

REPORT NO.

118



सत्यमेव जयते

PARLIAMENT OF INDIA
RAJYA SABHA

ONE HUNDRED EIGHTEENTH REPORT
ON
REVIEW OF GUARDIANSHIP AND ADOPTION LAWS

(Presented to the Rajya Sabha on 8th August, 2022)

(Laid on the Table of Lok Sabha on 8th August, 2022)

**DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE
ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE**



Rajya Sabha Secretariat, New Delhi
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COMPOSITION OF THE COMMITTEE
(Re-constituted on 13th September, 2021)

1. Shri Sushil Kumar Modi — *Chairman*

RAJYA SABHA

2. Shri Deepender Singh Hooda
3. Shri Mahesh Jethmalani
4. @*Vacant*
5. Shri Sukhendu Sekhar Ray
6. Shri K. R. Suresh Reddy
7. &*Vacant*
8. ^*Vacant*
9. Shri P. Wilson
10. *Shri Kanakamedala Ravindra Kumar

LOK SABHA

11. Shri Kalyan Banerjee
12. Shri Pradan Baruah
13. Shri Venkatesh Netha Borlakunta
14. Shri Pradeep Kumar Chaudhary
15. Shri Vinod Chavda
16. Shrimati Veena Devi
17. Shri Jasbir Singh Gill
18. Shri Choudhury Mohan Jatua
19. Dr. Ramesh Pokhriyal 'Nishank'
20. Shri Kanumuru Raghu Rama Krishna Raju
21. Shri Jyotirmay Singh Mahato
22. Shri Malook Nagar
23. Shri Suresh Kumar Pujari
24. Shri A. Raja
25. Shri Omprakash Bhupalsinh *alias* Pawan Rajenimbalkar
26. Shri Upendra Singh Rawat
27. Shrimati Sandhya Ray
28. Shri Kuldeep Rai Sharma
29. Shri Mahendra Singh Solanky
30. Shri B. Manickam Tagore
31. #Shrimati Kalaben Mohanbhai Delkar]

SECRETARIAT

1. Shri Pradeep Chaturvedi, Joint Secretary
2. Shri P. Narayanan, Director
3. Shri Goutam Kumar, Deputy Secretary
4. Shri Sammer Kapoor, Deputy Secretary
5. Shri Sunil Tripathi, Under Secretary
6. Ms. I.V. Rajya Laxmi, Assistant Committee Officer

**Nominated w.e.f. 11.11.2021*

#*Nominated w.e.f.07.02.2022*

@*Vacancy caused due to retirement of Dr. Sasmıt Patra on 01.07.2022*

^*Vacancy caused due to retirement of Shri Vivek K. Tankha on 29.06.2022*

&*Vacancy caused due to retirement of Shri Shiv Pratap Shukla on 04.07.2022*

INTRODUCTION

I, Chairman of the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, having been authorized by the Committee on its behalf, do hereby present the One Hundred Eighteenth Report on the Subject '**Review of Guardianship and Adoption Laws**'.

2. The Committee identified the subject to review the extant Laws on Guardianship and Adoption and to identify the lacunae and shortcomings therein and to suggest reforms that can make these enactments more child friendly, welfare oriented and consonant with contemporary needs and times. The subject was, inter-alia, notified in Parliamentary Bulletin Part-II No.60314 dated 10th December, 2020.

3. The Committee first heard the Secretary of Legislative Department, Ministry of Law and Justice and Secretary, Ministry of Women and Child Development during the meeting held on 9th January, 2020. The Committee then heard the State Adoption Resource Agency of Maharashtra, select adoption centres and State Judicial Academy on the subject during study visit to Mumbai on 18th January, 2020. During the third meeting on the subject held on 9th November, 2020 a sub-Committee Comprising five Members headed by Shri Naresh Gujral was appointed to suggest contours of the subject and to identify the vital issues to be taken up by the Main Committee. The sub-committee held intense deliberations with the Secretary, Ministry of Women and Child Development on 17th November, 2020. The sub-Committee presented its Report to the main Committee on 4th January, 2021 in which it recommended among other things that the Committee should undertake a study visit to some adoption centres to have first hand information about the working of adoption Laws. The Committee undertook a study visit to PALNA, a Specialized Adoption Agency based in Delhi on 17th November, 2021.

4. While considering the Subject, the Committee mainly replied upon the following documents/information:-

- (i) The Hindu Adoptions and Maintenance Act, 1956; Juvenile Justice Act 2015; Juvenile Justice (Amendment) Act 2021;
- (ii) Guardians and Wards Act, 1890; The Hindu Minority and Guardianship Act, 1956; Personal Laws (Amendment) Act, 2010;
- (iii) Adoption Regulations; Juvenile Justice Rules;
- (iv) Report no. 257 of the Law Commission on "Reforms in Guardianship and Custody Laws in India";
- (v) Background notes and Replies to questionnaires received from Ministry of Law and Justice, Ministry of Women and Child Development, Ministry of External Affairs, Ministry of Social Justice and Empowerment and Ministry of Minority Affairs;
- (vi) UNICEF statistics on orphans;
- (vii) 2020 Orphans report of INSAMER (IHH Humanitarian and Social Research Centre), PRS summary of JJ Act Amendment, 2021;
- (viii) Study tour report (14-18 Jan, 2020);
- (ix) Statistics from the website of CARA; CARINGS portal;
- (x) Replies of CARA to the Parliament;
- (xi) Social Audit Report of NCPCR on Child Care Institutions; and
- (xii) News and authentic sources on the internet.

5. The Committee wishes to place on record its gratitude to the Secretaries of Legislative Department, Ministry of Law and Justice and Ministry of Women and Child Development, authorities of CARA and others for furnishing necessary information/ documents and rendering valuable assistance to the Committee in its deliberations.

6. For the facility of reference and convenience, the observations and recommendations of the Committee have been printed in bold letters in the body of the Report.

7. The Committee considered and adopted the Report in its meeting held on the 4th August, 2022.

New Delhi
4th August, 2022

SUSHIL KUMAR MODI
Chairman,
Department-related Parliamentary Standing
Committee on Personnel Public Grievances
Law and Justice

ACRONYMS

CARA	Central Adoption Resource Authority
CARINGS	Child Adoption Resource Information and Guidance System
CCI	Child Care Institution
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CWC	Child Welfare Committee
DM	District Magistrate
GWA	Guardians and Wards Act
HAMA	Hindu Adoptions and Maintenance Act
HMGA	Hindu Minority and Guardianship Act
UNICEF	United Nations Children's Fund
JJ	Juvenile Justice
LGBTQ	Lesbian, Gay, Bisexual, Transgender, Queer
NCPCR	National Commission for Protection of Child Rights
PAPs	Prospective Adoption Parents

Chapter 1

INTRODUCTION

1.1 The Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice has taken up the subject ‘Review of Guardianship and Adoption Laws’ for detailed examination. The Committee believes that every child deserves a good future and feels that there is an imminent need to empower children and give them access to basic amenities and services.

