CHAPTER - 4
POSITION OF HINDU WOMEN UNDER THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956
4.1. Introduction:

The Constitution of India guarantees gender equality in its preamble and through other various Constitutional provisions. Article 15 of the Constitution is more specific instance of right to equality which prohibits the state from making any discriminatory law against any citizen only on grounds of religion, race, caste, sex, place of birth or any of them. To uplift
the pitiable condition of Indian women, in fact, our forefathers enacted clause (3) of Article 15 which enable the state to make special provisions for women and children. Articles 14 and 16(4) of the Constitution of India intends to remove legal, social and economic inequalities to make equal opportunities available for all. In fact, Articles 14, 15, 16, 21, 38, 39 and 46 of Indian Constitution are specifically designed to give the life of poor, disadvantaged, disabled citizens meanings in the real terms of equality, socialism, liberty etc. Article 42 requires the state to make provisions for securing human conditions of work and maternity relief. Part IVA of the Constitution which was inserted into the Constitution by an Amendment Act of 1976 deals with Fundamental Duties. Article 51A (e) of Part IVA of the Constitution specifically renounces practices derogatory to the dignity of women. Apart from the Constitutional provisions, there are certain other legislations that were specifically passed for women. The Dowry Prohibition Act, 1961, prohibits receiving and giving dowry. Section 304B of Indian Penal Code (IPC) also deals with the offence of ‘dowry death’, for which minimum punishment is not less than seven years. Section 498A of IPC is about the crime of cruelty by the husband or the relatives of the husband. Section 113A of Indian Evidence Act (added by Criminal Law Amendment
Act, 1983) has been added to raise a presumption regarding abetment of suicide by a married woman. Again, enactment of the Protection of Women from Domestic Violence Act, 2005 is a bold step to protect women from any kind of abuse, like physical, mental, verbal, emotional, sexual and economical etc.\textsuperscript{85} It also includes in its ambit any harassment of women concerning dowry. Not only abusing or harassing a woman that is ‘victim’ but abusing any person relating to her is also within the broad concept of ‘Domestic Violence’. Laws like Immoral Traffic (Prevention) Act, 1956; the Commission of Sati (Prevention) Act, 1987; Indecent Representation of Women (Prohibition) Act, 1986 etc. protect women from crimes like rape, abduction, torture, sexual harassment, selling of girls for slavery or prostitution etc. The Child Marriage Restraint Act, 1929, has been enacted to protect women from the menace of early marriage by providing minimum age for marriage as eighteen years. There is the Medical Termination of Pregnancy Act, 1971; the Pre-Natal Diagnostic Techniques (Regulation and Prevention of misuse) Act, 1994 to save the lives of women. Also, in the arena of personal laws, there are: the Special Marriage Act, 1954; the Hindu Marriage Act, 1955; the Hindu Adoptions and Maintenance Act,

\textsuperscript{85} Section 3 of the Protection of Women from Domestic Violence Act, 2005.
1956; the Hindu Minority and Guardianship Act, 1956; the Hindu Succession (Amendment) Act, 2005; the Muslim Personal Law (Shariat) Application Act, 1937; the Muslim Women (Protection of Rights on Divorce) Act, 1986 etc and also various other enactments specially committed for the cause of women, like, the National Commission for Women Act, 1990; the Protection of Human Rights Act, 1993 (as amended by the Protection of Human Rights (Amendment) Act, 2006); the Juvenile Justice (Care and Protection of Children) Act, 2000 and amended Act of 2006; the Maternity Benefit Act, 1961; the Child Labour (Prohibition and Regulation) Act, 1990; the Payments of Wages Act, 1936; the Minimum Wages Act, 1950; the Equal Remuneration Act, 1976; the Bonded Labour System (Abolition) Act, 1979, the Factories Act, 1948 etc.

After the fact that our Constitutional provisions and other legislative enactments provides due protection to women, in Indian society, women’s suppression is deep rooted in the very fabric of tradition; religious doctrines and practices; within the educational and legal systems; within families etc. Discriminatory laws against women persist in every corner of the globe. In our societal traditions till now second class status is given to women and
girls in access as well as enjoyment of rights relating to education, marital rights, parental rights, inheritance and property rights etc.

