

REASSESSING THE ROLE OF LAW IN ADOPTING VULNERABLE CHILDREN IN HINDU SOCIETY

ABOUTALEB BAZVAND & MARYAM KAYDANI

Department of Law, Osmania University, Amberpet, Hyderabad, Telangana, India

ABSTRACT

“There are no unwanted children, just unfound families.”

The National Adoption Center

Purportedly, biology doesn't make a difference. Adoption, as an option to child bearing, is a generally acknowledged means for framing a family in most of present day societies. India is a marvelous accident of adoption. India with long tradition of child adoption initially was restricted within the family and was covered by social and religious practices which have gone under changes within the course of times. An adoption arrangement has the impact of severing the parental duties and rights of the biological parents and exchanging those obligations and rights to the new parents. Since emergence of the social change in the 1950's, India concentrated on finding home for vulnerable children such as abandoned, orphan, destitute, illegitimate, and surrendered children. These children are institutionalized and in the long run put for domestic and inter-country adoption. India multiplied the domestic adoption momentum only in late 1980's. From that point forward, critical changes have happened in the field of adoption. This paper will give a short history of adoption in Hindu religious and look at the Hindu adoption and maintenance Act which enacted in India in 1956 as part of the Hindu Code Bills and emergence of inter-country adoption. It also evaluate whether adoption really equals trauma or not. It studies people's propensities to adopt and to relinquish a child for adoption, and evaluate elective theories regarding supply and demand in adoption.

KEYWORDS: Child Adoption, Legal Lacuna, Biology, India

INTRODUCTION

Having child is a sine qua non for family peace and stability in India. Chowdry believes that adoption is as old as Hindu law. Being so, legislatures have given certain rights and imposed certain obligations on adopting child which are important constituents of any family. To SiyaShruti, “Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship”(1). Since adoption is carried out under different Acts in India. Children adoption by Hindu adults is carried out under the Hindu Adoption and Maintenance Act, 1956 which enacted to give the support and all the rights, benefits and duties that are appended to the relationship of the received children like biological child. Initially, Hindus were permitted to legally adopt the children and other communities could

just act as legal guardians of the children¹. Adoption has dependably been considered as a great chance to furnish a child with home and guardians. It provides a fabulous other option to vulnerable children, abandoned and neglected child in an atmosphere of love, affection and understanding which only a family can give. Before any plans put into consideration for child adoption, the appropriate authority shall study all alternatives for permanent family care of a child. Yet., at the point when the adoption of a child need to give it away in adoption or the child is abandoned and it is viewed vital in light of a legitimate concern for the child to give it in adoption, each effort of adoption that first occur with finding new family for it within the country, in light of the fact that such adoption would steer clear any issues of assimilation of the child with the new parents which may emerge by virtue of cultural, racial or linguistic contrasts if there should be an occurrence of adoption of the child by foreign parents.

If it is impossible to find appropriate new parents for the child within the country, it's substantial to give the child in adoption rather than permit the child to experience childhood in an orphanage or an institution where the child may not experience family life and no love and affection of parents and perhaps in the socioeconomic conditions prevailing in the country, it might make the life of a vulnerable children difference.

There is no motivation behind why such children ought not be permitted to be given in adoption to foreign parents since it would allow children, generally desperate, neglected or abandoned, to lead a healthy decent life, without privation and experiencing destitution, obliviousness, unhealthiness and absence of sanitation and free from neglect and exploitation, where they would have the capacity to acknowledge "full potential of growth".

Therefore, each and every effort should be first on "inter country adoption" if that is impossible, then only adoption by foreign parents"². Further, to solve the social problem of orphans, abandoned and refugee children is another issue pertinent to the policy of child welfare under the Hindu Adoptions and Maintenance Act, 1956.³

HINDU ADOPTION

Neetish Kumar Handa clearly claims that "The Hindu law of adoption is mainly founded on the religious belief that a son is absolutely essential for spiritual salvation"⁴. Hindu law is the only law in India which treats an adopted child as being equivalent to a natural born child. The reason for this is mostly because of the belief that a son was indispensable for spiritual as well as material welfare of the family.