1.2 According to UNICEF, almost 10,000 children become orphans every day. There are about 140 million orphans in the world. The 2020 Orphan Report of IHH Humanitarian and Social Research Center (INSAMER) places the figure for India at 31 million. Since such children constitute the most fragile members of the society, it is the responsibility of the State to ensure that they get a better childhood by providing them with a home like environment and care so that they reach their full potential. While there are legislations and mechanisms in place for facilitating adoption and guardianship in the country, a bird’s eye view of the state of affairs reveals that there is a need to reform the enactments forthwith.

1.3 It was against this backdrop that the Committee embarked on a journey to review the laws governing adoption and Guardianship and to recommend measures that can make these enactments more child friendly, welfare oriented and consonant with contemporary needs and times.

1.4 The Committee held a series of deliberations with various stakeholders during which it heard how the lacunae and inconsistencies in the extant laws on adoption and guardianship are defeating the very spirit of the enactments and what can be done to improve their effectiveness.

1.5 During its first meeting on the subject held on 9th January 2020, the Committee heard the Secretaries of Legislative Department of Ministry of Law

and Justice and Ministry of Women and Child Development. During the meeting, Secretaries briefed the Committee on extant laws relating to adoption and guardianship and also apprised the Committee about the loopholes in the existing legislations and the initiatives taken by the Government to overcome some of them. The Chairman and Members spoke at length on the Challenges of adoption and guardianship laws such as lengthy and cumbersome adoption procedure under JJ Act, need for early deinstitutionalization of child, need to review the old colonial Guardians and Wards Act to suit contemporary times, need for uniform laws on adoption and guardianship, need to do away with the term ‘illegitimate’ child in Guardians and Wards Act and Hindu Adoptions and Maintenance Act, Patriarchal tone of the Guardianship laws and growing illegal/informal adoptions in the country among others.

1.6 The Committee held its second meeting on the subject during study visit to Mumbai on 18th January 2020, during which it heard the State Adoption Resource Agency of Maharashtra, Select adoption Centres and State Judicial Academy in Mumbai. During the meeting, the Committee was apprised that Orientation Programmes were conducted in the State for Judges with an object to sensitize the Judges and reduce the pendency of adoption cases. The stakeholders also interacted with the Committee and put forward their views and suggestions on the subject.

1.7 During the third meeting on the subject held on 9th November 2020, the Chairman decided to appoint a sub-Committee comprising Shri Naresh Gujral as Convener, Shri Shiv Pratap Shukla, Shri P.Wilson, Shri Malook Nagar and Smt. Sandhya Ray as Members to suggest the contours of the subject ‘Review of Guardianship and Adoption Laws’ and to identify the vital issues to be taken up by the Main Committee for further deliberation. The sub-Committee held intense deliberations with the Secretary, Ministry of Women and Child Development and the representatives of Central Adoption Resource Authority on 17th November, 2020.

1.8 The sub-Committee deliberated on various issues such as child trafficking in the guise of adoption, poor conditions in Specialized Adoption Agencies and Child Care Institutions, abandonment of adopted children, inconsistencies between Hindu Adoption and Maintenance Act and Juvenile Justice Act, need for greater involvement of the District Magistrates in the rehabilitation of Orphan, Abandoned and Surrendered Children among others.

1.9 The sub-Committee presented its Report to the main Committee during the meeting of the Committee held on 4th January, 2021. Members suggested that the Committee should undertake a study visit to some adoption centres for an on-the-spot assessment of the subject under consideration.

1.10 The Committee has undertaken a study visit to PALNA, a Specialized Adoption Agency based in Delhi, run by Delhi Council for Child welfare, a non-profit NGO established in 1952 on 17th November, 2021. On the spot, the Committee examined various in-house facilities at PALNA including newborn unit, toddler's room, crisis units, kitchen, pre-school among others and interacted with care givers. The Committee observed that there are a significant number of special needs children at PALNA. During the visit, the Committee interacted with the Joint Secretaries of the Ministries of Law and Justice & Women and Child Development, officials of CARA, State Adoption Resource Agency, Delhi and the management of PALNA about the lacunae and inconsistencies in extant laws on adoption and the reforms that are needed to facilitate smooth adoption and to combat trafficking in children.

Chapter 2

Laws on Adoption and Guardianship

Adoption and Guardianship:

2.1 'Adoption' is the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child. Guardianship establishes Guardian-Ward relationship and Guardian is a person who takes care of the person or the property of the ward or both person and property. The fundamental difference between adoption and guardianship is that the former establishes a Parent-child relationship whereas the latter does not.

History of Adoption and Guardianship:

2.2 The first adoption laws were passed by England and Wales. It was the Adoption of Children Act, 1926. Until that date, adoption had not been recognized as a legal concept. A large number of countries enacted new adoption laws in the aftermath of the World War II.

2.3 The custom and practice of adoption in India dates back to the ancient times. Although the act of adoption remains the same, the objective with which this act is carried out has differed. It usually ranged from the humanitarian motive of caring and bringing up a neglected or destitute child, to a natural desire for a kid as an object of affection, a caretaker in old age, and an heir after death.

2.4 The Hindu Adoptions and Maintenance Act enacted in 1956 provided for the adoption of Hindu children by the adoptive parents belonging to Hindus. This Act was not applicable to other communities. They had recourse to Guardians and Wards Act, 1890 wherein they become Guardians of children. However, both HAMA and GAWA remained silent about orphan, abandoned and surrendered children. India became a signatory to the United Nations Convention on the Rights of Child in 1992 which prescribed a set of standards

to be adhered to by all State parties. Against this backdrop, JJ Act was enacted in 2015 to provide a transparent and verifiable mechanism of adoption and also to streamline the adoption of orphan, abandoned and surrendered children.

2.5 The law on the subject of guardians and wards was contained in several Acts and Regulations such as –

- a) Act 40 of 1858, passed in the Bengal Presidency and applicable to the Punjab, Oudh, in respect of minors who were not British subjects and who were not under the superintendence of a Court of Wards;
- b) Act 9 of 1861, relating to the custody and guardianship of minors who were not European British subjects, and applicable to the whole of India;
- c) Act 20 of 1864, passed in the Bombay Presidency in respect of minors who were not European British subjects;
- d) Act 13 of 1874, relating to the guardianship of European British minors in territories beyond the jurisdiction of Chartered High Courts; and
- e) Acts and Regulations in the Madras code relating to minors in the Madras Presidency who were not European British subjects and were not under the superintendence of Court of Wards.

