

CHILD ADOPTION IN INDIA: A COMPREHENSIVE STUDY

Written by Akshita Prasad & Kunal Nema***

** 3rd year BA LLB Student, New Law College, Bharti Vidyapeeth, Pune*

*** 3rd Year BBA LLB Student, New Law College, Bharti Vidyapeeth, Pune*

ABSTRACT

To have a kid is a parent's biggest happiness. Adoption seems to be the most effective way of achieving this joy. It arises as to the panacea to those who crave children's plight. Adoption can be the loveliest option not only for single-parent and childless couples but also for homeless kids. It enables a parent-child relationship to be established between people not biologically related. In India, there is only one personal law pertaining to adoption which is the Hindu Adoption and Maintenance Act 1956. Other personal laws like Muslim, Parsi, Christian do not have provisions for Adoption. This paper throws light on other provisions of law with respect to adoption and also the lacunae and shortcomings within those acts, acts, it also enunciates the role of the judiciary in shaping the adoption scenario in India.

Keywords: *Hindu, Personal laws, Inter-country, parent-child*

INTRODUCTION

According to Richard Bach “The bond that links your true family is not one of blood, but of respect and joy in each other's life”¹. It is considered by many that for the utmost development and betterment of a child, adoption is the best option. Why is adoption important? Who does it affect? Adoption has an impact on more than just the adopting family. Adoption is an act that not only impacts the child who is being adopted, but their family, extended family, and community. It is also generational, as it will impact the future generations of the family². Adoption involves the origination of the relationship between the parent and the child who aren't naturally related to each other. The adopted child is able to enjoy the rights, privileges, and duties of a child through the aid of the adoptive family. In the past, adoption was viewed primarily as a means for a childless married couple to "normalize" their relationship. The focus has switched, however; now, adoption is ordinarily seen as an institution that exists to help place children into improved environments³.

As times have changed so has adoption during the recent years with the advent of judicial activism and proper enactment of laws, adoption is no longer seen as a tool for a couple to “normalize” marriage but to give a homeless and parentless child his right to have a parent and standard of living. To ease the process of adoption of orphaned children and bring in greater clarity in the process, the Government of India has issued revised guidelines for adoption of children in August 2015⁴. In consonance with the provisions of the constitution and international commitments the Indian government formulated National Policy on Children, enacted Juvenile Justice Act and ratified the UN Convention on the rights of the child and the national plan of action on children to ensure that childhood is protected against exploitation and against moral and material abandonment.

GENERAL NARRATIVE OF ADOPTION IN INDIA

¹Richard Bach, *Messiahs handbook: reminders for the advanced soul: the lost book from illusions*(2004).

²Why Adoption is Important for Everyone, Adoption.com, <https://adoption.com/why-adoption-is-important-for-everyone> (last visited Aug 15, 2019).

³ adoption, The Free Dictionary, <https://legal-dictionary.thefreedictionary.com/adoption> (last visited Aug 16, 2019).

⁴The number of Children available for adoption is less than 1/4th the demand despite the simplification in adoption process, FACTLY (2018), <https://factly.in/number-children-available-adoption-less-14th-demand-despite-simplification-adoption-process/> (last visited Aug 16, 2019).

