

ADOPTION: WITH EMPHASIS ON WOMEN RIGHTS UNDER HINDU LAW

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INTRODUCTION

SCOPE AND OBJECT OF THE PAPER

This article proposes to outline the rights of the female spouse or the weaker sex in matters of adoption in Hindu, Muslim and Christian personal law in the Indian subcontinent.

The article proposes to examine the various provisions which deal with the rights of women in matters of adoption. It also proposes to deal with leading case laws that protect the rights of women in various personal laws. The law of adoption relating to Hindus in India is regulated by Chapter II, containing sections 5 to 7 of the Hindu Adoptions and Maintenance Act, 1956. Unusually, the law of adoption relating to Muslims is not enumerated in the Shariat, however there is a controversy as to the concept of adoption, but still many Muslim families adopt. Just like the Muslim law, even the Christian law is vague about the concept of adoption.

IDENTIFICATION OF THE ISSUE

Thus, the research problem meaning the rights of women with regard to adoption answering the following questions:

- a) Who can adopt?
- b) What are the rights of women?
- c) Who can give in adoption and rights of women?
- d) Who is to be adopted?
- e) What are the rights of the girl child?

The research aspect of the paper also deals with problems like:

- a) Awareness of the adoption provisions in the country.
- b) The need for a uniform civil code.
- c) What are the special rights a woman deserves?
- d) Is there an equality of adoption rights between man and woman?

THE HISTORY OF ADOPTION IN ANCIENT INDIA

HINDUISM

Hinduism is regarded as one of the most ancient and popular religions in the world. The faith derives its sources from the Aryan civilization, or vice versa, as history unfolds. In Hinduism, there is an uncanny, enormous need and desire for a family to have a naturally born legitimate male heir (also known as 'varasa'). However, this need is backed up by its own set of reasons. Having a son and marriage is given a high pedestal in Hindu law because, marriage gives rise to the concept of 'Prajā Sampatti'. This concept enunciates that a male heir helps in translocating the departed soul of the parent from hell to heaven, thus acting like a ladder. Hence the son is called 'putra'. He thus acts like the only mean of salvation.

Adoption has also gained importance in Hindu law from concepts derived from 'Pindotaka Kriyahetu', 'Namasankeerthanayacha' and the eminent 'Vedas'. 'Pindotaka Kriyahetu' refers to one who continues the family name, that in ancient Hinduism refers to the son. The Vedas and Manu also have a deep and intrinsic idea and need of having a son by any means. Thus this is how from the ancient times, the need to adopt has been derived right from the kings in the kingdoms to the paupers in the villages of ancient India.

Any person, who is a Jain, Sikh or Buddhist by religion, is also a Hindu since Hindu Law applies to him or her.¹

Adoption is recognized by the Hindus and is not recognized by Muslims, Christian and Parsis. Adoption in the Hindus is covered by The Hindu Adoptions Act and after the coming of this Act all adoptions can be made in accordance with this Act. It came into effect from 21st December, 1956. Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the state of Jammu and Kashmir.

ISLAM

In Islam, there is no specific provision of adoption in the Shariyat or the Muslim personal law. However, this concept is debatable as the populace can interpret the Quran differently.

From ancient times itself, the concept of adoption was accepted. This can be proved through the known fact that Prophet Mohammad himself adopted a boy- Zaid, the son of Haris. as his own.

Prior to the Shariat Act, 1937, adoption among Muslims was recognized by custom.²

By understanding the main passages of Quran, it can be asserted that adoption in technical sense is not allowed in the Islamic law. But nowhere in the Quran, is adoption prohibited.

¹ *Rani Bhagwan v. J.C. Bose*, ILR (1903) 31 Cal 11, *Sugan Chand v. Prakash Chand*, AIR 1967 SC 506 (Sikhs) *Babbalabadi v. Babbalabadi*, ICR (1927) 50 Mad 228;

² Section 29, Oudh Act, 1869

According to authors 'The Prophet has not barred adoption in absolute terms. What is intended is erecting of false relationship to the detriment or loss of true bloods relation.'. Guardianship, however does primarily exist. In the Muslim Law, the father is the sole and supreme guardian of his minor children, if he is alive³

However, the custom of adoption is very much prevalent in the Muslim law, in Jammu and Kashmir. In the following cases, law has also taken the side of Muslims who want to adopt-accepting adoption as a proper system⁴ in the Muslim personal law and acknowledging its validity⁵.

