



Adoption in India: A critical analysis

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Abstract

The subject matter of this paper deals with comprehensive analysis of Adoption law in India. The 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 i.e Hindu Adoption and maintenance act 1956. In India religions like Muslims, Christians, Jews and Parsis do not have their own personal law governing Adoption due to which they cannot adopt a child and give him/her his family name they can only become guardian of child under Guardians ND wards act 1890.

The government of India have taken steps to make Uniform law for adoption but there was failure. This paper focusses on Adoption laws which are governing Adoption in India and how uniform civil code is necessary in area of Adoption.

Keywords: adoption law, maintenance act

Introduction

According to Hindu Mythology only son could be adopted which can be inferred from the texts of Manu, Vashishta, Saunaka ND others.

According to Manu- "Boy, equal by caste, whom his mother or his father affectionately gives a confirming the gift with a libation of water, in times at distress to a man as his son for he is without a son, must be considered as an adopted son."

Vashishta says- "Man formed of uterine blood and virile seed proceeds from his mother and father as an effect from its cause. Therefore the father and mother have power to give, to sell and to abandon their sons. But let him not give or receive in adoption an only son for he must remain to continue the line of the ancestors. Let no woman give or receive a son except with the assent of her Lord. He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the kin, make fire offerings in the courtyard of his house, reciting Vyahrites and take as a son, not a remote kinsman, just the nearest among his relatives."

Traditionally adoption evolved amongst Hindus because the importance they attach to a male child, male issue was treated as necessary for protecting the deceased parents from the sufferings of the hell and to perform their funeral obligations. The Vedas declare "Endless are the worlds who have sons, there is no place for a man who is destitute of male offspring."

Female adoption was not accorded in early Hindu physiology it is evidenced from the fact that the scriptures did not permit the wife or daughter to perform the funeral rites of a man or utter sacred text. It was believed that a female child cannot redeem the deceased from hell or save from suffering after life.

The foundation of the doctrine of adoption is the duty which every one owes to his ancestor to provide for the continuance of the line and the solemnization of the necessary rites ^[1].

Meaning and definition of adoption

There is no authoritative definition of the term adoption given under the Hindu adoption and maintenance act, 1956. According to Manu adoption is the "Taking of a son, as a substitute for the failure of a man issue". Thus it is a transplantation of a son from the family in which he is born to another family where he is given by the natural parents by way of gift. The adopted son is thus taken as having been born in the new family. He acquires all the rights and status in the new family and his ties with the old family come to an end. Manu says, "He whom his father and mother give to another as son, provided that the donee have no issue if required be of the same class, and affectionately disposed, is considered as a son given, the gift deed been confirmed by pouring water"

In English Law adoption has been defined as "A legal process treaty as child's legal parentage is entirely and irrevocably transferred from those formally having parental rights, usually the natural parents, and the vested in adoptive parents."

DN Aggarwal in his book of "Hindu Law" defines adoption as, "A fiction of Hindu law by virtue of which the necessary legal requirements and formalities are fulfilled, a person ceases to be the child of his or her natural parents and becomes the son or daughter of his or her adoptive parents".

According to J. DM Derett under Hindu law "Adoption is the talking of the child of another as a substitute for the failure of his own natural child of the same sex" ^[2].

The Hindu Adoption and Maintenance Act, 1956 only states that an adoptive child shall be the child of his or her adoptive father or mother for all purposes with effect from the date of his adoption and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by adoption in adopted family.

The Hindu Code Bill has also attempted to give a brief definition of adoption saying, "Adoption is a formal recognition of a person as the son of another." ²(H.S. Gaur,

The Hindu Code Bill (5th edition, 1978) vol. 4th p.763)

The opinions conveyed by diverse authorities evidently exhibits that no one has strived to give an acceptable definition of the term adoption. The above views on adoption are merely illustrative of the factum of adoption.

Child adoption laws in India, act, enactments, ruling and decisions

Difference between Hindu Adoptions and maintenance act 1956 and guardians and Wards Act 1890

In India there is no general law as to Adoption for people belonging to different religions, the only law related to Adoption is governed by the Hindu Adoptions and Maintenance Act 1956. Which provides Hindus to adopt a child legally and people belonging to other religion can only take Guardianship under the provisions of the Guardians and Wards Act 1890.

