

IN-COUNTRY ADOPTIONS - NEED TO BE REVAMPED

K. VIJAYALAKSHMI

Senior Lecturer

DR. A.G.L.C

Pondicherry.

Human rights are the burning topic of today's world. They are actually part natural rights of mankind. When we talk about children the natural right of them is to be properly nurtured, take care of and brought up with love and affection. This can be achieved only when they have a home and a family.

In India, the conditions of poverty and related social problems, scanty national resources and economic resources has driven many children homeless and deprived of proper care and protection. The National Policy of Children for 1974 declared that it should be the policy of the State to provide adequate services to children during their growth and ensure their full potential, mental and social development. India has ratified the United Nations Convention on the Rights of the child 1989. This means that there is a duty cast upon the Government to create an environment in which all children are able to live securely realize their goals in life irrespective of the Child's race, nationality, colour, sex, language, religion, political, or and other option, national, social origin or status. Adoption is the way in which the child is identified in the family. Welfare agencies and institutions of similar nature can also take care of abandoned children. But they stand no where when a child is taken care of by a family. Hence the need for a proper adoption law.

The position prevailing in our country is that adoption as a legal institution exists only among Hindus which includes Buddhists, Jains, Sikhs, and other sub sets of these

religious groups. The other religious communities that is Christians and Parsees do not have a personal or statutory adoption law. Islam is said to be indifferent to adoption. But the practice of adoption is prevalent among the Indian Muslims, Christians and Parsees as well. The Guardians and Wards Act 1890 is resorted to by these communities but rights, which the children get under this Act, is very limited. Under this law the parents are appointed only as Guardians of a child 'adopted' with no right of inheritance. The child remains a foster child as distinguished from an adopted child¹. Orthodox Muslim interpret the Koran in such a way that it prohibits adoption. Where as the modern Muslim scholars believe that the holy Quran is no way prohibits adoption. Some of the Muslim countries like Turkey and Tunisia have permitted adoption by legislation called Motobonno².

The law of adoption as prevailing among the Christians in India is only the Guardian and Wards Act 1890. The Cannon law does not bar or prohibit the Christians from adopting a child³. The Guardian has a fiduciary relationship with the child and this relationship would cease to exist on the death of the Guardian or if the minor becomes a major. The consequence is that it neither creates any legal relationship nor a legal status. To overcome this type of situation English statutory provisions as existing in that country allow a foster parent to execute a will in favor of the adopted child to avoid unforeseen consequences. The English statutory provisions permitting adoption do not and cannot apply to Christian in India⁴. If there is any custom permitting adoption it is allowed and property right of such child is governed by the Indian Succession Act.

Parsees do not recognize adoption⁵. Adoption of a son was made by a widowed Parsee woman to perform the religious rites of her deceased husband. Thus these religious communities in India do not have an adoption law and have only to take recourse to Guardian and Wards Act 1890. There is a need for a secular law on adoption which should be acceptable to all communities if its main objective is, on the welfare of the destitute and orphan child. The prime objective being security and the safety of the child measures should be taken in the Act to provide property rights or some monetary benefits to the child from the properties of the parents, if possible.

The Hindu Adoption and Maintenance Act permits both a Hindu male and a Hindu female to adopt a son as well as a daughter. The only condition is that the adopter must not have a child of the same sex either natural born or by adoption living at the time of adoption.

The Hindu Adoption and Maintenance Act 1956 which was religious in nature is now secular⁶. Prior to 1956 only a male child could be adopted and a woman had no right to adopt. Today the objective of adopting a son or a daughter may be to satisfy the parental instincts and emotional needs. It may also be to seek a helper or assistant in old age or an heir or successor to property. A benevolent person or a married couple without any issue may adopt a child. The Act has expressly stated that only a person professing Hindu religion can adopt. The person to be adopted should be a Hindu.

The procedure and formalities prescribed by the Hindu Adoption and Maintenance Act 1956 is the ceremony of giving and taking. There is no separate court procedure involved except when the child is given in adoption by a guardian. Moreover there is no mention made in the Act about foreigners adopting a child.

