CHAPTER – 3

LEGAL PERSPECTIVE IN CHILD ADOPTION: A CLARION CALL TO SECULARISM
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The objects of adoption are twofold: the first is religious, to secure spiritual or religious benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of waters to the soul of adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter’s name. Under the light of that it is significant to trace historical perspective of child adoption not only in India but in western/foreign countries and also Islamic countries.

3.1 TRACING THE ADOPTION HISTORY WITH SPECIAL REFERENCE FROM WESTERN WORLD

Historical Adoption has been a known feature even in western countries. Adoption has been called the quintessential American institution, embodying faith in social engineering and mobility. While it is true that the modern form emerged in the United States, civilization has a long history of the practice of adoption. A legal process, adoption in the United States creates the status of parent and child between individuals who are not each other’s parent or child. In simpler words, there is no biological relationship between the two.

3.1.1 SPECIAL SPECIFIC CODES RESPONSIBLE FOR THE DEVELOPMENT OF CHILD ADOPTION: CODE OF HAMMURABI

The Code of Hammurabi, for example, details the rights of adopters and the responsibilities of adopted individuals at length while the practice of
adoption in ancient Rome is well documented in the Codex Justinianus. Markedly different from the modern period, ancient adoption practices put emphasis on the interest of the adopter providing a legal tool that strengthened political ties between wealthy families and creating male heirs to manage estates. The use of adoption by the aristocracy is well documented; many of Rome's emperors were adopted sons\textsuperscript{14}.

\textbf{3.1.2 EMERGENCE AND EFFECTS OF INDUSTRIAL REVOLUTION ON ADOPTION SYSTEM ACROSS THE WORLD}

Industrial revolution marks substantial change in human history. This was the period from the 18th to the 19th century where major changes in agriculture, manufacturing, mining, transport, and technology had a profound effect on the socioeconomic and cultural conditions starting in the United Kingdom, and then subsequently spreading throughout Europe, North America, and eventually the world.

Modern American adoption laws evolved during the latter half of the 19th century, prompted by changes due to the Industrial Revolution, large numbers of immigrant children who were often in need of care, and a growing concern for child welfare. Because of the poor health conditions in the tenements of large cities, many children were left on their own at early ages. These dependent children were sometimes placed in almshouses with the mentally ill, and sometimes in foundling homes plagued by high mortality rates.

\textsuperscript{14} http://www.wsu.edu/~dee/MESO/CODE.HTM as visited on 15 Dec 2010
In the 1850s the Children’s Aid Society of New York City began to move dependent children out of city institutions. Between 1854 and 1904 orphan trains carried an estimated 100,000 children to the farms of the Midwest where they were placed with families and generally expected to help with farm work in exchange for care\textsuperscript{15}. The Orphan Train Movement lasted from 1853 to the early 1900s and more than 120,000 children were placed. This ambitious, unusual and controversial social experiment is now recognized as the beginning of the foster care concept in the United States. The Orphan Train Movement and the success of other Children's Aid initiatives led to a host of child welfare reforms, including child labour laws, adoption and the establishment of foster care services, public education, the provision of health care and nutrition and vocational training\textsuperscript{16}.

Massachusetts became the first state to pass legislation mandating judicial supervision of adoptions in 1851, and by 1929 all states had passed some type of adoption legislation\textsuperscript{17}. During the early part of the 20th century it was standard practice to conduct adoptions in secret and with records sealed, in part to protect the parties involved from the social stigma of illegitimate biological.

\textsuperscript{15} The Children’s Aid Society, Newyork, An estimated 30,000 children were homeless in New York City in the 1850s.
\textsuperscript{16} New-York Historical Society, Guide to the Records of the Children’s Aid Society 1836-2006 (bulk 1853-1947) MS 111
\textsuperscript{17} http://dlib.nyu.edu/findingads/html/nyhs/childrensaidsociety_at.html
3.2 AFTERMATH OF WORLD WAR II- REPERCUSSIONS AND RESULTS

World War II, or the Second World War was a global military conflict lasting from 1939 to 1945, which involved most of the world's nations. After WWII two factors combined to increase interest in the adoption of infants. In America the development of formula feeding allowed for the raising of infants without a ready supply of breast milk, and psychological theory and research about the relative importance of training and conditioning in child rearing eased the concerns of childless couples about potential "bad seeds." Because of the burgeoning interest in infant adoptions, many states legislated investigations of prospective adoptive parents and court approval prior to finalization of the adoption. Americans began adopting orphan children from Japan and European countries. Additional war time conflicts in Greece, Korea and Vietnam increased inter-country adoptions. Social upheaval and poverty were the reasons for the increase in international adoptions.\(^{18}\) Latin America, China and Eastern European Countries all have a large amount of inter-country adoptions on a yearly basis. This scenario can be discussed as in 1945s post WWII and post 1970s with special reference to America.

3.2.1 SCENERIO AFTER 1945s

Until about mid-century the balance of infant supply and parent demand was roughly equal in United States of America. However during the 1950s the demand for healthy white infants began to outweigh the supply.

\(^{18}\) International Adoption Facts, http://www.livestrong.com/article/87467-international-adoption/
Agencies began to establish matching criteria in an attempt to provide the best fit between characteristics of the child or biological parents and the adoptive parents, matching on items such as appearance, ethnicity, education, and religious affiliation.

### 3.2.2 SCENERIO AFTER 1970s

By the 1970s in America, it was not uncommon for parents to wait 3-5 years after their initial application to a private adoption agency before they had a healthy infant placed with them. These trends resulted from a decrease in the numbers of infants surrendered for adoption following the increased availability of biological control, the legalization of abortion, and the increasingly common decision of unmarried mothers to keep their infants. In response to this dearth of healthy, same-race infants, prospective adoptive parents turned increasingly to international and transracial adoptions.

Children from Japan and Europe began to be placed with American families by agencies after WWII, and since the 1950s Korea has been the major source of international adoptions (except in 1991 with the influx of Romanian children). The one child policy of the Chinese government has provided a new source of infants to American families, and recently many adoptees have come from Peru, Colombia, El Salvador, Mexico, the Philippines, and India.
The Civil Rights Movement of the 1960s was accompanied by an increase in the number of transracial adoptions involving black children and white parents. These adoptions peaked in 1971, and one year later the National Association of Black Social Workers issued a statement opposing transracial adoption. They argued that white families were unable to foster the growth of psychological and cultural identity in black children. Transracial adoptions now account for a small percentage of all adoptions and these most frequently involve Korean born children and white American families.

3.2.3 USA UNDER THE IMPACT OF THE 1960’S AND 1970s REVOLUTIONS ON CURRENT ADOPTION PRACTICES

There was Liberation movements on women’s liberation, civil rights movement, sexual revolution, adoptee’s liberty movement (ALMA, 1971), biological fathers’ rights. Biological control methods were used to reduce the number of unplanned pregnancies. The legalization of abortion or termination of pregnancy gave women a choice in whether or not to carry an unplanned pregnancy to term. Normalization of single parenthood in the dominant culture allowed women to choose whether to place a child for adoption or raise the child alone. Support of this choice was provided by increased welfare aids for unmarried females and head of household tax relief, as well as increased job opportunities. Introduction of The Indian Child Welfare Act, (ICWA-1978). Normalization of step, blended, or other family types which are not connected by blood. Social workers were encouraged to modify their role into one of educators for adoptive parents.
in order to help them recognize and cope with the differences in raising adopted children vs. raising biological children. Biological Parents and adult adoptees began to speak out about their experiences, their rights and their needs. Adoptive parents demanded more information on the children whose futures were entrusted to them.

