ADOPTED AND ILLEGITIMATE CHILD UNDER INDIAN CHRISTIAN LAW: REVISITING INHERITANCE RIGHTS

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ADOPTED AND ILLEGITIMATE CHILD UNDER INDIAN CHRISTIAN LAW: REVISITING INHERITANCE RIGHTS

by

Archana Mishra*

I. INTRODUCTION

During early twentieth century inheritance law shifted its focus from the dynastic family to the nuclear family, resulting in prioritisation of close kinship relationships over more distant ones. Kinship has become one of the factors which determine the child’s membership to a family. Christian law of inheritance in India regulated by Indian Succession Act, 1925 (ISA, 1925) steered by rule of kinship recognizes only consanguinity as a determining factor for title to succession and does not protect the rights of adopted and illegitimate child to inherit property. Christian law though grants equal inheritance rights to sons and daughters and protects right to property of surviving spouse but allows only children born from valid marriage to inherit. The transfer of physical assets from the parent to the child generation can provide the start-up material for the younger generation’s more independent future livelihoods and economic productivity however, exclusion from assets inheritance can exacerbate vulnerability to chronic poverty and the intergenerational transmission of poverty. Attempting to protect one’s offspring from the vagaries through inheritance is an individualized reaction to social conditions. Denial

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of inheritance rights to adopted and illegitimate children causes social and economic deprivations. Inheritance practices among Christians disallowing such rights to adopted or illegitimate children of the deceased have profound negative impact on them.

General provisions relating to succession under ISA, 1925 are based on the Statute of Distribution which governed the succession to the personal property in England, the notable features of which are (1) that there is no discrimination based on sex among the heirs (2) that there is no discrimination between persons related by full blood and those related by half blood and (3) relations by adoption are not recognized. Kindred under ISA, 1925 contemplates only relation by blood through lawful wedlock, therefore the term ‘lineal descendants’ refer to legitimate relationships only. Illegitimate children are therefore taken out of the scope of the Act. There is no difference between agnates and cognates. Christian law recognizes the personality of child in womb and grants inheritance rights to him but denies such rights to adopted and illegitimate child. The Act of 1925 does not define ‘child’ but defines minor to mean any person subject to the Indian Majority Act, 1875 who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years; and “minority” means the status of any such person. In dealing with personal laws larger participation of the community is required to make a concerted effort to request legislature to change and improve laws and bring them in tune with modern thinking and in consonance with human dignity. This paper intends to examine the void left in statutory law of inheritance pertaining to rights of adopted and illegitimate child under Christian law, examines the legislative and judicial developments with respect to granting of rights to such children and suggests reforms in inheritance laws to bring change in family structure.

II. INHERITANCE RIGHTS OF ADOPTED CHILD UNDER INDIAN CHRISTIAN LAW

Adoption under Christian law is not clear as no specific statute regulates adoption among Christians in India. In absence of any statutory code enabling adoption, Christians in the past approached the court under the provisions of Guardians and Wards Act, 1890 (GWA, 1890) for

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5 Emma Agnes Smith v Thomal Massey (1906) ILR 30 Bom 500; Sarah Ezra In Re AIR 1931 Cal 560.  
6 Emma Agnes Smith v Thomal Massey (1906) ILR 30 Bom 500.
order of guardianship in respect of the minor child or adopted under the customary law. By the order of court one could only become the guardian of minor child. GWA, 1890 was the only secular law that allowed guardians to take care and have legal custody of minor child called ‘ward’. Any child under the age of 18 could be ward and the guardianship could be revoked by the court or guardian. The child after attaining majority has no rights or duties towards his guardian. On dying intestate, neither guardian nor the ward has any right in the property of the other as enjoyed between child and his parent. The only way for giving away the property by the guardian to his ward is by bequeathing the property in favour of ward by way of will. If he fails to make a will in favour of his ward, then on his death his property passes to his heirs and no share is to be reserved for his ward. GWA, 1890 gives right of legal custody of minor to the guardian but does not make him to be the ward’s parent. Thus GWA, 1890 indirectly fills void of having custody of minor in absence of any secular code regulating adoption in India. Muslim law and Parsi law also do not recognize adoption. Adoption is statutorily recognized only under Hindu law via Hindu Adoption and Maintenance Act, 1956(HAMA, 1956) which allows Hindus, Sikhs, Buddhists and Jains to legally adopt. Under HAMA, 1956 adopted child has the same rights as natural born child of the parent(s). Adopted son is treated as natural son for the purpose of succession of property under Hindu Succession Act, 1956. Indian Succession Act, 1925 which regulates the rules of intestate and testamentary succession among Christians recognise, rights for intestate succession, only among relations by consanguinity and does not expressly recognize the rights of adopted child. Though for testamentary succession, Schedule III of ISA, 1925 grants right to adopted children of the deceased; his grandchild and the wife of his adopted son are considered to be at par with natural born relations, with similar succession rights but such rights are in specific situations only. Major emphasis of ISA, 1925 is to grant succession rights to blood relations only. In view of absence of the statutory recognition of adopted child getting rights in intestate succession and judicial activism of Supreme Court granting rights to Indian citizen irrespective of his religion to adopt and confer rights to adopted children, uncertainty prevails over inheritance rights of adopted children in the property under the Act of 1925.

