

HINDU WIDOW AND HINDU ADOPTIONS AND MAINTENANCE ACT: COLOURING THE GREY

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ABSTRACT

One of the India's characteristics is its diversity, which has always changed across the country's history from ancient to contemporary times. Because of their beliefs, culture, and religion, Indians abide by their laws. Emotions are exchanged during adoption between the adopted child and adopted family. The adopted child is separated from his biological family and all his ties with the biological family are severed. Adopted children develop their sense of self-worth and self-concept throughout time. Eventually they come to terms with who they are. Childhood problems like connection, self-image might become more complex after the adoption. Adopted children need to integrate with both their adoptive and birth families. The Hindu Adoptions and Maintenance Act, 1956 has totally categorized the adoption legislation and made important changes to it. Compared to Hindu traditional law, the HAMA has improved the position of Hindu women in India in adoption. Any woman, regardless of her marital status, divorcee, widow, spinster, etc. can adopt a child. This paper focuses on the adoption by widows under HAMA, status and positions of widows, and doctrine of relation back and its removal. The primary subject of this article is section 8 of the HAMA, which Act 30 substituted in 2010. This paper contains both the retrospective view and the prospective view of adoption by widows under HAMA. This paper puts emphasis on the problems face by widows in adopting a child before the enactment of the act.

Keywords- adoption by widow, doctrine of relation back, personal law, adoptive family.

INTRODUCTION

Adoption is a process of formation of a family, which has been the center of the substantial study for the past few decades. A child born into one family is transferred to another family through the process of adoption, whereupon the child gains new rights, responsibilities, and status and severs all the links with the original family. Every child in this world is entitled to have a family and adoption can be the most effective rehabilitation strategy in this case. By means of adoption, parents without children and single parents adopt a parentless child. Therefore, adoption is a good way for a childless couple to have a child and a child without a family to have a parent and to have a home.

Adoption is one of those legal fictions that has been used to support individual rights. Adoption is the process of welcoming a stranger child into a home where they were not born. It's a long been believed that adopting a child offers a child a loving home and parents. It gives a great substitute for institutional care for poor, neglected, and abandoned children in a setting of love, compassion and affection that comes from a family. Parenting is a joyful experience of raising a child with love and affection. In India's past, adoptions were typically intrafamilial affairs carried out to satisfy familial and religious obligations.

Adoption was a process that was exclusive to traditional Indian families and was initially veiled in secrecy. At that time, it was customary for childless couples to adopt a child in order to preserve tradition and prevent property from being alienated. In those days, it was common for adopted children to be misrepresented as biological children through various forms of deceit.

Adoption is not a Hindu institution; rather, it has its roots in the social communism that was unique to the prehistoric races. Adopted children were taken in the past, regardless of their gender. Manu describes an adopted son as follows: "The Dattrima (Dattaka) son is a son who is equal in caste and affectionately disposed, and who his mother or father, or both, give with water in a time of calamity."

The sacramental element is far removed from the adoption situation as it exists now. The statutory laws established by legislators prescribe rules and regulations that control the current adoption norm. the Hindu Adoptions and Maintenance Act, 1956¹ now governs adoption under Hindu law.

HAMA

The Hindu Adoptions and Maintenance Act, 1956² governs adoption among Hindus, and all adoptions may now be completed in compliance with this act. It became operative on 21 December, 1956. Before the act, only a boy child could be adopted but this act provides that a female child may also be adopted. This act applies to the whole of India. It is applicable to everyone including Sikhs, Hindus, Buddhists, Jains, and who is not a follower of Islam, Christianity, or Parsi.

This act is a crucial piece of legislation in India that governs adoption and maintenance matters in Hindu households. According to this act, age difference of 21 years should exist between the adopted parent and the adopted child, in the cases where their sexes are different. The goal of this is to stop sexual abuse. The ancient Hindu law concerning adoption by Hindus has undergone several modifications as a result of this codified law. The codification of HAMA has, above all, strengthened the status of women who are adopting and placing children for adoption.

