

A CRITICAL ANALYSIS OF ADOPTION LAWS IN INDIA

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

Jodi Picoult

I. INTRODUCTION:

Adoption is not to be treated as an act by a State to force a child on unwilling parents. On the contrary it is a voluntary act on the part of eligible persons to provide comfort, love and security to the abandoned and homeless children. No religion, can deny the love and affection towards the child because these children are given by God. In the smile of the child we see the beauty of creation. Children are considered as a future of country. While on one hand children have right to pampered, taken care of and given all the necessities for development, on the other hand there are many children being abandoned per year in India. In some cases, these children become victims of human trafficking and sexual violence. In fortunate cases, the abandoned children are taken to any adoption agency. Such cases, of children adoption give a chance of second life. In its simplest of senses, adoption is a process whereby a person assumes the parenting for another and, in doing so, permanently transfers all rights and responsibilities from the biological parent or parents.

II. ORIGIN OF ADOPTION CONCEPT

In early 17th Century Dattaka-mīmāṃsā by Nanda-Pandita was considered to be the classical work on the topic of Adoption and subsequently used by the British authorities as Hindu law³. Later it was translated by Sutherland in 1821. Another renowned work Dattaka chandrika is attributed to Kuvera. Indian culture has its distinctive paradoxes. Indian mythology is full of stories where babies were born in one place and brought up elsewhere by non-parents. The tenets of Hindu Law clearly state that 12 kinds of sons were recognized and one of them was the Dattaka son, i.e, a son whom his father or mother gives as a son

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³ Mayne: “Hindu Law & Usage”(Bharat Law House, New Delhi, 2012) at P 2-3

affectionately in a time of distress to one who is of the same caste. Under Indian law there is no specific law for child adoption but due to judicial activism there are lots of cases which have set precedents for the contiguous issues and other complexities in child adoption⁴.

During the early part of 20th century it was common for parents to wait 3-5 years after their initial application to a private adoption agency before they had a healthy infant placed with them. The civil rights movement of the 1960s was accompanied by an increase in the number of adoption.

III. MEANING 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”

Punjab and Haryana High court in *Inder Singh V Kartar Singh*,⁵ has expressed the meaning and purpose of adoption in the following words.

“Broadly put, adoption under Hindu law is the admission of the stranger by birth to the privileges of a child by a legally recognized form of affiliation and contemplation of Hindu law and adopted child is deemed to be begotten by the father who adopts him or for and on behalf of whom he is adopted. Thus, ‘Taking of a son’ is a substitute for the failure of male issue and its object is two folds:

- 1) To secure the performance of funeral rites of the person to whom the adoption is made; and
- 2) To preserve the continuance of his lineage. In other words the main object of adoption under strict Hindu law seems to be to secure spiritual benefit for the adopter, though its secondary object is to secure an heir to perpetuate an adopter’s name”.

⁴ Vinita Bhargava:” Adoption in India – Policies and Experiences” (Sage Publication, New Delhi, 2013) at P 24

⁵ AIR (1966) Punj.258

According to *Black's law Dictionary*: Adoption is a legal process pursuant to state statute in which a child's legal rights & duties towards his natural parents are terminated & similar rights & duties towards his adoptive parents are substituted. To take into one's family the child of another & give him or her rights, privileges & duties of a child & heir. The procedure is entirely statutory & has no historical basis in common law. Most adoptions are through agency placement.⁶

IV. THE OBJECTIVES OF ADOPTION AS FOLLOW:

1. To get old-age protection by the adopted child.
2. To perpetuate family name and fame.
3. To keep secured the family property.
4. To solemnize of last rites and rituals of parents.
5. To provide a better future
6. To save life of a child
7. To provide a good family and love
8. To avoid any king of treatment to those who cannot conceive.

V. FUNDAMENTAL PRINCIPLES GOVERNING ADOPTION

The following fundamental principles shall govern adoptions of children from India, namely:-

- The child's best interests shall be of paramount consideration, while processing any adoption placement.
- Preference shall be given to place the child in adoption with Indian citizens and with due regard to the principle of placement of the child in his own socio-cultural environment, as far as possible

⁶ Bryan,A.Garner, "Black's Law Dictionary", (Thomson Business, USA: West Publishing Company, 1990) ,P 28 to 30.

- All adoptions shall be registered on Child Adoption Resource Information and Guidance System and the confidentiality of the same shall be maintained by the Authority.

