

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

---

**Volume 5 | Issue 5**

---

**2022**

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

---

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Uniform Civil Code: An Emerging Law from the Existing Law Trends on Adoption, Custody and Guardianship

---

CHANDA KUSHWAHA<sup>1</sup>

## ABSTRACT

*India is a land of diverse people with diverse religions. However, if the diversity of religion turns into a national legal problem to govern the people regarding different subject matters, there must be a serious consideration to check and reform the existing laws which have a significant role in the current modern world. The term 'secular' was added in the Preamble after the 42nd Constitutional Amendment in 1976 which meant that the state will not follow any particular religion. Additionally, people have the freedom to follow any religion they want. However, it must be pondered that India is a secular country but does not have secular laws. Every religion is governed by separate personal laws, for example, Hindus, Sikhs, Jains, and Buddhists are administrated by the Hindu Marriage Act of 1956, the Hindu Adoption and Maintenance act of 1956 and, The Hindu Minority and Guardianship Act of 1956. Similarly, Christians and Muslims are governed by Christian laws and Islamic laws respectively. Now the problems posed by these separate laws are very deep and diverse. There are many discrepancies and differences among all the personal laws. There is no uniformity among the laws.*

*This paper would analyse the broader question of why we need the Uniform Civil Code (hereinafter UCC) in place of personal laws. While discussing marriage, succession, guardianship, adoption, and inheritance, women are usually regarded as inferior to their male counterparts in most personal laws.*

## I. INTRODUCTION

India is a land of diverse people with diverse religion. However, if the diversity of religion turns into the national legal problem to govern the people regarding different subject matters, there must be a serious consideration to check and reform the existing laws which have significant role in the current modern world. The term 'secular' was added in the Preamble after the 42<sup>nd</sup> Constitutional Amendment in 1976 which meant that the state will not follow any particular religion. Additionally, people have the freedom to follow any religion they want. However, it

---

<sup>1</sup> Author is a student, India.

must be pondered that India being a secular country but do not have secular laws. Every religion is governed by separate personal laws, for example: Hindus, Sikhs, Jains, and Buddhists are administrated by the Hindu Marriage Act of 1956, Hindu Adoption and Maintenance act 1956 and, The Hindu Minority and Guardianship Act 1956. Similarly, Christians and Muslims are governed by Christian laws and Islamic laws respectively. Now the problems posed by these separate laws are very deep and diverse. There are many discrepancies and differences among all the personal laws. There is no uniformity among the laws.

This paper would analyse the broader question of why we need Uniform Civil Code (hereinafter UCC) in place of personal laws. While discussing marriage, succession, guardianship, adoption, inheritance, women are usually regarded as inferior to male counterparts in most personal laws. These laws are a serious attack on the Constitution of India. Women cannot adopt a child in any of the personal laws and when specifically talked about the Hindu law, women cannot be guardians of their child till her husband is present. Islamic law makes it worse as women in the Muslim community are not allowed to be natural guardians. These examples sufficiently demonstrate the patriarchal character of Indian society. It highlights the urgency to overcome these laws by UCC. Through this paper we would argue that there must be the implementation of UCC more specifically in context of laws related to Adoption, Custody and Guardianship.

Dr BR Ambedkar was in favour of the application of the Uniform Civil Code. However, considering the circumstances of the country during the framework of Constitutional, he was of the view to include it in the Directive Principles of State Policy. He believed that India was not ready for a unified code at that time as it might hurt the sentiments of a few communities. Simultaneously he also suggested that in future, Parliament can try to implement it across the nation for those who voluntarily agree to get bound by the code.<sup>2</sup> Although there are many contentions against codifying the personal law, it contradicts the individual freedom guaranteed under Article 25 of the Indian Constitution. UCC must be implemented immediately as it has the power to end the regional disbalance in the country. It will support and strengthen the social and secular fabric of the nation.

This paper has extensively used secondary sources such as literature reviews and research papers to study and articulate the possible reforms that will enable the implementation of the UCC concerning adoption, custody, and guardianship.

