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Comprehensive Study on Child Adoption in India with Special Reference to Hindu Laws

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ABSTRACT

Adoption as a family formation has been the subject of extensive study for the past three decades. India, as one of the more ancient Asian mainland nations, has seen significant changes in the adoption sector. India has changed dramatically from casually embracing male child for performing last conducts after the death of the received guardians. During the 1950s, India's social reform focused on finding a home for relinquished, dejected, ill-conceived, and surrendered youngsters. These children were supervised and eventually placed for residential and international adoption. In India, there are several different religions, but there is no single adoption rule that applies to all of them. In India, the Hindu Adoption and Maintenance Act, 1956, is the only personal law that governs adoption. Since Indian religions such as Muslims, Christians, Jews, and Parsis lack their own personal law regulating adoption, they are unable to adopt a child and give them their family name. Under the Guardians and Wards Act of 1890, they can only become the child's guardian. Adoption is a sophisticated and vulnerable concept which was susceptible to the societal stigma that was attached to it therein. The focus of this paper is on a thorough examination of India's adoption laws and the need for a uniform civil code in the field of adoption.

Keywords: Adoption, Children, Personal law, Religion.

I. INTRODUCTION

India is a nation with a wide range of religious beliefs. Every religion has its own collection of rituals that it adheres to. The Indian legal system incorporates both customs and laws to create law. In personal matters, Indian society is ruled by the customs of the four most prevalent religions: Hinduism, Islam, Christianity, and Parsinism. Adoption is the process by which a child of one set of guardians becomes the child of another set of guardians or parent. Adoption has long been regarded as a fantastic way to give a child a home and parents. Adoption was seen as a sacramental rather than a secular act by the Shastric Hindu Law. Not only among authors, but also among judges, there has been much debate about whether the secular or

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religious motives should take precedence in adoption.³ Some judges continue to believe that the purpose of adoption is twofold: to ensure the performance of one's funeral rites and to maintain one's lineage.⁴

One thing is certain: different people adopt for various reasons, some of which may be purely selfish, such as despising a potential heir who would inherit the property in the absence of a son. Whatever the case may be, the primary goal of adoption law is to offer comfort and aid to a parent who is without a child. Its aim in modern law is to save the dependent, discarded, needy, or orphan child and provide it with parents and a home. The court is not required to inquire into the motives.⁵

II. MEANING OF ADOPTION

Adoption is the legal mechanism by which an adopted child is legally removed from his biological parents and becomes the official child of his adoptive parents, with all of the rights, privileges and obligations that come with it. In India, the adoption of orphan, abandoned and surrendered children is regulated by a set of guidelines issued by the Indian government. Adoption is the legal method of placing a child with a wedded couple or a single female who agrees to adopt her as their own child and take full liability for her. Adoption is a legally recognized method of establishing a parent-child relationship between individuals who are not biologically related.

Only Hindus are concerned with the idea of adoption. The concept of adoption can be traced back to the Vedic period. This term is well referenced in prehistoric transcripts such as Dattaka Mimamsa, Dattaka Chandrika, Manu, Yagnavalkya, Gautama, Baudhayana, and Kautilya. In Manusmriti, adoption is described as "taking someone else's son and raising him as one's own." By using the word "child" instead of "son," the Hindu Adoption and Maintenance Act (HAMA), 1956 has broadened the meaning of "adoption." A child may be either a girl or a boy, and not just a son. To serve democracy, a codified and uniform law was required as culture changed over time. As a result, no adoption can be made without following the process outlined in this HAMA, 1956. Any adoption made in violation of this act would be declared null and void.

Adoption is not permitted under Muslim rule. Adoption was accepted by custom among some Muslims prior to the Shariat Act, 1937. A Muslim *talukadar* was allowed to adopt under

³ Mayne, Hindu Law and Usage, (11th Ed.) 184-188.

