CHAPTER - 7
CONCLUSION
&
SUGGESTIONS
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Article 21 of the Indian Constitution has been given such a status by our active judiciary that it becomes a milestone in the development of Indian Constitutional jurisprudence. Article 21, since the famous case of Maneka
Gandhi,\textsuperscript{166} has proved to be multi-dimensional. It is quite evident that the words ‘life’ and ‘liberty’ are most crucial to us. In one of its historic judgment the honourable Supreme Court has defined ‘life’ as follows:

“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 of life would mean the tradition, culture and heritage of the person concerned.”\textsuperscript{167}

Does ‘life’ not include in its ambit love and affection which a mother deserves? To deny a Hindu married woman right to adopt a child only on the ground of her marital status, is it a going ahead with the concept of realization of precious Fundamental Right to ‘life’ as guaranteed by our supreme law of the land? At the same time giving the same right to adopt a child to a Hindu married man, is not a grave violation of right to equality on which our whole Constitutional jurisprudence rests? There are a number of good decisions where absence of relevant legislations do not come in the way of reaching justice and relief to the victim. Our judiciary has time to

\textsuperscript{166} Maneka Gandhi v. Union of India, AIR 1978 SC 597.

\textsuperscript{167} P. Rathinam v. Union of India, AIR 1994 SC 1844.
time adopted lenient approach in interpreting various Constitutional as well as statutory provisions so as not to defeat the very spirit of the ‘Rule of Law’. But here in the matter of adoption right of Hindu married women under the Hindu Adoptions and Maintenance Act, 1956 (HAMA), the court has shown unbelievable silence which is beyond my understanding.

The personal laws (Amendment) Act, 2010 which amends Section 8 (c) of Hindu Adoptions and Maintenance Act (HAMA), 1956, is nothing but a parrot like repetition of Section 7 of the original Act, except the word ‘Female’ instead of ‘Male’ and interchange of words husband and wife.

Section 7 of the Hindu Adoptions and Maintenance Act, 1956 says that, a male Hindu who is of sound mind and who is not minor may adopt a child. If he is married, the consent of his wife or wives (if more than one, prior to the commencement of Hindu Marriage Act, 1955) is condition precedent for a valid adoption to take place 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. Likewise under Section 8 of the said Act, a female major and sound mind Hindu who is unmarried or widow or divorcee or whose 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 may adopt a son or daughter in adoption. But a married female Hindu, that is, a Hindu wife cannot adopt a child to herself even with the consent of her husband. If she adopts, the adoption will be null and void. After coming of the Personal Laws (Amendment) Act, 2010, now a married female Hindu is capable to adopt a child in her own capacity, of course with the consent of her husband unless her husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect.

Thus, after a long gap of about fifty four years (1956-2010), a married Hindu woman has been given her dues and she becomes capable to adopt a child to herself. After such a long period of deprivation, what has been given is nothing but a stereotype amended right which has little timeliness with respect to the changed socio-economic conditions in our country vis-a-vis the second class citizenship treatment accorded to women. Unlike past Shastric Hindu law, now Indian women are armed with the weapon of divorce in cases where she feels unable to cohabit with her husband on various grounds enumerated in Section 13 of the Hindu Marriage Act, 1955.
Section 13B provides for divorce by mutual consent. There is now provision for decree for judicial separation (Section 13A of the Hindu Marriage Act, 1955). Now, if a woman initiates divorce proceedings against her husband in court of law and at the same time she wants to adopt a child, then according to amended Section 8, consent of her husband is an essential condition to be fulfilled.

Can we imagine a situation where one of the opponent party to any proceeding, begs another’s consent for her any personal benefit. Due to their bitter relationship first and foremost husband will not give his assent to make her wife able to adopt a child to herself. Thus, position is that, unmarried and divorced women as also widows are allowed to adopt a child but women separated from their husbands either engaged in lengthy divorce battles or not, cannot adopt a child. A wife if she wants to adopt will have to prove that the husband is of unsound mind or he has changed his religion or his consent all the while when they are fighting a bitter divorce battle. In the famous *Brajendra Singh’s case*\(^ {168} \) our honourable Supreme Court had held that a married female Hindu can adopt only if the marriage has been

