



Adoption in India: The deconstruction of the evolving jurisprudence

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Abstract

Adoption is the formal union of a child and the person willing to adopt them. In India, adopting a boy for last rites after the passing of the adoptive parents has undergone liberal adjustments. Although adoption has been practised for many years, the adoption legislation evolved in the nineteenth century. In India, there are many different religions, but there is no one adoption rule that applies to all religions. Hindu Adoption and Maintenance Act, 1956, followed by Hindus, Sikhs, Buddhists, and Jains is the only personal legislation in India that has existed to date that regulates adoption. Due to the lack of a personal law governing adoption in India, religions like Muslims, Christians, Jews, and Parsis are unable to adopt a child and offer him or her their family name. Under the Guardians and Wards Act of 1890, they can only take on the role of guardian for the kid. This essay focuses on an in-depth analysis of Indian adoption law and addresses the need for a uniform civil code in this area as well as how little influence foreign adoption laws have on Indian adoption law.

Keywords: Adoption, personal law, indian adoption law, foreign adoption law, uniform civil code

Introduction

“Being a parent wasn’t just about bearing a child. It was about bearing witness to its life.”

In accordance with Hindu mythology, an only boy may be adopted in order to preserve the family line and carry out funeral rites. Even the Dharmasastras only discuss the requirements for adopting male children. A kid was traditionally adopted for temporal and spiritual reasons, but today adoption is also done to sate the adopters' emotional and parental needs.

It was essential to invite relatives to the adoption ceremony (Dattahoma), which was considered the most significant witness to the adoption in ancient India. The adopted child is still entitled to the property even if a male is born after his adoption, according to Smrtikaras, if a person adopts a child, he will be the authority or heir of the entire property inherited. Due to the value Hindus place on a male kid, adoption traditionally developed among the Hindu people. According to Hindu scriptures, everyone should have their own natural kid; if they don't, they were allowed to have the additional kid. A natural-born child was believed to be the only representation of a male in historical events, and it was thought to be wholly incorrect to accept a secondary son through adoption. As a result, Hindu texts never recognised a son other than a man's natural son as legitimate. Early Hindu thought did not accept female adoption. The fact that the scriptures forbade the wife or a daughter from officiating at a man's funeral or reciting holy texts is proof of this. It was held that a female infant could not deliver the dead from the torments of the afterlife or save them from hell.

Evolution of adoption in the nineteenth century

The practise of adoption has a lengthy past in America. Adoption in America is a legal procedure that establishes the position of parent and child even though there is no biological connection between them.

The Industrial Revolution ushered in the biggest shifts in human history. Beginning in the United Kingdom, significant changes in agriculture, manufacturing, mining,

transport, and technology between the 18th and 19th centuries had a profound impact on socioeconomic and cultural conditions before eventually spreading throughout Europe, North America, and eventually the entire world. In the second half of the 19th century, as a result of the Industrial Revolution, modern American adoption legislation developed, allowing the child welfare system to support a significant number of immigrant children who were frequently in need of care and protection. These dependent children were occasionally housed in homes for the mentally sick or foundlings, both of which had high mortality rates.

More than a lakh children were placed during the nearly 50-year span between 1853 and the early 1900s in America thanks to the Orphan Train campaign. In America, this social experiment is now known as the foster care idea. In 1851, Massachusetts became the first state to enact legislation requiring court oversight of adoptions, and by 1929, all states had adopted some form of such legislation. It was common practise to perform adoptions in private with records sealed during the early 20th century, in part to shield the partners from the stigma of an illegitimate biological relationship. Many organisations worked to provide kids in the 1950s to make the adoption procedure easier. By the 1970s, it was typical for American parents to have to wait three to five years after submitting their original application to a private adoption agency before a healthy baby was placed with them.

After World War II, adoption organisations started matching children from Europe, Korea, and Japan with American families. Korea was the main source of foreign adoption at the time. Chinese government's one-child policy has given American families a new supply of newborns. There were more transracial adoptions of black children by white parents in the 1960s, which coincided with the Civil Rights Movement. However, due to white families' inability to support the development of black children's psychological and cultural identities, transracial adoption now only makes up a tiny portion of all adoptions.

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

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

1. Difference between hindu adoption and maintenance act, 1956 and guardians and wards act, 1890

In India, there is no overarching law governing adoption of people of various religions. The Hindu Adoption and Maintenance Act, 1956, which allows Hindus to adopt a child lawfully, governs all adoption-related laws in India. Only Hindus in India have the legal right to adopt children; anyone from another faith who wants to adopt a child must adopt the child under the terms of The Guardians and Wards Act, 1890.

