

**CRITICAL ANALYSIS OF ADOPTION LAWS IN INDIA WITH SPECIAL
REFERENCE TO SHABNAM HASHMI VS UOI AIR 2014**

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ABSTRACT

India is a nation with a wide variety of religions. Each religion adheres to its own set of observances. The Indian legal system combines conventions and statutes to create law. Personal affairs in Indian society are governed by the four predominant religions: Hindu, Muslim, Christian, and Parsi. Hindu and Muslim personal laws are derived from their respective religious texts. Children are viewed as the nation's future. Children have the right to be loved, cared for, and provided with all the necessities for their growth but however many children are abandoned each year in India. In some instances, these children fall victim to human trafficking and sexual assault. In very rare circumstances, sometimes abandoned children are brought to adoption agencies. Adoption is the process by which a person adopts parental obligations for the child adopted and, in doing so, such parental rights and obligations are transferred to the adoptive parents permanently from the biological parents or the guardian.¹

Keywords: Adoption, Maintenance, Muslim Law, Juvenile Justice.

INTRODUCTION: MEANING OF ADOPTION

Adoption refers to the process by which the adopted child is permanently separated from his biological parents and becomes the legal child of the adoptive parents with all the rights, benefits, and obligations of a biological child.² In adoption, the child is adopted by a married couple or a single female who agrees to raise the child as their own and assumes care for them. Adoption is a legally sanctioned method of forming a parent-child relationship between individuals unrelated by birth. This two-way method has aided childless parents in conceiving. Adoption results in the termination and transfer of parental obligations and rights from the biological parents to the adoptive parents. It is an international institution. Adoption is

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¹ The Juvenile Justice Act, 2015, s2

² The Juvenile Justice Act, 2015, s2

mentioned in the majority of world faiths and mythology. In today's society, the concept of adoption has shifted from providing children to orphans to providing homes for the homeless.

ADOPTION IN INDIA

In India, there is a legal process that provided the rights to both the parents that are adopting and to the child that is being adopted. The purpose of this process is to legally transfer all obligatory legal rights from the biological parents to the adoptive parents.

A child in India can be adopted under three major laws:

- 'Hindu Adoption and Maintenance Act of 1956'
- 'Guardian and Wards Act of 1890'
- 'Juvenile Justice Act of 2015'

THE HINDU ADOPTION AND MAINTENANCE ACT, 1956 (HAMA)

Hindu includes any person who is a Hindu, Sikh, Jain, or Buddhist. Any person who is a Muslim, Christian Parsi, or Jew is not said to be Hindu.³ Any male or female who is Hindu is of sound mind, and has attained majority is eligible for the adoption of a child. If the person adopting is married then the consent of the other spouse is required and it should be free consent.⁴

Journal of Legal Research and Juridical Sciences

CONDITIONS FOR ADOPTION BY A HINDU FAMILY OR BY AN UNMARRIED PERSON

- When in a family, a biological child already exists then the child of the same gender cannot be adopted.
- If the child being adopted is a boy, then the couple adopting the child should not already have a Hindu son's son's son or son's son' irrespective of whether the son is biological or he is adopted alive at the time of the when adoption is done.
- If the child being adopted is a girl, then the couple should not have a Hindu son or daughter's daughter alive at the time of when adoption is done.
- An unmarried man adopting a child of the opposite gender should have at least 21 years of age group

³ The Hindu Adoptions and Maintenance Act, 1956 s2(b)

⁴ The Hindu Adoptions and Maintenance Act, 1956 s2(c)

- The unmarried women adopting a child of the opposite gender should have at least 21 years of age group.
- Under this law, adoptions cannot be revoked⁵.

SECTION 10⁶ OF HAMA DEFINES: A PERSON CAN BE ADOPTED IF:

- He is a Hindu;
- If he or she is not already being adopted;
- The child is not married;
- The age of the child is below 15 years.

THE GUARDIANS AND WARDS ACT, 1890 (GWA)

Before 'The Juvenile Justice (Care and Protection) Act of 2000', The Guardians and Wards Act, of 1890 was the only legislation that gave rights to non-Hindus to adopt. This act was the first secular law that permitted child adoption in India for people other than Hindus.

Features of 'The Guardians and Wards Act, 1890':

- Anyone under the age of 18 years can be adopted;
- Both spouses can be made legal guardians;
- Under this act, the district court or any other court of ward appoints a guardian to the minor;
- When it comes to guardianship, the Guardian and Wards Act of 1890 serves as an umbrella law, supplementing personal laws under all religions;
- The Act is mostly substantive legislation, but it also contains some procedural provisions relevant to personal law.⁷

THE JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015

A Juvenile is said to be a child who is less than 18 years of age.⁸ The JJ Act's primary purpose and motive is to treat and rehabilitate juvenile offenders. This law also provides rights to children in need of care and protection. Children under this act have the same rights whether

⁵ The Hindu Adoptions and Maintenance Act, 1956, s.11

⁶ The Hindu Adoptions and Maintenance Act, 1956, s.10

⁷ The Guardian and Wards Act, 1890.

⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015 s34

they are adopted or biological. It was necessary to have such legislation that made adoptive parents' religious affiliation irrelevant to the adoption process.

THIS ACT PROVIDES

- All Indian citizen under this act is free for adoption;
- The child adopted gains the same right as any adoptive child;
- Under this act, the religion of the parent's adoption is not important.⁹
- A person who is not married can also adopt¹⁰

While the Act itself applies to the entirety of India, adoptions can only be approved under it in those states that have established JJ Boards (as is required under the Act). This process is ongoing, with the majority of states already issued notifications that make up these boards.

DIFFERENCE BETWEEN ADOPTION UNDER HAMA and JJ ACT

'Hindu Marriage and Maintenance Act', which places an upper age limit of adoption to 15 years, while under the Juvenile Justice Act adoption can be done up to 18 years of age. According to HAMA, more than one child of the same gender cannot be adopted. HAMA also prohibits or does not allow parents to adopt a child of the same gender as their biological son. However, under the JJ Act, three children can be adopted irrespective of their gender. There is no prohibition for the adoption of a child with the same gender as the parent's biological child.

A single man under HAMA can adopt a child of the opposite gender i.e., a girl if they have if certain conditions like 21 years age gap between them are met, whereas under the JJ act a girl child is not allowed to be adopted by an unmarried male. Unlike HAMA, which applies only to Hindus, the JJ Act is a secular law with territorial applicability, meaning that persons of all faiths are eligible to adopt children under its provisions.¹¹

⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015 s58(1)

¹⁰ The Juvenile Justice (Care and Protection of Children) Act, 2015 s57

¹¹ Articles, B.B. (2022) *Adoption under juvenile justice (care and protection of children) act, 2015, brain booster*. brain booster. Available at: <https://www.brainboosterarticles.com/post/adoption-under-juvenile-justice-care-and-protection-of-children-act-2015#:~:text=The%20Juvenile%20Justice%20act%20allows,than%2015%20years%5B6%5D.&text=Under%20HAMA%20more%20than%20one,two%20children%20of%20same%20gender> > accessed: March 23, 2023

In **Rajwinder Kaur & Anr vs. Central Adoption Resource Agency**¹², the Delhi High Court held that if the adoption of a child is done by HAMA rule, it is not needed to also abide by the rules of JJ Act, 2015 to make the adoption legal. An adoption completed in conformity with the requirements of HAMA would be accepted even in the absence of any outside support, without recognition from CARA or any governmental entity. Any direct or indirect adoptions done under HAMA would be exempted from the jurisdiction of the JJ Act of 2015 and the CARA Guidelines of 2017. Further, the court held that it does not mean if Hindus are governed by HAMA, they cannot adopt a child under the JJ Act of 2015. Section 56 (2)¹³ of the JJ Act, 2015 allows enrolment for adoption even to the people who are covered under HAMA.

MUSLIM LAW

In Muslim law, the father is given special status. Furthermore, it differentiates between guardianship and custody. Shias and Sunnis consider the father as the sole guardian. Even after the death of the father, the mother is still not given the status of natural guardian. Adoption under Muslim Law is different from the adoption that is usually practiced. The term used for adoption under this law is 'kafala'¹⁴. Adoption like any other matter is highly regulated to maintain the biological lineage. The adoptive parents under Muslim law are considered trustees or caretakers of the adopted child and unlike other laws, they are not considered the full replacement for the adopted child's biological parents.

SHABNAM HASHMI v. UOI & Ors (2005) - Section 41 JJ Act

In the landmark cases of **Mohd. Ahmed Khan v. Shah Bano Begum**¹⁵ and **Smt. Sarla Mudgal and Ors. v. Union of India**¹⁶, the definition of what constitutes a "Civil Code" has been changing to personal laws, religion, etc. The goal is to unite people of different faiths under a common set of standards for the problems or issues that are now being regulated by different personal laws, which are not central to any one faith.

¹² *Rajwinder Kaur & Anr vs Central Adoption Resource Agency* <<https://indiankanoon.org/doc/134686650/>> accessed: March 23, 2023).

¹³ The Juvenile Justice (Care and Protection of Children) Act, 2015 s56(2)

¹⁴ Arora, S. (2019) *Can rights be limited under the garb of religion? Academic*. Available at: <<https://www.lawctopus.com/academike/can-rights-limited-under-garb-religion/#:~:text=Editor's%20Note%3A%20Rights%20cannot%20be,throughout%20the%20territory%20of%20India>> (Accessed: March 23, 2023).

¹⁵ *Mohd. Ahmed Khan vs Shah Bano Begum and Ors* (no date). Available at: <<https://indiankanoon.org/doc/823221/>> (Accessed: March 23, 2023).

¹⁶ *Smt. Sarla Mudgal, president, ... Vs Union of India & Ors* (no date). Available at: <<https://indiankanoon.org/doc/733037/>> (Accessed: March 23, 2023).

