

## ADOPTION LAW AND GENDER JUSTICE

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Amongst the diverse personal laws of India, governing the disparate religious communities, adoption is treated as equivalent to natural birth only under the Hindu law. In the ancient times the objective of adoption was purely spiritual, as Hindu scriptures enjoined begetting a son as one of the three primary debts that a man has to discharge during his life time.<sup>1</sup> The belief in the need of performance of the funeral rights as essential to the salvation of a man's soul to prevent his life after death to be ruined and coupled with the fact of the son being the only appropriate person to preform such rites, necessitated the need to have a son in the family. A son is called "Putra". Put is a kind of hell and "ra" is a person who could deliver his father from hell<sup>2</sup>. Thus in order to avoid going to hell to beget a son was mandatory.

Budhayana declared<sup>3</sup> :

Through a son, one conquers the world, through a grandson one attains immortality, and through a great-grandson one ascends to the highest heaven.

The Veda declares<sup>4</sup> :

Endless are the worlds of those, who have sons: there is no place for a man who is destitute of a male offspring.

The primary reason, thus being the accomplishment of the spiritual desire, the rules provided, that the adopted son must have a likeness of the man whose child he was to become, and accordingly, a man could adopt a child from within the family only. Adoption of a daughter, an illegitimate child, the child of a stranger, an orphan or even an abandoned child was not permissible<sup>5</sup>. Interestingly, the spiritual salvation through a son was the essential prerogative of a man only, and despite the fact that motherhood,

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1. See. Paras Diwan, MODERN HINDU LAW (1988) at 207.
2. MANU, V : 138, quoted in Paras Diwan, *Ibid*.
3. MANU, IX : 137-138; VISHNU, XV : 44-46; YAJNAVALKYA, I : 78.
4. R.K. Agarwal, HINDU LAW (19th ed. by R.K. Sinha, 1996) at 143.
5. *Supra* n. 1 at 209.

that too of a son was glorified, coupled with the fact that it is the mother who gives birth to the child, the son could spiritually benefit the father only. The explanation for it being that a woman in general is sinful and dependent, and her spiritual salvation is possible only through duty; obedience; submission; and faithfulness to the husband throughout her life. Accordingly, no woman was permitted to adopt a son for herself.

Vashishta enjoined<sup>6</sup> :

Let a woman neither give nor take a son except with her husband's permission.

Thus no woman had the power to adopt in general. However, a widow was permitted to adopt a son, to enable the performance of funeral rites of the deceased husband, but only if the deceased husband had desired so and had also authorised her to effect the adoption during his lifetime. In certain cases, where the authorisation from the husband could not be proved, the consent of the sapindas was a mandatory requirement. The reason for requiring the assent of the kinsmen was explained by the Lordship as follows<sup>7</sup> :

The assent of the kinsmen seems to be required by the reason of the presumed incapacity of a woman for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary right in the estate may be defeated by the adoption.

Further, where the widow proved the permission of the sapindas, it led to an implied presumption of the adoption being essentially for the benefit of the husband and the incidental motive for adoption became irrelevant except to operate as a check on the possible exploitation of this power. In *Balasu Gurulingaswami v. Balasu Ramalakshamana*<sup>8</sup>, it was observed :

The reason for requiring the assent of the sapindas is to see that the adoption was a bonafide performance of the religious duty and not due to any capricious action by the widow.

In joint families, it was necessary for the widow to consult the elders in the husband's family, particularly his father, and in divided families, she had a duty to consult the agnates of the husband. If they withheld their consent for capricious reasons, she was ordained to consult, and obtain the

6. VASHISHTA, XV : 1-6, cited by Lord Hobhouse in *Balasu Gurulingaswami v. Balasu Ramalakshmana*, (1899) 26 IA.

7. See, *G. Appaswami v. Sarangapani*, AIR (1978) 520 at 521.

8. (1868) 12 MIA 397 at 442.

consent of the remoter agnates. In such cases, the adopted child was deemed to be the child of the deceased husband of the widow and had property rights in his property as per the doctrine of relation back.