The paper has been divided into four sections. The first section of the paper discusses the

---

<sup>2</sup>Pathak V, "Ambedkar Favoured Common Civil Code" (*The Hindu* March 24, 2016) <<https://www.thehindu.com/news/national/ambedkar-favoured-common-civil-code/article7934565.ece>> accessed November 2, 2021.

existing laws on adoption, custody and guardianship and further elaborates on the possible reasons for codifying them. The second section of the paper extensively discusses the reforms required. The third section of the paper discusses the problems and the benefits of implementing UCC.

## **II. EXISTING LAW TRENDS ON ADOPTION, CUSTODY AND GUARDIANSHIP**

### **(A) Adoption**

Adoption has been a tradition in India from the beginning of time. Even though the act of adoption stays the same. However, because adoption falls under the purview of personal law in India, there has been no opportunity to create a consistent rule that applies to all of the many cultures that make up this melting pot. As a result, this legislation is controlled by several religious personal laws.

#### **1. Adoption In Hindu Law**

There is no specific law in India that indifferent religions for adoption. In India, the adoptions of Hindus are governed by the Hindu Adoption and Maintenance Act, 1956 (hereinafter HAMA 1956). It is the only personal law which makes adoption legal. It discusses adoption from Section 5 to Section 17 of HAMA 1956.<sup>3</sup> This Act addresses issues such as the ability to adopt, the ability to donate in adoption, the impact of adoption, and gender prejudice. The adoption is irreversible under this statute, and it grants the child complete legal standing as a natural child born of a family who can inherit property. According to HAMA 1956, Section 7 states the capacity of any adult Hindu male who is of a sound mind to adopt. If the male in question is married, his wife's permission is required. Furthermore, Section 8 discusses the capacity to adopt a child by any adult Hindu Female. After the Personal Amendment Act 2010, a married woman can even adopt if she has a husband alive. However, she can adopt only after the consent of her husband. This consent is not required if he has completely renounced the world or has ceased to be a Hindu or has been declared of unsound mind by a court of competent jurisdiction.<sup>4</sup> Section 10 of the HAMA 1956 states that only a child who is Hindu and below the age of 15 can be adopted.<sup>5</sup> According to Section 1, the only restriction under HAMA 1956 is that if a parent already has a child of the same sex, they cannot adopt the same sex child. Additionally, if a male adopts a female child or vice versa, there must be an age gap of 21 years or more.<sup>6</sup>

---

<sup>3</sup>The Hindu Adoption and Maintenance Act, 1956.

<sup>4</sup>The Personal Laws (Amendment) Act, 2010.

<sup>5</sup>The Hindu Adoption and Maintenance Act, 1956.

<sup>6</sup>The Hindu Adoption and Maintenance Act, 1956.

There is also the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter JJ Act 2015) in addition to the HAMA1956. All Indian citizens are covered by the JJ Act 2015. It allows the adoption of two children of the same sex. The adopted child is granted the same rights as that the biological child. The JJ Act2015 is intended to provide for the care, protection, development, and rehabilitation of juveniles in conflict with the law and children in need of care. The law is enforceable for minors, and it establishes a consistent legal foundation for justice across the country.

However, there are many points where the JJ Act 2015 clashes with the HAMA1956. In the case of *Secretary Shubhadra Mehtab Seva Sadan of Kolathia v. the State of Orissa*,<sup>7</sup> the question was whether two children of the same gender may be adopted as the HAMA 1956 restricts but JJ Act 2015 allows. Another case that came up regarding adoption was *Payal @Sharinee Vinay Pathak v. High Court of Judicature at Bombay*,<sup>8</sup> under which the Court construed both Acts for the issue of adoption of abandoned children and the interpretation of the Acts. These instances are enough to understand the need for the analysis of both laws to overcome the shortcomings by implementing a single codified law.

## 2. Adoption In Muslim Law And Christian Law

Muslim law holds that adoption, as defined by Hindu law, does not exist. Muslim law only acknowledges the concept of guardianship and not adoption. If a Muslim adopts a child, the paternity of the child cannot be proven. Adoptions among some Muslims were recognised and permitted before the 1937 Shariat Act.<sup>9</sup> Muslims never recognise the non-biological child as their own, and hence the child is believed to be the direct descendant of the father. The Islamic Kafalah allows the adoption of an abandoned child, but the child does preserve the biological family name and does not modify it to fit the adopted family's identity. In contrast to Hindu law, adopted parents do not have the same legal standing as natural parents.<sup>10</sup> Similarly, the Christian community laws do not recognise the adoption, although it is possible to adopt from an orphanage, only after the court's authorisation under the Guardians and Wards Act 1890 (hereinafter GWA 1890).<sup>11</sup>

---

<sup>7</sup>*Secretary Shubhadra Mehtab Seva Sadan of Kolathia v. State of Orissa* AIR 2013 Ori 110.

