

UNIFORM CIVIL CODE AND LAWS OF ADOPTION AND CUSTODY

*Prerna**

Abstract

The concept and requirement of Uniform Civil Code is much debated in India. There are various groups with different notions regarding the same. In the Indian society religion has played a very major role. It is the first affinity of a man when he is born and governs the life of a person till death. The diverse country as we are in is an amalgamation of different religions, discrepancies are obvious result. The personal laws were made keeping in view the demand of the society and the people. The Constitution which is the supreme document, rather a social document in the words of Granville Austin, talks about Uniform Civil Code under article 44. It imposes a non justiciable duty on the state to secure a Uniform Civil Code for its citizens. The concept of Uniform Civil Code is linked to a number of issues under personal law like marriage, adoption, inheritance et al. In this paper the researcher shall make an attempt to explain the Uniform Civil Code and deal elaborately with the existing adoption and custody laws in India and highlight upon the need of Uniform Civil Code in this sphere.

I	Introduction	1-3
II	Law of Custody	3-5
III	Custody in other religions	5- 6
IV	The law of adoption	6-11
V	Adoption in other religions	11
VI	Conclusion	11

I Introduction

Sir H.S. Maine stated:¹

* LL.M Student, Indian Law Institute, New Delhi.

¹ Ancient Law, Its connection with the early history of society and its relation to modern ideas (1861): *available at*: <http://oll.libertyfund.org/titles/maine-ancient-law> (last visited on Nov. 27, 2016).

“There is no system of recorded law from China to Peru, which when it first emerges into notice, is not seen to be entangled with religious ritual and observances.”

INDIA IS a country with great religious diversity. Every religion has its own set of practices which it follows. The Indian legal system includes customs along with statutes and legislations to form law. The Indian society, in personal matters is governed by the customs of the four most prevalent religions Hindu, Muslim, Christians and Parsi. The personal laws of Hindus and Muslims find their sources in their respective religious books. The Hindu personal laws originated from the Vedas, Smritis and Shruti where as the source of Muslim personal law is the holy Quran and Shariat. All religions somewhere make a contention that rules of law are derived from the word of God or from words of uniquely qualified sages who possess superhuman wisdom or from the practice of those who have enjoyed guidance of equivalent quality.² It is the faith that turns into law. Every personal law that is made or codified is done with the objective of bringing social justice, equality among classes and uniformity. The system of complex personal law is an attempt to make the personal faith and belief simple and easy. It applies only to the identified members, of certain religious groups. The self identity of people is not much considered. These personal laws have many off shoots and implications. For example the personal law applies even to adoption and maintenance among the identified community even when a secular law for such purpose exists in the Sovereign, Socialist, Secular, and Democratic Republic of India. On the other hand the notion of Uniform Civil Code (hereinafter referred as UCC) is an initiative to alter the discrepancies of the personal law system and make an attempt to see the personal matters through one single lens. When the country became independent and the Constitution came into existence it was not possible to implement the concept of UCC at once as the society as it was then was very much entangled in religion and guided by religious believes. The founding fathers did have an idea that the country in future would need a secular binocular to decide personal matters. B.R. Ambedkar saw no merit in the role of religion in its application to personal laws thus, at the time of initiating the dialogue and finalising the draft of the

² J, Duncan and M. Durrett, *Religion, Law and State in India* 97 (London 1968).

Constitution, it was the obvious choice³ to include a provision for UCC to help the future government to implement it if need be. The truth is that personal laws are what we confront in our personal lives from birth to death, viz., laws of marriage, maintenance, adoption, custody, guardianship of children and succession. Religion is the first affinity at birth and it is carried through at one's will through the laws that we recognise as personal to him/her. If we withdraw the personal laws by force, we trench upon the most intimate emotion of an individual.

In this paper we shall discuss about rather try to highlight the need of uniform civil code in relation to law of custody and adoption under the personal law system. Both these term adoption and custody at some level mean the same but also contradict each other. Custody arises out of hatred, when a family breaks down and the parents without considering the feelings of the child and in their own selfishness and ego quarrel to be the master of his life decisions. It makes a child insecure. Whereas in adoption a child gets a family, love and placed under care. Adoption brings in a feeling of security.