The Hindu Adoption and Maintenance Act, passed in 1956 provide as follows:

The facility of adoption is available only to Hindus; only a Hindu has the right to give a child in adoption;<sup>9</sup> only a Hindu can adopt a child<sup>10</sup> and only a Hindu can be adopted.<sup>11</sup>

#### I. PERSONS CAPABLE TO GIVE A CHILD IN ADOPTION

The basic qualifications for giving a child in adoption are:

(1) the right to give a child in adoption is that of the child's biological father only. Section 9(2) provides in unambiguous terms :

...the father if alive shall alone have the right to give the child in adoption....

However, he cannot do so without the consent of the mother of the child. Her consent is not required if she has ceased to be Hindu by converting to any other religion; or has been declared by a court of competent jurisdiction to be of unsound mind or has finally renounced the world.

Some parliamentarians however considered it totally unnecessary to involve the mother and wanted the father to have the sole and exclusive right to take decision in these matters. Tek Chand said :<sup>12</sup>

Insistence upon the consent of the mother to give away is totally unnecessary. Therefore no harm will be done, if the law is reframed, whereby the father alone has the right to give a child in adoption.

The Act was passed without accepting his suggestion.

(2) The biological mother can give a child in adoption if she is a widow and has not remarried<sup>13</sup>. Her own child, born to her from her deceased

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9. See, THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956, sec. 9(2).

10. Secs. 7 and 8.

11. Sec. 10(1).

12. Tek Chand, LOK SABHA DEBATES, 13th Dec. 1956 at 2918.

13. Sec. 9(3).

husband, cannot be given in adoption, as on remarriage she ceases to have even guardianship rights over it.<sup>14</sup>

Where the father of the child is alive, the mother is competent to give the child in adoption if :

- (i) the child is illegitimate;
- (ii) where the child is legitimate, but the father has ceased to be a Hindu by converting to another religion; or has been declared by a court of competent jurisdiction to be of unsound mind; or has finally and completely renounced the world<sup>15</sup>.

A woman who is living separately from her husband under a decree of divorce, is incapable to give her child in adoption even though the custody might be with her, the father might have remarried and may have nothing to do with the child.

It is again interesting to note, that while the re-marriage of a widow operates as a disqualification on her rights to give her own child in adoption, subsequent matrimony of the widower-father does not affect his rights at all over the child.

In absence of the parents of the child, i.e., where they might be dead, or have abandoned their child, or have finally and completely renounced the world, or have been judicially declared to be of unsound mind, or where the parentage of the child is not known, its guardian has the power to give it in adoption but only after seeking a permission from the court<sup>16</sup>. While granting such permission the welfare of the child is the primary consideration with the court.

## II. PERSONS CAPABLE OF TAKING A CHILD IN ADOPTION

The facility of taking a child in adoption is available to both males as well as females, the primary requirement of course being that they should be major and of sound mind.<sup>17</sup> However amongst the married couples, the right to adopt is that with the husband which he can exercise with the consent of his wife. In case he has more than one wife living the consent of all of them is mandatory. Following the similar principle of obtaining the

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14. *Supra* n. 1 at 215. *Mast Ram v. Daroga*, AIR (1981) Pat 204. See also, THE HINDU WIDOW REMARRIAGE ACT, 1956, sec. 3.

15. Sec. 9(3).

16. Sec. 9(4).

17. Secs. 7 & 8.

consent, the consent of all or some is not required if she has ceased to be a Hindu by converting to any other religion, or if has been declared by a court of competent jurisdiction to be of unsound mind or if she has finally or completely renounced the world.<sup>18</sup> After a valid adoption has been effected, if a man has more than one wife the senior most amongst them would be the adoptive mother while the rest of them would be related to the child as the step mother.<sup>19</sup>

A married woman can take a child in adoption only if she is a widow, or where though her husband is alive is legally disqualified to adopt.<sup>20</sup> A judicially separated or a deserted woman is incapable to take a child in adoption. In such a case she has to obtain divorce from the husband which may be a lengthy or cumbersome procedure.