⁴ *Inder Singh v. Kartar Singh*, AIR 1966 Punj 258.

⁵ *Shripad v. Dattaram*, AIR 1974 SC 878.

Section 29 of the Oudh Act of 1869. However, it seems that the practice of adoption has been abandoned to a significant level. If no declaration under the Shariat Act has been made, a person can plead and prove the custom of adoption, which will be given effect if he succeeds. Adoption is legal in Jammu and Kashmir, according to local customs.⁶ Adoption is stated in almost all religions and mythologies in some way. In today's world, the idea of adoption has evolved from providing a child to the childless to providing a home to the homeless.

III. ADOPTION UNDER HINDU LAW: ANCIENT PERCEPTION

Adoption is a legally recognised type of association in which a stranger is granted the rights and privileges of a child by birth. The adopted son is displaced from his biological family and relocated into the adoptive family as if he were a biological child. Adoption is the method of permanently incorporating an infant into a family with all of the privileges of a natural child, despite the fact that he was not born there. Adoption has been practiced in India for several years. Since Hinduism is India's most widely practiced faith, epics and historical documents have collected lists of saints and royals who have been adopted and who have not been adopted. The Ramayana and Mahabharata are two of Hinduism's most popular epics that contain references to adoption. In the past, when there was a shortage of male children, couples would adopt a male child and name him as a legal recipient. The Hindus went to great lengths to establish the institution of adoption. It is not an exaggeration to state that no other human beings on the planet have gone to such lengths to perfect the institution of adoption as Hindus have.⁷ Control was regarded as 'dharma' by Hindus. Dharma is a set of values, laws, and regulations that control a man's entire life.

(A) Purpose of Adoption under Ancient Hindu Law

Things were complicated in the ancient period because the idea and practice of adopting a stranger child into one's own family was frowned upon by society. It was seen as a sign of impotency by the male family member, and the woman of the family was criticized for giving birth to only a young girl rather than a male baby. The woman has been through a lot as a result of their inability to have a male child. As a result, we can confidently assert that people in ancient times had a strong attachment to a male boy.⁸ As a result, there was a need for a male child in the family at that time, and the individual adopted only a male child. There was no

⁶ *Md. Ismail v. Noor-ud-Din*, AIR 1986 J & K 14.

⁷ Akshita Prasad, K.M. (2019) "Child Adoption in India: A Comprehensive Study", *International Journal of Legal Development and Allied Issues*, V (V), pg. 3.

⁸ Shruti, S. (2012) *Adoption Laws in India: Reviews and Recommendations Needed*, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021003 (Accessed: May 10, 2021).

provision for a female child's adoption.

IV. LAWS GOVERNING ADOPTION IN INDIA

(A) Hindu Adoption and Maintenance Act, 1956

Adoption is a matter of personal law in Indian law, so it is regulated by a number of statutes. The Hindu Adoption and Maintenance Act, 1956 governs adoptions in Hindu law. It went into practice on December 21, 1956. Prior to this Act, only a male could be adopted; however, the Act now allows for the adoption of a female. Except for the state of Jammu and Kashmir, this Act applies to the entire nation. It covers Hindus, Buddhists, Janis, and Sikhs, as well as anyone who is not a Muslim, Christian, or Parsi by religion. Some relevant parts of the Act are as follows:-

- Any Hindu man of sound mind who is not a minor and is not a minor is qualified to adopt a son or daughter; however, if the male has a living spouse at the time of adoption, his spouse's consent is required.
- Any Hindu woman who is not married or has had her marriage dissolved, or whose husband is deceased or has been found incompetent, is eligible to adopt a son or daughter.

If the family already has a biological child, the adoption of a child of the opposite sex is permitted. When a male child is adopted by a female, the female must be at least 21 years older than the baby. In the case of a male adopting a female infant, the male must be at least 21 years older than the baby. The rights of an adopted child are the same as those of a biological child. Adoption is irreversible under this Act.

