

WOMEN'S RIGHT TO ADOPT AND TO BE ADOPTED UNDER THE PERSONAL LAWS: AN OVERVIEW

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ABSTRACT

Adoption provides a unique opportunity, not only to those who do not have child and single parent but also to those unfortunate little ones who are deprived of the pleasure of parental care and family bonding. It establishes parent-child relationship between persons who are not related biologically. Through this process the adopted child becomes the legitimate child of adoptive parents with all rights, privileges and responsibilities that are attached to the relationship. The adopted child is separated permanently from his biological parents. Basically, in India, we have two laws dealing with adoption *i.e.* the Hindu Adoption and Maintenance Act, 1956 and the Juvenile Justice (Care and Protection) Act, 2015. The present paper is an attempt to examine the women's rights adoption under the Personal Laws in India. The paper will also highlight the legislative framework and judicial response towards providing equal rights of adoption so far as women's adoption right is concerned.

Keywords: Adoption, Maintenance, legitimate child, Juvenile Justice, Personal Laws

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I. Introduction

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IN OUR country we have written Constitution *i.e.*, the Constitution of India and Part III confers the fundamental rights including right to equality. Equality is one of the basic principles enshrines in the Constitution of India any kind of discrimination on the ground of sex against any citizen is prohibited by the Constitution. So far as adoption is concerned, it comes under the “Personal” laws and whose origin may be traced from religious “scriptures”. Adoption is defined “as a process by which people take a child not born to them and raises it as a member of their family”.¹ The Hindu law is the first personal law on the subject of adoption which has been enacted by the Parliament of India. But under the old Hindu law only male could adopt and only male child could be adopted. It reflects that the women and girl child did not have right to adopt and be adopted (“adoption rights”) respectively. The position was changed under the Hindu Adoption and Maintenance Act, 1956 (*hereinafter* referred as ‘HAMA’), Under the HAMA Hindu woman got adoption rights subject to certain conditions.

So far as women’s rights of adoption in other Personal Laws (Muslims, Christians and Parsis), are concerned, these communities do not have any such right because neither their Personal Laws recognize complete adoption, nor they have any statutory laws which give them adoption rights. If any women, other than Hindu, desires to adopt a child, she cannot do so, in absence of any specific law. A woman can take the child in ‘guardianship’ under the provisions of ‘the Guardian and Wards Act, 1890’. However, this particular law does not confer the same status to the child as adopted child can enjoy and she would not legally be considered “as if born to” the adoptive parents. Other than Personal Laws any one can also adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2015 (*hereinafter* referred as ‘JJ Act’) irrespective of any religion. This right is subject to the provisions of Central Adoption Resource Authority (*hereinafter* referred as ‘CARA’).

II. Adoption Under Hindu Law

Adoption as a legal concept was available only among the members of the Hindu community and they were allowed to legally adopt the children, so far as the other religions are concerned they

¹ Debaditya Roy, “Adoption under Juvenile Justice Act: A Clarion Call to Secularism” *available at*: www.legalserviceindia.com/article/1327-Adoption-under-Juvenile-Justice-Act.html. (last visited on March 29, 2021).

could only act as legal guardians of the children.² Manu declared: “He whom his father, and mother with her husband’s assent, give to another his son provided that the donee have no issue if the boy be of the same class and affectionately disposed is considered as a son given, the gift being confirmed by pouring water”.³ Yajnyavalkya said “He whom his father or his mother gives for adoption shall be considered as a son given”.⁴ These religious texts reflect that only male child could be given in adoption and there was no reference with regard to the adoption of girl.

The HAMA applies not only to the Hindus by birth but is also applicable to Jains, Sikhs, and Buddhists as well.⁵ Section 2 of HAMA applies only to Hindus, as the child, the giver and the taker has to be a Hindu (a Muslim, Christian, Parsis, Jews, any member of a scheduled tribe governed by their customary law cannot adopt). No religious ceremony at the time of adoption is required under HAMA. It prescribes only the ceremonies of giving and taking. Chapter II of the HAMA (sections 6-17) is dealing with adoption.

Women’s Adoption Rights Under Hindu Law

Here authors will attempt to give an overview of right of women to adopt and to be adopted under old Hindu law under HAMA.

Under the Old Hindu Law:

Adoption was allowed in exceptional cases where a family did not having a child and only male had the right of adoption It was a privilege could only be enjoyed by a Hindu male and his wife did not have the locus to question his right or to object to the adoption. An adoption by a woman married or unmarried of a son to herself was invalid and conferred no legal rights upon the adopted child. Thus, under the classical Hindu law neither female could adopt nor female child could be adopted. It was restricted only for male.⁶

² *Ibid.*

³ Manu Smriti chap. IX, 168.

