CHAPTER - 1
INTRODUCTION
Introduction:

The family is the fundamental and natural unit of society. Human rights law upholds the positive right of all people to marry and found a family. Article 16 of the Universal Declaration of Human Rights, adopted by the United Nation’s General Assembly on 10th December, 1948 establishes the right of men and women to marry and found a family. Article 23 of International Covenant on Civil and Political Rights, 1966 guarantees the right to a family:
1. “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”

2. “The right of men and women of marriageable age to marry and to found a family shall be recognized.”

Right to family is also positively recognized by the International Covenant on Economic, Social and Cultural Rights, 1966 through its Article 10. The Article says that the widest possible protection and assistance should be accorded to the family because it is the natural and fundamental group unit of society and it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

A family is again considered incomplete without a child. A child is most certainly the best gift that God can give to a couple. Birth of a child brings happiness and joy. Every child has the human right to grow to adulthood in an environment which ensures health, peace and dignity which a family only can provide.
The first document which says that the child shall enjoy the benefits of social security was Declaration on the Rights of Child which was adopted by the General Assembly of the United Nations on 20th November, 1959. Again, the Convention on the Rights of Child, 1989 which is a reservoir of various valuable rights concerning children says in its preamble,

“The state parties to the present Convention, recalling that in the Universal Declaration of Human Rights, the United Nations has provided that childhood is entitled to special care and assistance have recognized that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”

Article 20 of the same Convention ensures the right of a child to family environment and also says that if a child is temporarily or permanently deprived of his or her family environment, shall be entitled to special protection and assistance provided by the state. In our country providing youngsters all basic human rights as well as to protect them against all sorts of exploitation is a Constitutional promise. The Constitution of India
guarantees all children certain rights, which have been specially included for them. These includes:

- Right to free and compulsory elementary education for all children in the six to fourteen year group (Article 21A).
- Right to be protected from any hazardous employment till the age of fourteen years (Article 24).
- Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength (Article 39(e)).
- Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment (Article 39(f)).

Other fundamental human rights which the Indian Constitution has the potential to provide are equally applicable to a child just as to any other adult male or female. For example, Right to equality (Article 14); Right against discrimination (Article 15); Right to personal liberty and due process of law (Article 21); Right of being protected from trafficking and bonded labour (Article 23); Right of weaker sections of the people to be protected
from social injustice and all forms of exploitation (Article 46) etc. Thus, right from the preamble, Fundamental Rights and the Directive Principles of State Policy to the present day judicial activism; our Constitution has been trying its best to protect the interest of the children.

At the international as well as regional levels, the right of a child to have a family is fully recognized and implemented through Conferences, Conventions and other legislative as well as judicial processes. The process of ‘adoption’ is one of them which can provide a child an environment of peace, love and understanding to develop. A home with parents can be a best solution to get rid of all sorts of deprivation and exploitation which destitute or street children have to suffer. Adoption itself has existed since the dawn of time. As long as there have been humans on this earth, there has been a need for adults to take in children who were not born to them biologically and raise them as their own. Parenthood is an integral stage in the life cycle of a family. Parenting involves nurturing, care and contribution to the growth of another human being. It is much more than procreation and the biological process of birth. Adoption can be an excellent solution not only for a needy child but also for childless couples, single persons and unwed
mothers. The process of adoption has been well defined by the newly enacted Juvenile Justice (Care and Protection of Children) Act, 2000 in its Section 2 (aa) as,

“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.”

Thus, ‘adoption’ is a process by which people take a child not born to them and raise him or her as a member of their family with the adoptive parents assuming all parental responsibilities. It enables a parent child relationship to be established between persons not biologically related.

