generally Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42.

<sup>33</sup> Romit Chowdhury, *Conditions of Emergence: The Formation of Men's Rights Groups in Contemporary India*, 21(1) INDIAN J. OF GENDER STUDIES 27–53 (2014) (The Men's Rights Movement began in India in the early 1990s, and increased in impact with the turn of the 21st century. These are groups organised around the gendered identity of 'men' have attempted to foreground issues relating to deprivation of male rights and prerogatives. A core concern of such 'men's rights groups' has been initiated by the rampant misuse of 'pro-women' laws that have been introduced as a result of feminist activism, particularly those laws that relate to the institution of family).

<sup>34</sup> *Id.* ("The earliest men's rights organisations in India can be traced back to the early 1990s in Calcutta, Bombay and Lucknow- Kolkata-based Pirito Purush (The Persecuted Man) formed in 1992, the Mumbai based Purush Hakka Samrakshan Samiti (Committee for the Protection of Men's Rights) formed in 1996 and Patni Atyachar Virodhi Morcha (Protesting Torture by Wives) formed in Lucknow.").

<sup>35</sup> Consultation Paper, *supra* note 3.

<sup>36</sup> Chowdhury, *supra* note 33 (The cause identified for the growth of these groups was the "view that the only way men's rights can be realised is by undoing some of the changes in social organisation and legal reforms that have been initiated by feminist activism."); See also Helen Rhoades, *Posing as Reform: The case of the Family Law Reform Act*, 156-157, 14 AUSTL. J. FAM. L. 142 (2000).

<sup>37</sup> Helen Rhoades, *The Rise and Rise of Shared Parenting Laws: A Critical Reflection*, 19 CAN. J. FAM. L. 75 (2002).

children.<sup>38</sup> The underlying rhetoric within the Law Commission's Consultation Paper<sup>39</sup> is similar to that of the Australian experience – predicating demands for shared parenting on the ideas that women are unfairly favoured and that the 'pendulum of equality' has swung too far.<sup>40</sup> Within the Indian paradigm, these groups also evolved in order to respond to several changes in the Indian legal setup, as reflected by filing of petitions by men's group alleging the misuse of §498-A of the Indian Penal Code, 1860 ('IPC').<sup>41</sup> Therefore, the claim that informs the demands by these groups is evidently a claim of the existence of a reverse patriarchal bias in legal systems and hence, the society in India.

### B. ON PATRIARCHY AND REVERSE BIAS: THE LACK OF FORMAL AND SUBSTANTIVE EQUALITY FOR INDIAN WOMEN

The question that then becomes relevant is whether the 'pendulum of equality' in favour of women has swung too far. Across time and space, families have been characterised by dominance of the man over the woman in several ways, ranging from discrimination, financial dependency as well as physical, mental, emotional and sexual abuse.<sup>42</sup> These inherent power structures persist even in Western 'modern', 'liberal' societies wherein women are victims of domestic violence, marital rape and other forms of violence in the private sphere and are also systematically excluded from public spheres of political structures.<sup>43</sup> However, particularly in the context of India, it would be absurd to suggest that the pendulum of equality has swung too far and now women are more safeguarded than men in the Indian legal paradigm. This is for a variety of reasons, all indicating that patriarchal bias and power is very much still characteristic of familial units in India. We characterise these reasons on two levels. *First*, the lack of formal equality in India or the presence of discriminatory laws. *Second*, the lack of substantive equality and the presence of discrimination in both the private and public sphere of functioning.

<sup>38</sup> See S. Sevenhuijsen, *Care and Justice in the Public Debate on Child Custody* in CITIZENSHIP AND THE ETHICS OF CARE: FEMINIST CONSIDERATIONS ON JUSTICE, MORALITY AND POLITICS 90-121(1998) (Sevenhuijsen argues that the shared parenting issue "provides a perfect illustration of the limitations and pitfalls of equal rights reasoning for feminism").

<sup>39</sup> Consultation Paper, *supra* note 3.

<sup>40</sup> See Chowdhury, *supra* note 33

("One of the main goals is establishing fathers' rights in child custody cases. Children's Rights Initiative for Shared Parenting (CRISP), an organization based in Bangalore, has been floated to further this goal.")

<sup>41</sup> Consultation Paper, *supra* note 3.

<sup>42</sup> Sylvia Walby, *Theorising Patriarchy*, 23(2) SOCIOLOGY 213–234 (1989).

<sup>43</sup> *Id.*, 228. (Welby outlines two types of patriarchy that exist - public and private patriarchy. Private patriarchy is based upon the relative exclusion of women from arenas of social life apart from the household, with a patriarch appropriating women's services individually and directly in the apparently private sphere of the home. Public patriarchy does not exclude women from certain sites, but rather subordinates women in all of them. In both forms, violence is often used as a tool.)



First, laws in India still continue to uphold an unapologetic bias against women. The most pertinent example of such a law, although not within the realm of family law but still crucial to feminist debates, is §375 of the IPC that carves out an exception to the criminal act of rape by stating that sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, will not be considered to be rape.<sup>44</sup> Therefore, despite several campaigns towards criminalising marital rape,<sup>45</sup> Indian laws continue to uphold the position that non-consensual sexual intercourse within a marriage would not constitute rape.

A less straightforward but extremely biased law that discriminates against women is §6(a) of the Hindu Minority and Guardianship Act, 1956 ('HMGA'), under which a woman is not statutorily entitled to be the guardian of her child in the presence of the father of the minor.<sup>46</sup> Rather than treating the father and the mother alike, the wording of §6 clearly establishes a hierarchy saying that the natural guardian of a Hindu minor is "the father, and after him, the mother".<sup>47</sup> Hence, as per this provision, as long as the father was alive, the mother could not aspire to the status of a natural guardian of her children. In 1989, the Law Commission recommended that §6 be amended "so as to constitute both the father and the mother as being natural guardians jointly and severally having equal rights in respect of the minor".<sup>48</sup> Successive governments, however, paid little heed to this long overdue recommendation. The next push for reform came in 1999 when the Supreme Court ruled on a petition filed by author Githa Hariharan challenging the validity of this stipulation.<sup>49</sup> Though it did not strike down any part of §6, the Supreme Court held that the term "after" in §6 should not be literally interpreted to mean "after the lifetime of the father" but instead be taken to mean "in the absence of the father".<sup>50</sup> It clarified

<sup>44</sup> The Indian Penal Code, 1860, §375.

<sup>45</sup> Aarefa Joharey, *As Government Refuses to Criminalize Marital Rape, Laws on Such Assaults Remain a Muddle*, April 15, 2015, available at <http://scroll.in/article/724239/as-government-refuses-to-criminalise-marital-rape-laws-on-such-assaults-remain-a-muddle> (Last visited on August 4, 2016).

<sup>46</sup> The Hindu Minority and Guardianship Act, 1956, §6(a).

<sup>47</sup> *Id.*

("The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are – (a) 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.")

<sup>48</sup> Law Commission of India, *Removal of Discrimination against Women in Matters Relating to Guardianship and Custody of Minor Children and an Elaboration of the Welfare Principle*, Report No. 133, 31 (August 1989), at ¶4.1, available at <http://lawcommissionofindia.nic.in/101-169/Report133.pdf> (Last visited on August 4, 2016).

<sup>49</sup> Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228.

<sup>50</sup> *Id.*, ¶ 18.