History

In India, adoption has been practiced for lots of years. Hinduism being the major religion practiced in India, epics and historical records have compiled data of saints and royals who had been adopted and who did adopt. Ramayana and Mahabharata are the two such brilliant epics of Hinduism which suggest references to adoption. Traditionally, wherein a lack of male offspring befell, couples went for embracing a male child to assign him as a legal beneficiary. As in keeping with Hindu convention, children are important and a deceased parent's spirit can simply accomplish salvation at the off risk that an individual has a child to light the memorial service fire, and salvation can be achieved via kids who provide tribal love. The Hindu evolved the institution of adoption to a substantial length. It might not be an exaggeration to say that no other human beings of the globe advanced themselves to such minute details in regards to the institution of adoption as Hindus. Hindus considered regulation as 'dharma'. Dharma incorporates principles, rules and regulations governing the entire life of a man. The institution of adoption continued to occupy a great significance under Hindu law as the aspiration for sonship predominated the Hindu culture and civilization⁵. In the Smritis literature, the law of adoption was parent based and not child based. The Smrtikaras suggested that only one son could be adopted for the continuation of the family line and to offer oblations to the deceased ancestors. The Dharmasastras deals in detail with the qualifications of the male child to be taken in adoption. The adopted son is uprooted from his natural family and transplanted in to adoptive family like a natural son⁶. But with the advent of numerous legislations the whole idea of adoption in relation to various personal laws has undergone a significant transformation.

Current scenario in Indian adoption

In India, till recently adoption as a legal concept was available only among the members of the Hindu community. Also, exception where personal laws permit such adoption for any section of the polity. A major chunk of the population could only act as legal guardians of the children⁷. There have been numerous progressive changes brought about by the new concept that have

⁵M. S. Pandit, *Outlines of Ancient Hindu Jurisprudence*, (1st edn., 1989)

⁶Dr Achina Kundu & Ayushi Kundu, AN OVERVIEW OF INTERCOUNTRY ADOPTION WITH SPECIAL FOCUS ON INDIA, 2 *Bharati Law Review*42–54, http://bharatilawreview.com/uploads/42-54_KunduKundu_F.pdf (last visited Aug 21, 2019).

⁷Ekka.srinivasrao, HISTORY OF ADOPTION IN INDIARACOLB LEGAL, <https://racolblegal.com/history-of-adoption-and-a-legal-beginning-of-inter-country-adoptions/> (last visited Aug 21, 2019).

been adopted, such as female Hindu adoption, girl child adoption eligibility, etc. Because of our country's multicultural, multi-lingual and multi-religious sentiments, identifying all complexities and bringing an effective adoption policy into force uniformly in the country has been a challenging task. Adoption shall be used to ensure the right to family for orphaned, abandoned and surrendered children and with the emergence of civilization; the method of adoption has an impact on secular as well as religious requirements. The main purpose of adoption was to secure the performance of one's funeral rights and to preserve one's lineage's continuity. Recently, adoption has been the best way for a child deprived of his or her biological family to restore family life. The positive duty to provide protection and assistance to children is also expressly mentioned in various international conventions on human rights.

Adoption rates in India have always been low, but in recent years they have fallen: The government's Central Adoption Resource Authority (CARA) adoption statistics show that in 2010 there were 5,693 in-country adoptions, while in 2017-2018, there were only 3,276 in-country adoptions. These are disgraceful figures for a population as mammoth as India's. And currently, there are approximately only 20,000 parents in line waiting to adopt, compared to the 27.5 million couples who are actively trying to conceive but are experiencing infertility, according to the Indian Society of Assisted Reproduction⁸.

TYPES OF ADOPTION AVAILABLE IN INDIA

Adoption is a legal way to get a child from an adoption agency and to raise the kid as your own by taking on all that child's responsibilities. Different types of adoptions are accessible in India based on their impact on adoptive parents and mother birth.

The different types of adoption available are as follows:

1. OPEN ADOPTION

⁸Central Adoption Resource Authority Ministry of Women & Child Development Government of India, CARA, http://cara.nic.in/resource/adoption_Statistics.html (last visited Aug 23, 2019).

It involves open contact between both the parties. The birth mother or parents may stay in touch through letters, e-mails, phone calls and may even visit each other and the birth mother can meet the child⁹. This type of implementation includes drawing up a plan that can meet the expectations and needs of everybody. Access is generally given when the adopted child (in most nations) reaches the age of 18. The birth mom can also meet potential relatives and decide which pair to go to. `

2. SEMI-OPEN ADOPTION

A semi-open adoption resembles an open adoption, except that after adoption the birth giver has no physical contact with the kid. Prior to the adoption, the mother is permitted to meet the adoptive parents. After the child is placed with them, she may continue to receive letters and photographs of the child, either directly or through the adoption agency she registered with¹⁰. This may be for a couple of years or until adulthood reaches the kid. A semi-open adoption can develop into an open or closed form of adoption at any stage.