Legislature apprised of the change in society changes law accordingly but slowly. Since adoption found place only under Hindu law and there was no law regulating adoption under personal laws, the need to was to statutorily recognize adoption in India irrespective of religion. Adoption being
a practical reality, the legislature recently has taken an indirect route to recognize the rights of adopted children in India regardless of his religion. It has not made any change in ISA, 1925 nor laid down a specific uniform law of adoption applicable to all religions, but has passed Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 under Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act, 2000) to include care and rehabilitation by adoption of children in conflict with the law. The JJ Act, 2000 via amendment in the year 2006 for the first time provides a small section for ‘adoption’ as one of means to rehabilitate and socially reintegrate such child. The JJ Act, 2000 defines adoption as “the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship.” Under JJ Act, 2000 any Indian citizen, irrespective of the sex and number of child, can adopt a child who is legally free for adoption. The adoptee child gets the same rights as the biological child, single person can adopt and adoption is irrevocable. It has empowered the State Government and the Juvenile Justice Board to give a child for adoption. It also delinked adoption from the religion of adoptive parents(s)\(^7\) keeping the thrust on the best

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\(^7\) Section 40 of JJ Act, 2000 - Process of rehabilitation and social reintegration:

The rehabilitation and social reintegration of a child shall begin during the stay of the child in a children's home or special home and the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) sponsorship, and (iv) sending the child to an after-care organization.

Section 41 of JJ Act, 2000 - Adoption:

(1) The primary responsibility for providing care and protection to children shall be that of his family.

(2) Adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the State Government from time to time in this regard.

(4) The children's homes or the State Government run institutions for orphans shall be recognized as adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued under Sub-section (3).

(5) No child shall be offered for adoption-

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

(6) The Board may allow a child to be given in adoption-

(a) to a single parent, and
interest of the child. Even though adoption being one of the means of rehabilitation of such child is a small step towards providing rights to such child, considering its impact on the right of adoption, it is a giant step as this provides first secular law for adoption in India. Christians right to adopt may have been restricted under their personal statutory law but now their right to adopt has been introduced under JJ Act, 2000.

(A) LEGISLATIVE DEVELOPMENTS WITH REGARD TO INHERITANCE RIGHTS OF ADOPTED CHILD UNDER INDIAN CHRISTIAN LAW

Inheritance among Christians in India are regulated by Indian Succession Act, 1925 (ISA, 1925). ISA, 1925 recognizes relationship only by consanguinity i.e., blood therefore adopted child is not considered to be ‘child’ under the Act of 1925. The property of an intestate devolves upon those who are of the kindred of the deceased and kindred has been defined as the connection or relation of the person descended from the stock or common ancestor. ISA, 1925 further provides that where the intestate dies leaving behind his child and no more lineal descendant the property is to devolve on the surviving child therefore it is clear that ISA, 1925 does not contemplate an adopted child’s share on intestacy. Just after passing of the Act of 1925 an adopted child was not a ‘child’ within the meaning of the section according to judicial constructions. No specific statute be it ISA, 1925 or Christian Marriage Act, 1872 or Indian Divorce Act, 1869 mentions adoption or enables adoption among Christians in India. Since the institution of adoption did not exist in England before the 20th century and was not prevalent among the Christians in India the Act of 1925 did not provide for adaptive

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8 Section 32 of ISA, 1925-. Devolution of such property.-
The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

9 Section 24 of ISA, 1925 -. Kindred or consanguinity
Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor.

10 Section 37 of ISA, 1925 -. Where intestate has left child or children only
Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

relationships.\textsuperscript{12} By passing of ISA, 1925 the Britishers made the personal law applicable to Christians to be the common law followed in England, under which the transfer of parental rights and duties in respect of a child by another person and their assumption by him was unknown although in equity it was possible for a relative or a stranger to put himself in \textit{loco parentis} towards a child by undertaking the office and duty of a father to make provision for the child so as to assume a fiduciary position in respect of the relationship with the child that created neither legal relationship nor legal status.\textsuperscript{13} After passing of ISA in 1925 in India, law relating to adoption changed in England in the year 1926 and adoption was introduced by the Adoption of Children Act, 1926 which was later replaced by Adoption of Children Act, 1958. Lastly Adoption Act, 1976 was enacted in conformity with the provisions of European Convention on the Adoption of Children. The Adoption Act, 1976 of England contains provisions relating to the recognition of adoption and conferral of certain status on the adopted child and provides for devolution of property. Adoption in the sense of transfer of parental rights and duties in respect of a child to another person and their assumption by him was unknown in the common law of England but now the nature and the concept of adoption under English Law have undergone a sea change as a result of legislative enactments. As a matter of fact 'legal adoption' as distinguished from 'de-facto adoption' or 'fostering' of children in England as also elsewhere in the world is being insisted upon bearing in mind the welfare of the child and consequent upon conceptual changes as to socio-religious and social-political ethos and philosophy of life.\textsuperscript{14} Adoption, therefore, is no longer foreign or unknown to English Law.

The law relating to adoption changed in England but the law in India under ISA, 1925 based on the principles of common law introduced by the Britishers still remains. Later changes in the made in the English statutory provisions with regard to adoption could not retrospectively be applied to the law passed in India, therefore Christians in India are left with no legal sanction for a valid adoption. The matter relating to manner and method of adoption and the rights and obligations of the adoptive parents and that of the adopted child are all to be governed by statute made by the Indian Legislature which still has not passed any such secular legislation.

