

Adoption Laws in India: An Evolutionary Study of Religious Personal Laws and Secular Frameworks

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Abstract: *Adoption in India has evolved at the intersection of religious personal laws and secular legal frameworks. Historically, adoption practices were largely governed by religious personal laws, particularly within Hindu society, where scriptures sanctioned adoption subject to specific ritual and gendered requirements. This religious foundation was later substantiated through the Hindu Adoption and Maintenance Act, 1956, which formalised adoption but limited its applicability to only dharmic religions. In contrast, non-Hindu communities were constrained to guardianship arrangements under the Guardian and Wards Act, 1890, which failed to establish a full legal parent-child relationship. This paper examines the development of adoption laws in India through an evolutionary lens, analysing Hindu, Christian and Islamic religious perspectives on adoption and their influence on legal recognition. It further traces the state's gradual shift towards secularisation through repeated but unsuccessful legislative attempts, culminating in the enactment of the Juvenile Justice Act, 2000. By analysing judicial interpretations and socio-religious resistance, the paper highlights the persistent tension between religious personal laws and the constitutional vision of a uniform, child-centric adoption law. The study concludes that while the Juvenile Justice framework represents a significant move towards inclusivity and secular governance, religious and cultural preferences continue to influence adoption practices.*

Keywords: *Adoption, Hindu, Christian, Islam, Religious laws, Legal laws*

Introduction

Adoption is primarily a legally recognised process through which an adult or adults become the lawful parent(s) of an adopted individual. In other words, adoption involves individuals taking responsibility for raising another person and welcoming them into their family. Adoption is a popular option for those who wish to become caregivers and parents, often fulfilling an emotional need. There are several reasons why married and unmarried individuals may seek alternative ways to become parents. Many pursue adoption

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due to infertility or medical conditions that make it difficult to have a biological child. Other factors, such as sexual orientation or biological challenges, may also prevent individuals from becoming biological parents, leading them to consider adoption. At the global level, the Convention on the Rights of the Child (CRC) is the principal international convention that sets standards for the adoption of children worldwide. It outlines children's rights and the responsibilities of states towards children, and Article 21 of CRC states: *"If a child cannot be properly looked after in their own country... then they might be adopted in another country."* Similarly, in India, the rules and conditions established by the Ministry of Women and Child Development facilitate adoption. These rules state that there are three categories of children who can be declared legally free for adoption: orphans, surrendered, and abandoned children. An orphan child is someone who has lost both parents. A surrendered child has been relinquished to the Child Welfare Committee by either their parents or guardian due to physical or mental factors beyond their control. Lastly, an abandoned child is someone who has been left unaccompanied and renounced, and who, on that account, is declared abandoned by the Child Welfare Committee. At present, the Central Adoption Resource Authority (CARA), a statutory body established in June 1990, regulates, monitors, and promotes the adoption of the three categories of children. CARA oversees a comprehensive and complex adoption process that involves various institutions, including the Magistrate, Court, State Adoption Resource Agency, Specialised Adoption Agency, Authorised Foreign Adoption Agency, and various legal verification.

Adoption laws in India have been secular since the enactment of the Juvenile Justice Act of 2000. However, they are not always determined solely by the laws prescribed by the relevant institutions, but also by historical considerations, religious beliefs, and societal expectations. Adoption laws in India reflect the responsibility of the state towards minors. Over the years, the state has taken on the role of a guardian, encouraging the establishment of institutions and the enactment of laws to protect minors and guide parents and individuals in filling the emotional void within families. Until recently, adoption laws had variation, particularly in their applicability to different religions, and were as fragmented as the country's diversity. Although there should not have been any boundary where religion conflicted with the wish to adopt, unfortunately, legal disparities prevented people of certain faiths from adopting a child. Through this analysis, the paper examines adoption laws in India and their evolving religious and secular foundations over the years.

The Hindu Scriptures on Adoption

Dattaka-Mimansa and *Datta-Chandrika* are the two historical treatises that include the law of Adoption. The former was written by Nanda Pandita, a classical work in the 17th century that was well accepted by the Hindu society and the British.² The other renowned work was *Dattaka-Chandrika* by Kuvera. Both these treatises were based on the religious wisdom of the *Vedas*. Traditional Hindu adoption laws have extensively mentioned the importance of a male child for various purposes within the family and society. Moreover, adoption in the Hindu society has assigned less importance to adopting a girl child than to a boy due to two main objectives of an adopted son laid down by *Dattaka-Chandrika*: -

- I. To perform the last rite of a deceased, also called '*antim sanskar*'.
- II. To follow the legacy and family name of the adoptive father.