(B) Guardians and Wards Act, 1890

Since there is no universal adoption law, and the personal laws of Muslims, Christians, Parsis, and Jews do not accept the principle of full adoption. Under this Act, someone who wants a child will become a guardian before the child reaches the age of 21. This Act, however, does not grant the guardian any adoptive rights, and the only relationship that exists between the parents and the child is that of Guardian-Ward. Unlike the Hindu Adoption and Maintenance Act of 1956, this Act does not grant the adopted child the status of a biological child.

(C) The Juvenile Justice (Care and Protection of Children) Act, 2000

The Juvenile Justice (Care and Protection) Act, 2000 was passed by Indian parliament in December 2000 to secure and preserve the rights and dignity of children in need of care and protection. The original Act of 2000 has been amended to demonstrate greater attention to the

desires and development of people. The Juvenile Justice (Care and Protection) Act of 2006 was enacted with the aim of making adoptions more child-friendly. Every Indian inhabitant is entitled by Juvenile Justice (Care and Protection of Children) Act 2000. It enables two children of the same gender to be adopted. It confers parental and child status rather than guardian and ward status. It's similar to the Special Marriage Act of 1954, which allows anyone residing in India, regardless of religion, to marry under the Act.⁹ It establishes a consistent legal structure for justice throughout the world, and it applies to children under the age of 18. There was no codified statute prior to the JJ Act.¹⁰

(D) Constitution of India, 1950

The Indian government is fully aware of and dedicated to children's protection and dignity. Fundamental Rights are enshrined in Chapter III of the Indian Constitution. Article 21 guarantees one of these rights. Article 21's main goal is to ensure that the process specified by statute is strictly followed before a person's life or personal liberty is taken away by the state. The right to life refers to the ability to live a complete, healthy, and comfortable lifestyle. It doesn't have a specific definition. As a result, article 21 ensures that every child lives in dignity.¹¹ As a result, religion-specific adoption laws should be scrapped in favour of the development of a Uniform Civil Code. The Act specifies the requirements for a legal adoption. The Act's only legal consequence of a legitimate adoption is that an adopted child is considered to be the child of his or her adoptive parents for all purposes as of the date of the adoption.

(E) Central Adoption Resource Authority

CARA is a government of India organization under the Ministry of Social Justice and Empowerment. It was founded on June 20, 1990, to handle all aspects of adoption in India. Its mission is to enforce and control both domestic and international child adoption in India. In compliance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by the Government of India in 2003, CARA has been named as the Central Authority to deal with inter-country adoption process. Through its partnered adoption agencies, CARA primarily deals with the adoption of orphaned, abandoned, and surrendered children.¹²

V. GUIDELINES FOR ADOPTION IN INDIA

CARA has released policy recommendations on both international and domestic adoptions. The key policy adopted is that adoption placement agencies must strictly observe and adhere

⁹ *M/S Shambnam Hashmi v. Union of India & Ors.*, (2014) 4 SCC 1.

¹⁰ Adoption laws In India: Challenging Existing Laws, (2015) Manupatra.

¹¹ Article 21, Constitution of India, 1950.

¹² http://cara.nic.in/about/about_cara.html.

with CARA policies, as well as register with their respective state governments. Until placement agencies process the application in competent Judicial Courts, a No Objection Certificate [NOC] from CARA is required in all inter-country adoptions. The following primary principles shall administer adoptions of children from India, namely:-

- When processing any adoption placement, the child's specific needs must take precedence.
- Preference will be provided to placing the child for adoption with Indian people, with due consideration for the idea of placing the child in his own socio-cultural context.
- Every adoption must be reported on the Child Adoption Resource Information and Guidance System, and the Authority must keep information private.