4.2. Position of Women under different Personal Laws:

Although the Indian Constitution guarantees all citizens equal rights irrespective of gender and religion, but these rights do not extend to personal laws. In fact, still India does not have a Uniform Civil Code. In family matters, legal decisions are based on religious law. Modern Hindu law refers to one of the personal law systems of India along with similar systems for Muslims, Parsis, and Christians.

For example, Muslims in India are governed by the Muslim Personal Law (Shariat) Application Act of 1937. Marriage under the Muslim law is a contract with the right of polygamy available to a Muslim man. What is more? A Muslim woman cannot marry a non-Muslim whereas a Muslim man can do so. A husband has also a partial unilateral right of divorce. He can utter the word ‘talaq’ thrice even without stating the reasons and in the absence of his wife.\(^\text{86}\) After the coming into force of Dissolution of Muslim

Marriage Act, 1937, now, a Muslim woman is able to take divorce on various grounds such as, absence of husband, failure to perform marital obligations; impotency of husband; insanity; leprosy or venereal diseases; repudiation of marriage by wife; cruelty of husband and other grounds such as, Ila, Zihar, Khula, Mubarat and Tafweez which are recognized as valid under Muslim law.\textsuperscript{87} Under the Muslim law, the husband is liable to maintain his divorced wife till the period of ‘Iddat’ (‘Iddat’ is described as a period during which a woman is prohibited from marrying again after the dissolution of her first marriage) only and his liability to maintain the divorced wife terminates after this period.\textsuperscript{88} In the famous Shah Bano case it was held by our honourable Supreme Court that a Muslim husband having sufficient means must provide maintenance to his divorced wife who is unable to maintain herself.\textsuperscript{89}

Now, after the coming of Muslim Women (Protection of Rights on Divorce) Act, 1986, a divorced woman is entitled to claim reasonable maintenance from her former husband and the husband must do so within the period of

\textsuperscript{88} ibid, p. 152.
\textsuperscript{89} Shah Bano Begam v. Mohammad Ahmed Khan, AIR 1985 SC 945.
‘Iddat’ and his obligations are not confined to the period of ‘Iddat’. All obligations of maintenance however end with her remarriage.

Under Muslim law till today a mother is entitled only to the custody of the person of her minor child up to certain age, according to the sex of the child and in accordance with the different views of different sects of Muslim law. Mother is not the natural guardian. Mother, brother, uncle etc. are not entitled as of right to be the legal guardians of the property of the minor.

Discrimination against women is expressly evident from the treatment accorded to the Indian Christian women. Under Section 10 of the Indian Divorce Act (IDA) 1869, while a Christian man may be granted a divorce on the grounds of adultery, a woman is required to prove an additional marital offence like change in religion; a form of marriage with another woman; incestuous adultery; rape, sodomy or bestiality and bigamy with adultery. Ironically, Section 34 of the Act enabled the husband to make the adulterer and the wife as co-responsive in a petition for dissolution of marriage and claim damages from the adulterer and Section 35 enables even now to claim the costs of the litigation from the alleged adulterer, but there are no such

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90 Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986
similar provisions for the wife. Section 39 of the Act provided that when a Christian man filed a case of divorce on the ground of adultery and won the case then all the property of the woman automatically went to the husband. But in the similar situation woman did not get any property of the husband transferred to her. Also, the upper limit of maintenance (that is one-fifth of the property of the husband) fixed for the women was ridiculous in the present day soaring price context. After a long battle for reforms in Christian personal law ultimately pleasant amendments in the form of Indian Divorce (Amendment) Act, 2001 came. Now, aforesaid discriminatory provisions have been deleted to make a step forward in the direction of elimination of discrimination based on sex. Regarding custody and other parental rights, Christian law per se does not have any provision but the issues are well solved by the Indian Divorce Act, 1869. Section 41 of the IDA gives necessary powers to the court to make necessary orders regarding custody, maintenance and education of the minor children considering interest of the child to be paramount.

92 Section 36 of the Indian Divorce Act, 1869.
In the matter of inheritance and property rights Indian women are highly divided within themselves. Property rights of Indian woman depends on her religion; religious sect; her marital status; from which part of the country she belongs, whether she is a tribal or non-tribal woman and so on. Regarding property rights or rules of inheritance in Muslim law, till 1937, Muslims in our country were governed by customary law which was highly unjust and unfair. After the coming of Shariat Act, 1937, now Indian Muslims are governed in their personal matters by Muslim personal law instead of customary laws.

