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## **An analysis of adoption laws under Hindu dharma in India**

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### **Abstract**

The concept of adoption is not a new concept rather the custom and practice of adoption is continuing from the past. The dictionary meaning of the term 'adoption' is the act of taking and rearing of the child of other's parents as one's own child. Attitudes and laws regarding adoption vary greatly. Not all cultures have the concept of adoption. One of the biggest examples is Muslim law where adoption is not recognised. This paper deals with the motivation of the parents to adopt a child and various aspects relating to adoption under the Hindu law and the Over the time steps have been taken to improve the status. In this paper, there is focus on the adoption under hindu religion with the help of cases and provisions.

**Keywords:** adoption, dharma, concept, child, provisions

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### **Introduction**

Children are considered a bundle of joy and on whom the future of the country depends. While on one hand children born in India are being pampered, taken care of and given all the necessities for their all-round development, on the other hand there are over 60,000 children being abandoned per year in India. In some cases, these children become victims of human trafficking and sexual violence<sup>[1]</sup>. In fortunate cases, the abandoned children are taken to any adoption agency and may hope for a better life while waiting to get adopted.

Such cases, of children being given a chance at a second life through adoption are on the rise. In its simplest of senses, adoption is a process whereby a person assumes the parenting for another and, in doing so, permanently transfers all rights and responsibilities, along with filiation, from the biological parent or parents.

This paper on the Adoption Laws will trace the adoption practices in hindu law. A brief description will be given about the history of adoption and its development to the hindu adoption laws as we know now. Apart from this, the areas where adoption is discussed under many other jurisdictions is touched upon.

### **Nature and scope**

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. But it is significant to note here that this role as a 'deliverer of hell' was [ limited to the son.

Under the old Hindu Law, only a male could be adopted and an orphan could not be adopted. Then even if a male was to be adopted, restrictions were imposed based on Caste and Gotra. A female child could not be adopted under the Hindu Law. Under the old Hindu law, only the male had a right to adopt and the consent or dissent of his wife to the proposed adoption was immaterial.

But such restrictions have changed in the course of time. Such gender biases have been minimized in today's modern society. Under the modern Hindu Law, every Hindu, male or female has the capacity to make an adoption provided he or she has attained majority and are of sound mind. Most of these laws, rules and regulations have been enumerated in the Hindu Adoption and Maintenance Act of 1956<sup>[2]</sup>.

### **Hindu adoption and maintenance act, 1956**

The Hindu Adoption and Maintenance Act was passed after Independence as part of modernizing and codifying Hindu Law. The Act to some extent reflects the principles of equality and social justice by removing several (though not all) gender based discriminatory provisions.

This Act deals with topics such as capacity to adopt, capacity to give in adoption, effect of adoption, gender 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 wife is necessary. Likewise, a female adult Hindu of sound mind could adopt a child if she is

1. Unmarried
2. Divorced
3. Widowed or
4. Her husband suffers from certain disabilities
  1. Ceased to be a Hindu
  2. Has renounced the World
  3. Has been declared to be of unsound mind by the court.

**Capacity to give in Adoption:** The section 9 of this Act states that only the father, the mother or the guardian can make the decision of giving a child in adoption. The father can give the child in adoption only with the consent of the mother, unless the mother has ceased to be a Hindu, has renounced the world or is

of unsound mind. The mother may give the child in adoption if the father 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<sup>[3]</sup>.

**Effect of Adoption:** When once a child has been adopted, that child severs all ties with his natural family. All the right and obligations of natural born children fall on him.

The wife of a Hindu male, who adopts is deemed to be the adoptive mother. Where an adoption is made with the consent of more than one wife, the senior most in marriage is deemed to be the adoptive mother and the rest are given the title of step mothers. All laws relating to the adoptive parents and/or step parents can be seen in ss. 12, 13 and 14 of the Hindu Maintenance and Adoption Act of 1956.

In this context, an issue came up. The case of *Sawan Ram v. Kalavati*, brought out the question as to whether, in the case of adoption by a widow, would the adopted child be deemed to be the child of the deceased husband as well, so as to be his heir. The Supreme Court held that the adoption would not only be by the female, but also to her deceased husband. This argument was based on the words found in s. 5(1) of the Act.

Also, it has to be noted that the adoptions once made by the parents cannot be cancelled by the parents, nor can the adopted child renounce the adoptive family and go back to his/her birth parents. Adoption is generally held to be permanent in nature, with neither parties going back on their words. This has been stated in section 15 of The Act. But care has to be taken that the adoption referred to in this section is a valid adoption.