CHRISTIANITY

There is no specific statute enabling or regulating adoption among Christians in India. In the absence of a statutory or customary adoption recognized by court, the foster children will not be treated in law as children and upon the death of the foster parents their estate would be distributed among the legal heirs of the intestate to the detriment of the foster child or children.

In the past persons who wished to adopt a minor child usually approached the Court under the provisions of the Guardians and Wards Act of 1890 and an order of guardianship in respect of the minor child is obtained. The difficulty would arise when the child attains the age of majority as the order obtained under the Guardians and Wards Act would cease to have any effect and the child, who has become a major, will not get the benefits of an adopted son or daughter.

In order to overcome the difficulties in the matter of adoption, the Central Government introduced the Adoption of Children Bill, 1972 in the Rajya Sabha but it was subsequently dropped.

THE RIGHTS OF WOMEN IN HINDU LAW

Who can adopt and what are the rights of women?

Capacity of Female (section 8)

Section 8 of the Hindu Adoption and Maintenance Act, 1956 enumerates the capacity of a Hindu female in adoption of a child, in India. In short, there are three conditions that are to be satisfied by a Hindu female for a successful adoption to take place:

- (i) She should not be a minor;
- (ii) She should not be of unsound mind; and

³ *Imambandi v. Mutsaddi*, (1918) 45 Cal 887

⁴ *Mst. Bibi v. Syed Ali* (1914) SC (India)

⁵ *Nenoo Khan v. Mst. Sugani* (1913) SC (India).

- (iii) She is not married; if married, her husband should be dissolved, or her husband is dead or renounced the world or ceased to be a Hindu or had been declared to be of unsound mind by a court of competent jurisdiction.

Capacity of female as a widow under Hindu Personal Law

A widow⁶ may make an adoption. The power of a widow to adopt depended upon the School of Law to which she belonged.

The rights differ according to the place where the widow resides, such as:

- (i) Mithila: A widow could not adopt at all
- (ii) Bengal: A widow could adopt only with prior authority from husband conferred upon her during his lifetime.
- (iii) Madras: A widow could adopt even with the assent of her husband's Sapindas after husband's death.
- (iv) Bombay: No one's consent is necessary.

However, an age difference of 21 years⁷ is mandatory if she is adopting a male child.

There are certain developments in the Hindu law with regard to adoption by a woman.

CASE LAW

Abhishek Sharma v State of Uttar Pradesh & Ors.⁸

This is a landmark case which defied the provisions of the Shastric Hindu law and thus allowing a female to adopt a son or daughter even after the death of her husband.

Gurumma v Mallappa⁹

This case deals with adoption by a widow unchaste and pregnant at the time of adoption (Pre-act case). The pregnancy of the woman by itself was not considered to be a bar for adoption. However, the quality of being unchaste was given emphasis. Being unchaste, she was not allowed to recreate the ceremonies of adoption, but if any other person was willing to do it on her behalf, it would be considered as a valid adoption¹⁰.

Bijendra Singh v State of Madhya Pradesh¹¹

⁶ *Vijayalakshamma v. B.T. Shankar*, AIR 2001 SC 1424

⁷ Section 11 (iv) of the Act

⁸ *Abhishek Sharma v State of Uttar Pradesh & Ors.* (AIR 2009 All. 77).

⁹ *Gurumma v Mallappa* AIR (1964), SC 510, (India).

¹⁰ *Pratap v Bai Suraj* AIR (1946), BOM, (India).

¹¹ *Bijendra Singh v State of Madhya Pradesh*, AIR (2008) SC 1056 : 2008 (1) Supreme Court 354, (India).

The court held that a Hindu wife who is not divorced but is leading a life like a divorced woman cannot, thus, adopt a son or a daughter.

[B] Who can give in adoption and rights of women?