<sup>8</sup>*Payal @ Sharinee Vinay Pathak v. High Court of Judicature at Bombay*2010(1) BomCR434

<sup>9</sup>Muslim Personal Law (Shariat) Application Act, 1937.

<sup>10</sup>AK Bhandari, 'Adoption Amongst Mohammedans- Whether Permissible in Law.' [2005]. 2(1). *ILI Journal*. pg. no. 110-114.

<sup>11</sup>Kannappan. Arul and M.Rajavelpraveen, "A STUDY ON LEGAL FRAMEWORK GOVERNING GUARDIANSHIP IN INDIA." (2018).*International Journal of Pure and Applied Mathematics*. pg. no. 2967-298.

## **(B) Guardianship And Custody**

The GWA1890 is secular legislation that governs guardianship and custody matters for all children living in India, irrespective of their religious faith. It allows District Courts to appoint guardians for a minor's person or property when the child's natural guardian or a testamentary guardian appointed under a Will fails to fulfil his or her responsibilities to the minor. The Act is a comprehensive code that spells out the guardians' rights and responsibilities, as well as the procedures for their removal and replacement, and the consequences of their wrongdoing. It is a piece of legislation that enhances the personal laws which regulate guardianship matters in all religions.<sup>12</sup> Even though the parties' law governs the substantive law in a given matter, the GWA1890 governs the procedural law. Section 7 of the GWA1890 allows the court to appoint a guardian for a minor's person, property, or both if it is convinced that it is required for the minor's welfare.<sup>13</sup> Section 17 lays up the criteria that the court must consider when appointing guardians and the main emphasises is laid down on the minor's welfare.<sup>14</sup> In circumstances where the court is unable to appoint a guardian, Section 19 of the GWA 1890 applies.<sup>15</sup> A court is not entitled to appoint a guardian for a minor whose father or mother is living and who, in the view of the court, is unfit to be a guardian, according to Section 19(b)<sup>16</sup>. The previous Section 19(b) prohibited the court from appointing a guardian if the minor's father was still living. The Personal Laws (Amendment) Act, 2010, extended this clause to include circumstances in which the mother was still alive.<sup>17</sup> The guardian's jurisdiction over the ward's care is dealt with in Section 25 of the GWA<sup>18</sup>. If a ward leaves or is removed from the guardian's custody, Section 25(1) provides that the court may issue an order for the ward's return if the court believes it is in the child's best interests.<sup>19</sup> Thus, it can be concluded that the main purpose of the Act is to safeguard the best interest of the child in every possible manner.

The guardianship and custody of children were not addressed in classical Hindu law because Karta was in charge of all the dependents and the management of their property in the Joint Hindu Family. Particularly legal regulations dealing with guardianship and custody were not required.<sup>20</sup> The Hindu Minority and Guardianship Act of 1956 (hereinafter HMGA 1956) on

---

<sup>12</sup>The Hindu Minority and Guardianship Act of 1956, S.2.

<sup>13</sup>Guardian and Wards Act, No. 8 of 1890, S.7.

<sup>14</sup>Guardian and Wards Act, No. 8 of 1890, S.17.

<sup>15</sup>Guardian and Wards Act, No. 8 of 1890, S.19.

<sup>16</sup>Guardian and Wards Act, No. 8 of 1890, S.19(b).

<sup>17</sup>Personal Laws (Amendment) Act, No. 30 of 2010, S. 2.

<sup>18</sup>Guardian and Wards Act, No. 8 of 1890, S. 25.

<sup>19</sup>Guardian and Wards Act, No. 8 of 1890, S. 25 (1).

