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Child Adoption in India: from a Human Rights Perspective

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Abstract: ***The main objective of my paper is to analyze the international and national instrument on the Child Adoption in India: From A Human Rights Perspective. Child Adoption in view of violation of Human Rights and to critically analyze: How far these instruments are effective in realization of above-mentioned Rights? How much there is the implementation of standards and measures mentioned in the instrument? Up to what extent the India has observed these standards and measures in their domestic policies? What steps could be taken for the realization of these Human rights. The researcher in the present study has tried to lay emphasis to provide a comprehensive and authentic review of various statutory provision so as to know the existing actual position of children under the various civil and criminal laws, namely Constitutional Law, Labour Legislation, Contract Act, Partnership Act, Procedural Law such as Indian Evidence Act , Civil Procedure Code and Family Laws, Criminal Procedure Code ,Indian Penal code, , Medical Termination of pregnancy Act, Juvenile Justice Act which have been invoked during the pre and post-Independence era in India and International instruments on Child Adoption In India from A Human Rights Perspective.***

Keywords: Child Adoption, India, Human Rights, Perspective.

1. INTRODUCTION

In India the children work as labourers, they often become victim of violence. And a girl child is no exception to it; apparently girls are more prone to violence in different ways (Bartholet, 2014). The narrations from the past tell how suppressed and distressed the children of India have been. With 13 million infants added every year India has achieved the distinction of having the world's largest population of children.

The main objective of my study is to analyze the international and national instrument on the Child Adoption in India: From a Human Rights Perspective

Child Adoption and Child Rights in view of violation of Human Rights. And to critically analyze:

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- How far these instruments are effective in realization of above mentioned Rights?
- How much there is the implementation of standards and measures mentioned in the instrument?
- Up to what extent the India has observed these standards and measures in their domestic policies?
- What steps could be taken for the realization of these Human rights.
- Whether family, community, society, State, Nation, Governmental and Non-Governmental organization can play some role for the achievement of goals provided in the part third and fourth of the constitution pertaining to children?

The researcher in the present study has tried to lay emphasis to provide a comprehensive and authentic review of various statutory provision so as to know the existing actual position of children under the various civil and criminal laws, namely Constitutional Law, Labour Legislation, Contract Act, Partnership Act, Law of Tort, Income Tax Act, Procedural Law such as Indian Evidence Act , Civil Procedure Code and Family Laws, Criminal Procedure Code ,Indian Penal code, , Medical Termination of pregnancy Act, Juvenile Justice Act which have been invoked during the pre and post-Independence era in India and International instruments on Child Adoption In India from A Human Rights Perspective.

Background -Review of Research on Child Adoption in India
Adoption is an alternative mode of building a family. Adoption meets reciprocal needs - the needs of an orphaned, abandoned and destitute child for a family and the need of a childless couple for experiencing parenthood (Pati, 2016).

The fundamental question in adoption is about parenthood, but parenthood through procreation is perceived as the more “natural” and “superior” form of parenthood .This has got a lot to do with a belief that ties of blood are superior to ties of love. In order to be a part of a family one either had to be “born” into the family or be “married” into the family. Therefore adoption is not recognised and is not an accepted practice among many religions.

A systematic review of both published and unpublished literature on adoption in India reveals a scarcity of empirical research.

Adoption raises several issues requiring study from a Human Rights Perspective perspective. Presently, the available literature on adoption in India is limited in comparison with that available in western countries. Research in the area of child development and welfare too is inadequate. Empirical studies need to be encouraged in such areas as they are significant and would be of utility in evaluation of services, suggestions for improvement and analysis of the Human Rights Perspective impact.

The lack of interest in research in the field of child welfare services such as adoption can be attributed to:

1. Lack of focus on research of an applied nature.

2. A poor understanding or awareness about the service in society.

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There are only four empirical studies on adoption in India, carried out by Chatteijee, Singh and Yadav (1971), Ahmad (1975), Mehta, Krishnan and Munshi (1983) and Billimoria (1984) (Kumar & Rani, 2019).