("We do feel it expedient to record that the word 'after' does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as 'in the absence of' – be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of

that “absence” in turn could extend to situations where the father was away for a long time or was totally apathetic to the child or was rendered unfit because of an illness.<sup>51</sup> However, under the Supreme Court judgment, the father continued to have a preferential position for natural guardianship and the mother could become a natural guardian only in certain specific exceptional circumstances.<sup>52</sup> The unresolved issue of guardianship was mitigated to an extent in 2010 by the Parliament, which brought an amendment to change the same.<sup>53</sup> However, the amendment that was made then was not to the Hindu law but to the secular law enacted during the colonial era – the Guardians and Wards Act, 1890.<sup>54</sup> §19 of this Act had barred the court from appointing a guardian for a minor whose father was alive and was fit to assume the responsibility of parenting.<sup>55</sup> However, under the amended section, the court could appoint a guardian, even when the father was alive, if he was unfit for this parenting. However, since §6 of the Hindu Minority and Guardianship Act, 1956 Act remained unchanged, the law still presumes that in all normal cases, the father should assume guardianship.

*Second*, women are not equal in Indian society because the implementation of laws themselves has not ensured equality between men and women in society. Therefore, even if certain laws do, in fact, protect the rights of women, their implementation has been, at best, questionable. Therefore, women have not achieved a stage of “substantive equality” in Indian society. This idea of substantive equality has been addressed briefly by the Law Commission in its Report.<sup>56</sup> However, we extend this analysis to demonstrate not only the lack of substantive equality, but also the active presence of patriarchy in India. For this analysis, we demonstrate the lack of equality in both private spheres and public spheres.

Patriarchal bias continues to characterise Indian societal setups in institutionalised and culturally endorsed manners. Statistics reveal that

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such a meaning being ascribed to the word ‘after’ as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation viz. welfare of the child.”).

<sup>51</sup> *Id.*

<sup>52</sup> Law Commission of India, *supra* note 2, 16-17.

<sup>53</sup> The Personal Laws (Amendment) Act, 2010.

<sup>54</sup> Law Commission of India, *supra* note 2, 14

(“The earlier Section 19(b) of the Guardians and Wards Act prevented the court from appointing a guardian in case the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.”).

<sup>55</sup> *Id.*

<sup>56</sup> Law Commission of India, *supra* note 2, 31-32, ¶ 3.2.4

(“Our Constitution and the legal framework direct the state to pursue substantive equality. Substantive equality recognises the difference in the socio-economic position of the sexes within the home and outside of it, and aspires to achieve equality of results. We therefore reject the position of the father’s rights groups on shared parenting based on the rhetoric of equal rights over children.”).

Indian women are subjected to extreme violence in the form of rape,<sup>57</sup> domestic violence<sup>58</sup> and dowry related deaths<sup>59</sup> at alarming rates. These crimes characterise the lives of women in private spheres or domestic spheres. Further, with respect to the public sphere, women are continually denied access to education<sup>60</sup> and political participation<sup>61</sup> and are actively devalued and denied agency within the public sphere as compared to male counterparts.<sup>62</sup> Infanticide and feticide of girl children continue to be rampant.<sup>63</sup> We use these facts to highlight the grossly pervasive and shocking nature of inequality that still exists in India. These issues are intensified in rural India<sup>64</sup> – a paradigm that the men's rights movement in India has scarcely engaged with. In a society in which Indian women in rural areas and in urban areas are subjected to such dramatic inequality and violence in private and public spheres of action, it is clear that the goal of equality for women has not nearly been achieved. In light of this, the argument advanced by men's rights collectives that, women are not only equal but in fact the pendulum of equality has swung too far and that men are now the actual targets of any discriminatory treatment seems clearly misplaced. Therefore, employing both the lens of formal equality and the law as well as the lens of substantive equality and the society, it is clear that women are treated unequally on both fronts and that patriarchy as a system continues to characterise the Indian legal and societal framework.

However, it is possible that even with the existence of institution-alised patriarchal bias that acts against women, men may be specifically disfavoured in particular areas of law. The particular grievance that we focus on in this paper is the claim that men are dis-favoured in the area of family law and particularly, in the context of the custody laws. Interestingly, in fact, feminist

<sup>57</sup> Chaitanya Mallapur, *Crimes against Women Reported Every Two Minutes in India*, September 5, 2015, available at <http://scroll.in/article/753496/crimes-against-women-reported-every-two-minutes-in-india> (Last visited on August 4, 2016).

<sup>58</sup> *Id.*

<sup>59</sup> *24,771 Dowry Deaths Reported in Last 3 Years: Government*, THE INDIAN EXPRESS, July 31, 2015, available at <http://indianexpress.com/article/india/india-others/24771-dowry-deaths-reported-in-last-3-years-govt/> (Last visited on August 4, 2016).

<sup>60</sup> 15<sup>th</sup> Official Census of India, 2011, available at <http://www.census2011.co.in/literacy.php> (Last visited on August 4, 2016) (The male literacy rate in India is 82.14% and the female literacy rate is 65.46%).

<sup>61</sup> Mudit Kapoor & Shamika Ravi, *India's Missing Women*, THE HINDU, February 10, 2014, available at <http://www.thehindu.com/opinion/lead/indias-missing-women/article5670801.ece> (Last visited on August 4, 2016).

<sup>62</sup> Pratiksha Baxi, *Impractical Topics, Practical Fields Notes on Researching Sexual Violence in India*, 2 (18) ECO. & POL. WEEKLY (2016).

<sup>63</sup> Press Release, UNICEF, *Female Foeticide in India*, available at <http://unicef.in/PressReleases/227/Female-foeticide-in-India> (Last visited on August 4, 2016); Kumkum Dasgupta, *India's Missing Girls: Fears Grow Over Rising Levels of Foeticide*, April 9, 2014, available at <http://www.theguardian.com/global-development/2014/apr/09/india-missing-girls-rising-levels-foeticide> (Last visited on August 4, 2016).

<sup>64</sup> Girish Shelke, *Spurt in Crime against Women in Rural Areas*, TIMES OF INDIA, January 12, 2016, available at <http://timesofindia.indiatimes.com/city/pune/Spurt-in-crime-against-women-in-rural-areas/articleshow/50543302.cms> (Last visited on August 4, 2016).

legal scholars have highlighted the importance of men demanding a larger role in the process of child-rearing.<sup>65</sup> As the process of child-rearing has traditionally been exclusively associated with women, increased participation of men in this sphere has been encouraged.<sup>66</sup> Therefore, the demand itself, for increased participation in the rearing of children made by men's rights groups, purely in principle, is a legitimate and justified demand.<sup>67</sup> We argue, hence, that particularly in the Indian legal context, men's rights groups suffer not from campaigning for illegitimate demands or causes but from a problematic and simplistic articulation of legitimate demands. Therefore, we subsequently suggest that the men's rights movement would benefit from a nuanced and responsible articulation of its legal demands to further meaningful engagement with the processes of inclusive, fair and holistic child-rearing.

### C. MEN'S RIGHTS AND LEGAL ISSUES: THEORISING RESPONSIBLE ARTICULATIONS OF LEGITIMATE GRIEVANCES

The men's rights movement tackles one particular aspect of custodial disputes, arguing that custody particularly has been recently given to mothers over fathers.<sup>68</sup> While this claim has not been empirically proven, it poses larger issues to the feminist movement itself in its approach to dealing with the legitimate issues that men face. In what way should the feminist movement address these legitimate issues that men face?<sup>69</sup> What is the interaction of the feminist movement with the masculinities scholarship and are the two inherently opposed to each other or part of the same syncretic whole? To answer these questions, it is important to understand what masculinities scholarship is and examine the relationship of feminist legal scholarship with masculinities scholarship.

<sup>65</sup> Deborah E. Connors, *Feminists Researching Fathering: What Do We See through a Reconciliation Lens?*, 43(1) PEACE RESEARCH 51–79 (2011) (Connors refers to the works of Andrea Doucet, a feminist sociologist. Doucet identifies three areas of parenting responsibility usually associated with mothering: emotional, moral, and community, and she examines fathering in light of these responsibilities.