Law Minister Sh. Patasker while presenting the Bill in the Parliament explained the scheme of adoption under the Act in the following words:<sup>21</sup>

The scheme of the Act is like this. In Clause 7 which precedes clause 8, we say that a male Hindu can take a person in adoption. If he has a wife he has to take the consent of the wife.... Having said that we go over to the capacity of the female to take in adoption. Naturally, the wife whose husband is living is excepted. If she is married she is the wife of someone and she cannot adopt unless the marriage has been dissolved. Then she is no longer the wife. So it is only such woman of sound mind, not minor, unmarried, whose marriage has been dissolved or her husband is dead or has completely or finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind - it is only such woman who can take in adoption.

Thus the right to adopt was vested in the husband and the wife was granted a power to veto it. It is interesting to note that while the present provisions ignoring her rights have been challenged as gender biased, even the requirement of taking her consent by the husband was vehemently opposed in the Parliament. Primary objective of adoption was contrived by a number of our parliamentarians as according spiritual salvation intrinsically to a man and also as a channel of continuation of his family line. The primary purpose of adoption was explained as :

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18. Sec. 7.

19. Sec. 14.

20. Sec. 8 (c).

21. Pataskart, LOK SABHA DEBATES, 14th Dec, 1956 at 2959.

The original idea of Hindu adoption was that the father would adopt the child because he leaves his son behind him to perform the religious duties so that he may go to heaven. The second conception was that his continuation of the thread of his race, so far as his part of the duty is concerned was safe and sure.<sup>22</sup>

This group of members opined that the husband should have a unilateral right in matters of adoption without the involvement of the wife at all. This proposed formality of requiring her consent could only complicate the matters. Some of their reactions are given below:

the wife may always be opposing him at every turn of his life, in fact making his life hell. And here you say that he should not be allowed to adopt except with the consent of that very lady who has made his life hell.... So far as the man is concerned he adopts for two reasons. It may be... for spiritual benefit and in that the wife has no share.... To a man, who wants to adopt a son, it is a very serious matter. You force him to take the consent of the wife.<sup>23</sup>

If is very difficult to get consent of the wife. The result is that he cannot adopt at all.... The happenings of family would be disrupted.... She can be consulted and persuaded. Her consent need not be necessary for adoption.<sup>24</sup>

The capacity of a male Hindu to take a child in adoption, so far as he is being called upon to obtain the consent of his wife.... If a son is being brought in the family, then it is due to the subjective state of the mind of the adoptive father. The consent of the wife is not necessary at all.<sup>25</sup>

The rule that the wife should consent is a wrong rule. There are thousands and lakhs of people whose wives will never consent.<sup>26</sup>

The continuation of the race was the duty of the father and the mother was attached to the father. Now the mother is also a consenting party. Under no system of law is the mother respon-

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22. K.C. Sharma, LOK SABHA DEBATES, 14th Dec. 1956.

23. J.S. Bhist, RAJYA SABHA DEBATES, 27th Nov. 1956 at 797-799.

24. Deputy Chairman, LOK SABHA DEBATES, 14th Dec. 1956.

25. *Supra* n. 12 at 3015.

26. Thakur Das Bhargava, LOK SABHA DEBATES, 14th Dec. 1956 at 3016.

sible for the continuation of the race. It is always the male that gives the child and not the female. The female is a passive partner. Therefore even biologically it is unacceptable. Make a law on some scientific basis. This law has no science behind it.<sup>27</sup>

The logic stipulated here appeared full of paracholiasm, and spoke of deep rooted male chauvinism. Parliamentarians like Pt. Sharma wanted to use scientific arguments to keep a woman completely out of picture as far as the entire process of adoption was concerned. The upbringing of the adopted child is the job of the adoptive mother. But the decision whether the child should be adopted; when it should be adopted or who should be adopted, should be exclusively with the father. Once the child is adopted then it should be handed to the mother for its upbringing. This in itself sounds not only unnatural but also unjust. Further to call the mother a passive partner for the birth of the child sounds amazing. It takes two to make a child, but after the child is conceived a man's role is over and it is the woman's role that starts. For a period of nine months and even after the birth of the child the man is not even a passive partner. If we accept this scientific argument then the law should be that a woman should have a right to take a child in adoption and that the man should be consulted. It is apparently clear that while framing the law the woman's need to have a child have been clearly ignored by the legislature.

