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# Capacity of Male and Female to Adopt

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## ABSTRACT

*This article discusses in depth about the analysis of capacity of a male and female to adopt and evolution of the law in adoption. Adoption in general is referred to as the legal process of becoming a non – biological parent, this transfers all the rights of a child from the biological parents to adoptive parents. In Hindu law, section 7 and 8 of The Hindu adoption and maintenance act, 1956 states about the capacity of a male and female to adopt. The legal rights of adoption took continuum changes. There were traditional practices carried out for adoption in Hindu law. This article also talks about a comparative analysis about adoption in Hindu, Muslim and Christian law.*

**Keywords:** Adoption, Children, Capacity to adopt, Hindu adoption act.

## I. INTRODUCTION

### (A) What is adoption?

Children who will not be raised by their biological parents can become complete and permanent legal members of a new family through the social, emotional, and legal process of adoption, which preserves the children's genetic and psychological ties to their natural family. Adoption may take place for a number of reasons, including the child's orphanage, the biological parent's voluntary decision to place the kid for adoption, or the biological parent's incapacity to care for the child. Every nation and jurisdiction has its own set of adoption laws and processes, although they are all generally made to protect the child's best interests.

There are different types of adoption, including domestic adoption (within the same country), international adoption (across borders), open adoption (where there is some level of contact between the birth and adoptive families), and closed adoption (where there is no contact between the birth and adoptive families).

The Hindu Adoption and Maintenance Act, 1956 (HAMA) and the Juvenile Justice Act, 2015 are the two laws that govern adoptions in India. Each law has different requirements for adoptive parents to meet in order to be eligible

Legal procedures, extensive background checks, and assessments are usually part of the

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adoption process, which aims to verify that the potential adoptive parents are qualified and able to give the kid a secure and caring home. Although the goal of adoption was once to place children in need of homes, contemporary adoption procedures frequently place an emphasis on the child's best interests and may take the birth family's wishes into account. Adoption unites persons who may not have a biological link but establish a family bonded by love, commitment, and legal ties. It is an important and transforming experience for both the adoptive parents and the adopted kid. Diverse jurisdictions have diverse adoption laws and procedures that reflect subtle differences in culture, society, and the law.

## II. BASIS AND PURPOSES OF ADOPTION

- **Child Welfare:** Children who are unable to be raised by their biological parents for a variety of reasons can find a secure and supportive home via adoption. Adoption can provide children with a safer and more secure life when they are in danger from abuse, neglect, or other unfavourable situations.
- **Parental Aspirations:** Adoption offers a means of creating a family and experiencing parenthood for individuals or couples who are either unable or choose not to have biological children. Adoption is a popular choice among families who want to grow their family and give needy children a loving home.
- **Legal Framework:** By creating a legal parent-child bond between the adoptive parents and the adopted child, adoption gives the latter the same rights and benefits as if they were a biological child.
- **Child-Centric:** Adoption is primarily done to advance the child's best interests and well-being by ensuring that they are raised in a loving and supportive family.
- **Social and Cultural Value:** Adoption can help create inclusive and diverse families by fostering acceptance of non-biological family structures and dispelling social stigmas associated with biological ties.
- **Legal Protection:** Adoption provides a framework for obligations, inheritance, and other legal considerations, giving both the adoptive parents and the adopted child legal protection and recognition.

## III. EVOLUTION OF THE LAW OF ADOPTION

A growing emphasis on the child's best interests and cultural and societal changes have all influenced the dynamic evolution of adoption laws. The legal environment pertaining to adoption has changed significantly over time. Here is a broad summary of how adoption laws

have changed over time.

The topic of adoption has received very little attention in the literature of the Smriti and Dharma Sutras. In a few verses, a text by Manu defines an adopted son and outlines its consequences. The outcomes of a lawful adoption have been expounded upon by mediaeval pundits in their commentary on Manu's text. One of the most significant texts on adoption can be found in the Vasishtha dharma Sutras. The statement "one should not give or accept an only son" comes from Vasishtha. The privy council has deemed this rule to be merely advisory.