dissolved, that is, if she gets a decree of divorce. In this case all the evidence showed that husband and wife had been staying separately for a very long time and that wife ‘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 leading the life of a divorced woman.” Mishri Bai may have been living separately since the time of her marriage, but there was no dissolution of marriage or divorce. Therefore, the court held that under the Hindu Adoptions and Maintenance Act, 1956 Mishri Bai did not have the capacity to adopt as her husband had neither renounced the world nor ceased to be a Hindu and was of sound mind and living at the time of adoption. With due respect to our parliamentarians, I don’t understand the reasoning behind the fact that where in our country number of divorce cases pending before courts are increasing day by day and where, with due honour to our judicial system, “justice delayed, justice denied” is an embarrassing fact, how such an amendment will be effective for a woman who is a party to a divorce proceeding and at the same time an applicant to adopt a child. The moment she asks for the consent of her husband, she begs the issue. Same will be the fate of women who instead of seeking relief by way of divorce asks the court for relief by
way of judicial separation. In our country where institution of marriage is
equalize with the social security of women and where a woman feels
reluctant to go to court of law for divorce so as not to disturb her status quo
and thinks better to live like a divorcée, what relief will this amended Act
provide for those women, it’s a burning question which needs due
consideration. The very Act starts from the word “in the name of gender
justice”. Does gender denote only male and female sex? The word ‘gender’
is much more than the word ‘sex’. ‘Gender’ is a range of physical, mental
and behavioural characteristics which depending on the context may refer to
Sex that is, state of being male and female. Both original and amended Acts
are concerned with the adoption rights of male and female sexes. They are
silent on and about Bisexual and Transgender Hindus. Is those Hindus who
are not categorically come within ‘male’ or ‘female’ should have no right to
adopt a child. Article 21 of the Indian Constitution which is often described
as ‘Reservoir of Fundamental Rights’ asserts that, “No person shall be
deprived of his life or personal liberty except according to procedure
established by law.” Here, the word ‘person’ is not qualified by the words
‘male’ or ‘female.’ If right to life, according to our honourable Supreme
Court, includes; “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 of life would mean the tradition, culture and heritage of the person concerned.”¹⁶⁹, then why the right to adopt a child is not available to any person who is ‘Hindu’? Is only ‘male’ and ‘female’ Hindus are ‘person’ in the eye of law and bisexual or transgender persons are not? We should have no hesitation in accepting the fact that a child can make anyone’s life really worth living, then why those bisexual and transgender Hindus are deprived of this precious fundamental right or we can say the basic human right?

Again, in our country at present there are two legislations on the law of adoption. First is the Hindu Adoptions and Maintenance Act, 1956 who is only applicable to Hindus as defined by Section 2 of the said Act. The second one is newly coming Juvenile Justice (Care and Protection of Children) Act, 2000 or the Amendment Act, 2006 which is secular in nature but specially designed for Christians, Muslims, Parsis, Jews etc. as a substitute for Guardians and Wards Act, 1890. A Hindu is also capable to adopt a child under Juvenile Justice Act. Under HAMA, the maximum age

for a child to be adopted has been fixed to be not completing his or her fifteen years unless there is a custom or usage applicable to the parties gives permission for adoption of the persons above fifteen years. But under Juvenile Justice Act, 2000 and amended Act, 2006, a ‘child’ is a person who has not completed the age of eighteen years. Also, Indian Majority Act, 1875 maintains the age of majority as eighteen years. So firstly the maximum age fixed by the HAMA is in contradiction with the age of majority as accepted by general law of the land. Secondly, such age restriction which is fixed as a criterion for adoption has no justification with the spirit of adoption as a person who is above fifteen years may be as much in need of parental care and home as a child who is below fifteen years. Therefore, I strongly plead for the elimination of such age restriction from the pages of the Hindu Adoptions and Maintenance Act. At present under the HAMA, for adopting a son, the adoptive father or mother must not have a Hindu son or a grandson or a great grandson, either by legitimate blood relationship or by adoption living at the time of adoption. Likewise, for adopting a daughter the adoptive parents must not have a Hindu daughter or son’s daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption. Thus, the aforesaid Act prohibits same sex child adoption
whereas it is positively permitted by the Juvenile Justice Act. So these contradictory provisions deserve necessary amendments. Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 says that “domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.” Thus, the very Act recognizes “relationship in the nature of marriage” or a very popular and fast growing concept of today’s time known as “live-in-relationship” for the purposes of providing protection to women from violence of any kind. Although the concept of live-together or live-in – relationship has no legal sanction in India with respect to any marital rights, or any inheritance rights to the parties or any other rights, but our judicial system seems to be ready to give it necessary recognition. Recently honourable Allahabad High Court in one of its landmark judgments held that “in our opinion a man and a woman, even without getting married can live together if they wish. This may be regarded immoral by society but it is not illegal.”170 In two of its judgments, the honourable Supreme Court of

