

An Analysis of Adoption by Widow

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Abstract: India as a country of variant diversity has many religions and cultures. For personal matters like marriage, adoption and inheritance they have their own set of personal laws. In the same way the law of adoption by the Hindus in India is governed by the “Hindu Adoptions and Maintenance Act, 1956” which is the only personal law that governs adoption in the country. With the passage of time, adoption, which is a social institution, has undergone various changes. In India, there has been drastic change in the concept and objectives of adoption from time to time. Even though the old Classical Hindu law was patriarchal in nature, the codification Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as HAMA), and Personal Laws (Amendment) Act, 2010 (hereinafter referred to as PLAA), has improved the women’s status to take and give a child in adoption. The subject matter of this paper deals with the analysis of adoption by Widow. There are more studies relating to the problems of married, widow and divorced women in the country, but, none of them speak about the sufferings of widow. Widows don’t have a positive reputation in society. They are not treated with respect and they are seen as a bad sign for society. Due to the challenging conditions in earlier times, adoption was not a popular idea among widows. This article discusses about the rights of a widow to adopt and a comparative study on adoption laws and practices worldwide.

Keywords: Adoption; Widow; Hindu adoption and Maintenance Act, 1956; Personal Laws Amendment Act, 2010; Adoption by widow

1. Introduction

In this world, every single child has a right to have a family and parents have a right to have children. For this, adoption is the best rehabilitation measure. Adoption is a process in which the child is disconnected from its biological parents and creates a new relationship with the adoptive parents. Through Adoption Childless parents and single parents get a homeless & parentless child. To give a happy home for homeless children, the parents may have a desire to adopt a child even though they have a child already. Thus, adoption is very beneficial for a homeless child to have a home and a childless couple to have a child.

The Hindus including Buddhists, Sikhs and Jains are governed by “Hindu Adoptions and Maintenance Act, 1956”¹ (HAMA) which is a personal law. The “Juvenile Justice (Care and Protection) Act, 2015”² (hereinafter referred to as JJ Act), is another adoption law in India which is a secular law. Through the JJ Act, all the persons in India irrespective of religions can adopt. The adoption laws have gone through various reforms and amendments so as to ensure that the women are given equal rights as men to adopt.³ Before the enactment of Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as HAMA), under the Classical Hindu Law women were not free to adopt. Only after the occurrence of the HAMA, the Hindu women got some freedom in adoption but, even this was considered a little biased.⁴ There are more studies relating

to the problems of married, widow, divorced and single women in the country. But, none of them speak or stress about the problems and sufferings of the Widow (i.e.) a woman who has lost her spouse or partner by death and has not married. Widows don’t have a positive reputation in society. They put pressure to the widows to alter their way of life and expect them to live their lives in sorrow. They are not treated with respect and they are seen as a bad sign for society in general and due to the challenging conditions in earlier times, adoption was not a popular idea among widows. This article discusses about the rights of a widow to adopt and a comparative study on adoption laws and practices worldwide.

The main objective of this article is to have a detailed analysis on adoption by widow. The paper is divided into three parts. The first part deals with the concept of adoption in India. In this part, the meaning and concept of adoption, adoption under HAMA will be explained in detail. The second part deals with the main topic, Adoption by widow. The third and the last part of this article deals with the comparative analysis on adoption laws and practices across the globe with the help of case laws.

2. Adoption by Widow

A widow is a person whose husband has passed away. Before the enactment of HAMA, Adoption for widows was prohibited and the only condition for adoption is that the husband should give his consent for the adoption. After HAMA, 1956, a widow had the right to adopt a son/daughter for herself. No consent is required from her husband and the child shall be treated as the son/daughter of the deceased husband of the widow.

2.1 Meaning and Concept of Adoption:

Adoption is a process in which a person who doesn’t have a child or who wants another child takes a child and treats him as his own child from a biological or natural parent to his

¹ Hindu Adoptions and Maintenance Act, No.78 of 1956.

² Juvenile Justice (Care and Protection of Children) Act, No. 2

³ Niraj Mena, “Adoption Laws in India: Challenging Existing law”, MANUPATRA <http://docs.manupatra.in/newslines/articles/Upload/E8EFE493-114B-4E5B-A014-682EB1729301.pdf> (Last visited 24th Oct 2023)

⁴ “Women get equal rights in guardianship, adoption of children”, THE TIMES OF INDIA <https://timesofindia.indiatimes.com/india/women-get-equal-rights-in-guardianship-adoption-of-children/articleshow/6476814.cms> (Last visited 24th Oct 2023)

family. This concept has existed from a very old time in various legal systems.⁵*Ghanta China Ramasubbayya vs Moparthi Chenchuramayya*⁶ adoption was defined as “A juridical act creating between two persons certain relations, purely civil, of paternity and affiliation.”