“Most of the studies conducted on gender divisions of domestic labour are informed by the view that gender differences are to be avoided and gender equality is the gold standard. The consensus by researchers is that something along the lines of fifty-fifty parenting or an equal division of labour is the ideal or most successful pattern.”;

See also ANDREA DOUCET, *DO MEN MOTHER?: FATHERING, CARE, AND DOMESTIC RESPONSIBILITY* 24 (2006).

<sup>66</sup> *Id.*, 58 (It is now a well-recognised cross cultural and historical fact that women take on the lion's share of unpaid work – whether it be housework, child care, informal caring or volunteer work).

<sup>67</sup> See DOUCET, *supra* note 65.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (The need that men feel to participate in the child rearing process is a demand for inclusiveness in a certain space or for protection against unjust laws that keep men outside this domain. This, in fact, challenges patriarchal norms and hence, these specific demands can be termed as 'legitimate' demands that are articulated by men.)

Masculinity theory or masculinities scholarship studies the concept of “hegemonic masculinity” – an idea that has considerably influenced recent thinking about men, gender, and social hierarchy.<sup>70</sup> The concept of hegemonic masculinity, formulated in these terms, found prompt use. In the late 1980s and early 1990s, research on men and masculinity was being consolidated as an academic field, supported by a string of conferences and the publication of textbooks.<sup>71</sup> Since then, masculinity theory has extended its research and domains of exploration to several fields – in discussions of art,<sup>72</sup> in academic disciplines such as geography<sup>73</sup> and law.<sup>74</sup> Masculinity scholarship has had a complex and fractured relationship with feminist thought. There are seemingly two schools of thoughts amongst feminists that have evolved with time regarding the relationship between feminist scholarship and masculinities scholarship. The first school regards the two as inherently opposing each other in their goals and the second school contends that masculinities scholarship is essential to feminist theories and their goals are similar to each other, lending credibility and nuance to each other.

In their pioneering work ‘Exploring Masculinities: Feminist Legal Theory Reflections’, Martha Fineman and Michael Thomson highlight the perspective of the first school of feminists wherein they note that masculinities theories generate certain risks and challenges for the feminist movement, thereby preventing feminists from being able to openly embrace this field of critical legal theory within its fold.<sup>75</sup> While feminist analysis itself has sometimes been turned on its head or used for precisely the opposite effects from those intended by its advocates, masculinities scholarship is even more risky.<sup>76</sup> These risks involve primarily shifting the focus from women and the problems women face because of institutionalised patriarchal power structures.<sup>77</sup> The biggest risk is displacing the focus on girls and women or blaming women for men’s harms in a way that feeds into old stereotypes.<sup>78</sup> Particularly, scholars who have worked on issues relating to fathers have highlighted the tightrope between changing masculinity norms and hijacking fatherhood analysis

<sup>70</sup> R.W. Connell and James Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19(6) GENDER AND SOCIETY 829-59 (2005).

<sup>71</sup> *Id.*

<sup>72</sup> See generally R.J. BELTON, *THE BERIBBONED BOMB: THE IMAGE OF WOMAN IN MALE SURREALIST ART* (1995).

<sup>73</sup> See generally L.D. Berg, *Masculinity, Place and a Binary Discourse of “Theory” and “Empirical Investigation” in the Human Geography of Aotearoa /New Zealand*, 1(2) GENDER, PLACE AND CULTURE 245-60, (1994).

<sup>74</sup> See generally M. Thornton, *Hegemonic Masculinity and the Academy*, 17 INT’L.J. OF THE SOCIOLOGY OF LAW 115-30.

<sup>75</sup> See generally MARTHA FINEMAN & MICHAEL THOMSON, *EXPLORING MASCULINITIES: FEMINIST LEGAL THEORY REFLECTIONS* (2013).

<sup>76</sup> *Id.*, 15.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (Feminists who subscribe to this position argue that the primary focus of the feminist movement needs to be the issue of women. Hence, any move that dilutes this focus is considered undesirable).

to browbeat mothers.<sup>79</sup> For feminists, this is a massive problem as dominantly sexist narratives often label women's experiences of inequality as 'exaggeration' or 'lies'.<sup>80</sup> Often, a narration or increased focus on the grievances of men tends to feed into that narrative and retract from the reality and credibility of women's experiences that the feminist movement bases itself on.<sup>81</sup> Hence, certain feminists regard masculinity analysis as inherently antithetical to the goals of feminist scholarship by taking away the focus from women and labelling their experiences as fabricated, exaggerated or untrue.

However, the other school of feminist scholarship regards masculinities-based scholarship as an essential piece of feminist analysis critical to the equality analysis that the feminist movement aspires for.<sup>82</sup> This school argues that the strength of feminist theory lies in the fact that it has continually questioned, disputed and debated itself and that self-analysis has only strengthened feminist analysis.<sup>83</sup> They argue that the incorporation of masculinities-based scholarship continues that tradition and lends more nuance and insight into gender analysis.<sup>84</sup> Dowd identifies several ways in which feminists can benefit from asking the 'man question' or engaging with masculinity analysis.<sup>85</sup> Some of the important theoretical principles masculinities scholarship has drawn attention to are that all men are not universal and undifferentiated,<sup>86</sup> that men pay a price for privilege,<sup>87</sup> that masculinity is socially constructed and not biologically inherited<sup>88</sup> and that hegemonic masculinity recognises that one masculinity norm dominates over all other,<sup>89</sup> amongst several other important ideas. An incorporation of these ideas within the ambit of feminist scholarship allows it to be more inclusive in its approach to understanding the important theoretical constructions of men and masculinities understood by masculinities-based scholarship.

Therefore, from an understanding of both schools of thought, it is clear that although masculinities scholarship is critical to understanding gender, it also carries with it certain risks. The question that then arises is how can the grievances men face be articulated in a manner that minimises the risks posed to feminist theory? Is there a way to ensure that masculinities scholarship and its theoretical articulation can respond to the concerns of the feminist movement? We think that such a way exists and argue for a three-pronged

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<sup>79</sup> *Id.*, 16.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See DOWD, EXPLORING MASCULINITIES: FEMINIST LEGAL THEORY REFLECTIONS (2013).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*, 11.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

introspection and subsequent rethinking of certain areas of masculinities scholarship. The propositions that we suggest are a non-exclusive and fluid set of ways that masculinities-based scholarship can rethink itself to ensure that it does not undermine the struggles that women have started in patriarchal paradigms. The cumulative effect of these three propositions, we argue, will diminish the risk to feminist theories that Fineman<sup>90</sup> and other feminists identify.

The *first* proposition is that masculinities theory errs by attributing the problems that men face to the feminist movement. Often men's rights movements regard the denial of rights to men as caused by the increasing traction gained by feminists in the public sphere.<sup>91</sup> This is an incorrect attribution for two reasons. First, feminist theory itself has gone a long way in addressing the problems associated with hegemonic masculine ideals, which is the root cause of a large number of problems faced by men around the world.<sup>92</sup> Second, feminists are not the reason for any indiscriminate benefits given to women and the discretion of the judicial bodies in each case must take into account the facts of the case before awarding custody to either parent. Hence, the attribution paradigm under which men's rights movements operate is flawed as feminist theory itself addresses many legitimate problems that men face and never endorses these problems, but continually challenges them.

The *second* proposition is that masculinities theories when arguing against the legitimate issues men face must continually be informed by recognition of patriarchal bias as an institutional factor. Patriarchy as a system confers powers on men and denies powers to women.<sup>93</sup> We must distinguish between 'patriarchy'— the long-term structure of the subordination of women – and the specific 'problems that men face' due to gender – a situation that has evolved in certain contexts.<sup>94</sup> Therefore, patriarchy as a system affects women determinately.<sup>95</sup> However, it is also true that being dominant and powerful comes at a cost to men.<sup>96</sup> Hence, men's rights movements must not forget that the root of the problems faced by men by virtue of their gender identity is

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<sup>90</sup> FINEMAN & THOMSON, *supra* note 75.

