

A STUDY ON LEGAL FRAMEWORK GOVERNING GUARDIANSHIP IN INDIA

¹M.RAJAVELPRAVEEN

¹BA LLB(hons),131701037, Saveetha School of Law, Saveetha Institute of Medical and Technical Sciences, Saveetha University, Chennai-77,Tamilnadu,India.

²Mr. ARUL KANNAPPAN

²Assistant Professor, Saveetha School of Law, Saveetha Institute of Medical and Technical Sciences, Saveetha University, Chennai-77,Tamilnadu,India.

¹rajavelpraveen1532000@gmail.com, ²arul kannappan.ssl@saveetha.com

ABSTRACT:

Even though adoption is an age old practice, adoption laws have come into being only very recently, with England passing the first laws in the year 1926. A legal framework was established so as to protect the rights of the adopted child. In India, adoption falls under the ambit of personal laws, and due to the incidence of diverse religions practiced in our country, mainly two different laws operate. Muslims, Christians, Parsis and Jews are governed by the Guardians and Wards Act, 1890, as formal adoption is not allowed in these religions. Hindus, Sikhs, Buddhists and Jains on the other hand follow the Hindu Adoption and Maintenance Act, 1956. This paper focuses on the various adoption laws in India and emphasises on the need for a uniform civil code of adoption, instead of discriminating on the grounds of religion.” This paper on the Adoption Laws will trace the adoption practices in English law. A brief description will be given about the history of adoption and its development to the modern adoption laws as we know now. Apart from this, the areas where adoption is discussed under many other jurisdictions is touched upon.

‘Adoption has the dimension of connection — not only to your own tribe, but beyond, widening the scope of what constitutes love, ties and family. It is a larger embrace. By adopting, we stretch past our immediate circles and, by reaching out, find an unexpected sense of belonging with others.’

-Isabella Rossellini

Keywords: Adoption, guardianship, Maintenance , Hindu law , Uniform civil code.

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.[i] In some cases, these children become victims of human trafficking and sexual violence. 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 English law. A brief description will be given about the history of adoption and its development to the modern adoption laws as we know now. Apart from this, the areas where adoption is discussed under many other jurisdictions is touched upon. The aim of my research is Finally, the legal framework governing adoption laws in India are extensively discussed. A comparison is made among the differences cited in the adoption laws for different religions in India. The paper then discusses about the need for uniform civil code regarding adoption. Lastly, this paper ends with a short note on inter-country adoption.

HYPOTHESIS:

NULL HYPOTHESIS: There is no significant impact on guardianship in India with regard to the current legal framework

ALTERNATIVE HYPOTHESIS: There is significant impact on guardianship in India with regard to current legal framework

MATERIALS AND METHODS

Descriptive methodology- Descriptive research methods are pretty much as they sound — they describe situations. They do not make accurate predictions, and they do not

determine cause and effect. There are three main types of descriptive methods: observational methods, case-study methods and survey methods.

ADOPTION UNDER ENGLISH LAW

The English Law started recognizing adoption during the latter half of the nineteenth century. Legal adoption came into existence only during 1926. The purpose of this Adoption Act was to prevent the biological parents from claiming back their children. A more comprehensive Act was passed in 1950. This Act was modified in the year 1958.

English law of adoption is very similar to the Hindu Law of Adoption inasmuch as that it lays down that the adopted child, for all intents and purposes, becomes like a natural child and the child's ties with his natural family are severed.

MODERN ADOPTION LAWS

The history of adoption traces back to ancient times. Examples of Moses being adopted and the adoption of King Octavian Augustus. Modern adoption laws came into existence only after the First World War. The main reasons were the influenza epidemic and the aftermath of WW I. Many kids were abandoned by their parents, others were separated from their biological families. The confusion and chaos caused due to the War influenced many countries to enact new legislations or modify previously existing laws on adoption.¹

The first adoption laws were passed by England and Wales. It was the Adoption of Children Act, 1926. Until that date adoption had not been recognized as a legal concept. This law required the consent of both the biological parents and that of the adoptive parents. Although the Act recognized that adopted children benefited from the same rights, duties, liabilities and obligations as a birth child, it did not ensure the child's full integration into the adoptive family, nor were inheritance rights replaced in the birth family.