There are instruments at the international as well as regional levels which are treasure of rules and regulations relating to adoption processes. The Hague Adoption Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Adoption Convention) is an international agreement to safeguard inter-country adoptions. Concluded on May 29, 1993 in The Hague, the Netherlands, the Convention establishes international standards of practices to ensure that inter-country adoptions
take place in the best interest of the child and with respect for his or her fundamental rights recognized at the international law. It also seeks to prevent the abduction, the sale of, or traffic in children through a system of co-operation amongst the contracting states. India is also a signatory to this Convention. For the purpose of implementation of the Convention in our country, Ministry of Social Justice and Empowerment is functioning as the Administrative Ministry and Central Adoption Resource Authority (CARA) as the central Authority.

Adoption in India has a flavour of antiquity. In olden days adoption was restricted within the family and was full of religious as well as social practices. But with the changing times the adoption process has been institutionalized and legalized beyond the limits of family.

At the national level India has prepared a National Policy for children in 1974 under which Ministry of Social Justice and Empowerment (now known as Ministry of Women and Child Development) has got the mandate to frame rules regarding welfare of children. In India, a resident Indian, Non Resident Indian (NRI), or a foreign citizen may adopt a child. Indian citizens
who are Hindus, Janis, Sikhs or Buddhists are allowed to formally adopt a child under the Hindu Adoptions and Maintenance Act, 1956. Foreign citizens, NRIs and those Indian nationals who are Muslims, Parsis, Christians or Jews are subject to the Guardians and Wards Act of 1890. Under this Act, the relationship between adoptive parents and the child is that of Guardian and Ward which comes to an end when the child reaches the age of eighteen years. Foreign citizens and NRIs are supposed to formally adopt their child according to the adoption laws and procedures of the country of their residence within two years of becoming a child’s guardian. There is also a secular enactment, the Juvenile Justice (Care and Protection of Children) Act, 2000 and its subsequent Amendment Act of 2006 which also deals with adoption of children who are abandoned, abused, orphaned or surrendered but not to those who have been voluntarily put up for adoption. The enactment of the Juvenile Justice Act is definitely a significant legislative step towards adoption of needy children by persons irrespective of their religious status. But this Act is suffering from its inherent drawbacks. It is not a stand alone law on the law of adoption. It also does not legislate on the process of inter-country adoptions.
The Hindus are governed by the Hindu Adoptions and Maintenance Act, 1956 in matters of adoption. Under this Act, unlike a married male Hindu, a married female Hindu is not permitted to adopt a child (till the passing of the Personal Laws (Amendment) Act, 2010). This is discriminatory as not only of fundamental human rights guaranteed by our Constitution but also of those which are available at the international law solely on the ground of sex.

We are in the midst of a great revolution in the history of women human rights. In more recent years, international human rights law has been highly influenced by movements for recognition of the equal rights of women. The very first document adopted by the United Nations General Assembly in the year 1948, which clearly outlines some fundamental human rights of all people in relation to such matters as security of person, slavery, torture, protection of the law, freedom of movement of speech, religion and assembly and rights to social security, work, health, education, culture and citizenship was the Universal Declaration of Human Rights (UDHR). It clearly says that these human rights apply to all equally “without distinction of any kind such as race, colour, sex, language……or other status.”

1 Article 2 of Universal Declaration of Human Rights, 1948.
Obviously, then these human rights as declared by UDHR are to be understood as applying to women also. These rights are universal, inalienable and indivisible. The universality of human rights means that human rights apply to every single person by virtue of he or she being human. These rights are inalienable and indivisible means no person or group of persons can deprive another individual of her or his human rights.

In 1979, the international community adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which can be described rightly as the Magna Carta of women human rights. The document first time officially defines the meaning of the concept ‘discrimination against women.’ The Convention says in its Article 1 that, “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 stats, or 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.”
Thus, to exclude or restrict a woman in the enjoyment or exercise of her fundamental rights only on the basis of her sex amounts to discrimination and clear violation of the provisions of CEDAW. But nearly after thirty years of adoption of this great Convention, women and girls still do not have equal opportunities to realize rights recognized by law. Human rights are universal but access to those rights is not universal. Women face distinct barriers in realizing their rights because they are women.

