

Paper-7 Module-5

Women's Right to take or give a child in adoption

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(B) Description of Module

Items	Description of Module
Subject Name	Women's Studies
Paper Name	Women and the Law
Module Name/ Title	Women's right to take or give a child in adoption
Module ID	Paper-7 Module-5
Pre-requisites	The student should be aware of some of the social and economic issues involved in the

	question of adoption
Objectives	To make the student aware of the complex nature of adoption and the legal necessities that have to be completed
Keywords	Adoption, parents, child, independence, single parents, religion

Women's right to take or give a child in adoption

Introduction

Adoption is a process whereby a child's affiliation with its genitive family is severed and affiliation to a new family, called adoptive family is created. Adoption establishes a parent-child relationship between persons not biologically related. It gives parenthood to childless couples and single parents. It also satisfies the desire of those parents who have a child yet want to adopt another child so as to give a loving home to homeless children. Thus adoption is an institution beneficial for a childless couple to have a child and homeless child to have a home.

Adoption involves three parties – persons taking the child in adoption, persons giving the child in adoption and the child being adopted. In this process the legal status of women as a taker and as a giver requires special mention.

In India there is no uniform law on adoption. The Hindu Adoptions and Maintenance Act, 1956 is a religious specific law governing Hindus. Muslim personal law and Christian personal law do not recognize adoption and if a Muslim or a Christian informally adopts a child, he is free to treat him as his own child and give the child his property by way of gift and will but neither the Muslim law of inheritance nor Indian Succession Act governing Christians treats him as a heir entitled to succession. Section 41 of the Juvenile Justice (Care and Protection) Act 2000, as amended in 2006 provides for adoption as one of the techniques of rehabilitation of children by all Indians and it is a secular law.

Women's right to take or give a child in adoption under Hindu Law

The institution of adoption under Hindu law has passed through many changes by way of codification and judicial decisions. Hence for the purpose of our present study, it can be studied under two heads, namely, position under classical Hindu Law

otherwise known as *Shastric* Hindu Law and position under codified Hindu Law, also known as modern Hindu Law.

Position under Classical Hindu Law

Classical Hindu law attached great importance to a son and viewed begetting a male child by every Hindu as indispensable to discharge the debt owed to his *Pitrus* (the deceased ancestors) by offering *pindas* to them and to perpetuate his line of descent. *Putra*, the son, is considered to be a means of attaining salvation and is believed to save the *Pitrus* from going to *Put*, meaning hell. So a Hindu, who does not have a son, can adopt a son and get spiritual benefit not only for himself but also for his deceased ancestors, thereby bringing prosperity to the entire family. Thus classical Hindu Law viewed adoption as purely a religious act in which only a male Hindu had an important role to play. The role of the woman was of less significance, except by participating in the ceremony of adoption as a *Dharma patni*. In case, a male Hindu died without a son, the classical Hindu law, which is manifested through different schools of thinking having their own sets of rules regarding a widow's power to adopt, permitted his widow to adopt a son 'for' and 'on behalf of' her predeceased husband and the adoption was related back to the date of the death of her husband, meaning thereby that her husband died as a Hindu having a son. The said adoption was exclusively for the deceased husband and not for the widow. Any other woman, married or not married, could not adopt because there was no similar religious duty. In case of adoption of a son by a married man during his life time, the patriarchy law did not require the consent of the wife for the adoption as mandatory. Similarly, for giving the child in adoption, the father alone could give the child and the mother's consent was immaterial, except her role as a participator in the ceremony of adoption. Only in case of the death of the father, the widowed mother could give their child in adoption. To discharge the spiritual duties and to inherit the properties, only a male child could be given and taken in adoption and not a female child unless there was a custom permitting adoption of a female child. This male centric adoption relegated the woman and a girl child to a secondary position - that is to say - a woman could neither give nor take a child in adoption and a girl child also could never be given or taken in adoption.

Position under Hindu Adoptions and Maintenance Act, 1956

The Hindu Adoptions and Maintenance Act, 1956, shortly called as HAMA, has brought in substantial changes and removed the bias against women in many ways. The Personal Laws (Amendment) Act, 2010 has further amended the law of adoption so as to confer equal status for woman in case of adoption. They can be discussed under the following headings.

Legal status of a Hindu woman in taking a child in adoption:

Under HAMA 1956, any Hindu male who is of sound mind and is not a minor can adopt a child. If he is married and the marriage is subsisting, he cannot adopt except with the consent of his wife. Absence of her consent renders the adoption void. However her consent can be dispensed with if she (i) has ceased to be a Hindu; or (ii) has renounced the world; or (iii) has been declared to be of unsound mind by a competent court.