Now, the main principles of Islamic Inheritance law according to the Shariat Act, 1937 are that,

(i) the husband or wife are made an heir;

(ii) females and cognates are made competent to inherit;

(iii) parents and ascendants are given the right to inherit even when there are male descendants and

(iv) a female is entitled to have one half the share of a male. But till now, women are given half the share of a male. For example, if a daughter co-
exists with the son, or a sister with a brother, the female gets one share and
the male two shares.\textsuperscript{93}

Also, under Muslim law ‘Mahr’ (dower) ranks as a debt and a Muslim
widow is entitled along with the other creditors of her deceased husband to
have it satisfied out of his estate. She is not entitled to a charge on the
husband’s property unless there is an agreement. Thus, the principle of
equality in the matter of succession is yet to be recognized in the Muslim
law of inheritance. The laws of succession for Christians and Parsis are laid
down in the Indian Succession Act, 1925. According to Section 33 of the
said Act, property of a male Christian intestate shall devolve one-third to his
widow and remaining two-third shall go to his lineal descendants. But if he
has left no lineal descendant, but has left persons who are of kindred to him,
one-half of his property shall belong to his widow and the other half shall go
to those who are kindred to him. Again, if he has left none who are of
kindred to him, the whole of his property shall belong to his widow.

After independence of India, Shastric Hindu law was reformed and codified.

As a result a series of four major pieces of personal law legislations were


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passed in the year 1955-56: the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956. The Hindu Marriage Act which came into force on 18th May, 1955, amends and codifies the law relating to marriage among Hindus. After coming of the Marriage Laws (Amendment) Act in 1976, now, Hindu women has got a respectable and justified status at par with Hindu men. Now, inter caste marriage is permitted with monogamy a rule. Minimum age for bride and bridegroom has been prescribed with strict follow-up. The concept of divorce which was generally not known to the Shastric Hindu law has been considerably recognized today by way of judicial separation, declaration of nullity of marriage etc. Maintenance for wives and children has now been well recognized through the Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956.

After the Hindu Succession Act, 1956 and the Hindu Succession (Amendment) Act, 2005, now in a joint Hindu family, the daughter of a coparcener shall,
(a) by birth became a coparcener in her own right in the same manner as the son;

(b) have the same right and subject to same liabilities in respect of the said coparcenary property as that of a son.\textsuperscript{94}

Unlike old Shastric law and Hindu Minority and Guardianship Act, 1956, the Personal Laws (Amendment) Act, 2010, includes mother along with the father as a fit person to be appointed as guardian.

Now come to the question of adoption rights of Indian women, which is the central point of my discussion. There is no general law of adoption of children. As adoption is legal affiliation of a child it forms the subject matter of personal law. Muslims, Christians and Parsis have no adoption laws and they have to approach the court under the Guardians and Wards Act, 1890. Hindu are governed in the matter of adoption by the Hindu Adoptions and Maintenance Act, 1956. As personal laws of Muslims, Christians, and Parsis does not recognize adoption, they can only take child in ‘guardianship’ under the provisions of the Guardians and Wards Act, 1890 (GAWA).

Unlike the child adopted under the Hindu Adoptions and Maintenance Act (HAMA) 1956, GAWA only confers a guardian-ward relationship. The process makes the child a ward not an adopted child. They do not have any automatic inheritance rights, adoptive parents have to leave whatever they wish to bequeath to their children through a will which can be contested by any blood relative. The guardian and ward relationship comes to an end after the ward attaining the age of majority that is twenty-one. The Act does not confer the child the same status as a child born biologically to the family.

Due to the rigidities and restrictions governing personal laws regarding adoption, our Parliament has enacted the Juvenile Justice (Care and Protection of Children) Act, 2000, a legislation which is secular in nature and applicable to all Indian citizens. The Juvenile Justice Act (JJ Act), 2000, recognizes adoption as an important process in rehabilitation and social reintegration of children who are abandoned, orphaned, neglected or abused in their families or in institutions.

The JJ Act has been suitably amended in the form of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 to include in its
broad ambit the definition of the concept of ‘adoption’\(^95\) and the declaration of the legal status of the adopted child to be equal to that of a biological legitimate child. Under Section 41(6) of the JJ Act 2000, the court is empowered to allow a child to be given in adoption to the following persons:

1-A person irrespective of his/her marital status.