⁴ *Papamma and N. Appa Rau v. Appa Rau* (1893) ILR 16 Mad 384.

⁵ Explanation II of sub-clause (b) of clause (2) of article 25 of Constitution of India provides that the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly. Further, in terms of clause (b) of sub-section (1) of section 2 of the HAMA, the provisions of the HAMA apply to any person who is a Buddhist, Jaina or Sikh by religion.

⁶ Ranjana Kumari, *Femaleness: The Hindu Perspective*, in Jyotsna Chatterji (ed.), *Religions and the Status of Women* 3 (Uppal Publishing House, New Delhi, 1990).

Under the *Shastric* Hindu law adoption was considered as sacrament and a girl had no right to be adopted. The main object of adoption was: *firstly* “to secure one's performance of one's funeral rites” and *secondly* “to preserve the continuance of one's lineage.”⁷ It was belief among Hindus that one who died without having a son would go to hell called *Poota*, and it was only a son *i.e.* *Poot* who could save the father from going to *Poota*.⁸ This was also one of the reasons which made adoption of a son compulsory.

The old Hindu Law has been codified to a large extent in accordance with the Constitutional principle of equality, which is one of the ideals enshrined in the preamble and also guaranteed as a fundamental right in Part III of the Constitution of India. The HAMA, 1956 have been enacted by the Parliament for providing equal rights to women at par with men and daughters at par with son in the matter of adoption. Now both men and women are allowed to adopt and to be adopted irrespective of gender.

Provisions Under the HAMA

Section 6 of the Act⁹, provides the requisites for a valid adoption and the adoption is to be made in compliance with the other conditions mentioned in Chapter II of the HAMA.¹⁰ This section clearly provides that an adoption can only be valid, if it is done after fulfilling the conditions as mentioned under the Act. The term ‘shall’ reflect this section is mandatory in nature.

Right to take in Adoption

Section 7 of the HAMA,¹¹ makes it clear that any sound mind male Hindu who is not minor can adopt a son or a daughter. This is subject to the rider that the consent of his wife is necessary

⁷ *Inder Singh v. Kartar Singh*, AIR 1966 Punj. 258. See also, Mayne's, *Mayne's Treatise on Hindu Law and Usage* 475 (Bharat Law House, New Delhi, 2008).

⁸ *Supra* note 3 at 138.

⁹ HAMA, s. 6: Requisites of a valid adoption of the HAMA as Amended by the Amendment Act, of 2010 says: No adoption shall be valid unless— (i) the person adopting has the capacity, and also the right, to take in adoption; (ii) the person giving in adoption has the capacity to do so; (iii) the person adopted is capable of being taken in adoption; and (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

¹⁰ Such as the adoption must be completed by an actual giving and taking and the ceremony called *data human* (oblation to the fire) shall not be essential to the validity of adoption.

¹¹ HAMA, s. 7: Capacity of a male Hindu to take in adoption.

unless she is incapacitated to give her consent by reasons given in section.¹² If any person has more than one living wives, then consent of all the wives is *sine qua non* for a valid adoption unless they suffer any of the disabilities specified in the proviso to section 7¹³. However, bigamy is not allowed among Hindus.

It is clear from the language of section 7 that the participation of wife/wives is mandatory in the process of adoption by a male Hindu which vitally affects the family. If the wife finds that the choice of the person to be adopted by her husband is not appropriate or is not in the interest of the family, then she can veto his discretion. This section seems one step towards gender equality so far as women's adoption right is concerned. The following cases also highlight the importance of consent of wife in the process of adoption:

In *Ghisalal v. Dhapubai (D) By Lrs.*,¹⁴ the court held that “consent of wife envisaged in proviso to section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. Consent cannot be inferred from mere presence, silence, or lack of protest.”¹⁵ The court further observed:¹⁶

The term “consent” used in the proviso to section 7 and the Explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to section 7

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation — If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

¹² The wife will be considered incapable of giving consent if she has completely and finally renounced the word or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

¹³ *Ibid.*

¹⁴ (2011) 2 SCC 298

¹⁵ *Id.*, at para 20. Also see, *Brijendra Singh v. State of M.P.*, 2008 (1) SCALE 372. In this case, the Supreme Court observed that a female Hindu who is married can adopt only if the marriage has been dissolved, i.e. if she gets a divorce.