Similarly any female Hindu who is of sound mind and is not a minor can also adopt a child. It permits an unmarried woman, a divorcee and a widow to adopt. If she is married and the marriage is subsisting, she cannot adopt except when her husband (i) has ceased to be a Hindu; or (ii) has renounced the world; or (iii) has been declared to be of unsound mind by a competent court.

Here it is to be noted that under HAMA 1956, in the absence of the above three disqualifications of the husband, a married woman was legally incapable of adopting a child by herself even with the consent of her husband, which a male Hindu is capable of doing. So she could be only a consenter to the adoption made by her husband and she could not initiate adoption on her own. This gender bias was reiterated by the Supreme Court in a landmark judgment, *Malti Roy Chowdary v. Sudhindranath Majumdar* (AIR 2007 Cal 4) wherein the child was taken in adoption by a married woman in the presence of her husband, who did not raise any objection. When the validity of the adoption was challenged, the court held that according to law, the wife has no capacity to adopt when the husband is alive even if he consents to it. A similar stand was taken by the apex court in *Brajendra Singh v. State of MP* (AIR 2008 SC 1058) in which case a physically crippled woman practically having no legs was given in marriage to a person as a social necessity and since her marriage had living with her parents like a divorced woman having no contacts with her husband. In her later years she adopted a boy to take care of her. The adoption was challenged as invalid due to the fact that she being a married woman could not adopt without the consent of her husband. The apex court, highlighting the contextual difference between a divorced woman and one who is leading a life like a divorced woman, held that as both cannot be equated and as the present adoption does not come under any of the exception as mentioned above, declared the adoption an invalid one.

This gender discrimination has been removed by way of bringing as amendment in the HAMA, 1956 through the Personal Laws (Amendment) Act, 2010. Now the present position is that as in the case of a married man, a married woman can also adopt with the consent of her husband and his consent can be dispensed with under the three legal incapacities mentioned earlier. To that extent gender parity is sought to be achieved in the Hindu law of adoption. This provision enables especially a childless woman, who is under judicial separation or living separately, to adopt provided her husband gives his

consent to adopt, which was otherwise not permissible under old provisions of HAMA, 1956.

The legal status of a widow to adopt requires special mention in two aspects. Firstly, her position under classical Hindu law has been improved under HAMA, 1956 by which she can adopt not only for her deceased husband but also for herself exclusively. But secondly, on the question - in case where a male Hindu leaves behind him his own widow and a widowed daughter-in-law, whether both the widows can adopt? Or whether a widowed mother-in-law cannot adopt a child in the presence of a widowed daughter-in-law? – codified Hindu law is silent.

Under Classical Hindu law ‘the interposition of a grandson or the son’s widow, competent to continue the line by adoption, brings the mother’s power of adoption to an end and this right could never be revived’ was a rule and it came to be known as ‘*Bhoobun Moyee* rule’ as laid down by the Privy Council in *Bhoobun Moyee v. Ram Kishore* (1866). Under the HAMA, 1956, there is no mention about this rule. The Bombay High Court in *Mudaliar Vaijoba v. Vasant* (AIR 1974 Bom 111) held that a widowed mother-in-law’s power would revive when the widowed daughter-in-law remarries. But the Supreme Court in *Ningappa v. Shivappa* [(2005) 12 SCC 492] reiterated this rule and held that a widow’s power to adopt once extinguished cannot revive even if the childless widowed daughter-in-law subsequently remarries or dies. This ruling is viewed by many Hindu jurists as against the religious tenet of adoption because it deprived the widowed mother-in-law to continue the line of her husband, when the opportunity was lost through the widowed daughter-in-law’s remarriage. It is also viewed as illogical because the widow’s power to adopt, which was eclipsed during the possibility of continuance of the line by her widowed daughter-in-law should be restored back to her once the possibility becomes an impossibility. Nevertheless, under codified Adoption law a widow is capable of adopting a child for herself and not necessarily for her deceased husband. It is her independent personal right. Hence the classical rule should be assessed in the light of the codified law. The amendment of 2010 also does not try to remove this anomaly and make the law clear. This is a grey area still existing in the law of adoption.

Legal status of a Hindu woman in giving a child in adoption:

Under HAMA 1956, a father could give the child in adoption only with the consent of the mother, if she was alive, and the absence of mother’s consent renders the adoption void. However her consent can be dispensed with if she (i) ceased to be a Hindu; or (ii) had renounced the world; or (iii) been declared to be of unsound mind by a competent court.

A mother could give the child for adoption only if the father was not alive or had ceased to be a Hindu or had renounced the world or been declared to be of unsound mind by a

competent court. Here also it is to be noted that the mother was legally incapable of giving her child for adoption by herself even with the consent of her husband, which a male Hindu was capable of doing. This was a bias existing under HAMA, 1956.

