CHAPTER IX

ADOPTION

I INTRODUCTION

ADOPTION IS a valuable legal fiction which is of great help to children and, therefore, its importance in law relating to children cannot be over-emphasized. In India, a unique feature of this extremely important aspect of children's law is that among the various religious communities living on this soil only the Hindu community (in its broad legal sense) possesses a law of adoption. All other communities, namely, Muslims, Parsis and Christians who may be bracketed together, have no laws of adoption of their own.

The Parsi personal law is now found in the Parsi Marriage and Divorce Act,1936 and part III of the Indian Succession Act, 1925. No provision relating to adoption is found in these legislative measures. The laws applicable to the Christians of India, *i.e.*, the Christian Marriage Act, 1872, the Indian Divorce Act, 1869 and the Indian Succession Act, 1925, are also silent about the fiction of adoption. The position of Muslims in this regard is indeed peculiar. The Muslim Personal Law (Shariat) Application Act, 1937, which determines the scope of Muslim law in India provides two different lists of subjects, one mentioning those subjects, in regard to which all Muslims of India will be compulsorily governed by the law of Islam, any contrary custom notwithstanding,[1] and the other list referring to those subjects in regard to which a Muslim can individually opt for the law of Islam by means of a declaration, the declaration made once being binding on the maker's minor children and their subsequent descendents[2]. While the

1. Muslim Personal Law (Shariat) Application Act, 1937, s. 2.
2. *Id.*, s.3.

first list is quite long, the other includes only three subjects and adoption is one of them.[3] Whatever be its history and background, the legal position is that (unless a Muslim has expressly opted for the Islamic law of adoption or unless it was adopted during his minority by his father or by a higher ancestor while the latter was a minor), he will not necessarily be governed by the Islamic law of adoption. What is the law of Islam on adoption? This we will consider later. Here the question is, by what law will a Muslim be governed should he wish to adopt a child, if not by the Islamic law of adoption? There is so far no statute in India which may be availed of by him. Such a Muslim can only seek the help of a custom permitting adoption, provided he can prove the existence of such a custom in his family satisfying all judicial requirements for that purpose.[4] There are very few Muslim families in India who have a legally recognizable custom of adoption. Among them are some families in the Kashmir valley who have a custom of "adopting" sons (called *pisar-e- parvarda*).

In the absence of a legally recognizable custom of adoption, the courts will, thus, apply Muslim law on the basis of justice, equity and good conscience.

There is no prohibition of adoption in the religious laws of Parsis and Christians, though none of these communities have a personal law of adoption or a statutory law to that effect. It will be thus custom (if there is one) which governs adoption in their case. However, it is generally believed by the Muslims that their law prohibits adoption altogether. A probe into the correctness of this belief is out of the scope of this work.[5] Suffice it is to say that there are Muslims in India who believe that Islam is indifferent to adoption;[6] and some of them are convinced that a modern of law adoption, with some adaptation, may be accommodated by Islam.[7] In Turkey adoption is generally permitted under its Civil Code of 1926[8] and in Tunisia a modern law of adoption was enacted in 1958.[9]

Hindus, Sikhs, Jains and Buddhists are at present governed in the matter of adoption by the Hindu Adoptions and Maintenance Act, 1956,

3. *Ibid.*
4. See *Abdul Hussein* v. *Sona Dero,* (1917) 45 I.A. 10.
5. Reference may be made to T. Mahmood, 'A Secular Law of Adoption in the Making' *An Indian Civil Code and Islamic Law* 98-103 (1976); also D. Latifi, 'Adoption and the Muslim Law', 16 *J.I.L.I.* 118-122 (1974).
6. This is the opinion expressed by T. Mahmood in his work referred to above, *ibid.*
7. This refers to D. Latifi's article, *supra* note 5.
8. See T. Mahmood, *Family Law Reform in the Muslim World* 20-21 (I.L.I., 1972).
9. See T. Mahmood, 'Law Relating to Children : Recent Reforms in Tunisia', *S.C.J.* 23-27 (1974).

which is now the only statute on adoption existing in this country. The textual laws as well as customs adhered to in regard to adoption by these communities before 1956 have all been abrogated by this Act, and an adoption made by a member of any of these communities is to conform to the provisions of the aforesaid Act of 1956.

In 1972, a Bill called the Adoption of Children Bill was introduced in Parliament.[10] It sought to enact a modern and secular law of adoption which could be availed of by any Indian citizen irrespective of religion.[11] It was intended that after this Bill became law, the Hindu Adoptions and Maintenance Act, 1956 would be repealed as also all customs and usages relating to adoption, if any, adhered to in any part of India and by any community.[12] Religious leaders of the Muslims and their followers vehemently opposed the Bill for several years. Although there have also been supporters of the Bill among the Muslims, yet they constituted a small section. Six years after its introduction in Parliament, the Bill was, eventually, withdrawn by the government in July, 1978.