<sup>20</sup>Paras Diwan, "LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY" (2012), *Universal Law Publishing*, Pg.no15.

the other hand, stipulates that the father is the natural guardian of a minor, followed by the mother. The natural guardian of a minor boy or unmarried minor girl is the father, followed by the mother and a minor under the age of five years will typically be in the custody of his or her mother (emphasis added) according to Section 6(a) of the HMGA 1956.<sup>21</sup> In the case of an illegitimate boy or an unmarried illegitimate girl, the mother is the first guardian, followed by the father.

### **1. Guardianship And Custody Law In Muslim And Christian Law**

The father is the natural guardian in Islamic law; however, custody of the son and daughter remains with the mother until they reach puberty. Islamic law was the first legal system to distinguish between guardianship and custody, as well as to recognise the mother's right to custody.<sup>22</sup> According to Hizanat, the mother is the best person to have custody of her children until they reach a particular age, both during and after the marriage. A mother's right to custody cannot be taken away unless she is disqualified due to apostasy or misconduct and her custody is judged to be detrimental to the child's welfare.<sup>23</sup> In GWA 1890 related judicial rulings involving Muslim children, courts have occasionally affirmed the mother's claim to custody under Islamic law, and in other instances have given custody to the mother out of concern for the child's welfare. The GWA 1890 is in charge of guardianship for Parsi and Christian children. Courts have the authority to issue interim orders for custody, maintenance, and education of minor children in any process for Christians.

## **III. AMELIORATION REQUIRED FOR THE EXISTING LAW TRENDS**

All citizens of India are subject to the same laws on crime and punishment, as well as laws governing commerce, contracts, and other matters. However, there are no consistent laws in the Indian setting surrounding family matters. Every religion is administered by some personal law and additionally by a central law which in many ways contradict each other. Uniformity in such laws are desired for a long time.

### **(A) Adoption**

When it comes to adoption, the starkly different laws that apply to Hindus and non-Hindus create an emotional difficulty. Section 7 and 8 of HAMA 1956, permit the husband and the wife to not take the consent while adopting a child if the partner ceases to be Hindu seems a useless

---

<sup>21</sup>The Hindu Adoption and Maintenance Act, 1956.

<sup>22</sup>Paras Diwan, "LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY" (2012), *Universal Law Publishing*, Pg.no 15.

<sup>23</sup>Sonali Abhang, "Guardianship and Custody Laws in India- Suggested Reforms from Global Angle," (2015).IOSR Journal of Humanities and Social Science. Pg. no. 39-58.

provision in today's society. It must be considered that many couples are living in our country wherein one of the spouses might have ceased to be a Hindu but still they are living a happy life. Their consent should be considered as paramount when one of the spouses adopts a child. Not giving the right to consent just based on religion seems highly illogical in present times. In the case of *M. Vanaja vs M. Sarla Devi*<sup>24</sup> the Supreme Court of India discussed the need for the consent of the spouse under the sections 7 and 8 of HAMA 1956 however, it just touches the soil but ignored the deep-rooted need for consent of the spouse who ceased to be Hindu. A man who is childless can adopt a stranger or a close relative, under this Act. However, a strange child is seldomly adopted but if they want to adopt, Section 10 redistricts Hindu parents to adopt a child who is not a Hindu. This makes it difficult to adopt an abandoned child because mostly it is not possible to determine the religion. The problem in the case of *Payal @ Sharinee Vinay Pathak v. High Court of Judicature at Bombay*<sup>25</sup> was that the adoption of abandoned children and the interpretation of the HAMA and JJ Act. The petitioner had spent four years with the abandoned child and wished to designate herself/himself as the girl's adoptive parents. But instead of looking to different laws, it will be much easier and feasible if both the HAMA 1956 and JJ Act 2015 are amalgamated by codifying them.

Secondly, Section 11 of the HAMA 1956 unnecessarily redistricts the Hindu couple to have a child of the same sex they already have or cannot adopt 2 children of the same sex. However, JJ Act 2015 does not have any restrictions based on this. In the landmark case of *Secretary Shubhadra Mehtab Seva Sadan of Kolathia v. State of Orissa*<sup>26</sup> the questions highlighted was whether two children of the same gender may be adopted. Taking a pragmatic and optimistic approach, the court decided that while the petition appeared to be submitted under the HAMA 1956, it was filed under the JJ Act 2015. The Court also ruled that minor girls who were raised as siblings by an agency could not be split by adopting them into different families. Similarly, in the case of *Vinay Pathak and His Wife v. High Court of Bombay*<sup>27</sup> it was held that although the mechanical application and technical interpretation of the law may thwart the pursuit of justice, the court should uphold the spirit and substance of the legislature's laws. Justice can be done more effectively if these laws are codified.