The law as it was passed by the Parliament require that the consent of the wife is necessary, but a married woman does not have a right to adopt individually in her own right. In *Lalitha Ushayakar v. Union of India*<sup>28</sup> the petitioner challenged section 8 of the Act as violative of the Constitution which confers equality before law and equal protection of laws to every citizen, irrespective of the sex. According to the Act, the petitioner alleged a married woman had been deprived of the right to take a child in adoption, by the same Act, which confers a right to a man to adopt. A woman's role is limited to giving a consent only, whether express or implied. The High Court of Karnataka, held the alleged provision non-discriminatory and said:

Where sec. 7 gives the wife a right to give the consent, it also granted it the power to refuse consent. The Child was adopted to the family and not to an individual. Sec. 8 of the said Act, was enacted to make a specific provision in regard to woman under

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27. *Supra* n. 23 at 2932.

28. AIR 1991 Kant 186.

Art. 15 of the Constitution of India without which no adoption for woman was possible at all.

The court further held that there was no discrimination on account of sex, having regard to Article 14 of the Indian Constitution. As long as the woman was in a position to "*induce her husband*" to give consent to adoption, it could not be said that she is aggrieved and rejected the petition. The court thus not only affixed a judicial stamp to the subordinate role of the wife but justified it as non discriminatory.

A single (unmarried) woman or a man can also take a child in adoption but in such cases the child would have only one parent as the future spouse of the adoptive parent would be related to the adopted child as the step parent. For example, if an unmarried woman adopts a child and gets married, her husband would be related to the child as the step father. Similarly if a man adopts a child and gets married his wife would be related to the child as his step mother.<sup>29</sup>

While the right of a man to adopt has always been unquestionable the idea of a single woman being allowed to adopt appeared sensational. Parliamentarians were bewildered and wanted this right to be subject to certain restrictions, primarily to act as a deterrent in the way of a young woman to adopt. It is evident by some of the reactions given below:

My submission is that she should not marry after taking a boy in adoption... many unhappy things would result. Therefore, in old age alone, she can have an idea of taking a boy in adoption.

I am surprised that no knowledge of general Hindu principles is there. How can an unmarried woman acquire a child without a man? How will that child be treated as legitimate? This appears to be strange. God alone knows, who will protect the Hindu community, For example, an unmarried man or a woman adopts and does not marry then this girl or boy would be without a father, that means there would be a new race started according to Mr. Patasker, that a child would be born of only a mother or a father. Such children would exist who would have no father or on mother. I feel deeply sad on this point, you have made a mockery of the Hindu culture.<sup>30</sup>

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29. Sec. 14.

30. Lakshmayya, LOK SABHA DEBATES, 13th Dec. 1956 at 2914.

In keeping with the general trend of laying down inequitable provisions for women, there was intense opposition to the facility given to Hindu to adopt a daughter. The arguments ranged from a genuine fear of the possibility of a young girl's exploitation by the unscrupulous single males, only twenty one years their seniors to the provision being opposed to traditional Hindu law. Some therefore described it as the last nail in the coffin of Hinduism while others explained the inherent dangers of allowing a girl to be adopted.

By means of this attempt, impressionable young girls may be exposed to serious and sinister hazards; specially when in another clause it has been provided that the ... span of age between them is going to be 21 years only... one of the notorious features of crime in our country is what is known as trafficking of young girls. In the garb of adoption of a girl of 15 by a young person only twenty one year her senior, the girls would be exposed to grave dangers... why should a man feel the necessity of adopting a girl, and a man who may not have got a wife. Permission to a male to adopt a daughter ought not to be granted under any circumstances.<sup>31</sup>

By many High Courts it has been held to be illegal... that is what I am pointing out. It is neither feasible nor desirable. It will not be a step in advance; it will be a retrograde step. All that we know of this kind of adoption of girls is among prostitute class. It has been a black spot in our society and the sooner it is eradicated it is better. It is very undesirable and wherever that system has been prevalent it has been condemned by our progressive society as well as by the High Courts.<sup>32</sup>

A man or a woman can take a son in adoption if they do not have a living son, son of a predeceased son, or a son of a predeceased son of a predeceased son (great grand son). If any of these sons, grand sons or great grand son has ceased to be a Hindu by converting to any other religion, then even in their presence, a son can be taken in adoption. Similarly if they want to take a girl child in adoption the couple should not have a living Hindu daughter or the daughter of a son. If such a daughter has ceased to be Hindu because she has embraced another religion, the couple can take another daughter in adoption.<sup>33</sup>

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31. *Id.* at 2916.