The Canon law of Christian does not prohibit adoption. Canon 110 of the Code of Canon law commissioned by the Canon Law Society of America speaks of legal consequences of an

\begin{footnotesize}
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\item\textsuperscript{12} \textit{Supra 4.}
\item\textsuperscript{13} Devadason, E.D. (1974) \textit{Christian Law in India}, Madras, India: DSI Publications.
\item\textsuperscript{14} \textit{Ajit Datt vs Mrs. Ethel Walters} (Decd.) through L.Rs. and others AIR 2001 All 109.
\end{itemize}
\end{footnotesize}
adoption made in “accordance with the civil law”.\textsuperscript{15} Decree XXI of the “Acts and Decrees of the Synod of Diamper 1599” provides that adoption of sons is illegal except in default of children, which by implication suggests that in default of children, adoption could be legal. Decree XXII which forbids the Bishop to sanction such adoption as those mentioned in decree XXI provides the ways to get an adoption perfected. In absence of statutory law before amendment of JJ Act, 2000, parents of other faiths could only become guardians.

For regulating adoption in communities where adoption is not provided for, a Bill was first introduced in Parliament in 1955 but was withdrawn as the then Law Minister wanted a smooth passage for the Hindu Adoption and Maintenance Bill. Later on two more Bills were introduced in 1967 and 1970 in response to growing demand for general law for adoption to provide proper homes for destitute and abandoned children, but both bills lapsed. Then in 1972 the Central Government in Rajya Sabha introduced the Adoption of Children Bill, 1972 providing for uniform law of adoption for all communities in order to rectify this serious lacuna in the law. The Bill intended to enable all those domiciled in India to adopt children by means of an order by the District Court. Under the Bill the child in respect of whom adoption was to be made, would have been considered to be the child of the adopter for all purposes including intestacy with effect from the date on which adoption took place and from such date all the ties of the child in the family of his or her birth was to be severed. This Bill was vehemently opposed by the Muslim clerics as they considered adoption to be against the tenets of Islam consequently the Bill failed. Later after eight years when again Adoption of Children Bill 1980 was introduced in Lok Sabha. The Bill would have remedied the situation to a larger extent by providing a uniform application of law in the case of adoption to all parties irrespective of religion, caste, tribe etc. The welfare of the child was the main consideration for adoption of child under the 1980 Bill. This Bill gave unmarried woman right to adopt a child, equal rights to married woman with her husband to adopt a child jointly. It also required consent of both parents. Adoption of Children Bill 1980

\textsuperscript{15} Paruck, P.L. (2015) \textit{The Indian Succession Act, 1925}, Nagpur, India: Lexisnexis Butterworths Wadhwa (11th Edition); \textit{Philips Alfred Malvin v. Y.J Gonsalves and others}, AIR 1999 Ker 187 – “Canon – 110 – Children who have been adopted in accordance with the civil law are considered as being the children of that person who have adopted them. Adopted children are usually not at all, or occasionally not wholly, related to the parents adopting them.............................Church law adopts the civil law pertinent to the area and states that adopted children are held to be the equivalent of natural children of an adopting couple in those instances in which adoption has been duly formalized according to the Civil Law. Canon - 111 - A child of parents who belong to the Latin Church is ascribed to it by reception of baptism, or, if one or the other parent does not belong to the Latin Church and both parents agree in choosing that the child be baptized in the Latin Church, the child is ascribed to it by reception of baptism but, if the agreement is lacking, the child is ascribed to the Ritual Church to which the father belongs.”
could not be passed and it also lapsed. In 1990 Christian Adoption and Maintenance Bill, 1990 was mooted by Christian Organizations but that has also failed to become a law. In 1999 during XIIIth Lok Sabha Debate\textsuperscript{16}, Member of Parliament, Dr. Beatrix D'Souza, brought to the attention of the Government the need to reform and update the Christian personal law pertaining to few specific Bills, i.e., the Christian Marriage Bill, 1997, the Christian Divorce Bill, 1997, the Christian Succession (Amendment) Bill, 1994 and the Christian Adoption and Maintenance Bill, 1997. She ardently favoured the reform as the said Acts did not meet the requirements of the social realities that exists and requested the Government to introduce these Bills to grant justice to the minority Christian community but the Government did not take any action. No Bill has been proposed for bringing adoption on the statute book nor has the Government felt the need to bring corresponding changes in the law for enabling adoption statutorily.

(B) JUDICIAL DEVELOPMENTS WITH REGARD TO INHERITANCE RIGHTS OF ADOPTED CHILD UNDER INDIAN CHRISTIAN LAW

Supreme Court of India has expanded the scope of right of person, irrespective of his religion, to adopt but is yet to give a definite ruling on the rights of Christians to adopt. Contradicting judgement of various High Courts have gone into the rights of Christians to adopt by delving into their canon law or customary law of adoption or by giving expansive meaning to the right to life of the adoptive child or adoptive parents. Supreme Court in \textit{Lakshmi Kant Pandey’s} case\textsuperscript{17} has accepted the right to life to such child guaranteed under Article 21 of the constitution. \textit{Lakshmi Kant Pandey v. Union of India} though does not deal with adoption right for Christians in India but is a landmark case relating to adoption of Indian children by persons outside India. In absence of legislation to regulate inter-country adoption, the Supreme Court, relying on existing constitutional safeguards, international conventions and the Guardians and Wards Act, 1890, laid down elaborate principles governing the rules for inter-country adoption. While accepting that there was no law to regulate inter-country adoptions, it emphasized the need for taking efforts to rehabilitate the child by adoption within the country and when not possible then only inter-country adoption to be accepted. Acquiesced of malafide intention of trafficking of children by many ill-equipped and undesirable organisations or individuals activating themselves

\textsuperscript{16} XIII LOK SABHA DEBATES (1999), \textit{Session II (Winter Session)} Thursday, December 9, Agraahjana 18, 1921 (Saka ) available at http://www.parliamentofindia.nic.in/lsdeb/ls13/ses2/50091299.htm (visited on 5/1/2015).