With the passage of time, adoption, which is a social institution, has undergone various changes. There has been drastic change in the concept and objectives of adoption from time to time. People adopt children for either religious reasons or ceremonial reasons. *The object of adoption has been considered to be two-fold*: The first is religious and the second is Secular. But, in modern times there are various objectives for adopting a child. To make the process of adoption smoother and proper, there are laws that govern the said process. As mentioned earlier, in India there is HAMA and JJ Act that governs adoption in India.

2.2 Adoption under HAMA

Prior to the codification of HAMA, adoptions in India were governed by the uncodified Hindu Law as mentioned earlier. This act is applicable to all the Hindus⁷ who are domiciled in India and to any person who is not a “Muslim, Christian, Parsi or Jew”.⁸ This codified law has brought various changes in the old Hindu law relating to adoption by Hindus. Most notably the codification of HAMA has improved the women’s status in taking and giving a child in adoption.

2.3 Valid Adoption

There are certain requisites that are to be fulfilled for any adoption by a Hindu to be valid in India as mentioned under Section 6 of HAMA. This section consists of 4 criteria (i.e.) whether the person taking in adoption has the right and capacity to do so, whether the person giving in adoption and the person who is being adopted has their respective capacities for adoption and finally whether all the other conditions given under this act are fulfilled.⁹ If all these requirements are satisfied, then it is a valid adoption under the eyes of law. Adding to this, all the above said requisites should be in accordance with sections 7 to 11 of the HAMA.

The persons who are taking in adoption must be more than eighteen years (a major) and of sound mind. Both the Hindu males and females have their own separate capacities to take in adoption. Section 7 talks about the Hindu male’s capacity to

take in adoption¹⁰ and Section 8 talks about the Hindu female’s capacity to take in adoption¹¹. According to Section 7, The Male should be of Sound mind, and he should not be a minor and there should be consent of his wife to adopt. In case of an unmarried male, consent is not required. Consent is not needed if his wife renounced the world or ceased to be a Hindu or if she is of Unsound mind. If the wife of a Hindu male is alive, then he should get her consent to adopt and if the husband of a Hindu female is alive, then she should get his consent to adopt. According to Section 8, The Female should be of Sound mind, and she should not be a minor and there should be consent of her husband to adopt. In case of an unmarried female, consent is not required. Consent is not needed if her husband renounced the world or ceased to be a Hindu or if he is of Unsound mind.

According to Section 9 of HAMA¹², only the biological parents and the guardian can give a child in adoption. This includes only the biological parents and not the adoptive parents. If father or mother is alive then they have equal rights to give adoption but there should be each other’s consent unless one of them renounced the world or ceased to be Hindu or of unsound mind. If both father and mother are dead or renounced or abandoned the child or of unsound mind then the guardian may give the child in adoption with prior permission of the court. The court should ensure that the adoption is for the welfare and wishes of the child and no consideration of payment has agreed or received.

According to Section 10 of HAMA¹³ There are certain conditions that a child should be met, before being taken in adoption. The child should be a Hindu, should be below the age of 15 years, should not be married and should not be adopted before. Adding to this, Section 11 of HAMA¹⁴ puts down various other conditions like the age gap between child and the adoptive parents, for at least twenty-one years, when can a girl/ boy/ orphan be adopted and how can they be adopted.

If all the abovementioned conditions are fulfilled, then it can be considered as a valid adoption under HAMA.

3. Adoption by Widow

A widow is a person whose husband has passed away. It is such an ill-fated occurrence, and a woman unexpectedly becomes a widow that completely changes her life, her behavior, clothing, and lifestyle. This is not what she wishes for, but the norms of the society framed in such a way, and

⁵ Harneel K. Lally, *Divided Dharma and Adoption Laws in India*, 4 SOAS L.J. 133 (2017), <https://www.studocu.com/in/document/symbiosis-international-university/family-law-ii/family-law-ii-obe-jgkmtgkbtmktbmtkbtb/70085299> (Last visited 25th Oct 2023)

⁶ AIR 1947 P.C 124, <https://indiankanoon.org/doc/1754034/> (Last visited 25th Oct 2023)

⁷ Hindu Adoptions and Maintenance Act, 1956, Sec 2 (a).

⁸ Hindu Adoptions and Maintenance Act, 1956, Sec 2 (c).

⁹ Hindu Adoptions and Maintenance Act, 1956, Sec 6.

¹⁰ Hindu Adoptions and Maintenance Act, 1956, Sec 7.

¹¹ Hindu Adoptions and Maintenance Act, 1956, Sec 8.

