

ADOPTION LAWS IN INDIA: A CRITICAL ANALYSIS****HIMANI PATEL¹ & DHWIJA SHAH²****INTRODUCTION**

Children are considered a bundle of joy and on whom the future of the country depends. If we look at the current scenario; on one hand children born in India are being pampered, taken care of and given all the necessities for their all-round development, on the other hand there are over 60,000 children being abandoned per year in India.³ In many cases, these children become victims of human trafficking and sexual violence. In fortunate cases, the abandoned children are taken to any adoption agency and may hope for a better life while waiting to get adopted. Such cases, of children being given a chance of a second life through adoption are on the rise. In its simplest of senses, adoption is a process whereby a person assumes the parenting for another and, in doing so, permanently transfers all rights and responsibilities, along with filiations, from the biological parent or parents. But some other form of adoption was practiced in the countries of India and China especially, where the practice was considered for the continuance of the religious and cultural practices. In ancient India, the adopted son got the funerary rights like that to one's natural son. But as the time passed, the idea behind adoption changed to developing the child rather than using them as farm labourers and household servants. Gradually, the idea of adoption developed to be of building a family and not to the idea for one's economic interests. Eventually, the aim behind adoption was to give the child a family, the desire to make a child move on in his/her life, give the child parental and family love and to give him/her what he/she deserves.

People started believing in the thought of "*Blood does not determine a family, love does.*" Adoption is intended to effect a permanent change in status and as such requires societal recognition, either through legal or religious sanction. In legal language, adoption is defined as "*twostep judicial process in conformance to state statutory provisions in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents.*"

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³ Over 60,000 Children Abandoned Each Year in India: Report, International Business Times, India, 26/8/2013

ADOPTION UNDER HINDU LAW

Hindu law is the only law in India which treats an adopted child as being equivalent to a natural born child if we see the structure and provisions of the same. The reason for this is mostly because of the belief that a son was indispensable for spiritual as well as material welfare of the family.⁴ But it is significant to note here that this role as a ‘deliverer of hell’ was only limited to the son.

Under the old Hindu Law, only a male could be adopted and an orphan could not be adopted in the ancient time. Then even if a male was to be adopted, restrictions were imposed based on Caste and Gotra. A female child could not be adopted under the Hindu Law. Under the old Hindu law, only the male had a right to adopt and the consent or dissent of his wife to the proposed adoption was immaterial.

But such restrictions have changed during the course of time. Such gender biases have been minimized in today’s modern society which we live in. Under the modern Hindu Law, every Hindu, male or female has the capacity to make an adoption provided he or she has attained majority and are of sound mind.⁵ Most of these laws, rules and regulations have been enumerated in the Hindu Adoption and Maintenance Act of 1956.

Adoption for the Hindu community in India is governed under The Hindu Adoptions and Maintenance Act, 1956 (herein after referred to as “the Act”). This is the Act to amend and codify the law relating to adoptions and maintenance among Hindus.

According to the Act, this Act applies⁶-

- i. to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or a follower of the Brahmo, Prarthana or Arya Samaj;
- ii. to any person who is a Buddhist, Jaina or Sikh by religion; and
- iii. to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by

⁴ Kusum, *Family Law Lectures – Family Law I*, Lexis Nexis Butterworths, Wadhwa, Nagpur (2nd edn., 2008)

⁵ Ibid.

⁶ Section 2, the Hindu Adoptions and Maintenance Act, 1956

any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

According to this act, certain conditions have to be fulfilled for a valid adoption⁷.

- i. The person adopting is fully capable of taking the child in adoption and also has the right to do so;
- ii. The person giving in adoption is capable of doing so;
- iii. The person adopted is capable of being taken in adoption; and
- iv. The adoption is made in compliance with the other conditions mentioned in the Chapter.

Also, pertaining to who can take a child into adoption, there are certain prerequisites to be fulfilled as defined under section 7 and section 8 of the Act.

“Any Hindu male, who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption: Provided that, if he has a wife living, he shall not adopt except with the consent of his wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by court of competent jurisdiction to be of unsound mind.”⁸

Similarly, for a female Hindu, she can adopt a child, whether a boy or a girl, to herself and in her own right. If the female is a divorcee or an unmarried woman can also adopt a son to herself, provided that she has no Hindu daughter or son's daughter living at the time of adoption. If the female has a husband living, she shall not adopt a son, or a daughter during the life time of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by court of competent jurisdiction to be of unsound mind.

No person can be adopted unless

- a) he or she is a Hindu;
- b) he or she has not already been adopted;
- c) he or he has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

⁷ Section 6, the Hindu Adoptions and Maintenance Act, 1956.

⁸ The Hindu Adoptions and Maintenance Act, 1956; Universal Law publication.

