

ADOPTION PROVISIONS AND MAINTENANCE UNDER HINDU LAW

by

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ABSTRACT

Adoption is a legal process of transferring all the rights and privileges of a child from his biological parents to the adoptive parents. A valid adoption requires various requisites and capacity. A set of procedure and laws has been laid down for the effective governance of the procedure of adoption. Maintenance on the other hand, whether of husband/wife or of dependents is a major concern of the progressive societies. This part of law is still under development and is adopted as per the dynamic needs of the State.

In this paper, efforts have been made to present all such relevant legalities in a short but comprehensive manner. This paper deals with various provisions laid down by Indian legal system over a long period of time. Also, an attempt has been made to bring together substantiate part of the law with procedural part so as to best understand the actual functioning of the laws.

In ancient India, the adoption ceremony known as Dattahoma is one of the most valuable witness of the adoption of a child. Traditionally, adoption evolved amongst the Hindus due to the importance that they attach to a male child, only failing which one was permitted to have a second child. The Shashtrik Hindu Law looked at adoption more as a sacramental act rather than a secular act. The basic objective of adoption was to preserve the lineage and secure one's funeral rites.

Adoption is legal process of transferring all the rights and privileges of a child from his biological parents to the adoptive parents. It is a key to happiness for a kid who is an orphan. It is a noble cause that shines the humanity by giving a child all the love and care showing the real meaning of being human. Adoption is a creation of new strong bond of love between a child and the adoptive parents which their family a complete one. The Ramayana and Mahabharata are the two most important Hindu epics that serve as the base of adoption. The length of adoption intuition of the Hindus is incomparable to any other religion in the world. Historical documents, epics and practices of Hindus is a wide collection of rules, regulations, traditions and experiences of the adoption practices of the Hindus.

Hindu law expressly provides the provisions of adoption but Muslim law, Parsi law, Christian law etc. do not provide any specific law for adoption. Thus, their adoption procedures are governed by the Guardians and Wards Act, 1890. The same law also provides procedures for a foreigner to adopt a child and if adopted child is taken out of the country, the adoption should be carried according to the foreign laws. Once a child is adopted, all his rights are concerned with adoptive parents and no more from biological parents. A child can be adopted by a married/unmarried male or female or by NRI.

Nowadays, the adoption under Hindu Law is governed by The Hindu Adoption and Maintenance Act, 1956 which extends to only the Hindus, which are defined under Section-2 of the Act and includes any person, who is a Hindu by religion, including Buddhists, Jainas and Sikhs and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh. Before this act was enforced, only male child could be adopted as per Hindu Laws but this act

legalizes the adoption of a female child too. Manusmriti describes adoption as, “taking someone else’s son and raising him like their own”. However, HAMA, 1956 has widened the scope of adoption and all adoptions neglecting this act is considered to be void as mentioned in Section 5 of the act.

Foremost, the required condition is to verify the capacity of a child to be adopted. The child has capacity to be adopted if he or she is a Hindu and is unmarried (subjected). **Kumar Sursen v. The State of Bihar**¹, the Honourable Court held the importance of adopted child to be Hindu for a valid adoption. The Hindu Adoption and Maintenance Act provides the detailed provisions that are essential for the adoption to safe and omnibus. Section 6 of the act provides the requisites of valid adoption as being:

- 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.
- 4) The adoption is made in compliance with the other conditions

The Honourable Court in the case of **Dhanraj v. Suraj Bai 1972**² held that non-observance of the any requisite is enough to convert the adoption as invalid one.

As mentioned in Section 7 of the act, the 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. If the wife of the male Hindu is alive at the time of adoption, he should have the consent of his wife for a valid adoption. This has been set in stone by the Honourable Court in the case of **Sarabjeet Kabir v. Gurumal Kaur**³.

Section 8 of the act states the capacity of the female Hindu to take in adoption as being own who is of sound mind, not a minor, who is unmarried, or whose marriage has been divorced or whose husband is not alive 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. The

¹ Kumar Sursen vs The State of Bihar, AIR 2008 Pat 24

² Dhanraj v. Suraj Bai, 1972 Raj LW 612

³ Sarabjeet Kabir v. Gurumal Kaur, AIR 2009, NOC 889 (P&H)

Honourable Court has observed in the case of **Narinderjit Kaur v. Union of India**⁴, that the adoption of a child under the authority of parents is valid where a child was given in adoption with consent and willingness by biological parents and was taken in adoption by the adoptive mother.

The act provides certain conditions for a valid adoption, that is, the adoptive parent must not have a son whether by blood relation or by relation if he wishes to adopt a son and consecutively for a daughter. Also, it is necessary for a male adoptive father to be at least twenty-one year old to adopt a girl child and vis-à-vis a female to adopt a male child. Any payment, reward for consideration of adoption is a punishable offence under Section 17 of the act. The person shall be punished with any term of imprisonment up to six months or fine or both.