Under the amendment Act, 2010 the mother's position has been changed. Now the father or the mother, if alive, shall have equal right to give a child in adoption. But such right shall not be exercised by either of them without the consent of the other unless one of them has ceased to be a Hindu or has renounced the world or has been declared to be of unsound mind by a competent court. Thus equal status is accorded to both the parents in matters of giving the child in adoption.

An unwed mother can give her illegitimate child for adoption without anybody's consent. An adoptive mother cannot give the adopted child for adoption to someone else. Similarly a step mother cannot give her step child for adoption. Mother, for the purpose of adoption, means natural mother only.

Legal status of girl child to be given and taken in adoption

Analytically speaking, HAMA, 1956 has revolutionized the concept of adoption in the sense it has done away with the major bar existing under classical Hindu law that only a boy child but not a girl child could be adopted. This bar was founded on the notion that only a son could offer *pinda* to the ancestor and could continue the family line of the Hindu and a girl child was unqualified to confer spiritual benefit upon the souls of the deceased ancestors. Adoption of a daughter was permissible only in a very few communities. Now the Act has conferred legal status on a girl child by providing that adoption can be of a son as well as of a daughter and the only bar for adopting a daughter is that the adoptive parents should not have a Hindu daughter or a son's daughter living at the time of adoption.

Maternal and paternal affiliation in adoption:

Where the adoption is made by a male Hindu with the consent of his wife, the wife becomes the adoptive mother of the child. If the adoption is made by a bachelor or a childless divorcee or a widower who subsequently marries, his wife is deemed to be the step mother of the child. Similarly, a spinster or a childless divorcee adopts a child and subsequently marries, her husband is deemed to be the step father of the child and the child in these cases does not have an adoptive father. The reason is that the adoption is made by a single parent.

The adoption of a child by a widow again raises an important legal issue – whether her deceased husband would be the adoptive father of the child? In other words, whether a child adopted by a widow is related to her deceased husband? The classical Hindu law evolved the paternal affiliation to the adopted child. But there is no express provision in HAMA, 1956 either confirming or abrogating the old rule. The High courts have given conflicting decisions. One view was that in the absence of express provision, the pre-Act

law on the subject would govern the situation and the deceased husband of the widow would be deemed to be the adoptive father of the child and the child would continue the line of descent in the adoptive family. The second view was that he could not be deemed to be the adoptive father of the child because there is no express provision in the Act to that effect. Moreover by giving a widow a right to adopt exclusively for herself and making the adopted son not to divest the interest already vested in other person in the adoptive family, the doctrine of relation back has been abrogated under the Act. The matter was set at rest by the Supreme Court of India, in a few landmark cases. In *Sawan Ram v. Kalawanti* (AIR 1967 SC 1761) the court held that in the absence of an express provision in the Act, the old law is deemed to continue. Section 5(1) of the Act, worded as 'adoption by or to a Hindu', makes it clear that adoption by a widow would not only be to herself but also to her deceased husband and hence the adopted child is to be treated as the child of the deceased husband also. In *Sitabai v. Ramachandra* [(1969) 2 SCC 544] also the Supreme court held that according to Section 12, new ties are created to the child, from the date of adoption, in the adoptive family and when the widow belonged to the family of her deceased husband, the child must also belong to the same family. A widow, on the death of her husband, does not lose the membership in his family. She retains his surname and continues to be a widow of the deceased Hindu. Hence in the present case, the relationship with the deceased husband was established through adoption and it did not mean that adoption was related back to the death of the husband, a concept which was abrogated by the Act.

Here it is to be noted that adoption by a widow is different from adoption by a divorced wife because divorce ends the marital relationship with the husband and so all her ties with the husband's family. A son adopted by a divorcee does not enter into the family of her former husband or in case of her remarriage subsequent to adoption to that of her later husband.

Other conditions for a valid adoption:

HAMA stipulates certain other conditions for a valid adoption, equally applicable for a female as well as a male Hindu.

- (i) If the adoption is of a son, the adoptive mother should not have a Hindu son or son's son or son's son's son (either by legitimate blood relationship or by adoption) living at the time of adoption.
- (ii) If the adoption is of a daughter, the adoptive mother should not have a Hindu daughter or son's daughter (either by legitimate blood relationship or by adoption) living at the time of adoption.
- (iii) In case of adoption of a male child, the adoptive mother should be 21 years older than the child. This is not required in case of adoption of a girl child by adoptive mother. (This rule applies *mutatis mutandis* for adoption of a girl child by a male Hindu)

- (iv) The child to be adopted shall be a Hindu child.
- (v) The child should be unmarried and below 15 years of age, unless custom permits otherwise.
- (vi) The same child cannot be adopted simultaneously by two females.
- (vii) The child to be adopted must actually be given and taken in adoption with an intention to give and take.
- (viii) There is no necessity of performing *datta homam* to give validity to adoption, which was necessary among regenerate castes under classical Hindu Law.

