CHAPTER VIII

ADOPTION PRACTICES IN INDIA

VIS-A-VIS ‘BEST INTEREST OF THE CHILD’

The International community as well as the Indian Legal System has recognized ‘adoption’ as one of the best and appropriate forms of alternative family care.¹ In India, but, adoption of children continues to be determined by religion. The only existing legislation on adoption is the Hindu Adoption and Maintenance Act, 1956. Non-Hindus can only avail of the procedure provided under the Guardians and Wards Act, 1890. The Juvenile Justice (Care and Protection of Children) Act, 2000 also provides for adoption making no exception on the basis of religion.

Adoption Process: The Realities

In the existing Indian set-up, adoption of a child never serves the purpose of adoption as intended by the International Convention. More than that, the existence of country-wide rackets involved in inter-country adoption exploiting the loopholes of the existing rules explain how the ‘best interests’² of the children are being oppressed.

Section 41, Juvenile Justice (Care and Protection) Act, 2000.

² Article 3(1), Convention on Rights of the Child, 1989 provides: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of Law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 5, UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children provides: “In all matters relating to the placement of a child outside the care of the child’s own parents, particularly his or her need for affection and rights to security and continuing care, should be the paramount consideration.”
The demand for children in adoption in the international sphere increases due to many reasons like fertility declines, availability of contraceptive aids, legislation of abortion, increased participation of women in the social activities and employment, rise in the age of marriage, postponement of child birth, legal recognition of single mothers etc. Due to the increasing demand of children, many unscrupulous adoption agencies have made India an international baby shopping center\(^3\). Children are sold abroad by providing false information about them and without assuring their security. The total disregard for the welfare of the children makes them mere commodities in the adoption market.

The adoption agencies never prefer children being offered for Indian adoption, even though the adoption guidelines provide that children shall first be offered for Indian adoption.

**Hindu Adoption and Maintenance Act 1956**

It is the only statute in force governing adoption of children in India. Unfortunately, its ambit is confined to Hindus\(^4\).

Hindu Adoption and Maintenance Act amended the pristine law of adoption among Hindus and unified the customary forms of adoptions into a single form. The Act recognizes even a private act between the natural and adoptive parents concerning adoption and except in giving the child for adoption by a person other than the natural guardian, even the scrutiny or permission of the court is not required.\(^5\) Even a religious ceremony like *Dattaka Homa* is not necessary. The child to be adopted must actually be given and taken in adoption by the parents or guardians with the intent to transfer the child to the family of its adoption. In *Madhusudhan Das v. Narayanibai*\(^6\), it was held that the ceremony of giving and taking is an essential requisite on all adoptions. The capacity of

\(^3\) Frontline, June 3, 2005, p 4-25

\(^4\) Section 2, The HAM Act, 1956

\(^5\) Section 9

\(^6\) AIR 1983 SC 114
married man, widow, widower, single or divorced or deserted women to adopt is also recognized by the Act.\textsuperscript{7}

To prevent sexual abuse, the Act provides that there shall be an age difference of 21 years between the adoptive parents and the adopted child, whenever they are of opposite sex.\textsuperscript{8}

The position of the adopted son is better under the Act than the pristine law. Now he takes equal share with a subsequently born \textit{aurasa}. But his share was less under the ancient law.

\textbf{Adoption under the Guardians and Wards Act, 1890}

The Guardians and Wards Act, 1890 is a general law of the land applicable to all religious communities, which decides of the custody of the child for guardianship. Section 7 (1) of the Act provides:

“(1) where the Court is satisfied that it is for the welfare of a minor that an order should be made.

a) appointing a guardian of his person or property, or both, or

b) declaring a person to be such a guardian, the court may make an order accordingly.”\textsuperscript{9}

Sec 17 of the Act further provides that the welfare of the child must guide the Court in the appointment or declaration of a guardian. In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section 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. In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian

\textsuperscript{7} Section 8  
\textsuperscript{8} Section 11  
\textsuperscript{9} Section 17 (1)
and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property, if the minor is old enough to form an intelligent preference, the court may consider that preference. An order for guardianship under Section 7 may be made only on the application of the person desirous of being, or claiming to be the guardian of the minor or any relative or friend of the minor or the collector of the district or other local area within which the minor ordinarily resides or the collector having authority with respect to the class to which the minor belongs.

The district court is given the jurisdiction to entertain the application of such persons.