While healthy infants have been much in demand for adoption during the last 50 years, the number of other children waiting for adoptive homes has grown. In response, the U.S. Congress passed the federal Adoption Assistance Child Welfare Act in 1980, giving subsidies to families adopting children with special needs that typically make a child hard to place. Although individual states may define the specific parameters, these characteristics include older age, medical disabilities, minority group status, and certain physical, mental, or emotional needs.

3.3 TRACES OF CHILD ADOPTION AS OF ANCIENT TIMES IN INDIA

In early 17th Century *Dattaka-mīmāṃsā* by Nanda-Pandita was considered to be the classical work on the topic of Adoption and subsequently used by the British authorities as Hindu law. Later it was translated by Sutherland in 1821. Another renowned work Dattaka-chandrika is attributed to *Kuvera*.

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19 Rita Meiser, Esq. and Marcie Velen of Arizona Children’s Home Association
20 Sanskrit Text of Nanda Pandit's *Dattaka Mimansa* and its English translation; "Law, Liberty and Social Justice" (Asia Publications)
The main points, according to the Dattaka-Chandrika, are as follows: there are two motives in adopting a son; viz.

(i) to perform obsequial rites is honour of the adoptive father and his ancestors,

(ii) to be the successor of the adoptive father. Any sonless man may adopt a son; 'sonless' implies the absence of son, grandson and great-grandson.

Except for a Sudra, one cannot adopt a daughter's son or a sister's son. A person's single son cannot be given in adoption. A woman cannot give away a son without the permission of her living husband. If the husband is dead, she can do so in the absence of prohibition by the husband. An adopted son is placed on equal footing with a natural son. In the Commentaries and Digests, while the father’s power of giving in adoption is universally recognized, the same power is denied or doubted to the mother. The learned writer of the *Dattaka Minansa* quotes the following text of Saunaka,

"By one having an only son the gift of a son should not be made; by one having many Sons the gift of a son should anxiously be made, and comments since the masculine gender is used in the compound word 'by one having many Sons’ the gift of a son, by a woman is prohibited," 21 but on the basis of the text of Vasishtha except with the assent of her husband he admits that the mother can give her child in adoption with the

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21In Hindu mythology he is one of the Saptarishis (Seven Great Sages Rishi)
assent of her husband curiously enough, Nand Pandit denies the power of taking in adoption to a widow, but gives the power of giving in adoption to a widow and maintains that in such cases assent must be presumed inasmuch as Vedic instances indicate the legality of such gifts and inasmuch as several texts of sages recognise independent power of the mother to give in adoption.

Then, referring to text to Manu\textsuperscript{22}, Baudhayana\textsuperscript{23}, Yajnavalkaya and Vasistha he laid down the following three propositions:

(i) The competency of both parents united is the principal;

(ii) That of the father alone independently of the mother is the mediocre, and

(iii) That of the mother, depending as it does on the assent of her husband, is an inferior alternative.

Indian culture has its distinctive paradoxes. Indian mythology is full of stories where babies were born in one place and brought up elsewhere by non parents. The tenets of Hindu Law clearly state that 12 kinds of sons were recognized and one of them was the Dattaka son, i.e, a son whom his father or mother gives as a son affectionately in a time of distress to one who is of the same caste. Some of the prominent examples are

\textsuperscript{22}Manu is a title accorded to the progenitor of mankind, and also the very first king to rule this earth, who saved mankind from the universal flood. He was absolutely honest which was why he was initially known as "Satyavrata", (One with the oath of truth)

\textsuperscript{23} Baudhayana Dharma Shastra: (Sanskrit) A book of laws associated with the Krishna Yajur Veda and governing studentship, marriage, household rituals, civil law, etc. It is followed by brahmins of Southwest India.
Goddess *Sita* from *Ramayana* and *Lord Krishna* from *Mahabharata*. Other characters from those days are *Daan Veer Karan* and *Shakuntala*. These characters and admired even defied within the same tradition, childless women are some time treated with contempt or petty and denied certain ritual roles, especially in the upper caste groups. A tress memory of this attitude still lingers in the collective unconscious of our people.

It is often quoted as a narrative in which there is total acceptance of the notion that an adoptive mother can love and care for non offsprings also establishes the reciprocation of the love by the child. The fact that Krishna is referred as *Yoshada Nandan* appears very crucial to the notion of adoption and entitlement.

### 3.3.1 Hindu Mythological Tales in Special Context to Child Adoption

Mahabharata has more in common with the practice of adoption as it existed today. *Karan*’s story also portrays the intense loyalty of the adoptee the adoptive parents. Karna was the son of *Kunti* from the Sun God. The story is that Kunti, while still very young, had occasion to serve Rishi (sage) *Durvasha*. She looked after him with great dedication. *Durvasha* was highly pleased. He gave *Kunti* a mantra (chant) and said that whichever God she would think of after reciting the mantra, would appear before her and bless her with a son endowed with his own godly

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24 Vinita Bhargava, Adoption in India, 2005, Sage Publications
qualities. *Kunti* got scared and wanted the Sun God to go away, but he pleaded his helplessness against the power of mantra. Surya however assured *Kunti* that even after being blessed with a son, she would still remain a virgin and would not have to suffer any opprobrium. And so *Karna* was born with *kavach* and *kundal* (armor which would make him invincible). Kunti was nevertheless afraid of social stigma and therefore she abandoned the child. She put *Karna* in a basket and placed the same in the Ganges river, the basket was seen by *Adhirath*, a charioteer, who had no issues. He picked up the baby and brought him up. That is why *Karna* is also sometimes referred to as *Sarathiputra*. *Radha* adopts *Karna* after his rescue from his famous basket ride down the river Ganges. She names him *Vasusena*. This was his first adopted name as an infant, whiles his name *Karna*, was a later name. *Vasusena* is the one, who in later times became "*The Mighty Surya*" the Sun God and the Legendary Karna.

There are several other tales in Hindu methodology that suggests that the concept of raising a stranger’s child has always existed. Children were brought up by sages or Rishi’s. Girl children were brought up and given in marriage to prince and kings indicating a child centeredness in adoption. The myth of *Shakuntla* and *Andal* assumed importance as examples of female adoption. Whereas it is known about Shakuntala that she was born of the sage *Vishwamitra* and the Apsara *Menaka*. *Menaka* had come at the behest of the King of the Gods, *Indra*, to distract the great
sage Vishwamitra from his deep meditations. She succeeded, and bore a child by him. Vishwamitra, angered by the loss of the virtue gained through his many hard years of strict asceticism, distanced himself from the child and mother to return to his work. Realizing that she could not leave the child with him, and having to return to the heavenly realms, Menaka left the newborn Shakuntala in the forest. It was here that the new born child was found by Kanva Rishi surrounded by birds. He thus named her Shakuntala. Kanva Rishi took the child to his ashram, which was known as "Kanva Ashram" on the banks of the Malini River which rises in the Shivalik hills of Himalayas and lies about 10 km from the town of Kotdwara in the state of Uttarakhand, India. This fact is corroborated by Kalidas in his famous epic Abhighyan Shankuntalam in which he has described the ashram of the Kanva Rishi on the banks of river Malini.