¹ "The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)"

² "The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)"

HINDU WIDOW

A woman who was still married to her spouse when he passed away is referred to as a widow and who hasn't remarried. A child by a Hindu widow could only be adopted prior to the new bill if she had her husband's personal consent. This has now been altered, and the widow has three years from the date of her husband's death to adopt at any time³. In India, widows are viewed as a marginalized minority due to their extremely low social position. They must, thus, contend with extreme social, economic, and cultural hardships. Becoming a widow requires forming new relationships with the kin group, the community, and the family. Widows frequently have to seek sanctuary in ashrams or charitable homes and avoid their families if it is tough for them to form these new ties.⁴

HINDU WIDOW AND HAMA

Adoption for widows was prohibited prior to the enactment of HAMA; the only requirement for adoption was that the husband must specifically consent to the adoption (in writing) prior to the widow's passing. Once the widow becomes a widow, she may adopt a child, but the adoption must be in husband's name; this means the child could not be adopted by the widow for anyone other than the husband. It is because a woman was not considered to be able to make her own decisions in her life. A widow could only adopt a kid under her husband's name, which was approved and recognized.

In 1956, HAMA removed the need that a widow should obtain her husband's consent before adopting a child. A child adopted by a widow without her husband's consent will be regarded as the widow's son even after the law has passed.

ADOPTION AND ITS OBJECTIVES

The procedure through which a kid of one set of guardians becomes a child of another set of guardians or parents is known as adoption. Adoption is widely considered as an excellent means of providing a child with a home and parents. The Shastric Hindu law viewed adoption as a sacramental rather than a secular act.

The "Hindu Adoptions and Maintenance Act (HAMA), 1956"⁵ is a crucial piece of legislation in India that governs adoption and maintenance issues in Hindu households. This act changes and unifies a number of rules pertaining to Hindu adoptions maintenance.

EVOLUTION OF ADOPTION LAWS IN INDIA

Although adoption has been done since the beginning of time, adoption laws were only enacted in England in 1926 to safeguard the rights of adopted children. The Department of Economic and Social Affairs (2009) states that the regulation was created to prevent biological parents from reclaiming their children. The Hindu Adoption

³ B. E. H. F., 'Social Reform in India: The Hindu Code Bill' [1952] The World Today 123

⁴ Alka Ranjan, Determinants of Well Being Widows, Economic and Political Weekly, 27.10.2011

⁵ The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)

and Maintenance Act of today and the English law were very similar in that they both declared that the adopted child was the natural heir of the adoptive parents and was no longer connected to their birth family.

Before the Guardians and Wards Act of 1890⁶, adoption in India was illegal due to religious prohibitions against it held by Jews, Christians, Muslims and Parsis. Jawaharlal Nehru led the codification of Hindu personal laws in 1955-1956, which is when the Hindu Adoption and Maintenance Act of 1956⁷ was created. This act permitted legal adoption of children by Hindu parents and all those who were deemed to be Hindu. It differed from the previous act in that, it included provisions for equating the rights of an adopted child with those of a natural child. It liberalized and changed the adoption system.

ADOPTION UNDER OLD HINDU LAW

For the sake of the family's continuance, the father's name, the lineage, and other offerings, rites, and rituals, it was common in early societies to have sons. Older authors like Manu, Yajnavalkya, and others explained and outlined the necessity of having children in their writings. The Vedic literature does not mention having second son, although adoption is a later notion that appears in Sanskrit literature.⁸

According to Manu, an adopted son is referred to as a "Dattaka son" when his parents offer him water during a disaster and he is treated with respect and equality in caste. In ancient Hindu writings, there were twelve different types of sons: "Apavidha, Aurasa (legitimate son), Dattaka (adopted son), Gudhaja, Kanina, Krita, Kshetraja, Putrika Putra, Punarbhava, Suhodhaja, and Svayamdatta." Furthermore, it is well known truth that there exist three categories of sons: adoptive, illegitimate and legitimate. A child is transferred from the family in which he is born to another family through the doctrine of adoption, wherein the son has new rights, new responsibilities, and position and severs all the links with the previous family. The primary reason for adopting a son under previous Hindu law was to fulfill religious obligations.

