

A SOCIO LEGAL STUDY ON ADOPTION UNDER JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN), ACT, 2015: NEED FOR PROTECTION OF RIGHTS AND WELFARE OF THE ADOPTED CHILD, PRE AND POST ADOPTION

Shambhavi Sinha

Lecturer, University of Petroleum & Energy Studies (UPES) School of Law

Abstract: *Anyone who ever wondered how much they could love a child who did not spring from their own loins, know this: it is the same. The feeling of love is so profound, it's incredible and surprising¹*

Change is the only constant in life. The changing needs of society leads to changes in laws and their implementation. With the changing status and roles of women and men in the society, the concept of marriage and parentage has shown a paradigm shift. One such significant change is reflected in the concept of adoption, another surrogacy. The institution of adoption entails the legal procedure of transposing the child from the natural family by birth to the new kin or non-biological parents. The adopted child has the same rights and obligations as a natural born child. There is no general law of adoption. The institution of adoption per se continues to be an integral part of Personal Laws. The Hindus are governed by specific statutory enactment for adoption - the Hindu Adoption and Maintenance Act, 1956. A person who is a Non -Hindu citizen can adopt under the Juvenile Justice (Care and Protection of Children) Act 2015. It is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. Adoption is a welfare measure but what about the rights of the child once adoption has been completed as per the Juvenile Justice (Care and Protection of Children) Act 2015. The aim and objective of this research paper is to critically examine the rights and welfare of the child under the said act both pre and post adoption. The Research Methodology followed shall be predominantly Non-Empirical, essentially theoretical in nature.

Keywords: Adoption, Child, Juvenile Justice (Care and Protection of Children) Act 2015,

Introduction: Change is the only constant in life. The changing needs of society leads to changes in laws and their implementation. We once lived in an era where parentage was strongly associated with the institution of marriage. Single persons could not in any way think of enjoying parenthood. With the changing status and roles of women and men in the society, the concept of marriage and parentage has shown a paradigm shift. The ideology of the society has changed over the period of time and couples and single alike can now have their own child who may not necessarily be their biological child. One such significant change is reflected in the concept of adoption, another surrogacy. Adoption essentially includes the act of legally taking a child to be taken care of as your own. The adopted child has the same rights and obligations as a natural born child.

Historical Perspective on Adoption: The historical genesis of Adoption can be traced to Antiquity. The Greek and Roman practices form the first examples of persistent use of adoptions. The, ancient adoption practices put emphasis on political and economic interests of the adopter that strengthened political ties between rich families and created male heirs to manage estates. The Hammurabi Code gave details on the rights of adoptive parents and the responsibilities of adopted individuals. Roman legal records indicate that foundlings were occasionally taken in by families and raised as a son or daughter. Although not normally adopted under Roman law the children, called alumni, were reared in the capacity of guardianship. In India infant adoption during Antiquity was a rarity. Abandoned children were often picked up for slavery. Adoption though bearing resemblance to certain aspects of slavery it was not slavery in the real sense of the word. The father had absolute and unlimited rights on

their children. Difficult conditions of life lead to selling of children while others captured in war or criminals condemned to slavery. In medieval society bloodline was of paramount importance. A ruling dynasty lacking a natural-born heir apparent was replaced. The evolution of European law reflects this aversion to adoption. English Common Law, for instance, did not permit adoption since it contradicted the customary rules of inheritance. Europe's cultural changes lead to a period of significant innovation for adoption. Without support from the nobility, the practice gradually shifted toward abandoned children. In India those who did not have their own-born children resorted to artificial methods. The son was considered to be significantly important for continuation of family lineage and salvation of the soul. With the increasing importance of the son and need for saving the family from disruption, it became impediment to introduce members other than the natural born. Even after abolition of slavery, the institution of adoption continued but with material changes especially with changes in concepts of paternity and sonship. Adoption existed even prior to Vedic society but lacked importance because of the lower rank attributed to an adopted son in comparison to natural born children. The entire law of adoption is derived from a few texts and a metaphor. The underlying texts include those of Manu, Vashistha, Baudhanya, Saunaka and Sakala.

In the Indian context there have been several progressive changes. Diverse economic and social changes have lead to its shaping in the successive stages and like other social institutions it is a product of several evolutionary processes.