- d) he or she has not completed the age of 15 years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of 15 years being taken in adoption;⁹

Other conditions for a valid adoption are fulfilled

- a) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son living at the time of adoption;
- b) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter, or a son's daughter living at the time of adoption;
- c) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
- d) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;
- e) the same child may not be adopted simultaneously by two or more persons;
- f) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth.

CRITICISMS:-

- The Act is not 'Religion Neutral'. The orphans could be of any other religion as well. If the child to be taken into adoption is an infant or a toddler, he/she is going to learn what the adoptive parents want them to learn. What will the infant or the toddler understand about religions? A child, merely aged around 2, is in need of parental love more than anything and that anything may include the diversification of a religion. Does the Act mean that the orphans other than Hindu (as defined by the Act) are not good enough to get parental love? Isn't it there right too, as an India, to grow up in a family?

⁹ Ibid.

- The Act goes against the spirit of Uniform Civil Code (herein after referred to as UCC). If not for all laws, then at least for adoption laws there should be a UCC in order to provide justice to all orphans.
- The Act restrains the adoptive parents from having adopted a child of same sex as their other natural child. Why is it wrong to adopt a child of same sex as the other?
- An age difference of 21 years has been recognized by the Act between the adoptive parent and the child to be adopted, in order to prevent any harassment to the child of the opposite sex to that of the adoptive parent. But this age difference should also be there for the child or children of the same sex as there can be harassment of a child of the same sex.

Additionally, there is no regular check on the children after adoption as to how the adoptive parents are treating the adopted children.

ADOPTION UNDER MUSLIM LAW

Taking a glance at the Islamic law, it is clarified that there is no recognition of legal adoption in Islam. Islam was never against helping the poor. Islam recognizes the poor and the orphan as the prime eligible recipients of help.

It has been stated in the Quran that, *“Those who `swallow' the property of the orphans unjustly, are actually devouring fire into their bellies and they shall enter the burning fire.”*¹⁰

The concept of adoption remains same for both the Islam and the West but the discrepancy is that that there is no concept of legal adoption in the Islamic religion. In Islam, the concept of adoption is considered as giving fatherly and parental love to a child but the child is not given the name of the adoptive father. The child will get the love and affection of the adoptive parents but the adoptive parent can only be the guardian and not a father. Hence, in Islam, the child is not able to get the name of the adoptive father and hence, the identity of an infant in this case remains untraceable.¹¹

¹⁰ Holy Quran by Mushaf Al-Madinah An-Babawiyah edited by the Presidency of Islamic Researchers, IFTA at 1144.

¹¹ A.K. Bhandari, Adoption Amongst Mohammedans-whether permissible in Law, [pg. No.110-114] (2005) I.L.i Journal.

According to the Quran, one cannot become a person's real son merely by virtue of a declaration; Allah Says (what means): "...And He [i.e., Allah] has not made your claimed [i.e., adopted] sons your [true] sons. That is [merely] your saying by your mouths, but Allah says the truth, and He guides to the [right] way. Call them [i.e., the adopted children] by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers, they are your brothers in religion..." [Quran 33: 4-5].¹² It is believed that adoption or declaration of adoption does not change the reality neither does it change the blood running the child.

To a question proposed by a Muslim that whether adoption is allowed in Islam, Zakir Naik, an Islamic preach said that "If, by the meaning of adoption, we understand that providing shelter and giving him fatherly love, then Islam never was against that." What Islam is against is legal adoption. To justify that three reasons were by Mr. Zakir Naik listed below:

1. The identity of the child will be lost
2. If you may have your children, then the preference will be your own child and not the adopted child.
3. If the child born is of opposite sex, then the children won't be able to live freely under the same roof.¹³

Also, it is a belief that after the adopted girl grows, she will have to do a Hijab with the adoptive father as he is not his natural father. Also, if the adoptive child is a boy and if he marries in future, his wife also will have to do Hijab with her father-in-law as her husband is not the real son but the adoptive son.

CRITICISMS:-

- Preach Zakir Naik says that if the child is legally adopted then he will lose his natural identity, but if the child is legally adopted, then wouldn't he be getting a new identity with a new family that will give him the love and affection?

¹² ILR (1888) 12 ALL. 289.

¹³ Supra note 9.

- If the child born later is of opposite sex, how it will be difficult for the children to live comfortably under one roof? Can't two siblings be of opposite gender? If the parents are totally unbiased, why cannot the siblings stay together comfortably?
- If the parents have made a decision to adopt a child and are aware that they might have a future natural child, why there would be discrimination?¹⁴

Adoption under the Juvenile Justice (Care and Protection of Children) Act, 2000

Adoption has been defined under the Juvenile Justice (Care and Protection of Children) Act, 2000 as,

“Adoption means 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.”¹⁵

Adoption under the Juvenile Justice (Care and Protection of Children) Act, 2000 is governed under section 41 of the act.

