

Adoption – Indian And International Aspect

Eolina Pearl

ABSTRACT:- Adoption is the process by which a child is transferred from the family of his birth to his adoptive family. In case of the regenerate classes there is a change of gotra.. In Hindu society, the term gotra refers to clan. It broadly refers to people who are descendants in an unbroken male line from a common male ancestor or patriline. Generally the gotra forms an exogamous unit, with the marriage within the same gotra being prohibited by custom, being regarded as incest. In country adoption is nothing but adopting the child within the country. In simple term, in country adoption means adopting the Indian child by the Indian adoptive parents. Inter country adoption is nothing but adopting the child from outside the country. In simple term, inter country adoption is where the adoptive parents are foreigners that is the adoptive parents are from other country. Inter country adoption is nothing but adopting the child from outside the country. In simple term, inter country adoption is where the adoptive parents are foreigners that is the adoptive parents are from other country. The paper also explained about the various provisions which are given for adoption under Hindu Adoption And Maintenance Act, 1956 for Indian aspect and the various provisions under convention on the rights of child and committee on the rights of child and the two committees which are formed by the government for international aspect.

I. INTRODUCTION

Adoption is nothing but separation of the child from its original or biological parents and taken care and grown up by the non – biological parents who are the adoptive parents. In simple term adoption is the legal process of becoming a non –biological parent . According to Manu, adoption is the taking of the son as a substitute for the failure of a male issue. Thus, it is the transplantation of a son from the family in which he is born to another family where he is given by the natural and biological parents as gift. The adopted son is thus taken as having been born in a new family. He acquires all the rights and status in this new family and his tie with the old family comes to an end.

There are two classification of adoption, namely:

- i) In country adoption
- ii) Inter country adoption

In country adoption is nothing but adopting the child within the country. In simple term, in country adoption means adopting the Indian child by the Indian adoptive parents. Inter country adoption is nothing but adopting the child from outside the country. In simple term, inter country adoption is where the adoptive parents are foreigners that is the adoptive parents are from other country. With regard to In Country adoption the Indian Aspect that is Hindu Adoption And Maintenance Act, 1956 is explained and with regard to International aspect, Convention on the rights of child, committee on the rights of child and Hague convention is explained in this paper. The law of adoption evolved when the Smriti and Dharma Sutra literature have treated only meagrely with the subject of adoption. A text of Manu defines an adopted son and states the effect of it in a few verses. From the text of Manu, the results of valid adoption has been elaborated by the medieval pundits in their commentaries. The Dharma sutra of Vaishtha has said that, “ one should not give or accept an only son”. This rule has been regarded as only commendatory by the privy council. The paper also explained about the various provisions which are given for adoption under Hindu Adoption And Maintenance Act, 1956 for Indian aspect and the various provisions under convention on the rights of child and committee on the rights of child and the two committees which are formed by the government for international aspect

Basis and purposes of adoption¹An Hindu sage mentioned the purpose of taking a son in adoption to be securing offirstly, pindodaka Kriya i.e. Offering of pandas, on Latino Of food and Udaka i.e. libation of water by the adopted son to the adopter and his manes and secondly Nama samkirtana. Perpetuation of the name of the adopter and by the continuance of his line. These purposes are spiritual in character. The adopted son becomes entitled to share in the property of the joint family of the adopter and to inherit other property of the adopter on his death, they are, however, only incidental legal consequences. These temporal considerations based upon property rights are purely secondary and do not detract from the essential spiritual purpose of the adoption. The

¹Family law in India by prof.T. V Subba Rao and prof. Vijender Kumar, pg. 329

formula prescribed for adoption by Baudhayana in his dharma sutra is “ I take thee for the fulfilment of my religious duties”. This clearly shows that the ancient law -givers favoured the “ religious theory” of adoption. Dwamushyamana adoption²

This is a form of adoption under the old law. The natural father may stipulate that inspite of adoption, he would continue to be the father of his child. This means that the child would be treated as the child of two persons, the natural father and adoptive father. The Karnataka High Court has held that the natural father and adoptive father in this form of adoption need not be brothers. Sec 2 (v) must be deemed to have abolished this form of adoption.