Thirdly, Section 11(3) and (4) of the HAMA 1956 must have had the right intention to prevent the sexual abuse of the children but there is indeed a wide gap left. In cases where the adoptee and adoptive parents are of the opposite sex, the Act is silent on the age difference criteria. What

---

<sup>24</sup>*M. Vanaja vs M. Sarla Devi* 2020 5 SCC 307.

<sup>25</sup>*Payal @ Sharinee Vinay Pathak v. High Court of Judicature at Bombay* 2010(1) BomCR434.

<sup>26</sup>*Secretary Shubhadra Mehtab Seva Sadan of Kolathia v. State of Orissa* AIR 2013 Ori 110.

<sup>27</sup>*Vinay Pathak And His Wife v. High Court of Bombay* 2020 5 SCC 307.

the law fails to realize is that in the case of a pedophile, a mere difference in age will not suffice for the protection. Similarly, the same danger exists in same-sex relationships, for which the law fails to take note.

Most importantly, no law, neither personal law nor the central law legalises adoption to same-sex couples and transgender people as if these people do not even exist. If India can decriminalise Section 377 of IPC, it should also give them the right to have a complete family. Adoption rights cannot be denied based on the individual sexual orientation. This practice is a blot on the legal system as it demeans the sexual preferences of the LGBTQ+ community. Although in the case of *National Legal Ser. Auth vs Union of India & Ors*<sup>28</sup> Supreme Court has interpreted Article 21 of the Constitution – the right to life and personal liberty – to include the right to motherhood and reproductive autonomy in the past, this does not appear to apply equally to same-sex couples, transgender people, and the LGBTQ+ community as a whole. Even in India in 2021, according to India's Adoption Regulations, 2017, as published on the official website of the Central Adoption Resource Authority (CARA), the right to start a family by adopting a child is exclusively only open to heterosexual cisgender men and women.

There appear to be no rules or infrastructure in place, and there is little clarification on related problems such as whether or not the law will apply to Muslims. The amendment to the JJ Act 2015 now defines adoption. This Act would apply to all Indians. It's unclear how this statute would supersede the existing personal-law requirements. In the case of *Shabnam Hashmi vs. Union of India & Ors*,<sup>29</sup> the court emphasised that now is not the correct time to include adoption under Article 21 of the Indian Constitution and there is hardly any need to amend the existing judicial principles for adoption. However, the judicial system cannot attempt to close loopholes in a single Act by reform. The present discrepancies among the personal laws point toward the need to reform the existing principles for adoption. Furthermore, the codification of personal laws must be done methodically rather than simply by altering the existing principles.

## **(B) Custody And Guardianship**

In custody disputes, the Supreme Court of India has concluded that the child's best interests/welfare outweighs all the statutory provisions. While the older cases under the GWA 1890 indisputably affirm that the father's position as natural guardian can be taken away only if he is judged unsuitable for guardianship. The Court awarded custody to the mother based on the welfare principle laid in the case of *Soora Beddi v. Cheema Reddy*<sup>30</sup> under GWA 1890, even

---

<sup>28</sup>*National Legal Ser. Auth v. Union of India & Ors* (2014) 5 SCC 438.

<sup>29</sup>*Shabnam Hashmi v. union of India* (2014) 4 SCC 1.

<sup>30</sup>*SooraBeddi v. Cheema Reddy*AIR 1950 Mad 306.

though the father was not declared incompetent to be a guardian. The Courts in *Vegetina Venkata Narasiah v. Chintalpati*<sup>31</sup> ruled that while deciding custody, children should not be removed from their families only to give the father's right to natural guardianship effect. Under *L. Chandran v. Venkatalakshmi*,<sup>32</sup> emphasized on Article 21 of the Indian Constitution, states that children cannot be considered as chattel and that the father's unconditional right to custody of children and their property cannot be enforced, even if the father was competent to act as the guardian. The High Court in the case of *Suharabi v. D. Mohammed*<sup>33</sup> ruled in favour of women involving custody of Muslim children. It was found that the mother was entitled to have custody of a 1 ½-year-old daughter under Islamic law whereas the father opposed the mother's custody because she was poor. In the same vein, the Court granted the father custody of an eleven-year-old child in *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda*<sup>34</sup>, despite Muslim law allowing the mother to have exclusive custody.

