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The Child's Rights in the Adoptive Process

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Historically speaking, Jews are newcomers to the whole problem of adoption. It is a rather remarkable fact that despite ample precedent in other ancient and mediaeval laws the Jewish legal tradition, which is as extensive and sophisticated as any yet created, is singularly silent on this whole subject. Only recently has there appeared a treatise which, for the first time, studies the matter comprehensively from the point of view of traditional Jewish law[1].

There were a number of sociological reasons for the absence in Hebrew literature of a parallel to the Roman *adrogatio*. For one, permanent childlessness amongst couples (which creates one side of the adoptive demand) was rare, because where childlessness in a couple persisted divorce was encouraged and the two partners would seek other mates. When a child had no living parents, his relatives or the community would see to it that he received the proper home environment so that the children might be raised as if they were the children of their foster-parents. Thus, there existed in every community funds for the proper wedding and dowry of indigent children. Orphanages in the western sense made only a relatively brief appearance in Jewish life and have today almost entirely disappeared.

With the change of the social structure of Jewish communal life there has now arisen a keen interest in adoptive procedure and legislation, especially since illegitimacy provides so substantial a part of the number of children available for adoption. The reasons for the changed attitude and interest of the Jewish community are two.

One, childlessness no longer results in divorce and re-marriage; Jewish marriage under such circumstances remains a permanent

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[1] The author is Rabbi Gedaliah Felder of Toronto; the book is entitled *NAHLAT ZEVI* and is written in Hebrew. For details of biblical and Talmudic allusions see the articles on adoption in the *Jewish Encyclopedia,* vol. I, p. 206, and *Universal Jewish Encyclopedia,* vol. 1, page 100.

covenant which cries out for fulfillment through the presence of a child.

Two, the presence of illegitimate Jewish children has always been and still remains, at an insignificant level. Hence, non-Jewish children are practically the only source for fulfilling the adoptive demand. Formerly, an exclusively and rigidly oriented Christian society precluded the adoption of such children by Jews; today in many countries this has become a possibility, if not a practice, and it is this matter precisely—that is, cross-line religious adoption—which is at issue in our present consideration.

Notwithstanding a recent policy decision of the Children's Aid Society of Metropolitan Toronto, the Ontario Child Welfare Act, discourages (if it does not prohibit) cross-line religious adoptions, except where special circumstances prevail which may move the Courts to dispose otherwise. While the Act is silent on religious requirements for adoption, it expresses itself, in sections 30 and 31, on the matter of custody as well as on what constitutes a child's religious faith.

Since other contributions to this symposium have set forth the substantive matter of these regulations, they will not be repeated here. It may be helpful, however, to enter into a brief analysis of the philosophy which apparently underlies the Act.

It is apparent that first of all it proceeds from an essentially two-dimensional point of view. That is, it conceives of a society composed primarily of Protestants and Roman Catholics. In section 31, sub-section 3, the Act deals specifically with Protestants and Roman Catholics and makes but a glancing reference to people "other than Protestant or Roman Catholic." While applying to such children the same basic rule, it nonetheless relaxes the rigidity of the section and introduces a large measure of judicial latitude by employing the words "where practical".

It is this two-dimensional view of society which creates the fundamental problem. It cannot be denied that the Act was motivated by highly commendable principles which aimed at the protection of religious denominations and of the rights of children and parents, but in attempting to do so it falls into a net of other problems. It makes the state partner to a definition of what constitutes Protestants, Roman Catholics, and people of other faiths, and, in its specific mention of the two majority faiths, gives preferential treatment to them, which is not in accordance with the more egalitarian view of society which has since developed. If children are to be protected, such protection must extend to all children alike. If the religious faith of children is to be protected, the religious faith of all children should be protected in like manner, and no special reference need or ought to be made to any specific religious group. To do so, reveals only uncertainty and thereby constitutes a serious defect in the philosophic structuring of the legislation.

This bring us to a related dilemma which is clearly reflected in the Act. It may be phrased as a question: "How far may the state proceed with the shaping of a child's religious future, when admittedly religion is a private matter and, as far as the State is concerned, can only be of administrative, but not of substantive concern?" On the whole the Act is fairly successful in this respect, although, as one would expect, the very confluence of private and public interest creates contradictions and conflict. Once the law enters into religious definitions, it is on shaky and difficult ground, for it tries to combine the uncombinable, and reconciles that which is often by tradition or religious conviction irreconcilable.

The moment the law becomes specific, it becomes partisan. An example in point is Section 31, sub-section 1, which states that: "a child shall be deemed to have the same religious faith as his father."[2] From the Jewish point of view this constitutes an arbitrary rule and an interference with hallowed and established rights. In Judaism the child always goes after the mother's religious faith and background. In a case in which a civilly valid marriage has been contracted between a Christian man and a Jewish woman, the Child Welfare Act would consider the child of such a union to be presumptively Christian, while Jewish tradition would with equal justification feel that the child is deprived of his legitimate religious heritage. Needless to say, in such a case the law vitiates by its very specificity its own intent of granting children their inherent rights.

It is caught on the horns of a dilemma and by its own making treats citizens differently, maintaining the rights of some and at the same time depriving others of them. This defect too arises from the above-mentioned two-dimensional view of society and it compounds the problem by making the law partner to religious definitions. This defect too must be remedied by taking the legislator as far as possible out of the business of religion and by making him provide guiding principles rather than rigid rules.