2.6 In order to consolidate and amend the law on the subject of Guardians and Wards, the Guardians and Wards Bill was introduced in the Central Legislature and was enacted as the Guardians and Wards Act, 1890, to consolidate and amend the law relating to Guardians and Wards.

Extant Laws on Adoption and Guardianship:

2.7 The following are the extant laws governing Adoption and Guardianship in India:

- a) The Hindu Adoptions and Maintenance Act, 1956
- b) The Juvenile Justice (Care and Protection of Children Act), 2015
- c) Guardians and Wards Act, 1890

d) The Hindu Minority and Guardianship Act.

The Hindu Adoptions and Maintenance Act, 1956

2.8 The Hindu Adoptions and Maintenance Act, 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. This Act provides for the maintenance and all the rights, privileges and responsibilities that are attached to the relationship of the adopted children similar to biological child.

2.9 Presently, the child adoptions among the Hindus are being governed by this Act. This Act does not allow adoption of two children of the same sex by one adoptive couple. Further, it does not allow for adoption of a child of the same sex as the biological child.

2.10 Section 2 of the Act provides that this Act shall apply -

- (a) To a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,
- (b) To a Buddhist, Jaina or Sikh by religion, and
- (c) To any other person who is not a Muslim, Christian, Parsi or Jew by religion.

2.11 Section 4 of the Act provides for overriding effect of the Act. It provides that save as otherwise expressly provided in this Act,-

- (a) Any text, rule or interpretation of Hindu Law or any custom or usage as part of that law or any other law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

2.12 Chapter II of the Act provides for adoption. Section 5 of the Act provides that adoptions shall be regulated in accordance with the provisions contained in Chapter II. Section 6 of the said Act provides for the requisites of

a valid adoption. As per the said section, an adoption shall be valid if (i) the person adopting has the capacity, and also the right, to take in adoption; (ii) the person giving in adoption has the capacity to do so; (iii) the person adopted is capable of being taken in adoption; and (iv) the adoption is made compliance with the other conditions mentioned in this Chapter.

2.13 Section 7 of the Act provides for capacity of a male Hindu to take in adoption and Section 8 thereof provides capacity of a female Hindu to take in adoption. Both these sections inter alia, provide that any male or female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption. Further, section 9 of the said Act provides for the persons capable of giving in adoption. Sub-section (1) of the said section provides that no person except father or mother or the guardian of a child shall have the capacity to give the child in adoption.

2.14 Section 10 of the said Act provides for the persons who may be adopted. As per the said section, no person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely;-

- (i) He or she is a Hindu;
- (ii) He or she has not already been adopted;
- (iii) He or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption.
- (iv) He or she has not completed the age of fifteen years, unless there is custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

2.15 Section 11 of the Act provides for other conditions for a valid adoption. The following conditions have to be complied with:-

- (i) If the adoption is of a son, the adoptive father or mother must not have a Hindu son or even son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

- (ii) If the adoption is of a daughter, the adoptive father or mother must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (iii) Where a daughter is adopted by a male then it is mandatory that the adoptive father must be at least twenty-one years older than the adoptive daughter;
- (iv) Where the adoption is by female and the child to be adopted is a male, the adoptive mother must be at least twenty-one years older than the person to be adopted;
- (v) It prevents the adoption of the same child simultaneously by two or more persons;
- (vi) Adoption must result in actual giving and taking of the child.

2.16 Section 12 of the Act provides for effects of adoption. It provides that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

2.17 Section 13 of the Act provides that subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of their property by transfer inter vivos or by will.

The Juvenile Justice (Care and Protection of Children) Act, 2015

2.18 The Juvenile Justice (Care and Protection of Children) Act, 2015 is an Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies

established, herein under and for matters connected therewith or incidental thereto.

2.19 This Act has been enacted, keeping in view, among other things, the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption (1993) also. The Convention requires designating a Central Authority for the purpose of Inter-country adoption. Accordingly, Central Adoption Resource Authority (CARA) was given statutory status under section 68 of the Act and has been designated to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption.

2.20 As per clause (1) of section 2 the Act an “abandoned child” means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Child Welfare Committee after due inquiry. Clause (42) of section 2 defines that an “orphan” means a child, who is without biological or adoptive parents or legal guardian or whose legal guardian is not willing to take, or capable of taking care of the child. Further, clause(60) of the said section defines that a “surrendered child” means a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee.

2.21 Chapter VIII of the Act deals with the matters relating to adoption. In the said Chapter, section 56 provides for adoption. Sub-section (1) of the said section 56 provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children as per the provisions of this Act, the rules made there under and the adoption and the adoption regulations framed by the Authority.

2.22 Sub-section (3) of section 56 of the Act also provides that nothing in this Act shall apply to the adoption of children made under the provisions of Hindu Adoption and Maintenance Act, 1956. Whereas, in

terms of sub-section (4) of said section all inter-country adoptions shall be done only as per this Act.

2.23 Further, section 65 of the Act provides for specialized adoption agencies for the rehabilitation of orphan, abandoned or surrendered children through adoption and non-institutional care. Further, the said section also empowers the State Government to recognize one or more institutions or organizations, in each district as a Specialized Adoption Agency, in such manner as may be provided in the adoption regulations framed by the Authority.

2.24 Section 66 of the Act provides for adoption of children residing in institutions not registered in adoption agencies. As per the said section the agencies which may not have been recognized as Specialised Adoption Agencies shall also ensure that all orphan or abandoned or surrendered children under their care are reported, produced and declared legally free for adoption, by the Committee under section 38 of the Act.

2.25 The Central Government had notified the Adoption Regulations, 2017 under clause (c) of section 68 of the Act, inter alia providing for adoption. The regulations provide time-lines for each process and the responsibilities of different agencies have been fixed. Some of the salient regulations are as follows:-

- (1) Procedures related to adoption by relatives both within the country and abroad have been defined in the Regulations.
- (2) Validity of Home Study Report has been increased from two to three years.
- (3) The time period available to the domestic Prospective Adoptive Parents for matching and acceptance, after reserving the child referred, has been increased to twenty days from the existing fifteen days.

(4) District Child Protection Unit shall maintain a panel of professionally qualified or trained social workers.

(5) There are 32 Schedules annexed to the regulations including model adoption applications to be filed in the Court and this would considerably address delays prevalent in obtaining the Court order.