When it comes to issues of personal law, the Sarla Mudgal case has become a classic example. It helped to protect the rights of women whose husbands uses the pretext of religious liberty to avoid the responsibilities of marriage. The Supreme Court said that due to the absence of any Uniform Civil Code, both Hindu law and Muslim law may continue to function within their spheres of influence without infringing upon the rights of citizens of the other religion. This case deals with adoption irrespective of the religion they have. On February 19, 2014, the Supreme Court ruled that anyone can adopt a kid under the 'Juvenile Justice (Care and Protection of Children) Act 2000', even if their faith forbids them to do so.

CONTEXT OF THE CASE

Shabnam Hashmi, a Muslim civil rights activist, has fought in court for eight years to establish paternity over her adoptive daughter, Seher. In 1996 when Seher was just 1 year old was abandoned by her parents. The Supreme Court denied Mrs. Hashmi's petition to be identified as the parent of her adopted daughter since no statute exists that allows non-Hindus to adopt. So, she adopted Seher under Guardianship and Wards Act, however, their relationship will be only of a guardian and ward. However, on 19th February 2014, she after a long battle got parental rights under the Juvenile Justice (Care and Protection of Children) Act, 2000 even though being a Muslim. This was highly opposed by Muslims.¹⁷

ISSUE RAISED

The All-India Muslim Personal Law Board, however, argued against the adoption stating that under Islam law the adopted child is not recognized as a biological child. The Board, claims that Islamic law upholds what is known as the "Kafala" system, under which a child is legally allowed to be cared for by a third party (the "Kafil") who provides for the child's well-being, including financial support, but the child continues to be the legal descendant of his biological parents. The Board further argued that the 'Kafala' system is one of the alternative childcare systems considered under the JJ Act, 2000, and is also protected by the 'United Nations Convention on the Rights of the Child under Article 20(3). Section 41¹⁸ of the JJ Act of 2000 specifically acknowledges foster care, sponsorship and to be taken care of by the child care organization or the organizations who look after abandoned children. Therefore, all Child Welfare Committees responsible for facilitating adoptions should be instructed to take Islamic

¹⁷*M/s Shabnam Hashmi vs Union of India & Ors* (no date). Available at: <https://indiankanoon.org/doc/105818923/> (Accessed: March 23, 2023).

¹⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015 s41

principles and morals into account and act accordingly before making the adoption of a Muslim child under Section 41(5) of the JJ Act, 2000.¹⁹

COURT JUDGEMENT

The court gave the judgment in favor of Mrs. Hashmi stating her to have parental rights over her child. The JJ Act, 2000 by amendment of 2006 defined adoption as “the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship”

In a court decision in the landmark case **Lakshmi Kant Pandey v. Union of India**²⁰, the court held that it was necessary to make laws related to adoption. The court laid down certain guidelines to safeguard and advance the best interests of the child. The Government of India established the ‘Central Adoption Resource Agency (CARA), in 1989’ after the proposal to establish such an organization was recommended. The central government's formal notification of them under Rule 33(2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, the aforementioned standards were made legally binding and in effect throughout the country.

In another case, **Manuel Theodore D’Souza**²¹, upheld adoption by Indian Christians. The court further stated that the child who is orphaned, abandoned, and destitute has a right to be adopted as it is their fundamental right to life. Based on this ruling, anyone in Mumbai, Goa, or Dadra and Nagar Haveli, which fall under the purview of the Bombay High Court, can adopt a child, regardless of their religious affiliation. Bombay High Court in this case took the initiative to create a single Uniform Civil Code.

CONCLUSION

As was seen in the cases of Shabnam Hashmi and Manuel Theodore, adoption is a secular subject that does not fall under the purview of religion, as envisioned by Articles 25 and 26 of the Constitution²². Indian democracy is failing due to the non-implementation of the provisions included under Article 44. Developing a new secular social order necessitates a Common Civil

¹⁹ *M/s Shabnam Hashmi vs Union of India & Ors* (no date). Available at: <https://indiankanoon.org/doc/105818923/> (Accessed: March 23, 2023).

²⁰ *Laxmi Kant Pandey vs Union of India*. <https://indiankanoon.org/doc/346574/>> accessed March 23, 2023.

²¹ *Manuel Theodore: Indian case law: Law* <https://www.casemine.com/search/in/manuel%2Btheodore>> accessed March 23, 2023.

²² The Constitution of India, Articles 25 & 26

code. Since Indians are citizens of the same country, the ‘Common Civil Code’, like all other laws, should apply to them as well. No religion has the right to justify the denial of civil liberties. They are all citizens of the same country and as such deserve the same protections under the law, regardless of their individual beliefs. To achieve this end, Article 44 of the Constitution calls for the creation of a standard civil code. This change is not possible all of a sudden but we should not become complacent instead should try to remain progressive and work towards bringing this transformation about in reasonable increments. Progress will be impossible without the cooperation of the population and the government together.

Chief Justice Chagla, an eminent Muslim Judge said: “An (Article 44) is a mandatory provision binding on the government. The constitution was enacted for the whole country, it is binding on the whole country, and every section and community must accept its provisions and its directives.”