3. CLOSED ADOPTION

A closed adoption is one where no birth family or adoptive family data is shared between the two and there is no family contact. As the adoptive family, you will receive non-identifying information about the child and birth family before he or she joins your family. After your adoption is finalized, the records are sealed. Depending on local law and what paperwork was signed and filed when the adoption was finalized, these records may or may not be available to the adopted child when they reach 18¹¹.

4. DOMESTIC ADOPTION

⁹ FirstCry Parenting. (2019). *6 Different Types of Adoption Options in India - Pros & Cons*. [online] Available at: <https://parenting.firstcry.com/articles/types-of-adoptions-in-india/> [Accessed 26 Aug. 2019].

¹⁰Types of Adoption, Indiaparenting.com (2019), https://www.indiaparenting.com/adoption/3_3282/types-of-adoption.html (last visited Aug 30, 2019).

¹¹Types of Adoptions | Adoption Center, Adopt.org (2019), <http://www.adopt.org/types-adoptions> (last visited Aug 30, 2019).

Domestic adoption relates to adoption involving a mother and parents of adoption who are citizens of the same nation. It can also be called intra-country adoption of this sort of adoption. In this process, a couple wishing to adopt a child will register themselves with a government-recognized agency. After registration, their personal details will be checked, and the investigating officer will certify if they are eligible to adopt a child¹².

5. INTERNATIONAL ADOPTION

This is the process of adopting a child outside of the India. It is mostly done through private lawyers, or an international adoption agency. Only 88 countries in the world allow international adoption. These countries include 6 countries in Africa, 20 in Asia, 32 in Europe, and 30 in Latin America. The age range would be from infants to teens. The approximate cost averages between 5 lakh Indian Rupees to 21 lakh Indian Rupees. It depends on the agency country to decide who can adopt. It may take six months to several years to actually receive a child depending on the age¹³.

ADOPTION LAWS IN INDIA

Adoption under Hindu law

The Old Hindu Law saw post-independence reforms and one of them was in the form of the 1956 Hindu Adoptions and Maintenance Act (hereinafter referred to as HAMA) codified adoption legislation. It enabled anyone who falls within the definition of the term 'Hindu' as described in Section 2 of HAMA¹⁴ to be eligible for adoption for a kid. There have been numerous gradual changes brought about by this new codified law, such as adoption by Hindu women, eligibility for adoption by girls, etc. The Shastric Hindu Law looked at adoption more as sacramental than secular act. Some judges think that time object of adoption is twofold: 1)

¹² Supra note. 11

¹³ Types of adoption, Depts.washington.edu (2019), <http://depts.washington.edu/triolive/quest/2007/TTQ07039/textsite/typesofadoption-t.htm> (last visited Aug 30, 2019).

¹⁴ Hindu Adoption and Maintenance (Amendment) Act 2010

to secure one's performance of one's funeral rites and 2) to preserve the continuance of one's lineage. Hindus believed that one who died without having a son would go to hell and it was only a son who could save the father from going to Poota. This was one of the reasons to beget a son. Currently, the adoption under Hindu is governed by The Hindu Adoption and Maintenance Act, 1956¹⁵. HAMA offers for the adoption of Hindu kids by Hindu parents. This does not apply to other groups such as Muslims, Christians and Parsis. In India, now several changes to the law regarding adoption have been made under the Hindu Adoption and Maintenance Act, 1956. The most important changes that this act brought are that it reduced the aim of adoption to secular only and also gave women equal rights to a man i.e. now, under this act both boys and girls may be adopted¹⁶.