32. N.C. Chatterjee, LOK SABHA DEBATES, 14th Dec. 1956 at 2957.

33. Sec. 11(i) and (ii).

Though the law in clear cut terms curtails the power of both a man and a woman to take a child in adoption in presence of a Hindu son, son's son or son's son's son, judiciary has brought in a curious interpretation of the same. In *Sau Ashabai Kate v. Vithal Bhika Nade*<sup>34</sup>, a case before the Supreme Court, a man died leaving behind a widow and a widowed mother. The court held that the widowed mother's power to adopt is extinguished permanently even though she has no living Hindu son or any of his male descendant, as the responsibility of the continuation of the line is now with the widowed daughter in law. It further held that, the power to adopt is not revived even where the widowed daughter in law gets married again and leaves their house. This judgment suffers from many flaws. It amounts to adding when there is none yet another disability on the capacity of a widow to take a child in adoption. A woman therefore forfeits her right to adopt if her son dies issue less after getting married, with his widow also marrying subsequently. Firstly, it is a question of her right, which has expressly been conferred on her by the Act; Secondly, if she is in need of company, who will provide her with that? The court should not see and lay down the purpose of adoption in this manner in absence of an express provision. Nowhere has it been provided that the object of adoption is the continuation of the family line. Even if we assume (incorrectly) that it is the basic purpose, the court's presumption that only because a woman has a daughter in law, she cannot continue her own or her deceased husband's line appears to be incorrect. Does this mean, that if a woman's son gets married, she loses her reproductive capabilities and becomes incapable to bear a child? If not, then why is she being deprived from being a mother by adoption? The Act itself provides that its basic objective is to amend and codify the law relating to adoption and maintenance among Hindus. The primary motive of amending the then existing law relating to adoption and permitting the adoption of a daughter was to deviate from the concept of adoption being useful and essential only for the continuation of the family line and to make it as well an instrument of providing a home to the home less children and give the joy of parenthood to the childless couples. How else the court would explain the facility of adoption given to unmarried people or that of adoption of orphans and girls. According to Paras Diwan<sup>35</sup> :

In the present submission the Hindu Adoptions and Maintenance Act, 1956, has steered off clearly from all religious and sacramental aspects of adoption and has made adoption a

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34. 1989 Sup (2) SCC 450.

35. *Supra* n. 1 at 209.

secular institution and a secular act, so such so that even a religious ceremony is now not necessary for adoption.... Whatever it may be the primary purpose of allowing adoption is to provide consolation and relief to a childless person. In modern law its purpose is also to rescue the helpless, the unwanted, the destitute or the orphan child.

The same courts however, and not surprisingly, took a different view when it involved the right of a man in a parallel situation. In *Bhima Kotha Dalai v. Sarat Chandra Kotha*<sup>36</sup>, the court held that a male Hindu does not lose his capacity to take a child in adoption if his son dies and his widowed daughter in law living with him. Here in this case the daughter in law had not remarried. The court said:

...accepting the contention of the learned counsel that a male should lose his competency to adopt if his widowed daughter in law is living would be against the settled principle that adoption is mainly for the spiritual benefit of the adopter.

It further stated that a male Hindu if otherwise competent to take a son in adoption could not lose his right merely because of the contingency wherein the wives of his predeceased sons could adopt sons to their husbands.

### III. EFFECTS OF A VALID ADOPTION

Once a valid adoption takes place the adoptive child is deemed to be born in the adoptive family and his relations with the natural family cease in all respects except<sup>37</sup>:

- (1) the child cannot marry any person in the natural family, who is within prohibited degree of relationship;
- (2) any property which had vested in the adopted child before adoption would continue to vest in him, subject to the obligations if any attached to the ownership of the property, including the obligation to maintain relatives in the family of natural birth;
- (3) the adopted child cannot divest any person of any estate which vested in him or her before adoption.

