

Adoption Laws in India: Challenging Existing law

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The subject matter of this paper deals with comprehensive analysis of adoption law in India and how the adoption law around the world do not have much impact on India's adoption law. Practice of adoption is been followed since many decades but the law for adoption came in the 19th Century. There are various religions in India but there is no particular adoption law governing the adoption of all religions. Till now in India there is only one personal law governing adoption that is Hindu Adoption and Maintenance Act, 1956. In India the religions like Muslims, Christians, Jews and Parsis do not have their own Personal law governing adoption because of which they cannot adopt a child and give him/her his family name. They can only become the guardian of the child under Guardians and Wards Act, 1890. Hindus, Sikhs, Buddhists and Jains follow Hindu Adoption and Maintenance Act, 1956. The Government of India have taken steps to make a uniform law for adoption but there was a failure. This paper focuses on the adoption laws which are governing the adoption in India and how uniform civil code is necessary in the area of adoption.

I. INTRODUCTION

According to the Hindu Mythology, it believes that only son could be adopted for the continuation of the family lineage and for the performance of one's funeral rites. Even the Dharmasastras deals only with the qualification of male child to be taken in adoption. Traditionally, a child was adopted for temporal and spiritual purposes and now adoption is also done to satisfy the emotional and parental instincts of the adopters.

In ancient India the adoption ceremony (Dattahoma) is the most important witness of the adoption and it was necessary to invite relatives for the validity of the adoption ceremony.¹ According to Smrtikaras if a person takes a child as his own, he will be the authority or heir of the whole property inherited and the adopted child is still entitled to the property even if a boy is born after his adoption.²

Traditionally adoption evolved amongst the Hindus because due to the importance Hindus attach to a male child. Every Hindu was enjoined by scriptures to have his own natural child, only failing which he

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¹ Neetish Kumar Handa , Adoption In Ancient India, (Visited on December 15, 2015) Available at <<http://www.scribd.com/doc/20167904/ADOPTION-IN-ANCIENT-INDIA#scribd>>

² Ibid

was permitted to have the secondary son. According to the historical events a natural born child was taken to be the sole representative of a man and the acceptance of secondary son by adoption was considered completely wrong. Therefore, Hindu scriptures never legitimized any son other than the natural born to be begotten by a man. Female adoption was not accorded in early Hindu philosophy. It is evidenced from the fact that the scriptures did not permit the wife or a daughter to perform the funeral rites of a man or utter sacred texts. It was believed that a female child cannot redeem the deceased from hell or save from the suffering of the afterlife.³

II. EVOLUTION OF ADOPTION IN THE 19TH CENTURY

America has the long history of the practice of adoption. A legal process, adoption in America creates the status between parent and child where there is no biological relationship between the two.

Industrial revolution brought about the most important changes in the human history. From 18th to the 19th century major changes in agriculture, manufacturing, mining, transport, and technology had a profound effect on the socioeconomic and cultural conditions starting in the United Kingdom, and then subsequently spreading throughout Europe, North America, and eventually the world.⁴ Due to Industrial revolution modern American adoption law has evolved during the latter half of the 19th century, because of which large numbers of immigrant children who were often in need of care and protection were provided support by child welfare society. These dependent children were sometimes placed in almshouses with the mentally ill, and sometimes in foundling homes plagued by high mortality rates.

The Orphan Train movement in America lasted for almost 50 years from 1853 to the early 1900s and more than one lakh children were placed. This social experiment is now known as foster care concept in America. Massachusetts became the first state to pass legislation mandating judicial supervision of adoptions in 1851, and by 1929 all states had passed some type of adoption legislation. During the early part of the 20th century it was standard practice to conduct adoptions in secret and with records sealed, in part to protect the parties involved from the social stigma of illegitimate biological.⁵

During the 1950s many agencies worked to provide children to ease the process of adoption. By the 1970s in America, it was common for parents to wait 3-5 years after their initial application to a private adoption agency before they had a healthy infant placed with them.

Children from Europe, Korea and Japan began to be placed with American families by the adoption agencies after World War II. That time Korea was the major source of international adoption. The one child policy of the Chinese government has provided a new source of infants to American families. The

³ Ibid

⁴ R. Mathur, Legal Perspective In Child Adoption: A Clarion Call To Secularism, (Visited on December 15 ,2015) Available at <
http://shodhganga.inflibnet.ac.in/bitstream/10603/4130/1/11_11_chapter%203.pdf>

⁵ Ibid

Civil Rights Movement of the 1960s was accompanied by an increase in the number of transracial adoptions involving black children and white parents. But now transracial adoption account for a small percentage of all adoptions because white families were not able to foster the growth of psychological and cultural identity in black children.⁶

III. CHILD ADOPTION LAWS IN INDIA- ACT, ENACTMENTS, RULING AND DECISIONS

Following Acts, Enactments, Ruling and Decisions governs the Child Adoption in India:

Difference between Hindu Adoption and Maintenance Act, 1956 and Guardians and Wards Act, 1890

There is no general law of adoption in India to people belonging to different religions. In India only law related to adoption is governed through The Hindu Adoption and Maintenance Act, 1956, which provides to Hindus to adopt a child legally. In India only Hindus can adopt a child legally and people belonging to other religions who are desirous of adopting a child can only take the child in 'guardianship' under the provisions of The Guardians and Wards Act, 1890.