(A) Position under Hindu Law

The only rule in India that considers an adopted child equivalent to a normal born child is Hindu law. This is primarily due to the belief that a son was needed for the family's spiritual as well as material well-being. Other communities may only serve as the children's legal guardians. Things were complicated in the ancient period because the idea and practice of adopting a stranger child into one's own family was frowned upon by society. It was seen as a sign of impotency by the male family member, and the woman of the family was blamed for giving birth to only a female child rather than a male child. Under Shastric Hindu Law, two main aim of adoption are as follows:

- The aim is religious i.e. to obtain a son who will take part in the funeral ceremonies of the father.
- The aim is secular i.e. to carry out family's name.

Only a male child can be adopted under Shastric Hindu Law, and he must be from the same race as his adoptive parents. The Hindu Adoption and Maintenance Act, 1956, has made many amendments to the law about adoption in India. The most significant changes brought about by this act were that it limited adoption to spiritual purposes only and gave women equal rights to men, i.e., both boys and girls may now be adopted under this act.

(B) Position under Muslim Law

Adoption is not permitted under Islamic law. Since Muslims do not have an adoption statute, they must move toward the court under the Guardianship and Wards Act of 1890. When a Muslim adopts a child under this act, the child is assumed to be placed in foster homes. Prior to the Shariat Act, 1937, Muslim adoption was accepted by custom. A Muslim talukadar was

allowed to adopt under Section 29 of the Oudh Act of 1869. According to Muslim tradition, the father has the upper hand. It also distinguishes between custody and guardianship. However, both Sunni and Shia schools believe that the father is the sole guardian while he is alive. Even after the father's death, the mother is not regarded as a natural guardian. Adoption is handled a bit differently under Islamic law than it is in other cultures. Kafala is the Islamic word for what is often referred to as adoption.¹³ In Islam, there are a few laws that govern the principle of adoption:

- Adopted children keep their biological family names (surnames) and do not change their names to match that of their adoptive family.
- Adopted children inherit from their birth parents rather than from their adoptive parents.
- If the biological family provides the child with property/wealth, adoptive parents are expected to be careful not to mix that property/wealth with their own. They just act as trustees.

VI. WHO MAY TAKE IN ADOPTION

To adopt a child, you must be a Hindu and have the financial means to do so. A Hindu male who wishes to adopt a child must comply with Section 7 of the act, while a Hindu female who wishes to adopt must follow Section 8 of the same.¹⁴

(A) Capacity of Hindu Male to Adopt (Section 7)

If he is a bachelor, widower, divorcee, or married, a major Hindu male of sound mind may adopt. A married Hindu male, on the other hand, is required to obtain his wife's consent. If he has more than one wife, the consent of all of them is needed. Adoptions that are made without the wife's permission are null and void.¹⁵ The wife's permission may be expressed or implied. For example, unless the wife claims fraud or coercion, her consent would be assumed if she participates in the adoption ceremonies. The plaintiff in *Bhooloram and Ors. vs. Ramlal and Ors.*¹⁶ had two wives, and the validity of his adoption was called into question because he had not obtained the consent of either of them before adopting. The complainant claimed that his wife had gone missing and could be considered as good as dead. The plaintiff's wife had run away, but she couldn't be presumed dead because she hadn't been heard from for at least seven years, according to the Madras High Court. It was decided that as long as the wives are alive,

¹³ Kumari, E. (2018) *Analysis of Laws on Adoption in India*, Latestlaws. Available at: <https://www.latestlaws.com/articles/analysis-of-law-on-adoption-in-india-by-ekta-kumari/>.

¹⁴ Gandhi, P. (2019) *Adopting a Child under Hindu Law*, blog.ipleaders. Available at: <https://blog.ipleaders.in/adopting-child-hindu-law/>.

¹⁵ Section 5(1).

¹⁶ AIR 1989 MP 198.

each wife's consent is needed for a legal adoption.