**Gender Bias in Adoption:** Though after the enactment of the Act, it has been noted that the gender discrimination has been eliminated but in actual sense it still exists. A married female cannot adopt, not even with the husband's consent, unless her husband dies or suffers from any disability or renounces the world or so. On the other hand, a husband may adopt with the consent of the wife. To clearly show the gender discrimination, two cases have been referred. [x] Similarly, in the matter of a giving a child in adoption, the Hindu male enjoys broader rights than a corresponding female. The case of *Malti Roy Choudhury v. Sudhindranath Majumdar* is oft referred to<sup>[4]</sup>.

In the case of *Malti Roy Choudhury*, the appellant, Malti had been adopted by the deceased mother. After her mother's death, she became the sole heiress and applied for estates and properties left behind by her mother. There were a lot of evidences which have been presented by the appellant like proof of the ceremony of adoption, natural parents handing over the child to the adoptive mother in the presence of her husband and the priest; acknowledgement through school records; Malti being performed the funeral ceremony of her mother. But however, the Court did not accept the argument and it was held that, "under the provisions of the act, the husband alone can adopt, but here, it is an admitted position that Malti was adopted by the mother Tripti not by the father and thereby, rejected her appeal."

It is time that law, in this age of equality, takes cognizance of the same and give equal rights to both men and women with regard to adoption. There is no reason to give to the husband veto power to deny fulfillment of maternal instincts of his wife.

### **Guardians and wards act, 1890**

As the name itself suggests, the Hindu Adoption and Maintenance Act were mostly the guidelines for the Hindu society. Another law had to be made which was sensitive to the personal laws of other religions which did not come under the Hindu Adoption and Maintenance Act of 1956. This gave rise to the Guardians and Wards Act of 1890<sup>[5]</sup>.

The Guardians and Wards Act, 1890 was a law to supersede all other laws regarding the same. It became the only non-religious universal law regarding the guardianship of a child, applicable to all of India except the state of Jammu and Kashmir. This law is particularly outlined for Muslims, Christians, Parsis and Jews as their personal laws don't allow for full adoption, but only guardianship. It applies to all children regardless of race or creed. Following is an overview of the act.

It was stated that any child who had not completed 18 years of age was to be a minor. This child would be appointed guardians by the court or any other appointed authority. They would decide who would take place as the said child's guardian or by removing another as a guardian. All these procedures took place only after an application had been placed by the person who was willing to take a child under himself and to act as his guardian. The applications should contain all the possible information that would have been required, including the information about the guardian and any reason as such for the guardianship. This was just the first step. Once the court admits the application, a date for a hearing would be set. The court will hear evidence before making a decision. Unlike in the procedures given in the Hindu Adoption and Maintenance Act, 1956, where a person once adopted has a single set of parents, here a minor and his property could have more than one guardian. It was required under these cases of guardianship that the court use its discretionary power and considered the interests of the minor. His/her age, sex, religion, the compatibility quotient with the guardian, the death of the parent, etc. must be taken into consideration. The minor's preference may also be taken into consideration.

### **Historical perception of sonship & adoption**

The son under the Hindu Law has been assigned utmost importance in the Hindu Dharamshastras, male issue was treated as necessary for protecting the deceased parents from the sufferings of the Hell and to perform their funeral obligations. The ancient Hindu Law mentioned about the following kinds of son i.e.

1. The Aurasa or the legitimate son
2. The Dattaka or the adopted son
3. Kritima or the son made
4. Kshetraja i.e. the son begotten from another man with the consent of the husband
5. Gudhaja i.e., son secretly brought forth by the wife. A son born in the family but as to who begot him being unknown
6. Kanina i.e. son secretly born to an unmarried damsel.
7. Putrika Putra i.e. son of an adopted daughter
8. Sahodaja i.e. son born to the wife who was pregnant at the time of the marriage
9. Krita i.e. son purchased from his parents on some price, is the Krita son of the purchaser
10. Swayamadatta- where an abandoned son offers himself to one.

11. Paunarbhava- son of a remarried woman
12. Apviddha- where an abandoned son was accepted by a person on his own initiative.
13. One more kind of son was added by some law givers, called Nishad, i.e., son of a Brahmin by his shudra wife.

**But, in modern time, our present Hindu Law enactments are concerned with only three kinds of sons, namely-**

- Legitimate
- Illegitimate
- Adoption
- **Meaning:** According to Manu, adoption is the “taking of a son, as a substitute for the failure of a male issue.” Thus it is a transplantation of a son from one family in which he is born to another family where he is given by the natural parents by way of gift. Adoption is a legally recognised mode of affiliation as the son of a person, of one who in fact was not his son <sup>[6]</sup>.

