

**FUNDAMENTAL RIGHT TO ADOPT: A CRITICAL ANALYSIS OF
COMPETENCY OF PERSONS IN ADOPTION PROCESS**

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INTRODUCTION TO ADOPTION IN INDIA

Adoption is an institutionalized process which enables a child, who belongs by birth, to another kinship, to be acquired by a new kinship that ties him/her socially and legally to this new one, as if they were congenital ties. These new ties supersede the old ones either wholly or in part.

Adoption, though existent in the Indian subcontinent for a long time, has taken proper, definitive shape in the very recent past. In *Bal Gangadhar Tilak v. Shrinivas Pandit*² the Privy Council opined that adoption is necessary not just for the continuance of a childless Father's lineage but also to make necessary sacrifices for the Father's soul to reach heaven, achieve *moksha*. These were the initial notions of adoption, but the very basis of the process of adoption lies in the phenomenon that the welfare of the child is of paramount importance. The motive of the practice is essentially to provide for conducive environments for destitute and orphaned children to be raised and cared for. The most generally known motives of adoption is that it's an artificial means for satisfying the supreme instinctive human desire of procreation, or the-most primitive desire of having an heir or the fulfillment of religious obligations of the family. Sometimes its motive is the legitimization of illegitimate children, thus removing the stigma of illegitimacy from the child born out of illicit relations. Lastly, an important recent motive of adoption is the assurance of child welfare or provision of proper home for children deprived of parents or such facilities provided through adoption by persons who are capable of and willing to so do.

Sadly, in India, this noble cause leading to the formation of the most pure relationship of parent and child is given only limited encouragement by law. Until

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² 42 IA 135

very recently only Hindus were allowed to legally adopt. Other communities could only act as legal guardians to the children they adopt.

The secular laws governing adoption in India are the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as “the 2015 Act”), The Juvenile Justice (Care and Protection of Children) Rules and the Central Adoption Resource Authority Guidelines. The JJ Act permits members of all religion to adopt, even if their personal laws don’t permit the practice.

Adoption was not defined in the JJ Act, 2000, however the 2015 Act brought with itself the meaning and definition that came to be expressed in the following terms:

“2(2)-“adoption” means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship”

Section 56 of the 2015 Act deals with Adoption and states that:

(1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.

(2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.

(3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.

(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.

(5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a

foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.

The eligibility criteria for a prospective adoptive parent is provided under S. 57 of the 2015 Act³, which lays down that the prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to the adopted child, that couples adopting requires the consent of both spouses, marital status is immaterial for adoption, as single or divorced persons are equally eligible to adopt and a single male is not eligible to adopt a girl child.

The Hindu Adoption and Maintenance Act, 1956, S.11 which specifies that one of the conditions for a valid adoption is that the adoptive father or mother can't adopt a son, if they already have a Hindu son, son's son or son's son's son living at the time of the adoption, similarly for daughter. No such stipulation is provided for in the 2015 Act, which states that the presence of biological son or daughter shall not restrict the adoptive parents from adopting a son or daughter respectively.

Also, the court can give a child for adoption to a childless couple as well.

FUNDAMENTAL RIGHT TO ADOPT

The proposition that the right to adopt should be a fundamental right was first brought about in the case of *Shabnam Hashmi v. Union of India & Ors.*⁴ The main issue was of common procedure adoption of children irrespective of religion, race or class came before the apex court in the above writ petition wherein the petitioner sought guidelines for the same. It was this decision that led to the insertion of an

³ 57. (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority.

⁴ AIR 2014 SC 1281

adoption provision in the Juvenile Justice (Care and Protection of Children) Act, 2000 ((now the Justice (Care and Protection of Children) Act, 2015)) via amendment, thereby making it possible for Indians to adopt without distinction of caste and religion. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows.

This landmark judgment made it possible for people of any religion to adopt under the Juvenile Justice (Care and Protections of Children) Act, 2006, which was earlier available only to Hindus. The decision gained heed because it introduced adoption to Muslim law which didn't exist hitherto. Prior to this case, the Indian Courts had seen the evolution of the *Lakshmikant Pandey v. Union of India*⁵ decision series of 1984, 1986, 1987 and finally 2010. Relating to inter-country adoption and laid down the Central Adoption Resource Agency (for short 'CARA') for the protection of the interests of children. None of the decisions looked into fundamentality of the right of adoption.