Goddess Andal was found by devout Brahmin named Vishnucitta lived in Villiputtur, a town near Madurai while he was performing his daily prayers and collecting flowers he found one baby girl lying under tulsi plant. Having no family of his own, Vishnucitta felt it was God's grace that gave him this child and named her Godai, or "gift of Mother Earth." Filled with joy, he took her home and raised her as his own. She is was a great devotee of Lord Krishna and later was famously known as "Andal", the girl who "ruled" over the Lord. Andal and Shakuntala both were considered as goddess, earth’s gift to their respective parents.

3.3.2 DEVELOPMENT OF CODIFY LAW: PRE CONDITIONS FOR ADOPTION

Under Indian law there is no specific law for child adoption but due to judicial activism there are lot of cases which have set precedents for the contiguous issues and other complexities in child adoption. Like under, *Andhya alias Supriya Kulkarni & another v. The Union of India & another*\(^{26}\), they have questioned the validity thereof on the ground of violation of Articles 14 and 21 of the Constitution of India. The Hindu Adoption & Maintenance Act, 1956 - Sections 11(i) and (ii) provisions read thus:

"In every adoption, the following conditions must be complied with –

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son (whether by legitimate blood relationship or by adoption),

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made 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 impugned provisions injunct a person from having second son or daughter by adoption. The main challenge put forth is that the Right to Life under Article 21 as explored through various judicial pronouncements has numerous dimensions. Life with human dignity is one such. The right

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\(^{26}\) AIR 1998 Bom 228
to have size of a family according to one's own choice is comprehended within the concept of human dignity. Since the impugned provisions prevent such right, they are violative of the Constitutional guarantee.

Ancient Hindu law alone rendered recognition therefore, that too was limited to as male child by an issueless parent. During one's lifetime, there could not be adoption of another male child. Adoption of a female child was not at all recognized. Predominant mythological design was to have a son, even by adoption, to perform last rites so that deceased could avail Moksha i.e. Eternal Bliss and also to continue the generation of adoptive parent.

In some part of the country, the dancing girl could adopt a female child. This was more a customary and perhaps with a view to perpetuate the traditional avocation of dancing. This could not, however, be a part of Hindu law. The Orissa High Court in Krushna Kahali v. Narana Khali\(^\text{27}\), held such custom as invalid.

Hindu Adoptions & Maintenance Act, 1956, herein after written as HAMA, codified the practices as prevailing under Ancient Hindu in relation to adoption. By way of an amendment, the Act incorporated a significant feature of adoption of a female child which was unknown to the Ancient law. This being the personal law, the adoption was confined by and to Hindu parents and that too of a Hindu child.

\(^{27}\text{AIR 1991 Ori 134}\)
The HAMA abrogates all pre-Act customs and usages pertaining to adoption except in two areas, where custom is preserved:

(i) A married child can be adopted, if custom permits such an adoption,

(ii) A child of fifteen years or above can be adopted if custom permits such an adoption.

If in the natural family some property was vested in the child before adoption, that will remain in him and he cannot be divested of it just because he has gone out to another family of adoption. Further, the child retains ‘sapinda’ relationship and degrees of prohibited relationship in his natural family for the purpose of marriage.\(^{28}\)

The Hindu Adoptions & Maintenance Act, 1956, amending Act, 45 of 1962 brought a revolution. Amended sections which threw light upon vital issues were as follows:

i. To provide adoption and congenial home for an abandoned child.

ii. To authorize manage of Fondling or Remand Homes to give abandoned children in adoption, with the permission of the Court.

iii. To include a child, legitimate or illegitimate, who has been abandoned by both of his parents or whose parentage is not known, but who, in either case is brought up as Hindu to be a Hindu by religion.

\(^{28}\) Legalpundits International Services
Indian Law as far as child adoption is concerned is religion-specific in, although it is a very conservative approach from the law point of view. It toughened practices that were unjust to children and hindered the formation of a Uniform Civil Code.

According to **Article 44** of the Constitution of India:

*"The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India."

Over the years several attempts were made to formulate a general secular law on adoption. The attempts of Parliament in this direction did not bear fruit, all these went in vain on account of a number of reasons. The history of all such efforts does not bring credit to the secular credentials of the Indian polity.

The Adoption of Children Bill, 1972 was not approved as the Muslims opposed it. The Adoption of Children Bill, 1980, aiming to provide for an enabling law of adoption applicable to all communities other than the Muslim community, was opposed by the Bombay Zoroastrian Jashan Committee, which formed a special committee to exempt Parsis from the bill. The National Adoption Bill, tabled twice in Parliament in the seventies, has yet to enter the statute books. The history of attempt to bring in the concept of secular adoption into our system of laws narrates a sad tale of inaction and action without conviction on the part of the legislature.
3.3.3 MUSLIM ADOPTION AND PRACTICE IN INDIA

Post independence there was no change in adoption laws. But there was always a need for uniform law governing adoption. GAWA - is Guardians And Wards Act, 1890. Does not give adopted child same legal rights a biological child. Parents are just the guardians of the adopted child and such an adoption can by revoked by the child after the age of 18. Legally it was only a Hindu citizen who, under the Hindu Adoption and Maintenance Act (HAMA), 1956, could adopt a child. The closest that non-Hindus, that is, Muslims, Christians, Parsis and Jews, could come to adoption was through procedures under the Guardians and Wards Act, one that is hardly a substitute for a full-fledged adoption law. There was a undeniable need for a civil law governing adoption, or failing that, an enabling adoption code which adoptive parents who are non-Hindus, or do not wish to adopt under HAMA, could take recourse to. The religion-specific nature of adoption laws was a very conservative step and claustrophobic in nature for the society where people from religion are treated differently in the eyes of law. Like In 1980, India passed The Adoption of Children Bill, 1980, that allowed non-Hindus to adopt children (prior to that time, only Hindus could adopt). However, Muslims believed that the Qur’an does not allow adoption. They tried to block the law.
In *Martha Nussbaum’s* Sex and Social Justice, she cites Tariq Mahmood, a professor at the University of Delhi, on this issue.

"Even if it is accepted that Islamic law prohibits adoption, how can the Muslims prevent enactment of a secular law of adoption which will be applicable only to those who wish to adopt a child? If Islamic law does not permit adoption, the Muslims need not make use of the Indian adoption law. That law will certainly not impose on any person a duty to adopt....If Islam does not recognize a social or economic concept, the state cannot compel every Muslim to keep away from it. If that were possible, our banking laws should not be available to any Muslim, since Islam does prohibit interest on money..."  

It is a defence of classical liberalism, feminism and humanism, providing support for an understanding of humanity that allows for criticism of other cultures without Western condescension. Nussbaum tackles the relativism of postmodern feminism, and its inability to give women true freedom in countries were genital mutilation is practiced, women are kept from education, etc. It has been asserted that adoption in technical sense is not allowed in Muslim law.

The intention of the Prophet was that if a man called another's son "his son" it might create complication with natural and normal relationship if

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29 Martha Nussbaum (born Martha Craven on May 6, 1947) is an American philosopher with a particular interest in ancient Greek and Roman philosophy, political philosophy and ethics.

