CHAPTER – VIII

CONCLUSION AND SUGGESTION

Once there were two women
Who never knew each other
One you don’t remember, the other you call mother
Two different lives shaped to make yours one
The first gave you life and the second taught you to live it.
One gave you nationality, the other gave you a name;
One gave you emotion, the other calmed your fears;
One saw your first sweet smile and the other dried your tears.
One gave you up, it was all she could do.
The other prayed for a child and god led her straight to you.
And more you ask me – through your tears.
The age old question – hereditary or environment, which are you the
product of?
Neither my child, neither, just two different kinds of love.¹

Adoption is one of the few concepts which have undergone a
radical change in the course of transit from primitive to modern age.
Like most other social institutions, adoption is essentially a product
of historical and evolutionary process. Diverse economic needs and
social demands of the times have gone into shaping it through the
successive ages. A study through times provides an interesting view
of its changing concept, form, objectives and purposes. It is but
natural that as the human thought progresses, the concept and
organizations of the social institutions advance and get refined.

By adoption an artificial but permanent relationship of parent
and child is created which was not in existence earlier. Adoption,
raises a presumption of factitious birth of the child in the adopter’s

family. In the ancient civilization, adoption was resorted to increase the strength of the male members of the family to protect oneself from the enemy and wild animals. With the progress of the civilization, adoption came to be considered as an important mechanism for the care of children on permanent basis, away from or in substitution of care by natural parents. Adoption may be distinguished from foster care which is nominal and temporary care as opposed to permanent parentage.

Adoption, thus, means taking the child of another person as one's own child and treating him for all intents and purposes as his/her natural child. Under Hindu law, adoption is the taking of a child of another as a substitution for the failure of his own natural children of the same sex so as to legally establish a parent-child relationship between persons not so related by birth.

Institution of adoption in one form or the other is prevalent in almost all the legal systems of the world. The roots of the institution are traceable into earliest historical times. Notwithstanding the recording of stray cases of adoptions in earlier civilization, Greek and Roman practices form the first examples of persistent use of adoptions. Some authors trace the origin of adoption in India to the practice and principle of slavery-survival of an archaic institution of human bondage of the weak by the powerful. Objectives and purposes underlying earlier adoptions differ substantially from those of modern times. Continuity of male line in a particular family was the main objective of the ancient adoptions. The person adopted invariably was male and often adult, whereas contemporary adoptions commonly involve infants of either sex. In addition, the welfare of the adopter in this world and the next was the primary concern, little attention was paid to the welfare of the one adopted.

In India the origin of adoption can be traced to the principle of slavery-survival of an archaic institution. Adoption though bearing
resemblance with certain aspect of slavery was not slavery in the real sense. In the ancient times, man like the animal could be brought and sold, given and accepted. The father had complete dominion over his children as on his slaves. Although father could sell his children as slaves, yet most of the slaves were either captured in war or criminals condemned to slavery.

The desire to have a child is innate in all human beings. In the absence of natural off spring from wedlock, people resorted to other artificial methods to fulfil this desired end. With the increase in the importance of the son and to save the family from disruption, it became necessary to bring into the family, foreign members who would carry on the tradition of the family. This led the people in ancient times to buy slaves freely and maintaining them at the cost of the patriarch. It was, therefore, natural that artificial relations of consanguinity be created for the welfare of the family. This seems to have been the origin of adoption which was nothing but a fictious creation of blood relationship. The observance of the religious ceremonies mentioned as additional formalities was the point of distinction between adoption and slavery. After the abolition of slavery, institution of adoption continued to exist as it had acquired a novel aspect.

The institution of adoption was in existence even in pre-vedic society though it was not favoured and welcomed during the Vedic age. During Vedic age, a low rank was assigned to the adopted son as compared to the other secondary sons recognised at that time. The practice of adoption was not often resorted to on the failure of male offspring during that period. It was later, during the Shastric times, that adoption really developed to attain respectability and became popular among the people.

In Hindu Law the law of adoption is derived from a few texts and a metaphor. The text are those of Manu, Vasistha, Baudhayana,
Saunaka and Sakala. The metaphor is that of Saunaka—the boy to be adopted must bear the reflection of a son. The texts ordain that the boy must be of the same caste as adopter and be given in times of distress and the gift of the boy is confirmed with a libation of water. The gift of an only son was prohibited.

The Hindu society appears to have made considerable progress in civilization when our sages have expressed their opinion regarding parents power to give a son in adoption. Though these texts indicate unlimited powers in both the parents to give a son in adoption, yet mother’s rights in this respect are limited by a different principle of early law.

