



Legal provisions of adoption in India: A critical study with special reference to child protection

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Abstract

The subject matter of this article deals with the position of laws of adoption in India. The adoption has been practiced since a long time ago but the law for it emerged in 19th century. Adoption in India is governed by the personal laws of different religions but there is no general law of adoption for all of the religions in India. There is only one personal law which governs adoption in India i.e. Hindu Adoption and Maintenance Act, 1956. There is no specific law governing adoptions in Muslims, Parses, Christians and Jews, they can be a guard to the children (ward) under the Guardians and Wards Act, 1890. The Juvenile Justice (care and protection of children) Act, 2000 provides provisions of adoption to all irrespective of any religion, still a uniform law has been lacking to provide the right to adoption to all religions as adoption is governed by the personal laws. There is no legislation for inter-country adoption in India. Inter-country adoption means adoption by foreign parents. Till this date there is no law which governs Inter-country adoptions. This article deals with the problems in existing laws of adoption in India and the need of its uniformity and also the possible improvements to be made.

Keywords: adoption, children, inter-country, uniformity, legislation and religions

Introduction

The question of rights of children has emerged as one of the most vibrant issues for discussion in this new millennium. The fact remains that children remain a part of the disadvantaged minority group even today as per realization of human rights and social justice are concerned. The main reason for this lacuna is that the children are still not complete political entity in true sense of the term. Besides they are generally physically, mentally and economically dependents. In this age of globalization where things are changing rapidly, taking care of child's rights at every stage has taken a back seat. This not only affects their whole value system, but also their present social and economic needs. No doubt that the future of humanity depends on children to a large extent even then a very partial and parochial approach has been followed toward bringing them on the mainstream of social and political agenda.

Adoption is the act of establishing a person as parent to one who is not in fact or in law his child. The purpose of adoption is to give effect to the new status of relationship which is not by nature but is created or established by status or legal relationship of parent and child between persons.

In ancient civilisations, the purpose of adoption was very different from what is of modern times. Earlier, male line was the main goal of it, contemporary adoptions involve either sex. The primary focus of the adoption is the welfare of the one who is adopted rather than of the adopter. Adoption is definitely a means of building a family where the needs of destitute children and childless couples are met. Adoption of children is a socio legal process, and has existed in India and abroad since ancient times. Its primary aim is to create a home for a child where it can be cared and matured. In ancient

times, adoption was primarily concerned with providing a family heir's and strengthening the family. It was only after the World War-I and II, the concept of welfare of the child emerged and the focus shifted on the interests of the children. The desire to provide homes to orphans and homeless children led to the adoption of such children. Our main concern is to provide legislations for the welfare of the children.

The government of India has adapted various policies for the welfare of the children. A Bill was introduced in 1980 called Adoption of Children Bill 1980. India has been signatory to various International Conventions for the welfare of the children.

Laws of Adoption in India

i) Hindu Adoption and Maintenance Act

Adoption according to Indian law is a matter of personal laws 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, following persons can make adoptions:

1. 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.
2. 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 opposite sex is allowed. Where there

is an adoption of male child by female, than the female shall be at least 21 years older than the son. Where there is an adoption of a female child by male, than the male shall be at least 21 years older than the daughter. The adopted child has the same rights as the biological child. Adoption under this Act is irrevocable.

ii) Guardians and Wards Act, 1890

As there is no general law for adoption and the personal laws of Muslims, Christians, Parses and Jews does not recognise the concept of complete adoption. Under this Act who is desirous of a child can become a guardian of the child until it 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.

iii) 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 child. The Juvenile Justice (care and protection) Act, 2006 has been introduced with the objective 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' and 'a juvenile found begging', 'a street child' 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.

iv) 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 in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated /recognised adoption agencies [1].

Adoptions among the Different Religions

In India there is no general law for adoption, it is regulated by the personal laws of the community. Among Hindus adoptions are regulated through the Hindu Adoptions and Maintenance Act, 1956. The Act does not cover adoptions for Muslims, Christians, Parsees, and Jews. These communities do not have personal laws for adoptions except a section of Muslims. The other communities indirectly invoke The Guardian and Wards Act, 1890 to obtain guardianship of the child during minority, but do not deal with adoption as such.

i) Adoption Under Hindu Law

The Shastric Hindu Law considers adoption as a sacramental rather than a secular act. The Supreme Court has observed that the objects of the adoption are twofold:

1. The first object was religious, i.e., to secure spiritual benefit to the adopter and his ancestor, by having a son for the purpose of offering funeral cakes and libations of water to the means of the adopter and his ancestors;
2. The second was to preserve the continuance of one's lineage.