Catholics, Muslims, Parsis, and Jews are subject to the GAWA because these groups' personal laws do not recognise full adoption. The only relationship that can be formed after adoption under the GAWA is that of guardian and ward, respectively. Contrary to HAMA, GAWA adoption does not grant the adopted kid the status of a child. Hindus, Jain, Buddhists, and Sikhs are all covered by the HAMA. According to this law, the adoption is final and grants the child the same legal rights as a child who was born into the family naturally, including the right to receive property. The only limitation imposed by the HAMA is that parents cannot adopt a child of a specific sex if they have already adopted a child of that sex. In accordance with the GAWA, minors who turn 21 cease to be wards and take on individual identities. They are not necessarily entitled to receive property. Adoptive parents must leave their children whatever they wish through a will, which any 'blood' related child may dispute. The aforementioned acts say nothing about orphans, abandoned children, or children who have been turned in. Regarding the adoption of the children of these groups, there was no codified law. As a result, there were a number of misunderstandings or irregularities regarding the possession, guardianship, or adoption of these kinds of kids that were detrimental to the kids' best interests.

2. The juvenile justice (care & protection of children) act 2000

All Indian citizens must abide by the Juvenile Justice (Care & Preservation of Children) Act 2000. It permits the adoption of two identical twins. It grants parental and child standing rather than guardian and ward.

Additionally, it grants the adopted child the same privileges as a child. The Juvenile Justice (Care & Protection of Children) Act of 2000 is intended for the care, protection, development, and rehabilitation of children in need of care and protection as well as the adjudication and resolution of specific issues relating to them. Similar to the Special Marriage Act of 1954, which permits any individual regardless of the faith he practises, to get married under that Act while residing in India. This act applies to children up to the age of 18, and it offers a uniform framework for justice across the nation. There was no written law prior to the JJ Act.

3. Constitution of India

The Indian government is working to ensure the welfare and complete rights of children. Chapter III of the Indian

Constitution outlines Basic Rights. Article 21 states that "No individual shall be deprived of his life or personal liberty except in accordance with the procedure established by law," which is one of these rights. Article 21 thus guarantees that every child can exist in dignity.

The protection against child exploitation is provided in Article 24 of the "Fundamental Rights of the Citizens" document.

The State shall endeavour to obtain for the citizens a Uniform Civil Code throughout the territory of India, according to Article 44 of the Constitution.

This objective has not yet been completely attained.

According to Article 39, the State must focus its policies on giving children a healthy atmosphere and making sure that the facilities are available. Young people are safeguarded against exploitation, forced labour, and moral and material abandonment by giving them a sense of independence and dignity.

4. Impact of International Convention on CARA

According to international standards like the United Nations Convention on the Rights of the Child, which the Indian government ratified in 1992, it is widely regarded as a progressive legislation. By ratifying the Convention, the government agreed to be held accountable for aligning all state laws and policies with the fundamental tenants of children's rights, including best interest, equality for all, and child input.

The provision for adoption of children as an alternative to institutional care has been inserted into this Act.

Adoption amongst various religions in India

Despite the fact that there is no general rule on adoption in India, it is legal among Hindus.

Since adoption is a child's formal affiliation, it falls under the purview of personal law. Without adoption legislation, Muslims, Christians, and Parsis must file a court petition under the Guardians and Wards Act, 1890. Adoption under a foreign law, or law that applies to the guardian, takes place outside of the nation if the court has granted permission for the child to be taken there.

1. Adoption under hindu law

Adoption was viewed more as a sacramental than a secular deed in Shastric Hindu Law. According to some judges, adoption serves two purposes: to ensure that one's funeral rituals are performed and to maintain one's lineage. Hindus thought that if a person died without having a son, they would go to hell and that the father could only be saved from Poota by having a son. One of the justifications for having a boy was this. The Hindu Adoption and Support Act, 1956 currently governs adoption under Hindu law.

The Hindu Adoption and Maintenance Act of 1956 only applies to Hindus, who are described under Section 2 of the Act as anyone who identifies as a Hindu, including Buddhists, Jainas, and Sikhs, as well as anyone else who is not a Muslim, Christian, Parsi, or Jew. It also includes any kid, legitimate or not, who has been raised as a Hindu, Buddhist, Jaina, or Sikh despite having been abandoned by both parents or whose parentage is unknown.

Only males could be adopted before this Act, but it now allows for the adoption of females as well. This Act extends to the whole of India.

2. Adoption Under English Law

The industrial revolution led to changes in English adoption law, which were recognised in the second part of the 19th century. Hindu adoption law and English adoption legislation are very similar. The Adoption Act 1976, which governs adoption in English law, is eased out by the Adoption and 2002's Infants Act. Additionally, it accepts international adoption and was approved by the international adoption agreement.

