

A progressive UCC must protect the child's best interests

At a time when the government may bring in a Uniform Civil Code (UCC) by holding a special session of Parliament on September 18-22, 2023, there is a need to think beyond polygamy and divorce and other such issues. A UCC cannot confine itself to merely changing the rule of the father being the natural guardian. It must go beyond this and provide for, in unequivocal terms, the 'best interests of child' principle in all custody disputes. It must deny absolute rights of biological parents vis-à-vis adoptive parents.

The Guardians and Wards Act, 1890 considers the welfare of the child as the prime consideration in the determination of custody. Section 6 of the Hindu Minority and Guardianship Act, 1956 declares the father as the natural guardian and 'after him' the mother; the mother would ordinarily have custody till the child attains five years of age. The person would lose custody if she/he ceases to be Hindu. In *Githa Hariharan* (1999), the Supreme Court of India held that the expression 'after him' does not necessarily mean 'after life-time' of the father but, instead, 'in the absence of'.

Child custody and the biological link

Interestingly, custody under Islamic law is the right of the child and not of the parents. In fact, the father is at number six in terms of the right to custody after the mother, mother's mother howsoever high, paternal grandmother, sister, maternal aunt and paternal aunt. Under the Hanafi school, the mother does not lose custody after she ceases to be a Muslim.

Islamic law gave custody to the mother till a boy attains seven years and a daughter till she is 17, under the Hanafi school. The Shafi and Hanbali schools gave custody to the mother till a daughter is married. Under the Maliki school, the mother gets custody of even a male child till puberty and female child till her marriage. Thereafter, the child gets the right to make a choice.

Let us consider the issues that are far more complex than custody claims between father and mother – i.e., the claims of biological parents after adoption, and of an 'accused of rape' biological father. Indian courts are attaching greater importance now to the claims of biological parents in preference to adoptive parents without due consideration to the best



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It must not overemphasise the point of biological ties and must also consider the rights of adoptive, single, surrogate and even LGBT parents

interests of the child. On July 26, 2023, two women judges of the Bombay High Court ordered that the custody of a child who had already been adopted to be given to the biological father (he is accused of rape which resulted in this child being born). In October 2021, the 17-year-old biological mother on realising that she was pregnant is alleged to have eloped with him, and gave birth to a boy on November 26, 2021. Based on a complaint by the minor mother's father – alleging rape and various crimes under the Protection of Children from Sexual Offences Act (POCSO) Act, 2012 – the biological father was arrested but was granted bail later.

The mother and child were sent to a home in Mumbai. In 2022, the biological mother got married to another person and in the larger interests of the child, surrendered the boy to the Child Welfare Committee (CWC) for adoption. The child, under Section 38(3) of the Juvenile Justice (JJ) Act, being an unwanted child of a victim of sexual assault, was declared free for adoption by the CWS. He was handed over to his adoptive parents on January 3, 2023.

Surprisingly, on the biological father's *habeas corpus* petition, the High Court stayed the adoption proceedings and despite the trauma to the child and adoptive parents, the child was returned to the shelter home. In July, the CWC rejected the biological father's application for custody on the ground that a biological father cannot take advantage of his own crime and giving custody to him would not be in the best interests of the child. On July 26, the High Court handed over custody of the child to the biological father without hearing the biological mother. The alleged love story is the version of the father and not of the mother who, under Section 164, had said that she was coerced to go with him and that the sexual relationship was not consensual. Unfortunately, neither the best interests of the child nor the biological mother's emotions were taken into account. The mother was opposed to giving the child to the biological father. The requirement of consent of the rapist father in such adoptions would set the wrong precedent.

A case of adoption

Similarly, in *Nasrin Begum* (2022), a two-judge Bench of the Allahabad High Court gave the custody of a girl child to her biological parents in preference to the rights of the adoptive parents

who, under a notarised deed, had adopted a three-month-old child. The family court on the basis of the testimony of the child, now six years old, and in the best interests of the child, had decided in favour of the adoptive parents. The biological parents asserted that mere custody for sometime was given to the adoptive parents. Does not Section 2(2) of the JJ Act provide that adoption completely severs the ties between the biological parents and the child?

Why would any parent leave a three-month-old child in another country without the child being given in adoption? The family court rightly concluded that children cannot be treated as the 'chattel and property' of their biological parents and she should not undergo the trauma of separation from her adoptive parents who had given her all the love and care over six years or so. The High Court overlooked the fact that the biological parents had spent the summer vacations every year from 2014 to 2018 with the child and the allegation of a denial of visitation by them was not made out from the facts. In fact, the adoption deed did not contain any visitation rights by the biological parents.

The trauma which a child and its adoptive parents would undergo was not given much consideration though the court did acknowledge that the child would 'undergo some difficulty' in the beginning due to separation from the adoptive parents. The court gave much importance to the right of the child to know her real identity and the right of her biological parents to her custody. The court moved on the premise that there was no legal adoption and, therefore, the adoptive parents having no right in respect of the child. But the Bombay High Court in *Iftiqar* (2021) ignored that the fact of adoption was not valid in terms of Muslim law. The court in the interests of the child had refused to give custody to the biological parents as the adoptive parents were given a five-day-old child; it was only because of their care that the child recovered from jaundice.

A progressive UCC should not overemphasise biological ties. It must protect the rights of adoptive parents; otherwise people would not adopt children. Similarly, it should not insist on the matrimonial bond between parents and should ideally make provision of guardianship even for a single parent, surrogate parent and queer parents.