The Hindu Adoptions and Maintenance Act, 1956, thus remains the only law of adoption in India. In this study we will make a brief survey of the provisions of the Act of 1956. It is, however, advisable to refer briefly to the position of adoption in the Hindu religious law before 1956.

II RELIGIOUS CONCEPT OF ADOPTION

Under the ancient legal-cum-religious texts of India, adoption was a purely parent-based legal fiction not at all meant to serve any interest of the adopted child. It originated under a religious belief according to which a male issue was essential to procure spiritual benefits in the life hereafter.[13] Adoption, therefore, could be made generally by men only, and only exceptionally by widows in the name of and for the benefit of their deceased husbands.[14] A non-Hindu child could not be adopted. Only a son could be adopted, and not a daughter.[15] Religious ceremonies were required for a valid adoption.[16] Only parents and

10. Bill No. XVIII of 1972 (hereinafter called Adoption Bill, 1972).
11. See the statement of objects and reasons made by the law minister on 23 May, 1972 and appended to the Bill published by the government.
12. Adoption Bill, 1972, s. 25.
13. For a detailed exposition of the concept of adoption in ancient Hindu law, see N.R. Raghuvachariar, *Hindu Law* 86-193 (1965); Mulla, *Hindu Law* 478-522 (1966).
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*

not any other guardian could give a child in adoption.[17] On the whole, the ancient Indian law was "primarily anxious to protect the rights of the parents—natural and adoptive—and was not concerned with protecting the adopted child."[18]

It has been observed by a critic :

> In fact when we consider that the law prohibited adoption of orphans, illegitimate children and girls, while permitting adoption of even grown up married men, it is clear that the idea of protecting destitute children or giving them a house and family was totally absent in the legal philosophy behind this law....[19]

The textual or customary laws of Buddhists, Jains or Sikhs relating to adoption were not better in any sense than the Hindu law commented upon above. All of them have been replaced by the Act of 1956.

III MODERN HINDU LAW OF ADOPTION

(i) Capacity to adopt

Under the Act of 1956, any male Hindu who is of sound mind and is not a minor has the capacity to adopt a child.[20] A man having a wife, who does not become of unsound mind, *sanyasi* or non-Hindu, should, however, seek her consent for the intended adoption.[21] Under the same Act any female Hindu who is a major and of sound mind and who is unmarried, widow, divorcee or wife of an insane, convert or *sanyasi* husband, may adopt a child.[22] Under the Act of 1956 there is no room for the adoption of an illegitimate child.

(ii) Capacity to give in adoption

Under the Act of 1956, the father, if alive, alone has the right to give a child in adoption.[23] Consent of the child's mother should be obtained except when she has become a *sanyasi*, non-Hindu or insane. Only if the father is dead or has become a non-Hindu, *sanyasi* or insane, the mother can give a child in adoption.[24] Where both parents of a

17. *Ibid.*
18. Sujata Manohar, 'On a Secular Law of Adoption', in T. Mahmood (ed.), *Family Law and Social Change* 70-73(1975).
19. *Ibid.*
20. Hindu Adoptions and Maintenance Act, 1956 (hereinafter called Adoption Act, 1956), s. 7.
21. *Ibid.*
22. *Id.*, s. 5(4)
23. *Id*, s. 9.
24. *Ibid.*

child are dead or have become insane or *sanyasi* or have abandoned it, his guardian can, with the court's permission, give the child in adoption and the court can grant such permission, having regard to the child's welfare, his own wishes keeping in view his age and understanding.[25]

(*iii*) The adoptee

Under the Act of 1956 only a Hindu child can be adopted.[26] Normally a child above the age of 15 or a married child cannot be adopted, but these provisions are subject to the force of a contrary custom.[27] No particular difference of age between the adopter and the adoptee is required by the Act where they are of the same sex; only where they differ in sex, a difference of 21 years is required.[28]

(*iv*) Right to adopt

Under the Act of 1956, a person who has a Hindu son, son's son or son's son's son (by blood or by adoption) cannot adopt a son.[29] Similarly, a person having a Hindu daughter or son's daughter cannot adopt a daughter.[30] Thus, an old woman in Delhi, whose son is settled in the U.S.A., for instance, along with his daughter and never cares for her, cannot adopt a daughter in Delhi even if she is dying for want of care and attention.

(*v*) Mode of adoption

Under the Act of 1956, though unlike the traditional law, performance of the ceremony of *datta homam* is not essential;[31] the only requirement to effect an adoption is actual giving and taking of the child.[32] The court does not come into the picture for effecting an adoption.