Vasishtha also outlined the requirements for a woman to be able to adopt a child legally. When interpreted by mediaeval pundits, this text produced a wide range of opinions and was the basis for the well-known Ramnad case. The interpretation of this text by the various schools of Hindu law has been drastically different, and a significant amount of case law revolves around a widow's ability to make an adoption.

In addition to these two well-known texts, the law on adoption has also been elaborated through the use of a Saunaka metaphor. According to Saunaka, the adopted son ought to possess the qualities of a son, or be "putrachayavaha". This metaphor has led to varying interpretations and a range of judicial opinions regarding the requirements for a person to be legally adopted. From this metaphor, Nanda Pandita in his Dattka Chandrika inferred the prohibition against adopting one's brother, uncle, daughter, or sister's son. This is due to the fact that the adopter's practise of Niyoga prevented them from procreating.

The two texts of Manu and Vasishtha, as well as the Saunaka metaphor, serve as the foundation for the development of the entire law of adoption.

The development of adoption is a reflection of larger cultural shifts, such as a move towards openness, inclusivity, and a child-centered approach. Adoption practises in the modern era are still being shaped by ongoing discussions and changes.

#### **IV. CAPACITY OF MALE AND FEMALE TO ADOPT**

The ability of Hindu male to adopt is covered in **Section 7** of the **Hindu Adoption and Maintenance Act of 1956**. Any male Hindu who is of sound mind and is not a minor is eligible to adopt a son or a daughter under this provision. As long as his wife is still alive, he is not allowed to adopt without her approval.

Any male who is not a minor may adopt under this section, subject to the restrictions outlined in this act's section 11(3). A minor is defined as an individual who has not reached the age of eighteen under section 3(c).

Adopting a daughter or girl was forbidden by previous law. In addition, the adopted son needs to be a member of the same caste as his adoptive father in order to be adopted. As a result, although a Brahman cannot marry a kshatriya, vaisya, or sudra, he is not required to come from the same caste subdivision. The proviso clause states that a male Hindu who is married must obtain his wife's permission before adopting a child.

The proviso to section 7 of the act states that if the person adopting the son has a living wife, he may only adopt with her approval. The party in favour of the adoption must present proof that it was carried out with his wife's approval if the court challenges the adoption of a Hindu man. This can be accomplished in one of two ways: either by presenting written documentation of her consent, or by providing evidence that she actively participated in the adoption ceremonies and had an affirmative mindset to support her husband's decision to adopt a son or daughter.

Wives cannot be considered to have given their consent to be present as observers in the crowd of people gathered at the location of adoption ceremonies. Stated differently, the mere fact that the wife was present during the adoption does not entitle the court to assume her consent. Furthermore, it cannot be assumed that the wife approved of the adoption based only on her silence or lack of objection.

**Kashibai W/O Lachiram &Anr VS Parwatibai w/o Lachiram & Ors.** In this case the Supreme court held that “ the first wife of deceased Lachiram had not only declined to participate in the alleged adoption proceeding but also declined to give consent for the said adoption and, therefore the plea of alleged adoption advance by the defendants was clearly hit by the provisions of section 7 and the adoption cannot be said to be a valid adoption”.

The wife's consent can only be obtained prior to adoption, as stipulated by the proviso to section 7. It cannot be granted after the act of adoption. The proviso stipulates that consent is a prerequisite for adoption and that it is required; an adoption would not be valid without the wife's consent.

**Consent of the wife , when not necessary:**

- (a) If the wife has completely and finally renounced the world or
- (b) has ceased to be Hindu or
- (c) has been declared by a court of competent jurisdiction to be of unsound mind.

Under the above mentioned three circumstances, the Husband need not get consent of his wife for making adoption. Any adoption that is made in violation of the aforementioned guidelines

will be void because it does not adhere to the requirements of section 7's provision. In all these cases, it is not required to provide concrete proof of the adoption's actuality.

The ability of a Hindu woman to accept adoption is covered in **Section 8**.