ADOPTION UNDER "THE HINDU ADOPTIONS AND MAINTENANCE ACT"

The adoption statutory law is an updated and codified version of the old adoption law. Now that there is a consistent legislative law governing adoption, all Hindu adoptions must be completed in compliance with the act's stipulations. It is no longer necessary to perform the Datta-Homam rite in order to adopt a child, as it once was. It is required to include provisions about the registration and the presumption. It is no longer necessary for the adopter and the adoptee to belong to the same caste; instead, the sole prerequisite is that they both must be Hindus or subject to Hindu law.

For all the Hindus and those falling under its purview, this statute formalizes adoption and upkeep traditions in India. It was very different from the traditional Hindu law of adoption and eliminated the religious component

⁶ Guardians and Wards Act, 1890, no.8, Act of Parliament (India)

⁷ The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)

⁸ Herbert Cowell, *The Hindu Law*, (2nd ed. R.Cambay & Amp; Co. Private Ltd., Kolkata 2013).

of the same. A female child now be adopted, single and/or widowed women could adopt, and the husband would need the consent of all wives in order to adopt a child. There were efforts to level the playing field for women in terms of private concerns.

HAMA comprises the following general provisions:

- Enables a husband to lawfully adopt a child with the approval of his wife or wives
- Permits a woman who is single, divorced, widowed, or whose husband has specific disabilities, to lawfully adopt a child
- Permits a woman who has ceased to be a Hindu, given up on life, or been declared mentally incompetent by the court
- Permits a mother, father, or guardian to decide if to offer the child for adoption; and permits the adopted child to sever all ties with the biological family.

OBJECTIVES OF ADOPTION

Spirituality: adoption has two goals. First, there is a religious object. Specifically, to ensure the adopter and his ancestors receive spiritual benefit by having a son present at funerals and perform water liberations. Progeny: securing an heir and carrying on the adopter's name is the second secular goal of adoption.

There has always been a spiritual and religious component to adoption. In order for a son to continue and maintain the family lineage, giving (gifting) away from a family severs all connections to the previous one and begins a new existence in a new family with their relatives as if the child was born in their own home. Adoption has been a tradition for many years, although adoption laws were first created in the 19th century.

STATUS AND POSITION OF WIDOWS

An individual who has lost her spouse is known as widow. When a spouse passes away, an unpleasant occurrence occurs, and the woman suddenly becomes a widow. This drastically alters her behavior, wardrobe, and way of life, not often because she chose it, but rather because of the way society has been structured. This is the situation faced by widows worldwide, and in India as well, after their husbands pass away, the widows are not welcomed or supported; rather, they are blamed, pressured to alter their way of life, and expected to live in despair. They are also not properly looked up to, treated with respect, and seen as a bad omen for the society.

STATUS OF WIDOWS IN INDIA BEFORE “HINDU ADOPTIONS AND MAINTENANCE ACT, 1956”⁹

In the history of women's struggles for equality and freedom, the nineteenth century is seen as the most significant time. The introduction of English education and western liberalism during this time period made

⁹ The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)

educated Indians aware of the appalling state of society. Their concerns were mostly focused on the terrible situation of women, especially those who were young widows, “Sati pratha”, polygamy, etc. They stated that changes were required in order to get rid of the social ills that had affected the community.

India’s women have won their right to equality following a protracted battle against superstition, orthodoxy, and obscurantism. The progressive provisions of the Constitution, along with other legislative measures, have bestowed upon women equal possibilities in the political, social, economic, and cultural arenas. The Indian Constitution envisions a legal revolution as a means of bringing about immediate social change.

The “Dharma Sutras” and the “Dharma Shastras” which are said to be the normative writings of Buddhism, assert that widowhood is a penalty for past-life misdeeds and is outcome of “purva karma” or past actions. A widowed woman is expected to live a chaste life according to the Manusmriti. Since her spouse was the only one who would see her decorations, she was not allowed to put any effort into decorating herself. The politicians therefore preferred that she remain alone following her husband’s passing. She had to stay single, only consume one meal a day from a bronze vessel, keep her distance from rage, sloth, and unsavory company, and so on. She was deprived of all life’s comforts.

