
SHORTCOMINGS IN INDIAN ADOPTION LAWS: A CRITICAL ANALYSIS

Arav Saxena, BBA LL.B. (Hons.), O.P. Jindal Global Law School, O.P. Jindal Global
University, Sonipat

ABSTRACT

This paper examines the judicial and legislative shortcomings in existing Indian adoption laws, while discussing their evolution and historical impact. The paper is divided into 3 sections, highlighting 3 major problems. First, it evaluates judicial decisions in reconciling caste and adoption, particularly in interpreting Section 12 of the Hindu Adoption and Maintenance Act. Second, it critiques the Indian government's regulatory approach to inter-country adoption, showcasing how assumptions about cultural suitability and restrictive CARA guidelines hinder the welfare-centric purpose of adoption. Third, it analyses contradictions between the JJ Act and the Hindu Adoption and Maintenance Act, illustrating how these gaps create confusion and weaken protection for adoptees. Through this examination, the paper argues that India's adoption framework remains fragmented and inefficient and calls for reform to alleviate these concerns regarding adoption.

INTRODUCTION:

Adoption, as a practice, has existed for a major portion of the world's history and its many civilizations. Owing to its long-standing position in the world, it has naturally evolved and adapted to the various changes in societal attitudes and purposes required in different periods. For example, it was used as a political and economic tool to strengthen ties among families in the Roman Empire. In India and China, it was meant to ensure the continuity of cultural and religious practices. In the medieval period, a drastic change in attitude led to adoption being nearly erased as a common practice, with an emphasis on blood relations, particularly in the case of inheritance¹. The way the practice is now treated and utilized can be largely credited to the United States, which advocated for providing orphans with a home after the Civil War. As time passed, adoption became a more formal structure of civilization. When concerned with the state of the practice today, we see the massive, interconnected legal frameworks and structures put in place to facilitate the practice, its goal emphasizing the protection of children. In India, some of the laws governing the practice include the Hindu Adoption and Maintenance Act of 1956, the Juvenile Justice Act of 2015 and the CARA guidelines. However, these structures are not as rigid as they seem, particularly when they interact with each other and other facets of the law.

This paper illustrates that the Indian adoption legal system is fraught with legislative gaps, inconsistent judicial interpretations, and procedural inefficiencies. These issues lead to a slowdown in adoption practices and insufficient protection of adoptees' rights, highlighting the need for legal reforms. To demonstrate this, this paper has been divided into four sections. The first focuses on contradictions in judicial interpretations, particularly in the case of caste; the second section discusses the attitude of the government concerning inter-country adoptions; the third section talks about shortcomings in the JJ Act of 2015; the final section provides a conclusion to the paper, summing up the issues discussed.

I. CASTE AND ADOPTION

The first issue this paper presents is the gaps and inconsistencies in the courts' enforcement of Section 12 of the Hindu Adoption and Maintenance Act², 1956, which largely codified the law on adoption. An important result of this Act was that it got rid of the Hindu law rule that inter-

¹ Syed M. Aatif, *The Law of Adoption in India: A Critical Analysis* (2019).

² Hindu Adoption and Maintenance Act 1956, s 12.

caste adoptions were not allowed. However, the courts have seemingly faced problems in enforcing this rule, making it hard to pinpoint a single legally binding precedent on the matter.

Essentially, this section provides that an adopted child will be considered the child of their adoptive father, and from the date of adoption, all ties of the child with their biological family will be considered severed and replaced with those with their adoptive family. This comes with some conditions:

- i) the adopted child cannot marry any person whom they could not marry when they were a part of their biological family;
- ii) the property vested in the adopted child before adoption shall continue to be vested in them;
- iii) the adopted child cannot divest any person of any estate which vested in him before the adoption.