India also has held that “there exists a rebuttable presumption of marriage when a man and a woman live together for a number of years.” Now, if a woman who is living in live-in-relationship needs protection from violence from her in-laws or her male partner and has got the right to go to the court of law against them, she must be in need of all sorts of necessary protective as well as beneficial human rights. If such a woman (if she is by faith a Hindu) is interested to adopt a child to herself under the HAMA, what will be her status? Will she be treated as unmarried or married or widow or divorcee? Again, if both the partners or rather couple (if they are by faith Hindus) to a live-in-relationship wants to adopt a child under the HAMA, what will be their status? Will they be treated as married couple? The provisions of the Hindu Adoptions and Maintenance Act are silent on both the above mentioned issues. In my opinion these issues deserve great attention. There should be specific legislation on the subject. Today’s world is gradually moving towards a new revolutionary change in our general societal setup. There is seen a growing trend towards the advocacy of various human rights relating to homosexuals people.

Although this trend is quite new and seems absurd to our Indian mentality and also it is not directly related to my topic but in future we will be unable to ignore it. At present there are nine countries in the world where homosexuals have marriage rights, adoption rights and other human rights. These countries are Argentina, Belgium, Canada, Iceland, Netherland, Norway, Sweden, South Africa and Spain. Many more other countries are also on the way towards recognizing these rights. I must suggest for its due consideration. Also, I think, right to adopt non-Hindu child should be given to a Hindu parent or parents. Religion of child should not come in the way of adoption of children by interesting parents.

Amendments Suggested:

Beside above observations the researcher like to forward following place of amendments which can make the available more workable and fruitful in terms of adoption:

➤ The concept ‘adoption’ is nowhere defined in the present format of the Hindu Adoptions and Maintenance Act, 1956 (HAMA). It is particularly irrelevant to think about an Act which is specifically
designed for a particular purpose to deal about the concept of ‘adoption’ but having no capacity to define it. A definition which can clearly and explicitly formulate the meaning of the concept of ‘adoption’ should be included in the said Act.

➢ The words ‘capacity of a male Hindu to take in adoption’ and ‘capacity of a female Hindu to take in adoption’ in respective Sections 7 and 8 of the HAMA should be eliminated and the words “capacity of Hindu persons to take in adoption” should be inserted to cope with the broad concept of ‘gender equality’. The said Act is not clear in itself. Section 2 of the HAMA defines ‘Hindu’ where the word ‘person’ has been used but in its Sections 7 and 8 instead of the word ‘person’, the words ‘male Hindu’ and ‘female Hindu’ are used.

➢ Clause 8 (c) of the Hindu Adoptions and Maintenance Act, 1956 (HAMA) should be amended in this way that it can include in its ambit the adoption rights of not only the married, unmarried, widow and divorcee Hindu women but also women who are engaged in
divorce proceedings or those who are not divorcee but living the life like a divorcee.

➢ The maximum age limit of not completing fifteen years (unless permitted by custom or usage applicable to the parties) as mentioned in Section 9 of the HAMA as an eligibility criteria for a child to be adopted should be wipe out so as to bring uniformity in the field.

➢ The same sex child adoption bar (Section 11 of the HAMA) should be eliminated from the pages of HAMA so as to defeat the confusion created by HAMA and Juvenile Justice (Care and Protection of children) Act, 2000 and its amended Act, 2006 which positively permits same sex child adoption.

➢ Also Hindu parents or Hindu persons should be allowed to adopt non-Hindu children.

➢ The newly enacted legislation ‘Protection of Women from Domestic Violence Act, 2005’ is positively determined to protect women from
any kind of exploitation or abuse with the due recognition of their live-in-relationship. I think there should be provision for recognition of their status as well as adoptive rights in HAMA.

The Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980 were placed for consideration but failed to enter in our statute book due to different reasons. Till today after such a long gap we are unable to frame a uniform law dealing with all civil matters including adoption. Thus, we are in strong need of Uniform Civil Code dealing uniformly with civil matters or at least a Uniform Adoption Code dealing uniformly with adoption related matters irrespective of religion, sex, marital status or anything which should not come in the way of proper and due realization of basic human right.