

How to Cite:

Singh, S., Mishra, S., Pathak, D. N., Ashutosh, K., & Tripathi, R. (2022). Adoption under Hindu law: Outbursting the myths about adoption in context of Hindu adoptions & maintenance act, 1956. *International Journal of Health Sciences*, 6(S5), 2772–2782.
<https://doi.org/10.53730/ijhs.v6nS5.9243>

Adoption under Hindu law: Outbursting the myths about adoption in context of Hindu adoptions & maintenance act, 1956

Shagun Singh

Law College Dehradun, Uttarakhand University, Dehradun-248007, Uttarakhand, India.

Email: 09shagunkithorya@gmail.com

Savi Mishra

Law College Dehradun, Uttarakhand University, Dehradun-248007, Uttarakhand, India.

Corresponding author email: savimishra530@gmail.com

Dr. Deependra Nath Pathak

Assistant Professor, Law College Dehradun, Uttarakhand University, Dehradun-248007, Uttarakhand, India.

Kumar Ashutosh

Assistant Professor, Law College Dehradun, Uttarakhand University, Dehradun-248007, Uttarakhand, India

Ramakant Tripathi

Assistant Professor, Law College Dehradun, Uttarakhand University, Dehradun-248007, Uttarakhand, India

Abstract---The relationship of a child and parents is beyond the definition of love and piety. This unreal bond has always been a constant source of origination of rights, liabilities and co-dependency of the former towards the latter and vice versa. The concept of adoption in India is prevalent since antiquity and the depth goes stronger in case of Hindu Law, it being the only major personal law that permits adoption even before its codification. For the following article, the authors attempted to go through how the practice of adoption has changed over the years, what are the myths associated with this concept, how Hindu Adoptions and Maintenance Act, 1956 has been able to setup equality between women and men in terms of their rights to adoption and how customs and practices are kept in harmony with the codified law. The authors have attempted to establish a link between the myths prevalent in our society on

adoptions and simultaneously tried to outburst and explain them with the help of provisions of Act of 1955. The key conclusion of this research article is to establish how Hindu law has adapted itself through time and changes and set aside various misnomers and gender-based discrimination which were obsolete and vague. Better adaptive and suited laws for the society have always been welcomed and practiced in compliance and codified Hindu Law is a sheer example of it.

Keywords---Adoption, Hindu Law, Child, Adoptive, Myths on Adoption.

Introduction

What comes in your mind when you are asked how an ideal family looks like to you? Well, in most cases, it is seen that an ideal family means a father, a mother and children. But not everyone is lucky enough to get everything at their end. It is often said, "those who don't have it, knows the real value of it." A couple might want a child, an orphan might want loveable parents, an unmarried girl or a bachelor might want to adopt a child. These relations are the result of need. Need to be taken, need to be loved, need to be felt complete.

The concept of adoption is an age-old custom and to be precise its roots are settled deep into the Hindu Mythology and the cause is purely religious. The religious significance to this practice could be traced back to the Vedic times when a son was considered the only source of their spiritual welfare and was the only way they could receive "moksha".

The significance of the male issue is two- fold, first, they continue the family and lineage and secondly the performance of funeral rites and offerings could be performed by a son only. Adoption in the earlier age was more or less about sonship. Manu explains the importance of having a son by saying that "through a son, one can conquer the world, the one who has a grandson gets immortal and the one with great- grandson for gets conquers the world of sons."(Buhler)

Meaning and Definition of Adoption

In common parlance, adoption means the complete shifting of a child from his birth and native family to a family who is willing to adopt the child. Under the ancient Hindu law, it was for the very first time that the practice of adoption had the sanction from the religion itself.(Navtika, 2013) The parents who receive the child are known as *adoptive parents*. In legal words, adoption is the legalized recognition of a person as son or daughter. The Hindu Adoptions and Maintenance Act, 1956 does not define the term adoption reasonably because it might differ from one person or community to another. The adopted child is thus taken up as if he was born in that family and he enjoys the same rights, liabilities and status in his new family. With rights, comes liabilities on the adopted child and these are the same as that of a natural born son/daughter. It is to be noted here that the current definition of adoption is gender neutral. This has not been

the case earlier. Adoption in the ancient Hindu philosophy was centred towards son only. As per the sages, illegitimate sons were considerable for adoption at instances where there was no natural born son. It was better to have substitute of son than no son at all, which leaves no scope for girl child to stand.