The act in addition to the procedure and requirements of the adoption provides the effects of the adoption that lies on the child as well as the adoptive parents. As a result of the adoption, the child shall be deemed to the child of the adoptive family for all the purposes. Also, the child is not allowed to marry any person whom he or she was forfeited to marry if he or she would have continued in the family of birth. The act provides the child to vest the property that he vested before the adoption (subjected). The act does not allow the child to divest any person of any estate vested before adoption. Also, as mentioned in Section 15 of the act, neither the child can renounce their adoptive parents, nor the adoptive parents can cancel the adoption once the adoption has been legally made in compliance with the act. The act provides all the necessary legalities required for the adoption of the child in India. However, there is no legislation for inter-county adoption.

Adoption of Children, 2015 is the guideline that covers the adoption of a child by a foreigner or NRI with the aim of protecting illegal use of children by adoption. Guardian and Wards Act, 1890 is followed in the case if there is absence of a concrete act in the foreign country. Juvenile Justice Act, 2015 also plays a key role in cases of inter-country adoption. Guardians and Wards Act, 1890 lays the conditions of adoption of a child that a child should be-

- 1) Minor
- 2) An orphan or abandoned or surrendered child

⁴ Narinderjit Kaur v. Union of India, AIR 1997 P&H 280

3) Non-Hindu

HAMA, 1956 provides that in order to adopt a child, an application has to be filed before Child Welfare Agency. The registration is done by the agency wherefore Central Adoption Resource Authority, Delhi certifies the same. Later, an interview with Adoptive parents is conducted which is followed by filing of the petition before the court. After the hearing, the court passes a decree and the adoption is complete. The adoptive parents have a right to specify the religion, gender, colour of the skin of the child. Also, the act allows adopting a child if the adoptive parents already have one child that is conditioned by the gender of the child.

Child Adoption Resource Information and Guidance System (CARINGS) is a recently established system for online registration of adoption a child. It is managed by CARA i.e. Central Adoption Resource Agency. Adoptive parents are required to submit all the required documents through this system that is later followed by making the study report by a social worker assessing the eligibility of the adoptive parents, within one month of the filing of the application. Once the parents are found eligible, the parents are named in the waiting list or seniority list. On the turn, the parents are provided with the details of six children and are required to reserve anyone within 48 hours. Within next 15 days, the process of meeting the child with their adoptive parents is completed. Once they decide to adopt the child, the agency moves ahead with the necessary requirements of legal work.

Adoption is a noble work. However, there are certain lacunae in the procedures. According to HAMA, only a male or female can adopt a child. Wherefore the adoption by third gender is neglected in the act. At present, the third genders are proudly recognized as the part of our country. The case of **Shabnam Hashmi v. Union of India**⁵, has welcomed all the religions to adopt a child but still the provisions are insufficient. Hopefully, the Transgender Bill once passed will provide all the right of adoption to the third gender as well. Also, adoption is long way process where one has to wait from months to years to get the validation. Strict procedure of the adoption makes the entire process troublesome due to hard eligibility criteria of the adoptive parents. The adoption also faces the gender biasness.

⁵ Shabnam Hashmi v. Union of India, (2014) 4 SCC

Justice P.N. Bhagwati in a case stated, “no child can grow his full stature, outside the framework of a family”. As per the directions of Honourable Supreme Court, Central Adoption Resource Authority (CARA), the apex controlling body in a matter relating to adoption in India under the Ministry of Women and Child Development (MWCD) for legal adoption has laid down guidelines based on the judgement of Honourable Court in **Lakshmi Kant Pandey v. Union of India**⁶ and Section 41(3) of the JJ Act.

Adoption is a legal procedure by which a person or couple is allotted the responsibility to take care of and raise the child. The practice has been followed for decades and is practiced worldwide. It is a noble cause that brings joy to orphans and fulfils the desire of a person to be a parent. As humanity will rise, adoption will provide the right to an orphan, a family. According to Hindu Mythology, once adopted the child becomes the ‘aurasa’ and has the right to perform the ceremonies prescribed in Shastras. In the case of **Amarendra Mansingh vs Sanatan Singh**⁷, the Honourable Court held the importance of religion and ceremonies during an adoption. Article 21 of the Constitution of India ensures the protection of person’s life and personal liberty. The concept of right to life ensures that every child lives with dignity.

Maintenance is mentioned in chapter three of the Hindu Adoption and Maintenance Act, 1956. Section 3(b) of the Hindu Adoption and Maintenance Act, 1956 states the definition of maintenance as a financial support to provide all the basic necessities of life that is food, clothing, shelter, education and medical expenses. As mentioned under Section 24 of the act, only a Hindu is entitled to maintenance under this act.

The act provides the maintenance to the wife after divorce that is based on the earning capacity of her husband. It provides the wife with a reasonable amount until she is married again. Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 states the situation for the same that are-

- 1) If the husband leaves his wife without any justified reason and without her consent or wish.
- 2) If the husband endangers her life during marriage.

⁶ Lakshmi Kant Pandey v. Union of India, AIR 1984 SC 469

⁷ Amarendra Mansingh vs Sanatan Singh, (1933) 35 BOMLR 859

- 3) If the husband is suffering from a disease that is not curable and contagious.
- 4) If the husband is married to any other women.
- 5) If the husband changes his religion or any other reasonable ground for the wife.