Adoption on behalf of widows was prohibited; the only adoptions that were permitted were those under which the husband had to have explicitly consented. Therefore, prior to his passing, the husband had the opportunity to put this in writing and give the wife, who thereafter becomes a widow, directives about the adoption of a child. The adoption had to be done in the husband’s name, which meant the widow could not adopt the child for anybody other than the husband. It was only in the husband’s name that the adoption was approved. The Dravida School in Madras and Maharashtra School in Bombay are the two schools that permit a widow to adopt a child without her husband’s consent.

STATUS OF WOMEN IN INDIA AFTER HAMA

As a result, over time, the personal laws underwent gradual modifications to become the Hindu Adoptions and Maintenance Act of 1956, which was enacted. The Act permitted a widow to adopt a child. However, laws and regulations have since modified for the gain of the society. The Hindu Law of Adoption brought about significant changes, including the introduction of equal rights for men and women. Additionally, it gave legitimacy to girls’ adoption right, which were unrecognized in India prior to independence. Adopting a child is open to widows without any restrictions.

WIDOWHOOD

During the nineteenth century, there was a prominent and extensive discourse on the inferior status of women, as demonstrated by the situation of the child widow who was compelled to live in enforced celibacy. Although the widows went through their own, others looked at them as if they were “like a stone without feeling and without emotion” with eyes that showed an excess of pain.

In this background Harper’s description of Havik Brahmins who called widows “animal” or “it” or the neuter “it”, is noteworthy. They considered widows to be lifeless entities. When widows were around, disparaging remarks would often be made about them as though they were inanimate objects. Widows were treated as though they did not exist.

The daily manifestations of authority such as routine verbal “lashings”, denial of sufficient food, monitoring, drudge, labor, and even physical attacks, served to reinforce the lowly and helpless state of the upper caste widow. The upper caste widow’s dependency on these individuals, especially if she had no son, was what made her situation so precarious and placed her under the authority and control of others.

Cultural norms surrounding widowhood among Hindu society strengthens the family’s ability to provide the widow with little support. There is a connection between beliefs about widow entitlement and beliefs about religious self- deprivation. In the case of Hindu Widows, notions of self-sacrifice and self-control, which are in any case quite popular with regard to women, are multiplied, and they are vital in creating an ideology of little or no right to the widow.

ADOPTION BY WIDOWS

An adoptee Hindu widow is entitled to adopt a son or daughter for herself under the Hindu Adoptions and Maintenance Act, 1956¹⁰. Section 8¹¹ of the act has acknowledged the same. Also, if a daughter is to be adopted, there cannot be a living Hindu daughter or Hindu son’s daughter during the time of adoption. The adoptive son and mother must be separated by at least 21 years according to section 11¹² of the act.

Earlier, a widow needed her husband’s approval before she could adopt a child. A widow could not adopt someone without the nearest sapinda’s approval because a woman is not capable of making her own decisions. The older female member, who is also a widow does not need to give her consent to the to the widow making an adoption.

In 1956, the requirement that a widow’s adoption has to be approved by her spouse has been removed. “A child adopted, without the consent of widow’s husband’s consent, by a widow, will be regarded as widow’s son even

¹⁰ “The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)”

¹¹ “The Hindu Adoptions and Maintenance Act, 1956, §8, no. 78, Act of Parliament (India)”

¹² “The Hindu Adoptions and Maintenance Act, 1956, §11, no. 78, Act of Parliament (India)”

after the law has been passed.”¹³ “If there are multiple widows, one widow may adopt a child without the other widows’ permission.”¹⁴

The capacity of a sapinda to authorize a widow’s adoption is referred to as his fiduciary power. The aforementioned power implies that he must use it impartially and honestly and express his judgment regarding the suitability of the proposed adoption in relation to the widow’s family branch. A widow’s adoption serves two purposes:

- Ensuring that the adoptee’s funeral rites are performed and that pindas are given to them and their ancestors; and
- Preserving the continuance of their lineage.