Historical Background

The earliest known adoption is beyond our reach and probably was not recorded at all. The relationship of a child with his parents is an obvious biological fact but this relationship has evolved over a period of time. The biological relationship is not anymore an important fact in order to become a parent.

Earlier the concept of adoption was the other name of Sonship. While the relation of the son to mother is an obvious biological relationship, relationship of father and son was marked by a ritual known as *couvade*. It seems to be the first step towards recognizing the concept of paternity. During this ceremony the father would lie with the child, after his birth. It gave father the right of the child. This ceremony was unconnected with the fact of procreation. The earlier philosophers have mentioned around twelve kinds of sons. There is a possibility of many more such types of adoption. Some of them are:

- (1) Aurasa: It is the most significant form of son(s). It is the other word for a legitimate son. The aurasa son occupies a very high status in ancient Hindu literature. He was often seen as a way to attain immortality. He is the son begotten by a man himself upon his lawfully wedded wife, the best of all sons. (Buhler)
- (2) Dattaka: Manusmriti defines the dattaka or adopted son as the one given voluntarily by the parents to and unfortunate son-less parents with a libation of water. This transplantation was usually allowed only in the same castes and has to be performed as a gift to the other.
- (3) Kritrima: It is the son accepted as one's own son considering his qualities which makes him fit like aurasa or close to him. Keeping in mind the qualities, faults and his caste which must be same to that of the one adopting him.

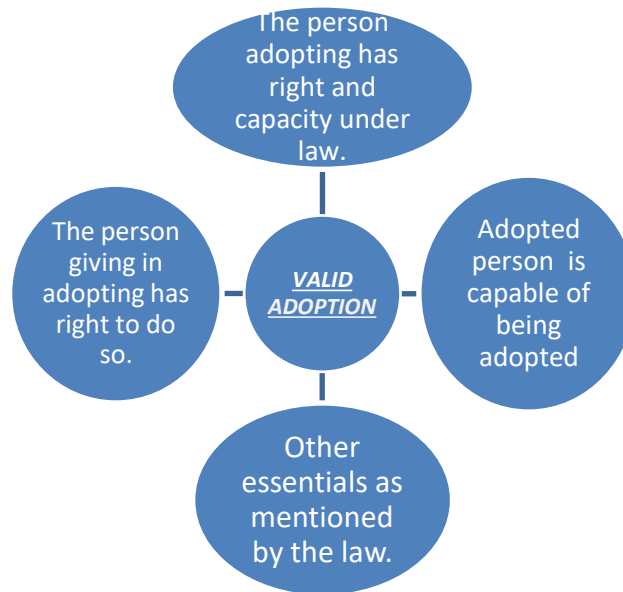
The last two types belong to the categories of adopted son, and this practice has been in prevalence since time immemorial. There are various other categories such as *Kanina* (Son secretly born to an unmarried damsel), *Krita* (Purchased son), *Nishad* (son of a Brahmin by his shudra wife) and many more. It was held by Privy Council in a case that whatever may have been the original position and status of these twelve or thirteen sons, all of them except the legitimately born and the adopted sons i.e., Dattaka and Kritrima are long obsolete. (*Nagin Das v. Bachoo Hur Kishen Das*, 43 IA 56).

The entire law of adoption has been given by the texts of *Manu* and *Vashishta*. Manu stresses on the need of adoption and its performance strictly by the father and the mother, the incapability to bear a son and the caste being same, are the other important and inexcusable factors. Vashishta writes that a woman can also make an adoption, but the requirement is the assent of her lord. He prescribes a declaration to be made before his assembled kinship and to prove his intention of adoption a son as his own by offering prayers in fire. The writings of Manu and

Vashishta were further amplified by whose key requirement for adoption is that the adopted son in question must bear the qualities and characteristics of the father who is adopting him. It was upon the son to have the capability of being begotten by his adopter. It means that only that person is eligible to be adopted as a child whose mother when married might have been legally married with the adopted father. (Dr. Kesari, 2018)