Meaning and Purpose of Adoption; Adoption is a parent ward relationship created by virtue of law and not by birth and genes. The meaning is derived from an Old French word *adoptare*, meaning "to choose for one self". The institution of adoption entails the legal procedure of transposing the child from the natural family by birth to the new kin or non-biological parents. As a consequence the all the child loses all the rights and is divested from all the duties with regard to his natural parents. For most purposes the adopted child has the same rights and obligations as a natural born child. Adoption is a legal procedure which permanently terminates the legal relationship between the child a child and his or her biological parents and initiates a new parent child relationship.² The Encyclopaedia Britannica describes adoption as a family experience. It is a way of conferring the privileges of parents upon the childless and advantages of parents upon the parentless.³ By adoption, an artificial but a permanent family relationship is created between the child and the adopter.⁴ It provides families for children who otherwise would remain parentless and permanently deprived of the physical and psychological benefits of family life.⁵ Caring adults are afforded a chance to become parents and experience growth as a family.⁶

Adoption is essentially a welfare principle based on *Parens Patriae* where the welfare of the child is of paramount importance. It gives an adopted child great opportunities that he may have never otherwise received. Such opportunities include loving homes and environments, parents who are able to provide and care for all their financial needs as well as access to education. In India there is no general law of adoption. It continues to be an integral part of Personal Laws. Those included by definition as Hindus, were governed by the Hindu Adoption and Maintenance Act, 1956 since its enactment. This includes Buddhists, Sikhs and Jains and excludes the Muslims, Parsees and Jews. Although the personal laws of Parsees and the Christians do not categorically prohibit adoption, they did not have a dedicated statutory enactment for the same. The customary Muslim law did not recognize per se the concept of adoption. Hence a Non Hindu did not have the choice of any enabling statute to adopt a child legally. The people belonging to these religions who are desirous of adopting a child could only take the child in guardianship under the provisions of The Guardians and Wards Act, 1890. The statute did not deal with adoption per se but with guardianship. The procedure under the Act makes the child a ward and not an adopted child. Under this enactment when a child becomes a major that is attains 18 years of age, they and assume individual adult identities. The aforesaid enactment for all purposes remains silent about the orphan abandoned and surrendered children. There was no codified enactment dealing with the adoption of such categories of children. This lead to several misconceptions with respect to the concepts of custody, guardianship or adoption and resulted in prejudice to the welfare principle that is the very root of the concept of adoption.

The pioneer legislation with reference to children was the Apprentice Act of 1850. The act provided that children in the bracket of ten to eighteen years of age and convicted by courts were intended to be provided with vocational trainings. This would in turn assist them in rehabilitation. The second in the line of enactment was the Reformatory Schools Act of 1897. The Indian Jail Committee emphasized the need for square trial and treatment of young offenders. The recommendations lead to the enactment of the Children Act in Madras in 1920. This was followed by enactment of the Bengal and Bombay Acts of 1922 and 1924 respectively, with extensive amendments between the years 1948 and 1959.