¹⁶ *Id.*, at para 26.

should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject-matter of challenge before the court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

In *M. Vanaja v. M. Sarla Devi (Dead)*,¹⁷ the Supreme Court has observed that “the consent of the wife of the adopter and actual ceremony of adoption is essential for a valid adoption as per the Hindu Adoption and Maintenance Act.” The bench of JJ. L. Nageswara Rao and Deepak Gupta said:¹⁸

A plain reading of the above provisions would make it clear that compliance of the conditions in Chapter I of the Act of 1956 is mandatory for an adoption to be treated as valid. The two important conditions as mentioned in sections 7 and 11 of the Act of 1956 one the consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption. The mandate of the Act of 1956 is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the Act of 1956. The two essential conditions *i.e.* the consent of the wife and the actual ceremony of adoption have not been established.

¹⁷ (2020) 5 SCC 307.

¹⁸ *Id.*, at para 12.

Recently in the case of *Bhanu Pratap Singh v. State of UP*,¹⁹ a Division Bench comprising of JJ. Manoj Misra and Rohit Ranjan Agarwal observed:²⁰

A wife's silence or lack of protest at the time of adoption by her husband cannot give rise to an inference that she has consented to such adoption under Section 7 of the Hindu Adoption & Maintenance Act, 1956. The court cannot presume the consent of wife simply because she was present at the time of adoption.

The court further reiterated that, “in order to satisfy the mandate of the proviso to section 7 of the Act, a party propounding adoption by a Hindu male, who has a living wife, has to adduce evidence to prove that the same was done with the consent of his wife”.²¹

Thus, section 7 of the Act and its proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the wife. The Indian Judiciary also makes it clear that section 7 of the Act should be followed in its letter and spirit in the process of adoption. It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Thus, no inferences can be drawn otherwise the spirit of the HAMA.

Section 8 of the HAMA makes a radical change in the old Hindu Law through the HAMA (Amendment) Act, 2010 and section 8,²² conferred adoption rights to a female who is sound mind and attains the age of majority. However, the un-amended section 8 conferred the right to adopt, on a woman who is not married or if married, the marriage has been dissolved, or whose husband is dead or has completely renounced the world or has ceased to be a Hindu or is of unsound mind. Thus, a married woman whose husband was living had ordinarily no right to adopt even with his consent. In this context the right of a female Hindu differed from that of a

¹⁹ 2021 SCC OnLine All 220 : (2021) 145 ALR 801.

²⁰ *Id.*, at para 12.

²¹ *Ibid.* The Bench said “This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption.”

²² HAMA, s. 8: Capacity of a female Hindu to take in adoption —

Any female Hindu— (a) who is of sound mind, (b) who is not a minor, and (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.

male Hindu, who was entitled to adopt even if his wife was living provided he obtains her consent.²³

The amendment of section 8 of the HAMA removes the hurdles in the way of a married woman for adoption. The amendment allowed a married woman, whether living with her husband or separated from her husband not be decree of divorce obtained from competent Court, to adopt with the consent of her husband, even during the time of divorce proceedings she can adopt. However, if her husband changes his religion or is declared to be of unsound mind or completely and finally renounced the world, no consent from the estranged husband will be required.

Right to Give in Adoption

Section 9 of the HAMA confers the competence to give a child in adoption only on three person's viz., the father, the mother and the guardian of the child. In case the child is being given by the guardian in adoption, the consent of the Court is required. Before the Amendment of 2010 only father had the right to give in adoption. However, it was not absolute right, but it could be exercised with the consent of mother if living. The mother could give in adoption only where the father was incompetent or disqualified.²⁴ However, it was permissible for the father to delegate the physical act of giving the child in adoption to another person including his wife, though the mother physically gives the boy in adoption, the giving must be decided to be the act of the father.²⁵

The Amendment of section 9²⁶ of the HAMA in the year 2010, removes the hurdles in the way of a married woman to give in adoption. The new amendment allowed a mother, whether living

²³ Mayne's, *Mayne's Treatise on Hindu Law and Usage* 581 (Bharat Law House, New Delhi, 2008).

²⁴ Where father completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Available at: [https://prsindia.org/files/bills_acts/acts_parliament/2010/the-personal-laws-\(amendment\)-act-2010.pdf](https://prsindia.org/files/bills_acts/acts_parliament/2010/the-personal-laws-(amendment)-act-2010.pdf) (last Visited on December 6, 2022)

²⁵ *Id.*, at 586-587.

²⁶ HAMA (Post-2010 amendment), s. 9: Persons capable of giving in adoption –

(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption:

with her husband or separated from her husband, to give in adoption with the consent of her husband. Under the old Hindu Law a woman could not give her son in adoption after remarriage, but the position under the Act appears to be different as there is no prohibition on the part of the mother to give her child in adoption if she remarries.²⁷ Now the father and the mother both have equal right to give a son or a daughter in adoption.