Chowdhri makes it clear "Under the old Hindu law, there were many rules relating to adoption which could be supported only on the basis that adoption was a sacramental act. It is supported by "the adopted son must be a reflection of a son; it means the adoption of orphans and illegitimate children; daughter could not be acceptable" (234).

Under the old Hindu Law, a female child could not be adopted under the Hindu Law. To PramilaPanditBarooah, a traditional law;

- Authorized a Hindu father without a son to adopt a male child.
- It did not permit a widow to adopt a son unless authorized by deceased husband.

¹ . To Danesh A. Chekki, Guardian is a person who has the care of minor's person or property or of both while minor means a person who has not reached the age of 18 years.

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³ .ShilpaKhatriBabbar,56

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- Adoptee must belong to the same caste as the adoptive father.
- An orphan (unless custom permitted) an illegitimate boy or a deaf could not be adopted.
- The natural father could give his son in adoption without his wife's consent.
- There was no uniformity regarding age and the Bombay school permitted adoption even of a married man by a younger man.⁵

As Jill Duba Onedera make an evidence," Hindus believe that only the son can perform the rites and thus save the father from entering hell, called putt in Sanskrit. The son is called Putra, who saves his father from putt". As such, all law is just about boys. The purpose of adoption to some extent could be certain; traditionally Hindus believed that a father who died without having a son would go to hell, poota.⁶ Similarly, Danesh A. Chekki states that, "The old Hindu Law allowed adoption of a son, not a daughter, in accordance with the traditional customs"⁷. What's more, SHarmin Aktar asserts that "only a male can be adopted and he must belong to the same caste as his adoptive parents and his mother must not be within the prohibited degrees to his adoptive father, that is, he must not be a boy whose mother his adoptive father could not have married. Besides, he should not suffer from any physical infirmity or be an orphan."⁸

By Hindu Adoption and Maintenance Act, 1956, a step goes farther which provides condition for adoption of not only son but also a daughter. It provides a chance for female as adopter and adoptee enjoy equal rights and privileges.

Most likely, such restrictions have changed throughout the time. Such gender biases have been underrated in today's modern society. Under the modern Hindu Law, both male and female Hindu is able to make an adoption. Most of these laws, rules and regulations have been specified in the Hindu Adoption and Maintenance Act of 1956.

THE HINDU ADOPTION AND MAINTENANCE ACT, 1956

The Hindu Adoption and Maintenance Act enacted in India in 1956 as part of the Hindu Code Bills which extends to the whole of India except the State of Jammu and Kashmir. The other legislations enacted during this time contain the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Minority and Guardianship Act (1956).

The Hindu Adoption and Maintenance Act, 1956 is applicable (a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prathana or Arya Samaj, (b) to any person who is a Buddhist, Jaina or Sikh by religion, and (c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matter dealt with herein if this Act had not been passed.

The Adoptions and Maintenance Act of 1956 dealt definitely with the legal procedure of adopting children by a Hindu adult, and with the legal obligations of a Hindu to give "maintenance" to different family members containing their wife or wives, parents, and in-laws.

This Act deals with topics, for example, capacity to adopt, capacity to give in adoption, effect of adoption, gender

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⁶ .Virginia M. Brabender, April E. Fallon.

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bias and such others Capacity to Adopt: In this Act it is said that any adult Hindu male who is of sound mind can adopt a child. If the said man is married, the consent of the spouse is essential.

REQUIREMENTS TO ADOPT A CHILD

To the Hindu Adoption and Maintenance Act, 1956, No adoption shall be valid unless,

- The person adopting has the capacity, and also the right, to take in adoption;
- The person giving in adoption has the capacity to do so;
- The person adopted is capable of being taken in adoption; and
- The adoption is made in compliance with the other conditions mentioned in this Chapter.⁹

CAPACITY OF A MALE HINDU TO TAKE IN ADOPTION

Capacity of a male Hindu to take in adoption- 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.

CAPACITY OF A FEMALE HINDU TO TAKE IN ADOPTION

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.¹⁰

WHO CAN BE ADOPTED?

