

“Adoption Laws in India”

*Arundhati Banerjee
Mewar Law Institute,
Ghaziabad, U.P.*

ABSTRACT

“Childbirth is an act of nature, Adoption is an act of God.”

Adoption as a construction of a family has drawn worldwide research for three decades. It is one of the few concepts that have undergone a radical change in the course of transit from primitive to the modern age. Adoption is a very important institution in our society. In India, there is no general law of adoption. It has been recognized for centuries but is being a part of personal laws only now. From an informally adopting male child for performing last rites after the death of the adopted parents, to single women adopting daughters India has shown progressive changes. During the social reform in the 1950s, India focused on finding a home for abandoned, destitute, illegitimate, and surrendered children. The domestic adoption in India gained momentum only in the late 1980s. Since then, important changes have happened in the field of adoption. This article is focused on the development of policies, legal guidelines, current challenges, and future trends of adoption in India.

Keywords: - Adoption, Hindu Law, Muslim Law, Adoption laws in India,

INTRODUCTION

Adoption is the establishment of a parent-child relationship through a legal and social process other than the birth process. It is a process by which a child of one set of parents becomes the child of another set of parents or parent. Owing to our multicultural, multilingual, and multi-religious sentiments in the country, it has been a difficult task to identify all complexities and bring into force an effective adoption policy uniformly in the country. Adoption shall be restored to for ensuring the right to family for the orphan, abandoned and surrendered children, and with the advent of civilization; secular as well as religious needs have the effect of the process of adoption. The main object of adoption in the past has been to secure the performance of one's funeral rights and to preserve the continuance of one's lineage. But in recent times, adoption has been the means to restore family life to a child deprived of his or her biological family.

Adoption as a legal institution came to be recognized only among the Hindus. Muslims do not recognize adoption but the practice has been prevalent among Christians and Parsis. Hindu law is the only law that recognizes adoption in the true sense of taking of a child as a substitute for a natural-born child. The desire to have a natural-born son is considered to be the basis of adoption among Hindus. If a person had no natural-born son he was allowed to take the son of some other person as his own. The sonship was given importance due to various religious and secular purposes in the ancient period.

WHAT IS ADOPTION?

As far as the concept of adoption is concerned it is very difficult to define it in words. This institution has changed over a while in its form, purposes, and objects. It is but, natural that as human thought proceeds the concept and organization of social institutions also advances and gets modified.

According to the Encyclopedia of Religion and Ethics-

“Adoption indicates the transfer of a child from old kinsmen to the new. The child ceases to be a member of the family to which he belongs by birth. The child loses all rights and is deprived of all duties concerning his natural parents and kinsmen. In the new family, the child is like the natural-born child with all the rights and liabilities of a native-born member.”

Encyclopedia Britannica explains thus-

“Adoption is a way of conferring the privileges of parents upon the childless and advantages of parents upon the parentless.”

International Encyclopedia of Social Science defines adoption in the following words-

“Adoption is the institutionalized practice through which an individual belonging by birth to one kinship group acquires new kinship ties that are civilly defined as equivalent to the congenital ties. These new ties supersede the old ones either wholly or in part.”

HISTORY OF ADOPTION IN INDIA

In India, adoption has been practiced for years together. All our epics Ramayana and Mahabharata contain records of saints and royals who were adopted. They also have a complied data of Kings and Saints who adopted. Hinduism believed in a patriarchal society, wherein a lack of male offspring befell, couples went for embracing a male child to assign him as a legal beneficiary. Children are important in a Hindu household and a deceased parent's spirit can simply accomplish salvation only when an individual has a child to light the memorial service fire, and salvation can be achieved via a male child who provides tribal love. This led Hindus to evolved the institution of adoption to a substantial length. It might not be an exaggeration to say that no other race or religion of the globe advanced themselves to such minute details in regards to the institution of adoption as Hindus. For Hindus adaptation was as ‘dharma’. Dharma incorporates principles, rules, and regulations governing the entire life of a man. The institution of adoption occupied a great significance under Hindu law as the aspiration for ‘son’ predominated the Hindu culture and civilization. The Smritis literature has a well-defined law of adoption. It was parent based and not child-based, and suggested that only one son could be adopted for the continuation of the family line, to offer oblations to deceased ancestors. The Dharmasastras on the other hand 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 into an adoptive family like a natural son. But with the advent of numerous legislations in Modern India, the whole idea of adoption concerning various personal laws has undergone a significant transformation.