VI. ADOPTION LAWS IN INDIA

I.CONSTITUTION OF INDIA

The Constitution of India do not directly deals with any kind of adoption. However it has contains numerous welfare provisions for social security of the children. Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services⁷. Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection⁸. The same also ethos in Constitution of India under Article 21. It guarantees that “No person shall be deprived of his life or personal liberty except according to procedure established by law”⁹ According to Bhagawati,J., Article 21 “embodies a constitutional value of supreme importance in a democratic society.” Krishna Iyer J., has characterizes Article 21 as “the procedural magna carta protective of life and liberty. This right has been held to be the heart of the Constitution, the most organic and progressive provision in our living constitution, the foundation of our laws. It is not direct provision but right to life include right to get marry and right to adopt a child also. The main aim of this Article is that every person lead a complete, meaningful and dignified life, it cannot be curtailed by state or any person without the procedure established by law. So under this provision every child has to live with dignity. Further, Article 23 of the Constitution prohibits traffic in human being¹⁰, beggar¹¹ and other similar forms of forced labour¹². This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and contrary to basic human values. The practice of forced labour¹³ is condemned in almost every international instrument dealing with human rights. Article 24 of

⁷ Article 25(1) Universal Declaration of Human Rights.

⁸ Article 25(2) Universal Declaration of Human Rights

⁹ Article 21 of the Constitution of India.

¹⁰ Traffic in human being means selling and buying women and children like goods and includes immoral traffic in women and children for immoral or other purposes.

¹¹ Begar means involuntary work without payment.

¹² It means to compel the person to work against his will.

¹³ The world force construed to include not only physical or legal force but also force arising from the compulsion of economic circumstance which leaves no choice of alternatives to a person in want and compels him to provide labour or service though the remuneration received for it is less than the minimum wage.

the Constitution prohibits employment of children below the 14 years of age in factories and hazardous employment. This provision is certainly in the interest of public health and safety of life of children. Children are assets of the nation. That is why Article 39 of the Constitution imposes upon the state an obligation to ensure that the health and strength of workers, men and women and the tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. It may be interpreted to include acts of beggary, for it is definitely an avocation unsuited for them.

In *Saral Mudgal V/S Union of India*¹⁴, the Apex Court has stressed on the need for the uniform civil code in the matter of marriage, succession and adoption etc. In the opinion of the court the fundamental rights relating to religion of members of any community would not be affected thereby. The court has made it clear that the legislation- not religion being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded or supplemented by introducing a uniform civil code

II. The Hindu Adoption and Maintenance Act, 1956 (HAMA):

It's only a statute governing adoption of children in India relating to Hindus. Hindu Adoption and Maintenance Act amended the pristine law of adoption among Hindus and unified the customary forms of adoptions into a single form. The Act recognizes even a private act between the natural and adoptive parents concerning adoption and except in giving the child for adoption by a person other than the natural guardian, even the scrutiny or permission of the court is not required. Even a religious ceremony like Dattaka Home is not necessary. The child to be adopted must actually be given and taken in adoption by the parents or guardians with the intent to transfer the child to the family of its adoption¹⁵. The married couple, widow, widower, single or divorced or deserted women are eligible to adopt a child under this Act. To prevent sexual abuse, the Act provides that there shall be an age difference of 21 years between the adoptive parents and the adopted child, whenever they are of opposite sex

III. The Guardian and wards Act 1890:

The Guardian and wards Act is indirectly invoked by other communities such as Christians, parsis, Muslims etc. to become guardians of the child during minority. The statute does not

¹⁴ (1995) 5 SCC 730.

¹⁵ M.N.Srinivasan: "Hindu law in Bharat", (Law book co,) at P344.

deal with adoption as such, but, mainly with guardianship. The process makes the child as a ward, not an adopted child. Under this Act, when children turn 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 a leave whatever they wish to bequeath to their through a will, which can be contested by any blood relative¹⁶.

In fact the Act provides the law and procedure for determining the custody of the child on dissolution of marriage and also provides for the appointment of guardians over the person or property or both of children by persons who are not the natural parents of the child.

IV. Adoption under the juvenile justice act, 2015 and adoption regulations 2017.

The Juvenile Justice (Care and Protection of Children) Act, 2015 deals with various aspects of adoption of orphaned¹⁷, abandoned¹⁸ and surrendered children¹⁹. Adoption of such children is in consonance with the emphasis on right to family of every child in need of care and protection. Juvenile Justice Act is a secular Act i.e, it applies to all the persons. The provisions of this Act do not apply to adoptions made under the Hindu Adoption and Maintenance Act, 1956.

Eligibility criteria for adoption by Prospective adoptive parents.