The second United Nations Congress on the Prevention of Crime and Treatment of offenders in 1960 at London saw extensive brainstorming sessions on this issue resulting in several beneficial recommendations. The Children Act, 1960 was passed to cater to the Union Territories followed by the Children (Amendment) Act in 1978. In exercise of its power under Article 253 of the Constitution read with Entry 14 of the Union List to make laws to fulfill international obligations, the Juvenile Justice Bill, 1986 was introduced in the Lok Sabha on 22nd August, 1986. The purpose of the introducing the bill was to bring the juvenile justice system in consonance with the UN Standard Minimum Rules for administration of Juvenile Justice. The Juvenile Justice Bill, 1986, passed by both Houses and on receiving the assent of the President came into force as the Juvenile Justice Act, 1986. The several provisions come into force in different parts of the country and replaced the corresponding laws on the subject. The Juvenile Justice (Care and Protection of Children) Act, 1986 which was the first of legislations dealt with only “neglected” and “delinquent juveniles”. The Juvenile Justice (Care and Protection of Children) Act, 2000 which was the Act superseding the Juvenile Justice (Care and Protection of Children) Act, 1986 introduced a complete separate chapter; Chapter IV under the head ‘Rehabilitation and Social Reintegration’ for a child in need of care and protection. The Juvenile Justice (Care and Protection of Children) Act, 2000 was a specialized enactment towards the prevention and treatment of juvenile delinquency and provides a framework for the protection, treatment and rehabilitation of children. The act was brought in compliance of the 1989 UN Convention on the Rights of the Child and repealed the Juvenile Justice Act of 1986. This act has been further amended in 2006 and 2010. The rehabilitation and social reintegration as contemplated under this chapter, was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 made it crystal clear that the primary responsibility for providing care and protection to a child was to be rested with the immediate family. Sections 42, 43 and 44 of the Act dealt with alternative methods of rehabilitation - foster care, sponsorship and being looked after by an after-care organisation. The Juvenile Justice (Care and Protection of Children) Act, 2000 however did not define adoption per se and it is only by the amendment of 2006 that the meaning came to be expressed in the following terms in the following terms that is ; “adoption” means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship”⁷ Section 41 of The Juvenile Justice (Care and Protection of Children) Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the Juvenile Justice Rules, 2007. Court was meant to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. ⁸. The Hague Convention on Inter-country adoption ratified by India in 2003 and the guidelines given by the Hon’ble Supreme court in *Laxmikant Pandey v Union of India* first laid down the law in relation to intercounty adoption⁹. The Central Adoption and Research Agency (CARA), as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)]. In exercise of the rule making power vested by Section 68 of the Juvenile Justice Act, 2000, the Juvenile Justice Rules, 2007 had been enacted. Chapter V of the said Rules deals with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central Government under Section 41 (3) of the Juvenile Justice (Care and Protection of Children) Act, 2000 were made applicable to all matters relating to adoption. It appears that pursuant to the Juvenile Justice Rules, 2007 and in exercise of the rule making power vested by the Juvenile Justice (Care and Protection of Children), Act, 2000, most of the States followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the concerned State. Rules 33(3) and 33(4) of the Juvenile Justice Rules, 2007

contain elaborate provisions regulating pre-adoption procedure that is for declaring a child legally free for adoption. The Rules also provided for foster care (including pre-adoption foster care) of such children who could not be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organization. Whatever the Rules did not provide were supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions. Section 41 explicitly recognized foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child.¹⁰

The Juvenile Justice (Care and Protection of Children) Act, 2015 that received the President assent on December 31st 2015 supersedes all the previous Acts.

Current Legal Regime on Adoption Laws in India: The summarized form of laws of adoption that exist today is that is no general law of adoption. The institution of adoption per se continues to be an integral part of Personal Laws. The Hindus are the only community that have a specific codified statutory enactment for adoption in the name of The Hindu Adoption and Maintenance Act, 1956. This act by application includes Buddhists, Sikhs and Jains and explicitly excludes the Muslims, Parsees and Jews. Although the religious law of the Parsees and the Christians does not categorically prohibit adoption, they do not have a dedicated statutory enactment for the same. The customary Muslim law does not recognize per se the concept of adoption. A person who is a Non Hindus citizen can adopt under the Juvenile Justice (Care and Protection of Children) Act 2015. Changing trends can be seen in Judicial precedents like Shabnam Hashmi vs Union of India . It is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. The legislation gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. Such a person is always free to adopt or choose not to

Adoption under Juvenile Justice

(Care and Protection of Children), Act, 2015

An aftermath of the Nirbhaya Gang Rape case saw a great stir in the society and several questions were raised especially in the context of Juvenile Justice. The government appointed the Justice J.S Verma Committee comprising of eminent Lawyers and social activists to look into probable amendments in the Criminal Laws. Maneka Gandhi the Minister of Women and Child Development introduced the said bill in the on 12 August 2014 On 22 April 2015, the Cabinet cleared the final version after some changes. The Standing Committee on Human Resource Development with Dr. Satyanarayan Jatiya as chairperson in the 234rd Report gave extensive comments on the Juvenile Justice (Care and Protection of Children) Bill, 2014 on February 25, 2015. The Bill addressed children in conflict with law and need of care and protection. It aimed primarily to replace the Juvenile Justice (Care and Protection of Children) Act, 2000. The bill was passed by the Lok Sabha on 7 May 2015 by the Rajya Sabha on 22 December 2015. The Bill received the Presidents assent on 31st December, 2015 and came into force from 15 January 2016.

The Juvenile Justice (Care and Protection of Children), Act, 2015 is an act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established under the Act.