Adoption under Muslim law

Adoption under Muslim law is not acknowledged. Muslims do not have the law of adoption and must therefore approach a tribunal under the Guardianship and Wards Act, 1890. Muslim law takes account of the concept of acknowledgement. A Muslim cannot establish the child's paternity if he adopts a baby he is not the real father of. According to various authors on Mohammedan law are of the view that adoption amongst Hindu creates a relationship of parentage, which is unknown to Mohammedan law¹⁷. According to authors like Ameer Ali, Wilson and Abdur Rahim are also of the view that adoption is unknown to Mohammedan law. They think that the Holy Quran prohibits adoption but the impression that adoption is not permissible or adoption is not known to Muslim law is totally based on improper application of Shariat law¹⁸. Prior to the Shariat Act of 1937, the adoptions by certain Muslims were recognized and allowed by customs. However, in matters of adoption, Muslim personal law does not automatically apply to an individual. Thus, a Muslim never recognizes another's baby as his or her own, and a baby is regarded to be a direct descendant by legitimate means. If the adoption takes place, the adopted child maintains his or her own biological family name and

¹⁵Docs.manupatra.in (2019), <http://docs.manupatra.in/newslines/articles/Upload/E8EFE493-114B-4E5B-A014-682EB1729301.pdf> (last visited Aug 30, 2019).

¹⁶CHILD ADOPTION IN INDIA – ISSUES AND CHALLENGES, 120 International Journal of Pure and Applied Mathematics (2019), <https://acadpubl.eu/hub/2018-120-5/4/358.pdf> (last visited Aug 31, 2019).

¹⁷ Supra note.16

¹⁸A.K. Bhandari, Adoption Amongst Mohammedans- Whether Permissible In Law, [Page No: 110-114] (2005) I.L.I Journal.

does not alter his or her name to that of the adoptive family. In all respects, unlike the Hindu law, adoptive parents do not have the status of natural parents.

Adoption under English law

The English legislation of adoption developed as a result of the industrial revolution and began to be recognized in the latter half of the 19th century. English law of adoption is very comparable to that of the Hindu law of adoption. Adoption under English law is governed by the Adoption Act 1976, but it is phased out under the Adoption and Children Act 2002. It also recognizes inter-country adoption and ratified by International convention on adoption. In England adoption results in the adopters and the adopted child assuming the same legal relation as if the child had been born to the adopter within marriage¹⁹.

Adoption under Parsi and Christian Law

The Christians do not have a law for adoption. They have no adoption laws and have to approach court under the Guardians and Wards Act, 1890. National Commission on Women has stressed on the need for a uniform adoption law. Christians can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance²⁰. The 1890 Guardians and Wards Act contains the general law pertaining to guardians and wards. It obviously states that the right of the dad is primary and no other individual can be appointed unless the father is discovered to be inappropriate. This Act also offers that, while appointing a guardian under the Act, the court must take into account the child's welfare. There is no particular statute in India that enables or regulates Christian adoption. In the lack of a court-recognized statutory or customary adoption, foster children are not regarded as kids in law. Their property is allocated among legal intestate heirs on the death of the foster parents, to the detriment of foster children. Christians in India can adopt children by resort to section 41 of

¹⁹Adoptionpolicy.org (2019), <http://www.adoptionpolicy.org/pdf/eu-england.pdf> (last visited Aug 30, 2019).

²⁰ legal India, Adoption: Under Hindu, Muslim, Christian And Parsi Laws - Requirements for a valid adoption Legalserviceindia.com (2019), http://www.legalserviceindia.com/articles/hmcp_adopt.htm (last visited Aug 30, 2019).

the Juvenile Justice (Care and Protection of Children) Act 2006 read with the Guidelines and Rules issued by various State Governments²¹.