A valid adoption creates rights in favor of the child which are identical to natural birth. An adoptive child is deemed to be natural born child in the

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36. AIR (1989) Ori 14.

37. Sec. 12.

adoptive family and therefore has mutual rights of inheritance in the property of his adoptive parents and all of their relations in exactly the same manner as a legitimate child has. From the date of a valid adoption the adoptive son becomes a coparcenor in the joint family of his adoptive father and consequently becomes a sharer in the ancestral property in which his adoptive father had a share. It has been held in various cases that where a widow adopts a son after the death of the husband, such son will be deemed to be the son of the husband and will be a coparcenor in exactly the same manner as his adoptive father was. These judicial interpretations have created confusing and unwarranted situations. Though the law permits a widow to adopt in her own right (unlike the law previously that a widow could adopt not to her but to her husband only) the judiciary is reluctant to endorse it. Like many of the parliamentarians, the judiciary's tenacity to hunt for a father of the child is persistent. In nearly all the cases the courts still hold, that the child adopted by a widow would be her deceased husband's child also. They go a step further and have held in many cases that the doctrine of relation back would apply and the date of adoption would be deemed to be the date of the death of the husband. A further complication is that there is absolutely no time frame within which a widow should adopt a child. She can adopt a child at any time after the death of her husband.

In *Sawan Ram v. Kalawati*<sup>38</sup> the Supreme Court held that a son adopted by a widow is the son of her deceased husband. Here though the husband had died in 1930 and the adoption took place in 1958, 28 years later, the husband's interest in the coparcenory property passed to the child by survivorship, as if he was in existence at the time of his father's death.

In *Ankush Narayan v. Janabai*<sup>39</sup> the Bombay High Court also held that where the widow of a deceased coparcenor adopts, the adopted son becomes a coparcenor with the surviving coparcenor. Here the court allowed the adopted son to divest his adoptive mother's inheritance which had vested in her absolutely. It thereby unsettled the entrenched claims that had vested in his mother prior to the adoption. J.Ramaswamy said:

...by adoption (on the basis of sec. 11 and 12) the child adopted by the widow becomes absorbed in the adoptive family to which the widow belongs i.e. the child adopted is tied with the relationship of son with the deceased husband of the widow and other collateral relations of the husband would be connected with the child through the deceased husband of the widow.

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38. AIR 1967 SC 1961.

39. AIR 1964 Bom 174.

While admitting that the Act does not provides so the court further observed,

It is true that section 14 of the Act does not expressly states that the child adopted by a widow becomes the adopted son of the husband of the widow. But it is a necessary implication of sec. 12 and 14 of the Act, that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband.

In *Sita Bai v. Ram Chander*<sup>40</sup> the apex court held that the adopted son of a widow becomes a coparcenor from the date of adoption. Bhargava J., while referring to sec. 5 observed that two kinds of adoptions are envisaged by the Act: One is adoption by a Hindu and the other is adoption to a Hindu. An adoption by a female Hindu, whose husband is dead, has finally renounced the world, has been judicially declared to be of unsound mind, or has ceased to be a Hindu, is covered under the later type. The Hon'ble judge further said that all ties of the child will be created in the adoptive family. The question that arose was which is the family of the widow, and that the Honble judge concluded that it would be her deceased husband's family. Accordingly the child would be deemed to be the child of her husband and would be entitled to succeed to his property, from the date of his death. A very important question arises. Can this right be predated? If a man dies in 1980 and his widow adopts a child in 1998, 18 years after the death of the husband, the child would be treated as the legitimate progeny of the husband and would be entitled to succeed to his father property and become a coparcenor with him of the property as it stood in 1980, as if he was in existence at that time.

Interestingly, the courts want to find the father only for the adopted child and not the mother in reverse situations. Thus where a widower adopts a child his former wife's relationship with the child remains a mystery. The Act does not mention any thing about the relationship of the former spouse of the adoptive parent, it nevertheless clarifies the ties that are created between this child and the present and the future spouse of the adoptive parent. Accordingly, if a bachelor, maiden, widow or a divorcee adopts, the child will have only one ancestral side, either maternal or paternal. It is basically due to the fact of them being single or independent parent. But in case of a widow the judiciary's resistance to treat her as a single or independent is evident. She is deemed to be attached to the family of her deceased husband and her actions are bound to have behind them

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40. AIR 1970 SC 343; See also, *Motilal v. Sardar*, AIR 1975 Raj 40.

his express authority. She is therefore treated as incapable to do anything for herself independently.