At the same time, under the Family Courts Act, 1984, any suit or proceeding in relation to the guardianship of the person or custody of, or access to a minor shall come under the jurisdiction of Family Court. Thus it is clear that the jurisdiction vested with the District Court under Section 9 of the 1890 Act in respect of guardianship over the person or custody of a child has been carried out and transferred to the Family Courts. But it is significant to note that the guardianship over the property of a child is still a matter of judicial concern for the District Court, by virtue of the omission in Section 7 of the Family Courts Act.

It is pertinent to note that the procedure laid down under both the Guardians and Wards Act and the Family Courts Act are inadequate to serve the very purpose of adoption as it does not recognize the parenthood of the parties approaching the court for guardianship. How much the child is attached to the family of the guardian, the child will not have the natural rights of succession to the property of his guardian and it shall not inherit where the guardian dies intestate. In fact, the Guardians and Wards Act provides the law and procedure for

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10 Section 17 (2)
11 Section 17 (3)
12 Section 8
13 Section 9
14 Section 7 (10) (b), Explanation (g), Family Courts Act, 1984
15 Section 9
determining the custody of the child on dissolution of marriage and also provides for the appointment of guardians over the person or property or both of children by persons who are not the natural parents of the child; but presently the same Act stands as a substitute to provide procedure for adoption! It is again violative of the constitutional mandate of equality as a destitute child intended to be adopted by a non-Hindu is deprived of the rights and obligations attached to his guardian whereas all such rights are conferred to the child adopted under the Hindu Adoption and Maintenance Act, 1956.\(^\text{16}\)

**The Juvenile Justice (Care and Protection of Children) Act, 2000**

The Juvenile Justice Act, 1986 provided for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles in conformity with constitutional provisions\(^\text{17}\) and international obligations.\(^\text{18}\)

In the year of 2000, consolidating and amending the law relating to juveniles in conflict with law and children in need of care and protection the Juvenile Justice (Care and Protection) Act was passed. This Act seeks to protect a ‘child in need of care and protection’\(^\text{19}\) and provides for a process of rehabilitation

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16 Article 14  
17 Article 39 (e) and (f)  
18 UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); UN Convention on the Rights of the Child  
19 Section 2 (d), “Child in need of care and protection means a Child- (i) who is found without any home or settled place or abode and without any ostensible means of subsistence, (ii) who resides with a person (whether a guardian of the child or not) and such person has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or (b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person, (iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after, (iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child, (v) who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry, (vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts; (vii) who is being or is likely to be abused for unconsciously gains, (ix) who is a victim of any armed conflict, civil commotion or natural calamity.”
and social reintegration of the child through various means including adoption and foster care.

The Act recognizes the preliminary responsibility of the family for providing care and protection to children\(^{20}\) and adoption shall be resorted to for the rehabilitation of the children who are orphaned, abandoned, neglected and abused through institutional and non-institutional methods.\(^{21}\) The Act empowers the Juvenile Justice Board to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the State Government from time to time.\(^{22}\) In this regard, the children’s homes or the State Government run institutions for orphans shall be recognized as adoption agencies both for scrutiny and placement of such children for adoption.\(^{23}\)

Again, Section 41(5) provides:

“No child shall be offered for adoption-

a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,

b) till the two months period for reconsideration by the parents is over in the case of surrendered children, and

c) without his consent in the case of a child who can understand and express his consent.

And, the Board, by virtue of section 41(6), may allow a child to be given in adoption-

a) to a single parent, and

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\(^{20}\) Section 41(1)
\(^{21}\) Section 41(2)
\(^{22}\) Section 41(3)
\(^{23}\) Section 41(4)
b) to a parent to adopt a child of same sex irrespective of the number of living biological sons or daughters.

Section 42 provides for foster care also, which may be used for temporary placement of those infants who are ultimately to be given for adoption. In foster care, the child may be placed in another family for a short or extended period of time, depending upon the circumstances where the child’s own parent usually visit regularly and eventually after the rehabilitation where the children may return to their own homes.\textsuperscript{24}

Model Rules have been framed under the 2000 Act by the Central Government that shall be applied until new rules are framed by the State Government. The Model Rules 2001 provide that as the family is the best option to provide care and protection for children, adoption shall be the first alternative for rehabilitation of children who are orphaned, abandoned, neglected or abused.\textsuperscript{25} The Rule further provides that before declaring a child legally free for adoption, the Child Welfare Committee (CWC) shall institute a process of inquiry which shall include:

1. a thorough enquiry by the probation officer, case workers or police, the report containing findings to be submitted within a maximum period of one month, and

2. declaration by the placement agency stating that there has been no claim for the child even after notification in at least one leading newspaper including a regional newspaper, TV and Radio announcements and after waiting for a period of one month, the time which shall run concurrently to the inquiry to be conducted and report submitted there under.