In “Mohammed Allahadad Khan v. Muhammad Ismail” [3] it was held that there is nothing in the Mohammedan Law similar to adoption as recognized in the Hindu System. Acknowledgement of paternity under Muslim Law is the nearest approach to adoption.

The Guardians and Wards Act 1890 is applicable to Muslims, Parsis, Christians and Jews as their personal law does not acknowledge complete adoption. Under the Guardians and Wards Act, the relationship established after adoption is only of guardian and ward. Adoption under Guardians and Wards Act does not confer status of the child on the adopted child, it is different from Hindu Adoptions and Maintenance act.

The Hindu Adoptions and Maintenance act is applicable to Hindus, Jain, Buddhist and Sikhs. Under this act the adoption is irrevocable and it gives full status to the child as natural child, it gives full status to the child as natural child, it also gives right to inherit the property. Only limitation in Hindu Adoptions and Maintenance act is that parents cannot adopt a child of a particular gender if they already have or adopted child of same gender. Under the Guardians and Wards Act when child turns 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 children of these categories. As a result, misconceptions and irregularities appeared in respect of the custody, guardianship or Adoption of these type of children, which were prejudicial to the interest of children.

The Juvenile Justice (Care and protection of children) act 2000

The Juvenile Justice (care and protection of children) act 2000 is applicable to all Indian citizens. It enable Adoption of 2 children of the same gender. It bestow the status of parent and child and not guardian and ward. It also bestow rights available to child on the adopted child. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under this act, irrespective of the religion he follows [3]. It lays down a uniform legal framework of Justice

across the country and this act covers children up to 18 years. Before this act there was no codified legislation.

Constitution of India

The government of India is doing arduous efforts to give replete rights to children. The Constitution of India lists down fundamental rights under chapter III. One of the rights is provided under Article 21 which reads “No person shall be deprived of his life or personal liberty except according to procedure established by law [4]. Thus article 21 gives every child to live with dignity.

Article 24 –“Fundamental right of citizens” -provides right against exploitation to the children below 14 years [5].

Article 44 of the Constitution declares that “The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India”. This goal is yet to be fully achieved [6].

Article 39 specifically requires the state to direct its policies. To provide healthy environment to the children and to make sure that the facilities are provided. It gives them a sense of freedom and dignity youth are protected exploitation, force labour and against moral and material abandonment [7].

Impact of international convention on CARA

It is generally considered a progressive law in accordance to the international principles, such as United Nations convention on rights of child to which India became a signatory in 1992. In signing the convention, the government accepted obligations to bring all state laws and policies in line with the main principles of child's rights namely non-discrimination, best interest and child's voice. This act has incorporated the provisions of Adoption of child as an alternative to Institutional care.

Loopholes and challenges to adoption in India

With more than 30 million orphans in the country according to one estimate. Only about 2500 were adopted last year down from 5700 four years ago.1(rami Lakshmi article in the Washington Post) Prospective parents meanwhile are stymied by complicated rules, long delays, over cautious bureaucracy and illegal trafficking.

1. A social taboo

Adoption is considered as to the last option available to parent's. A couple tries all possible ways to bear a child before considering adopting be it trying all the medical remedies available or any sort of superstitious practice. Caste barrier still persists in vast section of society. The elders of family feel apprehensive as to the caste of the child. Even when a couple decide to adopt, they are seen preferring child with fair complexion who might ‘look facsimile’ the come from upper caste. Retrogressive and ill-informed genetic arguments are often intermixed with archaic caste notion to come up with arguments like - ‘An adopted child wouldn't prove to be equally loyal’ or ‘Parents can feel true affection towards their biological children only’. Prospective parents are presumed to be sexually inactive or biologically incapable to conceive a child. Still in some parts of the progressive society there exists a stigma attached to a woman's inability to conceive children. The stigma attached to a woman's

barrenness together with presumption of man incapable of impregnating women is less manly makes couple less inclined towards adopting. This plethora of social pressures makes the adoption less in the country.