(B) Capacity of Hindu Female to Adopt (Section 8)

The Act is a significant departure from previous law in that allows a Hindu girl, even if she is not married, to adopt in her own right. Even a husband's permission is insufficient to grant a (married) woman the ability to adopt. If she is living a life of divorcee who is not really separated, even then husband's approval will not give her ability.¹⁷ A Hindu unmarried woman, widow, or divorcee may adopt under the Hindu Adoptions and Maintenance Act, 1956. In the case of *Vijayalakshamma v. B.T. Shankar*,¹⁸ it was decided that when a widow adopts a child, she does not require the permission of a co-widow because she adopts the child in her own right.

(C) Inter-Country Adoption

Inter-country adoptions are a relatively recent phenomenon that started to take off in a big way at the end of World War II. There is no law that allows a foreign parent to adopt an Indian child. The Supreme Court's modus operandi for inter-country adoptions in the *Lakshmikant Pandey vs. Union of India*¹⁹ case can be considered modern public interest litigations that have recognized inter-country adoption as a way of rehabilitating abandoned children. Adoptions have been halted as a result of these rules. All inter-country adoptions are made by overseas parents directly through government-approved adoption authorities or agencies in both the sending and receiving countries. The decisions aim to keep all concerned in the adoption process liable. The adoption of an Indian child by a foreign citizen or NRI in India is governed by the Adoption of Children, 2015 Guidelines. These guidelines were created to prevent children from being mistreated or exploited by adoption. A foreigner may adopt an Indian child before the age of three, according to the Supreme Court. In the absence of any concrete act on inter-country adoption, the provisions of Guardians and Wards Act, 1890 will be followed for adoption.

VII. ROLE OF JUDICIARY IN ADOPTION

Adoption of any child is a major concern in India's eyes, and the administration is totally devoted to children's rights and welfare. Even India's constitution establishes fundamental rights in Chapter III, Article 21, the main goal of which is to ensure that a strict process is followed before the state takes away a person's life or liberty. Since the right to life requires

¹⁷ *Brajendra Singh v. State of Madhya Pradesh*, AIR 2008 SC 1056.

¹⁸ AIR 2001 SC 1424.

¹⁹ AIR 1986 SC 272.

the right to live a meaningful life, Article 21 grants every child the right to lead a healthy lifestyle and safeguards children under the age of 14 from harassment. As a result, any stigma or prejudice against adoption should be scraped away, and a full civil code should be implemented instead. Article 45 of the Directive Principles of State Policy provides for free and compulsory education for children.

(A) Religion No Bar For Adoption

The recent decision in the case of *Shabnam Hashmi v. Union of India & Ors*²⁰ is the landmark judgment on adoption where religion was considered as no bar for adoption. The crux of the issue was the obligation of Muslim women to adopt. Under the Juvenile Justice (Care and Protection of Children) Act, 2015, the Court took a somewhat progressive approach and granted Muslims adopted rights. It upheld the JJ Act, 2015 as a secular adoption law in India, granting the right to adopt to people of all faiths in India, regardless of what personal laws suggest. The court dismissed the argument that the right to adoption was included in Article 21's right to life. The court ruled that it is up to Parliament to fulfill Article 44's constitutional obligations, and that it is up to future generations to formulate a UCC once India's conflicting cognitive processes have dispersed.

(B) Adoption under Hindu Laws

In the case of *Shrinivas KrishnaraoKango v. Narayan Devji Kango*²¹ an adopted child filed a lawsuit for a portion of his joint undivided family's land. The defendants argued that the adopted child was only eligible to assets that were hereditary in nature, not self-acquired property. The court determined that in cases where an infant is adopted, the result of adoption produces a legal principle, and the child becomes the legitimate successor. When a Hindu widow adopts a child, the adoption has the effect of relating back and making him eligible for all of the rights of a son from the date of the father's death. It was also decided that adoption has the benefit of making the son eligible for a portion of the adoptive father's property. Where a claim arises for someone else's property, however, the law of adoption back is not followed. In such instances, the law is that property that has already been vested in anyone cannot be divested.