The amount can be paid every month or as a whole. The wife can also claim maintenance if she is unable to meet her medical expenses as held in the case of **Smt. Anita Thaukral v. Shri Satbir Singh Tkukral**⁸. Section 18(3) provides the ground of defense for refusal of maintenance that are-

- 1) If the wife indulged in illicit sexual relation or adultery.
- 2) If the wife changes her religion

The Hindu Adoption and Maintenance Act, 1956 provides the maintenance to widowed daughter-in-law. On the death of husband, the liability of incurring maintenance shifts to father-in-law. Section 19 of the Hindu Adoption and Maintenance Act, 1956 states the condition that daughter-in-law is liable to get compensation if she has:

- 1) No income from any source
- 2) No property
- 3) Insufficient property to cater her basic requirements

Section 19 of the Hindu Adoption and Maintenance Act, 1956 also provides defense to the father-in-law in case he is unable to bear it based on property he owns or/and daughter-in-law gets remarried. In the case of **Raj Kishore Mishra v. Meena Mishra**⁹, the Honourable Court held that if daughter-in-law is able to meet her expenses, the maintenance should not be provided.

The Hindu Adoption and Maintenance Act, 1956 also provides maintenance to children and aged parents. Section 20 of the act states that the parents are under obligation to maintain their legitimate/illegitimate child as long as their child is a minor. A girl is entitled to maintenance until she gets married. Also, the section prescribes that old or physically/ mentally weak parents should be maintained if they are unable to do so on their own. Stepmother is also considered as a

⁸ Smt. Anita Thaukral v. Shri Satbir Singh Tkukral, (2004) 13 SCC 363

⁹ Raj Kishore Mishra v. Smt. Meena Mishra, AIR 1995 All. 70

parent under this section. The same has been held in the case of **Mst. Samu Bai & anr v. Shahji Magan Lal**¹⁰.

The Hindu Adoption and Maintenance Act, 1956 also provides maintenance to dependants. Section 21 of the act states the definition of dependants who are relatives of the deceased. Section 22 of the act states that the dependants are to be maintained by heir of the estate. In case of multiple heirs, the amount to be paid as maintenance is divided according to value of share in the estate. The dependants are not liable to have maintenance if they have obtained some part of the estate.

Section 23 of the Hindu Adoption and Maintenance Act, 1956 provides the necessities while deciding the amount of compensation. Since the act does not provide any specific amount of maintenance be paid, it is upon the discretion of the court. Section 25 of the act also allows alteration of the maintenance that can be decided by the court or can be decided by the concerned parties by an agreement. In the case of **Purusottam Mahakud v. Smt. Annapurna Mahakud**¹¹, the Honourable Court gave the civil court power to give interim maintenance. Interim maintenance refers to when the court compels husband to pay her wife from the date of filing till the date of dismissal. The concept is also known as Pendente Lite. The concept is held so as to ensure incurring of legal expenses by the wife, in case where wife does not have any source of income whereas permanent maintenance is paid in case of divorce. Reasonable factors are considered for grant that is reasonable needs, status of parties, lifestyle that spouse enjoyed, liabilities of spouse, basic needs, paying capacity of spouse, income and property of spouse and other reasonable factors.

The main objective of providing compensation is to maintain the compliance of basic needs in accordance with prior status of the person. Marriage is the base of any society. Certain rights and duties are imposed on the husband and the wife and the neglect may result in sufferance of the family. The Hindu Adoption and Maintenance Act, 1956 has presented a complete and satisfactory perspective of the Indian law to determine the adoption and maintenance procedures. Court precedents and rulings have been a cheery to the cake as it has further cleared the way of clear and specified provisions for adoption as well as maintenance. Thus, the decisions have

¹⁰ Mst. Samu Bai v. Shahji Magan Lal, AIR 1961 Raj 207

¹¹ Purusottam Mahakud v. Smt Annapurna Mahakud, AIR 1997 Ori 73

made India liberal in this context. The Hindu Adoption and Maintenance Act, 1956 is only enforced on Hindus. The act was passed in 1956 as a part of Hindu Code Bills. The act has brought closer to the idea of right to adopt and right to be adopted and serves as the most prominent legislation governing adoption under Hindu law. The definition of adoption is itself derived from Manusmriti. With the objective of old age protection, continuance of family, securing conduct of last rites and rituals, serving rights to an orphan and maintenance of various family members the Hindu Adoption and Maintenance Act, 1956 has standardized the Hindu tradition balancing it with right to life and justice.

As a famous Sanskrit quote states, “स्वस्तिप्रजाभ्यः परिपालयन्तां न्यायेन मार्गेण महीं महीशाः। गोब्राह्मणेभ्यः शुभमस्तु नित्यं लोकाः समस्ताः सुखिनो भवन्तु॥” which means, “May the well-being of all people be protected by the powerful and mighty leaders be with law and justice. May the success be with all divinity and scholars, may all the worlds become happy.”, our law system serves the path for the justice and happiness.