In India, after the Gupta empire and especially in the Mohammedan period, adoption became even more important. During the period of commentaries the adopted son was assigned the same higher position in the adoptive family as was accorded by Manu while Yajnavalkya Smriti assigns seventh rank to the adopted son and does not treat him as an heir to the adopted father’s collaterals. Among the primitive races, institution of adoption was not peculiar to Hinduism but owes its origin to the social communism. All the European races have passed through that stage. In India, of course, it has become an integral part of Hindu Personal law. A son could be adopted both during Mohammedan period and British period in India. And practice of adoption was prevalent not only amongst Hindus but also amongst Indian Muslims—in the British period. Interestingly, an Indian ruler during this period could adopt a son only with the permission of British rulers in India.

Adoption of daughters was not permissible under the Hindu law unless allowed by custom. A custom is prevalent among dancing girls of Madras, Pondichery and Western India to adopt girls to follow their adoptive mother’s profession. The girls so adopted succeeded to adoptive mother’s property. No particular ceremonies were
necessary, only recognition was sufficient. In the absence of special custom, only one girl could be adopted. But the adoption of a daughter by such dancing girls or naikins for the purpose of prostitution was held to be illegal and opposed to public policy. This decision was applicable both to Hindus and Muslims alike.

Adoption played a very different role in ancient civilization as in Babylonian, Chinese and Roman. There, its primary function was to ensure the continuity of the family. Roman law permitted adoption only to provide an heir to adult adopters past the child bearing age. In ancient Greece and Rome, and in certain later cultures as well, the purposes served by adoption differed substantially from those emphasized in modern times. Continuity of the male line in the particular family was the main goal of these ancient adoptions. The importance of the male heir stemmed from political, religious or economic considerations depending on the particular society. The person adopted invariably was male and often adult whereas contemporary adoptions commonly involve infants of either sex. In addition, the welfare of the adopter in this world and the next was the primary concern; little attention was paid to the welfare of the one adopted. In contrast, the contemporary laws and practices of adoption aim at promoting child-welfare. While the desire to continue a family line or to secure rights to inheritance are still among the motives for adoption, interest now centres more on the creation of parent-child relationship between a married couple and a young child. This attitude developed primarily in the period following World War-I ravages when a vast number of children were left homeless and orphans alongside an increase in illegitimate births. Adoption had popular appeal as a way to provide homes for these children.

Of the ancient system of law, only the Roman law and the Hindu law provided for an organised institution of adoption. Under both the legal systems, the principle objective of adoption was to
provide a child to a childless person. An artificial relationship of parent and child or father and son was created by adoption.

Though the Hindu law emphasized the religious aspect, adoption in practice bore more of secular character than of religious one. The earlier sages admitted that religious motive for adoption never altogether excluded the secular motive. Adoption is equally prevalent among tribes who have not come under the Brahmanical influence and is practised without any religious motive. So in Punjab adoption is common among Jats and Sikhs, but with them, it is simply the appointment of an heir. Similarly in Western India, adoption is prevalent amongst certain castes though no religious significance is attached to it. Secular motives were predominant amongst Jains who repudiate the Brahminical doctrine of obsequial ceremonies and the offering of oblations for the salvation of the soul of the deceased. Mere gift and acceptance are considered sufficient to constitute adoption amongst vast majority of Hindus. They are secular acts though the son adopted is expected to perform certain religious rites as well. The religious motive has since long been weakened. No religious purpose was served in Bombay where a man was permitted to adopt one older than himself or a married man with children. Generally, the husband authorises his wife to adopt a son after his death for purely secular motives such as to continue his line, to inherit his property, keep up his name and to act as a shield for her protection against the reversioners.

However, through all the centuries which have seen the spread of Brahminical influence and among all the classes which have come under its away, a peculiar religious significance was attached to the son. The Code of Manu contains many instances of this religious doctrine. The son was so essential to the spiritual welfare of the soul of his immediate ancestors that an extensive class of subsidiary sons were admitted to the family, all of whom could perform the necessary
ceremonies, though only some of them were allowed full rights of
inheritance. Of these, only the adopted son is now recognised.

Accepting the religious doctrine involved in an adoption, the
Privy Council in its earlier decisions observed that the validity of an
adoption is to be determined by spiritual rather than temporal
consideration. It further said that the devolution of property, though
recognised as the inherent right of the son, is altogether a secondary
consideration. The Court held that the object of adoption is two-fold:
(i) to secure the performance of the funeral rites of the person to
whom the adoption is made, and (ii) to preserve the continuance of
his lineage.\(^2\) The object of adoption is thus both religious as well as
secular even though, the Hindu law of adoption was mainly founded
on the religious belief that a son is absolutely essential for spiritual
salvation.