In *A.S. Sailaja v. Principal, Kurnool Medical College*³, the petitioner, daughter of A.S. Radhakrishnan, took an entrance examination and failed, attaining 417 out of 600. Though she described herself as the natural child of Radhakrishnan, her application showed her to be the adoptive daughter of B. Sivaramaiah, a backward class in Andhra Pradesh and sought admission on that basis. The court found that any person who would attempt to seek to acquire the status of a backward class would have to prove that they suffered the same disadvantages due to social, educational and cultural backwardness. It made certain observations, saying that children brought up in certain culturally, educationally and economically advanced atmospheres would be bound to start their life with advantages. So, in the context of Sailaja's petition, the court held that she was not eligible for admission to the college under Article 15(4) since she was unable to prove she had faced obstacles and disadvantages. Technically, this goes against Section 12, which provides that the children's ties must be replaced with those of their adoptive family. But the bigger problem arises with further inconsistencies in judgements provided by courts.

In *Khazan Singh v. Union of India*⁴, the court held that on the adoption of a Jatt boy into a

³ *AS Sailaja v Principal, Kurnool Medical College* AIR 1986 AP 209.

⁴ *Khazan Singh v Union of India* AIR 1980 Del 60.

scheduled caste family, he was entitled to the benefit of reservation under Article 16(4). The court holds that “it cannot be said that membership of caste is determined only by birth and not by anything else”, effectively attributing membership of caste to reasons other than birth, like adoption. Further, the judgement uses principles of the old Hindu law, where an adopted son was considered to be the son of the adoptive parents as if he was born to them. The court also uses Section 12 of the Hindu Adoption and Maintenance Act, 1956, particularly deliberating on the meaning of the word ‘ties’, finally holding it to include all types of bonds- social, religious, cultural, etc. Essentially, the *Khazan Singh* case showed the courts’ want to achieve social equality as aimed for in the Constitution by encouraging inter-caste adoption.

The courts have digressed from the letter of the law in Section 12 of the Hindu Adoption and Maintenance Act in more ways than one. Not only have they gone to the extent of considering the extreme notions of caste and their consequences under adoptions, even though they are not mentioned in the provision, but they have also diverged in their views on the subject. This has the effect of dampening the spirit of the Act that aims at integration of the society⁵.

II. INTER-COUNTRY ADOPTION

The CARA guidelines provide a set of regulations to adoption agencies for following in-country and inter-country adoptions. It stipulates for providing a “sound basis for adoption.” Essentially, the guidelines state that a family or a familial environment is best suited for the balanced development of a child. However, these guidelines tend to ignore its purposes, particularly in the matter of inter-country adoption. The government has made several assumptions that adversely affect the point behind adoption⁶.

Firstly, the government believes that it is important to maintain a familiar social and cultural milieu that is most appropriate for a child. Secondly, the government assumes that the best way of preserving this environment is by encouraging in-country adoption. Not only is this incorrect in light of the great diversity that exists in our country, but it also serves to undermine the basic foundation of adoption- to provide a child with a good home. It seems counterproductive to restrict or prefer adoption within the country when suitable homes can be found outside, too. Finally, it seems inconceivable how adoption agencies could determine the social and cultural milieu suitable for an orphaned child. Based on these assumptions, the policy to facilitate in-

⁵ Balu N, *Adoption- Some Unsolved Issues* (2003).

⁶ S. Aarthi Anand & Prem Chandra, *Adoption Laws: Need for Reform* (2002).

country adoption and regulate inter-country adoption has been arrived at⁷. This has resulted in the latter being discouraged constantly.

This regulation of the adoption process is done by the CARA guidelines in many ways. Firstly, though CARA serves as an information centre at the pre-adoption stage, it only keeps track of inter-country adoptions in the post-adoption stage. CARA is also mandated to liaise with diplomatic missions abroad to prevent 'neglect, maltreatment, exploitation or abuse and to maintain an unobtrusive watch over welfare and progress of such children⁸.' However, for in-country adoptions, the agency simply only needs to maintain contact with the family for a period of 3 years. The reasoning behind the procedures is understandable, as some follow-up is required for the safety of the children, but it seems unreasonable for there to be such a stark difference in the follow-up procedure between inter-country adoption and in-country adoption. Even if it is argued that the policy's intent is not discouraging, it is clear that inter-country adoption carries a sense of disapproval.