In England, adoption has the same legal ramifications for parents and adopted children as if the child had been conceived during the adopter's marriage.

The authority to make adoptions rests with English judges. The child is typically temporarily put with the future adopters by the English Adoption Agencies before the final adoption order is made.

3. Muslim Adoption and Practice In India

According to Mohammedan law, adoption that establishes a parent-child bond, as is known to Hindu law, is not permitted. They account for the idea of acknowledgment.

If a Muslim fosters a child who is not his biological child, he or she cannot prove paternity on the child's behalf.

Several authors on Mohammedan law are of the opinion that adoption among Hindus establishes a parentage relationship that is not recognised by Mohammedan law. The validity of any method of filiation where it is known that the adoptee's parentage originates from someone other than the adopting father is not recognised by Muslim law. Adoption, in the opinion of writers like Ameer Ali, Wilson, and Abdur Rahim, is not covered by Islamic law. They believe that the Holy Quran forbids adoption, but the idea that adoption is not permitted or that adoption is not recognised by Muslim law is entirely the result of incorrect Shariah application.

Adoptions among some Muslims were recognised and permitted by traditions prior to the Shariat Act of 1937. However, Muslim personal law does not always apply to a person in issues of adoption. Therefore, a Muslim never recognises another person's child as his own, and the child is thought to be the true direct descendent. In the event of an adoption, the adopted child keeps his or her biological family name and does not alter it to reflect the adoptive family's name. Contrary to Hindu law, foster parents do not technically have the same rights as biological parents.

3.1. The Holy Quran

In pre-Islamic Arabia, adoption was a common practise that, in some cases, was motivated by a feeling of comradeship in arms. The adoption of Zaid appears to have given the adoption procedure some recognition. Even the apostle Muhammad himself adopted Zaid, the Haris son.

Among Mohammedans, adoption continued a common practise. However, it has been claimed by different authors that the Prophet himself disapproves of adoption on the basis of a verse in the Quran. The pertinent Quranic verse, found in S.33.A.4-6, is as follows: "Allah has not made for any man two hearts in his breast, nor has He made for you the mothers of your wives whom you have divorced by Zihar, nor has He made for you the sons of your adopted sons. That is the only way you can speak with your lips. But Allah reveals the truth to you and guides you in the correct direction. Calling them by their dads' names is appropriate in Allah's eyes. However, if you don't know their fathers' names, they are still your brothers in faith or friends, and

even if you make an error there, Allah is always forgiving and extremely merciful, so you are not to blame. The Prophet and his wives are the mothers of the Believers, being closest to them than they are to themselves. In the Book of Allah, blood relations have closer interpersonal bonds than (the Brotherhood of) believers and Muhajirs.

According to the Quran's aforementioned verse, adoption in the strictest sense is forbidden by Muslim law. It is argued that a close reading of this text will reveal that adoption is not forbidden anywhere. The Prophet believed that if taken too literally, calling another man's son "his son" could complicate a natural and normal connection. The Prophet intended to convey that an adopted son is not a genuine son and that only a real son can be born. If one doesn't have a biological son, treating an adopted son like a real son is not a mistake because what matters is the purpose of the heart. Even though it is stated in this verse that adopted sons should be referred to as mulla or brothers if their father's identity is unknown, it is not stated in this verse that any adoptions made by a man without an adopted son are forbidden by Allah. It will be more just in Allah's eyes if you call a guy by the name of his biological father. But it won't be unfair, and Allah won't be upset if you refer to him as your son. Adoption has not been expressly forbidden by the Lord. To the detriment or loss of true blood relations, a false relationship is meant to be established. Where there is a conflict of duty, the followers should go with him rather than their parents or siblings.

The practise of adoption is legal among Muslims, and Shariah law does not forbid it. This will be covered in more detail later. Therefore, it cannot be said that adoption is forbidden by the Sacred Quran. If the prophet forbade adoption, as is implied by the verse above, it cannot be presumed that what the Holy Quran forbids can be made legal by tradition and usage. As a result, adoption is not forbidden in the Sacred Quran anywhere.

3.2. The muslim personal law (Shariat) application act, 1937 and its effect on adoption

Adoption restrictions apply to all Religious nations. Afghanistan, Bangladesh, Iraq, Israel, and Kuwait are examples of nations that either do not recognise or forbid adoption. Under the Guardian and Wards Act of 1890, an individual's adoption in Pakistan is only formally recognised when a guardian court gives a decree or a guardianship certificate to that person. Adoption is not acknowledged in Islam. There is nothing in the Mohammedan Law that is comparable to adoption as recognised in the Roman and Hindu systems, the judge in Muhammad Allahdad Khan v. Muhammad Ismail Mahmood J. observed. Adoption is not recognised as a form of kinship under Islamic law. To create a uniform adoption legislation that would apply to all Indian citizens, regardless of their religion, the Adoption of Children Bill was introduced in the parliament in 1972. However, the Government withdrew the Measure in 1978, preventing its passage.