2.26 Further, for ensuring a transparent method for the adoption, the entire process of adoption is operated through an online system viz., “Child Adoption Resource Information and Guidance System” (CARINGS) for facilitating, guiding and monitoring the adoption programme.

The Guardians and Wards Act, 1890

2.27 The Guardians and Wards Act has been enacted to consolidate and amend the law relating to guardians and wards. This law regulates the subject of guardianship and custody for all children within the territory of India irrespective of their religion.

2.28 Section 4 of the Act defines the term “guardian” to mean a person having the care of the person of a minor or his property or both of his person and property. Thus, the definition is wide and includes all kinds of guardians such as natural guardians, testamentary guardians, etc.

2.29 Section 7 of the Act empowers the District Courts to appoint guardians of the person or property of a minor or both if the court is satisfied that it is for the welfare of the minor. Thus, the father’s right to the custody of his minor child is no longer absolute and is circumscribed by the consideration of welfare of the minor. The welfare of the minor is of paramount importance in appointing a guardian. This Act lays down the procedure for appointment of guardians and the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. Thus, it is an umbrella legislation that

supplements the personal laws governing guardianship issues under every religion. Even if the substantive law applied to a certain case is the personal law of the parties, this Act lays down the procedure.

2.30 Section 7 of the Act authorizes the Court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the 'welfare of the minor'.

2.31 Section 8 of the Act provides for the persons who are entitled to apply for an order. No order for appointment of guardian shall be made unless the person desirous of claiming guardianship of the minor child makes an application to the Court.

2.32 Section 17 of the Act provides for matters to be considered by the court in appointing guardians. Sub-section (1) of the said section provides that in appointing or declaring the guardian of the minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. Subsection (2) of the said section provides that in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor; the character and capacity of the proposed guardian and his nearness of kin to the minor; the wishes, if any, of a deceased parent; and any existing or previous relation of proposed guardian with the minor or property of the minor. Sub-section (3) of the said section provides that if the minor is old enough to form an intelligent preference, the court may consider his preference. Sub-section (5) thereof provides that court shall not appoint or declare any person to be a guardian against his will.

2.33 Section 19 of the Act provides for cases where guardian may not be appointed by the court. The courts cannot appoint guardian in the following cases-

- (i) Where the minor is a married female, and her husband is not unfit to be the guardian of her person in the opinion of the court;
- (ii) Where the minor is other than a married female whose father or mother is living, and is not unfit to be the guardian of the person of the minor in the opinion of court;
- (iii) Where the property of the minor is under superintendence of a court of wards who is competent to appoint a guardian of the person of the minor.

2.34 Section 24 of the Act provides for duties of guardian of the person. It provides that guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, education and such other matters as the law to which the ward is subject requires.

2.35 Section 25 of the Act provides for title of the guardian to custody of the ward. Sub –section (1) of that section provides that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward’s return, if it is of the opinion that it is for the welfare of the ward to be returned to the custody of the guardian.

2.36 Section 27 of the Act provides for duties of guardian of property. It provides that a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own and he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property.

2.37 Sections 38 to 42 deal with termination of guardianship i.e. the right of survivorship among joint guardians, removal of guardian, discharge of guardian, cessation of authority of guardian and appointment of successor to guardian dead, discharged or removed.

The Hindu Minority and Guardianship Act, 1956

2.38 The Hindu Minority and Guardianship Act, 1956 is an Act to amend and codify certain parts of the law relating to minority and

guardianship among Hindus. Section 2 of the Act provides that the provisions of this Act are supplemental to the Guardians and Wards Act, 1890. Section 4 of the Act defines “guardian” to mean a person having the care of the person of a minor or of his property or of both his person and property and includes (i) a natural guardian (ii) a guardian appointed by the will of the minor’s father or mother (iii) guardian appointed or declared by a court (iv) a person empowered to act as such by or under any enactment relating to any Court of Wards.

2.39 Section 3 of the Act provides that this Act shall apply to-

- (a) To a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;
- (b) To a Buddhist, Jaina or Sikh by religion, and
- (c) To any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion.

2.40 Section 5 of the Act provides for overriding effect of the Act. It provides that save as otherwise expressly provided in this Act,-

- (a) Any text, rule or interpretation of Hindu Law or any custom or usage as part of that law or any other law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

2.41 Section 6 of the Act specifies who are the natural guardians of a Hindu minor. The natural guardians are-

- (a) In the case of a boy or an unmarried girl – the father, and after him, the mother;
- (b) In the case of an illegitimate boy or an illegitimate unmarried girl – the mother, and after her, the father;
- (c) In the case of a married girl – the husband.

2.42 Section 7 of the Act provides for natural guardianship of adopted son. It provides that the natural guardianship of adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. Section 8 of the Act provides for powers of natural guardian and Section 9 provides for powers of testamentary guardians. Section 11 of the Act provides that de facto guardian shall not deal with minor's property. It provides that no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor after the commencement of this Act.

2.43 Section 13 of the Act provides that welfare of minor to be paramount consideration in the appointment or declaration of any person as guardian of a Hindu minor and that no person shall be appointed as guardian of Hindu minor if the court is of the opinion that it will not be for the welfare of the minor.

Latest Amendments

2.44 The Personal Laws (Amendment) Act, 2010 has amended the Guardians and Wards Act (GWA), 1890 and the Hindu Adoptions and Maintenance Act (HAMA), 1956. The following sections have been amended:

- Under sub-section (b) Section 19 of the GWA, the mother was not included as guardian along with the father, but with this amendment the mother is included along with father.

- Sub-section (c) of Section 8 of the HAMA and Section 9 which incapacitates a married woman from taking in adoption on the basis of her marital status, stood amended.

2.45 The Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021, has amended the Juvenile Justice Act, 2015. The amendments include authorizing District Magistrate including Additional District Magistrate to issue adoption orders under Section 61 of the JJ Act in order to ensure speedy disposal of cases and enhance accountability.

2.46 The District Magistrates have been further empowered under the Act, to ensure its smooth implementation, as well as garner synergized efforts in favour of children in distress conditions. As per the amended provisions of the Act, any Child Care Institution shall be registered after considering the recommendations of the District Magistrate. The DM shall independently evaluate the functioning of District Child Protection Units, Child Welfare Committees, Juvenile Justice Boards, Specialized Juvenile Police Units, Child care Institutions.

2.47 The eligibility parameters for appointment of CWC members have been redefined. Criteria for disqualification of the CWC members has also been introduced to ensure that only the persons capable of rendering quality service with requisite competence and integrity are appointed to CWC.