The CWC has to make a release order declaring the child legally free for adoption within the period from the date of application in the case of children

\textsuperscript{24} Section 42(2)
\textsuperscript{25} Rule 33(1)
below the age of two years, and three months in the case of children above that age.

The rules further lay down the role of licensed or recognized Government and non-Government agencies for adoption. Where and abandoned child has been brought to such agencies, it must report the matter to the CWC within 48 hours and file along with such report a copy of the report filed with the police station under whose jurisdiction the child was found abandoned. In such cases, the agencies may initiate the process of clearance at the earliest for the purpose of the adoption within a period of 2 months, and for placing an application before the CWC for declaring the child legally free for adoption.

In the case of a child ‘surrendered’ by his own biological parent or parents, the agency shall make an application directly to Juvenile Justice Board for giving the child in adoption and the agency must wait for the completion of 2 months’ ‘reconsideration time’ given to the parents. During the said period, the agency shall try to counsel the parents to persuade them to keep their child and where the parents are still unwilling, such children shall be kept initially in foster care or arrangements shall be made for their sponsorship.

Where the surrendered or abandoned child is declared free for adoption, only the licensed agency shall have the discretion to place the child in pre-adoption foster care after intimation of this arrangement to the Juvenile Justice Board, within one week of the child’s placement pending final order of the Juvenile Justice Board in the matter of adoption.

Upon receipt of the application of the adoption agency, the Juvenile Justice Board shall call for an independent enquiry to be conducted by a recognized scrutinizing agency, which shall submit its report within a period of 2 weeks. Only if the Board is satisfied that it is in the best interests of the child to place him or her in adoption, it shall pass an order giving permanent custody of the child to

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26 Rules 33(10), Model Rules, 2001
27 Rule 33(11)
the adoptive parent or parents. The adoption order signed by at least one of the two members of the Board shall be counter-signed by the Principal Magistrate. The Board shall determine and fix the date of birth, in the best interests of the child and shall pass orders to the appropriate authority to issue a regular birth certificate for the child giving the name or names of the adoptive parent or parents just as in the case of their natural born child. The order shall include the provision for a periodic follow up report for a period of 3 years by the probation officer or caseworker or the adoption agency to ensure the well being of the adopted child. During the first year the follow up report must be submitted every six month; in the next two years it must be done annually.

It is also important to note the provisions for adoption in the Kerala Juvenile Justice (Care & Protection of Children) Rules, 2003, in line with the model Rules of 2001.

Constitution of Child Welfare Committee.\textsuperscript{28}

The Members of this committee shall be selected from a panel of 10 members of whom 3 shall be women, prepared by the District Judge in consultation with the District Collector. The chairperson of the committee shall be a law graduate and have either of the following qualifications besides 5 years experience in the respective field:

a) respectable, well educated citizen with the background of special knowledge of social work, child psychology, education, sociology or home science; or

b) a teacher or a doctor or a senior retired public servant who has been involved in work concerning child welfare; or

c) a social worker of repute who is directly engaged in child welfare.

The other members shall be graduates and have either of the following qualification, besides 5 years experience in their respective field:

a) respectable, well educated citizen with the background of special knowledge of social work child psychology, education, sociology or home science; or

b) a teacher or a doctor or a senior retired public servant who has been involved in work concerning child welfare; or

c) a social worker of repute who is directly engaged in child welfare.

Any child in need of care and protection shall be produced before the committee.\(^{29}\)

**Rules Concerning Adoption**\(^{30}\)

The children who are orphaned, abandoned, neglected and abused can be adopted under the Act. The guidelines shall be issued by the government from time to time. Further the guidelines issued by the Central Adoption Resource Agency (CARA) shall also be followed. An abandoned child can be given in adoption only when the committee declares such child to be legally free for adoption,\(^{31}\) after a due process of enquiry.\(^{32}\)

The role of licensed/recognized Government and Non-Government agencies for adoption is outlined as follows:\(^{33}\)

a) “when an abandoned child is received, the recognized agency shall within 12 hours of the receipt of the child report to the committee along

\(^{29}\) Rule 10, Even the child himself can approach the committee.