ADOPTION UNDER THE HINDU ADOPTION AND MAINTENANCE ACT, 1956

Capacity To Adopt:

The Act makes a distinction between a male Hindu's capacity to adopt *vis-à-vis*, that of a female Hindu. Section 7 says that a Male Hindu can adopt when he is of sound mind and has attained the age of majority. Further if he is a married man, he must take the consent of his wife unless she is dead or

- (a) has completely and finally renounced the world,
- (b) has ceased to be a Hindu,
- (c) has been declared by a court of competent jurisdiction to be of unsound mind.

⁵ 1984 AIR 469

The explanation states that the same consent would be required from all wives, if the man has more than one wives, unless any of them is covered under one of the three situations stated above.

The same is applicable to a Female Hindu as per Section 8 of the Act.

Unmarried male and female Hindus are also permitted to adopt if they are of sound mind and have attained the age of majority.

Who can Give for Adoption:

Section 9 reads 'Persons Capable of Giving in Adoption'. S. 9(1) says that No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

Further, the Father, if alive can give a child for adoption with the consent of his wife, unless she 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.

Similarly, the mother can exercise this right if the father is dead or any of the above.

If both parents are dead or have completely and finally renounced the world or have ceased to be Hindus or have been declared by a court of competent jurisdiction to be of unsound mind or the parentage of the child is unknown then the right can be exercised by the Guardian, with the permission of the Court, to give the child in adoption to anyone else or to the Guardian himself.

S. 9(5) states that before granting such permission to the guardian, the Court needs to be satisfied that the adoption is for the welfare of the child, the child's wishes have been given due consideration given their age and level of understanding and that no payment has been stipulated for the adoption of the child, unless sanctioned by the Court itself.

An issue with respect to consideration for adoption came up in the case of *J.V Vijaya Bastiar v. J Kesava Rao*⁶. The validity of an ante-adoption agreement between the adoptive son, and his adoptive parents was challenged and the agreement was held to be void.

The provision defines a guardian in a manner to include someone who cares for the child's person, his property or both. A guardian is more often decided by the will of the child's parents or is declared guardian by the Court.

Who can be Adopted:

Section 10 says that no person can be adopted, unless

- a) He or she is a Hindu;
- b) He or she has not already been adopted;
- c) He or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
- d) He or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

In *Hanmant Kaxman Salunke v. Shrirang Narayan Kanse*⁷ the Bombay High Court held that while a custom may permit adoption of a child above the age of 15 years, the minimum age difference between the mother and the child must be 21 years.

As far as competence with respect to adoption is concerned, both married and unmarried female and male have a right to adopt given that they are sound and major.

⁶ AIR 2003 SC 3314

⁷ AIR 2006 Bom 123

ADOPTION UNDER MUSLIM LAW

Adoption is known to have existed in Pre-Islamic Arabia, and like Hinduism, was related to the repose of the souls of the departed and preservation of household divinities. A short background of the existence of the practice of adoption in Islam is as follows: The development of adoption in Islam began after the Prophet's adoption of Zayd, who was originally a slave from Syria. The controversy began when the Prophet married Zayd's former wife, Zaynab. Adoption is prevalent in some Islamic countries today in the form of acknowledgment of paternity. Most of these countries are not following the Muslim Law strictly. Their practice, therefore, cannot be considered to be in consonance with the proper Muslim Law, as enunciated by the great Muslim legists. Nothing to the effect of adoption being a fundamental right has ever even been discussed in Muslim personal laws.⁸

In contemporary India, the situation was similar, yet haphazard.

In *Shabnam Hashmi*⁹, the Court ordered all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of S. 41 of the Act and follow the CARA Rules.

The All India Muslim Personal Law Board responded to the effect that Muslim personal laws do not provide for adoption, or equate an adopted child with a biological one. Though they have a similar practice known as "Kafala", by which a third person, known as the "Kafil" is allowed to look after the care child and his welfare but the child is still considered the descendant of the biological parents and not the adoptive ones. The Board substantiated that Kafal is recognized by the Convention of the Rights of the Child under Article 20(3) and that the agencies must be made to ensure that they keep this in mind and follow Islamic Principles when a Muslim child is declared available for adoption.