The prospective adoptive parents will to adopt a child; they must possess the following eligibility²⁰:

- 1) Prospective Adoptive parents should be physically fit, mentally alert and emotionally stable and should not have any life threatening medical condition;
- 2) The prospective Adoptive Parents should have adequate financial resource to provide a good upbringing to the child;
- 3) Consent of both the spouse is required in case of couples willing to adopt;

¹⁶ Choudhari : “The Guardian and Wards Act 1890” (Premier Publication Company, Allahabad, 2009) at P 210.

¹⁷ A child who is without biological or adoptive parents or legal guardian or whose legal guardian is either unable to unwilling to take care of the child.

¹⁸ A child deserted by his biological or adoptive parents or guardians and who has been declared as abandoned by the Child welfare committee following due inquiry.

¹⁹ A child who has been relinquished by the parents or guardian to the Child welfare committee due to physical, emotional or social factors that are beyond their control and declared as such by the CWC.

²⁰ Regulation 5 of the Adoption Regulation 2017.

- 4) A single female can adopt a child of any gender;
- 5) A single male is not eligible to adopt a girl child;
- 6) The couple should have at least two years of stable marital relationship;
- 7) The couple should free from all criminal records;
- 8) Age of the child and prospective adoptive parents also take into consider;
- 9) Living together person is also eligible to adopt a child;
- 10) The couple should not have more than three children; so the couple can legally adopt two or more child intermittently.
- 11) Adoption of a second child is permissible only when the legal adoption of the first child has been finalized but this is not applicable in case of siblings.

Age criteria of child and Prospective adoptive parents:

Age of the child	Maximum composite age of PAPs (couple)	Maximum age of single PAP
Up to 4 years	90 years	45 years
Above 4 up to 8 years	100 years	50 years
Above 8 up to 18 years	110 years	55 years

The minimum age difference between the child and either of the prospective adoptive parents should not be less than twenty five years.

Who are the children eligible for adoption in inter country and in country adoption:

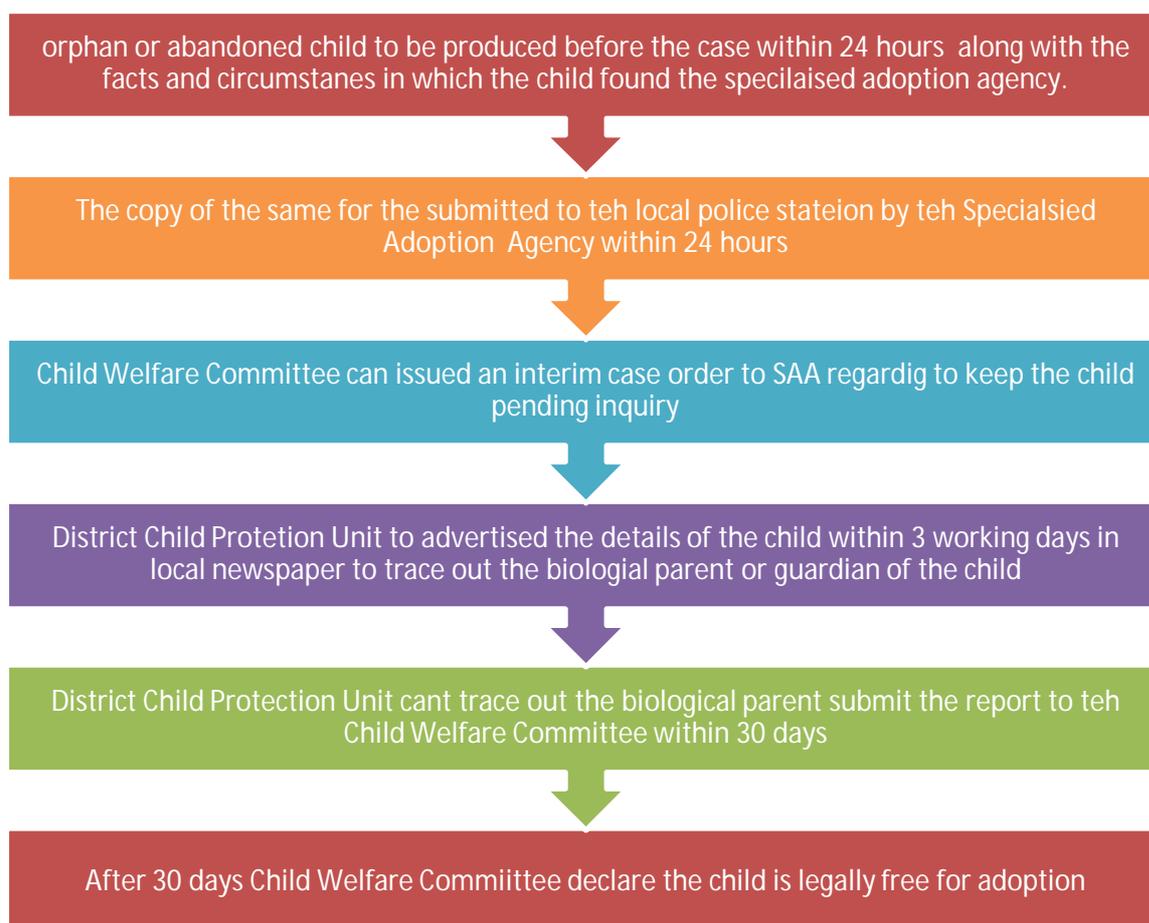
The following shall be eligible for adoption, namely:-