<sup>91</sup> *Id.*, 16.

<sup>92</sup> See generally R. Brannon, *The Male Sex Role: Our Culture's Blueprint of Manhood, and What it's Done for Us Lately* in *THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE* (D.S. David & R. Brannon ed., 1976) (Problems that men face can be described as arising out of the process of aspiring to comply with the hegemonic "male sex role." This role has been sharply criticised as the source of oppressive behaviour by men. Further, complying with this unreal standard for men causes difficulties for men that are not adequately 'masculine' in terms of the hegemonic ideal).

<sup>93</sup> *Id.*; G. Holter, *Gender, Patriarchy and Capitalism: A Social Forms Analysis* (1997) (Ph.D. dissertation, University of Oslo).

<sup>94</sup> T.R. Carrigan, W. Connell, & J. Lee, *Toward a New Sociology of Masculinity*, 14(5) *THEORY AND SOCIETY* 551-604 (1985).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

the institutionalised, historically and culturally sanctioned nature of patriarchal systems.

The *third* proposition flows logically from the second and suggests that men's grievances should be articulated within an exception-rule paradigm. In essence, this approach suggests that the problems that men face due to their gender identities should be articulated as distressing 'exceptions' to a larger institutionalised 'rule', where women are oppressed by patriarchal structures. While the larger rule that characterises any society, particularly Indian society, is the denial of rights to women, sometimes distressingly, men are also denied rights. Masculinities scholars need constantly to be challenged to remain focussed on issues of power, or the hegemony of men in patriarchal societies.<sup>97</sup> The moment men's rights movements locate their demands in this exception-rule paradigm, such an articulation renders itself more sensitive to the discrimination faced by women. Hence, we contend that the brand of masculinities theory that is espoused by male rights activists needs to constantly locate itself within this exception-rule paradigm.

Therefore, a cumulative appraisal of these propositions can lead to a harmonious understanding of masculinities scholarship with feminist theories. Such a harmony is not only necessary but also beneficial to both sides of the critique of traditional jurisprudence and legal theory. Hence, we conclude that masculinities analysis as espoused by men's rights movements needs to prevent attributing problems to the feminist movement, recognise the institutional and sanctioned nature of patriarchy working against women and constantly be challenged to look at itself as an exception to a larger, more general rule. Such a framework will unite two critiques and this collaboration will help in legal theory and practice for years to come. Hence, we argue that the root of the shared parenting demands based in the men's rights rhetoric is fundamentally misplaced and must be rejected strongly in light of the narrative that men's right groups are propagating.

### III. THE PROBLEMS WITH THE LAW COMMISSION REPORT: AN EXAMINATION OF ISSUES OF CHILD SUPPORT AND DOMESTIC VIOLENCE

The 257<sup>th</sup> Law Commission Report has clearly critically influenced the discourse on shared parenting. However, in this part of the paper, we argue that the Report is problematic in two aspects – *first*, in its approach to child support and *second*, in its consideration of situations of domestic violence. In the course of this part, we will first detail the contents of the Report

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<sup>97</sup> *Id.*



in these aspects and subsequently, detail the problems with the approach taken by the Law Commission.

### A. ON CHILD SUPPORT

The Law Commission states that personal laws in India deal with the idea of child support to some extent through the concept of custody of children in codified Hindu Law<sup>98</sup>, Parsi Law<sup>99</sup> and the Indian Divorce Act.<sup>100</sup> The Hindu Adoptions and Maintenance Act, 1956 ('HAMA'), has a provision for maintenance of children,<sup>101</sup> but this merely casts an obligation of maintenance on the father<sup>102</sup> and the mother.<sup>103</sup> The definition of maintenance is generally worded so as to be applicable to all persons entitled to claim maintenance under the various provisions of the HMGA,<sup>104</sup> and not specifically the child.

The Law Commission states that the issue of child support entails much more than the concept of maintenance, as captured by the HMGA.<sup>105</sup> Accordingly, it empowers the court to pass orders for the maintenance of children for an amount that is 'reasonable or necessary' to meet the living expenses of the child.<sup>106</sup> In Clause 19G of the Recommendations, the Report states that a court may pass appropriate orders for the maintenance of children, and fix an amount that is reasonable or necessary to meet the living expenses of the child, including food, clothing, shelter, healthcare, and education.<sup>107</sup> Hence, it is clear that by the usage of the phrase 'may pass orders' in the Clause above, the court can use its discretion to choose whether or not it passes orders on child support.<sup>108</sup> We argue that this discretion granted to the courts is problematic in itself.

To substantiate, it is important to clarify what 'child support' conceptually entails. At the outset, it is important to note that child support has not been specifically defined in any legal instrument in India. The concept of 'maintenance' under §20 of the HAMA includes, under its broad head,

<sup>98</sup> Hindu Marriage Act, 1955, §26.

<sup>99</sup> Parsi Marriage and Divorce Act, 1936, §49.

<sup>100</sup> Indian Divorce Act, 1869, §§41, 43.

<sup>101</sup> Hindu Adoptions and Maintenance Act, 1956, §20.

<sup>102</sup> Law Commission of India, *supra* note 2, 63.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Law Commission of India, *supra* note 2, Cl. 19G. (This clause stipulates that the definition of maintenance is generally worded so as to be applicable to all persons entitled to claim maintenance under the various provisions of the HMGA. The Law Commission believes that child support in custody matters entails much more than the concept of maintenance as captured by the HMGA. Accordingly, it empowers the court to specifically pass orders for the maintenance of children.)

<sup>108</sup> *Id.*

maintenance given to the child as a dependent of either parent.<sup>109</sup> However, in the absence of specific legal definitions of child support in India that transgress beyond the limited boundaries of maintenance, there is an existing ambiguity on the idea of child support. Broadly, in post-divorce family arrangements where children reside with one parent, child support is defined as the amount payable by the parent not having day-to-day care of the children to the parent who does have day-to-day care.<sup>110</sup> However, such a definition views child support as the monetary support given by one parent to another only in a sole custody arrangement.<sup>111</sup> The idea of child support, hence, conceptually requires re-thinking situations of shared parenting arrangements where access to the child's time is divided between both parents.

In this context, when the Law Commission suggests models of shared parenting, its mention of child support in Clause 19G of the Report is inadequate and creates several problems.<sup>112</sup> The Report grants discretion to courts in cases of shared parenting by stating that the court 'may pass orders' on child support if it deems such an order necessary.<sup>113</sup> In *status quo*, under models of sole custody arrangements, the non-custodial parent pays a certain monetary sum to the custodial parent for the upbringing of the child.<sup>114</sup> However, in shared parenting arrangements there no longer exists a binary between the parents, wherein one parent is the custodial parent and the other, the non-custodial parent, as both parents share the custody of the child. In such scenarios, there may be a tendency to assume that because the binary between the custodial parent and non-custodial parent no longer exists, the concept of child support would also not be necessary.<sup>115</sup> This is because it would be considered sufficient that with the division of time, the parents will incur the expenditure for the child's needs for the time that the child resides with each of them.

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<sup>109</sup> Hindu Adoptions and Maintenance Act, 1956, §20

(“(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.”)

<sup>110</sup> Michelle C. Christopher, *Shared Parenting and Child Support*, April 1, 2006, available at <http://www.thefreelibrary.com/Shared+parenting+and+child+support.-a0160104844> (Last visited on August 4, 2016).

<sup>111</sup> *Id.*

<sup>112</sup> Law Commission of India, *supra* note 2.