The child must be capable of being adopted. The adopted child can be male and female. The adopted child must be under the Hindu category. Further, the adoptee should be unmarried; on the other hand, if the particular custom or usage is applicable to the involved parties then the adoptee can be married.

It doesn't allow the child at the age of sixteen or older to be adopted, if there is any special custom or the usage which is applicable to the intending parties. An adoption can only happen if there is not a child of the same sex of the adopted child still living in the home.

Above all, if a son were to be adopted then the adoptive parent must not have a legitimate or adopted son still residing in the house.

EMERGENCE OF INTER-COUNTRY ADOPTION

Until 1970, Emergence of inter-country adoption very few Indians were interested in adopting an unrelated, child whose parentage was obscure. The parents who adopted kept it as a family secret because of the social stigma containing

⁹ .Hindu Adoption and Maintenance Act, 1956, s.6.

¹⁰ .Hindu Adoption and Maintenance Act, 1956, s.7&8.

barrenness and adopting an unrelated child (Mahtani). This bigotry and social stigma in the Indian family and social system provide an opportunity for inter-country adoption to increase momentum in the 1960's.

Financial affordability by foreign adoptive parents made inter-country adoption an alluring proposal to the Indian adoption agencies. Lack of a uniform law in India and caste prejudices made inter-country adoption more common than domestic adoption.¹¹

Nonappearance of a uniform law in India and standing partialities made between nation receptions more well-known than local appropriation.

For nearly two decades from the 1960's to the mid 1980's there was a progressive increase in inter-country adoptions and they were not reliably documented.¹² Structuring of inter-country adoption policies in India.¹³

DISCUSSIONS

Inter-country adoption is an issue of international law in several terms due to the immigration which raises core national sovereignty issues with international law significance. Further, inter-country adoption as a humanitarian matter involves human rights issues, which have become the concern of international law. The CRC is probably the most related human rights convention valid to inter-country adoption.

The primary effect of mostly adopted human right treaties in India is to identify and express international ideals and standards, rather than to provide an effective means of enforcement. To "[r]ecognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."¹⁴

Recently, the United Nations Children's Fund ("UNICEF") states:

For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption.

It is supposed not to be "suitable manner" for the permanent care of a child due to not ensuring the best interests of the child. It doesn't

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may

¹¹.(Nilima Mehta, personal communication, October 31 2009)

¹².(Hoksbergen, 1986)

¹³ .Adoption in India :the past, present and the future trends SarasBhaskara, Rene Hoksbergena , Anneloes van Baara , SubasiniMothiramb, and Jan terLaakaaUtrechtUniversiteit, The NetherlandsbJBAS College for Women, Chennai,

¹⁴ .The United States signed the Hague Convention on March 31, 1994, art. 21(b), 28 I.L.M. at 1464.

be necessary;(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it[.]

To provide the best interest of a child and safeguarding of a child, the CRC seeks the process for relinquishments of child inter-country adoption. As such, Article 7 claims that “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” This provision helps avoiding abusive adoption practices. As such UNICEF states that the removal of a child from the birth family violates the child’s right unless “a child’s family is unavailable, unable or unwilling to care for him or her.”

What’s more, the CRC raises question of whether systems of adoption that denies children information about their biological parents, particularly when a child seeks such information, violate the CRC.

While foreign adoption involves the loss of a child’s original identity, nationality, name, and family relationships. Thus in certain aspect, inter-country adoption to some extent is inherently destructive of the rights of the child which falls into a loophole under the “as recognized by law” language of Article 8. Of course the CRC claims that, “Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to reestablishing speedily his or her identity.”¹⁵ But still the question of reestablishing the identity of a child has been plagued by claims of illegality, including stealing or buying children from birthparents, and the forging of various documents related to the relinquishment, abandonment, or original identity of the child.

On the other hand, Article 3 of the CRC makes an overarching principle that, “[i]n all actions concerning children... the best interests of the child shall be a primary consideration.” Therefore, the child’s best interests is “a primary consideration” in “all actions concerning children” not just one aspect of it. Therefore, the nature of adoption is based on the severance of biological family relationships. Children’s rights should be on protecting, maintaining, and, where broken, reestablishing relationships within the biological family, adoption seeks to legally sever those relationships, and replace them with a new set of family relationships. While the CRC is notable for its definition of participation rights is not capable of considering his or her own views “**FREELY**” in all matters affecting the child. Concerning on child adoption, adoption require consideration of the views of the child.