2. Poor laws

Other than stigma, the presence of outmoded laws makes the situation execrable. Till 2006 Adoption in India was governed by HAMA (Hindu Adoption and maintenance act) 1956 and the Guardians and wards act 1890. According to the provisions of these laws, only Hindu had a legal right to adopt a child whereas Muslims, Christians and Parsis were allowed only guardianship under Guardians and wards act 1890. This entail that children adopted by non-Hindu parents had no right as to inheritance and as soon as they reached age 21, the law treated them as individuals. Hindu Adoption and maintenance act on other hand stipulates that no couple is allowed to adopt a child if they already had a biological child from same gender. These are only some of the rearward provisions of laws governing adoption. Despite a yearning recognition of the paucity and injudiciousness of these laws, for long amendments could not be carried out due to political antagonism. Many religious leaders and clerics were found to be yearner to shield their home turf than giving primacy to the interests and welfare of orphaned children. The absurdity of labelling small children on religious lines in a country that claims to be secular wasn't lost on anyone. Finally in 2006, the government carried out a major overhaul of adoption laws. The Juvenile Justice act of 2002 created provisions for Muslims, Christians atheists to become legal adoptive parents.

1. The law recognizes age difference of 21 years of age between opposite sex adoption but that should be in case of same sex adoptive parents and adopted child as there can be harassment of child of same sex. Hence the law should also apply to those categories of adoption also.
2. 3. There is no regular check on children after adoption is done once they are given away there is no check on adoptive parents as how they are keeping the child.

The case of Shabnam Hashmi landmark precedent for secular adoption in India

The right to adopt a child till now confined to Hindus, Buddhist and Jains now extends to Muslims, Christian's Jews, Parsis and all other communities.

Shabnam Hashmi v. Union of India & ors ^[9].

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 we'll being of the child which includes a financial support to the child even though he is not a biological parent to the child. Despite all that the child is still be considered to be child of biological parents and being kafil would not amount to adopting child.

The Supreme court ruled that any person can adopt a child under the Juvenile Justice (care and protection of children) Act 2000 irrespective of the religion he or she follows and

even if the personal law bars him from doing so. The Juvenile Justice act 2000 is a secular law that enables any person irrespective of the religion he profess to take child in adoption. The court ruling will have a way for foundation of a uniform civil law as mentioned in Article 44 of the Constitution of India. It will allow lakhs of orphaned children to find stable home, irrespective of their parent's religion.

Hashmi had moved to Apex court in 2005 after she was given only guardianship rights over a one year old girl she had brought from an adoption home. From now she can treat girl like her own daughter.

The Apex court however turned down the plea for declaring the right of child to be adopted and right of parent to adopt as a fundamental right under Constitution. Saying it is not possible to pass such order due to the contradictory beliefs existing in our society.

Conclusion

Adoption is one of the few concepts which have undergone a radical change in the course of transit from primitive to modern age. Like most other social institutions, adoption is essentially a product of historical and evolutionary process. Diverse economic needs and social demands of the times have gone into shaping it through the successive ages. A study through times provides an interesting view of its changing concept, form, objectives and purposes. It is but natural that as the human thought progresses, the concept and organizations of the social institutions advance and get refined. The various loopholes in the adoption laws has proved to be a hinderence in the Adoption be it the poor laws the social taboo or the bureaucratic hurdles. With the increase in the need of adoption and the increase in orphans in the country there is a need for a uniform law as to adoption in India. Adoption is recognised as such by Hindu family only not by the Mohammedon, Christian or Parsee law. Even so, these religious communities are engaged in adopting children. Absence of any appropriate legal provisions make them resort to the Guardianship and words act, 1890 under which only a guardian of child can be appointed. But guardianship provides none of the advantages of adoption. The natural parents can claim their child back at any moment from the adopter. There is no security to the child as well. The adopter can throw the child out at any moment, as in the absence of recognised adoption system, they are at best only guardians. Any agreement made by the adopter is not binding on him/her regarding his property. Futures of children of these communities thus stands jeopardized in the wake of inadequate law of adoption.

By enacting Uniform Civil Code it will also allow other religions to adopt a child legally and it will also improve the social life of a children's parents. A child will get proper care and protection and he will have bright Future.

I would conclude paper with a famous quote, "Adoption comes from the heart; but the adoption process from the law, you should follow your heart; but be sure you also follow the Law ^[10]".

References

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3. ILR 10 All, 1888, 289.
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5. Article 21-constituion of India
6. Article 24 – Constitution of India
7. Article 44 DPSP, Constitution of India
8. Article 39 Constitution of India
9. 4 SCC, 2014, 1.
10. Irina O' Rear