CHAPTER-6
JUDICIAL APPROACH
AND ADOPTION
6.1. **Introduction:**

‘Law’ is a term which does not have a universally accepted definition. Since the advent of human civilization, Jurists, Lawyers, Judges and persons belonging to the profession of law have made their great efforts to the study of law and to define law. The study of ‘Jurisprudence’ is linked with the ‘Knowledge of law’ or ‘skill in law’ or ‘science of law’. With the gradual maturity of the legal history; legal theories, legal schools came into
existence and tried to explore the concept of ‘law’ in its entirety. Sociological jurisprudence or the sociological school of law takes law as a social function having social purpose that is betterment of society.

According to Montesquieu, a great French philosopher, law should be determined by the characteristics of a nation so that,

“they should be in relation to the climate of each country, to the quality of each soil, to its situation and extent, to the principal occupations of the natives, whether husbandmen, huntsmen or shepherds; they should have relation to the degree of liberty which the Constitution will bear, to the religion of the inhabitants, to their inclination, riches, numbers, commerce, manners and customs.”¹⁴⁰

The honour of being the founder of the science of sociology belongs to Auguste Comte, an another French philosopher. According to him,“the

legitimate object of scientific study is society itself and not any particular institution of government.”\textsuperscript{141}

In his work, ‘Principles of Sociology’, another sociological jurist, Herbert Spencer traced his theory of law. He says that, “law arises from four sources: inherited usages with quasi-religious sanctions, injunctions of deceased leaders, the will of the predominant man and collective opinion of the community.”\textsuperscript{142}

Thus, law is very much linked with the notions of society and social revolution. The Indian Constitution is well acquainted with the concept of ‘Rule of law’ or the ‘Due process of law’. Rule of law as established by A. V. Dicey connotes that no person is above the law and that every person is subject to the jurisdiction of ordinary courts of law, irrespective of his rank or status. Rule of law requires no arbitrary government and upholds individual liberty. Rule of law does not mean application of purely and simply the statutory law as such pure statutory law may itself be inequitable, discriminatory or unreasonable and unjust. Constitutional values like


\textsuperscript{142} ibid, p. 608.
Constitutionalism, application of controlled power, liberty of the people, independent judiciary and activist judges, judicial review all are very much imbibed in the fabric of ‘Rule of law’. Judiciary in our country plays the vital role in the interpretation as well as application of law. The Indian Supreme Court plays significant role in relation to the Fundamental Rights guaranteed to us by our Constitution. Our apex court acts in the first place as the protection and guardian of these Fundamental Rights and in the second place, the court acts as the interpretator of the Fundamental Rights. Our Supreme Court has displayed judicial creativity of high order in the famous case of *Maneka Gandhi*, while expanding the scope of Article 21 (Fundamental Right to life and personal liberty). The court has observed:

“The attempt of the court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction.”

6.2. Case Law References:

Adoption rights in our country is governed by the respective personal laws of the citizens belonging either to Hinduism or Muslim faith, Christianity,

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143 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
Jew faith or Parsi faith. There are a plethora of decisions given by our honourable Supreme Court for the protection as well as betterment of women in every area of her life. Regarding adoption rights, guardianship rights of married Hindu women in the famous *Gita Hariharan’s case*, long before the coming of amended Section 19 of the Guardians and Wards Act (GAWA), 1890, our honourable Supreme Court ruled that,

“it is an axiomatic truth that both the mother and father of a minor child are duty bound to take due care of the person and property of their child.”

Again the court said that,

“the father by reason of a dominated personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category.”

In a very old case, *Saraswatibai Ved V. Shripad Ved*, the then Chief Justice observed that, “however the paramount consideration is the interest of the child, rather than the rights of the parents. Human nature is much the

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144 Gita Hariharan v. Reserve Bank of India, AIR 1999 SC 1149.
145 AIR, 1941 Bombay 103
same all the world ever, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years.”

In *Rosy Jacob V. Jacob A. Chakramakkal*, 146 a three-judge Bench of the Supreme Court observed that,

“the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”

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146 (1973), SCC 840.
Besides these old cases there are a good number of cases where guardianship and custodial rights of women are well recognized.

In *Vandana Shiva V. Jayanta Bandhopadhyaya*, a landmark judgment, honourable Supreme Court extended the meaning of the phrase:

“the father and after him the mother” as present in the Section 6(a) of the Hindu Minority and Guardianship Act, 1956. Here the Constitutional validity of Sections 6 of the Hindu Minority and Guardianship Act, 1956 and 19(b) of the Guardians and Wards Act, 1890 were challenged as being violative of Articles 14 and 15 of the Indian Constitution. The Court held that in certain situations a mother can validly act as a guardian even while the father is alive. The court held that if the father is not in the charge of actual affairs of the minor, either because of his indifference or due to mutual understanding between the parents, or because of some physical or mental incapacity, or because he is staying away from the place where the mother and the minor are living, then, in all such situations, the father can be considered as ‘absent’ and

147 AIR 1999 SC 1149
the mother in such cases can be validly recognized as natural


guardian.

Again, in *Jijabai Vithal Rao v. Pathan Khan*[^148^], it was held by the honourable Supreme Court that where the father was alive but was living separately for several years without taking interest in the affairs of the minor who was in the keeping and care of the mother, the father should be treated as if non-existent and therefore, mother could be the natural guardian of the minor’s person as well as property.

In *Thirty Hoshie Dolikuka V. Hoshiam Shavaksha Dolikuka*[^149^], our honourable Supreme Court held that in dealing with any matter relating to minor the court has a special responsibility to consider the welfare of the minor and to protect his or her interest. The honourable Supreme Court reiterated the same principle as above,

> “the paramount consideration is the welfare of the minor and not
the legal rights of this or that particular party.”[^150^]

[^148^]: AIR 1971 SC 315

[^149^]: AIR 1982 SC 1276.