\textsuperscript{17} AIR 1984 SC 469.
in the field of inter-county, it laid down broad guidelines to be adhered to by the foreigners desiring to adopt, laid down safeguards for biological parents, directed setting of adoption resource agency by the government of India etc. The court acted on a letter in public interest complaining of malpractices indulged in by social organisation and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents and therefore emphasized on guidelines mainly relevant for inter-country adoption. It issued directions in recognition of the right to life guaranteed under Article 21 to the child. Apex court judgement in Lakshmi Kant’s case is the high water mark in the development of the rights of the child as it candidly questioned that if an Indian child can be given to foreign adoptive parents irrespective of their religion, why cannot the same child have the right to be adopted in a home under Indian sky. The Supreme Court accepted the of right to life of all adopted child but did not lay down guidelines and consequences for in-country adoption by parents belonging to any religion.

At times the High Courts have taken proactive step with regard to recognizing rights of Christians to adopt child. The question regarding the Indian Christians’ right to adopt a child came up for consideration for the first time before the Kerala High Court in Philips Alfred Malvin v. Y.J Gonsalves and others\(^\text{18}\) wherein the single judge bench held Christian law does not recognise adoption but at the same time it is an admitted fact that the Christian law as well as Canon law does not prohibit adoption. Accepting the philosophy of adoption under Hindu law it observed that apart from the religious motives, secular motives were also important such as man's desire for celebration of his name for the perpetuation of his lineage, for providing security in the old age and for dying in satisfaction that one has left an heir to one's property. The right of the couple to adopt a son is a constitutional right guaranteed under Article 21 of the Constitution. The right to life includes those things which make life meaningful, therefore the position of an adopted child in respect of inheritance and maintenance is the same as that of a natural born child. Reiterating the provisions of Canon law it candidly held that simply because there is no separate statute providing adoption for Christians, it cannot be said that the adoption made by Christian couple is invalid. The adopted son gets all the rights of a natural born child, so he is entitled to inherit the assets of Christian couple. This view has been approved by Division Bench of same High court in Maxin George v. Indian Oil Corporation.\(^\text{19}\) Another judge of the

\(^{18}\) 1999 (1) K LJ247; AIR 1999 Ker 187.

\(^{19}\) 2005 (3) KLT 57.
Kerala High Court vide his judgment in *Biju Ramesh and Anr. v. J.P. Vijayakumar and Ors.*\(^{20}\), distinguished the decision of *Philips Alfred Malvin's* case on its facts and held that there must be a civil law providing for adoption and that the factum of adoption must be proved before the Court.

Recognition of right of adoption under Christianity was also an issue before the Bombay High Court in *Manuel Theodore D'souza and Anr.*\(^{21}\) Answering a bigger question that whether a civilised State committed to the rule of law, governed by a written constitution and signatory to International Conventions on the Rights of a Child, could deny to a section of its own citizens the right to adopt a child and to give that child, a home, a name and nationality, Justice Rebello ruled that the right of a child cannot be confused with the personal law of any section of our pluralistic society. He went further to say that adoption is not to be treated as an act by a State to force a child on unwilling parents, on the contrary it is a voluntary act on the part of eligible persons to provide comfort, love and security to the abandoned and homeless children and no religion can deny family love to these children of God. Justice Rebello did not stop with that question. He gave a constitutional basis for the Courts to evolve a solution on the issue of adoption in the following words:

> “The right of the child is independent, as a human being, and flows from his right to life as contained in Article 21 of the Constitution. Any eligible parent or parents irrespective of religion can apply to adopt a child. Personal laws, have to meet the test of Part III of the Constitution, if they are to be saved. On the coming into force of the Constitution it is Article 21 in which the rights of a child are cradled. Custom has given way to Article 21. The right of adoption after coming into force of the Constitution is not referable to any customary or personal right. It is now impregnated in Article 21. Its flow now is sustained from the Republican Constitution and not age-old Customs”.

Acknowledging the rights of Christian parents to adopt and right of being adopted to be a fundamental right under Article 21 of the Constitution the Bombay High Court citing *Lakshmi Kant Pandey* has held that the right of the child to be adopted and consequently to have a home, a name and a nationality has to be considered as part of his right to life.

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\(^{20}\) AIR 2005 KER 196.

\(^{21}\) II (2000) DMC 292.
On the issue whether adopted son of an Indian Christian of Hindu origin is entitled to succeed to the estate of his adoptive father or adoptive mother, dying intestate, divergent views have been expressed by G.P. Mathur J., and S.R. Singh J in Ajit Datt’s case\textsuperscript{22} by Allahabad High Court. G.P. Mathur, J. took the position that there is no custom amongst the Indian Christians that allows adoption. Justice Mathur further held that "a person who ceases to be a Hindu in religion and becomes a Christian cannot elect to be bound by the Hindu law in the matter of succession after the passing of the Indian Succession Act and a Hindu convert to Christianity is governed solely by the said Act. Where a son was adopted by Indian Christians of Hindu origin, the adopted son cannot claim as a matter of right to inherit the property of his adoptive parents in absence of any statutory provision. In order to obviate the problem being faced by childless couple or by abandoned, orphaned or destitute children whom persons are willing to adopt a comprehensive legislation should be made”. On the other hand S.R. Singh J. expressed his contrary view that for Christians, professing any form of Christianity, adoption is purely a secular concept and phenomenal event. The desire for celebration of one's name, for perpetuation of one's lineage, for providing security in the old age; and for dying in satisfaction of leaving behind an heir to succeed to one's estate constitute secular motive of adoption and such motive would be sufficient and valid ground to give legal recognition to adoption among Indian Christians of Hindu origin professing any form of Christianity. He further opined that “even in the absence of statutory or customary rights of adoption, a sonless person, may adopt a child in exercise of his personal right to life as a means of fulfilment of his happiness and as such, adoption must be recognised by Courts if it is not interdicted by any legislation, established custom, or personal law. There is nothing in the philosophy and ethics of Christianity which might be construed as prohibiting adoption and what is not expressly or impliedly prohibited by Legislature or any tenet of Christianity shall be deemed to be permitted by law and must be accorded recognition by Courts. The word 'son' in the case of any one whose 'personal law' permits adoption, shall include an 'adopted son' as provided in Section 3(57) of the General Clauses Act. In any case adoption being a facet of right to life, if established, will make the adopted child as a child born in the wedlock of adoptive parents. Adopted son of an Indian Christian of Hindu origin will come within the purview of 'lineal descendant' or lineal