\(^{30}\) Chapter V, the Kerala Juvenile Justice (care & Protection of children) Rules 2003.

\(^{31}\) Rule 37(3)

\(^{32}\) Rule 37(4)

\(^{33}\) Rule 37(5)
with a copy of the report filed with the police station in whose jurisdiction the child was found abandoned.

b) The adoption agency may initiate the process of clearance for the purpose of adoption at the earliest in the case of abandoned children….

c) where the child is surrendered by her/his biological parents/parents by executing a document of surrender, the adoption agency shall make an application directly to the Board for giving the child in adoption. However, the adoption agencies shall wait for completion of 2 months given as period of reconsideration to the biological parent/parents.

d) where a surrendered/abandoner child who is legally free for adoption so received, the licensed agency shall have discretion to place the child in pre-adoption foster care with the selected prospective adoptive parent/parents under intimation to the Board immediately after filing petition for final adoption order before the Board.

**Procedure for Adoption**

The petition for adoption shall be submitted before the Board by the Superintendent /Officer-in-charge of the recognized children’s Home/Placement Agency under the Act. The petition shall be accompanied by the following:

(1) Declaration of willingness of the institution to give the child in adoption

(2) A declaration from the prospective adoptive parent or parents expressing their willingness to take the child in adoption.

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34 Rule 37(6)

35 Sec, office order No.1-2/2003-CARA(PA) dated 16.10.2003 issued by the Central Adoption Resource Agency; Accordingly, age criteria for adoption is as follows:

(a) Infants preferably up to 12 months can be placed with adoptive parents whose composite age is 85 years and where neither parent has crossed 45 years.

(b) In the case of older adoptive parents, the age of the child has to commensurate as far as possible with the age difference of the parents eg: a child is 1 year + may be placed with a 46 year old, 2 years with a 47 years old.

(c) A child may be placed in adoption before it reaches the age of 12 as far as possible.
(3) Home study report prepared by probation officer or qualified social worker of the placement agency

(4) Child study report

(5) Medical Report of the Child

(6) Legally Free for Adoption declaration from child welfare committee

(7) Medical certificate showing both husband and wife are mentally and physically fit and do not suffer from any communicable disease

(8) Marriage Certificate

(9) Bank Statement

(10) Income Certificate

(11) Property statement

(12) Two recommendations from respectable members of the community

(13) Four photographs of the couple (Post card size, mid size)

(d) In case of special needs children with medical problems, the age limit of adoptive parents may be relaxed by CARA on case to case basis.

(e) However, in no case the age of an adoptive parent should be above 55 years.

Changes for In-Country Adoption/Placement

(a) Maintenance charge shall not exceed Rs.15,000/- at the rate of Rs.50/- per day from the date of admission till the child is placed in Pre-placement foster care

(b) Incase of special medical care hospitalization charges subject to a maximum of Rs.9000/- may be claimed on production of actual bills.

(c) Legal fees and scrutinizing fees to be charged on actual.

See, order F.No 1-2/2003-CARA(PA) dated 29.12.2003 issued by the central adoption Resource agency; Accordingly the Home study report may include the following:

(a) updated medical certificate
(b) Income certificate/proof of financial status
(c) Employment Certificate
(d) Two references
(e) Certificates of educational qualifications
(f) Residence proof
(g) Marriage Certificate/proof of the adoptive parents
(h) Recent photograph of the adoptive family
(i) Understanding by the parents to nurture the adoptive child as their own.
(14) Consent of the parents which should be obtained in a language known to the consenter; consent of natural mother in the case of relinquished child.

When the proposed child is a relinquished child, the Board shall satisfy itself that the relinquishment deed was taken properly and the child has been voluntarily surrendered by the biological parent(s) or unmarried mother. In doubtful cases, the Board may also direct the scrutinizing agency to enquire whether the child has been voluntarily surrendered or whether by fraudulent means. But unless the board so directs, the scrutinizing agency shall not make any attempt to trace the biological parents or unmarried mother of the child.