The adoption law prevailing prior to 1956 was the law laid
down by Smritikaras as modified by custom and usage and as
interpreted and applied by judicial decisions. The old law of adoption
has been codified to remove and uncertainties in 1956. A uniform
Hindu law of adoption was substituted in place of varying Law of
adoption as prevalent in different parts of India. It sought to alter the
existing law to a great extent. The Hindu Adoptions and Maintenance
Act is silent about the object of adoption. The religious motive which
was earlier so pronounced finds no place in the Act. Nevertheless,
the main objective of adoption continues to provide a child to a
childless person. Of course, in modern law, adoption is increasingly
being used for providing homes to homeless children and for
providing a richer family life. Welfare of the child is one of the
primary considerations in the new trend.

India, the Union is a socialist, Secular and Democratic
Republic. The Indian constitution envisages a parliamentary form of

government and is federal in nature with some unitary features. The size and population of some of India’s largest states is comparable to some countries in Europe, Africa, Latin America or Asia. India continues to wage its battle against poverty, and its attendant, such as, high mortality rates, malnutrition and illiteracy, the greatest victims of which are children and women. India has 400 million children below the age of eighteen years, the largest child population in the world. The importance of child has now widely been recognized in the Convention on the Rights of Child, 1989 also. The Government of India submitted its first country Report on the Convention on the Rights of the Child in February 1997 which stated that:

“Unless the life of the child in the family and community improves, all development efforts would be meaningless. There is, therefore, a need to raise awareness and create an ethos of respect for the rights of the child in society to meet his or her basic development needs. Advocacy and social mobilization are two crucial processes which are being emphasized to achieve this end. With India’s ratification of the UN Convention on the Rights of the Child, the ‘rights approach’ to child development is gradually gaining importance and will henceforth form the basis of Government’s strategy towards child development.”

There has been a paradigm shift in approaches towards children. The shift in focus is from the welfare to the developmental approach.

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4 Ibid.
There is a need for not only reviewing the existing law but making the legal provisions in the context of adoption of all needy children. The Hindu Adoptions and Maintenance Act, 1956 is however the first substantive enactment which has sought to introduce changes in the law of adoption and recognizing the sanctity of customs and usages which have been continuously in usage to have the force for law, provided it is not opposed to public policy.

The Hindu adoption and Maintenance Act 1956 has introduced remarkable changes the first and the foremost change introduced by the adoption law is the equality of treatment of both boys and girls in the matter of adoption. It has reinforced the equality of status between men and women in the matter of adoption – a concept which had been introduced through the Hindu Succession Act 1956. A woman can now adopt a child as the law gave her the right to do so. Even a widow can adopt a son or a daughter in her own right. The religion and the caste which permeated the institution of adoption do not any longer find place in the Act of 1956 which has done away with the old restrictions that an adoptee must belong to the same religion and the same caste as the adoptive father. Thus the concept of family lineage has been given up. Anyone who is a Hindu within the meaning of the Act can be adopted.
The religious disqualifications which operated as a disability against the valid adoption has been done away and it is now open to any male or female Hindu to take a child in adoption if he is of sound mind and a minor. The Act also lays stress on the maturity of the adoptive parents – physical and mental while denying minors the legal right to adopt, the right which existed prior to introduction of the new Hindu law.

The redeeming feature of Hindu law on Adoptions is that if the child is validly adopted under the law, he is treated to be a child of the adopted family and is also entitled to inherit property which is vested in the adoptee prior to the adoption and would continue to vest in him. The Act does not divest any person of any estate which had vested in him prior to his adoption.

The Act lays certain limitations, any Hindu who is of a sound mind and has attained the age of majority has the capacity to adopt. But this does not mean one has right to adopt also. One can adopt only if the other conditions laid down in the Act has been followed viz; a Hindu can adopt a son only when he does not have a son/son’s son and son’s son’s son.

He/she can adopt a daughter only when he/she does not have a daughter or his son’s daughter.

A married woman cannot adopt during the subsistence of the marriage. She can adopt only when her husband has completely and finally renounced the world, or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind.

A husband can adopt only with the consent of his wife but a wife cannot adopt even with the consent of her husband. But the unmarried female Hindu can adopt boy or a girl or both.

The Section 17 of the Act prohibits giving or receiving of any reward of any payment in consideration of adoption or any
agreement to give or receive any such payment or reward. It does not recognize the basic truth that such payment may sometime, be absolutely necessary in the interest of maintaining the health, safety and well-being of the child being adopted, particularly when the parents giving away the child in adoption and the adopted parents are poor. It is true that adoption, whether within the country of outside should not be looked upon as a trade or transaction to benefit the parents but as an institutionalized arrangement, legally recognized to promote the health, safety and well-being of the children being so adopted. The Supreme Court also observed that it would not be fair to suggest that the social or the child welfare agency that is looking after the child should not be entitled to receive any amount from the adoptive parents, when the maintenance and medical expenses on the child are actually incurred by the agency. This was clarified later in the Supreme Court judgement.