¹² Hindu Adoptions and Maintenance Act, 1956, Sec 9.

¹³ Hindu Adoption and Maintenance Act, 1956, Sec 10.

¹⁴ Hindu Adoptions and Maintenance Act, 1956, Sec 11.

widows are made forceful to change their lifestyle. This situation is not welcoming and supportive.¹⁵

Before the enactment of HAMA, Adoption for widows was prohibited and the only condition for adoption is that the husband should give his consent for the adoption expressly (in writing) before the death that once she subsequently becomes a widow she can adopt a child but the adoption should be in the name of the husband, means the child cannot be adopted by the widow for herself or anyone else but for the husband. It is because a woman was incapable of Independent Judgement. The adoption was approved and accepted only in the husband's name. Only the schools viz. the Dravida (Madras) School and the Maharashtra (Bombay) School allowed adoption without her husband's authority.¹⁶ After HAMA, 1956, a widow had the right to adopt a son/daughter for herself. No consent is required from her husband and the child shall be treated as the son/daughter of the deceased husband of the widow.

Doctrine of Relation Back is specifically applicable on Widows. According to this, whenever a widow is taking adoption, it was presumed that, the date of adoption is the date when the husband dies. Then only the adoptive child will get rights in property of deceased father. The concept is against the rule that a property once vested cannot be divested. This doctrine was repealed after the existence of Section 12 (c) of HAMA which says that once the property is vested cannot be divested. It defeated this doctrine and after that, the date of adoption will be the date on which the person has been adopted.¹⁷ In the case of *Sawan Ram & others Vs. Kalawanti*¹⁸, the Supreme court was revived the doctrine of Relation Back. Husband died without leaving an heir. Widow received his estate as a limited owner and later she gave the land to her niece. Husband's collaterals challenged this and sued them saying that his widow is limited owner. The court held the gift invalid. Later widow adopted a son. He claimed property's ownership which the collateral forcefully disagreed to give such property. The Supreme court held that the adopted son became a member of the family on the date when the husband died, hence he automatically becomes the son of deceased person.

A Hindu widow has a right to adopt a son/daughter to herself. Section 8 says that A widow should be of sound mind and not

¹⁵Shrushti D. Nikam, *Adoption by widow*, <https://lawessential.com/miscellaneous/f/adoptionbywidow?blogcategory=Miscellaneous> (Last visited 30th Oct 2023)

¹⁶*Id.*

¹⁷ Yash Gupta, *Doctrine of Relating Back – An Analysis*, <https://www.legalserviceindia.com/legal/article-2113-doctrine-of-relating-back-an-analysis.html#:~:text=The%20doctrine%20of%20relation%20back%20under%20old%20Hindu%20Law%20states,once%20vested%20can%20not%20be%20divested.> (Last visited 30th Oct 2023).

¹⁸AIR 1967 SC 1761 <https://indiankanoon.org/doc/102512/#:~:text=The%20Court%20C%20after%20reproducing%20the,the%20date%20of%20the%20adoption.> (Last visited 2nd Nov 2023).

a minor to adopt a child.¹⁹ She should be Socially, emotionally and financially stable to adopt a child. They should pursue emotional support and safeguard that they can afford a development, stable, and safe home for the child.²⁰ In Section 12²¹ of HAMA, it is said that the widow cannot adopt a son if she already has a Hindu son, Grandson and Great grandson living at the time of adoption. If she adopts a daughter, she must not have a Hindu daughter or son's daughter living at the time of adoption. There should be a gap of twenty-one years between the adoptive mother and adopted son. In Section 14²² of HAMA, if a widow marries subsequently after adoption, then her husband is considered as step-father of the adoptive child. There arises a question whether Family pension is issued to the adopted children by the Widow. In the case of *Shri Ram Shridhar Chimurkar Vs. Union of India* the Supreme court held that an adopted child by the widow of government servant is not capable to get a family pension under Central Civil Services (Pension) Rules. When the child born to the widow of deceased government servant then he is entitled. The facts of this case are, a widow adopted a son 2 years after the death of his husband who is government servant.²³ They had no children. The adopted son claimed the right to receive a family pension under HAMA. But the court rejected his contention.

Thus, from the above discussions it can be understood that the widow won't be restricted from adopting a child in the absence of husband.

4. Comparative Analysis of Adoption Across the Globe

4.1 United Kingdom

In the United Kingdom, both national and local administrations are in charge of adoption legislation. Regardless of their marital status, widows can adopt. In the UK adoption procedure, the child's welfare is given top consideration. Prospective adoptive widows must undergo a comprehensive assessment, typically carried out by social workers. This evaluation examines a number of factors, such as the widow's ability to provide a secure and nurturing environment, her emotional well-being, and her financial stability. The UK places a strong emphasis on the value of adoption agencies collaborating with potential adopters to guarantee a good fit.