30 http://arbitrarymarks.com/wordpress/2007/03/
taken too literally. The idea of the Prophet was to convey that the real son is a real son and adopted son is not a real son.

To treat an adopted son, as a real son if one has no real son is not a mistake as what counts is the intention of the heart. Even if according to this verse, the adopted sons are to be called by the name of their father and if their father's name is not known then to call them as *mulla* or brother, this verse nowhere says that if any adoptions made by a man who has no son of his own, it will be against the dictates of Allah. If according to the Prophet if a slave whose father's name is not known is to be treated as brother then is it not permissible for an issueless person to treat a boy as his (adopted) son. If you will recognize a man by the name of his natural father it will be more just in the sight of Allah. But if you call him as your own son it will not be unjust nor Allah will be displeased, *the Prophet has not barred adoption in absolute terms. What is intended is erecting of false relationship to the detriment or loss of true blood relation. The believers should follow him rather than their lathers, mothers or brothers where there is conflict of duty. The doctrine advanced by the Prophet is based on the situation where there is already a natural born son to a father. There can be situations where there is no son to a man so in that situation that man can or cannot adopt a son for himself and treat him like a son. It may be noted that the Prophet has envisaged that in case of slaves, they should be known by their father's name.*
The custom of adoption is valid amongst Mohammedans, and Shariat law does not prohibit such custom of adoption. It cannot, therefore, be said that the Holy Quran prohibits adoption. If the above verse is interpreted to mean that the prophet has prohibited adoption, it cannot be assumed that what is prohibited by the Holy Quran can be permissible by custom and usage.

3.3.4 THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937 AND ITS EFFECT ON ADOPTION

Yet, another question connected with adoption is application of the Muslim Personal Law (Shariat) Application Act, 1937. It may be pointed out that in 1937 this Act was promulgated to make provision for application of Muslim Personal Law (Shariat) to Muslims. Section 2 of this Act provides as under:

“Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq ila zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”
It may be seen that this section specially enumerates the subjects which are to be governed by Muslim Personal Law notwithstanding any custom or usage to the contrary. The matters enumerated in this section do not include adoption. For the interpretation of this section of the Shariat Act, reference can be made to two division bench judgments of the Madras High Court in *Puthiya Purahil Abdurahiman Kurnavan v. Thuyath Kancheentavida Avoomma*\(^{31}\) and *Maulvi Mohd. v. Mahboob Begam*,\(^{32}\) where it has been held that the non mention of other subjects such as adoption in respect of which a valid custom could govern and be binding on the parties does not mean that it is not permissible for the parties to rely on such a valid custom, if there is one. The Mysore High Court has also followed the above mentioned view of the Madras High Court in *Hajee Abdul Sattar Sait v. Controller of Estate Duty*.\(^{33}\) It cannot be said that The Holy Quran prohibits adoption amongst Mohammedans in absolute terms. And the custom of adoption amongst Mohammedans has been held also the valid. Muslim Personal Law (Shariat) Application Act, 1937 does not abrogate the custom of adoption prevailing amongst Mohammedans. The conclusion, therefore, is that the Holy Quran nowhere prohibits adoption.

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31 AIR 1956 Mad 244
32 AIR 1984 Mad 7
33 69 ITR 45. Reference may also be made to a Supreme Court's decision in Mohd. Yunus v. Syed Unnisa,MR 1961 SC 809 wherein the apex court has considered the scope of s. 2 of the Shariat Act.
In the landmark case of *Abdul Hakim & others V. Gappu Khan*, the Rajasthan High Court has interestingly observed, that:

“Besides the above decisions, which cover a period of 50 years, there is overwhelming oral evidence in support of the custom of adoption among the Mahawats, which remains unrebutted, and the several instances mentioned by the defendants' witnesses were not negatived by the evidence led by the plaintiffs.”

Even in another case that of, *Nenoo Khan v. Mst. Sugani* it was held by the same high court that by virtue of custom, Mohammedans might also have system of adoption. In *Mst. Bibi v. Syed Ali*, the same high court has considered the matter in detail and has come to the following findings:

(i) Adoption is, as a rule, not unknown to Muslim law.

(ii) By virtue of custom Mohammedans may also have the system of adoption.

(iii) A Muslim who alleges that by custom he is subject of adoption must prove it.

Thus, there is an overwhelming number decision to support the contention that Mohammedan law recognizes adoption by custom.

34 SB CSA No. 115/1950 decided on 22.12 1954
35 1974 WLN (DC) 8.
3.3.5 UNDER MUSLIM LAW- DOCTRINE OF ACKNOWLEDGEMENT OR IQROR

Putative or presumed father is not recognised under Muslim Law. It firmly believes in the concept of \textit{filius nullis}, which means, a son of nobody or an illegitimate son who has no legal rights as a son in respect to the inheritance of property. However, the doctrine of acknowledgement can be used to establish legitimacy only when real paternity is possible. It is a tool used under Muslim law to give legal status to the relationship. Thus the acknowledged child must be at least 12 years 6 months younger than the acknowledger. This represents minimum period of gestation added to the minimum period of puberty.\textsuperscript{37}

A father can acknowledge paternity if the following two conditions are:

(1) child is of unknown paternity,

(2) there is no definite proof that the child is the offspring of whom

These principles are clearly rules of substance. In the Indian and Pakistani context, therefore, the rules have not in any way been affected by the Indian Evidence Act. The leading case is \textit{Muhammad Allahdad Khan v. Muhammad Ismail Khan}, where in the parties were Sunni Muslims. Muhammad Allahdad Khan and his alienee Musammat Hakim-un-Nissa brought a suit against Muhammad [small Khan. his three sisters, and others, for a declaration of right to and possession of two shares in

\textsuperscript{37} A textbook on Muslim personal law By David Pear
villages left by one Ghulam Ghaus Khan, who was the father of Muhammad Ismail Khan and his three sisters. Muhammad Allahdad Khan asserted that he was the eldest son of Ghulam Ghaus Khan; thus he was entitled to shares in the estate in accordance with the Islamic laws of inheritance. In reply, Ismail Khan and the three sisters contended that Allatiadad Khan was no more than a step-son of Ghulam Ghaus. According to Muhammad Allahdad Khan, even if he failed to prove that he was the full son of Ghulam Ghaus, he argued that nonetheless Ghulam Ghaus had acknowledged him as his child, which gave him the status of a legitimate child. The latter argument found favour with the judge, Mahmood J. A child born of zina (illicit sexual relations) can never be legitimated, and is barred from inheriting from the father. Illegitimacy, in those circumstances, is a proved and established fact, and no amount of acknowledgement of the child can change the situation. Mahmood J expressed the rule in the following manner.

The doctrine of acknowledgement applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgement has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of an acknowledged child. On (the basis of the facts in Muhammad Aitohdad Khan’s case, Mahmood J was able to hold that the case presented all the conditions to which (acknowledgement is most appropriately applicable; thus Allahdad Khan could inherit together with the brother and the three sisters.
3.4 ISLAM ON EMERGENCE OF CHILD ADOPTION LAWS AND TOLERANCE TOWARDS THE PRACTICE

Islamic regulations regarding adoption are distinct from western practices and customs of adoption. Contrary to what happens in the western world, a child does not formally leave his or her family to enter the one that raises them. While raising someone else’s child is allowed and even encouraged in case of an orphan, the child does not become a child of the new parents. This form of adoption where children retain membership to their original family is called, in Arabic *kafala*. This implies for example that the new father cannot name the son after him, and that the child is counted as a non-Mahram. This can be sidestepped by having the child suckling the adoptive mother in the first two years of life. An important fact to keep in mind is that Muhammad himself was an adopted child; Muhammad himself was fed by an adoptive mother during the first two years of his life.