LACUNAE IN ADOPTION LAWS

Time consuming process

The process of adoption is very time taking and it needs to be addressed. In the researcher's humble opinion, to streamline the process, we need to ensure that there is awareness about adoption procedures and there are sufficient adoption centers²². The adoption process can take an extremely long time, which can cause severe strain and stress to some families. Average waiting times can vary from a few months to years in both national and international adoptions. Much comes into adoption, and the state, as well as adoption agencies and experts, often set very strict criteria in distinct countries. Though long wait times may be necessary for some adoptions, many families wish to find ways to reduce these long waits in any way that they can²³.

Very strict rules and regulations

Domestic adoptions conform to strict rules and very strict scrutiny is given to the eligibility of adoptive families. This makes the adoption process very troublesome and most the time the family fails to adopt a child through such rules which leads to a discouragement among the prospective adopters and adoptees²⁴.

Limited availability

According to the Child Adoption Resource Information and Guidance System (CARINGS), for every 10 adoptive parents in India, only one child is available. There are not enough kids accessible for adoption because the institutionalized care ratio of abandoned children to kids is

²¹Christian Law of Adoption in India, Wikipedia, available at http://en.wikipedia.org/wiki/Christian_law_of_adoption_in_India (last visited Aug 27, 2019).

²²Adoption laws in India - Law Times Journal, Law Times Journal (2019), https://lawtimesjournal.in/adoption-laws-in-india/#_ftn2 (last visited Aug 30, 2019).

²³How Long Does It Take To Adopt A Child | Adoption Network, Adoptionnetwork.com (2019), <https://adoptionnetwork.com/how-long-does-it-take-to-adopt-a-child> (last visited Aug 30, 2019).

²⁴Pros and Cons of Adoption, Indiaparenting.com (2019), https://www.indiaparenting.com/adoption/3_3786/pros-and-cons-of-adoption.html (last visited Aug 30, 2019).

lopsided. This may result in fewer kids being accessible for adoption, and adoptive parents may not be inclined to adopt a minority group (any) child.

Gender bias in adoption

Although it was stated after the enactment of the Act that gender discrimination was eliminated, it still occurs in the real sense. Unless her husband dies or suffers from any disability or renounces the world or so, a married woman cannot adopt, not even with the approval of the husband. On the other side, with the wife's approval, a husband may adopt.

In this era of equality, it is time for the law to recognize the same and offer men and females equal privileges with respect to adoption. There is no reason to veto the husband to deny his wife's maternal instincts satisfaction.

JUDICIAL PERSPECTIVE ON ADOPTION

- ***Shabnam Hashmi V. Union of India***²⁵

In this case, religion was considered as no bar for adoption. It is a very important case when it comes to adoption. In this situation, the petitioner was a Muslim who had embraced a young girl when she was a little girl. She requested recognition of the right of an individual belonging to any religion to adopt a child because the Muslim law did not allow adoption. A three-judge bench of the Supreme Court comprising of P Sathasivam CJI, Ranjan Gogoi and Shiva Kirti Sing J.J decided this case which dealt with the right to adoption by virtue of the juvenile justice Act, 2000, the Rules of 2007 and the CARA guidelines²⁶. The All India Muslim Personal Law Board asserted that adoption was only one of the techniques envisaged under the JJ Act, 2000 and Islamic Law did not recognize the Adoption idea. They objected to Thai Islam not recognizing adoption, but rather acknowledging Kafala's notion that was comparable to adoption. The Supreme Court ruled that the. J.J Act was an enabling law and seeks to achieve

²⁵ (2014) 4 SCC 1

²⁶Top 10 Landmark Supreme Court & Important Judgments on Adoption, Lawnn.com (2019), <https://lawnn.com/judgments-on-adoption/> (last visited Aug 30, 2019).

a Uniform Civil Code objective. Thus, it was held that any individual belonging to any religion could adopt a miseducated child. It hesitated but acknowledged the statutory right to adopt on the point of giving Adoption the status of a fundamental right.