3.3. Shabnam Hashmiv vs. Union of India

The Muslim Personal Law Commission raised the concern that Muslim Personal Law does not permit adoption, which is an objection to the idea of adoption in Muslims. Although the "Kafala system" was created with children's safety in mind. According to this system, a Muslim cannot adopt a child but can always become the child's kafil and can take

care of the child's maintenance and well-being, including providing financial assistance to the child, even though he is not the child's biological parent.

Despite everything, the kid will still be regarded as the biological child of the parents, and becoming Kafil does not equate to adopting a child.

According to the Honorable Supreme Court, the Juvenile Justice Act of 2000, as amended in 2006, is a secular law that pertains to everyone, including Muslims. It was passed for the benefit of children and makes it possible for anyone to adopt a child. As a result, a Muslim may adopt a kid even if he is bound by Muslim personal law. A Muslim may still use JJA despite the presence of Muslim personal law. So, a Muslim has the option of choosing to be ruled by Muslim personal law, which forbids adoption, or he can choose to be governed by the JJA, which permits adoption.

Additionally, it was determined that the right to adopt or be adopted is not a basic right in the modern world. The reason is that there are conflicting religious beliefs and practises involved, and the current situation does not permit the establishment of it as a basic right.

In re: Manuel Theodore Dsouza and Philips Alfred Malvin versus Y.J. González & Associates The Board objects to such a statement for the reasons already mentioned, namely that Muslim Personal Law does not recognise adoption but does not forbid an unmarried couple from providing a child with care, protection, and love.

In accordance with GAWA, adoption only confers the pair with guardianship rights; as a result, they are not the child's sole parents but merely his or her guardians, and the child is free to leave them once he or she reaches the age of 18. Even the kid is not safe once they reach the age of 18, as their inheritance rights will be weaker and susceptible to challenge by other children and family members.

In the unfortunate event that the guardians pass away, the child officially reverts to the state's custody. In contrast, when a child is adopted, the grandparents, uncles, and aunts take care of them as they would with any other child.

Since there are numerous religions in India, each should have its own adoption legislation, but non-Hindu adoption is given very little consideration by our legislators. Muslims and Christians in India are dealing with psychological and judicial issues as a result of the legislature's failures. They are unsure of the child's status as a family member. The fact that a Hindu cannot adopt a Muslim kid is another unfortunate aspect of Indian adoption.

According to the Hon. Supreme Court of India, it is doubtful that the personal laws of religious minorities will be able to be changed or amended as frequently as Hindu personal law has. A Muslim may elect to be governed by Muslim personal law and thus be prohibited from adopting children, or he may opt to be governed by the JJA and be permitted to do so.

Importance of a uniform civil code

Since the historic decision in Mohd. Ahmed Khan v. Shah Bano Begum, which made us understand the importance of having a uniform civil code, In India, all laws are uniform with the exception of family law. This situation needs to alter, and all Indian citizens must be subject to the same laws. Adoption should be subject to consistent legal regulations. Religious restrictions alone prevent adoption of children. Religious restrictions limit the ability of childless parents to foster a child. They cannot lawfully refer to

themselves as the adoptive parents of the child. As a result, a uniform civil law is absolutely necessary for adoption. There wouldn't be a single couple without children if the same laws applied to all Indian citizens in this region.

Conclusion

“The circumstances surrounding your birth are not as important as the opportunity to live.”

The most profitable method of integrating into society may be through adoption. Having the courage to hope for a child finding a home is a brave thing to do. Adoption agencies now operate as organised industries that are carefully regulated by the federal and state governments. Domestic adoption has gained momentum since the Indian government began to oversee and control international adoption legislation. Adoption's psychological impacts are difficult in every way, but working with social workers and getting counselling will help families secure their future. Due to the country's family planning system's prohibition on abortions as well as the expansion of its economy, the overall number of abandoned or surrendered children has decreased.

Hindu adoption rules and women's status in society have both significantly improved. It is unfair that Muslims cannot lawfully adopt a child in India simply because there is no unified civil code on adoption. A childless couple's social life will be improved by the adoption of the Uniform Civil Code, which will also make it permissible for other Indian faiths to adopt children. A child who receives the appropriate care and protection will have a successful future. Although it is a very complicated procedure, if it is implemented, every child who is parentless will be able to attend school and live a life he could never have imagined. Additionally, adopting a kid should not be based on gender bias.

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