While a Hindu male cannot have more than one adopted son or daughter, a female Hindu may have plurality of adopted son or daughter. This is likely to lead to anomalous situations which may result in unfortunate social and economic consequences.

The Supreme Court in Sawan Ram v. Kalawati has reiterated the Doctrine of relating back whereas the Act nowhere deals with such a provision. It is humbly submitted that the Supreme Court has erred in doing so. The Supreme Court has observed "It is well recognized that after a female is married she belongs to the family of her husband. The adopted child must also, therefore, belong to the same family. On adoption by a Hindu female who has been married, the adopted son, in fact be the adopted son of her husband also".

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8 AIR 1967 SC 1761.
However, the above rationale is not fully supported by Section 12 of the Act which deals with the effects of adoption and implies that from the date of the adoption all the ties of the child in the family of his or her birth shall deem to have been served and replaced by those created by the adoption in the adopted family. However, the ties of the biological parents are too deep, natural and intense to be severed by law and while adoption of the child by the adoptive parents may be fulfilling, the basic desire to adopt a child for social and religious purposes cannot be a substitute for the love, care and solitude of the biological parents.

Rather bare reading of Sections 11 and 12 of the Hindu Adoptions and Maintenance Act 1956 makes it clear that the adoption is parent-oriented and certainly not child-oriented. In other words, in the scheme of things, the desire of the parents to adopt for fulfilling certain social and religious obligations was far more sacrosanct and over-riding than the urges, needs and the aspirations of the child who is abandoned, neglected or is a destitute. The extent to which adoption provides an outlet for the full, free and uninhibited evolution and the growth of the personality of the child is being adopted was of very little and of no consequence. Thus the value of the child has never been the central point in the Adoption Act as the Act does not lay down specifically the purpose of the adoption.

Under the Muslim Law the mother has preferential claim to the custody of her minor children. Between the father and the mother, the mother has the right over the female child till she reaches puberty. If the minor is less than four years, in the absence of the mother other female relatives should have the custody of the female child. Thus in regard to the Muslim children, there is no concept such as the State becoming the ward of a destitute of an orphan
child. It is someone or the other in the extended family who has to take the responsibility for the care and upbringing of the child.

Although the Hindu Minority and Guardianship Act, 1956 applies only to the Hindus, yet the Guardianship and Wards Act 1890 is applicable to the whole of the country except the State of Jammu & Kashmir. Under the Act, the guardianship is entrusted to a person for care of the minor or his property or both. Minor means a person as defined in the India Majority Act, 1875. Ward means minor person or property or both, where there is no guardian.

An application has to be made to the court under the Code of Civil Procedure intimating the name, sex, age and other particulars of the property (if applicable), his relations etc. It should be accompanied by a declaration of willingness of proposed guardian to act as such supported by an affidavit.

While considering the matter, the court should keep in mind the welfare of the minor in regard to his age, sex and religion. The court fixes the date for hearing as also evidence for the case under the civil procedure. The Act also lays down duties of the guardian who is charged with the custody of the ward who must look to support, health, education and such other matters as the law, to which the ward is subjected, requires.

Until the Supreme Court Judgement of 1984, there were no clearcut guidelines for inter-country adoption. There existed only the Guardians and Wards Act of 1890 under which foreigners and non-Hindus could be appointed guardians of the adopted child.

The Guardians and Wards Act contemplates two kinds of guardians. First, guardians of a person of the minor and second, guardian of the property of the minor. A person can be appointed as the guardian of the person of the minor as well as the property. The

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Act deals mainly with the appointment of the guardians and their duties, rights and liabilities.

The Guardians and Wards Act 1890 is generally applicable to members of all religions, castes and communities. This Act does not take away the rights of a person belonging to other religions, as the personal law or statutory law governing those religions provide for what has been stated in this Act. In case those laws, personal or statutory are silent on any issue, the Guardians and Wards Act will be applicable to them.

The Act contains a narration of the rights, liabilities and duties cast on the guardians while dealing with the person and/or property of the minor. The relationship of the guardian with the ward is fiduciary in nature. The guardian should not make any profit or personal gain out of this relationship. This relationship and the duty thereunder extends to and affects purchases by the guardian of the property of the minor immediately or soon after the ward has ceased to be a minor and generally all transactions between them while the influence of the guardian still lasts are prohibited. The law further requires the guardian to exercise all care as a man of ordinary prudence while dealing with the property of the minor. Such care is compared to the one, the guardian would have exercised while dealing with his own property, such a care is expected to be exercised by the guardian for realization, protection and benefit of the property of the minor. However, the law provides a check on the guardian by prohibiting him from mortgaging, changing or transferring by sale, gift, exchange or otherwise any immovable property of the minor/ward or by leasing any property or part belonging to the minor beyond a specified term, without obtaining the prior permission of the court.