Essentials of A Valid Adoption

As per the codified Hindu law, a valid adoption must which satisfies the following prerequisite:



From the following figure, the law i.e., s.6 of the Act of 1955 has made it clear that for a valid adoption, the following requirements must be fulfilled and the failure of complying with these conditions renders the adoption made void. Such an adoption will not amount to creation of any kind of relations, rights or liabilities, neither for the child, nor for the adoptive parents or individual. Apart from the conditions mentioned above, there are certain other requirements (Section 11, of HAMA, 1956) which must be adhered to in order to make an adoption stand valid. Some of which are:

- If a Hindu male is adopting a female child, then the difference of age between the adoptive father and that of the female child must be at least twenty-one years of age.
- If a Hindu female is adopting a male child, then the difference between the age of adoptive mother and that of the male child must be at least twenty-one years of age.
- One child cannot be adopted by more than one person. A single child cannot be the son or daughter of two or more parents. It is strictly prohibited under law.

- When a male child is being adopted, it should be made sure that there is no son to the adoptive person and must not have a son's son or son of son's son living at that time.
- When a female child is being adopted, then the person making the adoption must not have a Hindu girl child as her daughter, daughter of daughter, or the son of the daughter's daughter alive or existent at the time of the making of the adoption.

Myths on adoption: out bursting with a legal approach

Adoption being an age-old practice comes with a lot of views, opinions, practices and myths. A legal scholar must always look at societal practices with a logical, reasonable and optimistic view. A lot of myths have been associated with the practice of adoption in Hindu culture and some of them have been discussed in brief and neglected by applying the aforesaid Act of 1956-

Only Sons Should be Adopted

As discussed earlier, adoption was the other name for Sonship. Those who were not able to reproduce and get themselves a son, who could fulfil their religious and after death rites, often resolved to acquire and adopt son. This type of adoption was very singular in nature which means that only a few types of males were eligible to become adopted son.

Legal Approach

Well, presently, this practice stands as a myth and has been discarded, both by people and by the law. Nowhere in Hindu Adoptions and Maintenance Act, 1955 is the word or phrase mentioned that only son could be adopted. Sons being the light bearers of the legacy of the families were given due importance almost in every aspect of life, as compared to daughters. As per the Adoption Statistics, by *CARA(Central Adoptions Resource Authority)* of the year 2020-21, the most in-country adoption has been in the state of Maharashtra, Kerala and Uttar Pradesh, and what is more surprising is that the number of adoptions of girl child is more in comparison to the adoption of boys. (Authority, 2021)

Practical Approach

But, looking at this issue from the practical point of view, there is still preference given to adoption of son by adoptive parents when they have no child at all and they have a choice to decide between the two genders. Well, I think no legislation but education and gradual change in the mindset of the people only can help us cure this ailment of preference of sons over daughters.

Caste of adopted child must be same as that of the adoptive parents

Keeping in mind the comparative perspective of what situation prevailed before and after the legislation coming into force, regulating Hindu Adoption, stress must be laid down on the ancient literatures which talks about what is a valid adoption. "Boy, equal by caste, whom his mother or father affectionately gives

confirming the gift with a libation of water, in times at distress to a man as his son for he is without a son must be considered as an adopted son.” (Buhler, p. 168)

Hence, it could be inferred that the adoptions under ancient Hindu law required the son (since daughters could not be adopted) to belong to the same caste as that of the adoptive parents be it mother or father, whoever is adopting. The reason for such a requisite could be the rigid Varna System. Where there was no availability of legitimate sons capable of being adopted, exception was created to adopt a lesser preferred category of son as well.

Legal Approach

In the present time, the situation has changed drastically. For a valid adoption, nowhere in the legislation of 1955, regulating Hindu Adoptions, it is mentioned that the child has to belong to the same caste as that of the adoptive parents. As per s 10(i) of the said act, the child must be a Hindu. Now, who is a Hindu has expressly been defined in the Hindu law in a rather complicated manner. Definition simplified is, a person who is a Hindu, Buddhist, Jaina, or Sikh by religion and who is not a Muslim, Christian, Parsi or Jew is considered to be a Hindu. So, if child and parents, both fits into the definition of “who can a Hindu”, it means that the adoption is valid, provided other requisites mentioned in the Act are fulfilled as well.