Who May Be Taken in Adoption

Adoption of a daughter was recognized for the first time in the HAMA, 1956.²⁸ Section 10 of the Act lifted the bar against the adoption of daughter and provides that a child whether male or female may be adopted. After this amendment, now a Hindu woman is free to adopt a daughter. But it is subject to certain conditions precedents as per section 11 of HAMA (Amendment 2010). Section 11 (i) and (ii) places a condition precedent that: “if a Hindu wants to adopt a son/daughter the adoptive father or mother by whom the adoption is made must not have a Hindu son/son’s son/ son’s son’s son or a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption.”

The other conditions lay down under section 11²⁹ and effect under section 12³⁰ and other provisions of the Act are equally applicable for male and female. By incorporating the

Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

²⁷ *Ibid.*

²⁸ M. N. Srinivasan’s, *Principles of Hindu Law and Statutory Enactments: Annotated, Along with Commentaries on Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 Volume I* 154 (Allahabad Law Publishers, Allahabad, 1969).

²⁹ HAMA (Post-2010 amendment), s.11 :

11. Other conditions for a valid adoption —

In every adoption, the following conditions must be complied with —

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son son’s son or son’s son’s son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son’s daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

requirement of wife's consent in the proviso to section 7 as amended in 2010 amendment Act confers independent right upon a female Hindu.

Thus, on the basis of above analysis of different provisions dealing with the adoption under HAMA, it can be said that the Parliament has achieved one of the facets of the goal of equality enshrines in the Preamble and reflected in article 14 read with article 15 of the Constitution. Particularly after the Amendment in 2010 many changes have been made in the HAMA for proving the equality with respect to the right to adopt and be adopted to both men and women. Now a woman can adopt during subsistence of marriage and after separation as well either male child or girl child.

III. Women's Right to Adopt and to Be Adopted under Muslim Law

The Holy Quran is one of the primary sources of Muslim law and it gives specific rules about the legal relationship between a child and his/her adoptive family. The Prophet Muhammad once said that "a person who cares for an orphaned child will be in Paradise with him."³¹ Muhammad paid special attention to the care of children. He himself adopted a former slave and raised him with the same care as if he was his own son.³² Islam fully supports the concept of

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:

Provided that the performance of datta homam shall not be essential to the validity of an adoption

³⁰ HAMA (Post- 2010 amendment), s.12 :

12. Effects of adoption —

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

³¹ Available at: <https://www.learnreligions.com/adopting-a-child-in-islam-2003804> (last visited on March 28, 2020).

³² *Ibid.*

helping the orphan and poor, and taking them under your wings. If there is no one to take care of the orphan and poor children, then this responsibility falls upon the Islamic government.³³

Allah says in the Holy *Quran* Chapter 2 *Surah Baqarah* verse 177:³⁴

It is not righteousness that ye turn your faces toward East or West; but it is righteousness to believe in Allah, and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance out of love for Him for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer and practice regular charity; to fulfill the contracts which ye have made; and to be firm and patient in pain (or suffering) and adversity and throughout all periods of panic. Such are the people of truth, the Allah-fearing.

So far as the concept of adoption in Islam is concerned it has no consequence. The child should not be attributed except to the natural father and not to the one who has adopted him. An adopted child can marry a daughter of his adoptive parents, because she is not his biological sister. An adopted child cannot inherit from his adoptive father, but it is permissible, rather advisable, for him that he, in his lifetime, makes a will/gift in favour of his adopted son.³⁵

As the *Qur'an* says, calling adopted children by the names of their adoptive fathers are contrary to “the truth,” and therefore, they must be called by the name of their real fathers. It means that adoption does not change the relationship of a person, adoption does not end the blood relationship between the child and his biological parents and siblings, nor does it create a biological relationship between him and his adoptive parents and their children.³⁶ The Holy *Qur'an* revealed the following verses:³⁷

And Allah did not make your adopted children your sons. That is only your words coming out from your tongues. And Allah says the truth and He guides

³³ Sayyid Muhammad Rizvi, Adoption in Islam, *available at*: www.al-islam.org/articles/adoption-islam-sayyid-muhammad-rizvi (last visited on March 28, 2021).

³⁴ *Available at*: www.islamhelpline.net (last visited on March 28, 2021).

³⁵ M. Asad Malik, *Case Comment: “Shabnam Hashmi v. Union of India”* 10 *Amity Law Review* 135 (2014).

³⁶ *Available at*: <http://www.al-islam.org>. (last visited on September 9, 2022).

