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## **LAWS OF ADOPTION IN INDIA**

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### **ABSTRACT**

The concept of adoption of a child is prevalent in India from the ancient times. Any society at large cannot deny its existence and need. Since time immemorial, the concept of adoption was required to justify various needs in their respective society at large. In the present era of globalization, the purpose of adoption has taken a dynamic view as the attention now shifted towards the welfare of the child primarily rather than the interests of the adoptive parent(s) which is of secondary importance. But there is no uniformity of adoption in India and being a part of personal laws, various religions provides a different set of provisions in this regard, making it a non-secular act. The Juvenile Justice (Care and Protection of Children) Act 2000 as amended in 2006 has heralded a new era of social justice in dealing with some of the aspects of secular adoption, but still not sufficient for the prospects of the child and the adoptive family, considering the modern needs.

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"I shall be called by a new name,  
Embraced by a fresh pair of arms  
But I shall come and go, the eternal me."

**-Rabindranath Tagore**

Parenthood is one of the most important tags of an individual's life. Every individual has the right to become a parent. Sometimes, however, this experience is missed by couples, or, even single people, due to various factors, like biological infertility, economic constraints, limited time factors, etc. The route to Assisted Reproductive Techniques also has considerable wastage of time and money, and an ordinary person may fail to afford it. Thus, came the process of adoption. Adoption is an institutionalized practice through which an individual belonging to one kinship group acquires new kinship ties that are socially and legally defined as equivalent to the congenital ties. The new kinship supersedes the old ones wholly or in part.

### **What is Adoption?**

Before analyzing the issues related to adoption, it is important to understand the literal meaning of the term "adoption." The meaning of the expression "to adopt" is "to take someone's child into your family and become his or her legal parent." So, is it that easy to take someone's child into your family and become his or her legal parent? Becoming a parent brings a sense of great responsibility, care, protection, feelings; emotions, etc. without these traits, a person cannot be called a parent in real sense and that too for a child who is completely alien to the adoptive family.

## **Adoption in India**

Adoption in India has been recognized for centuries, but being a part of the different personal laws, the adoption processes had no uniformity. Only Hindus, which includes Buddhists, Jains, and Sikhs, have legal provisions for adopting children, i.e., Hindu Adoption and Maintenance Act 1956 (hereinafter HAMA). The other communities' viz. Muslims, Christians, Parsis, and Jews do not have any law of adoption available to them. Shariat does not recognize adoption, and hence Muslims have no law of adoption. The Muslim personal law does not recognize adoption as a mode of filiations unless there is a special family or tribal custom (as in Punjab, Oudh, etc.). Even Hindu converts to Islam cannot adopt. Even if he adopts a son, such son cannot claim the full right of inheritance. In the absence of a law on adoption, Christian, Jews and Parses have to make use of the provisions of Guardians and Wards Act 1890. Under that law, the parents are appointed only as guardians of the child 'adopted' with no right of inheritance. The child remains a foster child as distinguished from an adopted child.

## **Indian Secularism and Adoption in India**

With the passage of time and emerging modern approach & requirement of the society, uniformity in adoption laws among various groups of the society irrespective of their caste, religion, and creed is being felt. Apart from Hindus, Muslims also are willing to adopt a child with all religious, property and inheritance rights to the child. Considering the modern needs, the future and overall welfare of a child, it is important to have uniformity in adoption in the country. Such uniformity may be brought only by a 'secular legislation' in this regard. The word 'secular,' in general, means 'not connected with spiritual or religious matters.' In other words, the secular approach focuses upon taking things more logically, reasonably, with prudence and without bias for any religious community. But, in India, religion has always been a way of life and is deeply rooted in society. Hence, any concept of secularism in India would require not only state neutrality in the matters of religion rather also a guarantee by the state that the various religions would be protected and conserved. In Indian society, being a multi-religious society, mere state neutrality and guarantee of freedom of religion to an individual is not sufficient. The guarantee has to be given equally to all individuals rather. Also, there has to be a Constitutional guarantee of the pro-active role of the State in matters of religion to promote fraternity to assure the unity and integrity of the nation as also the dignity of the individual. Hence, the Constitution, in light of the aforementioned goals of fraternity stipulates the state to take positive steps to promote religious tolerance and also a mutual respect between the various religious communities. This is indispensable in a multi-religious society to attain stability and coherence.

## **Judicial and Legislative Development Concerning Secular Adoption-**

Keeping the above view of secularism in India, the first step in regard of development of secularisation of adoption laws took place in a judicial pronouncement in the case of **Laxmi Kant Pandey vs. Union of India**<sup>1</sup> In the year 1984 by the Supreme Court of India. In this case, the apex court had issued several guidelines to regulate the procedure of adoption and to protect the interest of the adopted child. The court also directed the central government to establish a regulatory body viz. Central Adoption Resource Authority (hereinafter 'CARA'). Later, CARA came into existence in the year 1989 and which, finally, received statutory recognition on being notified by the central government under Rule 33(2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country.

The Juvenile Justice (Care and Protection of Children) Act 2000 as amended in 2006 (hereinafter to be referred to as "J J Act 2000) deals with the provisions relating to adoption under

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<sup>1</sup> (1984) AIR 469,(1984) SCR(2)795

section 41. Under the provision, the primary responsibility for proving care and protection to children shall be that of his family and adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods. The Juvenile Justice Board, under the Act, shall be empowered to give children in adoption and carry out such investigation as are required for giving a child in adoption by the guidelines issued by the State governments from time to time in this regard.