\textsuperscript{22} Supra 14.
consanguinity' and shall be entitled, under Section 37 of the Indian Succession Act, 1925 to inherit the properties of his adoptive parents dying intestate”.

The Karnantaka High Court in *Vasanti v. Pharez John Abraham* 23, while completely endorsing the view of the Kerala High Court in *Philips Alfred Malvin’s* case and the view of S.R. Singh J. in *Ajit Datt’s* case held that an adopted child of a Christian parents shall have right of inheritance. Unlike Hindu Law, there is no law prohibiting the Christian couple to adopt male and female child when they already have natural born male and a female child. Further it was of the view that adoption according to Christians is based on both temporal and spiritual values. Recently the same High Court in *Joyce Pushapalath Karkada v. Mrs. Shameela Nina* 24 while approving the *Vasanti’s* case categorically held that proving of formalities necessary for valid adoption was not relevant when it was admitted that adoptee had been treated as the adopter’s child from the time of his baptism till his death.

Contrary opinion has been expressed by Madras High Court 25 wherein it rejected the claim of inheritance rights of Christian adopted child-the defendant/appellant. C.J., K.J. Balakrishnan held that the defendant/appellant could not inherit the estate of deceased as he was an adopted son and under ISA, 1925, an adopted son is not treated on par with natural son and he will not inherit the property of the parents by intestate succession. It is for Hindus under HSA, 1956 that an adopted son is treated as natural son for the purpose of succession of ancestral property. The appellant had only pleaded that he had been treated as the son of the deceased but did not make a specific plea in the written statement that in the community which they belonged, there was a custom of adoption. It was observed that as there was no personal law governing the adoption, it could only be held that the appellant had no right to inherit the property of the deceased, even if it was assumed that he was the adopted son of the deceased. While distinguishing *Lakshmi Kant’s* case it held that it is a case where the Supreme Court laid down certain guidelines in the matter of inter-country adoptions. In 2011 the Kerela High Court in *Philips Alfred Malvin v. Y.J. Gonsalvis & Ors.* 26 has held that when adoption is not recognized by personal law applicable to parties it is not valid unless it is sanctioned by civil law.

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23 ILR 2007 Kar 2375.
24 Karnataka High Court, Regular First Appeal No. 849 OF 2010, Date of judgment -12/9/2013.
26 2011(2) KLJ 48.
The decisions of the Bombay High Court, Kerala High Court and Allahabad High Court were rendered before the Parliament amended the JJ Act, 2000 through Juvenile Justice (Care & Protection of Children Amendment) Act, 2006. The interpretation of the provisions of JJ Act, 2000 as amended in 2006 and HAMA, 1956 came before Bombay High Court. The Hindu petitioners, already having a girl child had obtained guardianship right with respect to another female baby when she was just 5 months old. After few years petitioners filed an application to legally adopt that child under JJ Act, 2000. HAMA, 1956 bars a person having a child to adopt another child of same sex. The court accepted that JJ Act, 2000 creates an exception with respect to abandoned child. Petitioners were declared to be the adoptive parents with all rights and consequences under law. The result was that the JJ Act, 2000 prevailed over personal law of the party and gave them right to adopt same sex child which was prohibited under their personal law. Adoption of orphaned, abandoned and surrendered children should be encouraged as it is a mode to provide them love, affection and care of the adoptive family and the restriction of numbers/ gender should be ignored in case the adoptive parents are able to satisfy the Courts that they are capable financially and emotionally to take care of the adoptive children. Before Madras High court came the issue of adoption by Christian parents under JJ Act, 2000 in Re: Mr. R.R. George Christopher and Mrs. Kristy Chandra. The petitioners had filed the application for a direction that the minor child, whom they had adopted as per Christian rites and customs under Canon law and had also been declared by court to be her legal guardian, was entitled to all legal rights including the right of inheritance as if it was a biological child. The court while allowing the application categorically held that the preamble to the JJ Act, 2000 and the JJ Act, 2000 itself was enacted with a view to fulfill the international obligations as well as the constitutional goal envisaged in Part IV of the Constitution, therefore, aspiring parents, who intend to adopt children, without being inhibited by their personal laws, are entitled to adopt a child in terms of the provisions of the JJ Act, 2000. The court candidly held “aspiring parents, who intend to adopt children, without being inhibited by their personal laws, are entitled to adopt a child in terms of the provisions of the Juvenile Justice Act”. The view of R.R. George Christopher was endorsed later by Madurai branch of