Practical Approach

The Supreme Court in one of its judgements held that, “any person belonging to any religion could adopt a child subject to the rules framed.” (*Shabnam Hashmi v. Union of India, 2014*)

Adoption is only for childless couples

From a sociological perspective, it is a taboo in the society that adoption is only for childless couple. The reality is rather harsh since childlessness in India is around 2.5%. it is around 5.5 percent for 30-49 age group and 5.2 percent for 45-49 age group. Adding the secondary infertility cases too, the marks as high as 17.9 million as per the report of 2007 (Gauguly). The data must have been disturbing by now. Historically speaking, then adoption was opted by those couples who did not have a son, even if they had a daughter. In ancient times, since adoption was equivalent to adoption of a male child, it was believed that, without a son, one cannot gain salvation.

Legal Approach

Law does not make a difference between a bachelor and a couple in terms of adoption. As per s. 7 and 8 of the Hindu Adoptions Act, any female or male is eligible to adopt a child, provided they are not disqualified by law.

Practical Approach

In such circumstances, it is high time that we need to look for alternatives, since the data regarding children who are either orphan or abandoned is humongous. Where there is obvious need of parents to a child and vice versa, adoption stands as a concrete and sustainable alternative, provided the social taboos is no hurdle. The trend has been shifted to couples, even the fertile ones, opting for adoption and nurturing the lives of millions of helpless children. As per the report of The Hindu, “a total of 3,531 children, including 2,061 girls, were adopted in India during the year 2019-20.” (The Hindu, 2020). Maharashtra was amongst the states to report the highest number of adoptions in India, as per the said data.

What if the former parents of the child claim him again?

The whole procedure of adoption and its effect are singular in nature. It means that once adoption is completed in compliance of all the rules, procedures and law, it is irrevocable in nature. According to the ancient as well as the present law, the adopted child is deemed to have merged into the family which adopted him and all relations and ties of the child with the family to which he was born into comes to an end as well. The relations of the child with his original native family are severed including the relations with his blood relatives and other relatives. It has been considered as new birth, as per ancient literatures. Once completed, it cannot be reverted back. Even the adopted child cannot claim to leave the adopting family and move back to his former one, at least not under normal circumstances.

Legal Approach

The situation has been made crystal clear as per section 12 of the Act of 1955, as per which a child in question of adoption become the son or daughter, whatever the case may be from the date on which the adoption came into effect and such adoptive party becomes the adoptive father and adoptive mother and from that day onwards all the relations of the adopted child with his birth family comes to an end and the formation of new ties and relations comes into force with the new family. As per section 15 of the said act, if an adoption is made validly, neither the adoptive father or mother nor the child being adopted can renounce the status and return back to the family of his or her origin.

Practical Approach

Practically speaking, there has been a lot of *disruptions* and *dissolutions* in adoptions across India, either for the foster care period, or the legally accepted by the court. Where the findings of the case are concluded and it is decided that either disruption or dissolution of the adoption in question has to be carried one, the data of the child is updated again in the database as “Legally free for adoption”. A Karnataka based NGO, in the year 2017 filed RTI in CARA (Central Adoption Resource Authority) and the results proved that “the children were being “returned” by parents to the Specialised Adoption Agency (SAA) that had handled their case.” (LiveMint, 2019)

Adopted child inherits lesser rights than the natural born child

As per ancient Hindu literatures, a prevalent form of adoption namely *Dydamushyayana* existed. It means, son of two fathers, which totally negates the myth of “who gets more”. As per this type of adoption, one individual could be the son of both, the biological as well as adoptive father, at the same time. In such instances, adoption was completed on the terms that even after giving the son in adoption, the former family especially the father does not divest itself from the ties to his son. It was developed as a means by which both families could attain religious salvation. The two-fold benefits were, firstly both families get to have the son and none suffered loss, and secondly son enjoys the rights and liabilities from both the families.