The Act also restricts the adoption on certain grounds, according to which no child shall be offered for adoption until two members of the committee declare the child legally free or placement in the case of abandoned child and also, the child cannot be given in adoption till the two months period for reconsideration by the parent is over in case of surrendered child. Further, adoption cannot take place without the consent of the child if he or she can understand and express his consent.

Both, the J J Act and CARA jointly deal with the numerous areas and secular aspects of adoption of a child, but still they are not comprehensive on the issues like, what would be the religion of the adopted child if the parents are of different religion, if a single parent after such adoption gets married to another what would be the status of such adopted child- whether he or she would have property rights, if yes, then up to what extent and which law would deal with such cases, how the adoption of a child would take place in case of transgender, homosexuals, bisexual and such other communities on the one hand and what would be the status of the other future rights related to such adopted child e.g., rights and duties relating to property, succession, religion etc.

Present available laws, rules, and regulations do not deal with all the aforementioned issues exhaustively. In a recent case of **Shabnam Hashmi Vs. Union of India**<sup>2</sup> on 19<sup>th</sup> February 2014 Supreme Court of India held that J J Act is a secular Act and it has nothing to do with the personal laws of the country and any person of any religion is free to adopt a child of different religion within the guidelines of CARA. The J J Act is a special law, and all the other personal laws are general in this perspective. Thus, a special law prevails over all the existing general laws.

The decision maintains the secular character of the J J Act and also emphasizes the role of CARA, but it does not say anything about the issues of after adoption. In this case, the petitioner also demanded to declare the 'right to adopt' and 'right to be adopted' as a fundamental right under Part-3 of the constitution, which has been denied by the court in the present scenario of the Indian society and which might be relevant in the near future as the issue of social welfare and future of next generation is deeply related to this. The JJ Act 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. Personal beliefs and faiths, though must be honored, cannot dictate the operation of the provisions of an enabling statute.

Thus, the statement of a problem for the study is a critical analysis of the on-going debate on the adoption under Juvenile Justice (Care & Protection of Children) Act 2000 (hereinafter J J Act). The study shall seek to examine all the prominent provisions & legal concepts vis-à-vis adoption under various social and religious groups generally and J J Act specifically which shall promote the adoption among all groups of society as a secular phenomenon.

### **Is There Fundamental Right "to Adopt" and "to be Adopted"?**

Hence, the central research question for the proposed study is as follows: "Whether the 'right to adopt' and the 'right to be adopted' may be granted as a fundamental right under Part-3 of Constitution of India, irrespective of religion, caste, creed, etc. in the present socio-legal framework of

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<sup>2</sup> (2014) 4 SCC 1-A

India, which may help in achieving the constitutional goal of Uniform Civil Code". There is no Uniform Civil Code in India, but a Uniform Criminal Code exists. The criminal law of the country is equally applicable to all citizens irrespective of their religious affiliation. However, in the case of civil law, particularly in matters of personal laws, there is no uniformity. The laws relating to marriage, divorce, maintenance, guardianship, and succession governing the Hindus, Muslims, Christians, etc. are different and vary from one religion to other.

There are different laws like the Hindu Marriage Act; the Hindu Succession Act; the Hindu Minority and Guardianship Act; the Adoption and Maintenance Act etc. are governing the personal matters of Hindus. The Shariat Act, The Dissolution of Muslim Marriage Act and Muslim Women (Protection of Rights on Divorce) Act, etc., which are based on the Holy Quran and governs the personal matters of Muslims only. Similarly, Indian Christian is governed by the Indian Christian Marriage Act, the Indian Divorce Act, and the Cochin Christian Succession Act, etc. Parses are governed by a different set of laws. Thus, it is clear that there is no uniformity in all personal laws as they confer unequal rights depending on religion and gender.

The Indian Constitution, in Article 44 of Part 4 directs the state to provide Uniform Civil Code throughout the territory of India. However, it is only a directive principle of state policy; therefore it cannot be enforced in the court of law. It is prerogative of the state to introduce Uniform Civil Code. Article 44 was made to promote unity and integrity which is cherished goal enshrined in the Preamble.

### **Issues Involved in Secular Adoption**

In the light of background already provided, the present study purports to inspect the following objective(s) for some crucial questions involved in the area of adoption-

- To study and explore the history, advantages, forms of protection, importance and significance of secularisation of adoption in the present socio-legal framework.
- To evaluate the pros and cons of declaring 'right to adopt' and 'right to be adopted' as a fundamental right under Part-3 of the Constitution of India.
- To analyze the nature, content and true scope of the provision in respect of adoption under J J Act.
- The 'right to adopt' and 'right to be adopted' as an instrument in accomplishing the constitutional goal of Uniform Civil Code under Article 44 of the Constitution.
- To determine the rights, duties & obligations of the government, courts, and parent(s).
- To come up with some suggestion(s) for the better harmonization of all personal laws vis-a-vis adoption
- Critical analysis of the various judgment (s) of Supreme Court and High Courts on the secularization of adoption.

And thus, this research work seeks to answer the following questions like What would be the impact of secularisation of adoption in the society at large?; Whether Indian society is ready to have such rights, i.e., right to adopt & right to be adopted as a fundamental right; Whether numerous issues related to the most vulnerable group, i.e., the interest of the adopted child, has been taken up or not?; Whether the multiple groups of the society, like LGBT, homosexual, heterosexual, single parent, etc. has been appropriately addressed or not?; In case of any dispute, what kind of speedy redressal mechanism is there, which may affect the future of the child?; Role of various existing commissions like Central Adoption Resource Authority, National Commissions for Protection of

Child Rights; Various other issues like inter-country adoption, inter country adoption, adoption in cases of surrogate children, etc. have been dealt properly or not?

Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public-spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed, etc. and further for a direction to the Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

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