Taking the other aspect of this Act i.e. the exercise of control of the court over the minor, this Act further provides for the custody of
the minor being restored to the guardian or such other person as it may deem fit, the other conditions laid down in this Act being satisfied. The mere fact that ward/minor has been removed from or has left the custody of the guardian does not automatically terminate the guardianship of the previous guardian as long as such removal of the minor is against the will of the guardian. The Act further deals with the termination of the guardianship by removal, discharge or cessation of the authority of the guardian. It may be pointed out that the Guardianship and Wards Act only provides for foster care but does not create any such permanent rights in favour of the minor. It was to overcome this loophole that the Adoption of Children’s Bill was drafted.

In the absence of any adoption law for the communities other than Hindus such as Muslims, Christians, Zoroastrians and Jews, there is much to be desired in terms of the legal process of adoption for children in these communities. It is humbly submitted that either children who are in institutions are treated as Hindu or they are given for adoption under the Guardians and Wards Act but this does not complete the legal process of adoption. The child is given only under the guardianship of other parents. This is equally true in the process of inter-country adoption which proceeds guardianship under the Indian Law followed by adoption under the law of the country to which the child is taken. However, in the country to which the child is taken under the guardianship may face problems, if there is no law on adoption prevalent in that country.

Thus, the rules and regulations on adoption are such which may create considerable problems. Moreover, the tendency for making money from the adoptive foreign parents by the Indian parents or child welfare agencies cannot be ruled out. The children who are taken under guardianship may or may not be taken for being adopted; some of the children may be used as free labour or
abused for a variety of purposes. It was in this context, that public interest litigation was initiated by Mr. Lakshmi Kant Pandey before the Supreme Court of India.

In *Laxmikant Pandey's case*\(^{10}\) and other respondents, the Supreme court of India reviewed the legislation on adoption, took note of the gaps in it and the need to facilitate foreign parents who intend to adopt Indian children. A bench comprising Mr. Chief Justice P.N. Bhagwati, Justice R.S. Pathak and Justice Amarendra Nath Sen declared their famous judgement on 6 February 1984, which became the basis of laying down the legal procedure for adoption of children of communities other than Hindus and children adopted under inter-country adoption. This was followed by judgements on seven petitions filed by placement agencies, scrutinizing agencies and individuals. In these judgements, not only matters regarding adoption of children were clarified but new dimensions were added to the procedure of adoption of children of communities other than Hindus and children adopted by parents of other nationalities. Thus, the Supreme Court have really fulfilled one of their innovative obligations to make laws which the legislature failed to do so, because of political pressure.

In India a Hindu has legal and social capacity to take a child in adoption under the provisions of the Hindu Adoptions and Maintenance Act 1956. the non-Hindu communities have no right to take a child in adoption as despite several attempts, there is no universal adoption law enacted for all communities. The alternative left for members of non-Hindu communities is that they can take a child under their care and custody after being appointed guardians of the child under the provisions of guardians and Wards Act, 1890.

Thus, there are no legal provisions for non-Hindus i.e. Muslims, Christians, Zoroastrians and Jews to adopt children. This

\(^{10}\) Ibid.
also applies to adoption of Indian children by foreign parents. The supreme Court, in Lakshmikant Pandey's case laid down procedure for adoption of such children.

The Indian non-Hindu parents are given only rights to guardianship under the Guardian and Wards Act 1890. Therefore, such children without legal adoption, are left high and dry in as much as they do not become the beneficiary of legal rights of children in a family in which they are placed. As a matter of fact, their position is little better than foster children, except that they have some legality under the provisions of the Guardianship and Wards Act 1890.

The Act provides the procedure for guardianship proceedings. The district Court having jurisdiction under clause (a) sub-Section 5 of section 4 of the Act has been empowered under Section 7, for appointing guardian of a minor, provided the Court is satisfied that such appointment is necessary for the welfare of the minor. The paramount considerations by the concerned court in the matter of appointment of guardian of the minor are the welfare and best interests of the minor in a broader sense-material and physical well-being, education, up-bringing, happiness and moral welfare.

In the case of foreign nationals, the children are placed under the guardianship of the foreign national. Thereafter they are supposed to be adopted by the foreign nationals in their country in accordance with the provisions of law on adoption in that country. The problem, however, arises where there are no laws of adoption in that country. Here again, the child is left without any legal rights as a member of the family of his/her guardians unlike an adopted child gets under the law. Therefore, there is a lacune which has to be rectified in the larger interests' of such children who cannot be adopted.