Adoption of Hindu children under HAMA

As Hindu religious scriptures sanctioned adoption subject to certain religious requirements, and with the growing unauthorized adoption post-independence in Indian society, the state institutionalised these principles through the Hindu Adoption and Maintenance Act (HAMA), 1956. It was the first initiative taken by the Government for legalizing Adoption. HAMA, however, applies only to Dharmic religions or Eastern religions, such as Hindus, Sikhs, Jains, and Buddhists. The Act, therefore, does not apply to other faiths, such as Christians, Muslims, Jews, or Parsis. HAMA brought a change in Indian society when only male individuals had the right to adopt, which was penetrated through the Hindu *Sashtri Law* and *Gotra* (lineage). HAMA, hence, attempted to denounce the traditional Hindu belief that only male children can be adopted. The *Sashtri* law, which allowed male individuals to adopt only male children in reference to their own caste, also neglected a woman's will and consent in matters of Adoption, as the husband or father had the sole authority to carry on with the process of Adoption. Therefore, HAMA was a huge step that allowed single females to adopt a child.

² Perna Gupta, "Adoption of Child in India with Special Reference To Hindus", *Scribd*, 3 May 2014, retrieved from <https://www.scribd.com/document/221733254/Adoption-of-Child-in-India-With-Special-Reference-to-Hindus> accessed on 2 April 2024.

Adoption process under HAMA

Unlike the procedures prescribed under the current Central Adoption Resource Authority (CARA) regulations, adoption matters under HAMA follow a simplified process. For an adoption to be recognized by the Government, the individuals involved require:

- i. Firstly, to perform a ceremony that spiritually validates the Adoption as accepted by the Hindu faith. A ceremony known as '*Datta-Hom*' and '*Dattaka-Homam*'. However, this religious ceremony is no longer essential.
- ii. Secondly, the authentication of an adoption deed, which is a legal foundation that creates a legal parent-child relationship.
- iii. Thirdly, a court order is to be made based on the deed submitted.

Under HAMA, the above procedures are enough to obtain the rights of Adoption and may be an effortless and smooth adoption process. Due to such legality, which did not require rigorous checks of a child and family, HAMA became the most sought-after. In the earlier years, HAMA became a '*cash for child*' business; many brokers, nurses, and middlemen were involved in the racket. Consequently, several trafficking cases were recorded across the country during the 1960s and 1970s, especially cases of trafficked young girls. The informal adoption under HAMA, which promised a better life, later turned out to be a living hell, especially for the girls involved. Moreover, many potential parents privately seek to see the available children and handpick children, reflecting an unethical and immoral practice.

There exist several criticisms of the HAMA, such as the stakeholders conducting no home study and a lack of bona fide documentation, posing a great threat to a possible abduction of the child given for adoption. Although HAMA had good intentions to build families, the easy process poses a significant risk. At present, HAMA is no longer applied to the Orphan, Abandoned and Surrendered children, as these children belong to the state's care and protection. The Act of HAMA post-JJ Act 2015 has been limited to direct adoption between two Hindu families. Therefore, the adoption agencies no longer play the role of a connecting dot between the potential parents and the biological parents.

Guardian and Wards Act

The absence of adoption laws for non-Hindu communities left no option for legal Adoption other than to proceed under the Guardian and Wards Act (GWA). Contrary to HAMA, GWA was introduced by the Colonial Government in 1890. The GWA was enacted to safeguard a minor's physical and mental well-

being. The Act defines a ward as a minor for whose person or property there is a guardian. In simple terms, a minor has not crossed the age of 18. GWA is a secular Act as it can be accessed by individuals of any faith, unlike HAMA, which only applies to Hindus. Until recently, the government had not recognized legal parent-and-child relationships for non-Hindus. They could only establish the status of a guardian or guardianship under the GWA. Hence, this Act does not give legal recognition to a minor as the child of the guardian; and on paper, the guardian and minor would share the association of simply ward and guardian. In other words, this Act does not create a parent-child relationship. Moreover, the Guardian-Ward relationship is temporary and lasts only until the child reaches the age of majority of 18. Although secular, GWA is flexible because it can provide procedural law into personal law. The very fact that it failed to establish and authorise the parent-child relationship was a significant drawback, as, due to this reason, communities of other faiths could not legally adopt a child.