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 the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.
3. In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court

¹⁴ Shabnam Hashmi v. Union of India, (2014) 4 SCC 1 [in which it was stated that Arts. 14, 15 and 44 - Adoption by any person irrespective of religion, caste, creed, etc., held, permissible - Impact of applicable Personal Laws not recognising such adoption - Held, any person can adopt a child under Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended in 2006) - Prospective parents have option to employ the provisions of S. 41 of JJ Act, 2000 to adopt a child or they can also choose not to do so and to submit themselves to their applicable Personal Laws - However, Personal Laws cannot dictate the operation of provisions of an enabling statute like JJ Act, 2000 and cannot come in the way of person who chooses to adopt a child under JJ Act, 2000 - Further held, JJ Act, 2000 is a secular law and a small step in reaching the goal of Uniform Civil Code under Art. 44 of Constitution, (2014) 4 SCC 1-A]

¹⁵ Section 2(a) of the Juvenile Justice Act, 2000.

after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.

4. The State Government shall recognise one or more of its institutions or voluntary organisations in each district as specialised adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3):¹⁶

Provided that the children's homes and the institutions run by the State Government or a voluntary organisation for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified 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 Court may allow a child to be given in adoption –
 - a. to a person irrespective of marital status; or
 - b. to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or
 - c. to childless couples.¹⁷

CRITICISMS:-

- Though the case cited above gives the right to Muslims for legal adoption, there is no law governing legal adoption in non-Hindu communities. In order to establish UCC in

¹⁶ Section 41 of the Juvenile Justice Act, 2000.

¹⁷ Ibid.

the country, there has to be a common law governing adoption but there is NO Law for some communities allowing legal adoption.

- Also, the act is silence about inter-country adoption.

GUARDIANSHIP AND WARDS ACT, 1890

As the name itself suggests, the Hindu Adoption and Maintenance Act were mostly the guidelines for the Hindu society. Another law had to be made which was sensitive to the personal laws of other religions which did not come under the Hindu Adoption and Maintenance Act of 1956. This gave rise to the Guardians and Wards Act of 1890.

The Guardians and Wards Act, 1890 was a law to supersede all other laws regarding the same. It became the only non-religious universal law regarding the guardianship of a child, applicable to all of India except the state of Jammu and Kashmir. This law is particularly outlined for Muslims, Christians, Parsis and Jews as their personal laws don't allow for full adoption, but only guardianship. It applies to all children regardless of race or creed. Following is an overview of the act. It was stated that any child who had not completed 18 years of age was to be a minor. This child would be appointed guardians by the court or any other appointed authority. They would decide who would take place as the said child's guardian or by removing another as a guardian. All these procedures took place only after an application had been placed by the person who was willing to take a child under himself and to act as his guardian. The applications should contain all the possible information that would have been required, including the information about the guardian and any reason as such for the guardianship. This was just the first step. Once the court admits the application, a date for a hearing would be set. The court will hear evidence before making a decision. Unlike in the procedures given in the Hindu Adoption and Maintenance Act, 1956, where a person once adopted has a single set of parent, here a minor and his property could have more than one guardian. It was required under these cases of guardianship that the court use its discretionary power and considered the interests of the minor. His/her age, sex, religion, the compatibility quotient with the guardian, the death of the parent, etc. must be taken into consideration. The minor's preference may also be taken into consideration.

GIST OF CARA GUIDELINES

All child adoptions not adhering to the recently-notified adoption regulations by the Ministry of Women and Child Development will now be considered violation of the law. The new regulations replacing the earlier guidelines have a clear provision for adoption by relatives and step-parents of their spouses' children as well.

Adoption Regulations, 2017, framed by the Central Adoption Resource Authority (CARA), as mandated under Section 68(c) of the Juvenile Justice (Care and Protection of Children) Act, 2015, have now come into force as per the statute and will be placed in the Parliament soon.

NEED OF UCC

Since the landmark judgement of Mohd. Ahmed Khan v. Shahbano Begum which realizes us that there is a significant need of having UCC. In India all laws except for Family Law are uniform laws so there is a need to change this and one must have same laws for the citizen of india. In case of adoption there should be a uniform law governing adoption. Just because of religion children are not adopted. Because of religion childless parents are not given the full right to adopt a child. They are not legally allowed to call themselves as the parents of the adopted child. Therefore, there is a real need to have UCC with respect to adoption. If in this area the same law is applicable for all the citizens in India then there would not be a single childless parents and the other way around.

CONCLUSION

Adoption is a noble cause, which brings happiness to kids, who were abandoned, or orphaned. This gives a chance for the humane side of civilization to shine through. 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 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.

'Adopting one child won't change the world: but for that child, the world will change.'

– Unknown