11 Sections 5 to 19 Guardian and Wards Act, 1890.
The placement agencies recognized by the Government for placing children under guardianship and adoption make application under Section 7 of the said Act before the District Court having jurisdiction on behalf of non-Hindu applicant for the purpose of appointment of the applicant(s) as guardian (and not joint guardian) of the minor. The ‘form of application’ to be moved before the Court having jurisdiction for appointment of guardian of a minor has been provided under Section 10 of the Act. Sub-section 3 of section 18 says that the application for appointment of guardian must be accompanied by a declaration of willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses. It is also provided under Section 17 that no person shall be appointed or declared a guardian against his will. As such, the declaration of willingness has been made as a mandatory requirement to be complied with for the purpose of making the application as a bonafide.

The Court issues notices of the application to the parents of the minor the person(s) having custody of the person and property of the minor and proposed guardian in pursuance of Section 11 of the said Act.

Thereafter, taking into consideration points and facts placed before the Court action is taken in accordance with the Section 17 of the said Act which provides that the welfare of the minor of paramount consideration in appointing a guardian as well as for the consideration of the preference of the minor. If the minor is old enough to give his preference to express his desire or wish for his being placed under the guardianship of the proposed guardian and the said appointment is not in violation of Sub-section 3 of Section 7 of the said Act, and also is not prohibited under Section 19, the Court being satisfied the contents of application and other material,
evidence placed before the Court may appoint or declare the petition as guardian and or joint guardian of the minor.

Children who are given under guardianship of non-Hindus have no family linkage including religion, property inheritance etc. in the family of their guardians so appointed or declared by the Court, because of non-existence of an adoption law non-Hindus, although such appointment definitely provides maintenance, education and family environment to unfortunate, destitute, abandoned, neglected and unwanted children in a family of their guardian.

In December 2000, the Parliament in view of its international obligations passed the Juvenile Justice (Care and Protection) Act, 2000, to protect and safeguard the interests and welfare of such children and to give effect to the minimum standards. But the amendment in the Juvenile Justice Act, the law makers have tried to spell out the role of State as facilitator rather than a doer. The very fact that the Act has been amended demonstrates the willingness of governmental machinery to ensure that children in difficult circumstances are the responsibility of everyone and by amending the same, it has been tried to give a new face to the Juvenile Justice System in India. The new Act has been renewed with spirit to show greater sensitivity to the needs and rights of a child. A recent amendment has been introduced named as the Juvenile Justice (Care and Protection) Amendment Act, 2006 with the objective to make a call for adoption of child-friendly approach in adjudication and disposition of matters. The amendment has further widened the ambit of the definition of child in need of care and protection by including 'abandoned and surrendered children' and 'a juvenile found begging, a street child or a working child'.


The Hindu Adoptions and Maintenance Act, 1956 reformed the old law filling some obvious lacunae existing therein. Alongwith a son, a daughter can also now be adopted under this Act. It further permits Hindu women to adopt in their own right. A Hindu male cannot adopt save with the consent of his wife. But a certain degree of sex discrimination is still evident in the statutory law. There is a unique trend in India to adopt sons. Daughters are adopted rarely. This trend has developed because of religious thinking and higher position of the son in the male dominated society. The statutory law hardly took any steps to undo this male bias. However, barring a few such welcome changes, it will not be wrong to say that the Hindu Adoptions and Maintenance Act by and large, continues the old practices and processes concerning adoption in a modified form. The Act failed to take any modern and advanced step for protection of child’s interest. For instance, it does not incorporate even the elementary process involving an enquiry into the family background of the adoptive parents aimed at testing their suitability or their ability to look after the child. It has also overlooked the inability of the mother of an illegitimate child to take him in adoption. It retains the old, anachronistic system of extra judicial adoptions. Even registration of adoption has not been made compulsory. Thus, the Hindu law of adoption continues to be archaic and incapable of protecting the interests of the child. Adoption in India is confined almost exclusively amongst the relatives of the child. This Act does not contain any provision permitting a foreigner to adopt a Hindu child from India. The Act permits only Hindus to adopt a son or a daughter who should also be a Hindu.

Adoption in India is recognised as such by the Hindu law only and not by the Mohammedan, Christian or Parsee law. Even so, these religious communities are engaged in adopting children. Absence of any appropriate legal provisions make them resort to the
Guardians and Wards Act, 1890 under which only a guardian of the child can be appointed. But guardianship provides none of the advantages of adoption. The natural parents can claim their child back at any moment from the adopter. There is no security to the child as well. The adopter can throw the child out at any moment, as in the absence of recognized adoption system; they are at best only guardians. Any agreement made by the adopter is not binding on him or her regarding his property. Future of the children of these communities thus stands jeopardized in the wake of inadequate law of adoption.