3.4.1 INTER-COUNTRY CHILD ADOPTION: RESTRICTIONS BY ISLAMIC COUNTRIES ACROSS THE WORLD

As observed Islamic countries have restriction in child adoption. There are countries like Afghanistan which does not recognise adoption altogether. It is interesting to see that Iraq does not deem inter-country adoption at all. Distinctive features of these countries are given under, as follows;

1. **AFGHANISTAN**: Islamic law does not recognize adoption (Art. 228 of civil Code of 1980)
2. **BANGLADESH**: Primarily Muslim country. Does not permit adoptions of Muslims. Under Hindu law, Hindus may adopt Hindu children. In order to obtain legal custody of an abandoned child delivered to an adoption agency, prospective adopting parents must apply to District Judge under Section 8 of the Guardian and Wards Act, 1890.

3. **IRAQ**: Iraq does not permit the adoption of its nationals by foreigners.

4. **ISRAEL**: Adoptions are strictly controlled by the Ministry of Social Welfare and the District Courts. Few children are available to foreigners. The adoptive parent(s) must be of the same religion as the child and work through a licensed adoption agency.

5. **KUWAIT**: Kuwaiti law has no provisions for adoption.

### 3.5 PAKISTAN’S LEGAL OBSERVATION ON CHILD ADOPTION LAWS:

It will be recalled that ‘Sun’ XXXIII, verse 37 abolished the pre-Islamic custom of adoption whereby an adopted child could be assimilated in a legal sense into another family, it can be suggested that the acknowledgement of family of a person of unknown origin amounts, in a way, to a form of adoption. Moreover, there are some Muslim scholars who argue that Sura XXXIII, verse 37 does not prohibit adoption, but merely classifies it into the category of acts known as *mubah* - the acts towards which religion is indifferent. Such arguments have not found

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favour with the legislators in the by Moselle presumably under the provisions of the Dissolution of Muslim Marriages An 1939.

Custody of the children was given to the petitioner. The husband, however, kidnapped the children and took them to Karachi in Pakistan. Contempt proceedings were drawn up in the Calcutta High Court against Ahmad and he was sentenced in absentia and committed to prison. Moselle then travelled to Pakistan, instituted a criminal proceedings under Section 368 of the Pakistan Penal Code, and in addition. Filed a petition for a writ of habeas corpus praying that the two children be brought before the court and dealt with according the law. Although the petition was not filed under the Guardian and Wards Act. The principles applied by the court relate to the jurisdiction under the Guardian and Wards Act. For in the result the court held that it was "improper to give the custody of the two Muslim children to a Jewess mother who is an Indian national and is residing in India".39 The preliminary problem was not raised by the court. In Jewish law, children are presumed to follow the religion of the mother. In Muslim law, the children are presumed to follow the religion of the father.40 In Pakistan, the personal law governing the father is certainly applied on grounds of public policy, but there is no reason why in India, where the mother was both domiciled and a national, the law of the father should be preferred to the law of the mother.

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39 1957 PLD (WP) Karachi at p. 52.
40 Atia Varis v. Sultan Ahmad Khan 1959 PLD (WP) Lah 205 at p. 215. “Under the law, the minor must be presumed to have the father’s religion and corresponding civil and social status.”
3.6 CHILD ADOPTION LAWS PREVELANT IN INDIA- ACT, ENACTMENTS, RULINGS AND DECISIONS

1. The Guardians and Wards Act, 1890
2. The Hindu Adoption and Maintenance Act, 195
3. The Constitution of India
5. Juvenile Justice Care and Protection of Children Act 2000
6. Supreme Court issued guidelines in Landmark cases, like *Laxmikant Pandy*.

3.6.1 THE GUARDIAN & WARDS ACT 1890 (GAWA)

Salient features of The Guardian & Wards Act 1890, herein after referred as GAWA are as follows:

- Applicable to Christians, Muslims, Parsis, Jews
- Under GAWA, the relationship between the adoptive parents and the adopted child is that of guardian and ward respectively.
- Unlike HAMA, adoption under GAWA is not irrevocable and doest not confer status of the child on the adopted child.
- All the inter-country adoptions are processed in India under the GAWA

Personal laws of Muslims, Christians, Parsis and Jews do not recognise complete adoption. As non-Hindus do not have an enabling law to adopt a child legally, the people belonging to these religions who are desirous of
adopting a child can only take the child in 'guardianship' under the provisions of The Guardians and Wards Act, 1890. The statute does not deal with adoption as such but mainly with guardianship. The process makes the child a ward, not an adopted child. Under this law, when children turn 21 years of age, they no longer remain wards and assume individual identities. They do not have an automatic right of inheritance. 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 aforesaid enactments remain silent about the orphan, abandoned and surrendered children. There was no codified legislation dealing with the adoption of the children of these categories. As a result, several misconceptions or irregularities appeared in respect of the custody, guardianship or adoption of these types of children, which were prejudicial to the interest of the children.

3.6.2 THE HINDU ADOPTIONS AND MAINTENANCE ACT (HAMA) 1956

There is no uniform Law in India that provides for the adoption by people belonging to all religions. The only existing law on Adoption is – The Hindu Adoptions and Maintenance Act (HAMA) 1956, which provides for adoption by Hindus only.

In the case of non- Hindus, the Guardians and Wards Act (GAWA) 1890 is invoked to confer guardianship of children. Under this legislation, there is no safeguard to the child’s legal rights. And it does not provide the child
the same status as that of the child born to the family. This act confers only a guardian-ward relationship. The reality is such that once the child is 18, he/she can either walk out on the parents or vice versa. Such a situation can have serious repercussions.

According to the Juvenile Justice Act, all States should formulate rules for adoption and set up Child Welfare Committees to examine cases and give "Legally free for adoption" clearance certificates, which alone can authorize agencies currently nurturing children to endorse adoption requests. Some other brief details about the law are as follows:

- Applicable to Hindus, Jain, Buddhists and Sikhs.
- Under Hindu Adoption & Maintenance Act, the adoption is irrevocable and confers the full status of a child, including the right to inherit on the adopted child.
- Under HAMA, only one child of each sex can be adopted. Parents cannot adopt child of a particular sex, it they already have a or adopted child of the same sex.

3.6.3 CONSTITUTION OF INDIA

The Government of India is fully sensitized and committed to the rights and welfare of children. The Constitution of India provides Fundamental Rights under Chapter III. These rights are guaranteed by

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41 The primary objective of the Child Welfare Committee is to inquire into child rights violations, and care and protection of children. It is also vested with the responsibility of issuing certificate of adoption to the Adoption Board.
the constitution. One of these rights is provided under Article 21 which reads as follows:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The main object of Article 21 is that before a person is deprived of his life or personal liberty by the State, the procedure established by law must be strictly followed. Right to Life means the right to lead meaningful, complete and dignified life. It does not have restricted meaning. Thus article 21 gives every child to live with dignity.