The studies reviewed show interesting findings and throw light on those aspects of adoption that require to be studied. Adoption is definitely a means of building a family where the needs of destitute children and childless couples are met (Waid & Alewine, 2018). Adoption is a possible solution to the country's problem of child destitution and institutionalisation.

2. Analysis

2.1 Adoption and Judiciary

Indian legislations in regard to the adoption make reference of only Hindu adoption and Maintenance Act, 1956. So to fill up these gaps judiciary had again played a vital role through number of cases. One such leading case is mentioned below. The guidelines made under this case are taken as law for Inter-country Adoption.

Lakshmi Kant Pandey V. Union of India is a renounced case for Inter-country Adoption("Lakshmi Kant Pandey vs Union Of India on 6 February, 1984", 2020).Judiciary has always taken a sympathetic attitude towards children. The welfare of the child is given paramount importance. This same attitude is reflected in the above mentioned cases, whether it is Laxmikant Pandey V. U.O.L, vishal Jeet V. U.O.I., Bandhua Mukti Morcha case,, Smt Dhani Nayak and others V. Sanakara Nayak or number of M.C. Mehta's case("Lakshmi Kant Pandey v. Union of India, 1984 AIR 469 | ESCR-Net", 2020).

2.2 Child Adoption in India- Analysis of the Legal Situation

On analysing the sequence of events and debates of the Adoption Bill it is quite clear child best interest does not feature anywhere in the discussion. The child takes a back seat in the religious communalisation and politicisation of a social and welfare issue.

The issue of adoption is inextricably linked to the issue of inheritance and succession and religious practices in the country.

To overcome this it is essential to delink child adoption with other religious issues and emphasize that a Special Adoption Law will protect the child best interest and bring justice to the orphaned, abandoned and destitute child.

Thus there are three clear arguments in this study, regarding the content and practice of

The adoption law in India.

1. Religious beliefs dominate the practice and law of adoption among the Hindus, and religion also dictates the non-acceptance of adoption by Muslims and Parsis.
2. Patriarchal ideology is clearly evident in the Hindu adoption law and practice, prior to the codification where a woman could not adopt unto herself, and a girl child could not be adopted.

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3. Hindu Adoptions and Maintenance Act (HAMA), 1956 is definitely not a "child-centered" legislation because it was enacted only to meet the needs of a "sonless male Hindu" and not the needs of a homeless, vulnerable, orphaned, abandoned and destitute child ("Hindu Adoptions and Maintenance Act, 1956", 2020).

Such anxious supervision by the Court over the entire matter and due consideration of the wishes of the child and advertent judicial determination as to whether the proposed Adoption would be for, and conducive to, the welfare of the child, would go a long way to make the relevant Law "reasonable", "right", "just" and "fair" and would squarely meet the requirements of Article 21 read with Article 14 in all their amplitude and plenitude as expanded in Maneka Gandhi and its zealous followers. Accepting that Adoption resulting in the uprooting of the child from its earlier Family environment, its social, economic, cultural and other background and transplanting the child in another Family, interferes with the child's "Personal Liberty" and even Right to "Life" as spectacularly amplified in the aforesaid Maneka-series of decisions, it is, however, not the Law that such Rights or Liberties cannot be affected or otherwise interfered with, but that the Law providing for and prescribing such interference or affectation must be such as can be regarded to be "reasonable", "right", "just" and "fair".

We are only endeavouring to impress that if Parliament could be awake and be alive to this aspect in respect of all Adoptions of all Adoptees and Natural and Adoptive Parents, the Law of Adoption among the Hindus would not have been vulnerable to any attack on the ground of being violative of Right to "Liberties" and "Life". There ought not to have been any presumption that all Parents, Natural or Adoptive, are Angels and would always act for the "Best Interest" and "Welfare" of the child.

Section 9(4), Hindu Adoptions Act, 1956, as discussed hereinabove, gives rise to another interesting question. Under the earlier Law, the Adoptee was required to be not only a Hindu, but to be of the same Caste, and also, wherever possible, to be of the same Gotra ("Section 9 in The Hindu Adoptions and Maintenance Act, 1956", 2020). But Section 10(i) only requires that the Adoptee "is a Hindu" without any reference to Caste or Gotra. And even the expression "Hindu" would have, as pointed out in Section 2(3), expanded meaning, including Buddhist, Jaina or Sikh and even others, who cannot, strictly speaking, be regarded as Hindu by Religion.