After receiving an application from a recognized agency for adoption, the Board shall call for independent enquiry by recognized scrutinizing agencies. The scrutinizing report shall be submitted within a period of two weeks. The Board shall undertake a process of enquiring which shall include interviewing the prospective parents, verifying the documents and scrutinizing reports. If the Board is satisfied that the placement is in the best interest of the child, it shall pass a final order giving permanent custody to the adoptive parent(s). An order of adoption shall be signed by the principal magistrate besides one of the two members of the Board.

The Board shall fix the date of birth, in the best interest of the child and shall pass order to the appropriate authority to issue a regular birth certificate for the child, giving the name(s) as if in the case of natural born children. The date of birth given in the order of the Board shall be conclusive proof of the date of birth of the child for all practical purposes.

As far as possible, the time taken for passing an adoption order shall not exceed 2 months from the date of filing. The order shall also include provision for a periodic follow up report either by the probation officer or caseworker or adoption agency to ensure the well being of the child. The period of such follow up shall be half yearly in the first year and annually for the subsequent years till he or she ceases to be a child.
When the proposed adoptive parent(s) is related to the child, the Board may dispense with any of the above conditions. A photograph of the child signed by the Principal Magistrate of the Board shall be attached to the order.

No formal form of ceremony for the adoption is required and the order issued by the Board shall be the final adoption order. Once if it is issued, it cannot be cancelled and the adoptive parents cannot be discharged of their responsibilities as such.

If the parents have already been appointed as legal guardian by the competent court, they need only produce the certified copy of the order before the Board and the Board after conducting a formal enquiry may issue an adoption order. Before issuing the same, the Board shall consider a report of the probation officer regarding the present condition of the child and family.

The adoptive parents, if employed, are eligible to get a familiarization leave for a maximum period of 6 months on the basis of the recommendation of the Board. The adoptive child is entitled to get all the rights as that of a natural born child with respect to the adoptive parents.

And, a copy of the Adoption Order shall be forwarded to the Director of Social Welfare by the Juvenile Justice Board.

**Inter-Country Adoption (ICA)**

The practice of ICA began as an ad hoc humanitarian response to children orphaned by the Second World War, who could not have a family of their own in their own country. Unfortunately, the present era witnesses it as a complex social phenomena causing child abuse. Several intermediaries have made it a profitable business adopting any fraudulent, illegal and unethical practices.

In India, almost 255 foreign adoption agencies (of which 131 are government bodies) and 74 Indian placement agencies are recognized by the government for the purpose of ICA. The most condemned situation is that there is
no specific legislation, which covers inter-country adoption. The Supreme Court of India in its notable decision, *Laxmikant Pandey v. Union of India*\(^{37}\), had laid down certain guidelines and in line with the judgment the Central Adoption Resource Agency (CARA)\(^{38}\), which implements and monitors ICA, was set up by the government.

Voluntary Coordination Agencies in the States are bound to ensure that children are first offered for Indian adoption and if it fails to happen within a stipulated timeframe, clear the children to CARA for inter-country adoption. No agency in India can proceed with ICA, without a ‘no objection certificate’ from CARA.

But in practice, the two-fold problem faced in ICA is the unethical nexus among agencies, middlemen and authorities and the available loopholes in the CARA rules.

**Norms to be followed in ICA: The Mandate of Lakshmi Kant Pandey**\(^{39}\)

Justice Bhagwati has recognized in his judgment the right of a child to love and be loved and to grow up in an atmosphere of love and material security, which is possible only if the child is brought up in a family. Though the most congenial environment would be that of the family of his biological parents, in the absence of the same the next best alternative would be to find adoptive parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will

\(^{37}\) (1984) 2 SCC 244

\(^{38}\) "Clearing house of information related to children for ICA"

\(^{39}\) *Lakshmi Kant Pandey v. Union of India*, AIR 1986 SC 272;

\[\text{AIR 1987 SC 232}\]

\[\text{AIR 1991 SC 379}\]

The decision laid down the important directions and new guidelines were issued by the subsequent decisions in view of the difficulties faced in implementing the 1984 directions. Though subsequent Rules were framed under the 2000 Act, *Lakshmi Kant Pandey* stands as good law.
have no family life and no love and affection and quite often, in the socio–economic conditions prevailing in the country, it might have to lead the life of a destitute, half-clad, half-hungry and suffering from malnutrition and illness.\textsuperscript{40} But while supporting ICA, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country\textsuperscript{41}.