- a) Any orphan ;
- b) abandoned ;
- c) Surrender child, declared legally free for adoption by the Child Welfare committee;
- d) A child of relative;
- e) Child or children of spouse from earlier marriage, surrendered by the biological parent(s) for adoption by the step parent;
- f) A child up to the age of eighteen years can be adopted;

g) Special need child²¹

One of the very important conditions for adoption is child should legally free for adoption. So illegitimacy of the child is neither a pre-requisite nor eligibility for the adoption.

The process for declaring a child legally free for adoption as follows:



PROCEDURE FOR CHILD ADOPTION:

The couples wants to adopt a child, they have to submit the application through online. The procedure for adoption is laid down in the Adoption Regulations, 2017. Presently it is mandatory to register online on CARINGS to adopt a child. If couples are not familiar or unable to register online, they can approach the District Child Protection Officer of district.

²¹ Special need child means a child who is mentally ill or physically challenged or both as specified in Schedule XVIII of the adoption regulation 2017.

Procedure for in- country adoption:

- Parents register online on CARINGS.
- Select preferred Adoption Agency for HSR (Home Study Report) and State.
- User ID and Password generated
- Upload documents within 30 days of registration
- Registration number generated
- Specialized Adoption Agency (SAA) conducts Home Study Report (HSR) of the PAPs and uploads it on CARINGS within 30 days from the date of submission of required documents on CARINGS
- Suitability of Prospective Adoptive Parent (PAP)s is determined (if not found suitable, PAPs is informed with reasons for rejection)
- PAPs reserve one child, as per their preference from up to 6 children
- PAPs visit the adoption agency within 15 days from the date of reservation and finalize
- If the child is not finalized within stipulated time, the PAPs come down in the seniority list
- On acceptance of the child by the PAPs, SAA completes the referral and adoption process (on CARINGS)
- PAPs take the child in pre - adoption foster care and SAA files petition in the court
- Court issues an adoption order.
- Post-adoption follow-up report is conducted for a period of two years.

VII.SPECIFIC RECOMMENDATIONS IN RELATION TO CHILD

ADOPTION:

- 1) Penal offence must be included in case of any sort of failure by the agencies to comply with the rules and regulations.
- 2) Licensing procedure for the adoption agencies should be made stricter.
- 3) Awareness programmes should be arranged for the poor, needy women and parents in case they want to give their child up for adoption.
- 4) Government should take all measures to create awareness in the mind of adoptive parents, regarding to adopt a child only from the specialized adoption agency instead of adopting a child from nursing home, hospital, maternity home, unauthorized institution or individual for adoption.

- 5) Create awareness in the mind of general public regarding Child adoption procedure through advertisements or presenting skit in street, ferry etc.
- 6) Before the adoption of child, read the guidelines carefully the procedure laid down under the law rather than becoming the victims of touts.
- 7) Not to upload any incorrect documents, otherwise registration of adoption will be cancelled.
- 8) The couples should follow the all the steps for completion the registration and not to skip any procedure.
- 9) Not to pay any additional adoption charges other than the fee prescribed by Central Adoption Resource Agency.
- 10) Keep away from touts or middlemen. There is no role of touts or middlemen in adoption. They will mislead the adoptive parents to adopt a child illegally.
- 11) There is need to provide counseling for prospective adoptive parents at pre-adoption and post- adoption stage.
- 12) In order to avoid confusion regarding the adoption laws, it is necessary to codify all the laws relating to adoption.
- 13) Government should take the responsibilities to educate the people regarding adoption procedure and laws.
- 14) Let there be uniform applicability of law of adoption. Hence laws cannot bifurcate on the basis of religion.
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VIII.EPILOGUE:

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's a beneficial program where the child is treated as the natural born child and given all the love, care and attention. Adoption is the creation of a new, permanent relationship between an adoptive parent and child. Once this happens, there is no legal difference between a child who is adopted and a child who is born into a family. While adopting a child, the couples should follow the procedure laid down under the law.

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