<sup>113</sup> *Id.*, 71 (“Clause 19G. Child support: (1) A court may pass appropriate orders for the maintenance of children, and fix an amount that is reasonable or necessary [...]”).

<sup>114</sup> *Id.*

<sup>115</sup> See generally Irwin Garfinkel, Marygold S. Melli & John G. Robertson, *Child Support Orders: A Perspective on Reform*, 4(1) CHILDREN AND DIVORCE 84-100 (1994)

(“Shared parenting implies not only caring for the child but sharing expenses as well. Where the child spends half time with each parent, it can be assumed that each parent incurs equal out-of-pocket expenditures for the child. Therefore, if parental incomes are equal, each parent's child support obligation should be equal, which is to say that the net obligation of each should be zero. If parental incomes are not equal, an adjustment in child support should be made because the costs to each parent are the same.”)

However, in situations of shared parenting, such a model left to the parents is unviable and problematic. In the absence of mandatory guidelines necessitating courts to grant orders of child support even in shared parenting arrangements, courts could refrain from passing child support orders and leave monetary sharing to the discretion of the parents.<sup>116</sup> We argue that this possibility of non-formulation of child support orders by the court is problematic for three primary reasons.

*First*, if the court does pass specific child support orders, monetary responsibility for the child is assumed to be directly proportional to the time spent with the child.<sup>117</sup> This would mean that the parties could assume that if there is a fifty percent time-sharing arrangement, there should automatically be a fifty percent monetary responsibility sharing arrangement. However, an equal sharing of monetary responsibility is often unfair considering the disparate incomes of the parents.<sup>118</sup> There are several lump sum expenditures that are incurred in a child's upbringing, for example, the expenditure on education and health.<sup>119</sup> In such a situation, parents with completely disparate incomes cannot be expected to share the burden of these expenditures in a mechanical fifty percent division because this would be unjust towards the parent who is earning substantially less.

A unique case in which a model of shared parenting was implemented is the case of *K.M. Vinaya v. B.R. Srinivas* before the Karnataka High Court.<sup>120</sup> This case has been cited by the Law Commission in the Report as well to explain how shared parenting would work pragmatically, post the incorporation of the suggestions made by the Report.<sup>121</sup> However, one of the most crucial aspects of this case was that, quite unusually, both the mother and father were earning largely equal sums<sup>122</sup> and hence, a mechanical equal division of the expenditure that would go into the child's upbringing was sufficient.

In the majority of situations where the parents are unequally situated with respect to their monetary capabilities, such a model would be clearly unjust. In India, the matrimonial set-up and the post-divorce situation further accentuates the need to clearly codify child support guidelines. The income and financial disparity between the husband and the wife in the majority of situations acts to the detriment of women. Statistics indicate that Indian women

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<sup>116</sup> *Id.* (Assuming, as stated above, that each parent will incur equal out-of-pocket expenditure, as a model, leaves discretion to the parents in handling the issue of child support. The Law Commission gives this discretion to the courts in its Report.).

<sup>117</sup> See generally Garfinkel, *supra* note 115.

<sup>118</sup> Courtney Palmer, *Child Support and Shared Parenting in Canada: A 'Reality Cheque'*, 22 DALHOUSIE J. LEGAL STUD. 101 (2013).

<sup>119</sup> *Id.*

<sup>120</sup> *K.M. Vinaya v. B.R. Srinivas*, 2013 SCC OnLine Kar 8269.

<sup>121</sup> Law Commission of India, *supra* note 2, 31, ¶ 3.2.1.

<sup>122</sup> *K.M. Vinaya v. B.R. Srinivas*, 2013 SCC OnLine Kar 8269, ¶ 19.

are still pressurised into quitting their jobs and becoming full time house-hold labourers after marriage.<sup>123</sup> Therefore, after divorce, their earnings are substantially less compared to their male counterparts.<sup>124</sup> In situations of shared parenting, the monetary support given to the child cannot be merely ‘equally’ distributed between the parents, but should be ‘equitably’ distributed to account for differences in their incomes.<sup>125</sup> Therefore, courts must necessarily pass child support orders to ensure an equitable division. For this, there should be a mandatory disclosure of income by both parents at the advent of court proceedings on the basis of which child support orders must always be passed.

*Second*, by giving the courts discretion in passing child support orders in cases of shared parenting, the Report allows for a model of shared parenting to be implemented between the parents but no legal, formal division of the monetary responsibility towards the child’s upbringing. In post-divorce set-ups, litigating parents are often not in a position to cooperate with each other.<sup>126</sup> Studies state that when shared parenting models are imposed on parents in the process of litigation, they often find it difficult to cooperate and ensure a smooth functioning of this division of time.<sup>127</sup> Leaving monetary responsibility and the division of child support also to the parents in an acrimonious, litigating set-up is undesirable. Hence, the court must mandatorily intervene to ensure that both parents are exercising their responsibility towards the child on a mandatory basis.

*Third*, the Law Commission fails to determine what a shared parenting arrangement precisely entails in terms of the distribution of time sharing. For example, in other jurisdictions,<sup>128</sup> when one parent has forty percent or more of the child’s time, such an arrangement is considered to be a system of shared parenting.<sup>129</sup> The Report has failed to clarify the threshold of time sharing that will fall within the ambit of ‘shared parenting’. Therefore, in cases where the division is not a precisely fifty percent division but where there is forty to sixty percent time sharing arrangement, the parents can still be

<sup>123</sup> Divya Arya. *Why Motherhood Makes Indian Women Quit their Jobs*, BBC, April 23, 2015, available at <http://www.bbc.com/news/world-asia-india-32377275> (Last visited on August 4, 2016).

<sup>124</sup> *Id.*

<sup>125</sup> FINEMAN, *supra* note 75.

<sup>126</sup> Belinda Fehlberg et al., *Legislating for Shared Time Parenting after Separation: A Research Review*, 25(3) INT’L J. OF LAW, POLICY & THE FAMILY 318-337 (2011).

<sup>127</sup> *Id.*

<sup>128</sup> See generally Australian Federal Child Support Guidelines, §9

(“Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account (a) the amounts set out in the applicable tables for each of the spouses; (b) the increased costs of shared custody arrangements; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.”)

<sup>129</sup> *Id.*

classified as 'non-custodial parent' and 'custodial parent'.<sup>130</sup> In such a scenario, the non-custodial parent cannot take care of only the direct day to day expenditure of rearing the child while the child is residing with him/her but must also contribute to the lump sum amounts of the child's education, health and holistic welfare, which would otherwise be borne by the custodial parent. Hence, in situations where the division of time is not exactly fifty percent, the need to ensure that the non-custodial parent fulfils his/her monetary responsibility is accentuated. In these situations, therefore, a passing of child support orders on a mandatory basis is of heightened importance.

Furthermore, a close reading of the Law Commission Report indicates clearly that it has analysed and explained shared parenting extensively in terms of the division of the child's time between both parents but has only briefly mentioned the issue of child support. This approach itself is imbalanced and inequitable in the context of the current family law paradigm. In several cases in India itself, it is the non-custodial parent community which argues for shared access and the custodial parent community argues for equitable division of monetary responsibility.<sup>131</sup> In pursuance of this constant access-maintenance tussle in family courts, Indian courts have viewed issues of access and maintenance as two sides of the same coin – disallowing access to be given to a parent who fails to exercise monetary responsibility towards the child.<sup>132</sup> The Report errs by its detailed focus on issues of access in shared parenting, without detailing considerations to ensure equitable division of monetary responsibility between the two parents. Hence, a cumulative consideration of these factors substantiates the position that discretion given to courts in matters of child support is not only risky, but also, tangibly discriminatory against the parent with lower income or the custodial parent who continues to remain burdened with the lump sum amount expenditure of the child's upbringing. Therefore, courts must be made to mandatorily pass orders of child support in cases of shared parenting after a disclosure by both parents of their income as well as an estimation of the expenditure to be incurred on the child's upbringing.<sup>133</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> Chowdhury, *supra* note 33.