II The law of custody

The word 'custody' has nowhere been defined under Indian family law system but it is related closely to guardianship where as guardianship has been defined under the Guardians and Wards Act, 1890 (hereinafter, GWA) as a 'person having the care of the person of a minor or of his property or of both his person and property.'⁴ Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor.⁵ To understand the system of custody one needs to first understand the patriarchal nature of law. Since inception according to customs the father was considered to be the legal guardian of the child. He had absolute right over person and property of the child. And it is a well known fact that customs form a very important part of law. This system of custody was prevalent under the common law system as well. Another reason behind such an approach towards custody law was that earlier women did not have an identity then, and this notion prevailed across the world. The

³ Uniform Civil Code, *available at*; <http://www.thehindu.com/opinion/lead/k-kannan-on-uniform-civil-code-now-is-not-the-moment/article8840401.ece> (last visited Nov. 27, 2016).

⁴ Guardians and Wards Act, 1860, s. 4(2).

⁵ Law Commission Report on Rights of Custody and Guardianship, (New Delhi May, 2015)

law of custody was introduced in India during the colonial era. The GWA was brought into force by the British⁶ under the colonial era and it was greatly influenced by the common law system. The Hindu Minority and Guardianship Act, 1956 came into force after independence. The act was a remarkable development. It was for the first time that the welfare of the child was given importance and preference over all other considerations. Another confusion that arises is the difference between natural guardian and custodian. The father generally is considered to be the natural guardian of the child.

India is a secular country and there exists two set of laws, one being personal laws for the identified community and the other being the secular law of the country. The GWA is a secular Act where as Hindu Minority and Guardianship Act, 1956 is an Act especially for Hindus.

In the classical Hindu law, Karta was the unquestioned custodian and guardian of the dependants in the family so the need for a separate statute or clause for custody or guardianship was not given enough emphasis.⁷ With the growth of time and change in society, women got their own identity independent of their husband and father and also separation of spouses came into picture and the need and demand for laws on custody arose. The Hindu Minority and Guardianship Act, 1956 provided father to be the natural guardian of the minor and after him, mother shall be the guardian. The Act provided that:⁸

- (1) In case of a minor boy or unmarried minor girl, the natural guardian is the father, and after him, the mother; and
- (2) The custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

The constitutional validity of the above section was challenged in the case of *Gita Hariharan v. Reserve Bank of India*.⁹ It was contended that giving father preference over mother was

⁶ The British, when they came to India, were perplexed by the existing judicial system, they tried to codify Indian Laws which were applicable to both Hindus as well Muslims. They refrained from codifying personal law as it was closely related to religious belief and faith of the people. The Guardians and Wards Act, 1890 was one such result of these attempts.

⁷ Paras Diwan, *Law of Adoption, Minority, Guardianship & Custody* 15 (Universal Law Publishing Co.: New Delhi, 2012).

⁸ Hindu Marriage and Guardianhip Act, 1956, s. 6(a).

⁹ (1999) 2 SCC 228.

discrimination on the basis of sex under article 14 of the constitution of India. The Supreme Court looked into the scheme of the statute to see if the mother was disentitled to be a guardian in the presence of father. The Supreme Court said that the term "after" must not be understood as after the life time of father but in the absence of father. The welfare of the child is of supreme importance. The court further held that; the word absence can be understood as total apathy or negligence by the father towards the child.¹⁰ Thus, it was made clear that a mother could be the natural guardian of the child even during the lifetime of the father. Section 13 of the Hindu Minority and Guardianship Act, 1956 says that in giving the child of custody or while appointing a guardian for him or her, the welfare of the child should be given supreme importance. And if the court finds that giving the child under someone's custody will be detrimental to the child then it will refrain from doing so and no person shall be appointed as a guardian to the minor.¹¹ The underlying principle in the case of custody and guardianship is the welfare of child. But for non-Hindu children, the court's authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural guardian.¹² The Hindu Marriage Act, 1955 also provides for the custody of children. Section 26 of the Act authorizes courts to give interim orders in cases related to custody, education of minor children *et al* with their consonance. The court under this section is also authorized to revoke any such order previously passed.