On adoption, ties of the son with his old family are severed and he is taken being born in the new family, acquiring rights, duties and status in the new family.

Now, in the present scenario, the Hindu Adoption and Maintenance Act, 1956 has completely codified the law of adoption and has materially modified it in correspondence to the needs of dynamism of Hindu society. Therefore, every adoption shall be made in conformity with this act and any contravention of the provisions of this act shall be void <sup>[7]</sup>.

#### **Essentials of valid adoption**

Section 6 of the Act enumerates the requisites of a Valid Adoption

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

Therefore, no adoption is considered valid unless it fulfils the abovementioned conditions under Section 6 of the Hindu Adoption and Maintenance Act, 1956. According Section 5 of the Act, an adoption made in contravention of the provisions of Chapter II of the Hindu Adoptions and Maintenance Act, 1956 is void.

#### ▪ **Capacity of a male Hindu to take in adoption**

According to Section 7 of Hindu Adoption and Maintenance Act, 1956, 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. But if the male Hindu has a wife living at the time of adoption, he shall not adopt except on the consent of his wife <sup>[8]</sup>.

In the case of Sarabjeetkabar v. Gurumal Kaur, AIR 2009 NOC 889 (P & H), the Court upheld that if adoption taken by the husband without the consent of the wife, that adoption will be illegal.

**But the consent of the wife of a male Hindu is not necessary in the following three conditions**

- The wife has completely and finally renounced the world, or

- The wife has ceased to be Hindu, or
- The wife has been declared by a Court of competent jurisdiction to be unsound mind.

In Krishna Chandra Sahu v. Pradeep Das, AIR 1982 Orissa 114, the Court held that where the above three disabilities of wife have not been established the consent of such wife would be mandatory for a valid adoption. If the consent of wife is not established, the Court will declare the Adoption null and void <sup>[9]</sup>. If a man has more than one wife living at the time of adoption, the consent of all the wives must be obtained. The Act has given two qualification for a male Hindu to be capable to take a child in adoption i.e. the person must be of sound mind and he must not be a minor. The man is required to take consent of the wives or wife, before adoption. Without the consent of wife or wives the adoption will be void.

#### ▪ **Capacity of a female Hindu to take in adoption**

A female has also the capacity to adopt any child. Section 8 of the Act provides that any female Hindu who is of sound mind, who is not minor and who is not married or if married, whose marriage has been dissolved or whose husband is dead or her husband has renounced the world finally and conclusively or her husband has become a convert or her husband has been declared to be of unsound mind by a court of competent jurisdiction has the capacity to take a son or daughter in adoption.

A woman who is of sound mind and is not a minor can take child in adoption. The woman has no right to adopt, during the subsistence of the marriage, if the husband not suffering with any of the disabilities mentioned in Section 8 of the Act. The unmarried and widow woman has also the right to take in adoption any child <sup>[10]</sup>.

In the case of Narinderjit Kaur v. Union of India and another, AIR 1997 P&H 280, it was held that the adoption of a child under the authority of parents is valid. Where a child was given in adoption willingly by natural parents and was taken in adoption by the adoptive mother through her attorney, it was held to be a valid adoption. It was also held that subsequent marriage of adoptive mother does not invalidate the adoption.

However the 2010 amendment of the Section 8 of the Hindu Adoption and Maintenance Act, 1956 has brought a radical change in the Hindu Law.

The newly enacted Section 8 reads as under,

“Any female Hindu who is of sound mind and is not a minor has the capacity can take a son or daughter in adoption, Provided that, if she has a husband living, she shall not adopt a son or daughter except with, the consent of her husband unless the husband 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.”

#### ▪ **Person capable of giving in adoption**

Section 9 of the Act lays down the capacity of person, who may give the child in adoption to another. No persons except the father or mother or the guardian of the child shall have the capacity to give in adoption.

- Capacity of the father to give in adoption: – If the father is alive, he shall alone have the right to give in adoption but such right shall not be exercise save with the consent of the mother.

- Capacity of the mother to give in adoption: – The mother may give the child in adoption if the father is dead or had completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court jurisdiction to be unsound mind.
- Capacity of the guardian to give in adoption: – Where both the father and mother are dead or to be unsound mind or had finally renounced the world, is declare by the court then the guardian of a child may give the child in adoption with the following conditions laid down by the courts:-
  1. That the adoption will be for welfare of the child.
  2. That the applicant for permission has not received any payment in consideration of the adoption.
  3. That no person has given any payment to the applicant for consideration of the adoption of child.