2-The parents to adopt a child of the same sex irrespective of the number of existing biological sons or daughters.

3-The childless couples.

Thus, unlike HAMA, JJ Act permits adoption of child to interested peoples irrespective of his/her religion and also a person can adopt any number of children of either sex. The Act recognizes the concept of single parent. A child as defined in the JJ Act is a person who has not completed eighteen years of age unlike under the HAMA, where ‘child’ is a person who has completed fifteen years.

\(^95\) The concept of ‘Adoption’ has been well defined in Section 2 (aa) of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, which is as follows: “Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship.”
Although the JJ Act definitely is an improvement over the pitiable situations arising due to lack of definite secular adoption laws in the very sense of Uniform Civil Code in our country, but the said Act is suffering from its inherent drawbacks. The Act recognizes adoption for children who are abandoned, orphaned, neglected or abused in their families or in institutions. The Act excludes from its purview those children who have been voluntarily relinquished by their biological parents. The Act is silent on the process of inter-country adoptions. There is no mention of minimum age difference which should be maintained between the adopted child and the prospective adopted parents or parent. In fact, JJ Act is suffering from major technical infirmities. The said Act has its origin in criminal jurisprudence and it incidentally deals with such civil matters like adoption of children. It hides in itself an adoption law with little details or we can say with no reflections on its implementation problems. Even there is no mention of the concept of ‘adoption’ as such in the statement of objectives of the Act. Again, the Act is in direct conflict with the existing legislation on adoption that is with the HAMA. No where the JJ Act says that it supersedes the HAMA and this abnormality can cause chaos in the field.
4.3. **Position of Hindu Women under the Hindu Adoptions and Maintenance Act, 1956 vis-à-vis Indian Constitution:**

Let us come to the central point of our discussion, that is, the adoption rights given to Hindu women under HAMA. Section 7 and Section 8 of the HAMA deals with capacity of persons who may lawfully take a son or daughter in adoption. Under Section 7 of the said Act, any male Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption of course with the consent of his wife or wives (if more than one wife living at the time of adoption) unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Under Section 8 of the said Act any female Hindu who is of sound mind, who is not minor; who is not married; or if married, whose marriage has been dissolved or whose husband is dead or 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, has capacity to take a son or daughter in adoption.
After comparing Section 7 of the HAMA with its Section 8, we find that there exists a wide gap between these sections which discriminates between a married Hindu male and a married Hindu female. Under Section 7 of the said Act, a major, sound-minded male Hindu has got an unconditional absolute right to adopt a child. If he is married, then there is a rider that for valid adoption to take place free consent of wife or wives (if more than one wife is living at the time of adoption) living at the time of adoption will be an essential condition precedent. This consent is not necessary if the wife has renounced the world and or Hinduism completely and finally or she has been declared by a court of competent jurisdiction to be of unsound mind.

After scanning Section 8 of the same Act, we will see a different picture. A major, sound-minded female Hindu can take a child in adoption only if she is unmarried; widow or divorcee. There is no such thing like a major, sound-minded married female Hindu can adopt a child with the free consent of her husband and also that this consent is not required if the husband has renounced the world or the Hindu faith or has been declared to be of unsound mind by a court having competent jurisdiction to do so (clause (c)
of the Section 8). We can cite here the famous *Brajendra Singh’s case*\(^{96}\) which projects some highly emotional and sensitive aspects of human life. In this case honourable Supreme Court observed that there was no dispute that Mishri Bai was a disabled lady living separately from her husband right from the day of her marriage and in fact had been looked after by Brajendra Singh whom she adopted. The court observed that all the evidence showed that husband and wife had been staying separately for a very long time and that Mishri Bai was living a life like a divorced woman. The court categorically declared that there was a conceptual and contextual difference between a divorced woman and one who was living the life like a divorced woman. Mishri Bai may have been living separately since the time of her marriage but there was no dissolution of marriage that is, divorce. Thus Mishri Bai did not have the capacity to adopt under HAMA. In a recent decision on 4\(^{th}\) September, 2006, it was held by the Kolkata High Court that during subsistence of a marriage a wife has no right to adopt but only to give consent in adoption process if taken by her husband. In this case

\(^{96}\) *Brajendra Singh v. State of M.P. AIR 2008 SC 1056.*
husband never took any initiative for decision to adopt. He was only present. So adoption made by the married lady was held invalid.  