The provisions of the Juvenile Justice (Care and Protection of Children), Act, 2015 includes several aspects of Juvenile Justice but in view with the scope of this paper relevant and incidental provisions with respect to adoption have been discussed. A detailed study of the Juvenile Justice (Care and Protection of Children), Act, 2015, (Chapter VIII, Sections 56-73) dealing with adoption categorically envisages a detailed procedure and guideline approach w.r.t adoption; from eligibility of persons wanting to take in adoption, detailed due diligence and guidelines, role of government specialized agencies; These detailed provisions strongly reflect a very meticulously drafted legislation clearly living up to its objectives ensuring proper adoption . A few provisions categorically depicting the same are:

1. Definitions:
 - a) Best interest of child: The basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development
 - b) Committee: Child Welfare Committee constituted under section 27 of the Juvenile Justice (Care and Protection of Children), Act, 2015.
 - c) Childline Services: A twenty-four hours emergency outreach service for children in crisis which links them to emergency or long-term care and rehabilitation service.
 - d) **Foster Care:** The placement of a child, by the Committee for the purpose of alternate care in the domestic environment of a family, other than the child's biological family, that has been selected, qualified, approved and supervised for providing such care.
2. The Central Government, the State Governments, the Board, and other agencies, while implementing the provisions are to be guided by certain fundamental principles.
 - Principle of presumption of innocence
 - Principle of dignity and worth
 - Principle of participation:.
 - Principle of best interest
 - Principle of family responsibility
 - Principle of safety
 - Principle of non-stigmatising semantics.
 - Principle of non-waiver of rights:
 - Principle of equality and non-discrimination
 - Principle of right to privacy and confidentiality
 - Principle of institutionalization as a measure of last resort
 - Principle of repatriation and restoration
 - Principle of fresh start
 - Principle of diversion
 - Principles of natural justice
3. Sections 39-55 deal with the concept of rehabilitation and reintegration based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care.
4. After Care of Children Leaving Child Care Institution and Observation Homes -"Any child under Section 46, leaving a child care institution on completion of eighteen years of age may be provided with financial support in order to facilitate child's re-integration into the mainstream of the society.
5. Concept of Adoption- "Adoption under Section 56 shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Juvenile Justice (Care and Protection of Children), Act, 2015 rules made there under and the adoption regulations framed by the Authority. Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority. Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956. All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority. Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80 of the Juvenile Justice (Care and Protection of Children), Act, 2015."¹¹

Protection Of Rights And Welfare Of The Child After Adoption –Critical Analysis: Adoption is essentially a welfare principle based on *Parens Patriae* where the welfare of the child is of paramount importance. It gives an adopted child great opportunities that he may have never otherwise received. Such opportunities include loving homes and environments, parents who are able to provide and care for all their financial needs as well as access to education. While these are all positive factors that will

enhance the life of the adopted child, and many do not realize that there are negative effects adopted children can experience both mentally and emotionally. The right to adopt can be interpreted to be an indispensable basic Human Right. It is important that sufficient measures are taken to ensure that a child is in safe hands in the garb of adoption in not in anyways subject to physical, mental, social, economic or sexual abuse.

The data below shows a sweeping number of adoptions that have taken place in the past years.

Adoption Statistics ¹²		
Year	In-country Adoption	Inter-country Adoption
2010	5693	628
2011 (Jan'11 to March'12)	5964	629
2012-2013 (April'12 to March'13)	4694	308
2013-2014 (April'13 to March'14)	3924	430
2014-2015 (April'14 to March'15)	3988	374
2015-2016 (April'15 to March'16)	3011	666

The figures are indeed impressive but we still have a long way to go. The Juvenile Justice (Care and Protection of Children) Act 2015, is indeed is a huge achievement in terms of being the only secular law on adoption and now having a specific detailed chapter in relation to adoption.(Chapter VIII, Sections 56-73).

Being a secular law on a subject that has primarily always been dominated by the personal laws it is also a leap towards the endeavour of the State to establish a Uniform Civil Code under Article 44 of the Constitution.