The Child Welfare Act neatly circumvents the most important problem of all, namely, the philosophic determination of what constitutes the rights of a child. There is an underlying feeling that the child's own wishes must be supreme. Section 31, sub-section 5, states this obliquely, when it notes that the judge "*may* (italics added) have regard to the wishes of the child in determining what order ought to be made as to his religious faith." And in sub-section 5 of Section 30, it speaks more forcefully of "any right that the child possesses to exercise his own free choice."[3] The law recognizes, and I think correctly, that *rights adhere primarily to the person in question,* which here means the child.

Is religious faith a "right" in this sense? The law would seem to agree that it is and various religious traditions would support

[2] Sub-section 2 rules differently for an illegitimate child.
[3] For the application of discretionary power see *In Re Lamb,* [1961] O.W.N. 356.

this point of view. In Roman Catholicism, for instance, baptism confers upon the child an inalienable status from which the temporal power has no right to separate him. In Judaism, with its close linkage of ethnic and religious elements, the incidence of birth (and not, as is often believed, the act of circumcision) provides a similar if not unalterable status. Once a child is born to a Jewish mother, nothing, — neither the state nor baptism, nor even a later free decision of the child himself — can take away this initial unalterable fact, which is acquired by natural act of birth. This same tradition, provides also, however, that where a non-Jewish child was adopted by Jewish parents, was circumcized and would therefore be considered in every respect like a natural-born Jewish child, such child, upon reaching maturity, may by his own free will and volition disassociate himself from his *acquired* tradition.

It is proper therefore for the Child Welfare Act to encourage the protection of such rights. At the same time the Act realizes that the child's right is limited in a pragmatic fashion, simply because, during the formative years of his life, he cannot intelligently and effectively exercise his own will. It is during these formative years, therefore, that a decision has to be made which likely will become the decisive factor for a child's life. This decision has to be made for him, by someone else. Usually it is made by the child's natural parents and the Act provides that substitute parents — be they Children's Aid Society or the state — may on occasion make this provision. *The right of the child is therefore inherent in the child, while the right of the parent or the substitute parent is only administrative.*

The law does not make this distinction when in Section 30, subsection 4, it speaks of a parent having "a legal right to require the child to be brought up . . . in that religious faith." It is obvious of course that in most cases the administrative right of the parent influences the substantive right of the child. The religious education to which the child is being exposed in his younger years almost invariably determines his future, and the free choice which the law leaves him is formal rather than real.

Recent discussions have generally attempted to broaden the concept of the child's rights. They have included in such rights the presumed right of a child to loving parents, to a proper home, and to an adequate environment and education. Some have gone so far as to declare religious rights to be distinctly secondary and subordinate to these other psychological and social prerogatives. There is some danger here that a positively motivated humanitarianism becomes so broad and shallow that it becomes meaningless, and that if wide-spread popular opinion today be reflected in the law, children may also be said to be endowed with "rights" to all manner of material possessions and privilege. It is quite true that religious affiliation neither is nor can it be the sole determinant of a child's life, but neither should we yield too quickly to what is commonly

called a "social work philosophy," while determining the total context of a person's existence.

In our opinion the present Child Welfare Act suffers from three defects:

(1) Its denominational two-dimensionality must be eliminated. The Act should be amended to omit any special mention and preferential treatment of any religious group. Religious as well as non-religious preferences must be treated in an egalitarian manner as befits our present day concept of society.

(2) The rigidity of the law, especially as formulated in Section 31, sub-section 3, must be loosened. We should place greater trust in the discretion of the courts, and not attempt to bind them too closely in an area where literalness may become self-defeating.

(3) It is contradictory for a parent who gives up a child for adoption, to give up the *person* of the child, but retain determination of the child's *spiritual future*. The recognition of such a parental right as a substantive right is an error of the law. Parents have the pragmatic right of guidance and child-rearing and have during the child's minority actual powers of direction. But where the child is given up, such powers cease. The desires of the natural parent may be serve as a guide and voluntary measure of preference to a Children's Aid Society and to the Court, but the law should not make this compelling. The child's inherent rights are more important than the natural parent's administrative rights. When determining the former, the law should take heed of the development of newer and deepened concepts of what constitutes "a religious environment." Religion is more than church adherence and affiliation; it constitutes the total ethical, moral, social as well as the specifically "religious" context of a family's life. Agnosticism and atheism are not identical with moral turpitude.

I would recommend therefore a broadening of the definitions concerning a child's rights, and would further recommend that a child's religious rights be included, and included prominently, in a catalogue of such rights. Such a definition should serve as a *guiding principle* to the various agencies of the state. It should by its very nature not attempt to be literally binding. If Jewish parents in search of an adoptable child will benefit from such a change it will only be because adoptable children in need of a home will be benefited.

In our society the entrance of the state into the business of determining a child's religious future can no longer be wholly successful. A revision of the Child Welfare Act should take this into consideration and should attempt to make whatever regulations it retains in this respect to be advisory only. I believe that the total fabric of our society will thereby be strengthened, and that the religious rights of adoptive children will thereby in no wise be diminished.