Illatom adoption This is a form of adoption is prevalent in Andhra Pradesh. The son – in – law is adopted in this form . Usually he assists the adoptive family in agricultural operations, lives in the adoptive family and in view of these services takes a share as an adopted son does. The present Act does not recognise this form of adoption.

Essential conditions of a valid adoption under Hindu Maintenance and Adoption Act, 1956³

Under section 6 of this Act, there are four essential conditions for a valid adoption. There are as under :

- 1)The person adopting a child has the capacity and also the right to take in adoption as provided under section 7 and 8 of this Act.
- 2)The person who is giving the child in adoption has the capacity to do as provided in section 9 of this Act.
- 3)The person adopted is capable of being taken in the adoption is provided under section 10 of this Act.
- 4)The adoption is made in compliance with the other conditions mentioned in section 11 of the Act.

Section 7 of this Act talks about the capacity to a male it states that :

- Any male Hindu who is of sound mind and is not a minor has the capacity to take up adoption.
- He can take a son or daughter in adoption or provided if he has a wife living he shall not adopt unless the consent from his wife is taken. It is relaxed when the wife is converted to other religion or has abandoned marital life or if she is of unsoundmind.
- If a person has more than one wife living at the time of adoption then the consent from all the wives is necessary.

Section 8 of this Act talks about the capacity to a female it states that :

- Any female Hindu who is of sound mind and not a minor has the capacity to take up adoption.
- She can take a son or daughter in adoption or provided if she has her husband living she shall not adopt unless the consent from her husband is taken. It is relaxed when the husband is converted to other religion or has abandoned marital life or if he is of unsoundmind.

Section 9 : The person giving a child in adoption should have the following capacities. They are as follows:

- No person except the father or mother or guardian of the child shall have the capacity to give the child in adoption.
- The father alone if he is alive shall have the right to give adoption but such right shall not be exercised except with the consent of the mother has not renounced the world, converted to other religion or unsound mind.
- The mother shall have the right to give adoption but such right shall not be exercised except with the consent of father unless the father has not renounced the world, converted to other religion or unsound mind.
- If both the father and the mother is dead or completely renounced the world, converted to other religion or unsound mind the guardian of the child may give the child in adoption with previous permission of the court. In this regard, the court will consider the welfare of the child, age, understanding and the will of the child.

Section 10: capacity of the child is given. It states that no person can be adopted unless:

- i) He or she is a Hindu
- ii) He or she has already been adopted
- iii) He or she has not attained the age of 15 years, if above 15 years he or she can't be adopted.

Section 11 : other condition of valid adoption.

The adoption should be made in compliance with the other conditions mentioned in section 11. The conditions are mandatory which must be followed. The conditions are as follows.

- i) If the adoption is of a son, the adoptive father or mother must not have a Hindu son, son's son, or son's Son's son living at the time of adoption.
- ii) If the adoption is of a daughter, the adoptive father must not have Hindu daughter or son's daughter living at the time of adoption.
- iii) If the adoption is by a male and the adopted is a female the adoptive father must be 21 years older than the girl adopted.

²Family law in India by prof.T. V Subba Rao and prof. Vijender Kumar, pg. 326

³ Law relating to women and children by Dr. S. C Tripathi and Vibha Arora, pg. 247

- iv) If the adoption is by a female and the adopted is a male the adoptive mother must be 21 years older than the boy adopted.
- v) The same child may not be simultaneously adopted by two or more parents.

Section 12: Effect of adoption.

The adopted child shall be deemed to be the child of his or her adoptive father for all purposes with the effect from the date of adoption.

Consequences of a void adoption

If the adoption is void, the aforesaid results are not attained. The child continues in the genitive family with all his rights intact. He does not become affiliated to the adoptive family and acquires no rights therein by virtue of adoption.

Concept of inter country adoption in India⁴

Intercountry adoption is the process by which :

1. A child is adopted from a country other than in which the adoptive parents belongs to.
2. Bring that child the country of residence where the adoptive parents live permanently.

Inter country adoptions are different from domestic adoptions because of the laws that make it possible to bring the child to live where the adoptive parents live. Generally speaking, to qualify as an adoption for immigration purposes into the United States, the adopted child must have the same status and relationship to the adoptive parents as a child by birth. Although the process can be intimidating, families from the United States adopt thousands of children in need of permanent and loving homes from other countries each year.