Denial of this right to adopt a child to any married female Hindu (till the passing of the Personal Laws (Amendment) Act, 2010); it seems to me is a clear violation of Fundamental Rights guaranteed by our Constitution as well as the precious rights guaranteed by the Universal Declaration of Human Rights and other various international documents to which India is also a signatory.

Right from its Preamble, Indian Constitution provides as well as protects equal treatment to all its citizens. Article 14 of Indian Constitution ensures ‘equality before law’ and ‘equal protection of law’ to all its citizens as well as non-citizens. This Article which is the very foundation of Indian democracy outlaws discrimination in general way. The first concept, that is, ‘equality before law’ is somewhat a negative concept which ensures that there is no special privilege in favour of anyone whatever is his or her rank or condition. The second concept, ‘equal protection of law’ is positive in

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spirit. It guarantees application of the same laws alike and without discrimination to all persons similarly situated. Thus, the principle is, “that equals should not be treated unlike and unlikes should not be treated alike. Like should be treated alike.” 98 It is also true that Article 14 permits rational classification or reasonable classification of persons, objects and transactions by the legislature to achieve specific ends. Classification to be reasonable should fulfill the following two tests:

(1) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction; which distinguishes persons or things grouped together in the class from others left out of it.

(2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question. 99

But at the same time Article 14 forbids class legislation. Here, through Section 7 and Section 8 of the HAMA, unmarried females and unmarried males are not treated as different class but married males and married

females have been put on different platform. I do not find any reasonableness in this classification or any intelligible differentia which have a rational relation to the object sought to be achieved by the Act. Again, the very Section 8(c) violates spirit of Article 15 and Article 21 of our Constitution. Article 15 directs the state not to discriminate against a citizen on grounds only of religion, race, caste, sex, and place of birth or any one of them. Article 21 of Indian Constitution lays down that no person shall be deprived of his life or personal liberty except according to the procedure established by law. After the famous *Maneka Gandhi* ¹⁰⁰ case, Article 21 has proved to be multi-dimensional. It includes in its ambit right to live with human dignity and not mere survival or mere animal existence. It therefore includes all those aspects of life which can make a person’s life meaningful, complete and worth living. As observed by our honourable Supreme Court, ‘life’ means, “The right to live with human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilization which makes life worth living and that the expanded concept

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of life would mean the tradition, culture and heritage of the person concerned.”

Therefore, right to life or right to live with human dignity includes in itself right to make one’s own family. It seems to me highly unjust and unreasonable to deprive any person to make his or her family only on the ground of his or her marital status.

At the International level the Universal Declaration of Human Rights which was adopted by the General Assembly of United Nations on December 10, 1948 and to which India is also a signatory affirms in its Preamble, “faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women”.

Article 2 of the Declaration says that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Also, Article 3 and Article 22 of

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this great human rights document ensures ‘right to life and liberty’ and ‘right to social security’ respectively. Again, Convention on the Elimination of All Forms of Discrimination against Women, 1981 which is treated as the Magna Carta of women’s human rights defines the concept of ‘Discrimination’ in its Article 1 as, “discrimination against women in the present context means any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Article 16(f) of the Convention expressly ensures the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation to both men and women. Besides these documents there are very good numbers of international as well as regional commitments which provides as well as protects women’s human rights. There is Convention on the Political Rights of Women, 1952, Convention on the Nationality of Married Women, 1952; Convention and Recommendation on Consent to Marriage, Minimum age for Marriage and Registration of
Marriage, 1962; the Underground World (Women) Convention, 1935; the Night Work (Women) Convention, 1948; the Equal Remuneration Convention, 1951; the Discrimination (Employment and Occupation) Convention, 1958 etc.

Thus, standing at the door of 21st century I strongly put my objection towards the highly discriminatory, unjust and inhuman provision that is clause (c) of Section 8 of the Hindu Adoptions and Maintenance Act, 1956 which deprive a married Hindu woman to adopt a child of her choice independently and thereby prevent to make herself a part of decision making process right from the smallest unit of family to the national as well as international level. Although, the very Section 8 (c) has been amended through the enactment of the Personal Laws (Amendment) Act, 2010 but the said Act needs proper reconsideration to make it suitable in the true sense of an amended beneficial legislation.