MODERN ADOPTION THEORY: CHILD WELFARE THEORY

In the present age, the concept of adoption has undergone a sea change. In our country, where there is a large number of orphans, abandoned, handicapped, and destitute children, adoption can serve a very important social purpose. Such children require homes and parents. On the other side, there are a large number of people in India and abroad who do not have children. Adoption serves the object of providing homes for homeless children and for providing richer family life to those persons who have no children or who have only one child and want to adopt another. In most Western countries one can adopt several children and one needs not to be childless but under Hindu Law, one cannot adopt more than one son and one daughter.

Thus, a new theory i.e., the child welfare theory has emerged over time. It is providing a child to the childless and homes and parents to the orphans, destitute and illegitimate children who may be living in neglected and inhuman conditions. Adoption is thus serving double purposes. The pious purpose of adoption may be served in a better manner if the people show more concern for such orphans and homeless children. Thus, the modern theory regarding adoption appears to be more appropriate in modern days where the welfare of children has been given utmost importance in all laws. Any law of adoption must be centered on the following premises:

1. Child's interest is the primary consideration and it outweighs all other considerations
2. Adoption is primarily a child-welfare service
3. Adoption, which is the most desirable form of substitute for children, should be provided as early as possible
4. The primary object of adoptions is to provide a home to the child. If the child gets home with love and affection; inheritance and property rights will follow, they are secondary.

ADOPTION UNDER HINDU LAW

The Old Hindu law saw post-independence reforms in the form of the 1956 Hindu Adoption and Maintenance Act codified adoption legislation. Anyone who falls within the definition of the term 'Hindu' as described in Section 2 of HAMA is eligible for the adoption of a child. There have been numerous changes in the law from time to time, such as adoption by Hindu women, eligibility for adoption by unmarried/single girls, etc. The Shastric Hindu law looked at adoption more sacramental than as a secular act. Some judges think that time object of adoption of a child is two-fold:

1. To secure one's performance of one's funeral rites
2. To preserve the continuance of one's lineage.

Hindus believed that the deceased parent's spirit can accomplish salvation only when an individual has a son to light the memorial service fire. 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 is one of the main reasons to beget a son. Currently, the adoption under Hindu is governed by the Hindu Adoption and Maintenance Act, 1956.

ADOPTION UNDER MUSLIM LAW

Muslim Law does not acknowledge Adoption. A Muslim therefore willing to adopt must approach a tribunal under the Guardianship and Wards Act, 1890. The law takes into account the concept of acknowledgment. A Muslim cannot establish the child's paternity and if he adopts a baby he does not becomes the father of the child. Various authors on Mohammedan law are of the view that adoption which creates a relationship of parentage, is unknown to Mohammedan law. Authors like Ameer Ali, Wilson, and Abdur Rahim are of the view that adoption is unknown to Mohammedan law, and that the Holy Quran prohibits adoption. Before the Shariat Act of 1937, the adoptions by certain Muslims were recognized and allowed by customs. Thus the impression that adoption is not permissible or adoption is not known to Muslim law is based on the improper application of Shariat law. 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 biological family name and does not alter his or her name to that of the adoptive family. In all aspects, adoptive parents do not have the status of natural parents.

ADOPTION UNDER CHRISTIAN AND PARSI LAW

The Christians do not have a law for adoption, and like Muslims have to approach the court under the Guardians and Wards Act, 1890. Christians can take a child under the said Act only under foster care. Once a child under foster care, he is free to break away all his connections once he attains the age of 18 yrs and is a major. Besides, such a child does not have any legal right to inheritance. The 1890 Guardians and Wards Act contains the general law about guardians and wards. It states that the right of the father is primary and no other individual can be appointed unless the father is discovered to be inappropriate. This Act also offers that while 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 children in law. Their property is allocated among legal intestate heirs on the death of the foster parents, to the detriment of foster children. Christian in India can adopt children by resort to Section 41 of the

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

ADOPTION LAWS IN INDIA

1. HINDU ADOPTION AND MAINTENANCE ACT

Adoption according to the Indian Law is a matter of personal law and hence is governed by various legislations. The adoptions in Hindu law are governed by the Hindu Adoption and Maintenance Act, 1956. The Act applies to all who are by religion Hindus, including Buddhists, Jains and Sikhs, and any person who is not a Muslim, Parsi, Jew, or Christian. Under this Act, the following persons can make adoptions:

- a. Any male Hindu, who is of sound mind, not a minor and is eligible to adopt a son or daughter, but if the male has a living spouse at the time of adoption, the consent of his spouse is mandatory.
- b. Any female Hindu, who is not married or if married, her marriage has been dissolved or whose husband is not alive or her husband has been declared incompetent can adopt a son or a daughter.