The validity of inter-country adoption was first debated in the well-known case of *In Re Rasiklal Chhaganlal Mehta*[x] whereby the Court held that inter-country adoptions under **Sec 9(4) of the Hindu Adoptions and Maintenance Act, 1956** should be legally valid under the laws of both the countries. The adoptive parents must fulfil the requirement of law of adoptions in their country and must have the requisite permission to adopt from the appropriate authority thereby ensuring that the child would not suffer in immigration and obtaining nationality in the adoptive parents' country. Only after the case of *Laxmi kandh Pande v. Union of India* , the Supreme Court gave certain guidelines and the government set up two regulatory bodies named CARA and VACA. According to United Nations on the convention on the rights of child, Article 21 states that it is the duty of the State party to check whether the adoption is done legally or not.

Case lawsⁱ

Karnataka State Council for Child Welfare v. Society of Sisters of Charity St Gerosa Convent, the court held that the rationale behind finding **Indian parents or parents of Indian origin** is to ensure the well-being of the children and that they grow up in Indian surroundings so that they can retain their culture and heritage. The best interest of the children is the main and prime consideration.

Varsha Sanjay Shinde & Anr. v. Society of Friends of the Sassoon Hospital and others

The Bombay High Court held that once a child is approved by an Overseas couple after the due procedure is followed, the same child cannot be shown to other Indian parents and that such Indian Parents then cannot claim any right or priority to get the child merely because they are Indian Parents and preference should be given to them over Overseas Indians and Foreign Couples. Although the main issues was decided the Court kept the petition pending in order to see the compliance of directions given by the Court for giving the child to the Overseas Indian Couple and to ensure that the Indian Parents (Petitioners) also get a child expeditiously.

Court further laid down following guidelines for in-country and inter-country adoptions to be read and applied in consonance with Guidelines of 2011:

- (i) All the concerned Agencies viz RIPA, Specialized Adoption Agencies, SARA, ARC, AFAA to scrupulously follow the Guidelines which have been laid down in 2011
- (ii) Though there is no specific number mentioned in the Guidelines as to the number of Indian parents to whom the child should be shown, within a period of 3/4 weeks, the child should be shown to as many Indian parents as possible and, secondly, at a time, the child should be shown only to one parent and not multiple number of parents as has been done in the present case.
- (iii) Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience come to conclusion that the child is not likely to be taken in adoption by Indian parents then, in that case, it should be shown to foreign parents.
- (iv) When the child is shown to the foreign parents, it should be shown in the list of priorities which are mentioned in the said Guidelines.
- (vi) ARC and SARA should work not in conflict but in coordination with CARA, it being the Centralized Nodal Agency

⁴www.loctopus.com

Laxmi kandh Pande v. Union of India Laxmi kandh is a lawyer and he wrote a letter to the court regarding the malpractices which is done in the social organisation and his letter was considered as Public Interest Litigation and the court gave certain guidelines which are as follows

- 1) The application submitted by the foreign parents should be in accordance with Guardianship and Wards Act.
- 2) The objective must be for the welfare of the child.
- 3) The application form should be processed by a licensed or recognised agency
- 4) Every application should be accompanied with the home study report. The home study report should include the recent family photo, full and permanent address, financial status.
- 5) Biological parents shall be given three months time to reconsider their decision.
- 6) Child study report should be submitted by the biological parents. The report should include doctor verification certificate of the child, details including health, recent family photo, physical, intellectual, emotional development of the child and reason for suggesting inter country adoption
- 7) Supreme Court also gave a suggestion as to keep the option for giving the child for adoption within the country in first place and to keep the option of inter country adoption as second choice.

II. CONCLUSION

India does not have a proper legislation to look into the matters of in country as well as inter country adoption. The legislature must take the issue of adoption into consideration and make law perfectly for adoption. Unless agencies systematically refuse to operate in the framework of systems that are in clear violation of international norms, they may find themselves complicit in abuses. If prospective adopters do not receive accurate and dispassionate information on inter-country adoption needs, they will not be able to adjust their plans and expectations accordingly. Thus, each actor in the process carries a particular responsibility, and all need to, and must, seek cooperation with one another to maximize the impact of their efforts.