2.48 On being asked as to what necessitated the Ministry of Women and Child Development to amend the Juvenile Justice Act and authorize the DMs and ADMs to issue adoption orders, the Ministry stated that in view of long delays in an adoption process, the Ministry felt it prudent to culminate the adoption process at the level of District Magistrate.

2.49 **Adoption among other communities** : The law of adoption is unknown to Muslims, Christians and Parsis. However, they may choose to be governed by Juvenile Justice Act and may thereon adopt a child.

Chapter 3

Review of Laws on Adoption- Observations and recommendations of the Committee

3.1 The sub-Committee held a meeting with the Secretary of Ministry of Women and Child Development and representatives of CARA on 17th November 2020. The issues that came to the fore during the deliberations of the Committee and the observations and recommendations of the Committee in this regard are as follows:

Uniform and Common Law on adoption:

3.2 The Committee notes that the Hindu Adoptions and Maintenance Act, 1956 is a personal Law and is applicable only to Hindus whereas the Juvenile Justice Act, 2015 is a secular Act and is applicable to all irrespective of religion. The Committee observes that both the enactments on Adoption are beset with several anomalies and that the provisions of HAMA are inconsistent with those of JJ Act. The list of anomalies and inconsistencies that came to the notice of the Committee are as follows:

3.2.1 **Upper Age Limit for adoption:** Under HAMA, children upto 15 years of age can be adopted whereas JJ Act provides that children upto 18 years of age can be adopted.

3.2.2 **Eligibility of Parents:** While HAMA stipulates only two primary conditions for a person taking a child in adoption i.e the adopting male/female should be of sound mind and should not be a minor, JJ Act lays down that the Prospective adoptive parents should be physically fit, mentally alert, emotionally stable, financially capable and highly motivated to adopt a child for providing a good upbringing to him. Further, JJ Act also stipulates that the prospective adoptive parents should not have any life threatening conditions.

3.2.3 **Stable Marital relationship:** JJ Act lays down that no child shall be given in adoption to a couple unless they have two years of stable marital relationship but no such pre-condition is laid down in respect of adoptions made by Hindu couple under the HAMA.

3.2.4 **Adoption of a girl child by a single male parent:** HAMA does not bar a single male parent from adopting a female child while JJ Act doesn't permit a single male to adopt a girl child. The only condition that HAMA stipulates for the adoption of a female child by a single male parent is that the adoptive father should be at least 21 years older than the girl child to be adopted.

3.2.5. **Adoption of children of same sex:** Sec 11 of HAMA lays down that if any 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's son (Whether by legitimate blood relationship or by adoption) living at the time of adoption and 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. JJ Act does not stipulate any such conditions.

3.2.6 **Minimum age difference between the adoptive parents and the child:** HAMA lays down age criterion for the adoption of children of opposite sex by single parents. The minimum age difference between the single male parent and female child/ single female parent and male child should be 21 years. The age criterion is not applicable for the adoption of a male child by a single male parent/ female child by a single female parent. JJ Act specifies that the minimum age difference between the child and prospective adoptive parents shall not be less than 25 years.

3.2.7 **Inheritance of property vested in the adopted child prior to adoption:** Section 12 of HAMA and Section 63 of JJ Act provide that

any property vested in the adopted child before the adoption shall continue to vest in such person subject to obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth; Section 12 of HAMA and Section 63 of JJ Act also stipulate that from the date of adoption all the ties of the child in the family of his or her birth shall be deemed to be severed.

3.2.8 Maximum age limit of adoptive parents taking a child in adoption: HAMA does not prescribe any maximum age limit for adoptive parents while JJ Act provides that the maximum age limit of single prospective adoptive parent shall not exceed 55 years and the composite age of the prospective adoptive parents shall not exceed 110 years.

3.2.9 Adoption of a new born child: HAMA does not prevent a new born child from being placed in adoption whereas under JJ Act, a child should be declared legally free for adoption by the Child Welfare Committee, the process usually takes at least two months to complete, thereby depriving the new born child of parental care.

3.2.10 Post adoption follow-up: Under JJ Act, in the event of non-adjustment of the adoptive child, the Specialized Adoption Agency arranges the required counselling for the adoptive parents and adoptees wherever required. In case of non-adjustment even after counselling at the stage of pre-adoption foster care, the adoptive child is taken back by the SAA and there is scope for annulment of adoption even after adoption order is issued. Unlike JJ Act, HAMA does not provide for a post adoption follow up.

3.2.11 ‘Illegitimate’ child: Section 2 of the Hindu Adoptions and Maintenance Act makes use of the word ‘illegitimate’ in reference to a child born out of wedlock.

3.2.12 **Subsection (1) of Section 5 of HAMA:** In view of the enactment of JJ Act, Sub-section (1) of Section 5 of HAMA which reads ‘No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this chapter and any adoption made in contravention of the said provisions shall be void’ bears no relevance and needs to be repealed.

3.3 The Committee is of the considered view that the Hindu Adoptions and Maintenance Act and Juvenile Justice Act have their own virtues and shortcomings. While the adoption procedure laid down under HAMA is simple and takes less time as compared to that stipulated in JJ Act, adoptions made under JJ Act are transparent, accountable and verifiable. However, the Committee also notes that the Adoption Regulations framed under Juvenile Justice Act provide for an elaborate and time consuming adoption procedure beset with inordinate delays. It is also observed that Specialized Adoption Agencies are also over burdened with the procedural requirements and massive paper work stipulated in the regulations. In view of the above, the Committee feels that there is a need to harmonize both the Laws and bring out a Uniform and comprehensive legislation on adoption which is more transparent, accountable, verifiable, less bureaucratic and applicable to all irrespective of religion in order to make adoptions more easy and less cumbersome. The Law so enacted may prescribe separate adoption procedures for institutionalized children and children living with family. As regards adoption by relatives, the adoption process should be more flexible and simplified and involve less documentation.

3.4 The Committee is of the view that the new Legislation so enacted should avoid using the term ‘Illegitimate’ as no child is illegitimate and the adoption law should be the same for all children whether born within or out of the wedlock. The Committee notes that

both the Hindu Adoptions and Maintenance Act (HAMA) and the Juvenile Justice (Care and Protection of children) Act provide for the adoption of children by married couple, single male and single female parents. The Committee feels that the new legislation should cover LGBTQ community.