The GAWA is applicable to Christians, Muslims, Parsis, and Jews because their personal law do not recognise complete adoption. Under the GAWA, the relationship which is established after adoption is only of guardian and ward respectively. Adoption under GAWA does not confer status of the child on the adopted child, it is different from the HAMA.

The HAMA is applicable to Hindus, Jain, Buddhists and Sikhs. Under this act, the adoption is irrevocable and it gives full status to the child as natural child born to the family, it also gives the right to inherit the property. Only restriction in HAMA is that parents cannot adopt a child of a particular sex, if they already have or adoption of child of the same sex. Under the GAWA, when children turn 21 years of age, they no longer remain wards and assume individual identities. They do not have an automatic right of inheritance. Adoptive parents have to leave whatever they wish to bequeath to their children through a will, which can be contested by any 'blood' related child. The aforesaid enactments remain silent about the orphan, abandoned and surrendered children. There was no codified legislation dealing with the adoption of the children of these categories. As a result, several misconceptions or irregularities appeared in respect of the custody, guardianship or adoption of these types of children, which were prejudicial to the interest of the children.

The Juvenile Justice (Care & Protection of Children) Act 2000

The Juvenile Justice (Care & Protection of Children) Act 2000 is applicable to all Indian Citizen. It allow adoption of two children of the same sex. It confers status of parents & child and not guardian and ward. It also confers rights available to child on the adopted child. Juvenile Justice (Care and Protection of

⁶ Ibid

Children) Act 2000 is designed for the care, protection, development and rehabilitation of juvenile in conflict with law and child in need of care and protection, as well as the adjudication and disposition of certain matters related to them. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows.⁷ It provides a uniform legal framework of justice across the country and this act covers children up to the age of 18 years. Before JJ Act there was no codified legislation.

Constitution of India

The Government of India is trying to give full rights and welfare of the children. The Constitution of India provides Fundamental Rights under Chapter III. One of these rights is provided under Article 21 which reads as follows: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”⁸ Thus article 21 gives every child to live with dignity.

Article 24- “Fundamental Rights of the Citizens” provides the right against exploitation of the children below 14 years.⁹

Article 44 of the Constitution declares that: “The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.”¹⁰ This goal is yet to be fully achieved.

Article 39 specifically requires the State to direct its policy: To provide healthy environment to the children and to make sure that the facilities are provided. It is give them a sense of freedom and dignity youth are protected against exploitation, force labour and, against moral and material abandonment.¹¹

Impact of International Convention on CARA

It is generally considered a progressive law in accordance with international principles, such as the United Nations Convention on the Rights of the child, to which India Government became a signatory in 1992. In signing the Convention, the Government accepted obligations to bring all state laws and policies in the line with the main principles of children’s rights, namely best interest, non-discrimination and child’s voice.

This Act has incorporated the provision of adoption of child as an alternative to institutional care.

IV. ADOPTION AMONGS THE DIFFERENT RELIGIONS IN INDIA

Although there is no general law of adoption in India, yet it is permitted by a statute amongst Hindus. Since adoption is legal affiliation of a child so it forms the subject matter of personal law. Muslims, Christians and Parsis have no adoption laws and have to approach court under the Guardians and Wards

⁷ M/S Shabnam Hashmi vs Union Of India & Ors (2014) 4 SCC 1

⁸ Article 21, Constitution of India

⁹ Article 24, Constitution of India

¹⁰ Article 44, Directive Principles of the State Policy, Constitution of India

¹¹ Article 39, Constitution of India

Act, 1890. In case the court has given permission for the child to be taken out of the country, adoption according to a foreign law, i.e., law applicable to guardian takes place outside the country.

A. ADOPTION UNDER HINDU LAW

The Shastric Hindu Law looked at adoption more as a sacramental than secular act. Some judges think that the object of adoption is twofold: 1) 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 Law is governed by The Hindu Adoption and Maintenance Act, 1956.

The Hindu Adoption and Maintenance Act, 1956 extends to only the Hindus, which are defined under Section-2 of the Act and include any person, who is a Hindu by religion, including a Buddhists, Jainas and Sikhs and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh.

Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the state of Jammu and Kashmir.

B. ADOPTION UNDER ENGLISH LAW

The English adoption law evolved due to industrial revolution and it was started recognizing during the latter half of the 19th century. English law of adoption is very similar to 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 intercountry 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 marriage.¹² English courts has been given the responsibility for making adoption. Before the final order for adoption is made, the child is usually placed temporarily with the future adopters by the English Adoption Agencies.¹³

C. MUSLIM ADOPTION AND PRACTICE IN INDIA

Mohammedan law are of the view that adoption such as is known to Hindu law, creating a relationship of parentage, is unknown to Mohammedan law. They take into account the concept of acknowledgement. The paternity of the child cannot be established by a Muslim if he adopts a child of whom he is not the actual father.

¹² Overview of English Adoption Law, (Visited on December, 20, 2015) Available at < <http://www.adoptionpolicy.org/pdf/eu-england.pdf>>

¹³ Ibid

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 law. The Muslim law does not recognise the validity of any mode of filiations where the parentage of the person adopted is known to belong to a person other than the adopting father.¹⁴ 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 law.¹⁵

Before the Shariat Act, 1937, adoptions amongst some Muslims were recognised and permissible by customs. But in matters of adoption Muslim personal law does not automatically apply on a person. So, a Muslim never acknowledges another's child as his own and the child is considered to be the direct descendent by legitimate means. If an adoption takes place, then an adopted child retains his or her own biological family name and does not change his or her name to match that of the adoptive family. In all sense, unlike the Hindu law, adoptive parents are not given the status of the natural parents.

The Holy Quran

The custom of adoption was prevalent in pre-Islamic Arabia based on a sense of comradeship in arms in some instances. The system of adoption seems to have received some recognition by the adoption of Zaid. Even Mohammad the prophet himself took Zaid, the son of Haris in adoption.¹⁶

The custom of adoption remained prevalent amongst Mohammedans. It is, however, on the basis of a verse in the Quran, it has been held by the various authors that the Prophet himself disapproves adoption. The relevant verse of Quran as contained in S.33. A.4-6 reads as under: "Allah has not made for any man two hearts in his breast: nor has He made your wives whom ye divorce by Zihar your mothers: nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah Tells (you) the Truth, and He shows the (right) way. Call them by after their fathers: that is just in the sight of Allah. But if ye know not their father's names, (then they are) your brothers in faith, or your friends but there is no blame on you if ye make a mistake therein: (what counts is) the intention of your hearts: and Allah is Oft-Forgiving, most merciful. The Prophet is closer to the Believers than their own selves, and his wives are their mothers. Blood relations among each other have closer personal ties, in the Book of Allah, than (the Brotherhood of) believers and Muhajirs."¹⁷

From the above passage of the Quran, it has been asserted that adoption in technical sense is not allowed in Muslim law. It is submitted that a careful reading of this passage will show that it nowhere prohibits adoption. The intention of the Prophet was that if a man called another's son "his son" it might

¹⁴ Bhartiya, V.P. , Muslim Law, 229 (1996) (Syed Khalid Rashid's Muslim law 5th Ed., Lucknow: Eastern Book Company, 2009)

¹⁵ A.K. Bhandari, Adoption Amongst Mohammedans- Whether Permissible In Law, [Page No: 110-114] (2005) I.L.J Journal.

¹⁶ Holy Quran (S.8.A72). Those who believed, and emigrated and fought for the faith with their property and their persons, In the cause of Allah, as well as those who gave (them) asylum?and aid, -these are (all) friends and protectors, one of another. As to those who believed but did not emigrate ye owe no duty of protection to them".

¹⁷ The Holy Quran by Mushaf Al-Madinah An-Babawiyah edited by the Presidency of Islamic Researchers, IFTA at 1144

create complication with natural and normal relationship if taken too literally. The idea of the Prophet was to convey that the real son is a real son and adopted son is not a real son. To treat an adopted son, as a real son if one has no real son is not a mistake as what counts is the intention of the heart. Even if according to this verse, the adopted sons are to be called by the name of their father and if their father's name is not known then to call them as mulla or brother, this verse nowhere says that if any adoptions made by a man who has no son of his own, it will be against the dictates of Allah. If you will recognize a man by the name of his natural father it will be more just in the sight of Allah. But if you call him as your son it will not be unjust nor Allah will be displeased. The Prophet has not barred adoption in absolute terms. What is intended is erecting of false relationship to the detriment or loss of true blood relation. The believers should follow him rather than their fathers, mothers or brothers where there is conflict of duty. As will be discussed later on, the custom of adoption is valid amongst Mohammedans, and Shariat law does not prohibit such custom of adoption. It cannot, therefore, be said that the Holy Quran prohibits adoption. If the above verse is interpreted to mean that the prophet has prohibited adoption, it cannot be assumed that what is prohibited by the Holy Quran can be permissible by custom and usage. The conclusion, therefore, is that the Holy Quran nowhere prohibits adoption.