Section 9 of the HAMA¹² Act, speaks about a person (father, mother, guardian, etc.) who can give in adoption. It is a necessity in the Act that, no other person other than the father, mother or guardian can give up the child for adoption. In accordance with sub section 4 of section 9, the father and the mother shall have equal rights. the mother may give up the child for adoption without the consent of the father; if he is dead, is of unsound mind, ceases to be a Hindu, or has renounced the world. In case, both the parents are dead, the Guardian is given custody of the child, and he may also give the child up for adoption. However, before the guardian gives up the child for adoption, the court should be satisfied with the reasons given as to why the guardian cannot adopt the child, himself/herself. However, the term mother does not include stepmother or adoptive mother¹³

Rights of a woman in Special Cases

- (i) The mother of an illegitimate child has power to give the child in adoption and no questions arise of putative father's consent.
- (ii) A remarried woman has no right to give away in adoption her son born to her from her deceased husband, according to section 3 of the Widow's Remarriage Act,1956. She doesn't have the right to divest her right of guardianship over children born to her from her deceased husband¹⁴.
- (iii) Mother however, has the right to give her legitimate child up for adoption after the death of her husband, even if the father during his lifetime expressed clearly that he didn't want his children given up for adoption.

Thus these are some of the special cases, with regard to a woman giving p her child for adoption.

[C] Who is to be adopted? What are the rights of a girl child?

Section 10 of the HAMA act speaks about the person (boy/girl) who is to be adopted. The conditions are as follows:

- (i) He or she is a Hindu;
- (ii) He or she hasn't already been adopted;
- (iii) He or she hasn't been married, unless otherwise, if there is a custom permitting a person who is married to be taken in for adoption;

¹² Hindu Adoption and Maintenance Act, 1956, hence referred to 'HAMA' in the paper.

¹³ *Dhanrai v. Suraj*, AIR 1973 Raj 7

¹⁴ *Martland v. Narayan*, (1939) BOM. 305 (India).

- (iv) He or she hasn't completed the age of 15 years, unless there is a custom permitting a child above 15 years to be taken up for adoption.

For a Girl child being adopted

Under the ancient Shastric Hindu Law, a girl child could not be adopted. However, with the developments of modern culture, now the Act has changed its position. In the pre-act, there was a discrimination based on caste, that only the child of the particular caste of the parents can be adopted. This ideology has also changed. The conditions for both the girl child and the boy child are same as mentioned in the above paragraph w.r.t. section 10 of the HAMA act.

CASE LAW

Rakhi v 1st Additional District Judge¹⁵

It was observed in this case that a person above 28 years can never be adopted.

Masya Ram v Jainarian¹⁶

It was observed that the adoption of a married Jat boy who was above the age of fifteen years of age is valid on the force of customs prevailing in that community.

Devgonda Raygonda vs. Shamgonda Raygonda Patil¹⁷

In this case the Bombay High Court laid down the following prepositions:

- (i) Motive of adoption (whether good or bad) is immaterial
- (ii) Lunacy or mental deficiency is no bar for adoption (ie. A lunatic can be adopted)
- (iii) A registered adoption deed raises a presumption in favour of validity of the adoption; and,
- (iv) The adoptee has no vested rights in the joint family property or the family of his birth.

[D] The Doctrine of Relation Back (Does not apply anymore/Pre-Act)

Before the HAMA Act, the Doctrine of Relation Back was in operation. It has a paternal affiliation. Adoption confers rights on the child w.e.f. the date of adoption. This position was the same in old law also. But under old law, when the adoption was made by a widow, the adoption would come into force from the date of the death of her husband. This doctrine gives retrospective effect to adoption by a widow under the old law.

¹⁵ *Rakhi v. 1st Additional District Judge* AIR (2000) 0 All.166, (India).

¹⁶ *Masya Ram v. Jainarian* AIR (1989) P&H 2031 (India).

¹⁷ *Devgonda Raygonda v. Shamgonda Raygonda Patil* AIR (1992), BOM,189 (India).

There is a relevant leading case on this point called –

Sawan Ram vs. Kalawati¹⁸

In this case, a Hindu male died in 1948 leaving behind his widow without any children. The widow took the properties of her deceased husband as a limited owner. In 1954, the widow made a gift of some land of her husband's property to her grand niece, which was challenged by her husband's collateral. The collateral sued for possession of land. The trial court granted declaration in the favour of the collateral. The grand niece preferred an appeal before the Supreme Court. While the appeal was pending, the widow adopted a son and she died in the same year.