3.5 The Committee is of the considered view that the upper age limit of the adoptee may be fixed at 18 in the new legislation. The Committee feels that the new Law should also permit adoption of children of the same sex. The Act may stipulate minimum age difference of 25 years between the adoptive child and prospective adoptive parent/s. Further, with regard to eligibility of prospective adoptive parents, the new Legislation may incorporate the criterion laid down under JJ Act, such as requiring the PAPs to be physically fit, mentally alert, financially stable and without life threatening diseases; two years of stable marital relationship in case of couple and a prohibition on the adoption of female child by single male parent among others. The new legislation needs to clearly define the eligibility criterion of Prospective Adoptive Parents in objective terms.

3.6 The Committee is of the view that the new law on adoption should provide for early de-institutionalisation of the new born as it is in the best interest of children. The Committee also opines that the adopted child should be entitled to a share in the property of his adoptive parents and not of his biological parents since adoption replaces biological parents with adoptive parents permanently.

3.7 The Committee also recommends mandatory post adoption follow-up because in the absence of post adoption follow up, it is not possible to ascertain the progress and well being of the child in the adoptive family. It could result in vulnerabilities and distress being experienced by the child remaining unnoticed which may not be in the best interest of the child.

National Adoption Registry:

3.8 The Committee notes that under HAMA, adoption of a child is concluded through a registered deed and in case if the parents are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself by obtaining orders of the court under section 9(5) of HAMA whereas JJ Act follows an elaborate procedure including an adoption order from the Court to finalize adoption.

3.9 HAMA does not have mechanism for adoption through recognised agencies nor does it provide for compulsory registration of adoption with any agencies. Since the adoption rules framed under JJ Act demand, transparency and accountability on the part of Specialized adoption agencies and Prospective adoptive parents (PAPs), more and more Prospective Adoptive Parents are resorting to private adoptions facilitated under unregulated HAMA.

3.10 The Committee notes that while JJ Act has provisions for verifying the source of the child, ascertaining the suitability of prospective adoptive parents and a post adoption follow up, all these necessary pre-requisites are missing from HAMA Act thereby facilitating the unscrupulous to traffic children in the guise of adoption. Adoptions made under HAMA are also not in accordance with the provisions of the Hague Convention on Inter-Country Adoption of children to which India is a signatory. Juvenile Justice Act demands transparency, accountability and doesn't permit parents to 'choose' the child, Prospective adoptive Parents are taking circuitous route by filing an application under Guardians and Wards Act for taking custody of Orphan, Abandoned and Surrendered (OAS) Children with a view to undertake private adoption under HAMA through a deed.

3.11 The Committee observes that CARA maintains data pertaining to adoptions taking place under JJ Act. As Parents adopting a child under HAMA are not required to register the adoption deed with CARA, there is virtually no data on adoptions taking place under HAMA. Therefore, in the opinion of the Committee, henceforth, any enactment on adoption must make registration of adoption deeds with CARA mandatory as it will facilitate it to maintain an ADOPTION REGISTER so that it can monitor all adoptions and keep a check on trafficking.

Declining rate of adoption in India:

3.12 The Committee notes that as per the adoption statistics of Central Adoption Resource Authority, the number of children adopted in the country declined from 5693 in 2010 to 3142 in 2020-21 and the number of children taken in inter-country adoption showed a drastic fall from 628 in 2010 to 417 in 2020-21 which is a cause of grave concern. The number of children placed in adoption in India is much lower as compared to other countries in the neighbourhood, for instance in China, 15000 and 1685 children were placed in in-country and inter-country adoption in 2018 and in Vietnam, 430 children were placed in in-country adoption and 2382 children were placed in inter-country adoption during the same year.

3.13 As per the information furnished by CARA, as on 16.12.2021, 26734 prospective adoptive parents have registered with CARA and are waiting for referral for In-country adoption and 1205 Prospective adoptive parents are awaiting Inter-Country adoption. As per the information furnished by the Ministry of Women and Child Development, the average time taken for Prospective adoptive parents to get a referral for children in the age group of 0-4 years is approximately 2 years.

3.14 As per the data made available by CARA, as on 16.12.2021, a total of 6996 Orphaned/Abandoned/Surrendered children are residing in the Child

Care Institutions linked with SAAs, out of which 2430 are declared legally free for adoption and 4566 children are in process at different levels prior to being declared legally free for adoption by CWC.

3.15 The Committee takes note of the paradoxical situation where on one hand there are a large number of Parents willing to adopt a child, on the other, there are not many children available for adoption, all this while the 2020 World Orphan Report estimates number of orphans in India at 31 million. Also, as per the information furnished by the Ministry of Women and Child Development, as per Census 2011 there are 55,258 child beggars in the age group of 0 to 19 years in the Country. The Committee is of the view that at the outset, it is important to get a true picture of number of children who are orphaned/abandoned through a district level survey and the data needs to be updated on a regular basis. A meeting chaired by the District Magistrate should be held in each District every month to take stock of the situation and to ensure that orphan and abandoned children found begging in streets are produced before the Child Welfare Committee and are made available for adoption at the earliest. The Committee also feels that it is important to prevent illegal and informal adoptions so that larger pool of children are available for placing them in adoption with the families registering for adoption under JJ Act.

Child Care Institutions:

3.16 The Committee notes that Section 41 of the JJ Act makes it mandatory for all CCIs to be registered by the States/UTs. A social audit commissioned by the National Commission for Protection of Child Rights (NCPCR) in 2018 revealed that out of 7,163 CCIs in the country, as many as 2,039 (29%) were still not registered with the State Governments. The incidents reported in Balika grih at Muzaffarpur (Bihar), Ranchi (Jharkhand) and Deoria (Uttar Pradesh) make a case for stringent action including closure of such unregistered CCIs.

3.17 A social audit commissioned by NCPCR in 2018 had found that 2,764 CCIs did not have adequate measures to prevent any form of physical and emotional abuse of children, only 52% CCIs have adequate number of counsellors, just 26% of them had adequate number of child welfare officers, probation officers, case workers and only 45.5% of them had a medical officer or physician including the 'on call' doctor. The study also revealed that CCIs are not equipped with requisite infrastructure. For instance, only 85% CCIs were able to provide one bed per child, 88% had bathrooms and 82 % had toilets.

3.18 On being asked as to what measures have been taken by the Ministry of Women and Child Development with respect to unregistered Child Care Institutions, the Ministry replied that it has corresponded with States/UTs for ensuring that all children in need of care and protection and children in conflict with law are housed only in the Child Care Institutions registered under JJ Act. Further, the Ministry has stated that Secretary, WCD has time and again requested states for registration of CCIs. Hon'ble Minister has also written a D.O. Letter to all MPs and MLAs to take necessary action for registration of CCIs and also against those institutions which are not complying with the requirement. The Ministry also said that it had categorically requested the States/UTs time and again to close down the unregistered institutions and make suitable alternative arrangements for the inhabitants.