And the apex judiciary expressed its concern for in those cases where the children sought to be taken in adoption are destitute or abandoned and are living social or child welfare centers that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. The court, again, considered what are the requirements, which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned:

In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by institution or center or home to which children are committed by juvenile courts. This will help to reduce the possibility of profiteering and trafficking in children because if a foreigner was allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption he might, in his anxiety to secure a child for adoption, be

\textsuperscript{40} (1984) 2 SCC 344 at pp. 251-252
\textsuperscript{41} Id. at p. 253
induced on persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Besides, it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption. If the adoption has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Again, if the application of a foreigner is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.

The court extended its concern towards the biological parents of the proposed child also. It should be regarded as an elementary requirement that if the biological parents assisted in making a decision about relinquishing the child for adoption. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after

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42 See Laxmi Kant Pandey v. U O I, AIR 1987 SC at p 240, “In case of a foreigner who has been living in India for one year or more, the home-study report and other connected documents may be allowed to be prepared by the recognized placement agency which is processing the application of such foreigner for guardianship of a child with a view to its eventual adoption and that in such a case the court should not insist on sponsoring of such foreigner by a social or child welfare agency based in the country to which such foreigner belongs nor should a home-study report in respect of such foreigner be required to be obtained from any such foreign social or child welfare agency, the home-study report and other connected documents prepared by the recognized placement agency should be regarded as sufficient.”

43 (1984) 2 SCC 244 id. at pp. 264-265
their decision a further period of about 3 months should be given to reconsider their decision.\textsuperscript{44}

The learned bench also considered the safeguards, which should be observed in so far as the child proposed to be taken in adoption, is concerned. The Child Study Report which should be prepared by the social or child welfare agency so as to help the foreigner to come to a decision whether or not to adopt the child and to understand him, should contain the following matter:\textsuperscript{45}

1. Identifying information, supported where possible by documents

2. Information about original parents, including their health and details of the mother’s pregnancy and birth

3. Physical, intellectual and emotional development.

4. Health report prepared by registered medical practitioner preferably by a paediatrician

5. Recent photograph

6. Present environment category of care (own home, foster home, institution etc), relationships, routines and habits.

7. Social worker’s assessment and reasons for suggesting inter-country adoption.

The court considered the question whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child. The pernicious practice of demanding huge amounts from the foreigner was condemned. At the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent,

\textsuperscript{44} \textit{Id.} at pp. 267-268
\textsuperscript{45} \textit{Id.} at pp. 270-271
when maintenance and medical expenses in connection with the child are actually incurred. So the court fixed a fair rate, say not exceeding Rs.60 per day (subject to revision) also from the date of selection until the child leaves the agency and also the actual medical expenses.

It is again, quite interesting to analyze the following details which the court suggested to be assessed by the concerned agency to see whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives: 46

1. Source of referral

2. Number of single and joint interviews

3. Personality of husband and wife

4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable)

5. Social status and family background

6. Nature and adjustment with occupation

7. Relationship with community

8. Description of home

9. Accommodation for the child

10. Schooling facilities

11. Amenities in the home

12. Standard of living as it appears in the home

46 Id. at pp. 279-280
13. Type of neighborhood

14. Current relationship with husband and wife

15. Current relation with parents and children (if any children) (b) development of already adopted children (if any) and their acceptance of the child to be adopted.

16. Current relationship between the couple and the members of each other’s families.

17. If the wife is working, will she be able to give up the job?

18. If she can not leave the job, what arrangements will she make to look after the child?

19. If adoption considered because of sterility of one of the marital partners

20. If not, can they eventually have children of their own?

21. If a child is born to them, how will they treat the adopted child?

22. If the couple already has children how will these children react to an adopted child?

23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.

24. Reasons for wanting to adopt an Indian child.

25. Attitude of grand parents and relatives towards adoption.

26. Attitude of relatives, friends, community and neighborhood towards adoption of an Indian child.

27. Anticipated plans for the adopted child
28. Can the child be adopted according to the adoption law in the adoptive parent’s country? Have they obtained the necessary permission to adopt? (Statement of permission required)

29. Do the adoptive parents know anyone who adopted a child from their own country or another country? Who are they? Why did they fail to get a child from that source?