Registration of adoption:

The Act does not prescribe that the fact of adoption should be in writing and to be registered. It merely provides that if there is a registered document recording the adoption made and signed by both the giver and the taker, the court shall presume that the adoption has been made in compliance with the provisions of this Act, unless disproved. Thus a registered document is a good piece of evidence of adoption duly made, but the presumption is rebuttable by the person challenging the adoption. Non registration would not render the adoption invalid.

Assessment of the Act from a woman's perspective:

The Hindu Adoptions and Maintenance Act, 1956 and the amendment Act 2010 have improved the status of women in taking and giving a child in adoption and have rationalized the scheme of adoption in many ways. A married woman can give and take a child in adoption, however subject to certain conditions, and she no longer needs to be a mere participator in the event and her consent is mandatory for a valid adoption by her husband and she can also initiate adoption like her husband. A spinster or a divorcee or a widow, can also adopt a child for herself. A girl child can also be adopted. But the only point for concern is that in the presence of boy or a girl, the adopter cannot adopt another male child or a female child.

Status of woman to adopt in other personal laws:

Neither Islam nor Christianity nor the Parsi religion legally recognizes adoption and there is no specific law to that effect. Their law of inheritance and succession does not acknowledge the adopted child as a heir and hence even in case of informal adoption, backed by custom, the child will not get inheritance rights and its interest can be protected only by way of bequeathing the adopter's property through will or gift by the adopter himself or herself. There is no special legal status of women to be mentioned.

In *Philips Alfred Malvin v. VJ Gonsalves* (AIR 1999 Ker 187) the validity of adoption of a child by a Christian couple came up before the Kerala High Court and the court held that the right of a couple to adopt a son is a constitutional right guaranteed under Art. 21

and simply because there is no separate statute providing for adoption, it cannot be said that the adoption made by the couple is invalid. This judgment underscores the need for a law of adoption for all Indians, male and female, who are otherwise deprived of their valuable right of parenthood under their personal laws.

Status of woman to adopt under Juvenile Justice (Protection and care) Act, 2000 as amended in 2006:

Juvenile Justice (Protection and care)(Amendment) Act, 2006 is a child centric secular law and Ss. 40 and 41 of the Act provide for adoption of a child through court of law, as a measure of providing rehabilitation and social integration to the child who is orphaned, abandoned and surrendered and who is in need of care and protection. Under the Act, any person, irrespective of his or her religion or marital status or any childless couple or any couple who is already having biological children, can adopt any number of children, subject to the satisfaction of the Court. This Act ensures a uniform law of adoption for all Indians who are otherwise prohibited under their respective personal laws. The adopted child will be treated equivalent to a biological child for the purpose of inheritance to adoptive parent/s. The Central Adoptions Resource Agency (CARA) is the central nodal agency monitoring the implementation of the Act.

In a move to consolidate and amend the existing law, very recently a proposal has been made to bring in Juvenile Justice (Protection and care) (Amendment) Bill, 2015 which was passed in the Lok Sabha in May 2015 and is waiting for consideration in Rajya Sabha. Among other things, the Bill contains a separate chapter on adoption prescribing conditions and procedure for in-country and inter-country adoptions. The Bill specifically stipulates that the prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him. In the case of a couple, the consent of both the spouses for the adoption shall be required. A single or divorced person can also adopt but a single male is not eligible to adopt a girl child.

Conclusion:

Personal law is an area, wherein gender discrimination is allowed to exist on the pretext of religious practice. It is reinforced by the patriarchic structure of family and society. Law, at times connives with it, and if there is heavy pressure from the pressure groups working to make the laws either gender-neutral or egalitarian, amendments are brought in. The role of judiciary in highlighting the lacuna existing in all personal laws and stressing the need for a uniform law of adoption to all Indians is commendable. The Juvenile Justice (Protection and care) Act, 2000, as amended in 2006, to some extent, is a step towards that direction and removes the barriers existing for Hindus under HAMA and makes adoption by a Hindu under the secular law more liberal. It also enables other religious people to adopt legally on par with Hindus. It is a legislation focused to give a

safe and caring home for thousands of homeless children and is more child-centric. However nothing in this secular law shall apply to the adoption of children made under the provisions of the HAMA 1956.

Suggested readings

Mulla Hindu Law

Modern Hindu Law by R.C. Nagpal

Family Law Lectures by Kusum

Family Law in India by G.C.V. Subba Rao

Family Law by Paras Dewan