The Constitution of India under Article 24- Chapter on “Fundamental Rights of the Citizens” provides the right against exploitation of the children below 14 years.

Article 44 of the Constitution declares that:

“The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.”

Therefore, religion specific nature of adoption laws should be scraped and formation of a Uniform Civil Code should take place.


At the International level, India has ratified the Convention on the Rights of Child and the Hague Convention on inter- country adoption of Children.
At 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 enact laws regarding welfare of children.

**The Juvenile Justice (Care and Protection of Children) Act 2000 is a landmark in this regard.**

In the Indian Constitution, there is a chapter entitled "**Directive Principles of State Policy,**" which sets out certain fundamental obligations of the State. While they are fundamental in the governance of the country, the provisions are not judicially enforceable. When the Indian Constitution was drafted, the Constitution makers were aware of the Universal Declaration of Human Rights, which contains certain civil and political rights and, also social, economic and cultural rights.

By and large, the civil and political rights were incorporated in a chapter of Fundamental Rights, which could be enforced judicially, while the social, economic cultural rights were included in Directive Principles, which are not judicially enforceable.

The following are the **Directive Principles of State Policy** to be followed by the State for the welfare of the children:

**Article 39** specifically requires the State to direct its policy:
- To protect the health and strength of children and, to ensure that they are not forced by economic necessity to enter vocations, unsuited to their age or strength.

- To ensure that children are given opportunities and facilities to develop in a healthy manner and, in conditions of freedom and dignity and, that their childhood and youth are protected against exploitation and, against moral and material abandonment.

**Article 45** requires the State to make provision for free and compulsory education for all children until they complete the age of 14 years. Adoption provides a very important function in Indian society. India has long tradition of child adoption. In olden days, it was restricted within the family and was covered by social and religious practices. But with the changing times, adoption beyond the contour of family has been institutionalized and legalized. What Government of India and State Governments is providing necessary support and guidance through its policies and programmes, the Non- Governmental Organizations (NGO’s) provide necessary delivery system for the process of adoption which is above board and transparent.

The laws, ideals, and procedures governing inter-country adoption in India, in terms of that nation’s role as a country of origin or sending nation, are impressive. These laws, principles, and procedures are generally consistent with the Hague Convention, even though India only
recently ratified the Convention, which entered into force on October 1, 2003.

3.6.4 THE JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT 2000

The Juvenile Justice (Care & Protection of Children) Act 2000, hereinafter referred as JJ, Act. Its salient features are as follows;

- Applicable to all Indian Citizen
- Allow adoption of two children of the same sex
- Confers status of parents & child and not guardian and ward
- Confers rights available to child on the adopted child.

The Juvenile Justice (Care & Protection of Children) Amendment Act 2006

Juvenile Justice (Care and Protection of Children) Act 2000

The Juvenile Justice (Care and Protection of Children) Act 2000 is designed for the care, protection, development and rehabilitation of juvenile in conflict with law and child in need of care and protection, as well as the adjudication and disposition of certain matters related to them. This Act was enacted by Parliament to replace the J.J. Act 1986. It provides a uniform legal framework of justice across the country, so as to ensure that no child under any circumstances is lodged in jail or police lock-up.

The Act covers children up to 18 years. The Act spells out the machinery and infrastructure required for the care, protection, development and rehabilitation of children. Such machinery includes Juvenile Justice
Boards for the screening of juvenile in conflict with law and Child Welfare Committees for the care and protection and treatment of child in need of care and protection. Mention is also made of the need for development of appropriate linkages between the formal system and voluntary agencies to assist in implementing a diverse approach towards the recover, re-education and rehabilitation of juveniles. The Act enables the competent authority a wide range of disposition alternatives with preference to family/community based placements.

3.6.5 IMPACT OF INTERNATIONAL CONVENTIONS ON CARA

It is generally considered a progressive law in accordance with international principles, such as the United Nations Convention on the Rights of the child, to which India Government became a signatory in 1992. In signing the Convention, the Government accepted obligations to bring all state laws and policies in the line with the main principles of children’s rights, namely best interest, non-discrimination and child’s voice. Furthermore, in relation to the Administration of Juvenile Justice system, Article 40 of the Child Rights Convention States. “State Parties recognize the right of every child alleged as accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account, the child’s age and the desirability to
promoting the child’s reintegration and the child’s assuming a constructive role in society”.

This Act has incorporated the provision of adoption of child as an alternative to institutional care. Before the introduction of JJ Act, there was no codified legislation dealing with the adoption of the children. Thus, several misconceptions or irregularities appeared in respect of the custody, guardianship or adoption of children, which were detrimental to the interest of the children. Though at the initial stage the Juvenile Justice (Care and Protection of Children) Act, 2000 did not contain these factors, these are introduced in Juvenile Justice (Care and Protection of Children) Amendment Act, 2006. The concept of adoption has been well defined in Sec.2 (aa) of the said Act, 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."

The Act introduced an expression “child in need of care and protection” and it has been defined in Sec. 2 (d) of the Act. This definition covers what is meant by orphan, abandoned and surrendered children.
3.6.6 REHABILITATION & SOCIAL REINTEGRATION FOR ORPHAN, ABANDONED OR SURRENDERED CHILDREN:

The chapter IV of the Act deals with rehabilitation and social re-integration of children. The primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise, through alternative care programmes and long term institutional care shall be of last resort.

Sec. 40 of the J.J.Act provides that the rehabilitation and social reintegration of a child shall begin during the stay of the child in children’s home or special home, but as the family is the best option to provide care and protection for children, adoption is the first alternative for rehabilitation and social reintegration of orphan, abandoned or surrendered children.

On implementation of JJ Amendment Act-2006 and its State Rules, all cases of orphan, abandoned and surrendered children have to be processed under the Act so that unrelated children have adequate safeguards in their placement.

1. **Sishu Greh Scheme**

The “Scheme of Assistance to Homes for Children (Sishu Greh) to Promote In-country Adoption” has been in operation since 1992-93 to promote in-country adoption. The Scheme was revised w.e.f. 1st
April, 2001 with the objective of bringing State Govt.-run-institutions within its ambit so that all institutionalized children who are legally free for adoption can find families within the country.

2. **ICPS**

Integrated Child Protection Scheme of Ministry of Women and Child Development is an intervention of holistic approach towards child protection and rehabilitation.

3. **Legislation/Guidelines/directives for adoption of orphan abandoned or surrendered children:**

The following legislation, guidelines or directives are to be complied with in respect of adoption of orphan, abandoned or surrendered children.

1. Guidelines issued by Central Adoption Resource Authority time to time based on the judgment of the Supreme Court on inter-country adoption in *Laxmikant Pandey v. Union of India & others*[^42][W.P. (Crl.) No. 1171/1982] and subsequent judgments.


Relevant provisions for Adoption under JJ Act, 2000 & Rules:

**Sec.41 of J.J. Act, 2000** read with Rule 33(1) of Central Rules expresses the following aspects of adoption:

[^42]: [W.P. (Crl.) No. 1171/1982]
“The primary aim of adoption is to provide a child who can’t be cared for by his biological parents with a permanent substitute family. The family of a child has the primary responsibility to provide him care and protection. Orphan, abandoned or surrendered children can be adopted for their rehabilitation through such mechanism as may be prescribed. Such children may be given in adoption by a Court in keeping with the provisions of several guidelines regarding adoption issued by the State Govt. Central Adoption Resource Authority and notified by the Central Govt. But the Court should be satisfied with the investigation having carried out which are required for giving such children in adoption. For placement of the orphan, abandoned or surrendered children for adoption in accordance with the said guidelines, the State Govt. shall recognize in each district one or more institutions or voluntary organizations as specialized adoption agencies.”