30. Did the couple apply for a child from any other source? If, yes, which source?

31. What type of child is the couple interested in? (Sex, age and for what reasons)

32. Worker’s recommendation concerning the family and the type of child, which would best fit into this home.

33. Name and address of the agency conducting the home study, name of social worker, qualification of social worker.

34. Name of agency responsible for post-placement supervision and follow-up.

**CARA guidelines based on Lakshmi Kant Pandey**

The realization of the unscrupulous practices in adoptions (intra-and inter-country) especially after the judicial verdict in *Lakshmi Kant Pandey* prompted the CARA to set up the following guidelines by which:

1. CARA shall maintain regular contacts with Indian diplomatic missions abroad to safeguard the interests of children of Indian origin adopted by foreign parents.

2. A detailed ‘home study’ of foster parents by professional social workers must be sent to CARA and the Indian agency. The ‘home study should
contain the details of the adopting family including its background; economic status; attitude of grandparents and other relatives towards adoption; and the reasons for wanting to adopt an Indian child.

3. The process of adoption abroad can begin only after securing a ‘no objection certificate from CARA, which is given after scrutinising all the documents and papers from the foreign sponsoring agency.

4. Among the documents needed for the ‘no-objection certificate’ are undertakings from the foreign agency that the child would be legally adopted by the foreign parents according to the local laws within 2 years of the child reaching the country that a report on the progress of the proceedings would be sent regularly for 5 years; and that in case of disruption of the adoptive parents’ family the foreign agency would take care of the child until it finds another suitable family.

5. The Indian agency is entitled to recover from the adoptive family the costs incurred in preparing and filing the application in the court, the passport and visa expenses, preparation of the child study report and medical expenditure incurred on the child, all not exceeding Rs.6,000/- and maintenance expenditure for a day (subject to revision from time to time) from the date of selection of the child. The cost of travel of the child and also an escort needs to be reimbursed. If any recognized agency exploits the foreign enlisted agency financially CARA may, after giving an opportunity to the agency to explain, suspended or revoke its recognition.

Inadequacies of the Present Legal Frame Work

Still, the law regarding adoption remains to be discriminatory and unjust denying equal opportunities to children.

Until the coming into force of the juvenile Justice (Care and Protection) Act, 2000, the only legislation enabling adoption was the Hindu Adoption and
Maintenance Act, 1956, which is applicable to Hindus only. The Muslims, Christians, etc., could only become guardians of a child under the Guardians and Wards Act, 1890. While the HAMA gives the status of a natural born child to an adopted child, the fiduciary relationship established under the GAWA between the guardian and ward does not do so. A person takes under guardianship by the GAWA, by a family can not claim property after the death of the parents. In other words, he has no legal right of intestate succession. Further, on attainment of majority of the ward, the powers of a guardian cease.  

A non-Hindu wanting to adopt a child for any reason has to face other problems also. For example, a married woman can only consent to an adoption through her husband. She cannot initiate the process herself again according to section II of the Act, a child of the same sex, as the one the adopting parents already have cannot be adopted. Consequently some times the adoption agencies are forced to separate the sibling of the same sex and give them in adoption to different homes. According to CARA guidelines, in an attempt not to separate sibling, special provisions have been made to encourage inter-country adoption. One the contrary, the Lakshmi Kant Pandey verdict categorically state that all efforts must be made to place the child in India itself and inter country adoption is the last resort.

Further, section II does not allow the adoption of a son in case the adopting parent or parents already have a grandson or great grandson or daughter in case they have a grand daughter. Such a provision only discourages adoption.

Even under the 2000 Act it is only provided that “adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned,

47 On the other hand, for an adoption under HAMA, the apex judiciary has applied even the ‘doctrine of relation back.’ Accordingly, the child adopted by a widow remains the child of her deceased husband on the assumption that the husband’s family is the family of the widow. This doctrine is based on the past legal notions and social values; see, Sawan Ram v. Kalawati, AIR 1967 SC 1761;  
See also, Paras Diwan, Law of Adoption; Minority Guardianship and Custody, Wadhwa & Co, 1989 at p. 81
neglected and abused through institutional and non institutional methods" The Act does not apply to cases where the biological parents themselves surrender the child to the adopting parents. And also it does not draw any attention to the religion. This would simply mean that while a Hindu family, who due to deplorable situations of life cannot provide good care of their child, cannot find a suitable family of their choice and religious culture.