A new social phenomenon having long-term repercussions in the adoption area has developed in India and some South-East Asian Countries. More and more couples in advanced countries are looking for children from less advanced countries even where they have their own children. There is a dearth of suitable, destitute and abandoned children in their own country available for adoption. Due to financial and administrative constraints, the less advanced and economically handicapped nations fail to provide adequate protection to their destitute and abandoned children and to that extent, some sections of society support adoption of such children by foreigners. But the inter-country adoptions carry in its train certain peculiar problems which are absent in purely national adoptions.

In India, conditions of poverty and related social problems, scanty national resources and economic pressures on individuals for survival often result in the neglect of children. They are exploited as slave labour and prostitution in cities. Whilst the welfare agencies cannot bear the cost for the vast number of abandoned children, local adoption system is unable to take care of it due to a number of other factors. Under these conditions one wonders if overseas adoptions is not one of the better alternative. But the opinions sharply differ in this regard and much thought and deliberation is
essential before formulating a sound policy in the field. Current trends and social concerns in this respect, however, oblige the nation to give due importance to this aspect if and when comprehensive legislation is undertaken.

As the position stands at present, there is no statutory law in India providing for adoption of a child by foreign parents. Neither does any other national legislation lay down the procedure to be followed in such a case. Resort is had to the provisions of the Guardians and Wards Act, 1890 for the purpose of facilitating such adoption. This Act only provides for appointment of guardian of the person or property of the minor. The foreigners wishing to adopt an Indian child apply to the court having jurisdiction over child's domicile for leave to be appointed guardians and to take the child out of country for the purpose of adoption in their own country according to the laws applicable there.

As a commitment towards children, the government of India has set up the Department of Women and Child Development in 1985. The creation of a separate Department was a landmark step in bringing Child Rights to the centre-stage. Another positive step in this regard was accession to the Rights of Child in 1992. It is noteworthy that in the last three decades several major policies and action plans have been announced for improving the status of children. But still the commitment undertaken by India requires that legislative administrative and other measures follow to implement specific policies and a review and revision of all pertaining laws to the children. It is humbly submitted that the following recommendations may be looked at in view of providing JUSTICE to the child.

- While enacting a uniform adoption law or in remodeling its existing laws, the country should avoid imposing stringent conditions of domicile, residence or nationality as essential
qualifications for adopters as such restrictions are likely to hamper the already bleak chances of finding a suitable family life for children.

- The applicant for adoption may be a single person or a married couple and considering the change in social and moral issues in Indian society Hetrosexual i.e. Gay and Lesbian couples should be allowed to adopt.

- Religion of the adopter should in no case come in the way of adoption. Preference for adoption may, however, be given to the adopter of the same religion as the adoptee. A number of foreign legal systems avoid putting any restriction on the ground of race or religion.

- An upper age limit of 45 years for adopters in India may be prescribed with the Court's discretion to relax this condition in appropriate cases. Such a condition will be instrumental in protecting the interests and advancing the welfare of the child (adoptee).

- The child to be adopted must be a minor (under 18 years or age). In fact, it is desirable to fix the age at adoption as low as 4 or 5 years since younger a child is, easier will be his integration in the new family. Furthermore, there should be sufficient age difference between the child and the adopter so as to give a natural semblance to their relationship. Almost all the foreign legal systems prescribe some age difference between the adopter and the adoptee irrespective of their sex. The court may be vested with the power to depart from these age limits in suitable cases.

- The Indian position regarding marital status of the child appears to be satisfactory and there are no social compulsions dictating any change in the existing law on this point.
- Adoption of more than one child should be permitted even where any child, either natural born or adopted, of the adoptive parents is in existence. Strict standards and means of verification, however, need to be established in such cases to ensure that the adoption is for the welfare of the child/children. If the child is old enough, keeping in view his age and understanding the opinion of the child must be ascertained before adoption.

- The Indian people have an exceptionally low motivation for adopting handicapped children. Therefore, there is a need to create public awareness favouring adoption of handicapped children as also abandoned and female children. Necessary incentives in this regard may be provided through diverse legal and administrative measures such as tax benefits, housing facilities, free or subsidized education, medical support, etc.

- Children in India must not be permitted to be adopted by private agreement except when the adoption takes place among relatives. All other adoptions should be channeled through the court. The District Court ought to be vested with jurisdiction to conduct adoption proceedings as is the case in matrimonial causes in India. An adoption agency or local authority to be appointed by the government should attend to the various formalities in the Court. Unrecognized child/social welfare agencies must be unequivocally banned from functioning both in the case of intra-country and inter-country adoptions. A number of such agencies at present functioning totally unmonitered. Hospitals and nursing homes should also be debarred from giving children in adoption whether within or outside the country. Severe penalty needs to be provided for violation of this provision. Besides, the law vis-a-vis Indian adoptions (in-country adoptions) must be brought
in line with the law pertaining to inter-country adoptions as laid down by the Supreme Court of India requiring mandatory scrutiny of each case and providing for social investigation/home study report.