III Custody in other religions

Islamic law is the first law to provide distinction between custody and guardianship. It gave explicit recognition to the right of mother to give custody. ¹³ In Islamic law as well the father is considered to be the natural guardian but mother of a child is the custodian of a male child till he attains the age of seven years and in the case of a female child till her puberty. The court has also recognized the rule of Hizzanat, wherein the mother is considered to be the most suitable custodian of a child till a certain age. Islamic law does not recognize the concept of welfare of child. In Parsis and Christians there is no law for custody. They are governed by the GWA.

¹⁰ *Gita Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

¹¹ Hindu Minority and Guardianship Act, No. 32 of 1956, s. 13.

¹² Guardian and Wards Act, No. 8 of 1890, § 17(1) "In appointing or declaring the guardian of a minor, the court shall . . . be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the welfare of the minor."

¹³ Paras Diwan, *Law Of Adoption, Minority, Guardianship & Custody* 225 (Universal Law Publishing Co, New Delhi, 2012).

In order to meet the lacunae in this current system of custody the need for a uniform law exists. The courts cannot always take the matters in its own hand and devise a harmonious mechanism. The legislature should work towards. Undoubtedly the personal laws have brought improvements but it is still not enough. A Muslim women can be custodian but only to a specified limit. The introduction of UCC in the case of adoption would bring people from all communities at par and provide them with equal rights. In communities where these laws do not exist at all the need is even greater. Law should be such that it should bring equality among citizens and not give an option to switch from one law to another to attain benefits whenever necessary.

IV The law of adoption

Adoption is a process by which a person takes someone into custody and all the legal rights of a legitimate biological child is transferred to him. In other words it is legal affiliation of a child. The object of adoption is twofold: the first one undoubtedly being religious as it offers and heir to the adopter who can fulfill the funeral obligations and the second being secular, to secure an heir and perpetuate the adopter's name.¹⁴ The human civilization has a long history and proof of adoption. The code of Hammurabi has a list of rights and obligations of the adopter and the Roman text of *Codex Justinianus*¹⁵ provides for laws guiding adoption in the ancient roman society. But the new rather the modern system of Adoptions originated in the United States of America. The secular country of ours provides two sets of law on adoption, the first being the personal law and the other being secular law of the country. Under the Indian law rather the Hindu personal law a child is capable of being adopted and an adult can adopt. It is only the Hindu personal law system that allows for legitimate adoption.¹⁶ The Hindu Adoption and maintenance Act, 1956 was brought into force post independence. It was an attempt to make the Hindu personal law system legitimate and in help the Hindu society solve the problem of sonship. The personal law system suggests that only a Hindu can take and only a Hindu can be given

¹⁴ Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/4130/1/11/11_chapter%203.pdf (last visited on Apr. 4, 2016).

¹⁵ See Britannica Code of Justinian, Latin Codex Justinianus, formally Corpus Juris Civilis (Body of Civil Law) the collections of laws and legal interpretations developed under the sponsorship of the Byzantine emperor Justinian I from AD529 to 565.

¹⁶ If we look into the system of personal laws it is only the system of Hindu Personal Law which talks about legitimate adoption of children, the other personal law system like that of Muslims, Parsi and Christians do not agree with the system of adoption, they believe in taking the child in foster care.

in adoption. An adoption which follows the sastric principles but is not in accordance with the Act may provide for religious purposes but would deprive the child of legal rights granted to him.¹⁷ The Anglo-Hindu law considered the adopted son at par with the biological natural child as the adopted child would have to follow rules regarding sapinda in the family. The new codified system was beneficial in two ways the first being it helped in securing security and love to orphans or those who were unattended and second it proved to be a boon for those who were heirless. Initially in the male dominated Hindu society this codified system of adoption law was used rather confined only to adopting male child. The need of a male heir capable of managing the estate and protecting the adoptive mother resulted in adoptions being confined to sons. The Act has certain highlights which are discussed below.