Presently, the adoption under Hindu Law is governed by the Hindu Adoption and Maintenance Act, 1956. It only applies to Hindus, defined under Section-2 of the Act and includes any person who is Hindu by religion, including Buddhists, Jains, 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 unknown and who is in either case brought up as Hindu, Buddhist, Jain or Sikh.

Before the commencement of this Act, only male could be adopted but after this Act was introduced a female may also be adopted.

ii) Adoption Under Muslim Law

Mohammedan law does not recognise the concept of adoption and argues that it is against the Quran. They take into account the concept of acknowledgement. If a Muslim adopts a child, the paternity of the child cannot be established.

Before the Shariat Act, 1937 adoptions were recognised according to customs, but in matters of adoption Muslim personal laws do not automatically apply on a person. Muslims never acknowledges another's child as their own. Unlike the Hindu Law, the adoptive parents do not get the status of natural parents under Muslim Law.

It has been believed that the Prophet himself disapproves of adoption. The relevant verse of Quran as contained in S.33. A4-6 reads as:

"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 not know their father's name, (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 [2]."

The careful reading of the above verse will reveal that it does not prohibits adoption, it merely says that the adopted child is to be called by their father's name and if the name of the father is unknown then it shall be called as mulla or brother. It is nowhere mentioned that if one adopts a child it will be against the dictates of the Allah. Thus it is interpreted that the Holy Quran does not prohibits adoption.

In the case of *Muhammad Allahdad Khan vs. Muhammad Ismail* [3] 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 recognise adoption as a mode of filiation."

Uniform Civil Code

The constitution of India in Article 44 states that, "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". But we have failed to provide a uniform law of adoption for all the communities. The first attempt to provide a common law of adoption was the Adoption of Children Bill 1972 which was applicable to all the communities but it was opposed by the Muslim community. According to them Adoption is against the Quran. The second attempt was made on 16th December, 1980, the Adoption of children Bill 1980 was introduced in the Lok Sabha, which exempted Muslim Community. This attempt too was failed as it was opposed by the Bombay Zorastrian Jashan Committee, which formed Special committee to exempt Parsees from the bill. This bill was also lapsed when the parliament dissolved in 1984.

The Indian Constitution embodies Article 14 and Article 15 which talks about Equality before law and prohibition of discrimination against any citizen on certain grounds, but having laws of adoption for only one community is a gross violation of these provisions. The Supreme Court of India in the case of *Bommai vs. Union of India* [4] states that "Secularism is one of the basic features of the Indian Constitution while freedom is guaranteed to all persons in India from that point of view of the State, the religion, faith or belief of a person is immaterial. To the state all are equal and are entitled to be treated equally.

There was no uniformity of law of adoptions until the judgement of *Shabnam Hashmi vs. Union of India* [5], any person can adopt irrespective of the religion under the Juvenile Justice (care and protection) Act, 2000. This case was presented by Shabnam Hashmi, who has only guardianship rights over a girl she adoption as adoption is not allowed in Muslim personal law. She claimed adoption on Humanitarian grounds and adoption to be a fundamental right. The court granted her the right of the parent over the girl and also stated that all the future intended parents desirous of adopting can seek adoption under the Juvenile Justice (care and protection) Act, 2000. However the Supreme Court has rejected the right of adoption is a fundamental right envisaged under Article 21 of the Constitution of India.

The decision of the Supreme Court has brought an urgent need to revise the adoption laws and grant every parentless child the right to have a family, to be nurtured, to be taken care of, and to have a home.