<sup>132</sup> Vinodchandra Gajanan Deokar v. Anupama Vinodchandra, 1992 SCC OnLine Bom 276 : AIR 1993 Bom 232 (As per J.B. Srikrishna,

“In my considered view, for three reasons, access must be denied: First, the petitioner cannot be allowed to benefit from his own wrong. Under the order of the Supreme Court, till the amount directed is paid, the custody petition remains stayed. By failure to deposit and by flagrantly flouting the order for maintenance, the custody petition might remain indefinitely stayed.”)

<sup>133</sup> Such estimation should also ideally contribute towards savings in the name of the child for the future, rather than merely their daily upbringing costs. Such a model would allow for a holistic approach towards the development towards the child.

## B. ON DOMESTIC VIOLENCE

Domestic violence in matrimonial relationships in India is widespread, pervasive and often, culturally and religiously sanctioned.<sup>134</sup> Owing to its shocking frequency, domestic violence was one of the first issues that the women's movement in India had to tackle – arguing for reform within the laws as well as of an entrenched patriarchal mindset within society.<sup>135</sup> Consequently, several legal reforms have been introduced over the years culminating into the Protection of Women against Domestic Violence Act, 2005, from which we derive our legal understanding of the term 'domestic violence'. Domestic violence under §3 of this Act includes and criminalises five distinct types of abuse that are witnessed in matrimonial set-ups – physical, mental, verbal, sexual and economic abuse.<sup>136</sup> It is with this comprehensive understanding of domestic violence that Indian courts navigate cases of domestic violence.

Before understanding the implications of domestic violence in shared parenting arrangements, it is important to understand the gravity of domestic violence in Indian matrimonial set-ups and the nature of relationship between spouses in abusive homes. The statistics released by the National Crime Records Bureau (NCRB) Report for 2011 state that the percentage share of domestic violence against women as a cognizable crime has alarmingly grown from 3.8 percent in 2007 to 4.3 percent in 2011<sup>137</sup> and, therefore, is on an increment rather than on a declining graph.<sup>138</sup> Further, a recent government household survey in India found that 40 percent of women had been abused in their homes; but an independent survey backed by the Planning Commission of India puts the number closer to 84 percent.<sup>139</sup> According to a recent exhaustive

<sup>134</sup> D. Hollander, *Domestic Violence in India is Linked to Individual and Community Factors*, 32(1) INTERNATIONAL FAMILY PLANNING PERSPECTIVES 53 (2006).

<sup>135</sup> Indira Jaisingh, *Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence*, 44 ECO. & POL. WEEKLY 50-57 (2009).

<sup>136</sup> The Protection of Women from Domestic Violence Act, 2005, §3

“For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. [...].”

<sup>137</sup> Geeta Pandey, *100 Women 2014: Violence at Home is India's 'failing'*, BBC, October 29, 2014, available at <http://www.bbc.com/news/world-asia-india-29708612> (Last visited on August 4, 2016).

<sup>138</sup> Sudha Chaudhary, *Domestic Violence in India*, 1(2) J. OF INDIAN RESEARCH (2013).

<sup>139</sup> Kanya D'Almeida, *For Women in Asia, 'Home' is a Battleground*, INTER-PRESS SERVICE NEWS AGENCY, October 24, 2016, available at <http://www.ipsnews.net/2015/03/>

family government-based survey, more than fifty four percent of men and fifty one percent of women said it is appropriate for a man to beat his wife.<sup>140</sup> Hence, whether the increased evidence of domestic violence cases is due to increased reporting by women or an actual increase in violence, statistics across the board clearly indicate that domestic violence continues to be prevalent in India.

Understanding domestic violence is a complex task, however, studies indicate that domestic violence touches several other legislative areas such as custody disputes. The relationship between an abusive spouse (generally, a man) and the abused spouse (generally, a woman) is characterised by politics of intimidation, coercion and fear.<sup>141</sup> When abusive spouses engage in domestic violence, they use an array of tactics<sup>142</sup> to systematically break down their victims' self-esteem and independence over a period of time. This causes a long-term abusive relationship that persists due to dependency – emotional, psychological, economic and physical – which is not comprehensible easily to people who have not experienced abuse.<sup>143</sup> It is purely assumptive to propose that domestic violence stops or is discontinued after a marriage is broken. In fact, studies indicate that domestic violence continues to be a reality for women post-divorce as constant access to the abuser spouse is a direct road back to a relationship of abuse.<sup>144</sup> In situations where courts mandate shared parenting arrangements, the parents are required to be in constant communication with each other regarding the child.<sup>145</sup> This continued relationship with the abuser is traumatic for the abused spouse and creates opportunities for the abusive spouse to continue a dominance-based, abusive interaction.<sup>146</sup> Therefore, in situations of domestic violence, a model of joint custody in shared parenting arrangements leads to the continued, and now court-sanctioned, harassment of the abused spouse.

However, the abused spouse is not the only stakeholder in shared custody arrangements with an abusive spouse. Witnessing the violence against one of their parents is extremely harmful to the young child as well. Studies demonstrate that when children are witnesses of domestic violence, it creates severe emotional and psychological problems for them.<sup>147</sup> Child witnesses can

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for-women-in-asia-home-is-a-battleground/ (Last visited on August 4, 2016).

<sup>140</sup> *Id.*

<sup>141</sup> See ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT (1994); D. Lee Khachturian, *Domestic Violence and Shared Parenting Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745 (1999).

<sup>142</sup> *Id.*

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

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See also Richard A. Gardner, *Joint Custody is Not for Everyone* in JOINT CUSTODY AND SHARED PARENTING 88 (Jay Folberg ed., 1991) (According to Gardner, joint custody requires that three factors are present, one of which is the parents' demonstration of "their capacity to cooperate reasonably and meaningfully in matters pertaining to raising their children.").

<sup>147</sup> *Id.*

experience developmental problems such as learning disabilities and impaired intellectual development.<sup>148</sup> In addition, watching a parent being abused initially traumatises children and causes shock, fear and guilt in them.<sup>149</sup> Further, frighteningly, children have a tendency to imitate the behaviour of people they have access to in their formative years.<sup>150</sup> Constant access and shared time with an abusive parent re-enforces the idea that violence is an acceptable behavioural pattern.<sup>151</sup> In this context, we refer back to the accepted threshold for deciding whether joint custody should be adopted – the threshold of the ‘best interests of the child’.<sup>152</sup> Several studies from other jurisdictions explain that shared parenting arrangements are not inherently in the best interests of the young child, but only are best for their welfare in certain specific scenarios.<sup>153</sup> In fact, witnessing a bitter, acrimonious and possibly abusive relationship between her/his parents over her custody is extremely traumatic for the young child who begins to blame herself/himself for the abuse she/he witnesses.<sup>154</sup> Such an arrangement, in no scenario, is in the ‘best interests’ of the child.<sup>155</sup>

How, then, do we deal with situations of domestic violence when deciding whether or not to impose systems of shared parenting in custodial disputes? The Law Commission briefly responds to this concern in its Report. In its recommendations, it introduces Clause 19C that defines ‘joint custody’. By inserting an extra schedule, the Report states that when courts are making an order for joint custody under Chapter IIA of the Act, the court shall have regard to several factors one of which is ‘family violence involving the child or a member of the child’s family’.<sup>156</sup> Other than being evidently ambiguous, this consideration of violence and abuse, we have argued, is first, discriminatory against the abused spouse and second, is against the holistic best interests of the

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> JONES, *supra* note 141.