Another notable discrepancy in the Act is the difference between the capacity of a male and that of a female to adopt. The Act recognizes the right of a Hindu male to adopt a child even during the lifetime of his wife. It does not permit the wife to adopt a child during the lifetime of her husband. She can adopt only on the death of her husband or after divorce or where the husband has renounced the world or has ceased to be a Hindu or declared by the court to be of unsound mind.

Succession rights of adopted children are not clearly spelled out in the case of a Hindu marrying under Special Marriage Act 1954 or by a Hindu whose parents were married to each other under the Special Marriage Act 1954. Such adopted children are not entitled to succeed on intestacy to such parents or to any relation of parents as the parents marrying under the Special Marriage Act are governed Indian Succession Act 1925, and not by the Hindu Succession Act 1956. The Indian Succession Act 1925 is silent about the succession on intestacy by adopted children. Hence it is suggested that if both the parties to the marriage are Hindus and married under Special Marriage Act 1954, the Hindu Succession Act 1956 may be made applicable to the adopted child. If one of the spouses is a Hindu married under the Special Marriage Act 1954 the succession right of the adopted child may be governed by the Indian Succession Act 1925.

The Hindu Adoption and Maintenance Act specifies only three persons who are capable of giving a child in adoption. The father, The mother and The guardian have the power to give the child in adoption. When the father is alive and capable of giving the child in adoption the mother has got no right to give the child in adoption. In this age of equality it appears that a women's right as mother is undermined. Father's preferential

right even though with the mother's consent as stated in the Act is viewed as discriminatory. The Act can be amended in such a way that both father and mother after mutual consent should have the power to give the child in adoption.

There is no law in India providing for adoption of a child by foreign parents. The Guardian and Wards Act 1890 is the alternative to foreign parents who wish to adopt. Children who are adopted in this manner are taken abroad and exploited in many cases. So Supreme Court of India have to intervene in the matter. An advocate of the Supreme Court Lakshmi Kant Pandey sought relief through a Writ Petition⁷. The Writ Petition came as a rescue to thousands of children who were exploited. In this case the Supreme Court has given priority to In-country adoption. Only when it is not possible inter country adoption may be resorted to in the welfare of the child. The Court laid broad guidelines for adoption to be carried out, only through recognized placement agencies, operating in India and abroad. Despite the guidelines given by the Supreme Court some unscrupulous elements working under the guise of taking of care of children and running some institutions for children are trying to convert adoption into trade in babies.

The present adoption law has to be reshaped in the light of changing concept and the role that the society expects it to play. Realizing the dire need for a secular, uniform law of adoption governing all the citizens of the country some private members of Indian Parliament presented to the house draft bills of a uniform adoption law. In 1972 the Government of India introduced the adoption of children bill in the Parliament but it was opposed by one section of Muslim Community. In 1980 again the bill was introduced excluding the Muslims but Parsees and some other communities objected it. Thus there is no uniform law of adoption till today.

The government has to take fresh initiative to enact a law of adoption which will be beyond religion and acceptable to all communities. The welfare of the destitute or orphan children should be the main focus.

The Comments of Dr. Munshi in the Constitution Assembly Debates needs to be recalled⁸. Dr. K.N. Munshi pointed out that as regards the freedom of religion guaranteed under of Article 25 of the Constitution, it was subjected to reasonable restriction by the State and the Parliament could make laws regulating and restricting ...any secular activity which may be associated with religious practices. If adoption of children can be taken as a religious or secular activity falling within the field of social welfare, it would be possible to make a uniform law and such a law would not be violative of any fundamental right. Such a law should not interfere with the inheritance laws of the communities which are of divine origin. The need for a uniform adoption law applicable to all persons irrespective of the religious backgrounds under which every child who is permanently placed with a family will have the irrevocable legal status of a natural born child, is actually felt by all concerned⁹. So long as the Government of India is not coming forward with such a uniform adoption law, the Supreme Court can frame necessary guidelines for in-country adoption, as it did with inter-country adoption by foreigners.

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