With the legal and judicial framework indicated above, there are two issues to consider. The first is the father's superior status in cases of guardianship, albeit not always in cases of custody. The second is the undetermined use of indeterminacy of the child welfare principle.

### Superior Position of The Father

The Researcher discovers that the 2010 change to Section 19 of the GWA 1890 removes the discrimination between the father and the mother in terms of guardianship. However, under Section 6 of the HMGA 1956, discrimination between parents for guardianship and custody remains intact. The Supreme Court emphasised in the case *Githa Hariharan v. Reserve Bank of India*<sup>35</sup> that the father continues to have a favoured position when it comes to natural guardianship additionally the woman becomes a natural guardian only in rare situations. Thus, even though a woman has been solely responsible for the minor's care and had custody of the minor since birth, the father can claim custody at any moment due to his superior guardianship rights. As a result, the *Githa Hariharan case*<sup>36</sup> fails to appropriately address the fundamental fault under Section 6(a) of HMGA 1956. Secondly, all statutory guardianship arrangements are ultimately subject to Section 13's concept that the "welfare of the child" is of paramount concern. As a result of the father's stronger guardianship rights, Section 13 is the only provision that a mother can utilise to fight for custody/guardianship in the event of a disagreement.

---

<sup>31</sup>*Vegetina Venkata Narasiah v. Chintalpati* AIR 1971 AP 134.

<sup>32</sup>*L. Chandran v. Venkatalakshmi* AIR 1981 AP 1.

<sup>33</sup>*Suharabi v. D. Mohammed* AIR 1988 Ker 36.

<sup>34</sup>*Md. Jameel Ahmed Ansari v. Ishrath Sajeeda* AIR 1983 AP 106.

<sup>35</sup>*Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 22819.

<sup>36</sup> *ibid.*

Parental equality is a goal that should be pursued, and the law should not discriminate between parents based on gender stereotypes. However, this equality must extend not just to roles and obligations, but also to the rights and legal status of the parents. As a result, dismantling the father's favoured status in the HMGA1956 and making both the mother and the father natural guardians is the first step toward reform in this area.

The Law Commission had proposed amending Section 6(a) to make both the father and the mother natural guardians "jointly and severally," with equal rights over a minor and his property.<sup>37</sup> The mismatch between the superior status of the father in statutory law and modern judicial thought on parental roles adds to the dilemma. The Supreme Court declared in *Padmaja Sharma v. Ratan Lal Sharma*<sup>38</sup> that the mother was equally responsible for the child's upkeep. While pursuing the aim of parental responsibility equality is admirable, the ruling has an ironic consequence: the mother is not considered to be a natural guardian as a result, she has no say in major choices affecting the child, but she shares financial responsibility for the child.

### **Undefined Welfare standards**

While the welfare principle is frequently applied by appellate courts in custody cases, there is no evidence of its widespread application. The issue with the welfare concept is that, despite its widespread use, the legal content of this principle is not illuminated by appellate judicial decisions. While there are several examples, family law specialists point out that the way courts apply the welfare of the child criteria lacks any fundamental grounding. In the absence of any statutory directions on what elements should be considered when determining a minor's best interests, it can be determined that courts use numerous interpretations depending on their own beliefs about what is in the best interest of children and ideal parenthood.<sup>39</sup> For example, there are differing opinions on whether a parent's financial capacity is a relevant consideration in determining custody. Indeed, a slew of decisions has seated precedents in the mother's favour. These decisions are also dependent on the judges' perceptions of who is a "good" mother.

The courts overlook several important elements that should be considered while using the welfare principle under custody cases. If allegations of sexual abuse against female children by fathers, grandfathers, or other male relatives appear implausible to the judge, they are dismissed without investigation.<sup>40</sup> The courts must employ their power with utmost discretion and

---

<sup>37</sup>Law Commission of India, 133rd Report, August (1989), Para.4.3, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>. Accessed on 26 October 2021.