3.19 The Committee notes with serious concern that 762 children have died in Specialized Adoption Agencies between 2018-19 and 2021-22 which is alarming. The Committee recommends the Ministry to commission a third party study of all Child Care institutions. The Committee also recommends the Ministry to investigate into the causes of child deaths in Specialized adoption agencies and furnish a brief note to the Committee within three months time. The Committee recommends the Ministry to amend the JJ Act and/or Rules, as the case may be, and

empower the District Magistrates to identify and close down unregistered child care institutions functioning within their jurisdiction.

Need for a single nodal ministry

3.20 The subject matter ‘personal laws’ including adoption falls under the Concurrent List of the Seventh Schedule to the Constitution of India. Under the Government of India (Allocation of Business Rules), 1961 the Legislative Department of the Ministry of Law and Justice is concerned with three enactments relating to Guardianship and Adoption namely, The Hindu Adoptions and Maintenance Act 1956, Guardians and Wards Act 1890 and the Hindu Minority and Guardianship Act 1956 as regards legislation alone. The said Acts are administered by State Governments and the rules and regulations under the said Acts are made by the respective State Governments.

3.21 The Central Adoption Resource Authority which is the nodal agency for the adoption of Indian children and mandated to monitor and regulate in-country and inter-country adoptions comes under the administrative control of the Ministry of Women and Child Development. Besides these, Ministries of Social Justice and Empowerment, Minority Affairs, External affairs, Home Affairs and the Department of Legal Affairs also a play a crucial role in dealing with the subject matter.

3.22 The Committee notes that subject matters relating to adoption fall under Concurrent list of the Seventh schedule to the Constitution. At present, adoption related matters are being dealt with by two Ministries, namely, Ministry of Law and Justice and Ministry of Women and Child Development. Under the Government of India (Allocation of Business) Rules, 1961, Legislative Department is concerned with the Hindu Adoptions and Maintenance Act for the purposes of legislation only whereas the day-to-day functioning of JJ Act is monitored by the Ministry of Women and Child Development at Union Level. The

Committee feels that there is a need to bring Adoption Laws under a single Ministry for better monitoring and implementation.

Practical issues in the implementation of Juvenile Justice Act:

3.23 The Committee has undertaken a study visit to PALNA, a specialized adoption agency based in Delhi. The management of PALNA have brought certain issues to the notice of the Committee. The Committee was told that PALNA used to keep upto 100 children in the past but ever since the JJ Act came into force, on an average, only 50 children are available in the institution at any given point of time. On being asked about the reason behind the decline in the inflow of children, the management of PALNA apprised the Committee that the present rules require that children should be placed in an adoption agency located within the jurisdiction. This jurisdiction restriction has given rise to a situation where some adoption agencies are functioning over and above their capacity while others are functioning below their capacity.

3.24 The management of PALNA has also expressed concern about the recent amendment to JJ Act which authorizes District Magistrate and Additional District Magistrate to issue adoption orders and opined that this procedure may cause more delays given the multifarious responsibilities that DMs and ADMs have and the consequential paucity of time.

3.25 The management of PALNA also lamented that the adoption fee is too low and doesn't even cover the medical expenses incurred on the child. Further, they went on to state that the financial support provided by the Government is also meagre. The Committee was also told that the timelines stipulated in the Adoption Regulations are not being adhered to. The Committee was told that, in practice, the process of declaration of a child as legally free for adoption, takes 8-9 months though the Adoption Regulations prescribe a two month period, largely, due to delay in furnishing of NOC by Police authorities, lengthy DNA profiling process, delay in publication of

advertisement about the Child in local newspapers by District Child Protection Unit among others.

3.26 The Committee was also aghast to learn that there are many unregistered Child Care Institutions in the Country. The Committee was also told that adoption agencies are finding it difficult to follow the procedure of adoption laid down under JJ Act is cumbersome, time taking and involves tremendous paper work. They went on to mention that adoption agencies are finding it difficult to report to multiple agencies.

3.27 The Management of PALNA told the Committee that there is a drastic decline in the number of orphan and abandoned children coming to adoption agencies over the years and expressed concern about child trafficking.

3.28 The Committee notes that Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 authorizes the District Magistrate (including Additional District Magistrate) to issue adoption orders and provides that any person aggrieved by an adoption order passed by the District Magistrate may file an appeal before the Divisional Commissioner. The Committee is of the considered opinion that Judges have the competence, experience and skills to determine whether adoption is in the best interest of the child. When deciding on adoption, Courts review documents, ensure necessary procedures have been complied with, and conduct an inquiry of the child and adoptive parents and ensure that adoption is for the welfare of the child. The Committee feels that it is not appropriate for an administrative authority to issue adoption orders instead of a judicial body. However, since the Act has been amended and the new system is yet to be tried and tested, the Committee recommends that appropriate training should be imparted to District Magistrates & Additional District Magistrates and Divisional Commissioners as well. The Committee recommends the Ministry of Women and Child Development to review the functioning of the new

system, after a year and present an Assessment Report to the Committee accordingly.

3.29 The Committee feels that while placing a child in any Child Care Institution, the Child Welfare Committee must pay due regard to the capacity of the institution, its state of infrastructure and resource availability. The Committee recommends the Central Adoption Resource Authority to apprise the Committee if the Juvenile Justice Rules or Adoption Regulations or the Parent Act itself contains any provision requiring the orphan, abandoned and surrendered children to be placed in a Child care institution located in the same jurisdiction where the child is found/located. In case, such Rules are notified by any State Authority, the Committee recommends CARA to furnish details of such states where the rule is being implemented.

3.30 The Committee recommends the Ministry of Women and Child Development that certain Child Care Institutions should be earmarked for children with special needs. Such institutions should have a team of health care professionals, special educators, therapists and facilities for medical rehabilitation.

3.31 The Committee is disheartened to know that older children and children with special needs are usually not preferred for adoption by Indian Prospective adoptive parents. The Committee feels that as children grow older, they find it difficult to adjust with a new socio-cultural milieu, therefore, the priority is to place a child in adoption at the earliest. The Committee notes that the time frame stipulated for adoption under JJ Act is lengthy and also not being strictly adhered to by the authorities concerned. There is a need to simplify the procedure further besides bringing down the time required for placing a child in adoption to less than six months. The Committee is of the view that a longer wait

period often forces the parents willing to adopt a child to resort to illegal adoption.

3.32 The Committee also expresses serious concern about decline in the number of children coming to adoption agencies over the years. This decline, by and large, points to trafficking or a thriving illegal child adoption market. The Committee is of the view that there is a need to increase surveillance, especially on unregistered child care institutions and adoption agencies/hospitals with the past record of trafficking.