The Children’s Homes and institutions run by the State Govt. or voluntary organizations for children in need of care and protection who are orphan, abandoned or surrendered, should ensure that these children are declared free for adoption by the Committee (Child Welfare Committee) and such cases shall be referred to the adoption agency of that district for their placement in adoption.

The guidelines issued by the CARA and notified by the Central Govt. U/s 41(3) of the Act, shall apply for all matters relating to adoption. Now, it is necessary to understand what Child Welfare Committee is.
As per Sec.2 (f) of the Juvenile Justice Act, 2000 the expression “Committee” means a Child Welfare Committee constituted U/s 29 of the Act. Now it is necessary to ascertain the meaning of Child Welfare Committee.

4. **Child Welfare Committee**

Sec. 29 of the Juvenile Justice Act, 2000 provides for the Child Welfare Committee. The Committee has the sole authority to declare the child in need of care and protection who are orphan, abandoned or surrendered free for adoption.

CWC shall determine legal status of all orphan, abandoned and surrendered children. Functions and powers of the Committee, procedure in relation to the Committee, production of child before committee, procedure for inquiry, procedure related to orphan and abandoned children and procedure related to surrendered children shall be governed as laid down in the Juvenile Justice Amendment Act 2006 and its Rules. On clearance from CWC that a particular child’s free for adoption, there will be termination of parental right.

5. **Criteria for the Child to be adopted**

Sec.41 (5) of Juvenile Justice (Care & Protection of Children) Act, 2000 provides that a child shall be offered for adoption on fulfillment of the following requirements:
1. In case of abandoned child, if two members of the Committee declare the child legally free for placement.

2. In case of surrendered child, if the period two months for reconsideration by the parents is lapsed.

3. In case of a child who can understand and express his consent, if his/her consent is obtained in this regard.

6. Child for Adoption- legibility

Sec. 41 (6) Juvenile Justice (Care & Protection of Children) Act, 2000 that the court is empowered by Sec.41 of the Act to allow a child to be given in adoption to the following persons:

I. A person irrespective of his/her marital status,

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

III. The childless couples.

7. Need for Separate adoption cell or court where matter can be heard

Prior to the amendment of the J.J. Act, 2000 the Juvenile Justice Board was placed instead of the Court for allowing the child to be given in adoption. However, the legislature has consciously amended the expression “Board” and replaced it with the word “Court” in the J.J. (Amendment) Act, 2006. So in case of adoption under the Juvenile Justice Act, the petitions should be filed U/s 41 of the Act before the Court.
Now it is necessary to understand which court is specifically meant by the said Act to deal with the adoption matters of orphan, abandoned and surrendered children. Since the J.J. Act does not define the expression “court”, the Model Rules framed by the Central Govt. relating to adoption should be taken to consideration.

According to Rule 33 (5) of the Central Rules under the said Act, the “Court” implies a civil court, which has jurisdiction in matters of adoption and guardianship and may include the court of District Judge, Family Court and City Civil Court.

But the provision of the said Rules empowering the Family court has been subjected to several criticisms by judiciary. In the case of Manuel Theodore D’Souza [II (200) DMC 292] the Bombay High Court also observed that the right to adopt being a fundamental right must be capable of enforcement through the civil court as it falls within the ambit of Sec. 9 of Civil Procedure Code. It was also opined that the District Court or the High Court has the jurisdiction to deal with the question relating to adoption as this court normally deal with the disputes regarding custody, guardianship etc. of children. It was also held that such applications can be filed before the District Courts exercising powers under the Guardians & Wards Act and such applications for adoption of the child by a guardian must be reckoned as a miscellaneous application in the petition in guardianship.
Similar conclusion has been drawn by the Hon’ble High Court of Kerala in the recent case of *Andrew Mendez & others v. State of Kerala* (2008). It minutely interpreted the expression “Court” in J.J. Act as well as the jurisdiction of the Family Court as mentioned in the Central Rules under J.J. Act and the Family Courts Act. As per Sec.7 (1) (g) of the Family Courts Act, the Family Court has the powers/jurisdiction to deal with the question of guardianship. So the question arises whether claim for adoption can be brought under any sub-clauses (a) to (g) of Sec.7 (1) of the Family Courts Act so that the Family court must be the court for the purpose of Sec.41 (6). Similar type of question arose in the case of Vinod Krishnaan v. Missionaries of Charity [1997 (2) KLT 863] where the Division Bench of Kerala High Court held that the Family Court can’t be clothed by the stipulations in Sec. 7(1) to deal with a claim for adoption U/s 9(4) of Hindu Adoption & Maintenance Act.

It is only the District court having the jurisdiction to entertain such application. Following this observation the Kerala High Court in Andrew Mendez’s case opined that Sec 7(1) (g) is not sufficient to clothe the Family Court with the jurisdiction to consider an application for adoption by reckoning the same as incidental to guardianship and custody. Another important point was raised in this case, i.e., Sec. 7(2) (b) of Family Courts Act declare that the Family court shall also have and exercise such other jurisdiction as may be conferred on it by any other enactment. Though J.J. Act is an enactment, it doesn’t certainly states
that Family Court shall be the court for the purpose of Sec. 41(6). On the contrary, the Central Rules promulgated U/s 68 of the J.J. Act confers such jurisdiction on Family Court, but it does not fall within the ambit of “enactment” as explained by the High Court in the aforesaid case. Consequently it was concluded by the Kerala High Court that the Family Court does not have jurisdiction to entertain an application for adoption by a guardian U/s 41 (6) of J.J. Act and it can't be held to be the court U/s 41(6). It is only the District Court, which can have jurisdiction to entertain such application U/s 41(6) of Juvenile Justice Act, 200 read with Rule 33(5) of the Central Rules.

8. Procedure for adoption

Procedure in case of orphaned and abandoned children:

The Specialized Adoption Agencies shall produce all orphaned and abandoned children who are to be declared legally free for adoption before the Committee within 24 hours of receiving such children, excluding the time taken for journey. A copy of the report should be filed with the police station in whose jurisdiction the child was found abandoned.

A Child becomes eligible for adoption when the Committee declares the child legally free for adoption after completion of its inquiry. Such inquiry should be conducted by the Probation Officer or Child Welfare
Officer, who shall produce report to the Committee containing the findings within one month.

The Specialized adoption agency shall declare stating that there has been no claimant for the child even after making notification in at least one leading national newspaper and one regional language newspaper for children below two years of age and for children above two years, an additional television or radio announcement and notification to the missing persons squad or bureau shall be made.

9. Time stipulation

In case of abandoned child below two years, such a declaration shall be done by CWC within a period of sixty days from the time the child is found. For an abandoned child above two years of age, such a declaration shall be done within the period of four months.

A child must be produced before the Committee at the time of declaring him/her legally free for adoption. Subsequently, the child shall be placed in a specialized adoption agency or recognized and certified children’s home or in a pediatric unit of a Govt. hospital followed by production of the child before the Committee within 24 hours.