CONSTITUTIONAL VALIDITY

Every Indian citizen is given protection and benefit under the Indian Constitution. Fundamental rights are guaranteed to every person, as stated in Article 21-

Article 21 ~

“no person shall be deprived of his life or personal liberty except according to a procedure established by law.”¹⁵

“Every person has the right to a life in society that is marked by respect and dignity.”

Article 24¹⁶~ “Fundamental Rights of the citizens” provides for the right against exploitation for the children, who are below the age of 14 years.

The government must enact new laws and regulations to protect its population. A widow's life has the right to live with dignity; this would fully safeguard the fundamental right protected by our Indian Constitution if citizens treat widows with respect and do not view it as a taboo but rather as an issue of common righteousness.

Article 44~ “the state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India.”

Although the Indian Constitution does contain this idea, it has not been elevated to the status of fundamental right. All anomalies in personal law would be eliminated if the Uniform Civil Code is made a legal requirement, providing a single solution to all issues. The idea of adoption will also be extended to all individuals from different religions.

¹³ Tahsil Naidu v. Kulla Naidu, A.I.R. 1970 S.C. 1673 (India)

¹⁴ Sawan Ram v. Kalawanti, A.I.R 1967 S.C. 1761

¹⁵ INDIA CONST., Art. 21

¹⁶ INDIA CONST., Art.24

DOCTRINE OF RELATION BACK

The doctrine of relation back has undergone multiple revisions; prior to the act of 1956, it was universally accepted. The doctrine was then repealed after the statute was put into effect, although it was later reinstated in certain instances based on the particular case's facts and circumstances.

According to the doctrine, a widow's adoptive son is considered to have entered the new family on the day of the husband's death if she adopts a boy with his permission or with his authority. The idea goes against the maxim that once a property is vested, it cannot be taken back. The legal fiction that the adoptive father's line should remain continuous served as the foundation of the theory.

This "doctrine of relation back" has two exceptions:

- Any legal estrangement occurred both prior to the adoption of the child and following the husband's passing. It is binding on the adoptive son and is legal.
- If collateral received the property through inheritance, the adopted cannot take back the property that was given to the collateral's successor.

The "Hindu Adoptions and Maintenance Act of 1956"¹⁷ invalidated the long-standing idea of the doctrine of relation back. As per section 12¹⁸ of the HAMA, the theory of relation back has been revoked by Article 14¹⁹ of our Indian Constitution. On the other hand, as per proviso (c) to section 12²⁰ of HAMA, the adopter came into being from the date of the real adoption. The adopted child used to be regarded as a member of the adoptive family as of the adoption father's passing.

The new statute has replaced the doctrine of relation back, but solely with regard to the particulars of divesting land. The doctrine still holds that when a child, the adopted child and the widow's deceased husband have a relationship, and the deceased husband subsequently becomes the adoptive father of the adopted child.

JUDICIARY INTERPRETATION

- *Sawan v. kalawanti*²¹

Facts- wife received husband's inheritance as a restricted owner after he passed away without issue, and she later gave the land to her niece. Husband's collaterals contested this and filed a lawsuit, claiming that the widow is the limited owner; in this case, the court declared the gift to be void.

Eventually, the widow adopted a son, who then asserted his rightful title of the property

That the collateral had declined to surrender.

¹⁷ The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)

¹⁸ The Hindu Adoptions and Maintenance Act, 1956, §12, no. 78, Act of Parliament (India)

¹⁹ INDIA CONST., Art. 14

²⁰ The Hindu Adoptions and Maintenance Act, 1956, §12, no. 78, Act of Parliament (India)

²¹ *Sawan v. Kalawanti*, A.I.R 1987 SC 389

Ruling-Although it was not very compelling, it has been claimed that the Supreme Court's ruling brought the notion of doctrine of relation back. The son automatically became the deceased husband's son, making him the adoptive son's father, according to the Supreme Court, which found that the son became a part of the family from the date of adoption. Thus, the theory was brought back.