The Muslim personal law (Shariat) application act, 1937 and its effect on adoption

All the Islamic countries have restriction in child adoption. There are countries like Afghanistan, Bangladesh, Iraq, Israel and Kuwait who either does not recognise adoption or do not permit the adoption. In Pakistan, adoption is formalised only when a guardian court issues a decree or a guardianship certificate to an individual under the Guardian and Wards Act, 1890.¹⁸

Islam does not recognize adoption. In Muhammad Allahdad Khan v. Muhammad Ismail¹⁹ Mahmood, J., remarked that, "There is nothing in the Mohammedan Law similar to adoption as recognised in Roman and Hindu system. The Mohammedan law does not recognize adoption as a mode of filiation". In 1972, the Adoption of Children Bill was introduced in the parliament in order to make a uniform law of adoption applicable to all the citizens of India regardless of their religion. However, the Bill was withdrawn by the Government in 1978 and could not be passed.

Shabnam Hashmi vs. Union of India²⁰

The objection to the concept of adoption in the Muslims under the Muslim Personal law as made by Muslim Personal law Board was that Muslim Personal law does not allow adoption. Though the 'Kafala system' exist for the purpose of welfare of children. As per this system a Muslim cannot adopt a child but he can always become a kafil to the child and he can provide for the maintenance and well-being of the child which includes a financial supports to the child even though he is not a biological parent to the child.

¹⁸ NAQIR IQBAL , SC takes up issue of deserted children's adoption ,DAWN, Islamabad , April 18, 2014
Available at < <http://www.dawn.com/news/1100655>>

¹⁹ ILR (1888) 12 ALL. 289

²⁰ (2014) 4 SCC 1

Despite all that the child will still be considered to be child of biological parents and being Kafil would not amount to adopting a child.

The Hon'ble Supreme Court held, that Juvenile Justice Act, 2000 as amended on 2006 is a secular law and applies on all including the Muslim and the act has been enacted for the welfare of children and it enables any person to adopt a child. Thus, a Muslim also even if he is governed by Muslim Personal law can adopt a child. The existence of the Muslim Personal law will not prevent a Muslim to apply JJA. Thus, a Muslim may choose to be governed by Muslim personal law and hence may not adopt a child or he may choose to be governed by the JJA and may therein adopt a child.

It was also held that as if today the right to adopt or to be adopted is not a fundamental right. The reason is that there are conflicting religious views and practices in the matter and at present the circumstances are not right enough to make it a fundamental right.

In re: Manuel Theodore Dsouza²¹ and Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.²². The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support

Adoption which is provided under GAWA gives the couple only the right of guardianship, which means that the couple are not the exclusive parents of the child, they are just his/her guardians and the child can go away and end this guardianship after he attains the age of 18. Even the child is not secure after attaining the age of 18 because the child will have weaker inheritance rights as this can be challenged by other children and relatives of the family.²³

The bad part about guardianship is that, legally the child reverts to the guardianship of the state in the unfortunate event of the death of the guardians but in an adoption, the grandparents, uncles and aunts take care, as happens with any other child.²⁴

India have many religions therefore every religions should be governed by different adoption law, but our legislature are not at all giving importance to adoption by non-Hindus. Because of failure on part of our legislature Muslims and Christians in India are facing emotional and legal problems. They are uncertain about the child as the member of family. Another bad thing adoption in India is that a Hindu cannot adopt a Muslim child.

The Hon'ble Supreme Court of India saying that it is unlikely that it will be possible to reform the personal laws of the religious minorities, like they have been constantly reformed and changed in the case of Hindu

²¹ (2000) 3 BomCR 244

²² AIR 1999 Kerala 187

²³ Adoptions for All, Economic & Political Weekly, March 15, 2014 vol xlix no 11

²⁴ Ibid

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V. NEED FOR UNIFORM CIVIL CODE

Since the landmark Judgement of Mohd. Ahmed Khan v. Shah Bano Begum which realizes us that there is a significant need of having uniform civil code. 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 uniform civil code 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.

VI. CONCLUSION

The adoption laws for Hindu has improved tremendously and so the position of women in the society. It is unreasonable that in India Muslims cannot legally adopt a child just because of lack of a uniform civil code on adoption. By enacting Uniform civil code it will also allow other religions of India to adopt a child legally and it will also improve the social life of a childless parents. A child will get proper care and protection and he will have bright future. It is a very complicated process but if it is enacted then every parentless child will go to school and have a life which he could not even dreamt of. And the gender bias should not be criteria to adopt a child.