The Supreme Court held that the son adopted by the widow was deemed to be the son of her deceased husband and the adoption would be effective from the date of death of her husband (i.e., in 1948) therefore, the adopted son was entitled to adopt the property of the deceased husband.

The above view laid down in this particular case was also followed in *Sitabai vs. Rama Chandran*.¹⁹

However, this doctrine has been abolished by section 12 of the HAMA act and applies no more.

RESEARCH TOOLS AND TECHNIQUES

SURVEY

This research paper also includes primary research. A set of nine research questions were asked to a number of people all over the country.

Apart from basic questions like name, age-group, and choice of religion practiced. Many other questions regarding adoption and problems faced by women in adopting a child were asked and answered.

A subjective question was asked to the respondents about what according to them are the problems faced by women w.r.t. adoption in India.

Most of the respondents agreed that the laws for adoption should be simplified, as it is too lengthy. Apart from the simplification of the laws, the mentality of the people of the country should also change. Many women have to battle social stigma and taunts for being a single parent and adopting. It must be inculcated in the societal norms that adoption is a right. It is further argued that India lacks financial stability and security. Some of the respondents have also brought forward the right of the surrogate or the woman who has given up her child for adoption, i.e., the biological parent wanting their child back.

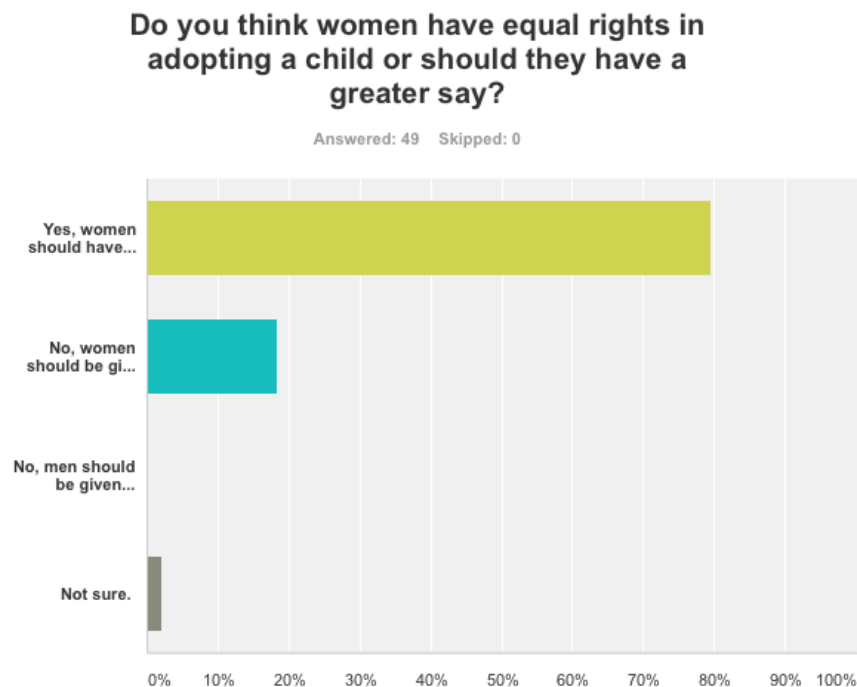
¹⁸ *Sawan Ram v. Kalawati* AIR (1967) SC 1761 (India).

¹⁹ *Sitabai v. Rama Chandran*, AIR (1970) SC 345 (India).

The survey also suggests that many of the respondents are adamant and want women to get equal rights when it comes to adoption. A very strange but alarming notion was answered in the survey by one of the respondents that her consent should be given priority because no women can raise a child in a free environment if she is constantly troubled as that affects the psychology of the child. Therefore, the process for adoption should be as simplified as possible, as she is already going to go through a lot of distress while taking all the responsibilities by herself.

The people that answered the questions were mainly between the age group of 10-40 years of age, out of which 75 % of whom were Hindus, 12 % were Muslims and the rest were Christians or of any other religions. 75 percent of the populace questioned were females and the other 25 % were males. Out of the entire lot questions, around 50 % admit that they are not aware of the provisions in the law that are concerned with adoption, but agree to have a vague idea of it.