- Shripad Gajanan suthankar v. Dattaram Kashinath Suthankar²²

The Supreme Court ruled that, in accordance with the relation back theory, adopting a son by a widow would be regarded as retrospective adoption, as if the child had been adopted before to the father's passing.

- K. Venkata Somaiah v. K. Ramasubamma²³

Facts- the lone surviving coparcener left his whole estate to his spouse. Following his passing, the widow adopted a son, giving him some of his possessions while keeping the others for herself. The adopted son made an attempt to seize all of his adoptive mother's possessions.

Ruling- the Andhra Pradesh High Court ruled that the topic of property divestiture and adoption is no longer subject to the connection back doctrine. A clear and explicit provision in 1956 Act stipulates that an adopted child cannot take away any estate that the adoptive parent already had.

CONCLUSION

Though adoption as a notion is morally repugnant, it has evolved throughout time and, notably widows in our nation, has undergone certain favorable modifications that have resulted in more liberal and gender-neutral legislation.

Emotions are exchanged during adoption between the adopted child and adopted family. The adopted child is removed from his biological family and placed in the adoptive family as if he were a natural son through the adoption process. The adopted child cuts all connections to the family from which he was born and integrates into the adoptive family.

The Hindu Adoptions and Maintenance Act,1956²⁴ governs the adoption and maintenance practices of Hindu households in India. Key provisions of this act, including as requirements for eligibility, the impact of adoption, and maintenance obligations, create a thorough legal framework that protects the welfare and rights of all parties concerned. HAMA supports the upholding of family values and social harmony within the Hindu community by shedding light on these issues.

²² Shripad Gajanan suthankar v. Dattaram Kashinath Suthankar, 1974 AIR 878

²³ K. Venkata Somaiah v. K. Ramasubamma, AIR 1976 SC 472

²⁴ "The Hindu Adoptions and Maintenance Act,1956, no. 78, Act of Parliament (India)"

Almost throughout history, widows have typically been on the receiving end of the society. Although not always present, discrimination has been routinely used. The justifications for this have ranged from safeguarding women, using them to bear children, and promoting self-immolation to uphold honor and keep family assets from being dispersed.

Widows in India want and need to become goal-oriented and make a respectable life. Widows had endured a tremendous deal of hardships, particularly in the beginning, and being a widow was now seen negatively. A widow and her adopted child share an unadulterated bond of love, tenderness, and affection. With no one to take care for her or whom she could care for, adoption is a wonderful way for a widow, already miserable and feeling abandoned by society, to fully embrace motherhood for a kid. All Hindus must abide by the Hindu Adoption and Maintenance Act²⁵; for other religious groups, separate legislation have been passed to allow for adoption.

With some restrictions, a widow is able to give and take in adoption. Any woman, regardless of her marital status, divorce, widow, spinster, etc., may adopt the child. Therefore, comparing HAMA to traditional Hindu Law, the position of Hindu women in adopting and giving birth to children has improved.

RECOMMENDATIONS

Since there is so much to discuss on the subject of “adoption by our widow”. In our society, being a widow and adopting a child regarded as abnormalities. The general public ought to be understanding and accepting of widows and adoption in general. Widows should adopt children more frequently since they can provide a child a child with the right care and compassion.

It is important to note that laws such as HAMA does not define the term “adoption”, which leads to misunderstandings over the meaning and interpretation of adoption. Furthermore, it has not been established that the adopted child’s legal standing is the same as that of lawful biological child.

Every state shall establish a state level adoption advisory committee in order to oversee, administer, and monitor non-institutional programs such as adoption, foster care, and sponsorship. It is important to specify these committees’ roles and authority.

Women should be actively encouraged to become aware of that laws that are in place and given support in obtaining and upholding their legal rights under Article 39A²⁶.

²⁵ “The Hindu Adoptions and Maintenance Act, 1956, no. 78, Act of Parliament (India)”

²⁶ INDIA CONST., Art. 39A

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