<sup>151</sup> *Id.*

<sup>152</sup> *See generally* Law Commission of India, *supra* note, 2. The Law Commission Report acknowledges the ‘best interests’ threshold for deciding custody disputes in India.

<sup>153</sup> JONES, *supra* note 141.

<sup>154</sup> *Id.*; *See generally* Judith S. Wallerstein & Janet R. Johnston, *Children of Divorce: Recent Findings Regarding Long-Term Effects and Recent Studies of Joint and Sole Custody*, 11 PEDIATRICS IN REV. 197, 200 (1990).

(“These studies suggest that a major factor in predicting a child’s ability to adjust to divorce, more significant than the extent of both parents involvement in a child’s life after divorce, is the post-divorce relationship of the parents. In one study of joint custody, parental relationships that involved verbal and physical conflict led to more social and behavioural problems in children.”)

<sup>155</sup> JONES, *supra* note 141. (“According to those who have examined the successful implementation of joint custody, parental willingness, cooperation, compromise, and communication are all necessary for joint custody to be in the best interests of the children.” In cases of domestic violence, the parents cannot cooperate with each other and hence, such a model is not in the best interests of the child.)

<sup>156</sup> Law Commission of India, *supra* note 2, 73.



child. Employing the approach of the Law Commission, courts merely have to 'consider' abuse as one of the many factors while extending custody.

In determining why a mere discretionary consideration of abuse is insufficient, it is beneficial to review statutes in other jurisdictions that address this matter. Scholars have outlined three basic types of statutes which acknowledge and attempt to address the nexus between domestic violence and child custody proceedings. First, statutes that require courts to consider domestic violence before joint custody can be awarded.<sup>157</sup> Second, statutes that presume that when there is a history of domestic violence with one parent, joint custody is not in the "best interest of the child" and require judges to give justification for awarding any custody whatsoever to an abusive parent.<sup>158</sup> Third, statutes which mandate that courts should not award joint custody, in cases where abuse has been demonstrated.<sup>159</sup> Statutes in several countries either reflect one of these three models or a combination of any of these models in their determination of domestic violence and joint custody.

Interestingly, the Law Commission itself acknowledges that most countries adopt the second model – the 'rebuttable presumption model' – for situations of domestic violence and joint custody.<sup>160</sup> This model necessarily imposes a presumption against joint custody in situations of violence.<sup>161</sup> Judges are held to the high threshold of providing detailed reasons if they ever chose to deviate from this norm. This rebuttable presumption model has been used in Australia and has been supported by several groups in the country.<sup>162</sup> Further within the United States – Ohio, Columbia, Florida and several other states – have incorporated this model.<sup>163</sup>

<sup>157</sup> See The Michigan Child Custody Act, 1970, 722.23, §3 (Michigan, U.S.A.) (There are currently twelve factors that are equally considered in the best interest's analysis, domestic violence being only one of them. This is similar to the model suggested by the Law Commission of India in their Report which only considers domestic violence as one of the many factors in awarding joint custody.).

<sup>158</sup> See The Idaho Code, 1996, §32-717B (4) (Idaho imposes a presumption that joint custody is in the best interests of a child, unless the court determines that one of the parents is a "habitual perpetrator of domestic violence." If a parent is a habitual perpetrator, then there is "a presumption that joint custody is not in the best interests of [the] child." This effectively combats the presumption of joint custody.).

<sup>159</sup> J. Greenwald & L. Nadkarni, *Domestic Violence Under the Microscope: Implications for Custody and Visitation*, 23 FAMILY ADVOCATE 35-37 (2000).

<sup>160</sup> Law Commission of India, *supra* note 2, 28.

<sup>161</sup> *Id.*

<sup>162</sup> Law Commission of India, *supra* note 2

("St. 32-717B(5) ("There shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence . . .") (Idaho); Australia Family Law Act, 197 (as amended), §61DA(2) (presumption that equal parental responsibility is in the best interest of the child does not apply if there are reasonable ground to believe that a parent has engaged in abuse or family violence)").

<sup>163</sup> Resource Center on Domestic Violence: Child Protection and Custody, *Family Violence and Domestic Relations Program (FVDR) of the National Council of Juvenile and Family Court*

However, the Law Commission in its Report only includes ‘abuse within the family’ as one of the many factors that have to be considered in the best interests threshold<sup>164</sup> – hence, recommending that India should fall within the first model of statutes regarding domestic violence as mentioned above. This means that domestic violence is just one of the many factors that courts are to consider in an award of joint custody. However, such a model ignores the severity of domestic violence and its impacts of custodial disputes. As argued above, shared parenting models are detrimental in situations of domestic violence. Hence, we argue that in the Indian context with the sanctioned and deep-rooted prevalence of domestic violence, there must be a mandatory presumption against joint custody in situations of domestic violence, rather than domestic violence being a mere consideration for courts.<sup>165</sup>

#### IV. RECOMENDATIONS: MODIFICATIONS TO THE LAW COMMISSION’S REPORT IN MATTERS OF CHILD SUPPORT AND DOMESTIC VIOLENCE

In the final part of this paper, we suggest certain amendments to the recommendations given by the Law Commission in its Report on the basis of our arguments in the previous parts of the paper. Our suggestions are two fold – first, with respect to child support and second, with respect to domestic violence.

##### A. RECOMMENDATIONS ON CHILD SUPPORT

The Law Commission Report mentions, in Clause 19G of the Recommendations, that a court ‘may’ pass appropriate orders for the maintenance of children, and fix an amount that is reasonable or necessary to meet the living expenses of the child, including food, clothing, shelter, healthcare, and education.<sup>166</sup> This indicates that the courts can use their discretion as to decide whether it will pass orders for child support or not. We had outlined three specific problems with this discretion vested with courts.<sup>167</sup> Hence, on the basis of these problems we have identified and argued against in Part II of the paper, we suggest the following suggestions to Clause 19 (G) of the Recommendations section in the Report.<sup>168</sup> *First*, the Law Commission must amend its recommendations to state that

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*Judges (NCJFCJ)*, 2013, available at <http://www.ncjfcj.org/sites/default/files/chart-rebuttable-presumption.pdf> (Last visited on August 4, 2016).

<sup>164</sup> Law Commission of India, *supra* note 2, 73.

<sup>165</sup> JONES, *supra* note 141.

<sup>166</sup> Law Commission of India, *supra* note 2, Cl. 19G.

<sup>167</sup> See Part III (A) of the paper.

<sup>168</sup> *Id.*

“Courts must mandatorily pass orders of child support in cases of shared parenting. This must be done after a disclosure by both parents of their income as well as estimation of the expenditure in the child’s upbringing.”<sup>169</sup>

This would rid the recommendations of any ambiguity that would allow courts to get away without passing clear orders on child support.

*Second*, courts must clearly define what time-sharing arrangement constitutes a shared-parenting arrangement. If it is not just situations that stipulate a fifty percent time sharing situation, the Law Commission must amend its recommendations to clarify what extent of time sharing qualifies as shared parenting. We suggest that while a fixed formula on how to calculate the amount of child support for such a wide diversity of custodial arrangements would not suit the purpose, where the parents are spending substantially equal time with the child, both must share monetary responsibilities accordingly, only after taking into account their individual financial capacity.

*Finally*, the Law Commission must add to its recommendations, an annual review and monitoring mechanism of both the welfare of the child and the income of each parent. This will allow an equitable distribution of monetary responsibility to be implemented in a fruitful manner for all the stakeholders involved. We believe that these amendments in the Report will clarify aspects of child support and ensure that the monetary responsibility of the child is equitably distributed between both parents.