- *Sawan Ram V. Kalawanti*²⁷

This was a case of Adoption under Hindus:

In this case, the deceased had died leaving behind a widow. As at the moment of his death, several properties and parts of the estate had been mortgaged to another individual by the widow and some had been given to the Grand Niece. The appellant lodged a case on the ground that mortgage and property transfer were illegal since the appellant was the deceased's closest relative. During the pendency of the case the widow adopted a child and thus the litigation failed. After the widow died, the appellant again filed a case for a share of the estate on the ground that the adoption was fictional and had not been granted property rights by the government. It was held by the court that an adoption by the Hindu woman would be considered a part of the deceased husband's family not only for herself but also for her husband who is dead. Since the adopted child loses all rights to his biological family, the same rights are to be substituted by comparable rights in the adoptive family, so he would be granted privileges as an adopted husband's son to a member of that family.

- *Laxmi Kant Pandey V. Union Of India, 1984*²⁸

This was the case of Foreign Adoption/Inter-Country Adoption:

In this situation, a letter from a lawyer was regarded as a public interest in which it was stated that voluntary and social organizations and agencies indulged in malpractice by overbearing inter-country adoption facilities. The children were ending up in bad condition and were compelled into beggary and other awful stuff. This situation relates to the adoption of kids who have been abandoned, destitute and living in households for kid or social welfare. The Supreme Court took legal notice and issued directions. It was directed to establish a regulatory body known as the Central Adoption Resource Agency (CARA) to oversee the entire adoption

²⁷ 1967 SCR (3) 687

²⁸ 1984 SCR (2) 795

process. It was aimed that every request for adoption by a stranger should be endorsed by the foreign country's child / social welfare organization. The biological parent must never be able to find out who adopts the kid. The request must be accompanied by all family information, property, liabilities, latest pictures, tax information, medical history etc. It was further directed that the government would intimate that country's embassy to keep a watch over the child's welfare and to protect against any ill-treatment.

- *Yaqoob Laway V. Gulla, 2005*²⁹

In this case, a petition was lodged by an individual to declare that he was the adopted child of the pair and that he was entitled to a share of the couple's property. The prosecutors presented that they were Muslims and that Muslim law did not permit adoption and therefore he had no right to share the estate. The Court ruled that there is no law for adoption in Muslim law, but in some cases, if there is a local custom that is common and permits adoption, then adoption may be permitted. Only that the custom permitted for adoption does not imply, that a right is created in the property. It was further argued that an individual would have to demonstrate that the property was gifted or provided to him through an act or document that could prove that the interest in the estate was created. In this case, the lower court had ruled that there was a legitimate adoption since the claimant lived in the deceased's house. The High Court overturned this finding and held that there was no adoption, and even if the customary law was taken into consideration, there was no document showing that the property had been given to the applicant.

CONCLUSION

Adoption is a noble cause that gives joy to children who have been abandoned or orphaned. This provides an opportunity to shine through the human side of civilization. It's a beneficial program where the child is treated as the natural born child and given all the love, care and attention. At the same time, it fills the void in the parents who yearned for kids, their laughter

²⁹ 2005 (3) JKJ 122

and mischief echoing off the walls of a home. Although a few changes could be made to make all the laws regarding adoption a little uniform. The existing law cannot be regarded useless as it did bear fruit, but it is time to meet the lacunae with the evolving times and increasing instances leading to discrepancy and provide a uniform law to bring about equal status and equal rights for all. There has been a need for a uniform civil code, as the personal laws of all religions have become static and cannot alter at the same rate as society. The kids of the nation are significantly supreme assets. Their nurturing and solitude are nation's obligations. Children's programs should play a prominent role in domestic human resource development plans to enable kids to grow up to become solid citizens; physically fit, mentally alert and morally healthy with the abilities and motivation that society needs. The objective is to provide all kids with equal opportunities for growth, as this will serve bigger aims to reduce inequality and increase social justice.

“If there is a cause worth fighting for, it’s this: Children belong in families”

-Nicole Skellenger