Dalit-targeted violence, a dimming of Tamil Nadu's halo

In an incident in Tamil Nadu earlier this month, a Dalit school student, Chinnadurai, was attacked by three students wielding a machete. His sister was also attacked when she tried to intervene. Dalits continue to face violence in some form or the other across India every day. However, the incident, which took place on August 9, in Nanguneri in Tirunelveli district, shocked the State as the perpetrators were school students, who belong to the numerically dominant community in that region.

Earlier too, there have been similar incidents in the State where Dalit students have been attacked – Muruganandam and Pradeep, from Cheranmahadevi, on August 4; Hariprasad of Kazhugumalai, on August 14, and a case on a bus near Karur on August 28. The perpetrators were either students or youth aged between 16 and 25 years. It is common knowledge that many students, particularly in rural Tamil Nadu, wear specific colour bands on their wrist as a mark of caste identification. In a State that has a history of caste violence against Dalits since Independence, the latest incidence is cause for worry. These incidents must not be seen in isolation. There are many factors such as a mushrooming of caste organisations that run high on caste pride, a near total absence of anti-caste activism within the powerful Other Backward Classes (OBC) by social and political organisations, and even the feeble response from non-Dalit intellectuals.

Caste pride

Today, the primary role of the caste organisations, most often patronised by youngsters, is to create exaggerated caste-specific symbolism. These organisations typically portray Dalits and their development as a threat to their interests of their community. By organising 'guru poojas', every caste has found a social icon around which to rally. It is not far-fetched to imagine that the youngsters behind the violent incidents mentioned above were influenced by this. In the past three decades, every government and other political parties have not only allowed but also fully participated in the celebration of these caste icons.

After the arson and violence against Dalits in Dharmapuri in 2012, orchestrated to separate an inter-caste couple, several caste organisations began to openly oppose inter-caste marriages. For instance, the Pattali Makkal Katchi, which represents the Vanniyar community in Tamil Nadu's northern and western districts, rallied



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Social and political organisations must acknowledge that the issue of violence against Dalits in the State exists and needs addressing

non-Dalit organisations against the Dalit community in 2014. Though it petered out, it was a development that reflects the changes within Tamil society.

In 2015, Dheeran Chinnamalai Peravai leader Yuvaraj and his accomplices killed a Dalit student, Gokulraj, for speaking to a caste-Hindu girl. In 2016, a Dalit youth, Sankar, was killed in Udumalaipettai for marrying an OBC girl. Former Tamil Nadu Deputy Chief Minister O. Panneerselvam even denied instances of caste-based honour killings in Tamil Nadu on the floor of the Assembly in 2015 when there was a demand for a special law against it. This reality, much like the rest of India, is in stark contrast to the halo that exists around Tamil Nadu outside the State.

The political factor

The Dravidian parties – the Dravida Munnetra Kazhagam and the All India Anna Dravida Munnetra Kazhagam – and all national parties have a presence in the State. While it is true that these parties, except the Bharatiya Janata Party (BJP), do not directly support these caste organisations, the ruling parties seldom speak against them or take action when there are transgressions committed by these organisations. This is because these political parties are dependent on the vote bank of the numerically dominant OBC communities; there is political competition to appease them. The political parties, which see no contradiction with these caste-organisations, are quick to form an electoral alliance with them if they manage to mobilise their communities.

After opposing the hegemony of Brahmins and pursuing the politics of anti-Brahminism, the Dravidian movement did not do much to oppose the dominance of powerful OBC communities or speak about these issues vociferously. It is only Dalit and Left organisations and individuals that are spotlighting the extent of the violence that Dalits face. Violence against Dalits by powerful OBC communities is not a new phenomenon either. Pandit Iyothee Thass's *Thumizhan* newspaper reported many such incidents in the early 20th century.

Why are Dalits facing violence in a State ruled by political parties that boast of promoting social justice? Why did not anti-Brahmin politics transform itself into anti-caste politics? What is the connection between social changes that have taken place so far and the situation now in Tamil

Nadu? There has been no research, no debate or political narratives to explain this emergent phenomenon.

Another worrying development is the rise of the BJP in Tamil Nadu. BJP-led Hindutva politics, as in other places, pampers the caste pride of powerful Brahmin and non-Brahmin caste organisations. There is open support for caste-based outfits and encouragement to castes to reclaim their past based on myths. Such myths only reinforce caste consciousness in the minds of upper caste students. BJP State Unit President K. Annamalai, on a 'yatra' across Tamil Nadu, did not speak about the violence while he went to Nanguneri.

Public intellectuals rarely speak about these problems in Tamil Nadu today. If Dalits flag the violence and discrimination, Brahmins are portrayed to be the common enemy and the voices of Dalits disregarded and suppressed. In Tamil Nadu, Dalits have historically been at the forefront and continue to be ideological opponents of Brahminism. It is true that Brahminical hegemony exists and should be opposed. However, does that mean that the issues faced by Dalits should not be discussed and debated in a transparent manner?

Ushering in reform

Rather than suppress the Dalit critique, social and political organisations must acknowledge that there is urgent need to address the issue of violence against Dalits in the State. They must discourage the formation of caste-based organisations, and delegitimise existing caste organisations. Governments must stop participating in 'guru poojas' and establishing memorials for caste leaders. Importantly, the idea of equality should be propagated earnestly in schools, colleges and workplaces. In schools and colleges, monitoring committees that involve teachers and parents must be set up to handle discrimination. The police must be held accountable where there is lax investigation and in bringing the perpetrators of violence against Dalits to justice.

The Dravidian movement stands for social justice. The criticism of Dalit activists, political parties and intellectuals is not to negate the achievements of the movement on the social justice front in the last 100 years, but only to point out the chasm between its lofty ideals and the situation on ground in an effort to correct its course in the pursuit of inclusive social justice.