

How to Adopt a Child in India?

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ABSTRACT

This paper deals with the adoption laws in India, i.e. how to adopt children in India. India is a country with plethora of religions having their own personal law. However, there is only one personal law in case of adoption i.e. Hindu Adoption and Maintenance act, 1956. Religions like Muslim, Cristian, Jews and Parsi are governed under Guardians and Wards Act. The research methodology is completely secondary with an aim to do a comprehensive research and analyse the laws governing adoption in India.

INTRODUCTION

Adoption involves the creation of the parent child relationship between individuals who are not naturally so related. The adopted child is given the rights, privileges and duties of a child and heir by the adoptive family.¹ In India, the policies adopted by the government of India clearly reflects the aim of the legislature i.e. the betterment of a child. Recent policy in the area of adoption was, Chapter IV of Juvenile Justice Act of 2000 which gives rise to the concept of having a secular adoption whereby, without any reference to the community or religious persuasions of the parents or the child concerned, a right appears to be granted to all citizens to adopt, and all children to be adopted. While this was a positive change, this concept still did not give the legal and legitimate status to the child equal to that of a biological, legitimate child.

Later, the Juvenile Justice (Care and Protection of Children Act of 2006) cleared the issue, where the adoption was defined as the process through which the adopted child is permanently separated from the biological parents and becomes the legitimate child of the adoptive parents with all rights, privileges and responsibilities that are attached to the relationship.² At the International level, India has ratified the convention on the Rights of Child and the Hague Convention on inter- country adoption of children.

¹ legal-dictionary.thefreedictionary.com/adoption

² (PDF) Adoption in India - the Past,Present and the Future Trends. Available from: https://www.researchgate.net/publication/236005514_Adoption_in_India_-_the_PastPresent_and_the_Future_Trends [accessed Aug 26 2018].

Adoption provides a very important function in Indian society. India has long tradition of child adoption. In olden days, it was restricted within the family and was covered by social and religious practices. But with the changing times, adoption beyond the contour of family has been institutionalized and legalized.

Traditional view

In Ancient India, people were of the view that only a male child can be adopted as only a male child can perform funeral rites of their father. Also, there is a ritual of “Datahoma” which needs to be performed after the adoption of a child. Hindus, in olden days refrain from adopting a daughter as they cannot perform the funeral rites and rituals.

Present view

The laws now are completely different from what they were like in olden days. They give equal importance to the female child. Hindu law has progressed so much that certain rituals and practises are now performed by both son and daughter.

CHILD ADOPTION LAWS IN INDIA

Hindu Adoption and Maintenance Act, 1956.

The Hindu Adoption and Maintenance Act, 1956 only governs Hindus (Buddhists, Jains and Sikhs). The provisions of this Act mandate that a Hindu married couple or unmarried adults can only adopt a Hindu child (son or daughter).

In consonance with the provisions of the constitution and international commitments the Indian government formulated National Policy on Children, enacted **Juvenile Justice Act, 2000** and ratified the UN Convention on the rights of the child and the national plan of action on children to ensure that childhood is protected against exploitation and against moral and material abandonment.

The issue that arises with having different laws, whether a Hindu couple governed by the Hindu Adoptions and Maintenance Act, 1956, with a child of their own can adopt a child of the same gender under the provisions of the Juvenile Justice Act of 2000.

In the case of **Indian Inhabitants vs Unknown**, in para 15-17 Justice DY Chandrachud said that: In para 15:

“Section 2(d) defines the expression "child in need of care and protection". Clause (v) includes within this category a child who does not have a parent and whom no one is willing to take care of or whose parents have abandoned or surrendered the child.”

And in Para 17:

“The Hindu Adoptions and Maintenance Act, 1956 regulates adoptions by or to a Hindu. Act spells out requisites of valid adoptions, defines capacities for men and women professing the Hindu religion to take in adoption and to give in adoption, for persons who may be adopted and the conditions for adoption. The Act enunciates consequences or effects of a valid adoption in law. Act establishes rules of general applicability to Hindus in specific areas of family law -adoption and maintenance. The Juvenile Justice (Care and Protection of Children) Act, 2000 is beneficent secular legislation. The Act makes special provisions for a limited sub class of children - those juveniles in conflict with law and children in need of care and protection.

Adoption under the Act of 2000 is an instrument of legislative policy to rehabilitate and provide social integration to children who need care and protection. The Preamble to the Act emphasizes that the legislation was enacted to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection.

Rehabilitation and social integration of orphaned, abandoned and surrendered children is a matter of legislative regulation by the Juvenile Justice Act. Adoption is a technique contemplated by the law in order to facilitate rehabilitation and reintegration of children of a particular class governed by Chapter IV. The mission of the law is to provide special rules to govern the adoption of a narrow sub class of children namely, those who are orphaned, surrendered or abandoned. In construing the provisions of the Juvenile Justice Act the effort of the Court must be to ensure that the beneficent object with which the legislation was enacted must be facilitated and furthered. Beneficial legislation, it is a trite principle of interpretation, must be construed liberally.”

The provisions of the Juvenile Justice Act came up for consideration before a Constitution bench of the Supreme Court in **Pratap Singh v. State of Jharkhand**³. held that “*the Act was not only beneficial legislation but that it was also remedial in character. The Constitution*

³ (2005) 3 SCC 551.

bench held that the statute must be construed in a manner that would make it effective and operative on the principle of ut res magis valet quam pereat.”