A large number of countries enacted new adoption laws in the aftermath of the World War II. Several amendments were made to earlier legislations during 1940 – 1980. A number

¹Hindu Adoption and Maintenance Act of 1956

of countries also modified existing legislation on adoptions to allow for new form of adoption.

ADOPTION IN INDIA

The custom and practice of adoption in India dates back to the ancient times. Although the act of adoption remains the same, the objective with which this act is carried out has differed. It usually ranged from the humanitarian motive of caring and bringing up a neglected or destitute child, to a natural desire for a kid as an object of affection, a caretaker in old age, and an heir after death.

But since adoption comes under the ambit of personal laws, there has not been a scope in the Indian scenario to incorporate a uniform law among the different communities which consist of this melting pot. Hence, this law is governed by various personal laws of different religions.

Adoption is not permitted in the personal laws of Muslims, Christians, Parsis and Jews in India. Hence they usually opt for guardianship of a child through the Guardians and Wards Act, 1890.

Indian citizens who are Hindus, Jains, Sikhs, or Buddhists are allowed to formally adopt a child. The adoption is under the Hindu Adoption and Maintenance Act of 1956 that was enacted in India as a part of the Hindu Code Bills. It brought about a few reforms that liberalized the institution of adoption.

HINDU LAW:

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 only 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.

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.²

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.

[vi] Likewise, a female adult Hindu of sound mind could adopt a child if she is

Unmarried

Divorced

Widowed or

Her husband suffers from certain disabilities

Ceased to be a Hindu

Has renounced the World

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

² Hindu Adoption and Maintenance Act of 1956

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.

Effects 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 section 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*,³ 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. Similarly, in the matter of a giving a child in adoption, the Hindu male enjoys

³<https://indiankanoon.org/doc/102512/>

broader rights than a corresponding female. The case of Malti Roy Choudhury v. Sudhindranath Majumdar is oft referred to.

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.

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 parent, 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.

MUSLIM LAW:

Adoption is a little different under Islamic law than the usual adoption practices that are followed. The Islamic term for what is generally called adoption is kafala. Like everything else in Islamic Law, the practice of adoption is highly regulated. A guardian/ward role is played out rather than a parent. This relationship has specific rules. These rules are mainly to preserve the integrity of the family line.

Adoption is certainly not prohibited. What is unlawful is to attribute one's adopted child to oneself, as if there is a biological relationship. This is because Islam seeks to safeguard biological lineage and not confuse lineage.

There are a few rules in Islam surrounding the concept of Adoption:

An adopted child retains his or her own biological family name (surname) and does not change his or her name to match that of the adoptive family.

An adopted child inherits from his or her biological parents, not automatically from the adoptive parents.

If the child is provided with property/wealth from the biological family, adoptive parents are commanded to take care and not intermingle that property/wealth with their own. They serve merely as trustees. These Islamic rules emphasize to the adoptive family that they are not

taking the place of the biological family — they are trustees and caretakers of someone else's child. Their role is very clearly defined, but nevertheless very valued and important.⁴

It is also important to note that in Islam, the extended family network is vast and very strong. It is rare for a child to be completely orphaned, without a single family member to care for him or her. Islam places a great emphasis on the ties of kinship — a completely abandoned child is practically unheard of. Islamic law would place an emphasis on locating a relative to care for the child, before allowing someone outside of the family, much less the community or country, to adopt and remove the child from his or her familial, cultural, and religious roots. This is especially important during times of war, famine, or economic crisis — when families may be temporarily uprooted or divided.

CHRISTIAN LAW AND PARSI LAW:

The personal laws of these communities also do not recognize adoption and here too an adoption can take place from an orphanage by obtaining permission from the court under Guardians and wards act. A Christian has no adoption law.

Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Christians have no adoption laws and have to approach court under the Guardians and Wards Act, 1890. National Commission on Women has stressed on the need for a uniform adoption law. Christians 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. Besides, such a child does not have legal right of inheritance.