³⁷ Usmani, Taqi Muhammad, “Adoption of a Child in Islam”, *available at*: www.muftitaqiusmani.com (last visited on March 28, 2022).

you to the right path. Call them with reference to their (real) fathers. It is more just in the sight of Allah. (Quran 33:4)

But Islam highly recommends the concept of helping the poor and the orphan in all types of charities; the orphan and the poor are mentioned as the prime eligible recipients for such help. In case of the rights of the orphan children, Allâh is very severe; for example, he says:^{38 39} Those who 'swallow' the property of the orphans unjustly are actually devouring fire into their bellies and they shall enter the burning fire. (4:10)

Thus, adoption or legal adoption *per se*, is not allowed in Islam. It is to be said that the Muslim law has established a regulation to substitute the model of adoption: *i.e.*, the *kafala* which allows adults to take care of abandoned minors in accordance with Islamic law.⁴⁰ Other than this in the Muslim Personal Law (Shariat) Application Act, 1937 also adoption has not been forbidden. Section 3 of the Shariat Act, lays down that "if a person belonging to a community whose customs regarding 'adoption, wills and legacies' prevail, makes a certain declaration, he will thereafter be governed in all respects by Muhammadan law". This section is applicable to certain communities in Punjab and Sind where adoption prevails; and to Khojas in Bombay, as regards to wills.⁴¹ So adoption among certain sections of Muslims was prevalent also under their customary laws. If (among that class) this custom has been practiced, the system of adoption can be prevalent.⁴² It means Islam also allowed the adoption but as per Islamic Law.⁴³

IV. Women's Right to Adopt and to Be Adopted Under Christian Law

The Personal law of Christians does not recognize complete adoption and they do not have an enabling law to adopt a child legally. Thus, those desirous of adopting a child could only take the child in 'guardianship' under the provisions of 'the Guardian and Wards Act, 1890'. In absence of any statutory law of adoption for Christians, the Indian judiciary has played a vital role in this

³⁸ *Supra* note 35.

³⁹ *Supra* note 34.

⁴⁰ *Supra* note 36.

⁴¹ Asaf A. A. Fyzee, *Outlines of Muhammadan Law* 59 (Oxford University Press, New Delhi, 2005)

⁴² V.P. Bhartiya (ed.), *Syed Khalid Rashid's Muslim Law* 159 (Eastern Book Company, Lucknow, 2010).

⁴³ *Supra* note 36.

regard and recognized the adoption. *Sohan Lal v. A. Z. Makuin*,⁴⁴ was the first reported case in which the Lahore high court held:⁴⁵ In the case of Punjabi converted Christians; it may be possible to prove the customary right of adoption applicable to them as members of their original caste.

The object of such an adoption is not to secure any religious benefit for the soul of the adopter but to obtain a practical and temporal benefit. During his life time, the adopter secures the assistance of the appointed heir in cultivation and after his death the appointed heir inherits the estate of his adoptive father to the exclusion of the adoptive father's collaterals.⁴⁶ By virtue of these decisions customary law on adoption among Panjabi Christians can be proved from case to case and that right seems to be judicially recognised.⁴⁷ In *Philip Alfred Malvin v. Y. J. Gonsalvis*,⁴⁸ the Kerala high court ruled:⁴⁹

Even in the absence of any specific law recognising adoption by Christians, an adoption made by a Christian couple is valid and the child adopted is entitled to inherit the assets of the couple. Christian Law does not recognise adoption. But it is an admitted fact that the Christian Law does not prohibit adoption. The main purpose of law of adoption is to provide consolation and relief to childless person. An adopted child is transplanted in the adoptive family creating all rights and relationships as if the child was a biological child. On the other hand, all his rights and relationships cease in the natural family.... It is essentially a transfer of dominion over the child from the natural parents to the adoptive parents and therefore some essential formalities were prescribed to effectuate the transfer on dominion. The position of an adopted child in respect of inheritance and maintenance is the same as that of a natural born child.

⁴⁴ AIR 1929 Lah. 230.

⁴⁵ *Ibid.*

⁴⁶ Available at: <http://www.christianfort.com> (last visited on October 8, 2022). Also see, *Ranbir Karam Singh v. Jogindra C. Bhattachargi*, AIR 1940 All. 134 at 139.

⁴⁷ *Ibid.*

⁴⁸ AIR 1999 Ker. 187.