Where the law is clear, the judiciary has unnecessarily created a confusion with their obsession to lay down rudimentary philosophy for a woman. It is not only fictitious but also illogical and perplex. The observations also contradict with the general presumptions of paternity of the child and come in direct conflict with the provisions of the Indian Evidence Act. With these rulings the courts have related a child to a dead man, dead around 20 to 30 years prior to even the birth of this very child. The Act provides, in clear terms, that the adoptive child is deemed to be born in the adoptive family from the date of the adoption and not from the date of the death of the husband of this widow who is adopting. As otherwise in each case when a widow adopts the tenure of the deemed existence of the child in the adoptive family would be different. For example three widows, A, B and C, take a one year old child each in adoption on January 1, 1999. A's husband had died in 1980; B's husband died in 1990 and C's husband died in 1995. Though the date of adoption is same in all the three cases, yet due to the interpretation of the courts, the adoption would create ties in favor of the three children from different dates. The deceased husbands of each of these widows would be deemed to be the fathers of the child respectively even though they were dead before 19, 9 and 4 years respectively. Formerly a widow could adopt only for her husband but now she can do it for herself. This is precisely the difference between the law as it stood before 1956 and now. But if the legislature still persists in forcing this child not only on the father but his entire family there would be no distinction between the old law and the present one. The primary reason before 1956, for relating the child to the deceased father was that it was the consent of this very father which had to be proved for the validity of the adoption. Further, the accepted motive of adoption was to satisfy the spiritual necessity of the father. It was the delegation of his power that enabled a widow to adopt. He consented to the adoption and consequently was treated as its father. Now a widow is no longer required to seek let alone prove his consent, or the consent of any one for that matter, nor is the motive of the adoption relevant. So if the husband did not consent to this adoption how can he be treated as the father of this child? What ever may be the position of a married woman during the presence of the husband, and despite being conferred superior rights, even a man is incapable to impose an adopted child on his unwilling wife. He has to compulsorily seek her consent unless she is judicially disqualified. Here the husband is incapable to give his consent due to the fact of his death. How can a widow impose a child on him without his consent? It becomes

her independent action for which she alone should be responsible. Taking an example, where the husband wants to adopt a child A and the wife refuses to give her consent, he cannot adopt the child and make her, the adoptive mother. Similarly, if the wife wants to adopt a child B, but the husband refuses to do that, she cannot adopt him and make him, his father. But the moment he dies, she now not only can adopt him validly, but also make him his father. The answer to that should be in the negative. Her unilateral actions should benefit or burden her alone and she alone should be treated as its parent.

Taking the second reason for relating the father to the child, that is the spiritual satisfaction of the father, it should be noted that the spiritual salvation of the father through adoption is no longer the only purpose of adoption nor was it in majority of cases where adoption of a child by the widow took place even before 1956. Shri Pataskar while explaining the intention behind this legislation had made the following observations<sup>41</sup> :

In many cases you will find that adoptions are made by the widows.... That was so because a widow was generally a limited owner and probably the estate was likely to go to some other people after her death.... The widow thought that probably she would have better rights in dealing with the property by taking a son in adoption rather than being merely a limited owner.

He admitted that most of the cases of adoption by the widow were neither from a religious motive nor from any religious beliefs but purely from a secular point of view. In almost every case it resulted in litigation and all sorts of complications.

Now where a woman is no longer a limited owner of her property, nor is the adoption meant to benefit the deceased father even in theory, the fiction and application of doctrine of relation back should be abrogated. The correct interpretation should be in tune with section 112 of the Indian Evidence Act,<sup>42</sup> which says :

The fact that any person was born during the continuation of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall be the conclusive proof that he is the legitimate son of that man, unless it can be shown, that the

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41. Pataskar, LOK SABHA DEBATES, 13th Dec. 1956 at 2982.