The first and foremost being the requisites of valid adoption; under the Hindu Adoption and Maintenance Act, 1956 a Hindu can adopt only when he is lawfully capable of adopting and the person giving in adoption is capable of giving such adoption and the person being adopted is capable of being legitimately adopted.

Another very important aspect is the power of a Hindu male and female to adopt. A Hindu male can adopt under section 7 of the Act:

Capacity of a male Hindu to take in adoption- Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation-If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

¹⁷ J Duncan and M Durrett *Introduction to Hindu Law*, (Oxford University Press, London 1963).

Section 8 of the Act¹⁸ provides that:

Capacity of a female Hindu to take in adoption- Capacity of a female Hindu to take in adoption. - Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind."

Adoption under the earlier Hindu law is regarded as an important institution. The judiciary has also given due respect to this codified system of and contributed in cases of ambiguities.

In the case of *Alturi Brahmanand (Dead) through L.Rs v. Anne Sai Bapuji*¹⁹ the issue that arose was, if adoption of a boy who was above 15 years was valid. The court held that adoption of a son above 15 years was valid. The court added that,

Customs play a significant role in the society, communities and our country. Customs have stood the test of time and are reasonable and they are explicitly saved under Hindu personal laws. As a matter of rule as laid down in the Hindu Adoption and Maintenance Act the age of adoption is below 15 years but exceptions can be made when customs recognizes adoption of child over the age of 15 years. The reason behind putting a bar on age was to make sure that a child gets attached to the adoptive family and it can happen only at a tender age.

In the case of *Amit Chandubhai v. Ahmedabad Municipal Corporation*²⁰ the issue was raised again. The court in this case also said that the reason behind providing an age limit was to make the assimilation of child easier in the adoptive family. In some customs the adoption above 15 is

¹⁸ Hindu Adoption and Maintenance (Amendment) Act 2010, s. 8.

¹⁹ AIR 2011 SC 545: (2010) 12 SCALE 157: 2011 AIR CC 729 SC.

²⁰ AIR 2011 Guj 145.

permitted. The logical reason behind it is to keep the family property in the family and to have an heir to fulfill funeral obligations. Although, this cannot always be a reason, if customs are not proved such adoption can be invalidated. In the case of *N.S Patni v. Basantabai*²¹ where the alleged custom was not proved the adoption was held not to be valid. Where as in the case of *H.L Salunke v. S.N.Kanse*²² the custom was established but the requisite age difference was not met thus, the adoption was invalidated. The court has been very careful while dealing with the matter of adoption.

In the case of *Laxmibai v. Bhagwantbuva*²³ an issue was raised about who can be adopted. The plaintiff claimed that adoption can be done from within the family and not outside the family. The court held that customs cannot be proved by logic or analogy and it was nowhere found that adoption can be from within the family only. In the absence of strict proof of a custom, it is a general law as written in statute that will prevail. Another case with regards to who can be adopted was that of *Kumar Suren v. State of Bihar*.²⁴ In this case the court held that the Hindu Adoption and Maintenance Act, 1956 provided only for adoption of Hindus and not Muslims.

The court has also dealt with the role of female in case of Hindu adoptions. In the case of *Bajendra Singh v. State of Madhya Pradesh*²⁵ the issue involved the question of validity of adoption done by a married female. The court agreed that matters of adoption are of high emotional nature but held it invalid on account of it being done by a married Hindu female. Although after the amendment even a married Hindu women can adopt with the consent of her husband. In the case of *Narinderjit Kaur v. Union of India*²⁶ it was held that, a divorced woman can adopt and even if she remarries the adoption will be held valid. In the case of *Ashabai Kate v. Vithal Bhikha Nade*²⁷ it was held that a widow mother in law had no right to adopt in the presence of daughter-in-law. Her power to adopt is extinguished and it does not even revive if the daughter in law remarries.

²¹ AIR 1994 Bom 235.

²² AIR 2006 Bom 123.