No child above seven years of age who can understand and express his opinion shall be declared free for adoption without his/her consent.

Procedure in case of surrendered children:
A surrendered child is one who has been declared as such after due process of inquiry by the Committee and in order to be declared legally free for adoption, a surrendered child shall be any of the following:

1. Born as a consequence of non-consensual relationship
2. Born of an unwed mother or out of wedlock
3. Whose one of the biological parents is dead and the living parent is incapacitated to take care
4. A child whose parents or guardians are compelled to relinquish him/her due to physical, emotional and social factors beyond their control.

The Committee shall give effort for counseling of the parents, explaining the consequences of adoption and exploring the possibilities of parents retaining the child and if the parents are unwilling to retain, then such children shall be kept initially in foster care or arranged for their sponsorship.

If the surrender is inevitable, a deed of surrender shall be executed on a non-judicial stamp in presence of the Committee.

Time stipulation: In case of surrendered child, two months reconsideration time shall be given to the biological parent or parents after surrender before declaring the child legally free for adoption.
3.6.7 PROACTIVE ROLE OF JUDICIARY: CARA AND ITS FUNCTIONS

The foreign adoption system outlined by the Indian Supreme Court had been largely based on those developed locally within certain parts of India. Nonetheless, the Supreme Court’s activism led to the development and coordination of a national system for foreign adoption. The Central Adoption Resource Agency (“CARA”), proposed by the Court, was created on June 28, 1990, “under the aegis of the Ministry of Welfare in pursuance of Cabinet decision.” CARA was designed to “deal with all matters concerning adoption,” as “in the Government of India all matters related to adoption shall be dealt with in the Ministry of Welfare.” The directions of the Indian Supreme Court were codified into CARA guidelines. CARA perceives itself as having a “principle aim is to encourage in country adoption,” while also being “engaged in clearing inter country adoption of Indian children.”

Under CARA regulations, Indian agencies must receive recognition by CARA in order to either “give a child to foreign parents for the purpose of adoption” or to “submit an application to an Indian court under the Guardians and Wards Act, 1890, for declaring a foreigner as a guardian of an Indian child.” Indian agencies involved in foreign adoption also should be licensed by the State “under the provisions either of the Women and Children Institutions (Licensing) Act, 1956 or the Orphanages or Charitable Institutions (Supervision and Control) Act, 1960.” In addition, Indian agencies applying for recognition from CARA should have the
recommendation of their state government for such work, although CARA may override a State’s refusal to recommend.

CARA also grants “enlistment of foreign agencies,” and effectively determines which foreign agencies may sponsor “applications of foreign adoptive parents for adopting an Indian child.” Both foreign agencies and Indian agencies should be run “on a non-commercial, non-profitable basis.” CARA approves all foreign adoptions, as its regulations require the recognized Indian agency to “apply to CARA for getting a clearance for the child.” Approvals by CARA of specific placements are called “No Objection Certificates” ("NOC"). Indian courts cannot grant guardianship to foreign parents unless CARA has first granted the NOC, with the possible exception of circumstances where CARA has failed to respond to the application “within the time limit specified” in the guidelines.

In addition, CARA guidelines implement the Supreme Court’s directions for Voluntary Coordinating Agencies ("VCA"). Local VCAs are responsible for promoting adoption within India, and for issuing an NOC when efforts to place the child within India have been unsuccessful. The various local VCAs are themselves required “to seek recognition from CARA by means of an application which shall be routed through the State Government.”

The VCA review and issuance of an NOC precedes CARA review, and provides CARA with evidence that sufficient efforts to place a child within India were made. CARA guidelines similarly reflect the Supreme Court’s
instructions regarding “scrutinising agencies.” The scrutinising agency is appointed by the local court reviewing the guardianship petition. The Indian Council for Social Welfare and the Indian Council of Child Welfare may serve as scrutinising agencies; local courts may also appoint other entities as scrutinising agencies from those recognized by CARA for this purpose. Scrutinising agencies “should not be involved in the placement of children in adoption.” Scrutinising agencies review all facets of the case, including issues pertaining to the voluntariness of the surrender of the child and the accuracy of the child study form. Additionally, they ensure that adoptive parents are “really interested” in accepting special needs and older children and guard against illicit profiteering. Also, they ensure proper clearances by VCA and CARA and determine whether the adoption is “in the best interests of the child.” Scrutinising agencies may charge for their review, with the ordinary rate. Although CARA plays a comprehensive regulatory role in relation to the other actors in Indian adoption, CARA has not fulfilled the Supreme Court’s expressed wish that it match prospective adoptive parents with Indian agencies and available children. The Supreme Court of India had envisioned a system in which foreign agencies initiated their contacts with CARA, who in turn matched them with Indian agencies. Instead, foreign agencies and prospective adoptive parents generally make direct contact with Indian orphanages, which subsequently seek CARA approval for specific placements. This direct contact between foreign and Indian agencies in arranging specific adoptions has been a mixed blessing, simultaneously creating
opportunities for initiative, efficiency, and corruption. A system in which all placements were based on matches or referrals made by CARA could have created a logjam at the centre of the system and would only have avoided corruption if CARA itself had proven incorruptible.

A) Programme Development and Monitoring Cell – Major functions

The PDM Cell was established in 1998 with functions like implementation and monitoring JJ Act, developing UNICEF assisted programme, their implementation and monitoring, organization of seminars / workshops / orientation training, policy development and programme formulation for all categories of children developing integrated programme for rehabilitation of women in distress, providing help line, monitoring and implementation of child right Conventions and extending child line services to major cities.

It’s Objectives:

2. Setting up of regional level training center
3. Computer installation in JJ institutions
4. Setting up of child line in 9 districts

The Government of India has published the new juvenile justice (care and protection of children) Act, 2000 w.e.f.1/4/2003 and its State Rules have been published on 4/8/2003. As part of the implementation of J.J. Act the Department is organizing various training/awareness programmes on JJ Act and CRC Programmes for street children programme for trafficking
and commercial sexual exploitation of children, rehabilitation measures /continuing education for Juvenile probationers and ex-pupils etc are other programmes under PDMC.

B) **Major functions of the Cell are as follows:**

1. Implementation and monitoring of JJ, Act.

2. National and state level programmes implementation and monitoring.

3. Developing UNICEF assistance programmes, implementation and monitoring.

4. Policy development and programme formulation for all categories of children, especially children in difficult circumstances – children without family support.

5. Programme development and support to state government for formulation and effective implementation of programmes and services for children.

6. Creation of awareness programmes on JJ, Act & CRC.

7. Organization of consultations/seminars/workshop/training.

8. Conducting reviews on implementation of programmes by central and state government and NGOs.

9. Training of the functionaries such as judiciary, police, chairman and members of JJ Board, Child Welfare Committee, Staff of JJ Institution Probation Officers, Social Workers and NGO’s.

10. Implementation of Street Children Programme.

12. Care and protection of children affected by HIV and children of HIV patients.


3.7 Agencies Providing Child Adoption Services

For safe guarding interest and welfare of child, Government of India has recognized the following agencies for Adoption.

- Indian Placement Agencies in different State - 73
- Foreign Placement Agencies Enlisted - 254
- Adoption Co-coordinating Agency in India in different States - 13
- Scrutiny Agencies in different States - 13