VIII. EFFECT OF ADOPTION

When a child is adopted, all ties to his natural family are severed, and he becomes a full member of the adoptive family as of the date of adoption. He has all of the rights and responsibilities of

²⁰ (2014) 4 SCC 1.

²¹ 1954 AIR 379.

a family's natural born child. There are three extenuating circumstances, namely:

- i. The child is not allowed to marry someone that he or she would not have been able to marry if he or she had not been adopted.
- ii. Any property that vested in the adopted child prior to adoption continues to vest in him, subject to any responsibilities that come with property ownership, including obligations to preserve birth ties.
- iii. The adoptive child cannot deprive someone of any property that belonged to him or her prior to adoption.²²

Although it is true that the adopted child acquires property rights in his new family, an adoption does not exclude the adoptive father or mother of the ability to acquire of his or her property by transfer inter vivo or will, unless there is a written agreement to the contrary.

IX. NEED FOR UNIFORM CIVIL CODE

“The State shall strive to secure for the people a uniform civil code in the territory of India,” declares Article 44 of the Indian constitution. However, we have failed to create a uniform adoption law that applies to all cultures. The Adoption of Children Bill of 1972 was the first effort to establish a common law of adoption that applied to all religions, but it was opposed by the Muslim community. The Adoption of Children Bill 1980, which exempted the Muslim Community, was introduced in the Parliament on the 16th of December, 1980. Articles 14 and 15 of the Indian Constitution speak about equality before the law and the exclusion of oppression against any person on such grounds, but having adoption laws that only apply to one group is a clear violation of these provisions.²³ Only Hindus are allowed to adopt under the Hindu Adoptions and Maintenance Act of 1956. However, there are still a large number of orphaned and neglected children. In 1972, a proposal for a uniform adoption law that would apply to all religious groups was introduced, but it was withdrawn due to resistance from Muslim communities.

There was no standardization of adoption law until the *Shabnam Hashmi vs. Union of India* decision, which established that anybody, regardless of religion, can adopt under the Juvenile Justice (Care and Protection) Act, 2000. This case was raised by Shabnam Hashmi, who only has guardianship rights over a girl she adopted because Muslim personal law prohibits adoption. She argued that adoption is a constitutional right and that it is based on humanitarian

²² Hindu Adoption and Maintenance Act, 1956, s.12.

²³ Garg, P. (2018) “*Legal provision of adoption in India: A critical study with reference to child protection*”, International Journal of Law, IV (III) pg. 13.

considerations. All Indian rules, with the exception of family law, are standardized, so there is a need to amend this and provide the same laws for all Indian citizens. Children are not adopted solely because of their faith.

Childless parents are denied the full right to adopt a child because of their religious beliefs. They are not permitted to refer to themselves as the adoptive parents of the boy. As a result, there is a pressing need for a standardized civil code in the area of adoption. There would not be a single childless parent in India if the same law applied to all people in this country.

X. CONCLUSION

Adoption is one of the ideas that have undergone a significant transformation during the transition from the prehistoric to the modern era. Adoption creates an artificial but lasting bond between a parent and a child that did not exist before. Other than Hindus, no group has a foolproof system for regulating adoptions on par with Hindus. While there is no prohibition of adoption in Parsi, Christian, or other religious laws, none of these cultures have personal or statutory adoption laws. In their case, it will be tradition that regulates adoption.

Adoption laws for Hindus have vastly improved, as has the status of women in society. It is absurd that Muslims in India are unable to legally adopt a child due to a lack of a uniform civil code on adoption. By enacting the Uniform Civil Code, other Indian religions would be able to legally adopt a child, as well as the social lives of childless parents. A child will be well-cared for and protected, and he will have a promising future. It is a lengthy task, but if it is implemented, every parentless child will be able to attend school and live a life he could never have imagined. Gender bias should not be used as a criterion for adopting an infant. 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.