Christian Scriptures on adoption

Christian personal law in matters of Adoption does not formally recognise the adoption process. However, the believers of this faith have laid down Bible scriptures, which they believe to be indirectly resonating with the modern-day Adoption. Bailey, in their work, refers to James 1:27, whereby God guides them to look after orphans and save them from the polluted world. The article also presents several stories of Adoption in the Bible, the book of Esther, an adopted child who later became queen and was used by God for deliverance to the Jewish people. The Bible also preaches "*to act as Father to the Fatherless*". According to the Bible, in John 3:16, Jesus Christ himself was born to a worldly human, Mary and Joseph, who were the parents of Jesus in the world and can be regarded as the adopted parents of Jesus by God; John 3:16 states, "*...God so loved the world that he gave his one and only son...*". Hence, Adoption in Christianity is not perceived as unacceptable but is also not overtly mentioned or guided as under Hindu scripture. For this reason, it failed to frame a separate law for the community as a whole. Since there were no separate adoption laws for Christians, the community had to go through GWA, which did not grant a parent-child relationship. As a result, several litigations were filed, and several court hearings took place. In Philip Alfred Malvin V. Gonsalves (1999), the Kerala High Court accepted that Christian Law does not prohibit Adoption, and the Canon Law allows it [*canon laws are ecclesiastical laws governing the Catholic Church*]. In similar Court hearings of Ajit Datt V. Mrs Ethel Walters and Ors. the court gave the verdict that an adopted child has the rights and duties to inherit on the same par as a natural son and also interpreted that Adoption is not prohibited under Christianity.

Islamic Scriptures on Adoption

The holy scripture of the Quran 33:4-6, in matters of adoption, writes that “*Allah has not made adopted sons their real sons and says He will guide the way*”. In verse 5, the Quran writes, “*Call them (adopted son) by their fathers*”. The Islamic law also allows raising a child to the best of the parents' capability, but the child must be named after their biological father. It is not in the context of villainising Islamism in matters of adoption because Islam does allow the provision of care and love to a child, and like any other rational human being, a person would have empathy for a child who does not have a family. In Islamic personal law, it is *haram* (forbidden) for a father to deprive his biological son of inheritance for someone who is not his own. This forbiddance is sanctioned by the Holy Book of the Quran, which recognizes that inheritance matters only in blood-based relationships. It is also further written in the Quran 8:75 *'those related by blood are only entitled [inherit] from one another'*. Moreover, tracing the rules of inheritance transfers in the Muslim community, Daniel Latifi writes that the contemplation of Adoption is due to the Islamic law of inheritance that guides property distribution. Since the religious scriptures make it difficult for the adopted children to be put on par with the biological children, the Islamic Jurists created a solution to this problem. In the year 1913, the Muslim Jurist *Ameer Ali*, through family *waqf* [*waqf is a permanent dedication of any property for any purpose recognized by Islamic Laws*], held that family *waqf* is also to be benefited by an adopted child who has settled as a dependent relation. Ameer Ali's words on family *waqf* were adopted by the *Mussalman Wakf Validating Act* (1913). The Act extended in undivided India, and in section 3 (a), the Act writes “*for the maintenance and support wholly...for descendants*”. A division bench of Lahore High Court in *Mubarak Ali Vs. Ahmad Ali* also included the word 'family', which refers to adopted children who have settled with the family based on dependent relations. Therefore, a massive shift in the Muslim attitude towards adoption has been noticed in the light of pre- and post-independence. During Pre-independence, the process of adoption was processed through religious beliefs, but it did allow legal Adoption for the Muslim community; however, post-independence, in the following years, the same spiritual beliefs stood against a unified Secular Adoption Bill.

Failed attempts at Secular adoption laws

With the implementation of HAMA, several civil society organizations, and social workers showed distress with the law sanctioned by and for one particular religion. Therefore, the Indian government and Christian groups, placing importance on Article 44, attempted to present uniform adoption laws for all communities in 1972, 1980 and 1992.