3.33 The Committee finds that the roles of various bodies involved in the process of adoption are overlapping. The Committee recommends the Ministry to define the roles and responsibilities of each body clearly. The Committee desires that various agencies involved in adoption should shed over cautiousness and act as facilitators for adoption agencies. The Committee recommends the Ministry to submit a note detailing the factors that are preventing the agencies involved in adoption such as Child Welfare Committees, District Child Protection Units from adhering to the timeframe stipulated in the Adoption Regulations.

Chapter 4

Review of Laws on Guardianship- Observations and recommendations of the Committee.

4.1 The Committee held a meeting with the Secretary of Legislative Department, Ministry of Law and Justice on 9th January, 2020 during which it discussed the loopholes in Guardianship Laws. The details of vital issues that emerged during the deliberation and the observations and recommendations of the Committee in this regard are stated below:

Legitimacy of Children

4.2 The Committee notes that Section 3(1) of the Hindu Minority and Guardianship Act, 1956 reads as follows:

3 (1) This Hindu Minority and Guardianship Act applies-

- (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or AryaSamaj;
- (b) to any person who is a Buddhist, Jain or Sikh by religion, and
- (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.--The following persons are Hindus, Buddhists, Jains, or Sikhs by religion, as the case may be:--

- (i) any child, **legitimate or illegitimate**, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;
- (ii) any child, **legitimate or illegitimate**, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(iii) any person who is convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.

4.3 The Committee notes that Section 3(1) of the Hindu Minority and Guardianship Act makes use of the term ‘illegitimate’ in reference to a child born out of wedlock. The Committee strongly feels that the word ‘Illegitimate’ should be omitted as no child is illegitimate and the law should be the same for all children whether born within or out of wedlock.

Need for Gender Equality

4.4 The Committee notes that Section (6) of the Hindu Minority and Guardianship Act defines Natural Guardians of a Hindu Minor as follows:

Section (6) The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and **after** him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl the husband.

4.5 Section (7) of the same Act provides for the Guardianship of Adoptive Hindu minors as follows:

Section (7)- Natural guardianship of adopted son-The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and **after** him to the adoptive mother.

4.6 The Committee is of the considered view that Section 6 of the Hindu Minority and Guardianship Act lays down that in the case of a Hindu minor boy and a Hindu minor unmarried girl- the father is the natural guardian and ‘after’ him the mother. Section 7 of the same Act provides

that the natural guardianship of an adopted son who is a minor, passes, on adoption, to the adopted father and ‘after’ him to the adoptive mother. The said Act does not provide for joint guardianship nor does it recognize the mother as the guardian of the minor legitimate child unless the father is deceased or is found unfit. Since, the Act gives preference to father over mother, it goes against the Right to Equality and Right against discrimination envisaged under Articles 14 and 15 of the Constitution. Further, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) envisages that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. The Committee feels that there is an urgent need to amend HMGA and accord equal treatment to both mother and father as natural guardians.

Primacy to ‘Welfare principle’:

4.7 The Committee notes that Section 19 (b) of the Guardians and Wards Act states that a Court is not authorized to appoint a guardian to the person of a minor, whose father or mother is alive, and who, in the opinion of the Court, is not unfit to be a guardian. Section 13 of the Hindu Minority and Guardianship Act declares that, in deciding the guardianship of a Hindu minor, the welfare of the minor shall be of paramount consideration and that no person can be appointed as a guardian of a Hindu minor if the Court is of the opinion that it will not be for the welfare of the minor.

4.8 The Committee is of the view that under Guardians and Wards Act, parental authority supersedes the welfare principle, while under the Hindu Minority and Guardianship Act, the welfare principle is of paramount consideration in determining guardianship. Thus, for deciding questions of guardianship for Hindu children, their welfare is of paramount consideration which will override parental authority. But for non-Hindu children, the Court’s authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural

guardian. However what constitutes the ‘Welfare’ of the child is undefined. The Committee feels that there is a need to amend the Guardians and Wards Act to give primacy to the ‘welfare principle’ over parental authority. The Committee is of the view that there is a need to define what constitutes the ‘Welfare’ of the child in broader terms in both the Acts.

Custody and Visitation Rights:

4.9 As the society is rapidly evolving, conjugal and familial relationships are becoming more and more complex. The basis for ending marriage has shifted from fault finding divorce to mutual consent divorce. There is a need to lay down a framework within the legislation within which the divorcing parents and children can decide what custodial arrangement works the best for them.

4.10 The Committee is of the view that the recommendation made by the Law Commission be taken into consideration that provisions relating to Custody, child support, visitation arrangements should be incorporated in the Guardians and Wards Act. Parents should be granted equal rights with respect to guardianship and custody. The Act should empower the Courts to award joint custody to both the parents in circumstances conducive to the welfare of the child, or award sole custody to one parent with visitation rights to the other. The Act must also empower the Courts to fix an amount specifically for child support to meet basic expenses of the child.

Need for a comprehensive legislation on Guardianship

4.11 The Committee notes that Guardians and Wards Act is a religious neutral legislation while the Hindu Minority and Guardianship Act is a Personal Law applicable only to Hindus. Furthermore, the guardianship rights of the physically challenged and those with mental illnesses ranging from autism to cerebral palsy are not covered under the abovementioned Acts.

4.12 The Committee also notes that both the Acts are applicable only to minors i.e. persons who have not completed 18 years of age. Further, the Acts do not stipulate any timeline for Courts regarding the disposal of applications for appointment or declaration of Guardian or removal of Guardian.

4.13 The Committee feels that there is a need to enact a single comprehensive law covering guardianship aspects of various categories of persons and applicable to all irrespective of religion. The Committee is of the view that the Act must facilitate guardianship of elderly persons as there may be circumstances where a senior citizen may reach a stage where the health concerns become overwhelming and they may need a guardian to take care of their health and well being, for instance, an elderly person diagnosed with dementia or lying in a vegetative state or an aged parent abandoned by his children. The Committee also recommends that timelines may be stipulated in the Act for Courts within which the application for Guardianship of the person or/and property of the minor or application for the removal of a guardian is to be disposed of by the Court to ensure speedy disposal of cases.

4.14 The Committee is of the considered opinion that if the proposed Law on Guardianship is to cover majors, then it should also provide for what is not known as ‘Supported Decision making’, a system gaining popularity in many countries around the world. This is an alternative to Guardianship. A person using supported decision-making appoints trusted advisors, such as friends, family, or professionals, to serve as supporters. Instead of having a guardian make choices for them, the person takes the help of supporters who help them make their own choices.