Inter-Country Adoptions

The inter-country adoptions are comparatively a new phenomenon which began to develop on a large scale at the end of the Second World War. There is no legislation providing for the adoption of an Indian child by a foreign parent. The only way in which a foreign parent can take an Indian child in adoption is by becoming a guardian of the child under the Guardians and Wards Act, 1890. Section 7 of

the Act deals with the power of the court to appoint or declare a person as guardian. Therefore, a foreigner wishing to take an Indian child for adoption has to use the circuitous route under the Guardian and Wards Act, 1890. The order will appoint the person as guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it, in accordance with the law of his country. This procedure led to a lot of malpractices by social organizations and voluntary agencies engaged in the work of facilitating the adoption of Indian children to foreign parents. After hearing several social organizations and voluntary agencies engaged in placement of child in adoption, an exhaustive judgment was delivered formulating the normative and procedural safeguards to be followed in inter country adoption.

The procedure for inter country adoptions laid down by the Supreme Court in *Lakshmikant Pandey vs. Union of India* [6] case can be treated as modern public interest litigations which have acknowledged inter country adoption as a means to rehabilitate abandoned children. These guidelines have put a stop to provide adoptions. All inter country adoptions are adoptions directly by foreign parents through government recognized adoption authorities or agencies recognized by them in both sending and receiving countries. The judgments attempt to make every party in the adoption process accountable.

The writ petition in this case was instituted on the basis of a letter addressed to the court by an advocate, Laxmikant Pandey alleging that Social Organization and Voluntary Agencies engaging in the work of inter-country adoptions are indulged in malpractices. It was further alleged that not only Indian children of tender age are under the guise of adoption exposed to long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and the Relief Homes, they in course of time become beggars or prostitutes.

Besides these guidelines laid down by the Supreme Court in *Laxmikant Pandey's* case, there is no definite legislation in India for inter-country adoptions.

Suggestions and Conclusion

Adoption is one of the concepts which have undergone a radical change in the course of transit from primitive to modern age. A study through times provides an interesting view of its changing concept, form, objectives and purposes. By adoption an artificial but permanent relationship of parent and child is created which was not in existence earlier. Adoption raises a presumption of factitious birth of the child in the adopter's family.

Institution of adoption in one form or the other is prevalent in almost all the legal systems of the world. The roots of the institution are traceable into earliest historical times. There has been a complete change in approaches towards children. The shift in focus is from the welfare to the developmental approach. There is a need for not only reviewing the existing law but making the legal provisions in the context of adoption of all needy children.

Adoption in India is recognised as such by the Hindu law only and not by the Mohammedan, Christian or Parsee law. Even

so, after the judgement of *Shabnam Hashmi's* they can adopt a child under the Juvenile Justice (care and protection) Act, 2000, absence of a uniform law for adoptions is still a major lacuna of our legislature system. There should be a uniform law for adoptions and adoptions should not be governed by personal laws. A secular approach should be taken rather than having different laws for different religions.

It cannot be overstated that the need of the hour is great desirability of a uniform law of adoption so that in accordance with our constitutional mandate under Articles 14, 21 and 44 of the Constitution of India all communities are given an equal standing in the society and the children do not suffer and their interest is not abused. We should not let religious orthodoxy and sentiment rule our personal laws. It is the need of the hour to provide the destitute, homeless, unwanted children a home, thus a uniform personal code has to be adopted

In India, conditions of poverty and related social problems, scarcity of national resources and economic pressures on individuals for survival often result in the neglect of children. Current trends and social concerns in this respect, however, oblige the nation to give due importance to this aspect if and when comprehensive legislation is undertaken.

As the position stands at present, there is no statutory law in India providing for adoption of a child by foreign parents. Neither does any other national legislation lay down the procedure to be followed in such a case. Apart from the guidelines ruled out by the honourable Supreme Court in the case of *Laxmikant Pandey vs. Union of India*, the Indian Parliament has failed in providing a legislative frame-work for inter-country adoptions. A codified legislation should be framed for inter-country adoptions to provide justice and for the welfare of the child.

It is worthy of mention that in the last four decades several major policies and action plans have been implemented for improving the status of children. But still the commitment undertaken by India requires that legislative administrative and other measures follow to implement specific policies and a review and revision of all pertaining laws to the children.

The children constitute the most fundamental and valuable resource of any society and there is justice to the child as in the words of Rabindranath Tagore:

“Every child when born brings with the hope that god is not yet disappointed with man”

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