More than that, the 2000 Act does not repeal the provisions of the HAMA, which are contradictory. Since the HAMA is a specific legislation, it would continue to govern the Hindus in points where they are contradictory. For example, the Act of 2000 defines a child who has not attained the age of eighteen as eligible to be adopted. But the HAMA does not allow the adoption of a child above 15 years of age. The 2000 Act allows children to be adopted irrespective of the sex of the biological children. However, the bar on adoption of son in case of a living grandson or great grandson and of a daughter in case of living granddaughter persists.

Again, the 2000 Act is not precise in the matter of procedure for adoption. The adoption procedure is left with the state Government, i.e., “the Board shall be empowered to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the state Government from time to time in this regard. The position of CARA guideline in the existing legal framework, also remain ambiguous.

Hence the objective of the 2000 Act is in effect defeated due to (1) the inadequacy of establishing a complete code of adoption. (2) the omission of a repealing clause by which the specific legislation of HAMA could have been easily avoided.

Again another logical conclusion, which may be arrived at, is that the only existing adoption legally permitted is only under HAMA, prior to the 2000 Act.

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49 Ibid, Section 41(3)
The non-Hindus can only avail the procedure under Guardians and wards Act, 1890. Hence it follows that ‘adoption’ referred to in the 2000 Act shall mean adoption by Hindus only, in the absence of a clear definition of ‘adoption’ or a corresponding legislation empowering the non-Hindus to adopt.

In nutshell, even now there is no uniform procedure for adoption throughout the territory of India.

At this juncture, the trend of the judiciary as revealed by its decisions deserves special mention.

**Judicial Process on Adoption**

Even in the absence of a precise legal framework other than that provided by the HAMA, the judiciary has done its best to protect the right of adoption. The right of adoption, religiously and statutorily recognized, has been appraised by the judiciary also in several numbers of cases. It is recognized that among Hindus, a peculiar religious significance has attached to the son. The foundation of the Brahminal doctrine of adoption is the duty, which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites having regard to the well-established doctrine as to the religious efficacy of sonship.\(^{50}\)

It has been held that adoption has not so far been statutorily recognized in India among the Christian and Muslim communities, as in England.\(^{51}\)

Though the judiciary is willing to recognize the fundamental right of adoption,\(^{52}\) it was held that there must be evidence of the actual formality of adoption by proving the physical act of giving and taking of the child.\(^{53}\)

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\(^{51}\) *In the matter of Manuel Theodore D’ Souza & Anr.*, II 2000 DMC 292

In Anokha (Smt) v. State of Rajasthan & Others, a notable step was taken by the apex judiciary. It was held that where the child is living with her/his biological parents who seek to give their child in adoption to a foreign couple who are known to them, the guidelines prescribed for ‘Adoption of Indian Children’ issued by the Ministry of Welfare, Govt. of India, need not be followed; the same being applicable only to children who are orphans and destitutes or whose biological parents are not traceable or have relinquished or surrendered their children for adoption. The relevant court should deal with the application under s.7 of the Guardians and Wards Act and dispose it of on being satisfied about the voluntariness of the adoption, suitability of the adoptive parents and best interest of the child. It was again held that the object of the CARA guidelines is to provide a sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court in the series of judgments delivered in Lakshmi Kant Pandey v. U O I between 1984 and 1991.

This judicial pronouncement again points towards the inadequacy of a legislative structure, which again emphasizes the need for a uniform law of adoption.

Towards Uniform law of Adoption

As a concluding remark, the discrimination on the basis of religion for exercising the right in connection with adoption deprives a non-Hindu child the protection available under Art. 15 of the Constitution. At this juncture, the question of Uniform Civil Code has again sprung into prominence, which has been mooted by the apex judiciary many a time.

It has been pointed out by Smt. Asha Bajpai that a proposed common secular law on adoption would perhaps be acceptable to all communities if its main focus is on the welfare of the destitute and orphan child and it does not

53 Philips Alfred Malvin v. Gonsalvis, 1999 (1) KLT 292
54 (2004) 1 SCC 382
55 Sarla Mugal v. U O I, AIR 1995
56 Asha Bajpai, Child Rights in India. Law, Policy and Practice, Oxford University Press, 2003 pp 90-91
interfere with the inheritance laws, which are of divine origin in some communities. Again she has suggested certain recommendation for the security of the adopted child, by which the following deeming provisions shall be included:

I. All the parents who adopted child would have deemed to have willed away one-third of their property to their adopted a child unless a wish to the contrary is expressed in writing

II. If there is no property, any other heritable rights could be shared at least to the extent of one third of the property.