⁴⁹ *Ibid.*

The Court further said that “the Christians law does not prohibit adoption.”⁵⁰ Thus, the Court held the adoption by the Christian couple is valid and considered adoption of son a Constitutional right of couple guaranteed under article 21 of the constitution. In the case of *Pharez John Abraham (Dead) v. Arul Jothi Sivasubramaniam K*,⁵¹ the supreme court has held: There is no prohibition against adoption in the Christian law. Unlike in the Hindu Law, there is no law prohibiting the Christian couple to adopt male or female child, although they may have natural born male or female child. The bench said:⁵²

By virtue of adoption, a child gets transplanted into a new family whereafter he or she is deemed to be member of that family as if he or she were born son or daughter of the adoptive parents having same rights which natural daughter or son had. The right which the child had to succeed to the property by virtue of being son of his natural father, in the family of his birth, is thus, clearly to be replaced by similar rights in the adoptive family, and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son.

It can be said on the basis of above discussion that any Christian couple can adopt male and female child. In absence of any enabling law on adoption, the judiciary has played a significant role in this direction and now women also have adoption rights.

⁵⁰ *Id.*, at para 8. The Code of Canon Law, commissioned by the Canon Law Society of America, goes to show that Canon 110 relates to adoption, which reads as follows:

Children who have been adopted according to the norm of civil law are considered as being the children of the person or persons who have adopted them. Adopted children are usually not at all, or occasionally not wholly, related to the parents adopting them Church law adopts the civil law pertinent to the area and states that adopted children are held to be the equivalent of natural children of an adopting couple in those instances in which adoption has been duly formalized according to the Civil Law.

Canon 111 provides, that:

A child of parents who belong to the Latin Church is ascribed to it by reception of baptism, or, if one or the other parent does not belong to the Latin Church and both parents agree in choosing that the child be baptized in the Latin Church, the child is ascribed to it by reception of baptism but, if the agreement is lacking, the child is ascribed to the Ritual Church to which the father belongs.

⁵¹ 2019 SCC OnLine SC 819

⁵² *Id.*, at para 11.2.

V. Women's Right to Adopt and to Be Adopted under Parsi Law

The Personal law of Parsis also does not recognize adoption and here an adoption can take place only from an orphanage by obtaining permission from the Court under the Guardians and Wards Act, 1890.⁵³ If a Parsi parent desires to 'adopt' a child, the latter would not legally be considered "as if born to" the adoptive individual or couple. There is nothing like strict adoption amongst Parsis. A Parsi can adopt a son to perform his funeral ceremonies, but such adopted person will not inherit any portion of the deceased's estate, except under his will.⁵⁴ Such adopted person is called "Paluk" or "Dharamputra".⁵⁵ Even the performance of the *Navjote* ceremony on a child whose parentage is unknown cannot make him/her "Parsi". The child would at best be considered a Parsi by religion but not a Parsi by race. In the case of *Laxmidas Morarji v. Jehangir Dinshaw Bamji*,⁵⁶ the Mumbai High Court held:

The Parsi community does not have the right to adopt children. Justice D.K. Deshmukh said that, 'in my opinion, judgment of the Division Bench of this Court referred to above in *Kershaji's case*⁵⁷ and a judgment of this Court in *Ratanshaw's case*⁵⁸ referred to above, leaves no doubt that in so far as the Parsees domiciled in British India are concerned, custom of adoption is not recognized.

Thus, Parsi Personal Law does not recognise adoption.

VI. Legislative and Judicial Response for adoption other than Personal Laws

The Adoption of Children Bill 1972 was introduced in the Parliament in order to enact a uniform law on adoption irrespective of religion. But it could not be passed due to opposition by the

⁵³ Available at: <http://www.livemint.com>. (last visited March 24, 2022). Also see *Smt. Lakshmi.R @ Suzitha v. The State of Karnataka*, the Bangalore District Court on April 23, 2019 said that: Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections.

⁵⁴ Framjee A. Rana, Parsi Law, "Containing the Law Applicable to Parsis as Regards Succession and Inheritance, Marriage and Divorce etc.", available at: archive.org/stream/parsilawcontaini00rnrich/parsilawcontaini00rnrich_djvu.txt (last visited on July 10, 2022).

⁵⁵ *Ibid.*

⁵⁶ 1998 (2) ALL MR 724; 1998 (1) Bom. C.R. 712.

⁵⁷ *Kershaji Dhanjibhai v. Kaikhushru Kolhabhai* (1929) 31 BOMLR 1081.

⁵⁸ *Ratanshaw Dinshawji Chothia v. Bamanji Dhanjibhai* AIR 1938 Bom. 238.

Muslim community and ultimately it was withdrawn in July, 1978.⁵⁹ An attempt was made again by the government and the Adoption of Children Bill, 1980, was introduced in the Parliament. The main purpose of the Bill was to provide an enabling law on adoption applicable to all communities other than the Muslim community. This Bill could not be passed due to opposition by the Bombay Zoroastrian Jashan Committee,⁶⁰ which formed a special committee to exempt Parsis from the bill.⁶¹ The Christian Adoption and Maintenance Bill, 1990 was mooted by various Christian Organizations, but that too could not make its entry in the statute book.