The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. This Act also provides that the court must take into consideration the welfare of the child while appointing a guardian under the Act.⁵

There is no specific statute enabling or regulating adoption among Christians in India. In the absence of a statutory or customary adoption recognized by courts, foster children are

⁴Islam Today (en.islamtoday.net)

⁵Paras Diwan, "Family Law", Allahabad Law Agency, (9th, 2009)

not treated in law as children. On death of the foster parents, their estate is distributed among legal heirs of the intestate, to the detriment of foster children. Christians in India can adopt children by resort to section 41 of the Juvenile Justice (Care and Protection of Children) Act 2006 read with the Guidelines and Rules issued by various State Governments

UNIFORM CIVIL CODE FOR ADOPTION

Laws relating to crime and punishment are the same for all citizens in India, and so are the laws relating to commerce, contracts and other affairs. But there are, as is evident from the case laws and the authorities put forth above, that there are no uniform laws regarding family matters in the Indian context. It has been requested since a long time for a uniformity in such laws. To treat all citizens equally, one must have same laws for everybody. In case of adoption, the conspicuously different laws for Hindus and Non Hindus creates an emotional problem. The non-Hindu parents, who may want to adopt a child and treat him/her as their own are not legally allowed to call themselves the parents or claim the child as their own. Hence, there has been a cry for a uniform civil code with respect to adoption.

A uniform civil code in adoption laws will not violate fundamental right to religion. It should be remembered that directive principles of States policy mandate the state to bring uniformity in laws. 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. Since Adoption is a salient feature of Hinduism, The Hindu Adoptions and Maintenance Act, 1956 statutorily recognizes adoption. The Act brought about significant changes to the law of adoption amongst Hindus and has improved the position of women in this regard. It is absurd that Muslim and Christian Indians cannot legally adopt a child for lack of a uniform code on adoption. If a Uniform Civil Code is enacted, like the Hindu women, the women following other religions will also be allowed to adopt. With the coming of a Uniform Civil Code,⁶ the status of Indian women will definitely improve in all aspects of social life. One way to avoid conflict would be to give people the option to opt out of classification based on religion. It should not be mandatory that there should be a set of religious personal laws that govern a person's life; instead, more laws to ensure basic human

⁶Paras Diwan, "Law of Adoption, Minority, Guardianship and Custody", University Law Publishing Company, (4th, 2010)

rights are the need of the hour. If the Centre is unwilling to move forward, individual states should take the lead. Goa is one state that has shown the way and other states may follow suit. A secular India needs a uniform civil code.

Apart from this, care has to be taken that the uniformity that has been requested for breaks through the shackles of gender bias too. The different rules regarding adoption for men and women must stop. Both must have equal rights to adopt a child. Thus this issue also needs to be addressed.

INTER-COUNTRY ADOPTION:

Inter-country adoption is the process by which you:

Adopt a child from a country other than your own through permanent legal means; and

Bring that child to your country of residence to live with you permanently.

Inter-country adoption is similar to domestic adoption. Both consist of the legal transfer of parental rights and responsibilities from a child's birth parent(s) or other guardian to a new parent or parents.

Lakshmi Kant Pandey's case is the most important in the area of inter-country adoption. In 1982, a petition was filed under Article 32 of the Constitution by advocate Lakshmi Kant Pandey alleging malpractices and trafficking of children by social organizations and voluntary agencies that offer Indian children for adoption overseas. The petition was filed on the basis of a report in the foreign magazine called "The Mail". The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. By an order- dated 6.2.1984 the Supreme Court laid down detailed principles and norms to be followed for the adoption of children by the people overseas. Many examples and references were cited while 'discussing the ⁷issue, including the statutory provisions and the international standards. While discussing the issue the court said: "When the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the

⁷Central Adoption Resource Authority (adoptionindia.nic.in)

country because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socio-economic conditions prevailing in the country, it might have to lead the life of a destitute, half-clad, half-hungry and suffering from malnutrition and illness”

The Supreme Court of India has laid down that every application from a foreigner/NRI/PIO (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the Government or a Department of the Foreign Govt. to sponsor such cases in the country in which the foreigner is resident. The foreign agency should also be an agency ‘authorized’ by CARA, Ministry of Social Justice & Empowerment, Govt. of India. No application by a foreigner/NRI/PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

CONCLUSION AND RECOMMENDATIONS:

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 the⁸ 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.’

⁸<http://www.oneindia.com/india>

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