1. Adoption of Children Bill (1972)

The Adoption of Children Bill Presented in the Rajya Sabha, sought to transcend the boundaries of caste and creed. The Bill aimed to prevent acts of acquisitive adoption and safeguard the child's interests. However, the Bill was opposed mainly by the Muslim community, and yet again, the secular adoption system was prevented by the religious beliefs of the society. The Bill was contested primarily because the Islamic personal law does not recognize adoption.

2. Adoption of Children Bill (1980)

The Adoption of Children Bill was once again brought to the lower house of the parliament in 1980, this time exempting the Muslim community. However, the Parsi community, precisely the Bombay Zoroastrian Jashan Committee, rejected the Bill as the scriptures of Parsis, similar to Muslims, do not recognize adoption in the modern sense.

Noshir H. Dadrawala, on “*Adoption is not yet legal for Parsis in India*”, writes that only after performing a religious ceremony called *Navjote* can an individual be inducted into the Zoroastrian religion. Moreover, an adopted child can be included in the religion as Parsi but not as a part of the Parsi Zoroastrian race. Dadrawala cites the Parsi Panchayat Case in which the right to entry to *Agyari* and *Atash Behram*, a sacred fire temple, was only for Zoroastrian Parsis; the adopted individuals could be denied admission.

3. Christian adoption and maintenance Bill (1992)

The 1992 Bill, initiated by the Christian community of India, was a unified demand by various associations of Christian denominations nationwide, including the Catholic Bishops' Conference of India, to formalize Adoption for Christian couples. However, the unified demand could not be realized.

Secular adoption law: Juvenile Justice Act

As Adoption in India was processed only through the HAMA 1956 and the GWA 1890, the religion-specific nature of the adoption law long undermined the Constitution's long vision of bringing a Uniform Civil Code. However, the JJ Act of 2000 was a significant step that formalized the adoption process in India. A juvenile is a person who has not attained the age of majority. In other words, a juvenile is someone below eighteen years of age, as prescribed by the Indian Majority Act. Therefore, the JJ Act applies to juveniles in respect to adoption. The JJ Act was first introduced in 1986 to administer juveniles, following India's adoption of the United Nations Minimum Rules for the Administration of Juvenile Justice in 1985.



However, in the years following, the debate over religious laws that challenged a common adoption law was finally ended through the JJ Act in 2000, which was enacted to comply with the UN Child Rights Convention (1989), which India ratified in 1992 and repealed the JJ Act of 1986.

Today, Adoption in India is governed by two major acts or legislation: HAMA and JJ Act 2015. HAMA has had its drawbacks, but it was the first legislation regarding Adoption to be introduced by the state, signifying a major step. On the other side, the JJ Act has had a subsequent development, making adoption policies more secure. In the following years, the secular nature of Adoption was once again challenged by the Supreme Court in *Shabnam Hashmi vs. The Union of India* (2014). The petitioner, who was a Muslim, faced legal difficulty in being recognised as the child's parent and therefore raised issues about whether caste, creed and religion affect the adoption process and the secular and personal law. In its verdict, the court stated that the Right to Adopt is a fundamental right and the JJ Act is a secular law. Since Islamic law does not recognize Adoption, the court advised the Child Welfare Committee to consider Islamic personal law before declaring a Muslim child eligible for Adoption under the three categories of the Child Welfare Committee.

Conclusion

Post JJ Act and considering the historical background of convergence between religion and adoption, it can be argued that the adoption laws in India have had two outlooks. One that is legal, run by the state's jurisdiction, such as laws, Acts, court verdicts and adoption agencies. The other is run by scriptures and the faith of communities, which is reflected in the preferences put forward by the potential parents, even to this day. There remains an underlying hope among prospective parents that they can form a stronger bond with a child of their own race and religion emotionally. Bartholet uses the term, biologism, to state that a 'natural' biological family is preferred in the context of adoption. For instance, the strong urge among potential parents to match a child who is a biological lookalike. Likewise, it is also visible among a few potential parents who wish to adopt a child whose birth parents would have the same religion as theirs, with the notion that the child shares the blood of the same caste or religion. While challenges remain, the state has attempted to secularise, unify and remove preferences of caste, race and religion in the adoption process through the JJ Act, aiming to transcend the barriers and recognised the right of individuals from any faith to adopt a child legally.

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