It reflects that the government tried to provide the recognition to adoption under other Personal laws but it went in vein. Finally, a secular Act *i.e.*, the Juvenile Justice Act, 2000 (JJ Act) was passed by the Parliament and under this Act any person irrespective of the religion could adopt a child, the JJ Act has now been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 58(1) of JJ Act deals with adoption and section 56 (3) of the JJ Act makes it clear that: “Nothing in this act shall apply to adoption under HAMA.”⁶²

Consequently, any person from any religion can adopt a child under JJ Act irrespective of religion and specific procedure is laid down under JJ Act for adoption. Thus, adoption can only be done after fulfilling all the rules and procedure mentioned in the Act. In *Lakshmi Kant Pandey v. Union of India*, the Supreme Court held:⁶³

Any adoption in violation of or non-compliance with the directives set forth in this judgment may lead the adoption to be declared invalid and expose the person concerned to strict action including prosecution.

⁵⁹ Aqil Ahmad, *Mohammedan Law* 195 (Central Law Agency, Lucknow, 2003).

⁶⁰ In 1979 a Zoroastrian Development Institute was founded, again with educational and social issues as priorities. There are numerous specifically religious organizations, notably the “Jashan Committee,” which for much of the century has been concerned to organize religious celebrations and classes. It tends to be associated with more orthodox traditions. Available at: https://referenceworks.brillonline.com/entries/encyclopaedia-iranica-online/bombay-COM_7050 (last Visited on December 6, 2022).

⁶¹ *Supra* note 1.

⁶² Also see *Sivarama v. The State of Kerala*, WP (CrI.) No. 439 of 2019 (decided on Jan. 07, 2020: MANU/KE/0027/2020), the High Court of Kerala observed: “the Juvenile Justice Act, 2015 will not affect the validity of an adoption carried out under the Hindu Adoption and Maintenance Act, 1956.”

The bench further observed:

“it in cases where a person qualifies for adoption under both the Acts, it would be the choice of the person to opt for Hindu Adoption and Maintenance (HAM) Act 1956 or the Juvenile Justice (JJ) Act, 2015. The court added that in such cases, no authority can compel such person to resort to only the JJ Act, 2015.”

⁶³ AIR 1986 SC 272.

The Supreme Court has recommended for creation of CARA⁶⁴ and the said agency accordingly set up by the Government of India in the year 1989. It was the Public Interest Litigation and the Apex Court keeping in view the interest of child has issued guidelines for adoption. Presently, this is being examined by the Supreme Court as to whether the guidelines issued in *Lakshmi Kant Pandey case*⁶⁵ will be applicable in case of adoptions under personal laws⁶⁶. In the case *Shabnam Hashmi v. Union of India*,⁶⁷ Supreme Court while defining section 41 of Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006 said:⁶⁸

Provisions of section 41 of the Act enabling any person, irrespective of religion he professes to take child in adoption. Prospective parents, irrespective of their religious background, are free to access provision of 2000 Act for adoption of children after following procedure prescribed.

This judgment is a high watermark in the development of the law relating to adoption other than Hindus. However, Hindus can also adopt under this law.

⁶⁴ Central Adoption Resource Authority (CARA) is a statutory body under the Ministry of Women & Child Development. It primarily deals with the adoption of orphan, abandoned and surrendered children through recognised agencies. Section 68 of the JJ Act 2015 notified by the Government of India on January 15, 2016, CARA attained the status of a Statutory Body with the mandate to regulate Inter Country Adoptions and the nodal body to implement the adoption programme in the country. CARA regulates and monitor all In-country and Inter-country adoptions through Child Adoption Resource Information & Guidance System (CARINGS). CARA aspires to place maximum children in institutional care with adoptive families. Available at: <http://cara.nic.in/PDF/RTI/RTI%20Manual%20of%20CARA.pdf>. (last visited on December 7, 2022).

⁶⁵ The Supreme Court issued certain guidelines *e.g.* that:

Every application from a foreigner desiring to adopt a child must be sponsored by social or child welfare agency recognised or licensed by the government of the country in which the foreigner is a resident.

No application by a foreigner for taking a child in adoption should be entertained directly by any social welfare agency in India working in the area of Inter-Country adoption or by any institution or centre or home to which children are committed by the juvenile court.

It also insisted the age within which a child should be adopted in case of Inter-Country adoption. " if a child is to be given in Inter-Country adoption, it would be desirable that it is given in such adoption before it completes the age of 3 years.

Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedures which must be followed in such a case, resort had to be taken to the provisions of Guardian and Wards Act, 1890 for the purpose of facilitating such adoption.

⁶⁶ Mehal Jain, Supreme Court Guidelines in LK Pandey Case Not Applicable to Adoptions Under Personal Law? SC to Examine, available at: <https://www.livelaw.in/top-stories/supreme-court-adoption-personal-law-procedural-guidelines-private-adoptions-biological-parent-176003> (last visited on June 26, 2021). Also see *In Re Contagion of COVID v. In Children Protection Homes*, LL 2021 SC 268, the Apex Court ordered: "No adoption of affected children should be permitted contrary to the provisions of the JJ Act, 2015. Invitation to persons for adoption of orphans is contrary to law as no adoption of a child can be permitted without the involvement of CARA. Stringent action shall be taken by the State Governments/Union Territories against agencies/individuals who are responsible for indulging in this illegal activity".

⁶⁷ (2014) 4 SCC 1.

⁶⁸ *Id.*, at para 11.

Recently in *Girish v. State of Karnataka*,⁶⁹ the Karnataka High Court has observed that “an adopted child can seek compassionate appointment following the death of his/her adoptive parent who took care of the family.” A division bench of Justices Suraj Govindaraj and G. Basavaraja observed, "A son is a son or a daughter is a daughter, adopted or otherwise, if such a distinction is accepted then there would be no purpose served by adoption."

In *Dr. Sonal Pratapsingh Vahanwala v. Deputy District Collector, Dharavi*,⁷⁰ the Bench of Justices Sunil Shukre and G. A. Sanap thus held that “an adopted child would be entitled to take the caste identity of his adoptive mother, despite the caste authorities' insistence on making the child's biological father's records available.” The bench further said, "One of the effects would be that the child would not get identity of mother and particularly caste of the mother. He would be without identity throughout his life. Similarly, very purpose of adopting child by the petitioner being a single mother would stand frustrated. In our opinion, such a situation could not be envisaged by law."

This kind of approach of judiciary will certainly be helpful in the protection of adopted children and really will serve the purpose of adoption. Thus, adoption is not yet statutorily allowed for women other than Hindu women in India but the Apex Court through its judgment in *Shabnam Hashmi case* open the door of adoption for the women of other religions too.

VII. Concluding Remarks

It can be concluded that adoption provides the much desired satisfaction to the childless persons and it also provides the care and protection to adopted child. The love of the family is life's greatest blessing and it can be enjoyed by both parent and child through adoption. Now under the Hindu law women is equally entitled to adopt and to be adopted. We observe that the Hindu law has been raised up to the Constitutional principle of gender equality. So far as other Personal laws are concerned, there is no specific law dealing with adoption either by man or woman but

⁶⁹ MANU/KA/5752/2022: 2022 LiveLaw (Kar) 473.

⁷⁰ 2022 SCC Online Bom 628 : (2022) 4 Mah LJ 221.

they can adopt, because their Personal laws do not prohibit adoption. Indian judiciary also has played a significant role in this direction.

Recently the Supreme Court in *Pharez John Abraham (Dead) v. Arul Jothi Sivasubramaniam K.*⁷¹ said that “unlike in the Hindu Law, there is no law prohibiting the Christian couple to adopt male or female child, although they may have natural born male or female child and adopted child obtain those rights in the capacity of a member of that family including the property right.” Now in Christians also, women have right to adopt or be adopted. Many attempt has been made by the government to enact a uniform law for giving right to adopt particularly to women other than Hindus but it could not be passed due to their respective personal laws. But other than Personal laws, the Indian Parliament has enacted the JJ Act and under this law any person can adopt irrespective of religion, race, caste, sex and place of birth subject to the conditions under the JJ Act and Adoption Regulations.

Now adoption has become more important from children’s perspective because many children have lost their parents to the second wave of COVID-19 and they are in urgent need of care and support. There is a need that people must come forward for adoption of such children but it should only be done after following the legal procedure laid down for adoption *i.e.* by registering with the CARA. The reformative legal framework and growing recognition of women as equal to men in all walks of life have helped women to assert their right of parenting in more inclusive ways. The adoption process may become less cumbersome and more transparent by collaborative efforts of all stakeholders. There is a great need to conduct awareness programmes to make people more informed and sensitive about the adoption process and to discourage evil practices like selling or abandoning of children by parents. For a holistic development of the children, it is imperative that they get a safe, caring and happy childhood and empowering women to get right to adopt will immensely contribute in ensuring a better childhood for many children.

⁷¹ *Supra* note 52.