Inter-country adoption has highlighted into the public consciousness in two clashing ways. From one perspective, inter-country adoption is introduced as a heart-warming act of cooperative attitude that advantages both child and adoptive family. The child is depicted as a bereft orphan destined to a dismal and horrid future within a poor country. More likely, all children deserve to live in a home and simple act of an adoptive family have to give love to the child.

Demerit of the positive perspective of adoption is deal with abundant scandals and horror stories regarding inter-country adoption. Child trafficking or baby selling has a shadowy figure on child adoption. Adoption is encompassed by buying, stealing, or kidnaping children from poor families in poor communities for sale to adoptive families. No doubt, corrupted agents or agencies deal with child trafficking or child adoption which collects fees from prospective adoptive families. Moreover, some women are shipped into s territory in order to place children for adoption without coming under the jurisdiction of the immigration authorities. Difficulty of reforming inter-country adoption and the legitimacy of

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inter-country adoption bears watching.

The procedures of adoption and child trafficking portray the wide gap of the laws of inter-country adoption. There are systemic vulnerabilities in the current inter-country adoption system that make adoption scandals numerous. To David M. Smolin “there are no actors in the inter-country adoption system with the requisite information, authority, and motivation to prevent abusive or corrupt adoption practices. Under these circumstances, “reform” of the inter-country adoption system remains elusive and illusory, leading to cyclic and repetitive patterns of scandal”.¹⁶

CONCLUSIONS

As a final point, the trust of national policy of India for welfare of children includes protecting abandoned and destitute children, finding a family for as many orphan children as possible and to safeguard their interest as visualized in the UN Convention on child rights and Hague Convention- on Inter country adoption ratified/approved by India government.

Of course, the ‘Best Interest of the Child’ is managing principle behind all adoption laws in India and social awareness programmers have helped to change the attitude of society and individuals towards adoption in India. The nation’s children are identifying and prioritizing the most critical assets. Their nurture, support and solitude are responsibilities of nation. Children’s programmer sought to find a prominent part in national arrangement for the development of human resources so that children grow out of en shackled childishness, grow up into fairly robust citizens; physically fit, mentally alert and morally healthy endowed with the skills and motivation needed by the society. Equal opportunities for development to all children during the period of growth are the aim, as this will serve larger purposes of reducing inequality and increasing social justice.

REFERENCES

1. Saxena, PoonamPradhan. Property Law.2013.
2. Sinjini, Legal Framework Governing Adoption Laws in India, February 4, 2015.
3. Chowdhry, D. P. Child Welfare Development. New Delhi: Atma Ram & Sons. 1980.
4. Chekki, Danesh A. The Sociology of Contemporary India.*Journal of Comparative Family Studies*.Vol. 12, No. 4 (AUTUMN 1981), pp. 523-525
5. Dutt Sharma, Sonia.Inter-Country Adoption-Myth and Reality.
6. Groza, V. et al, “Indian families adopting Indian children”.*Indian Journal of Social Work*.2003.
7. KhatriBabbar, Shilpa. Child Welfare: A Critical Analysis of Some of the Socio-Legal Legislations in India Prof. “*Child Adoption: Trends and Policies*”, Department of Economic and Social Affairs, UN, New York, 2009.
8. Wadhwa, Nagpur. *Family Law Lectures – Family Law I*. Lexis Nexis Butterworths,.2nd Edn., 2008.
9. Diwan, Paras.*Modern Hindu Law*, 20th Ed., Allahabad Law Agency, Allahabad, 2009.
10. Pramila, PanditBarooah, *Handbook on Child, with Historical Background*. Front Cover. PramilaPanditBarooah.

¹⁶ .404

Concept Publishing Company, Jan 1, 1999.

11. Siya, Shruti. *Adoption Laws In India: Reviews And Recommendation Needed*. Chanakya National Law University, March 13, 2012.