27 In Re: Adoption of Payal @ Sharinee Vinay Pathak and his wife Sonika Sahay @ Pathak 2010(1) BomCR 434.
28 Rajan Mittal and another v. Nari Niketan Trust (Regd.) Nakodar Road, Jalandhar 2012 (4) RCR (Civil) 541
29 2009 (8) MLJ 309.
same High Court in *Adlin Maria* (minor) rep. by her father and Guardian J. Mohandas v. Accountant General Chennai*. Recently writ petition was filed in the Supreme Court to elevate the right to adopt and to be adopted to the status of fundamental right under Part-III of the Constitution. It was also filed for requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. Agreeing that personal beliefs and faiths cannot dictate the operation of the provisions of an enabling statute, the court held that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved. With respect to raising the right to adopt to the status of fundamental right the court, the court adopted judicial restraint by holding that present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. The court refused to recognise right to adopt to be an integral part of Article 21, which guarantees the rights to life and liberty on the ground that there are conflicting thought processes and belief prevailing in the country which has hindered the goal of achieving Uniform Civil Code under Art. 44. But the Bench observed that persons of any faith can adopt a child under the JJ Act, 2000 and this law will prevail till Uniform Civil Code is achieved. Now adopted child regardless of the religion of adoptive parents have a right to inherit property same as naturally born child. This path-breaking Apex court judgment for the first time recognises legal rights of all citizens including Christian parents to adopt and consequently confer inheritance rights to adopted child.

### III. INHERITANCE RIGHTS OF ILLEGITIMATE CHILD UNDER INDIAN CHRISTIAN LAW

‘Child’ used under the Act is without qualification but since ISA, 1925 considers relation only by blood through lawful wedlock, it implies that children not born out of lawful wedlock are incapable to get share in the deceased’s property. ‘Child’ under ISA, 1925 for succession does

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31 *Shabnam Hashmi v. Union of India (UOI) and Ors.* 2014 (2) SCALE 529.
32 *Supra 9.*
not include an illegitimate child.\textsuperscript{33} The Act expressly discriminates illegitimate children in matters of testamentary succession when it says that if the intention of the testator to give the property to the illegitimate children is not clearly mentioned in the will, then the term child will refer only to legitimate child.\textsuperscript{34} Under Christian law only child born from legitimate relationship i.e., valid marriage have the right to inherit the property. Thus children born from void marriage under Christian law are considered illegitimate and incapable of inheriting property within the meaning of the ISA, 1925. Under Indian Christian Marriage Act, 1872 following marriages are void: (a) If either the bride or bridegroom is Christian and the marriage is not solemnized and registered according the provisions of this Act\textsuperscript{35}; (b) Marriage not solemnized within two months after the notice is given\textsuperscript{36}; (c) If the persons intending to be married has a wife or husband still living\textsuperscript{37}; (d) Marriages solemnized in contravention of mandatory provisions of the Act. Under Indian Divorce Act, 1869, passed to amend the law relating to the divorce of persons professing the Christian religion, a marriage may be declared null and void on the following grounds\textsuperscript{38}:

(i) the respondent was impotent at the time of marriage and at the time of institution of the suit;
(ii) the parties are within prohibited degree of consanguinity or affinity;
(iii) either party was lunatic or idiot at the time of marriage;
(iv) the former husband or wife of either party was living at the time of marriage and the earlier marriage was subsisting; or
(v) if the consent of either party was obtained by force or fraud.

Under section 21 of the Indian Divorce Act, 1869 only annulment of the marriage in two situations can confer the status of legitimacy to children born of the marriage, \textit{viz.}, (a) a second marriage during the subsistence of the first marriage in good faith that the former spouse was not alive, and (b) insanity. Besides, these children are entitled to succeed in the same manner as legitimate children only to the estate of the parent who at the time of the marriage was competent to contract. Thus illegitimate children born out of all kinds of void marriage are not debarred from inheriting the estate of their parents and child is disqualified only if born out of prohibited

\textsuperscript{33} \textit{In Re: Sarah Ezra v. Unknown} AIR 1931 Cal 560.
\textsuperscript{34} Section 100 of Indian Succession Act, 1925.
\textsuperscript{35} Indian Christian Marriage Act, 1872, Section 4.
\textsuperscript{36} Indian Christian Marriage Act, 1872, Sections 26 and 52.
\textsuperscript{37} Indian Christian Marriage Act, 1872, Section 60.
\textsuperscript{38} Indian Divorce Act, 1869, Sections 18 and 19.
degree or when the other party is impotent. The provision does not confer such status even on all children begotten in all marriages subsequently declared null and void. One fails to understand the justification for conferring partial legitimacy only on children born from second marriage and born to one of the parent who is insane and excluding succession rights to children born of a marriage within prohibited degrees and where the respondent is impotent.\textsuperscript{39} Children born to such parent out of second marriage or when such parent is insane get right to succeed to the properties only of that parent who at the time of marriage was competent to contract. None of the other laws which provide for legitimisation of children of void marriage, impose such restriction.\textsuperscript{40} For grant of succession rights no other succession laws makes a discrimination between children born out of different grounds of void marriage. Rest in all other cases the illegitimate child under Christian law is neither the child of the father or that of the mother thus has no legal right to succeed to their property, to receive maintenance or other benefits deriving from the status of parent and child. He has no right to participate in the intestacies of either of his parents or grandparents. The illegitimate child though cannot claim rights in his mother’s property but his domicile of origin is traced in the country in which at the time of his birth the mother was domiciled.\textsuperscript{41} The personal law of Christian does not also confer any obligation to maintain their illegitimate child though such child can claim maintenance under the secular law provisions of Code of Criminal Procedure, 1973.