<sup>38</sup>*Padmaja Sharma v. Ratan Lal Sharma* AIR 2000 SC 1398.

<sup>39</sup>Archana Parashar, "Welfare of Child in Family Laws—India and Australia," (2003). 1(1).*NALSAR LAW REVIEW*. Pg.no 49.

<sup>40</sup>Flavia Agnes, "Family Law II: Marriage, Divorce and Matrimonial Litigation" (2011).*Oxford University Press*.

moderation so that it does not result in a breach of a child's basic human right to life, which includes the right to live free from fear and trauma. The determinants of welfare standards should therefore be explicitly defined to avoid judges from ignoring specific concerns when deciding custody and access.

However, shared custody preferences are frequently weighed against the "best interest of the child" criteria. In many countries, particularly those that have signed the Convention on the Rights of the Child, the best interest of the child test is increasingly being used to examine child custody agreements.<sup>41</sup> It requires family courts to prioritise the child's well-being. The Supreme Court gave a landmark decision on gender equality in *ABC v. The State (NCT of Delhi)*<sup>42</sup>, ruling that even an unwed Christian mother shall be acknowledged as the legal guardian of her child without having to reveal the name of the biological father.

#### **IV. UNIFORM CIVIL CODE: DRAWBACK OR THE NEED OR HOUR?**

A Uniform civil code is the medium which can enhance unity among the people. Even though these arguments are against the implementation of the UCC still it is the legislation which India is looking for a long time. The personal laws related to adoption, custody and guardianship have been both welcomed as well as opposed by the people of the country at large. If personal laws are analysed through the lens of UCC, it can be witnessed that the codifying of laws is as difficult as it seems necessary in today's Indian scenario. It has been argued by many researchers that a country like India cannot endure a renaissance during the current times wherein people are divided from each other based on religion. The chances of major riots among the communities can arise because they might feel the state is trying to interfere in the religious matters of the people. It is difficult for the people to accept certain amendments in the principles which are present in the holy books like adoption and custody. Furthermore, if these personal laws on adoption, custody and guardianship are not reformed the current situation dealing with preferential rights given to males will continue to persist. Men will continue to have superior positions in matters of adoption, custody, and guardianship. The indifference among the people will grow day by day, then how can the judicial system ensure the 'welfare standard for the child' when people belonging to different religious communities will hesitate to adopt the abandoned children just because they are not sure what religious community they belong to?

The UCC laws can be the medium to join the cracks between the religious communities in India. Although many amendments and reforms are done in the personal laws to overcome the

---

Pg. no. 257-259.

<sup>41</sup>Convention on the Rights of the Child, (1989)Art.3.

<sup>42</sup>*ABC v. The State (NCT of Delhi)* 2015 SCC SC 609.

preferential status of males concerning adoption, custody, and guardianship laws but still the purpose has not been achieved. The implementation of UCC can improve the position of women in various matters. Women will have equal say in custodial and guardianship matters. They will then get equal rights to be a natural guardian of their child. The member religious communities like Muslims and Christians will also be able to legally adopt a child. The only state in India which have UCC is Goa. The state performs the actual meaning of ‘ a secular nation’. The implementation of UCC will shake the roots of gender biases for males, females, and others. It will maintain the balance between religious practices and the fundamental rights of the people.

## **V. CONCLUSION**

Since India has a diverse culture with high religious values, it is imperative to form laws in a way that could protect both, the welfare of the State and personal beliefs simultaneously. The reforms suggested above will ensure that welfare can happen in true spirit as these reforms were much needed for a long time. The existing laws seem to act as barriers to the welfare model as it unwarrantedly includes religious supremacy and prohibit welfare. As explained above, it makes no sense to bind a Hindu to adopt only a Hindu child. Similarly, there are numerous laws which are hurdles for welfare as they unnecessarily try to establish their religious supremacy. The existing laws subtly promote patriarchy and try to restrict the rights of LGBTQ+ and transgender as well. It can be well understood that males are given superior rights in the context of guardianship and adoption. By implementing the reforms suggested, there will be true welfare in the State and simultaneously no supremacy of any religion or gender would exist. Though these reforms may face hard criticism from the stereotypical members of society, eventually this will certainly benefit society at large.

\*\*\*\*\*