Legal Approach

Naturally acquired rights are vested by mere existence of a person and can be claimed by him anytime in instances of need or violation. To say that the adopted child inherits lesser rights in property, inheritance, marriage, partition etc. as compared to the natural born child would be to assume that adoption creates room for inequality, which is not the case. The result of adoption is such that the son becomes eligible to for the right in property of the adoptive father. (*Srinivas Krishnarao Kango v. Naryan Devji Kango, 1954 AIR 379*)

Practical Approach

As per the current circumstances, for secular, religious and other purposes, the relations of the adopted child are completely uprooted from the native family. All that property which belonged to the adopted child before he was given in adoption, continues to be vested in him and such child will have a right to carry the property with him in the adoptive family.

Couples, and no single individuals, are competent to make adoption

It is often believed that adoption is only for couples who are not able to conceive a child. Well, as vague as this myth stands in today’s era, many parts of our society still believe in it rigidly and a majority of them strictly adheres to it. Unless you are an influential and strong personality, the world will see you with guilty eyes for even thinking of adopting a child on your own. As per ancient literatures, many schools of Hindu law prescribed whether Hindu female should or should not be able to adopt a child on her own, is she is unmarried, married or widow. The texts of Vasistha even go to the extent of saying that *no women should be allowed to give or take a son in adoption except with the consent of her husband*.

As per Bengal and Benaras schools of law, a Hindu female was allowed to adopt a child, that too a son, only with the consent of her deceased husband, which she took while he was alive.

As per Mithila and Maharashtra school of law, a Hindu female can adopt a son only during the lifetime of her husband.

Legal Approach

From legal perspective, adoption is for everyone who is a major and capable of fulfilling the requirements of adoption. Law does not differentiate between couples and singles in case of adoption. As per Act of 1955 any Hindu male or a Hindu female who fulfils the requirement to take a child in adoption provided two requisites are satisfied i.e., the person must be sound mind and must not be a minor. The language of section 7 and section 8 of the aforesaid act stands the same for both Hindu male and female. The law has clearly prescribed that both of them are equally entitled to make adoption, provided there is one exception prescribed. As per the exception, if the Hindu male or female has a living spouse, then “he or she is not entitled to make adoption without his partner’s consent, the exceptions being, the partner has renounced the world, has ceased to be a Hindu or has been declared incompetent by the court of law.” (Hindu Adoptions and Maintenance Act). The following table shows what is the maximum age up to which children have been adopted and of which age group they belong to, keeping in mind the persons adopting i.e., adoption by couples or adoption by single in.

Age group of children	Maximum age of adoptive parents (couples)	Maximum age of adoptive parents (single)
Upto 4 years	90 years	45 years
4-8 years	100 years	50 years
8-18 years	110 years	55 years

Practical Approach

It should be noticed that like ancient literature and the prevalent societal norms and cultures, women did not enjoy equal rights in adoption till 2010. Before the *Personal Laws (Amendment) Act, 2010 (30 of 2010)*, the situation was different. Prior to the amendment, if any Hindu female was opting for adoption, one has to be a major, a sound mind person, and if married, must take the consent of her husband. The key highlight of this section was that unmarried women were not allowed to make adoptions. It was only after the amendment of the year 2010, women started enjoying equal rights to that of man in matters of adoption.

Conclusion

As old as the concept of adoption is and how efficiently it stands in full practice even after centuries of its origin, the concept has evolved with time and has been an amazing alternative for people to opt. While the practice was originally started to liberate the souls from the body by those who could not have a son by natural means and who were seeking for spiritual salvation, today the objective of adoption is rather dynamic. One does not adopt a child merely because he or she wants to seeks the doors of heaven. The choices of individuals are far reaching, be it a resolution made to oneself, or a need to take care of a child in suffering, to start a family, or to merely find a reason to live. The objective could be as amusing as it seems to be, provided the welfare of the child is kept as the top most priority. Before the codification of law, customs and usages were so in practice, that it left no room for growth and development of society. The

mammoth difference between rights of men and women was as rigid and we have seen it through the example of where there is no consent of the husband, the women is incapable to adopt a child.