The recent trend in most of the countries is to blur the distinction between legitimate and illegitimate children and confer property rights even to illegitimate children. In England there are no illegitimate children as the Children Act, 1989\textsuperscript{42} abolished the concept of illegitimacy and introduced the concept of parental responsibility which ensures that a child may have a legal father even if the parents were not married. The Universal Declaration of Human Rights says that all human beings have equal rights and should be treated with equal dignity\textsuperscript{43} and social protection should be given to all children whether born in or out of wedlock.\textsuperscript{44} Under Muslim law

\textsuperscript{40} Ibid.
\textsuperscript{41} Section 8 of ISA, 1925 - Domicile of origin of illegitimate child

The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.
\textsuperscript{42} Section 3(1) of The Children Act, 1989.
\textsuperscript{43} Article 1, Universal Declaration of Human Rights, 1948.
\textsuperscript{44} Article 25(2), Universal Declaration of Human Rights, 1948.
illegitimate child has no right of inheritance from either of the parents under both Shia and Sunni schools though such children can claim maintenance from mother only under Sunni law upto the age of seven years. Hindu law under Hindu Marriage Act, 1955 confers limited legitimacy\(^{45}\) to all children born of void and voidable marriage termed as ‘statutory legitimate’ to the extent of getting rights only in the separate property of their parents i.e., they are entitled to succeed to the estate of the deceased along with the children born in the wedlock. Hindu law separates ancestral property and separate property and only children born from valid marriage have rights in both ancestral and separate property. Statutorily legitimate child’s right is restricted to his only parents’s separate property and no other relative. An illegitimate child i.e., child not born from valid, voidable or void marriage under Hindu law still has right of inheritance in his mother’s property and maintenance rights from his father. An illegitimate child is recognized under Hindu law but with many riders and his rights are discriminatory in nature therefore has been given an inferior status and thus compassion along with discrimination exists. Thus, under Hindu law an illegitimate child is not considered as *filius nullius* i.e., son of nobody. Similarly children born out of void or voidable marriage under Special Marriage Act, 1954 are deemed to be legitimate children and are entitled to inherit in same way as other legitimate children.\(^{46}\) The changing social phenomenon and the intention of the Legislature must be taken into account to prevent branding of children as bastards for no sin committed by them. Legislation must be given a purposive interpretation to further and not to frustrate the eminently desirable social purpose of removing the stigma on such children.\(^{47}\)

The issue of grant of right of succession to illegitimate children born to Christian parents under ISA, 1925 came before the Kerala High court in *Jane Antony v. V.M. Siyath*.\(^{48}\) The other issues before the court was whether the requirement of a central legislation recognising the right of illegitimate children of all classes irrespective of their religion to inherit the property of their parents is the need of the hour and whether children born to parents living as husband and wife during the subsistence of the father’s first marriage are legitimate or illegitimate in the eye of law. The court very categorically held that the illegitimate children born to the father and mother who lived as husband and wife are to be presumed to be legitimate and such children shall be

\(^{45}\) Section 16 of Hindu Marriage Act, 1955.

\(^{46}\) Section 26 of Special Marriage Act, 1954.


\(^{48}\) 2008 (4) KLT 1002.
entitled to inherit the properties of their parents along with the children born in valid marriage. If all the children both legitimate and illegitimate are entitled to the maintenance under s. 125 of the Code of Criminal Procedure, there is no reason or logic in denying them their right of inheritance to succeed to the properties of their parents in cases of intestacy. It also suggested the Central Government to enact a legislation to confer right of succession on all illegitimate children irrespective of their religion in tune with Section 125 of the Code of Criminal Procedure which is for all purposes a secular legislation. It also suggested to enact separate laws for members of different religions or a single statute like Section 125 of the Code of Criminal Procedure enabling illegitimate children to succeed to the estate of their deceased father and mother. The court directed the Registry to send a copy of this judgement to the Ministry of Law and Justice, Government of India, to the Law Commission of India and Justice V.R.Krishna Iyer, Chairman, Law Reforms Commission,(Kerala), Ernakulam. This High Court judgment may become a torch-bearer in granting of rights to such illegitimate socially discriminated child. Keeping in mind the development in law in several jurisdictions across the globe it is high time legislature as well as Supreme Court of India frame and interpret laws which reflect protection of rights of such children

The Law Commission of India in its 110th Report had already suggested for two alternatives in the year 1985 which are (i) addition of a suitable Explanation to section 37 so as to include illegitimate children within the expression “child” or (ii) inserting a definition of expression “child” as including illegitimate children in s. 2, the general definition section, to settle the point in regard to all provisions of the Act. Due to Law Commission’s recommendation and the High Court’s progressive approach suggesting for reform in the existing legal framework to remove such disabilities and unreasonable classification between children, the Legislature introduced the IS(A) Bill, 1994 suggesting for addition of Explanation to include an illegitimate and adopted child within the definition of ‘child’. The Bill lapsed and with it lapsed the proposed suggestion. Necessary changes must be made in ISA, 1925 to declare that every child born is a legitimate child and will have equal rights irrespective of the status of the marriage of its parents. In the first place the legislature should encourage the legitimization of children by subsequent marriage. To equate an illegitimate child for all and every purpose with legitimate children is clearly not possible without undermining the legal principles of the monogamous family yet the very least
the law can do it to minimize the misfortunes of children born out of wedlock. Stigmatising children as illegitimate with no right is property of his parents for no fault of their own is unreasonable and unfair. No one has the opportunity of applying to be born in a certain family and as such children who find themselves in the category of those termed illegitimate should not be afforded different treatment from the legitimate children. Innocent children born out of such relationship should not be penalised for the wrong committed by their parents.