(*vi*) Rights and position of the adoptee

Under the Act of 1956 the adoptee is deemed to be the natural child of the adopter.[33] It provides that the child's prohibited degrees in his family of birth shall not be disturbed, but to them will be added new prohibited degrees in his adoptive family.[34] It further provides that property already vested in an adopted child before adoption shall be retained by him and

25. *Ibid.*
26. *Id.*, s. 10.
27. *Ibid.*
28. *Id.*, s. 11 (*iii*) (*iv*).
29. *Id.*,s. 11 (*i*).
30. *Id.*, s. 11 (*ii*).
31. *Id.*, s. 11 (*ii*) proviso.
32. *Id.*, s. 11 (*vi*).
33. *Id.*, s. 12.
34. *Ibid.*

the adopted child himself will not divest anybody in the new family of property vested in him or her before its adoption.[35] Monetary exchange or payment of money, *etc.*, in consideration of adoption is absolutely prohibited. Once an adoption has been made, it cannot be cancelled by the adopter, nor has the court been vested with the power to look into a case where unfair treatment is being meted out to an adopted child in the family which has adopted it.

IV CONCLUSION

About the Act of 1956, an observation recently made deserves careful consideration :

> Surprisingly, even as late as 1956 when Parliament enacted the Hindu Adoptions and Maintenance Act, it was content with filling some obvious lacunae in the existing law and never questioned the basic assumptions of the old law.... The (new) law failed to consider whether it was necessary to safeguard a helpless child's interest in any other way (than the limited provision which it made in this behalf) and it laid down no provisions for an investigation to be made regarding the suitability of adoptive parents or their ability to look after the child.[36]

The 1972 Adoption Bill (now withdrawn) was certainly a distinct improvement over the provisions of the Act of 1956. In the first place, while the Act is parent-based, the Bill was child-based. Second, religion is the governing factor under the Act of 1956, so much so tha only Hindus can avail of it, only a Hindu child can be adopted, a person whose spouse has become a non-Hindu need not consult him or her for an intended adoption, and a person having a Hindu son cannot adopt a son unless his son changes his religion. The 1972 Bill made no reference to religion of the child or of the adoptive parent, and provided for joint adoption by the husband and wife and adoption of children even though the parents had already other children. Third, while under the Act of 1956, adoption is an extra-judicial Act, the Bill permitted no adoption except under the order of a court. This itself made an adequate safeguard against corrupt practices in adoption and could check bogus adoptions. Over and above, the Bill of 1972 conferred wide powers on the court to safeguard the interest of the child both at the time of as well as after adoption. On the contrary, whatever limited powers to safeguard the child's interest are vested in the court under the Act of 1956, can be exercised at the time of adoption only. There is nothing that the court can do after an adoption has been

35. *Ibid.*
36. *Supra* note 18 at 71-72.

effected, even where the adopted child is found to be in undesirable hands. It is, thus, a pity that the government has chosen to withdraw the Bill for the sake of one particular section of the citizens—while their objections to the Bill, too, have been rather unfounded.

The socio-legal concept of adoption has now undergone a momentous change all over the world. This has led to the formation of two international Conventions—the Hague Convention in Jurisdiction, Applicable Law and the Recognition of Decrees relating to Adoptions, 1965 and the European Convention on the Adoption of Children, 1967.[37] Moreover, the 1971 World Conference on Adoption and Foster Placement held at Milan pointed out the flaws in the outmoded adoption laws of several countries. These include limitations on parent's right to adopt a child when they already have one and religious considerations. These flaws are all present in the Adoption Act of 1956.

The best way to remove the inherent flaws of the Act of 1956 was to replace it altogether by the law sought to be enacted, by the Adoption Bill of 1972. Its withdrawal is indeed unfortunate.

In recent years, citizens of some foreign countries have shown interest in adopting abandoned or otherwise destitute Indian children.[38] At present they can, for this purpose, have recourse only to section 8 of the Guardians and Wards Act, 1890 for being appointed guardian of such a child and for permission to take it out of India; the Hindu Adoption and Maintenance Act, 1 956 does not help them. The Adoption Bill, 1972 facilitated adoption of Indian children by foreign nationals under the authority granted by the Indian courts.[39] Unfortunately, it has now been withdrawn. Justice Nain's suggestion that a comparatively much lower age of the child for adoption should be laid down in case of adoption by foreigners[40] has some merit in it. Such a measure will to a grea extent ensure that under the garb of adoption Indian children willnot be taken abroad for domestic service.

37. *Id.* at 73.
38. See J. L. Nain, 'Adoption of Abandoned Indian Children by Foreign Nationals', in N. Khodie (ed.), *Readings in Uniform Civil Code* 61-63 (1975).
39. Adoption Bill, 1972, ss. 22-23.
40. *Supra* note 38.