Also, in 2014, the judgment of Shabnam Hashmi provided the adoption as the Fundamental Right. It was permitted that any person irrespective of religion can adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2000. This case was presented by Shabnam Hashmi in 2005. She had only guardianship rights over a girl adopted by her as granted by the court because as per the Muslim Law, adoption is not allowed. She claimed that adoption should be allowed on Humanitarian grounds and as a Fundamental Right as well. After the finality of this case, the judgment has permitted,

“All the future intended parents to go for adoption process (can adopt a child) under the Juvenile Justice (Care and Protection of Children) Act, 2000 irrespective of religion and it was also held that this act is of secular nature for the purpose of adoption of children under prescribed procedure.”

The same principle was upheld in adoption of **Payal @ Sharinee Vinayak Pathak**, the Bombay High Court of law has decided that

“The bar on adoption of child of same sex under the Hindu law will give way to statutory provisions in the Juvenile Justice Act which permitted the childless parents to adopt a child irrespective of child sex of the biological children. while enacting the Juvenile Justice Act 2000 the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. even if there were to be a conflict between the provisions of the Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act of 2000, it is the latter Act which would prevail. If the two pieces of legislation, both of which are enacted by Parliament are harmoniously construed, there is no conflict of interpretation. Alternatively, This is on the well settled principle that when there are two special Acts dealing with the same subject matter, the legislation which has been enacted subsequently should prevail.”

Central Adoption Resource Agency [CARA]

To strengthen adoption rules and facilitate adoption without any hassles, Government of India under advice of Supreme Court constituted a Central Agency- Central Adoption Resource Agency [CARA] with New Delhi as base to set up guidelines for adoption time to time safeguarding welfare and rights of children while granting adoption or guardianship under

Hindu Adoption and Maintenance Act 1956, Guardians and Wards Act 1890 or Juvenile Justice Act of 2000.

In **Lakshmi Kant Pandey v. Union of India**⁴, and Section 41 (3) of the J.J. Act, the Central Adoption Resources Agency (in short, 'the CARA'), has framed a set of guidelines. *As per the said guidelines, "in Clause 23(2) thereof, the Specialized Adoption Agency shall file a petition in the competent Court of jurisdiction for obtaining necessary adoption order under the Act, within ten days of acceptance of referral by the prospective adoptive parents and shall pursue the same regularly with the Court so that the provision of legal adoption is completed at the earliest. The said clause also envisages that the competent Court is required to dispose of the case within a maximum period of two months from the date of filing in accordance with the direction of the Supreme Court in the above case."*

The Indian Council of Social Welfare

To safeguard malpractices and deviations from prescribed guidelines for adoption notified by Government of India, Supreme Court of India has appointed an independent NGO with experience in child adoption. This agency verifies all the relevant documents and authenticity before orders are issued by Judicial Courts for the formal adoption.

CONDITIONS TO BE FOLLOWED FOR VALID ADOPTION

Who can be adopted

According to Section 4 of the latest guidelines provided by the Central Government in 2015 any orphan, abandoned or surrendered child, declared legally free for adoption by the Child Welfare Committee is eligible for adoption.

An orphan is a child who is without his legal parents or guardian or his parents are not capable of taking care of him.

An abandoned child is one who is deserted or unaccompanied by his parents or guardians and the Child Welfare Committee has declared him so.

A surrendered child is one who is relinquished on account of physical, emotional and social factors beyond the control of the parent or legal guardian and is so declared by the Child Welfare Committee.

⁴ AIR 1984 SC 469.

Who can adopt

- Any Indian, NRI or foreign citizen can adopt a child, though the procedure for all three is different.
- Any male or female irrespective of their marital status is eligible to adopt.
- A single female can adopt a child of any gender but a single male cannot adopt a girl child.
- If a couple is adopting, they should have two years of stable marriage and consent of both the spouses is necessary.
- Age difference should not be less than 25years between the adoptive parents and the adoptive child.

Conditions to be fulfilled

- The prospective parents should be emotionally, mentally and physically stable.
- They should be financially capable to raise a child.
- They should not have more than four kids.
- They should not be suffering from a life-threatening disease.

PROCESS OF LEGAL ADOPTION⁵

Only legally free children (having no claimants) can be placed in adoption. Once a child becomes legally free, the process of identifying a suitable family for placement of the child begins. PAPs need to prepare the required documents following which a home visit is conducted. to assess their suitability for parenting a child.

When documents are complete in all respect the PAPs are invited to see the child and can take the child for medical test. When the PAPs select a child, they can take the child for medical test, submitting all the required documents and signing a foster care agreement pending the finalization of their adoption case in the court of law. A miscellaneous case is then filed in the appropriate court. Documents are sent to the scrutiny committee by the court for verification

⁵ Deepak KR Verma, Hindu Adoption law and Judicial Interpretation.

when the scrutiny committee clears the case, documents are returned back to the court with its recommendations and then a date for hearing is fixed.

The court, when satisfied, passes adoption order giving permanent custody of the child to the adoptive parents. Within two months from issue of the order an adoption deed is made, which marks the end of the legal process of adoption. After completion of the Deed, adoptive parents can apply for birth certificate of the child.

CONCLUSION

The 'Best Interest of the Child' is the guiding principle behind all adoption laws in India and social awareness programs has helped to change the attitude of society and people towards adoption in India. However, there is a requirement of having a common and a uniform law for adoption instead of numerous legislations and guidelines because it should not be based upon the concept of gender or religion. Different safety measures should be included in order to curb scams related to the adoption. The Judicial Academy will have to give periodical training to the District Court Judges on sensitive handling of adoption cases. NGO's and Child Welfare Agencies need to give necessary guidance to raise children with special needs.

Equal opportunities for development to all children during the period of growth is the aim, as this will serve larger purposes of reducing inequality and increasing social justice.