In case a biological child already exists in the family, then the adoption of the child of the opposite sex is allowed. Where there is an adoption of a male child by female, then the female shall be at least 21 years older than the son. Where there is an adoption of a female child by a male, then the male shall be at least 21 years older than the daughter. The adopted child has the same rights as a biological child. Adoption under this Act is irrevocable.

2. GUARDIANS AND WARDS ACT, 1890

As there is no general law for adoption and the personal laws of Muslims, Christians, Parsis, and Jews, they do not recognize the concept of complete adoption. Under this Act, anyone who is desirous of a child can become a guardian of the child until the child comes to 21 years of age. This Act however does not provide any adoptive rights to the guardian and the only relationship which exists is of Guardian- Ward between the parents and the child. Unlike the Hindu Adoption and Maintenance Act, 1956, this Act does not confer the status of the biological child on the child so adopted.

3. THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

In December 2000 the parliament of India passed the Juvenile Justice (care and protection) Act, 2000 to protect and safeguard the interests and welfare of the children in need of care and protection. Amendments have been made in the existing Act, 2000 to show greater sensitivity to the needs and rights of children. The Juvenile Justice (care and protection) Act, 2006 has been introduced to give adoptions a child-friendly approach. It widened the definition of 'child in need of care and protection' by including 'abandoned'

and ‘surrendered children’ or a ‘working child’. Under this Act, there is no bar to religion for adoption. The provisions of this Act apply to all Indian citizens.

4. CENTRAL ADOPTION RESOURCE AUTHORITY

CARA is an autonomous body under the Ministry of Social Justice and Empowerment, Government of India. It was set up on 20th June 1990 to deal with all the matters concerning adoption in India. Its function is to mandate and regulate both in-country and inter-country adoption of children in India. CARA is designated as the Central Authority to deal with inter-country adoptions under the provisions of the Hague Convention on Inter-country Adoption, 1993 ratified by the Government of India in 2003. CARA primarily deals with the adoption of orphan, abandoned, and surrendered children through its associated/ recognized adoption agencies.

CHALLENGES IN ADOPTION

Although state-approved agencies are providing adoption, the fact is that private adoptions are still taking place in some hospitals through agents and with unorganized sectors.

1. Most of the time, adoption agencies are perceived to be “money makers” and so they are constantly put under “scanner” by the whistleblowers.
2. There is a lack of consistent and complete data in some states which makes it difficult to conduct research studies.
3. If and when there is a budget downturn, many agencies who are normally responsible for collecting data may find it difficult to continue their work.
4. Contrary to Western countries, Indian culture does not encourage “open adoption”. Because India follows “closed adoption”, confidentiality about the birth parent/s is not disclosed. As of today, it is observed both in rural and some families in urban areas, adoptive parents are also not comfortable telling their children about status. If a child gathered this information from others, the trust could become a major issue in the parent-child relationship.
5. Single parent adoptions are legal, yet there is no study or evidence of any increase in single parents who have adopted children. There are no data available on the success rate of single-parent adoption.

CONCLUSION

It is pertinent to note that it took at least three decades and several incidents that were arbitrary in nature to lay down guidelines for adoption. In the guise of Lakshmi Kant Pandey judgment, the Hon’ble Supreme Court laid down guidelines for intercountry adoption. In many researchers’ opinions, we as a nation are still divided and struggling with religious beliefs. So much so that a process as natural and giving birth of children and then adoption is being dragged into the umbrella of religious politics.

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 is a beneficial program where the child is treated as a natural-born child and given all the love, care, and attention.

Although there is a tremendous improvement in the adoption laws for Hindus, in the case of Muslims, there is a lack of uniform civil code on adoption, and they cannot legally adopt a child. Only by enacting uniform civil code in India, people of other religion will be allowed to adopt a child legally which means making registration of adoption compulsory. This will further help to improve the health of a childless parent. The adopted child will also get proper care and protection and will have a bright future. It is accepted that the observance of the above is a difficult task but not impossible.

A uniform civil code in adoption laws will not violate fundamental rights to religion. It should be remembered that the Directive Principles of States Policy (DPSP) mandate the state to bring uniformity in laws. The children from all religions may easily be given and taken in adoption and will agree with the constitutional mandate enshrined in Articles 39 and 44.

“The sovereignty of all scriptures of all religions must come to an end if you want to have a united, integrated, modern India”

-Dr. B. R. Ambedkar

Lastly, the world may not change if a homeless child is adopted. But for the child, their world will definitely change.