42. THE INDIAN EVIDENCE ACT, sec. 12.

parties to the marriage had no access to each other at any time when he could have been begotten.

Therefore following the provision of the Indian Evidence Act, a child adopted by the widow after 280 days of the death of her husband should be treated as her child alone. She should be equated with a divorcee or an unmarried woman and this imaginary classification of different categories of females with different consequences of their same actions should be done away with.

A study of the provisions relating to adoption laws reveal that these provisions do suffer from gender bias. Despite the Supreme Court's proud pronouncement in *Appaswami v. Sarangapani*,<sup>43</sup> that

Equality in status is recognised in matters of adoption also.

The law is far removed from this reality. Though the rules permit adoption by a female, her marital status plays an important role in determining her rights to take a child in adoption. There has been a total denial to a married woman to either take or give a child in adoption, if her husband is not judicially disqualified. His relations with his wife and his capability to take decisions which may or may not be in the interests of the child are not the considerations which weighed with the legislature. Rather it seems that there is an implied presumption on part of the legislature that the decisions taken by the father would necessarily benefit the child. These presumptions unfortunately do not hold good in light of the changing times. As it does not foresee the possibility of a break up in the relationship of the husband and his wife. A deserted or a judicially separated wife remains incapable to either take or give a child in adoption. Does the legislature presume that the mother is incapable to take an appropriate decision for her children? These discriminatory provisions should be deleted and the legislature should effect a parity between the rights of a man and a woman as regards the legal provisions of adoptions are concerned.

There is no reason why this facility of adoptions should not be extended to other religious communities as it benefit both the childless couples and also the orphans and abandoned children. Presently it is available only to the Hindu community in its true form. The facility of adoptions is also available to some of the Muslims who were converts from the Hindu religion and had not opted for the application of the Muslim Personal Law (Shariat) Application Act, 1937. Among the Parsi commu-

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43. (1978) 3 SCC 55 at 530.

nity also there was a custom of "Palak" (adopted) son but that was done away with and was not recognised by the judiciary as creating valid rights.

Under the Guardians and Wards Act, members of other religious communities can also take children under their care and protection. The primary drawback under that Act is that unlike the situation under the Hindu Adoptions and Maintenance Act, adoption here is revocable. There is also no restriction on the number of children who can be adopted. Also as the couple taking a child are the guardians only and not the parents, there are no mutual rights of inheritance between the guardians and the wards.

Though the Adoption bill was presented in the Parliament in 1972 and was treated as a step towards securing a uniform law of adoption, it could not be passed for political reasons. The primary objection to it was from the Muslim community. Objections were also raised from the members of the Scheduled Tribes, who had certain practical difficulties relating to permissibility of adoption in their communities, but they later relented in favor of the interests of the nation. Even though it was an enabling provision to legalize adoption for the betterment of orphans and childless couples. Muslims opposition to it was on the plea of it being unIslamic in character; as empowering the Muslims, to go against the basic injunctions of the Quran, and also due to the fear of being saddled with the Hindu law of adoptions on an unwilling Muslim community.

An amended draft of the Adoption Bill was recommended in 1976, repealing the existing Hindu Adoptions and Maintenance Act, 1956, and exempting the members of the Scheduled Tribes from its application. Muslim community again raised the objection, and opposed it on the ground that even though it was an enabling provision they were opposed to the creation of opportunities which may permit some of their fraternity to deviate from the personal law. So no situation should be created which may enable Muslims to disobey Quran. The opposition was turned down by the joint committee. The Bill however lapsed without any success with the dissolution of the Parliament.

In 1980, a fresh bill substantially different from the earlier bill was introduced in the Lok Sabha, exempting Muslims from its application and bringing within its preview the members of the Scheduled Tribes. It was referred to the Minorities Commission and was now opposed by the Parsis. The Commission was against the exclusion of any community on religious grounds. But there was no chance of their recommendations being accepted as this Bill also lapsed with the dissolution of the Parliament in 1984.

There is a need to have a secular law of adoptions which is free from gender bias and is available to every Indian irrespective of his or her religion. It will not only make the life of those children better who are without a home but would also bring a ray of hope in the life of the child less couples, making their life meaningful and filled with the joy of parenthood.