Two conditions have also been imposed on adoption agencies⁹. Firstly, 50 per cent of the adoptions of a recognized adoption agency must be made by Indian families. This seems to be an unnecessary requirement. Secondly, the government has prescribed an order of preference in determining adoptive parents, which must be followed: Indian families in India, Indian families abroad, one parent of Indian origin abroad, both parents being foreigners. This condition serves the purpose of fulfilling the "social and cultural milieu" aspect discussed earlier but also seems to emphasize the "Indian-ness" of the parents. This could easily negate the very foundation of adoption.

These regulations, even if they are meant with good intentions, have the adverse effect of discouraging inter-country adoption to a great extent. The government is seemingly operating under the misconception that it is the apex concern that the child must grow up in a suitable cultural and social milieu. The government has imposed an objective that is misplaced and not required. Instead, the government should strive to focus on the welfare of children, making it the first and most important principle. The government's existing policy has only resulted in this welfare principle taking the backseat in the adoption process. In fact, the procedure of

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

regulating inter-country adoption would have just as much utility if it were applied to in-country adoption.

III. FLAWS IN THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

The final issue examined is the inconsistencies and flaws in the Juvenile Justice Act of 2015¹⁰. Firstly, Section 63 of the JJ Act¹¹ prescribes that the adopted child's ties with his biological parents would be severed upon adoption. At the same time, however, Section 60 of the same Act¹² requires, in the case of inter-country adoption, for the adoptive parent to keep the adopted child in touch with his biological parents and siblings.

Next is the Act's relationship with the Hindu Adoption and Maintenance Act of 1956¹³. Section 56 of the JJ Act first states that nothing in the 2015 Act will apply to the adoption of children under the provisions of the 1956 Act. However, it does not say that Hindus are restricted from adopting under the JJ Act. So, it leaves Hindu families with a choice as to which Act they wish to adopt under¹⁴. It must be noted that there are many clashing and contradictory provisions between the two Acts. This can be especially troublesome when it comes to challenging the adoption of a child¹⁵. Further, a child below the age of 18 may be given for adoption under the JJ Act, but the same limit is 15 under the Hindu Act. These discrepancies between the two Acts make the adoption process hazy and unclear, only adding to the multitude of problems the framework suffers from.

Finally, the JJ Act does not seem to penalize parents who abandon their children, considering them the same as parents who leave their children in the care of institutions. As per section 38(2) of the Act, no criminal proceedings can be initiated under the IPC¹⁶ against parents who abandon their children. The JJ Act considers a right of the child to be "to know and be cared for by his parents." This approach does not seem to follow this belief.

¹⁰ Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act).

¹¹ JJ Act, s. 63.

¹² JJ Act, s. 60.

¹³ Hindu Adoption and Maintenance Act 1956.

¹⁴ Aatif (n 1).

¹⁵ *ibid*.

¹⁶ Indian Penal Code 1860.

CONCLUSION

To summarise, the Indian adoption framework still suffers from problems in its framework, which hinders its effectiveness and impact. Judicial contradictions make the spirit of the law confusing to understand, adversely affecting its purpose and what one could expect a case's outcome to be. The government's attitude towards inter-country adoption hinders a very sturdy pillar of the practice, preventing parents from opting for inter-country adoption. Finally, inconsistencies and contradictions in legislatures passed to regulate the practice only create confusion and challenges in the law.

To truly stress the importance of the best interest and protection of the child, adoption laws in India require comprehensive reforms. This should include streamlining processes, increasing transparency, examining where the law has gone wrong in the past and providing more support to adoptive parents and families. If this can be incorporated, India can create a more efficient, inclusive and child-centric adoption system that fulfils its apex purpose: providing good homes and protection to children in need.