## B. RECOMMENDATIONS ON DOMESTIC VIOLENCE

With regards to domestic violence, we have argued in the previous part of the paper<sup>170</sup> that shared parenting models should not be prescribed in families where there is history of domestic abuse, unless there are exceptional circumstances in the particular situation of the family that would deem the arrangement suitable. Hence, a model of ‘rebuttable presumption’ would be suitable in the Indian context. The Report states that while making an order for joint custody under Chapter IIA, the court ‘shall have regard to several factors’ one of which is “any family violence involving the child or a member of the child’s family.”<sup>171</sup> We argue that a mere consideration of domestic violence is insufficient. There must be a presumption against joint custody arrangements in situations where there has been a history of domestic violence in the family.

Hence, we recommend the insertion of mandatory clause within the Report that may be worded thus:

<sup>169</sup> *Id.*

<sup>170</sup> See Part III (B) of the paper.

<sup>171</sup> *Id.*, 72.

“Rebuttable Presumption against Joint Custody:

(a) Joint custody shall not be awarded if the court makes a finding of the existence of significant domestic violence or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.

(b) The court shall consider evidence of domestic violence as being contrary to the best interests of the child. If the court determines that a parent who is seeking custody has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child’s best interests. The court shall presume that custody awarded to this parent is against the best interests of the child.”<sup>172</sup>

This kind of a provision would be appropriate to the Indian context regarding evidence as well. §4 of the Indian Evidence Act, 1872 (‘IEA’), has introduced the concept of rebuttable presumption in India.<sup>173</sup> This section states that “whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”<sup>174</sup> Such clauses basically force the courts to presume a fact that is specified by the law unless and until it is disproved. Hence, as per the wording of the provision we have suggested above, the courts will have to assume that if there exist cases of domestic violence by one parent, joint custody arrangements cannot be prescribed as staying with this parent is not in the child’s ‘best interests’. Therefore, the rebuttable presumption model specifically stipulated for under §4 of the Act, we argue, is an appropriate and suitable model for the present context.

Now, questions that then would arise are what is the standard of proof or threshold of evidence required to prove the presence of domestic violence? If the spouse is convicted of domestic violence, then the rebuttable presumption model would naturally apply. However, in several cases the domestic violence case and the case on custody are being argued simultaneously in the

<sup>172</sup> Arizona Revised Statutes, 2013, §25- 403.01 (Arizona, U.S.A.); Arizona Revised Statutes, 2014, §25- 403.03 (Arizona, U.S.A.) (There is a rebuttable presumption that it is not in the best interests of the child for a parent who has committed domestic violence to have custody).

<sup>173</sup> The Indian Evidence Act, 1872, §4

“Whenever it is provided by this Act that Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

“Shall presume” – Whenever it’s directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it disproved; “Conclusive proof” – When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”).

<sup>174</sup> *Id.*

court.<sup>175</sup> What should the custody arrangement be if the spouse accused of domestic violence is charged with domestic violence, but not yet convicted? In this regard, we suggest that the standard of proof should not be conviction, but preponderance of evidence. Family law in several other jurisdictions, as well, operates on a 'preponderance of evidence' standard of proof.<sup>176</sup> This signifies a more reasonable standard of proof than conviction, in the case of operation of rebuttable presumption against shared parenting in cases where there is preponderance of evidence.<sup>177</sup> We suggest that if evidence is submitted before the court and accepted in the domestic violence case, there must be a presumption against joint custody arrangements. Furthermore, even if there are no parallel cases happening, we suggest that courts should conduct an independent inquiry when domestic violence is alleged and ensure that in cases where there is *prima facie* evidence, the rebuttable presumption model should apply.

If conviction and proof beyond reasonable doubt were regarded as the threshold, the very purpose of imposing a rebuttable presumption would be defeated. The idea behind such a provision is to provide timely intervention to ensure welfare of the mother and the child as the inevitably protracted judicial trial process would completely defeat the purpose of such a presumption. The very fact that it is a rebuttable presumption is an inherent safeguard and limitation safeguarding the rights of the accused.<sup>178</sup> An additional way to ensure that domestic violence claims are accommodated for is to set up a system of mediation and counselling in the court set-up with the child to investigate the nature of domestic violence that has existed amongst the parents. Such a model would allow for the intimate situation of violence within the family to be discovered as well as for taking into account the concerns and fears of the child in this situation. In this model, caution must be taken to responsibly and carefully navigate conversations with the child to account for her/his version of events rather than place her/him in situations of discomfort.

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<sup>175</sup> The domestic violence cases are criminal cases under the Protection of Women from Domestic Violence Act, 2005 and custody disputes are family law disputes fought in family courts in India. Hence, these two disputes are often fought in a parallel fashion.

<sup>176</sup> See Code of the District of Columbia, §16-1005(c-1) (“[...] if the judicial officer finds by a preponderance of evidence that a contestant for custody has committed an intra-family offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination); *Collins v. Collins*, 347 Ark 240, 245, 61 SW 3d 818, 822 (2001) (“[W]e are guided by the principle that the quantum of proof generally required in civil cases is that of preponderance of the Evidence”).

<sup>177</sup> See Alaska Statute, §§30-5-6 & 30-5-7 (Alabama, U.S.A.); Alaska Statute, §18.66.100 (Alaska, U.S.A.); Delaware Code, Title 10, §§1044 & 1045 (Delaware, U.S.A.); 725 Illinois Compiled Statutes §112A-6(a) (Illinois, U.S.A.).

<sup>178</sup> See Georgia Official Code, §19-13-3(c) (Georgia, U.S.A.) (“[A] hearing shall be held at which the petitioner must prove the allegations of the petition by a preponderance of the evidence as in other civil cases.”).

While it is true that a ‘preponderance of the evidence’ standard may create a greater risk of an erroneous deprivation of custody than a stricter standard in the short run, any errors which arise can be discovered and corrected in time. The parent, if proven to be innocent at the conclusion of the domestic violence case, can be given custody post adducing of proof that there was no domestic violence. Such proof of innocence would act as a conclusive reason to deviate from the rebuttable presumption model. Therefore, in cases of pendency of a domestic violence case, it is advisable to err on the side of caution.

Therefore, we recommend that the Law Commission must modify its Report to include concerns of domestic violence within its recommendations. A rebuttable presumption model ensures the ‘best interests’ of the child and is hence, the most appropriate way to deal with the issue of domestic violence in shared parenting set-ups in India.

## V. CONCLUSION

In the course of this paper, we have attempted to critically reflect on the Law Commission’s Report and the introduction of shared parenting in India. We have noted that the Report has rightly pointed out that joint custody cannot be the presumption in all cases of parenting. However, in responding to the demands made by groups that argue for this presumption, we have provided detailed analysis about the lack of both, formal and substantive equality, for women in India. The men’s right movement in India and the rhetoric it advances claims that there exists reverse discrimination in India against men. In response to these claims, we have further a theoretical analysis in favour of a responsible articulation of the grievances of men by men’s rights groups, one that will further engagement between masculinity theories of law and feminist theories of law. In the second part of the paper, we have noted that the Law Commission has erred in its two aspects of its Report: first, with respect to child support and second, with respect to domestic violence. We have suggested amendments to the Report in the third part of the paper. With respect to child support, we suggest a mandatory passing of child support orders in all cases with due consideration given to the parents income as well as institution of a monitoring mechanism for the same. This will ensure that child support is equitably divided between the parents and will promote a holistic development of the child. With respect to domestic violence, we have argued against domestic violence being a mere consideration for courts. A rebuttable presumption against joint custody in situations of domestic violence is a more just model for all the stakeholders involved. In suggesting these amendments to the Report, our endeavour has been to contribute to the jurisprudence in a small but tangible way to ensure a just implementation of shared parenting systems in the Indian legal and societal context.