The makers of the Indian Constitution were very realistic in their expectations and that explains the various safeguards that they built into the Constitution to protect the rights of the marginalized and vulnerable groups in society. The Constitution and the objectives of the Constitution as spelt out in the preamble ensures that justice, equality and liberty are for all irrespective of caste, creed, sex, religion etc. The Constitution of India guarantees to all Indian women equality (Article 14), no discrimination by the state (Article 15(1)), equality of opportunity (Article 16), and equal pay for equal work (Article 39(d)). In addition, it allows special provision to be made by the state in favour of women and children (Article 15(3)); renounces practices derogatory to the dignity of women (Article 51(A) (e))
and also allows for provisions to be made by the state for securing just and humane conditions of work and for maternity relief (Article 42). Again, there are numerous laws specially designed for protection and upliftment of women in every sphere of their life, like in the areas of personal, labour, service, criminal and socio-economic matters. Articles 325 and 326 of our Constitution ensures to all its citizens political equality; equal right to participate in political activities and right to vote respectively.

But there still exists a wide gulf between the goals enunciated in the Constitution, legislations, policies, plans and programs and related mechanisms on the one hand and the situational realities on the status of women in India, on the other. Even after a half a century of independence, barring a few exceptions, women have mostly remained outside the domain of power and political authority and also of political participation or decision making process. The political climate as it exists today continues to be male centered and women are not treated as a political entity in their own right. The trend is to treat women as decorative pieces. Illiteracy, women’s triple burden, patriarchal values, lack of access and control over income and other resources, restrictions to public spaces, insensitive legal systems and other
various social, economic, historical, geographical, political and cultural factors are responsible for women’s minimal participation in decision making processes.

Through this research paper I want to highlight the age old discriminatory treatment which was accorded to Indian Hindu women and which still exists in one or other form in matters of adoption of children. Though Shastric Hindu law relating to adoption of children has undergone a sea change but there still remains a lot to rethink. There still exists a wide gap between the rights and privileges enjoyed by a Hindu married woman and those of a Hindu married man. Although, the Personal laws (Amendment) Act, 2010, now provides the same equal rights in matters of guardianship as well as adoption of children to married Hindu women which are available to their male counterparts long before as a matter of societal privileges, but the said Act has been enacted unfortunately after totally avoiding the changed socio-economic conditions prevailing in our country. Through this paper, I want to draw with due respect to our parliamentarians, their attention towards the inherent defects present in legislations relating to adoption of
children and particularly to affect necessary amendments so as to make them more child and women oriented.

**Research Methodology**

This research study is basically concerned with the analysis of the relevant legal framework of Indian adoption laws as well as adoption laws in other Asian and European countries. It particularly criticizes the discriminatory and conflicting provisions of the Hindu Adoptions and Maintenance Act. This work basically studies the pros and cons of the Personal laws (Amendment) Act, 2010, with a little effort to make its probable necessary amendments possible. The title of the research work is a reflection of the very spirit of this research study, that is, to give a partnership to all who think of equal application of human rights for all irrespective of gender.

The Methodology employed in the research study is ‘doctrinaire’ and includes review of literature available from law journals, case law references, periodicals, library researches, books and internet.
Plan of Study

The entire research work has been divided into following six chapters:

Chapter-1, introduces the topic with its relevance, efficacy includes methodology;

Chapter 2, discusses the Pre-Constitutional Status of Women under different Personal Laws Regarding Adoption;

Chapter 3, embodies the Post-Constitutional Status of Women and Law of Adoption;

Chapter 4, attempts to highlight and explore the Position of Hindu Women under the Hindu Adoptions and Maintenance Act, 1956;

Chapter 5, sketches the Position of Women in Adoption under International Law;

Chapter 6, discusses the judicial approach and adoption;

Chapter 7, finally concludes the topic with findings and required suggestions.