⁸ Ali Raza Naqvi, "Adoption in Muslim Law", Islamic Research Centre, 19 *Islamic Research Institute, International Islamic University*, 183-302 (1980)

⁹ *Shabnam Hashmi v. Union of India* AIR 2014 SC 1281

The Apex Court responded to this appropriately by saying that:

“Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute”

The Bench opined that the Act mandates no compulsive action by any prospective parent, leaving them with the liberty to adopt or not and ultimately follow the personal law that dictates them. The Court also identified the provision as a step closer to achieving a Uniform Civil Code as enshrined in Article 44 of the Constitution of India.

ADOPTION UNDER CHRISTIAN LAW

All the statutes with respect to Christian family laws in India make no mention of adoption anywhere. However, if a custom is proved, there is no bar on adoption per se in Christianity. In *Phillips Alfred Malvinv. V.J Gonsalves*¹⁰ the Court allowed for an adoption on the basis of an alleged custom, despite the absence of any law to that effect. In this queer judgment the Court said:

“The right of a couple to adopt a son is a Constitutional right guaranteed under Article 21. The right to life includes those things which make the life meaningful. The Hindu Law, Mohammedan Law and Canon Law recognize adoption”

Further the Kerala High Court opined that:

“Simply because there is no separate statute providing for adoption, it cannot be said that the adoption made by the Correa couple is invalid”

The adoptive son has all the rights of a natural born son, so he has the right over the property of his father too. Furthermore, in the matter of *Manuel Theodore*

¹⁰ AIR 1999 Ker 187

*D'Souza*¹¹, the Bombay High Court laid down a principle in respect of abandoned children and it held,

“In the absence of any legislation setting out who can adopt, person or persons who has/have taken a child in guardianship under the Guardians & Wards Act will have the right to petition the courts to adopt the child.”

Thus, the scope of this judgment is restricted to Indian Christians who have taken a child in guardianship and are seeking to adopt such child.

In *Maxin George v. Indian Oil Corporation*¹² the Kerala High Court, opined that even among Christians, the formalities of adoption exist in the physical act of giving and taking of the child (like under the Hindu Adoption and Maintenance Act).

CONCLUSION:

The paper concludes on the note that adoption laws in India need to be strengthened further to improve the system and ease the process of adoption. My personal opinion is that not just should an orphan, destitute or abandoned child have the fundamental right to be adopted, but also couples, especially childless couples should not be devoid of the pleasure of raising a child and getting the opportunity to be parents, i.e. childless couples should have the fundamental right to adopt as well. Moreover, in a country like India, where families still continue to have a large number of children, especially in rural areas, adoption should be promoted rather than having children of your own. The adoption laws need to be strengthened in order to keep a check on adoption related crimes such as the adoption racket in Andhra Pradesh, where hundreds of NGO workers were arrested under the charge of child-trafficking in the guise of inter-country adoption. The matter at hand is not just to bring the criminals to justice, but more importantly, first, begin the adoption process of children currently in the custody of the State, and secondly, conduct a critical examination of the existing adoption laws and their implementation.

¹¹ 2000 (2) Bom CR 244

¹² WP(C) No. 26644 of 2003

This is clearly indicative of the fact the the agencies and organization for child-care are not being appropriately regulated despite the CARA Guidelines and the Lakshmikant Pandey judgments. There was a need for more stringent application of laws till 2002.¹³ Adoption laws should be made and implemented uniformly among all religions and that the fear of violation of religious practices should not be a barrier in doing so.¹⁴ India being signatory to CRC (Convention on the Rights of a Child), such uniformity is necessary so that the rights of adoptive children can well be enhanced and protected.

¹³ S Aarth Anand & Prema Chandra, “Adoption Laws: Need for Reform”, *Economic and Political Weekly* Vol 37, 3891-3893 (2002)

¹⁴ Almas Shaikh, “Legal Framework Governing Adoption Laws in India”, *Academike*(2015)