[^150^]: Veena Kapoor v. Shri Varinder K. Kapoor, AIR 1982 SC 792
Again, in a landmark judgment in the case of *Prabhati Mitra V. D.K. Mitra*¹⁵¹, our honourable Supreme Court held that “welfare principle” is the proper test to be applied in cases of disputes between the parents relating to children. The welfare of a child is not to be measured by money alone, or by physical comfort only. It must be in its largest possible sense after considering every circumstance.

In one of its good decision honourable Supreme Court ordered the custody of the son to be handed over to the mother, where the mother had been awarded custody of the minor son by a court in England and the father had removed the boy thereafter to India.¹⁵²

Upholding the women’s right to adopt a child, in *Narinderjit Kaur’s*¹⁵³ matter the honourable Punjab and Haryana High Court held that adoption by a divorced female before remarriage is valid as there are no restrictions on a female whose marriage has been dissolved to adopt a child under Section 8 of the Hindu Adoptions and Maintenance Act, 1956.

¹⁵³ Narinderjit Kaur V. Union of India, AIR 1997 P&H 280.
Same as above the Supreme Court also observed in the present case that remarriage of divorced mother is not her disqualification in the way of her Custodial rights.\textsuperscript{154}

In *Keshav Ganpatrao Medav V. Damodar Udaramji Kandrikar*,\textsuperscript{155} it was held by the Bombay High Court that a mother’s remarriage will not affect her right to custody of the minor child.

In *Rajesh K. Gupta V. Ram Gopal Agarwala*,\textsuperscript{156} in a dispute regarding custodial right of a minor child, it was held by the honourable Supreme Court that the legal right of a party is immaterial and paramount consideration is the welfare of the child.

The child’s welfare principle was again firmly settled in the recent *Mausami Moitra’s Case*.\textsuperscript{157} The Court clearly said that,

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\textsuperscript{154} Kumar V. Jahgirdar V. Chethana Ramateertha, AIR 2004 SC 1525.\\
\textsuperscript{155} AIR 2005 Bom. 118.\\
\textsuperscript{156} AIR 2005 SC 2426.\\
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“The principles of law in relation to the custody of a minor child are well settled. While determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances.”

In *Gaurav Nagpal V. Sumedha Nagpal*,\(^\text{158}\) the honourable Supreme Court considers the welfare of the child to be paramount and gave custody rights to mother.

The Gujarat High Court recently in *Surabhai Ravi Minawala v. State of Gujarat Case*,\(^\text{159}\), a landmark decision, held that the superior financial position of a party can not be of any consideration for awarding custody of a minor to that party. The prime consideration is always the welfare of the child and not the legal rights of the contesting parties.

\(^{158}\) AIR 2009 SC 557.

\(^{159}\) AIR 2005 Guj 149.
In *Mohan Kumar Rayana v. Komal Mohan Rayana*, our honourable Supreme Court again looked to the interest of the child to be paramount and ordered the custody of the minor daughter to the mother.\(^{160}\)

In *Smt. Gundamma v. Shivsharanappa*, \(^{161}\) honourable Karnataka High Court hold the view that mother was financially sound and was capable of giving good education and maintain the ward properly and therefore, grant of custody to father was not proper.

In *Vijaylakshmamma v. B.T. Shankar*, \(^{162}\) on the question of widow’s power to adopt a child, it was held by honourable Supreme Court that the requirement of consent of co-wives as required by Section 7 of the Hindu Adoptions and Maintenance Act, 1956, does not apply in case of widows. A widow may adopt without the consent of her co-widow.

The Court observed:

“To subject the exercise of power by senior widow to adopt conditional upon the consent of the junior widow where the Hindu

\(^{160}\) AIR 2008 SC 471.
\(^{161}\) AIR 2004 Kant. 357(359).
\(^{162}\) AIR 2001 SC 1424.
male died leaving behind two widows with no progeny of his own, would render the exercise of power more cumbersome and paradoxical, leaving at times, such exercise of power to adopt only next to impossibility.”

In a very historical judgment in the case of Philips Alfred Malsvin v. V.J. Gonsalves, honourable Kerala High Court displayed a high level of judicial activism by recognizing the adoption rights of Christian community. In this case a Christian couple adopted a child with the help of Church. The petitioner’s plea was that he was adopted by the deceased and brought up as his son. The petition was challenged on the grounds of absence of any adoption statute as well as no reference to any custom. The Court upholds the adoption and remarked:

“The right of a couple to adopt a son is a Constitutional right guaranteed under Article 21. The right to life includes these things, which make life meaningful.”

The Court further ruled:

163 AIR 199 Ker. 187.
“Simply because there is no separate stature providing for adoption, it can not be said that the adoption made by Christian couple is invalid.” ¹⁶⁴

The same Kerala High Court again in a landmark judgment in *Poolakkal Ayisakutty v. PA Saad*,¹⁶⁵ held that in case of conflict between the application of provisions of personal law and the Guardians and Wards Act, 1890, the latter shall prevail. The Court has been of the view that the overriding consideration is welfare of the child and the personal law would yield to the provisions of the Act.

Unfortunately, our judiciary has been silent on the question of adoption rights of Hindu married women. They were incapable to adopt a child for them in accordance with the clause 8 (c) of the Hindu Adoptions and Maintenance Act, 1956 (until the passing of the Personal Laws (amendment) Act, 2010).

¹⁶⁴ AIR 1999 Ker. 187.
¹⁶⁵ AIR 2006 Ker 68.