4.2 Canada

¹⁹ Hindu Adoption and Maintenance Act, 1956, Sec 8.

²⁰ Ayush Mishra, *Rights of Hindu Widow: A Critical Analysis*, 2 IJLMH, <https://www.ijlmh.com/wp-content/uploads/2019/05/Rights-of-Hindu-Widow-A-Critical-Analysis.pdf> (Last visited 5th Nov 2023)

²¹ Hindu Adoption and Maintenance Act, 1956, Sec 12.

²² Hindu Adoption and Maintenance ACT, 1956, Sec 14.

²³ *Shri Ram Shridhar Chimurkar vs Union of India*, 17 Jan, 2023, <https://indiankanoon.org/doc/142248850/> (Last visited 10th Nov 2023)

The laws governing adoption in Canada differ between the provinces and territories. Every area establishes its own laws. In Canada, widows are often eligible to adopt. They collaborate with private and public adoption agencies. The assessment looks at the widow's capacity to raise a kid. It considers factors including commitment to the child's welfare, emotional readiness, and financial stability. In-depth evaluations, interviews, and home visits are common adoption procedures. The goal is to ensure that the adoptive family, which includes widows, can provide a stable and nurturing environment for the kid.

4.3A comparative analysis of Adoption – India, United Kingdom and Canada:

There are differences in widow adoption rules between India, the UK, and Canada. Widows are typically eligible to adopt in India under the Juvenile Justice (Care and Protection of Children) Act, with evaluations taking age, financial stability, and general fitness into account. Influences from culture and society are important in the adoption process. Adoption laws in the United Kingdom are governed by both national and municipal regulations, with a focus on the child's welfare. Social workers do assessments and look closely at financial stability, mental health, and the capacity to create a safe and caring home. Widows are generally qualified to adopt. Working together with adoption agencies is typical. While each province in Canada has its own adoption regulations, widows are usually able to adopt. Working with adoption agencies, assessing the child's mental and financial stability, and conducting extensive examinations to guarantee an appropriate home are all part of the process. The adoption landscape for widows is shaped differently in each nation by the particular criteria and cultural factors that are present, even while similar elements such as the emphasis on the child's best interests and cooperation with adoption agencies continue to exist.²⁴

In conclusion, although widows are typically accepted as eligible for adoption in all three countries, differences in requirements, evaluation procedures, and cultural factors highlight how crucial it is to comprehend the complex legal systems in each nation. Potential adoptive widows who wish to effectively manage these difficulties should see a specialist.

5. Recommendations

- 1) A widow faces a lot of problems in the society. Adoption is a perfect opportunity for a widow who is already rejected by the society and no one care for her. Society should consider and support both Widow and Adoption and take care of them.

²⁴ Andrew C. Brown, *International adoption laws: A comparative analysis*–
<https://scholar.smu.edu/cgi/viewcontent.cgi?article=1307&context=til>
(Last visited 14thNov 2023)

- 2) The child's welfare should be of utmost importance. It is suggested that the laws that are concerning children, particularly adoption laws should be child centric.
- 3) There should be some amendments for the Maintenance of Widow to survive, as the lifestyle of her changes unexpectedly.
- 4) It is recommended that the widow should be given special privileges that allow them to take and give a child in adoption without any intervention of the society.
- 5) It is also recommended that there should be counselling and programmes for widows to get out of the societal stress and sufferings.

6. Conclusion

With the passage of time, adoption, which is a social institution, has undergone various changes. There has been drastic change in the concept and objectives of adoption from time to time. In India the HAMA, 1956 and PLAA, 2010 has improved the Hindu women's status in taking and giving a child in adoption compared to the classical Hindu law. A Widow can give and take in adoption, with certain conditions. Any woman can adopt the child, irrespective of their marital status like a divorcee or a widow or a spinster. There are more studies relating to the problems of the married, widow, divorced and single women in the country. But, none of them speak or stress about the problems and sufferings of the Widow (i.e.) a woman who has lost her spouse or partner by death and has not married. Being abandoned by their families, they too face a lot of problems in the society. Adoption is a perfect opportunity for a widow who is already rejected by the society and no one care for her. One main problem that they face is raising a child on their own or need for a child for them. Adoption can be a transformative and fulfilling option for widowed women seeking to expand their families. By providing love, support, and a nurturing environment, these women can offer a second chance at a stable and loving home for children in need. The journey of adoption not only enriches the lives of the adopted children but also brings a sense of purpose and joy to the widowed women who choose this path, fostering new beginnings and connections that last a lifetime.