IV. CONCLUSION AND SUGGESTION

Under Section 41 of the JJ Act, 2000 (as amended in 2006), the responsibility of giving in adoption has been cast upon the Court, which is also governed by the Juvenile Justice (Care and Protection of Children) Rules, 2007; court is vested with the power as per rule 33(5) of the said Rules to deal with adoption under the Act and the Rules and as per Section 68(1) of the JJ Act, 2000 the State Government, may by notification in the Official Gazette, make rules to carry out the purposes of JJ Act, 2000. The right to adopt now extends even to Muslims, Christians, Jews, Parsis and all other communities irrespective of the religion he or she follows and even if the personal laws of the particular religion does not permit it. The progression of recognising the need and granting right to adopt such child rather than restricting the rights under the personal law shows that rules of personal law based on religion are not above reform in order to bring them into conformity with social and legal change.

Adoption even tough is one of the methods of rehabilitation under JJ Act, 2000 this secular law is filling the void left under different personal laws which either remain silent on this issue or forbids adoption. The JJ Act, 2000 is a small step in reaching the goal enshrined by Article 44 of the Constitution. The courts with their practical approach are filling the gaps left in the personal laws with respect to adoption. But this does not appear to be sufficient as JJ Act, 2000 has its own limitations. It applies only when the child sought to be adopted falls within the description of an orphaned, abandoned or surrendered child within the meaning of Sub-section (2) of Section 41 of JJ Act, 2000 or a child in need of care and protection under Clause (d) of Section 2. Further the Board is to be constituted by the State Government to give in adoption. Where the State

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Government has not set up a Board, a child in that State cannot be given in adoption under JJ Act, 2000. By virtue of the provisions covered by the JJ Act, 2000 and the GWA, 1890, which is applicable to all Christians and also taking a cue from the directions issued for inter country adoptions by the Apex Court in a number of cases commencing from *Laxmi Pande*, which, of course, were formulated to streamline the adoption of abandoned children, followed by the 'Guidelines to Regulate Matter Relating to Adoption of Indian Children (1984)', by the Government of India, it may be possible for a Christian, now, to adopt a child under the civil law of the land.  

Since long there have been several attempts by courts to give expansive meaning and utility of adoption under Christina law but no specific law has been laid down yet. There is not even a flicker of a spark that any rethinking is on the anvil to reintroduce the Adoption bill and remedy the long felt need and necessity to have a uniform Code over the laws of adoption applicable to all. 110th Report of Law Commission of India had suggested for inserting expressive definition of term “child” to include adopted children in the general definition part and for addition of a suitable Explanation to section 37 so as to include adopted children within the expression “child”. The report emphasized on including adopted child within the definition of child more so because the expression ‘mother’ in the Code of Criminal Procedure, 1973 includes adoptive mother for the sake of providing maintenance. Also the General Clauses Act does not define the expression ‘mother’ but it does not necessarily mean that the expression should be taken in restricted sense. Legislature introduced the Indian Succession (Amendment) Bill, 1994 suggesting for addition of Explanation to include even adopted child within the definition of

Law Commission of India (1985), 110th Report on Indian Succession Act, 1925 (February 1985) has suggested for insertion of new clause under section 2 which is general defining section as:  
“(aa) ‘child’ includes-
(a) an adopted child, in the case of any one whose personal law permits adoption;
(b) an illegitimate child.”

Law Commission of India (1985), 110th Report on Indian Succession Act, 1925 (February 1985) has suggested for revised section 37 as:

“37. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall-
(a) belong to his surviving child, if there is only one, or
(b) shall be divided among all his surviving children as if section 40 applied to the case.”
‘child’ but the Bill lapsed. In order to statutorily recognize the rights of adopted child under ISA, 1925 for all religion including adoption among Christians it is suggested that sections 32 and 37 of the ISA, 1925 should be amended as follows:

“32. Devolution of such property.-The property of an intestate devolves upon the wife or husband, or upon those those who are lineal descendants or the kindred of the deceased including descendants or kindred through legal adoption, in the order and according to the rules hereinafter contained in this chapter

Section 37: Where intestate has left child or children only-
“Where the intestate has left surviving him a child or children, whether biological or through legal adoption, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.”

It would be far better to enact a new law of adoption for Christians, as there exists Hindu Adoption and Maintenance Act, 1956 for Hindus which lays down requisites of valid adoption, the capacity of individual to take in adoption, capacity of person to give in adoption, capacity of child to be taken in adoption, consequences and effects of adoption, protection of adopted child etc. It is time that the legislators intervene and bring into force a specific legislation that codifies the law governing adoptions amongst Indian Christians particularly to bring certainty in the area of intestate succession. This position must be rectified, especially since adoption is recognized within the religious custom of Christians in India.

Despite numerous cases that have attempted to clarify the law regarding inheritance rights of adopted and illegitimate children among Christians in India, due to lack of express statutory provision the question with regard to their inheritance rights continue to arise. The inability of adopted and illegitimate children to inherit property is the result of several important deficiencies in the ISA, 1925. For speedy change in inheritance laws the public needs to come forward to demand statutory change by legislature that better reflect the structure and needs of the families. To further the intent of today’s descendent, and to protect the family one creates, state legislatures must eventually develop new indicators that- along with or apart from marriage and blood- will help identify membership in modern families and serve as the basis for more
inclusive default inheritance rules.\textsuperscript{53} For achieving greatest happiness to greatest number, the law of inheritance must be reformed to fill-in the inadequacies and redress the loopholes.