- Till such time that the required number of child/social welfare agencies respond and start working in the field, the State or the Central government must recognize at least one such agency in each State/Union Territory for purposes of association in the adoption process. Proper scrutiny of the case should be a prerequisite before these and other placement agencies are permitted to proceed in the matter. A common scrutiny agency could be established for two or more placement agencies. In the matter of Inter-state transfer of children between branches of an organization/agency, each branch should be separately recognized and be required to act as a child welfare centre in its own right and not merely be a reception centre or a transit camp for children.

- There should invariably be proper investigation of all the circumstances surrounding adoption to be conducted either through an adoption agency, local authority or social worker appointed by the court. Notice of adoption must be given to all those persons whose consent is required. After observing the proper procedure, the court may pass the adoption order, if that is in the interest and for the welfare of the child. If need be, the court can pass interlocutory orders before issuing final decree of adoption. Appeal may also be provided from refusal or grant of the adoption order.

- Adoption proceedings in India ought to be held incamera as is being done in other family law proceedings of divorce, judicial separation, restitution of conjugal rights, etc. Such adoption proceedings should not be printed or published save with the
permission of the court of law except the judgments of the High Courts and Supreme Court.

- The court should not pass an adoption order without the consent or the child's: (i) Natural parents (or mother if the child be illegitimate), (ii) guardian of the child (in case the parents are dead or their consent is dispensed with). In addition to the already existing provisions, Indian law may, however, provide for dispensing with the consent of the parents or guardian when the child is neglected, abandoned, ill-treated, exploited or exposed to pernicious influences. In this age of equality, neither father nor mother should have preferential right to give/take the child in adoption. The natural parents or guardian should have power to revoke the consent given for adoption till adoption order is passed.

- The present legal position under the Hindu adoptions and Maintenance Act is that an adoption when once validly made cannot be revoked under any circumstances, nor can there be readoption of an already adopted child. These provisions are rather inflexible and can act harshly in certain cases. Adoption should be made revocable in exceptional circumstances even though the courts only. Child's readoption may be allowed under certain circumstances, particularly where the adopting parents have died or are unable to support the adopted child. So long as a comprehensive and satisfactory adoption law is not modelled and enacted, the Hindu Adoptions and Maintenance Act after appropriate changes may be applied to other religious communities in India, even if as an enabling law. It of course goes without saying that any reform or formulation of law has to take into account not only the country's prevailing social and economic conditions but has to confirm to the ethos and aspirations of its people. In case a law
were to be drafted on the suggested lines, it is hoped that a sound foundation of the adoption institution can be laid in India.

Kofi A. Annan, the Secretary General of the UN rightly observed that,

“There is no trust more sacred than the one the world holds with children, there is no duty more important than ensuring their rights are respected and their welfare is protected.”13

In view of the above it cannot be overstated that the need of the hour is firstly great desirability of a uniform law of adoption so that in accordance with our constitutional mandate under Articles 14, 21 and 4414 of the constitution of India all communities are given an equal standing in the society and the children do not suffer and their interest is not abused. We should not let religious orthodoxy and sentiment rule our personal laws. It is the need of the hour to provide the destitute, homeless, unwanted children a home, thus a uniform personal code has to be adopted.

Secondly the Hindu adoption and maintenance Act 1956 itself needs amendments and a complete review so that the welfare of a minor in real terms becomes a much needed welfare legislation with strict implementation, so that when in future it is hopefully amended and an ‘Indian Law of Adoption’ comes into existence it would be such that it would meet the requirements of the society because children are the most important asset of a country, and it is they who will become tomorrow’s young men and will provide the human potential required for the country’s development.15 It is therefore

necessary that to-day’s child should be healthy, both physically and mentally, so that tomorrow he may prove to be an energetic and dynamic young man with an alert mind and is able to contribute his maximum to the national development. Thus, efforts to improve the well-being of children is not only humanitarian in content but is also a definite step towards the economic and social development of a country. In fact human resource development is more difficult and complex compared to the material management. So, it should be planned very carefully in order to get maximum return for the money invested by the government and thirdly a law on Inter-country adoptions is a must so that children are not misused, sold in the garb of adoption and child trafficking leading to horrendous kinds of child abuse – like child prostitution, sex abuse, child labour, and the worst kind of life one can imagine as has been highlighted in which the researcher has described the international scenario on child trafficking and the Adoption racket as it exists in India today. This needs to be annihilated to that we can truly feel that children constitute the most fundamental and valuable resource of any society and there is justice to the child as in the words of Rabindranath Tagore:

“Every child when born brings with the hope that god is not yet disappointed with man”.

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