The laws regulating adoptions for Hindus is guided only by one law i.e., Hindu Adoption and Maintenance Act, 1955. Although the legislation has simplified and liberated, it stills possess various loopholes which needs attention of the legislature. A Hindu can only adopt a Hindu, the law is purely driven by religious parameters, a person who has been a convert lose all rights and a spouse who convert need not be consulted or consented at all. The act has no contemplation to the interest and welfare of the child specifically, although courts has sought to achieve it at various instances.

Even the law has not been able to remove and eradicate the myths associated with adoptions in India. Recently in a case before the apex court of India, a question arose, whether right to adopt and right to be adopted could be claim as a right under article twenty-one of the Constitution of India. In this case, Supreme court took the view that "Keeping into mind the present and ongoing trends, it will not be appropriate time and stage, to declare the right to adopt and right to be adopted as a fundamental right under article 21 of the Constitution of India"(2008).

At the last, the scholar would like to submit that there are millions of children who are abandoned, orphan, helpless and neglected roaming around in hope of getting a life they deserve while they fight each day with themselves and the world, and still strives to succeed by the end of the day. The age group from 6-8 is the most crucial for the growth and development of the child since the research have suggested that their development is at the fastest pace, and hence it could be inferred that this is the suitable age of adopting a child.(Pathak, 2016) But may be due to societal taboos and lack of efficient legislatures, many of them are still deprived of what they truly deserve, the children still remain homeless and abandoned and the parents still desire to adopt and start their new family. Co-dependency and co-relations can make many lives better, alive and worth living again.

References

1. Central Adoptions Resource Authority, Ministry of Women and Child Development, Govt. of India http://cara.nic.in/resource/adooption_Statistics.html
2. <<https://factly.in/number-children-available-adooption-less-14th-demand-despite-simplification-adooption-process/>>
3. 2,061 girls among 3,531 children adopted in 2019-20: Govt. data. (2020, November 01). *The Hindu*. Retrieved from <https://www.thehindu.com/news/national/2061-girls-among-3531-children-adopted-in-2019-20-govt-data/article32995902.ece/amp/>
4. Chaturvedi, R.G. (2010). Manusmriti: The Constituion of the Vedic Society. New Delhi, India: Universal Law Publishing Co. Pvt. Ltd.
5. Dr. Diwan P. (Ed.). (2018). Modern Hindu Law. (21st ed.). Faridabad, India: Allahabad Law Agency.

6. Dr. Kesari, U.P.D. (Ed.). (2018). Modern Hindu Law. (11th ed.). Allahabad, India: Central Law Publications.
7. Ganguly, S., & Unisa, S. (2010). Trends of Infertility and Childlessness in India: Findings from NFHS Data. *Facts, views & vision in ObGyn*, 2(2), 131-138.
8. *Hindu Adoptions and Maintenance Act, 1955*
9. <https://www.casemine.com/judgement/uk/5b4dc2462c94e07cccd237ba>
10. <https://www.livemint.com/mint-lounge/features/the-returned-1569587584096.html>
11. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4188020/>
12. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4188020/>
13. Jha, R. S. (2014). Women & the Curse of Domestic Violence: A Study. *International Journal of Economics & Managerial Thoughts*, 4 (2), 35-43.
14. *Juvenile Justice (Care and Protection of Children) Act, 2015*
15. Nagin Das Bhauwandas v Bachoo Hur Kishen Das, 43 IA, 56
16. Navtika. (2013). Inter Country Adoption- A solution or a Problem to Solution. *Dehradun Law Review*. Vol 5. Issue 1. 75-78
17. Pathak, V.K. (2016). Early Childhood Care and Education: International Perspective. *Dehradun Law Review*. Vol. 8. 37-38
18. Tyagi N & Shankhwar Y, 2013. Female Foeticide; A Cry Unheard. *Social Research Foundation, International Multidisciplinary Journal Shrinkhla*, I(II)
19. Suryasa, W. (2019). Historical Religion Dynamics: Phenomenon in Bali Island. *Journal of Advanced Research in Dynamical and Control Systems*, 11(6), 1679-1685.
20. Tyagi, N., Jha, R. S., Chaudhary, A., & Batar, S. (2021). Women in Dual Role; A Sociological Perspective. *Elementary Education Online*, 20 (1), 1766-1772.