As pointed out before, the present trend the world over is to treat adoption, more as Child - Care Policy and 'Best Interest' and 'Welfare' of the child are the focal points, and, the concern to provide a Childless with a Child has somewhat paled down. Orphans are generally in the greatest need of Child - Care and, therefore, Sub-Section (4) of Section 9 (as substituted by the Amending Act of 1962) was a step in the right direction. The sub-section has also provided for Adoption of a Child whose parentage is not known, something, which could not be thought of under the earlier Law.

But this provision permitting Adoption of a Child of unknown parentage would appear to be incompatible with the categorical fiat in Section 10 to the effect that no person shall be capable of being taken in Adoption unless "he or she is a Hindu". It is true that while substituting present Sub-Section (4) of Section 9 to provide for Adoption of Children of unknown Parentage, a new Clause (bb) was inserted in the Explanation to Section 2 to provide that a

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child of unknown parentage shall be treated as "Hindu", as expanded in Section 2(3), provided he "is brought up" as a Hindu ("The Hindu Adoptions and Maintenance Act, 1956", 2020).

By such provision in Clause (bb) of Section 2, the conflict between the provisions of Section 9(4) permitting the Adoption of a child of unknown Parentage and of Section 10(1) requiring the Adoptee to be Hindu is resolved to a great extent; but in the case of Child of unknown Parentage brought up in an Orphanage or some such Institution, it is difficult to predicate as to whether such a Child is brought up as a Hindu, or for the matter of that, in a manner according to any Religion whatsoever. And this may go a long way to prevent the Adoption of many orphans of unknown Parentage brought up in Orphanage or similar other child-care Institution, even though they may otherwise be most deserving and in dire need for Adoption.

Adoption of Orphans or any one of unknown Parentage, was not permissible under the Hindu Law of Adoption, whether before the Hindu Adoptions Act, 1956 or even under the Act, till it was amended in 1962 by the Amending Act being No. 45 of 1962. If the Hindu Adoptions Act, 1956, was only codifying the existing Law of Adoption, it might have been a different matter. But, as the long Title declares, it was also amending the Law and providing for matters deviating from, or even contrary to, the earlier Law on the point. It has provided for Adoption of Daughters, virtual abolition of Datta Homam, non-deprivation of any property already vested in any one in the Adoptive family before the Adoption. That being so, while it was providing for Adoption of Orphan or of Illegitimate Child, and child of unknown Parentage by an amendatory Legislation in 1962, it ought not to have discriminated against them solely on the ground of not having been "bought up as Hindu".

2.3 Human Rights Perspective

India was also alienated from the effects of World Wars, being colonised for almost two centuries when the country gained independence there were several challenges that the leaders of the country had to face. The responsibility to shoulder the process of nation-building and protecting the rights of the people became the most important tasks. The incessant violation of the rights had profoundly victimised the children who were always an easy prey. Due to which several efforts were made to assure some security to the susceptible group, which lead to formation of rights. The rights were thus made mandatory and were for the protection and welfare of the people. Under these rights, we see the dejected rights of the children, Child Adoption and Human Rights which are often left neglected and unattended (Bartholet, 2010).

Children are considered to be the most susceptible of the human race; we see systematic violation of their rights since ages. It is not wrong to say that gender violence is a Universal phenomenon which takes place across culture, race and class. The violence against women carried out by individual, institution or society is thus the violation of human rights. It is an irony that the sanctified land of India has worst victims of the violations. As this study focuses on the evolution of the rights of children in India therefore, an attempt has been made to cover the violation of the rights of the two in post independent India, the legislative measures taken for the protection of the same, the stories of violations of their rights, the role of government as well as social organizations for the protection of the rights etc. The in-depth study about the violation and protection of these rights has therefore been done.

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India is known all over the world for being the largest democracy; the country alleges not only the highest numbers of children, the said 19% of the world's children live in India as per the national census. The country accepts that the "Child is supremely important assets and their nature and solitude are the nation's primary responsibility "but in practice the things are not the same as many such children are deprived even of the basic needs. Due to the extreme poverty and fraudulent activities these children are trapped in the vicious circle of poverty and mal-nutrition.