²³ AIR 2013 SC 1204.

²⁴ AIR 2008 Pat 24.

²⁵ AIR 2008 SC 1056.

²⁶ AIR 1997 P&H 280

²⁷ AIR 1990 SC 630 (BOM).

In the case of *Ugre Gowda v. Nagegowda*²⁸ the court while talking about the rights of minor child said that a minor child had no right to restrict parents from disposing off their property by the way of will or gift. The above cases deal with law of adoption with respect to the Hindus and adoption of Hindu children.

Apart from the Hindu Adoption and Maintenance Act, 1956 (hereinafter HAMA) there also exists a Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) hereinafter called the JJ Act. This secular law allows adoption irrespective of religion. Section 2 (aa) of the JJ Act defines adoption as:

“adoption” means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship

In the case of *Secretary Shubhadra Mehtab Seva Sadan of Kolathia v. State of Orissa*²⁹ the JJ Act came into conflict with the HAMA. In this case the issue was that can two children of same gender be adopted? The court took a very realistic and positive view. It held that though the petition was seemed to be under the HAMA but in substance it was filed under the JJ Act. All requirements of adoption under the JJ Act were followed. The court further held that minor girls being reared by an agency as siblings cannot be separated by giving them in adoption to different families. Mechanical application and technical interpretation of law may defeat the cause of justice but the court should enforce the spirit and substance behind the law made by the legislature.³⁰ Another case arose where the court did a harmonious construction of HAMA and JJ Act. *In the matter of Adoption of Payal @ Sharinee Vinay Pathak*³¹ the issue was in respect of adoption of abandoned children and interpretation of HAMA and JJ Act. The petitioner lived with the abandoned child for four years and wanted to declare himself/herself as adoptive parents of the girl child. The court harmoniously construed provisions of HAMA and JJ Act in the background and objects of JJ Act and also looked into the provisions of the Constitution of India

²⁸ AIR 2004 SC 3974.

²⁹ AIR 2013 Ori 110.

³⁰ Kusum, *Cases and Materials on Family Law* 384 4th ed. (New Delhi, 2015).

³¹ Petition No 31 of 2009 Bombay.

and international conventions. The decision of the case is remarkable as it will facilitate adoption of such abandoned children and help in achieving the true spirit of the adoption laws.

V Adoption in other religions

The Muslim personal law does not acknowledge adoption. A child can be taken into foster care but he does not get the right of a natural rather legitimate biological child. He cannot inherit the property of his adoptive parents although the adoptive parents can give gift it to him. The JJ Act allows adoption as a general rule but it is in conflict with the personal law of adoption.

The Parsi personal law also does not recognise the law of adoption. In the present world when the society has changed a lot the laws present do not meet the requisite demand. The personal laws of Muslims do not allow adoption and if they adopt the child will not be allowed to inherit the property as a natural born child. Where as if a child is adopted in Hindu family he shall get all the right of a biological child. This discrepancy in laws can be removed only by a uniform law for all irrespective of religious beliefs and customary practices.

VI Conclusion

With changing times, the need has arisen for having a Common Civil Code for all citizens, irrespective of religion, ensuring that their fundamental and constitutional rights are protected. Nobody need have qualms on this count. While emphasizing that the foundations of secularism would only get further strengthened by introducing a Common Civil Code, In the words of Mahatma Gandhi: "I do not expect India of my dreams to develop one religion, i.e., to be wholly Hindu or wholly Christian or wholly Mussalman, but I want it to be wholly tolerant, with its religions working side-by-side with one another. It cannot be denied that the personal laws have tried best in their capacity to provide an easy way to custody and adoption. The legislature has also introduced the GWA in order to provide a remedy to those whose personal law do not provide for provisions of adoption. The existing law cannot be considered useless as they did bear fruits but with the changing times and growing cases leading to discrepancy it's time to fulfill to fulfill the lacunae and provide a uniform law in order to bring equality of status and provide equal rights to all. The need of a uniform civil code has come into being as the personal laws of all religions have become static and are unable to change at the same pace as society.