A deeper insight however also shows the flip side. There are certain grey limitation areas in the legislation as far as adoption in the Indian scenario is concerned. Starting from the incorporation in the Juvenile Justice (Care and Protection of Children) Act 2015, not many apart from those in the legal fraternity would be aware that this act incorporates the provisions of adoption as well. Adoption is a welfare and popular concept. The laws must be visibly existent and known to people of every strata and study. Those dealing and involved in adoption procedures, not necessarily having legal acumen legal and knowledge need understand these laws and procedures for effective implantation and ensuring welfare of the child. The implementation agencies and Government both at the Central and State Level need to ensure that there is proper sensitization and awareness of these laws. The very applicability, the Act talks of adoption orphaned, surrendered and abandoned children. There is a possibility that a child does not fall in any category.

Hence instead of keeping adoption restricted to these categories, it would have been better as per my understanding to keep the applicability more open ended and general more general with an upper age limit cap of adoption. The Act does not allow a male adult who is single to adopt a girl child. This is clearly in contravention of the eligibility of a male to adopt under the Hindu Adoption and Maintenance Act of 1956. While on the face of it, the intention is to clearly protect the girl child from any chances of abuse, it also restricts the possibility of the girl child to be adopted, as well as limits the scope of a single male to adopt. The changing times and rising homosexual relationships are a clear indication that exploitation is more person specific that gender based. A child is open to exploitation from a person of either sex. What is required is that proper and strict assurance of the fact that person taking the child in adoption has no malignant intentions. There should be provisions to ensure the welfare of the child even post adoption form may be certain number of years apart from a thorough background check of the adoptive parent. The changing society needs now extend the idea of adoption even to single male and females, divorced, widow/widower who may not want to enter into the matrimonial institution but are keen for parenthood. The marital status per se should not be the deciding factor rather the ability and intention to adopt and the welfare of the child.

These of course pertaining more to the pre adoption stages, irrespective of several committees incorporated, the scope of powers and functions reflect very little on what is being done for the child after he is adopted. The is suddenly put into a new world, vulnerable to abuse and neglect in any form- physical, sexual, economical or psychological. Should not their be mechanisms to monitor their holistic growth and development.

Recommendations and Conclusion: All said and done the actual implementation of any law in any legal system is different from the law that exists on statute books. In the Indian conditions, irrespective of being a social concept more than legal, the societal conditioning is such that adoption as an institution has not been very whole heartedly accepted. Though singles and couples are coming to the idea well, the desire for a male own blood son continues to dominate in most part of the country. High female foeticide rates reflect the same. Adoption to my understanding is a socio legal concept. While I do not undermine the role of religion in the way of life, to me religion is more of a personal faith than what should be the basis of Adoption. Yes it is difficulty in a country where religion is a deep rooted sentiment, but if effort is made in a phased manner to slowly bring in certain secular laws, the dream of Uniform Civil Code inspite of all the hurdles is not far away. The only codified enactment is that for Hindus, so instead of having a separate chapter, there could be a Uniform Law of Adoption as the only law superseding all other laws of adoption that can be applicable to persons irrespective of religion.; equipped with well drafted provisions looking into the needs of the adopted child both pre and post adoption. Strong fundamentalists can be assured the liberty to bring up the child by religion of their choice after adoption which is anyways the norm.

Adoption is a greater social concept than is visible to the eye. Law should ensure that procedure is well laid down; Implementation agencies should ensure awareness and that the procedures and laws laid down are well followed and implanted. It brings happiness to two worlds, that the child and the adoptive parent. The society needs more secular social concepts, strengthened with efficient laws and implementation to make the world a better place to live in.

References:

1. Nia Vardalos
2. Soler Mark , Costello Jan and Heaven Barbara ; Legal Rights of Children in the United States of America
3. Encyclopaedia Britannica, Vol 1 p 165
4. Whinnie A.M : Adopted Child –How they grow up 1967, page 36
5. Rondell Florence and Muray Marie Anne : New Dimension in Adoption ,1974 page 1
6. Pappas Mamalakis Anna : Law and the status of the child, p 513
7. The Juvenile Justice (Care and Protection of Children) Act,2000 ; Amendment Act 2006, Section 2 (aa)
8. Lakshmi Kant Pandey v Union of India AIR 1984 SC 469
9. Shabnam Hashmi v Union of India (2014) 4 SCC 1
10. Juvenile Justice (Care and Protection of Children), Act, 2015, Chapter VIII, Section 56
11. In re: Manuel Theodore D'souza and Philips Alfred Malvin v Y.J.Gonsalvis and Others 2 (2000)