India expresses its recognition, as a nation of happy children, according to the government the children here are educated and are given access to different opportunities. These statements all seem to be hollow as the large child force is leading miserable life. Government of India is making attempts for providing adequate and decent living to the children of the nation. The widespread child labour, existence of female infanticide, evil of child marriage, prevalence of child trafficking etc signify not only the bleak condition of the children of the nation but also the incapacity of the nation builders to restrain these practices. Several Child Adoption laws have though been formulated; Child Adoption policies are made but the feeble implementation of these has simply intensified the brutal acts.

Since ages the children have been the victim of violence in some way or the other. Though the endeavours for their protection have been made but the upheaval exists.

The rights of the children are a complex issue and their violation is quiet ambiguous in many different Human rights forms. The fact is bitter but true that large numbers of children bid good bye to their life at a very tender age as they become the victims of malnutrition.

The methodical defiance rights of the children raised the issue of child protection at international platform. The International Conventions have raised concern for the protection of the children. Eglantine Jebb of England was perhaps the first one who started an international movement for providing the status to the children (Krishnan, 2004). It was only in the fifties of the 20th century that the United Nation decided to draft once again a Charter of the Rights of the Child and after modifications it was adopted unanimously at the UN General Assembly (OHCHR, 2020).

India has signed number of international accords for the protection and development of the Children.

India has ratified in 1992 the United Nations Convention on the Rights of the Child (UNCRC), 1989. V/e have already noted in Seminar paper that under the Indian Constitutional Law, any such International Convention, as and when ratified, would become Law of the Land and would be supplementing all our National Laws, even without any Parliamentary Legislation transforming the contents of the Convention into Law under Article 253 of the Constitution of India ("T.Rajkumar vs Union Of India on 1 November, 2013", 2020).

2. CONCLUSION

Under the HAMA, 1956, as already noted, the Child to be adopted is treated almost like a movable property transferable at the will of the Parents and there is no provision to ascertain

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its own wishes or preference, or whether the proposed Adoption would be in its best interests and conducive to its welfare and development and since there is no independent authority to determine these matters, there is nothing to prevent Sale of a child through and under a transaction masquerading as one of Adoption, without any Protection squarely going against the Directive Principles enshrined in the Constitution in Article 39(f).

The UNCRC of 1989 has thus become a part of the Laws of India and to the extent the same is not inconsistent with the Constitution of India, or incompatible with any of our positive Laws, shall stand superadded to all our national Laws relating to child (Powell, 2019).

It would suffice to note that none of the provisions of this Convention appears to be inconsistent with the Constitution of India and, therefore, if this UNCRC, 1989, does not appear to be inconsistent with the provisions of the HAMA, 1956, then the provisions of the Convention shall supplement the provisions of the Act in all matters on which the Act is silent.

"Dignity of the Individual" has been proclaimed in the Preamble to the Constitution of India as a Basic Feature, "Life" in Article 21 means, as ruled by the Supreme Court, living with "Human Dignity" and to remain in one's own Family, to associate with its members and not to be deprived of its social, economic and cultural background is one's Personal Liberty under Article 21.The fact inexorably remain that no one can be deprived, even partially, of his "life" or "personal liberty" save under a Law which is "reasonable", "right", "just" and "fair".

Conclusively the seminar paper highlights the evolution of Human Rights and eloquently presents the condition of the children in India. The harsh realities of the past bear the grimness of the condition of the children.

The seminar paper depicts that the problem of the children was spread like viral in whole of India. The letters of the officials also reflect that the problems of infanticide etc were widespread. The traces of female infanticide, child marriage etc does reflect the violation of the rights of the children by their own parents. The formation of UDHR and other such initiatives emphasize that the rights were not of any importance till long period of time. The negligence of the human rights existed till long. And the continuation of the violation depicted the delayed effect of the work done by the reformers. This seminar paper also brought into light the efforts made by India to safeguard the rights, which was initiated with signing of different treaties and conventions.

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