The father has preferential right to give the child in adoption. If he is unsound mind or suffering from chronic disease has the right to give a child in adoption. The guardian may give the child in adoption with the prior permission of the court.

#### ▪ Who can be adopted

Section 10 of the Hindu Adoption and Maintenance Act, 1956<sup>[1]</sup> the following person who fulfil the conditions are capable for adoption:-

1. He or she should be Hindu.
2. He or She not already be adopted any child adopted.
3. He or She has not been married unless there is a custom applicable which permits being can adopt.
4. He or She has not completed the age of fifteen years which is to be considered being taken for adoption.

#### Adoption of an orphan

Under the present law an orphan could also be taken in adoption. In such cases the guardian of the orphan can obtain the permission of the court to this event and thereafter could give the child in adoption.

The case of Balakrishna v. Sadashive-1977<sup>[2]</sup>, another case of Mayaram v. Jai Naraiian -1989 and Kodippa Rama Papal urfShirke v. Kannappam -1990. It was held that where customs or traditions allow there a person above 15 years of age or married can be adopted.

Where, as among Maharashtra School and Jains a person of any age can be adopted refer case of Bishan v. Girish-1986.

Another case of Dev Gonda v. Sham gonad -1992<sup>[3]</sup>, the Bombay High Court held that any insane can also be adopted. Further any orphan found child or abandon child may be adopted.

#### • Other conditions for a valid adoption

According to Section 11, in every adoption, the following conditions must be complied with:

1. 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;
2. 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;

3. if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least 21 years older than the person to be adopted;
4. 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;
5. the same child may not be adopted simultaneously by two or more persons (does not refer to if both persons are adoptive mother and father) ;
6. 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 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 dattahomam shall not be essential to the validity of adoption.

#### Effects of a valid adoption – Section 12

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:<sup>[4]</sup>

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.

#### Right of adoptive parents to dispose of their properties – Section 13

Section 13 lays down that where there is no agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

Thus an adoptive parent is in no way restrained in the disposal of their property by reason of adoption.

Adoptive parent's right to disposing off his property is subject to an agreement to the contrary that might have been entered into at the time of adoption between the adoptive parents and the natural parents on behalf of the child for his benefit. Under the Act, thus, agreements restricting the power of alienation of the adoptive parents is void.

#### Relationship of adopted child – Section 14

Section 14 lays down as to how an adopted child will be related to certain relations of adopter. The Section provides for the determination of adoptive mother in certain cases. The Section lays down that –

(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be

deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

#### **Valid adoption not to be cancelled – Section 15**

Section 15 lays down that no adoption which has been validly made can be cancelled by father or mother. An adopted child also cannot renounce his/her status as the adopted child and return to the family of his/her birth <sup>[5]</sup>.

#### **Prohibition of certain payments – Section 17**

**Section 17** prohibits certain payments.

**Section 17 (1)** states that no person shall receive and no person shall make or give to any other person any payment or reward the receipt of which is prohibited by this section.

**Section 17 (2)** provides that if any person contravenes the provisions of Section 17 (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

**Finally, Section 17 (3)** states that no prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorized by the State Government in this behalf <sup>[6]</sup>.

#### **Effects of invalid adoption**

The adopted son does not acquire any right in the adopted family. He does not forfeit his right in the natural family.

#### **Formalities of Adoption**

i. The child to be adopted must be actually given and taken in adoption by the parents/guardian.

ii. Only after the transfer of a boy from one family to another with a ceremony will be valid.

Refer a case of Lakshman Singh Kothari v/s Smt. Rup Kuwar, 1961 the court held that under the Hindu Law there cannot be a valid adoption unless the adoptive boy is transferred from one family to another by doing the ceremony of given and taken adoption should be entertained directly by any social or child welfare agency in India.

#### **Conclusion**

Adoption is a noble cause, which brings happiness to kids, who were abandoned, or orphaned. This gives a chance for the humane side of civilization to shine through. It's a beneficial program where the child is treated as the natural born child and given all the love, care and attention. At the same time, it fills the void in the parents who yearned for kids, their laughter and mischief echoing off the walls of a home. Although a few changes could be made to make all the laws regarding adoption a little, uniform.

*'Adopting one child won't change the world: but for that child, the world will change.'* – Unknown

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