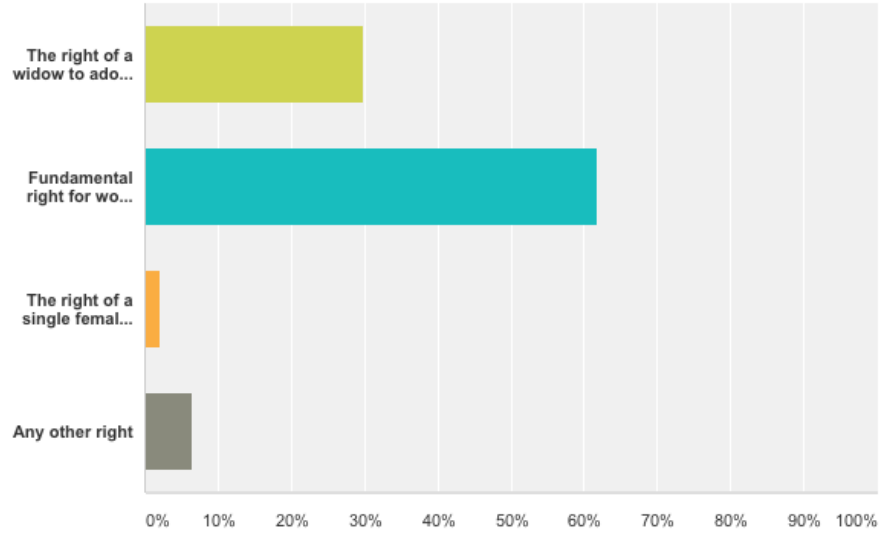
The rest of the questions asked were as follows:



79.59% agree that women should have equal rights with matters of adoption and 18.37% agree that they should have preferential rights.

If so, what special rights should you suggest?

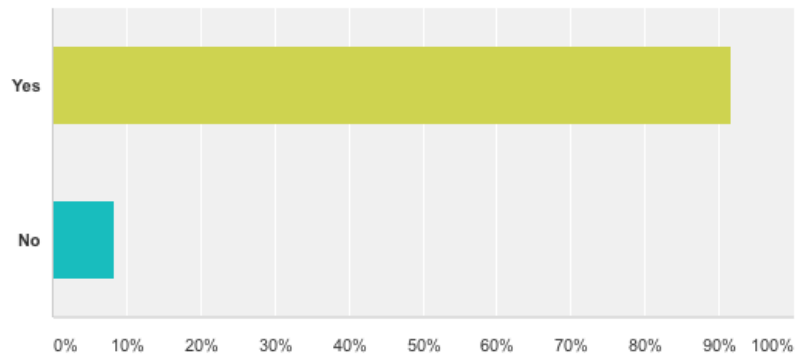
Answered: 47 Skipped: 2



61.70% agree on the special right being the Fundamental right for women to adopt under all religions of the country. 29.79% agree on the right of a widow to adopt a child without the consent of husbands relations.

Is there a need for a uniform civil code to govern adoption in India?

Answered: 48 Skipped: 1



91.67% of the populace believes that there is a need for uniform civil code in the country.

As can be seen above, the views of the people questioned is mixed and different from each other. But ultimately, wholly people admit that they are unaware of adoption provisions, women deserve equal rights and a uniform civil code in the country is a must. People have identified the maid problem faced by women to be- a fundamental right for women in India to adopt despite which religion they practice.

CONCLUSION

The law relating to the fairer sex needs a relook and further strengthening. With the massive cultural changes in the society, widow single mothers need heavy legislations to protect their rights. The process of adoption is very lengthy and all do not know the procedure. Many women are unaware of their rights, which take from them the power of knowledge to act in the direction to protect and enforce their rights. It is very important that there are campaigns carried out in the country to increase awareness about adoption rights- for both the sexes.

There should be a fundamental right bestowed upon every woman allowing her to adopt. Because After all, the child gives birth to a mother, it doesn't always have to be the other way round. Adoption should be encouraged to cage problems like over-population and increase and create feelings of love, acceptance and fidelity in the country. The law in the Hindu Succession Act and the Hindu Adoption and Maintenance Act, 1956 is exhaustive. However, it can still be tweaked keeping in mind the progressive interpretations of the courts.