It is possible for any Hindu woman of sound mind who is not a minor to adopt a son or daughter. If her husband is still alive, she is not allowed to adopt a son or daughter without his approval unless he has given up on life entirely, stopped being a Hindu, or been found mentally incompetent by a court of competent jurisdiction.

The 2010 Personal Laws (Amendment) Act replaced this section. Before the Personal Laws (Amendment) Act of 2010, a married woman had no legal right to adopt a child unless one of the following circumstances occurred: **(1)** the marriage was dissolved; **(2)** her husband passed away; **(3)** she had fully and utterly renounced the world; **(4)** she had ceased to be a Hindu; or **(5)** a court of competent jurisdiction had found her to be mentally incompetent.

Today, a woman has the same rights as a man, regardless of whether she is married or single. Women are subject to the same conditions that apply to men.

## **V. CENTRAL ADOPTION RESOURCE AUTHORITY (CARA)**

The Central Adoption Resource Authority (CARA), a division of the Ministry of Women and Child Care, oversees and controls the adoption process in India. It is the responsibility of CARA, the nodal agency for adopting Indian children, to oversee and control domestic adoptions. To guarantee that the adoption process is conducted morally, openly, and in the child's best interests, CARA has set up policies and procedures. These guidelines address a number of adoption-related topics, such as eligibility requirements for adoptive parents, the adoption procedure, necessary paperwork, and follow-ups after the adoption.

In compliance with the terms of the 1993 Hague Convention on Intercountry Adoption, which the Indian government ratified in 2003, CARA is also designated as the Central Authority to handle adoptions between countries.

### **(A) Major challenges related to adoption:**

- **Lengthy and Complex Adoption Process:** Adoption procedures in India can be drawn out, complicated, and bureaucratic, which causes delays in matching up adoptable children with adoptive families. The adoption process takes three years to finish, and about two thirds of them are children with special needs.
- **Illegal and Unregulated Practices:** Regrettably, there are cases of unlicensed and illicit adoption in India. This includes the sale of children for cash, the trafficking of

babies, and the existence of unlicensed adoption agencies that take advantage of both biological parents and vulnerable children.

- **Returning Children after Adoption:** Adoptive parents in India are experiencing an atypical surge in the return of adopted children. Over 1,100 adopted children nationwide have had their adoptive parents return them to child care facilities during the previous five years, according to a 2020 report by CARA.

## VI. COMPARITIVE ANALYSIS ON HINDU, MUSLIM AND CHRISTIAN LAW

### (A) Adoption under Hindu Law:

Hindus acknowledge adoption, whereas Christians, Muslims, and Parsis do not. **The Hindu Adoptions Act** governs adoption among Hindus, and all adoptions may now be completed in compliance with this legislation. It became operative on December 21, 1956. The Act provides that a female may also be adopted, whereas previously only a male could be adopted. All of India is covered by this Act, with the exception of Jammu and Kashmir. It is applicable to everyone who is not a follower of Islam, Christianity, or Parsi religion, including Sikhs, Jainas, Buddhists, Hindus, and Buddhists.

### (B) Adoption under Muslim law:

According to Islamic law, adoption entails moving a son from his birth family to a new family, who are then known as adoptive parents. To put it briefly, adoption is not accepted in Islam. A Muslim couple may adopt a child from another Muslim couple, but the child's biological parents must be present. If a couple of Muslims wishes to adopt a child from an orphanage, then doing so is prohibited by Islam. Such Muslim couples must rely on **The Guardians and Wards Act, 1890**, for this purpose.

### (C) Adoption under Parsis and Christian laws:

Even in these communities, adoption is not recognised by personal laws; however, in these communities as well, adoptions from orphanages are permitted with court approval under the Guardians and Wards Act. Christian adoption law does not exist. Adoption is a personal law topic because it involves the legal affiliation of a child. Christians must file a court case under **the Guardians and Wards Act of 1890** because they do not have any adoption laws. The necessity of a unified adoption law has been emphasised by the National Commission on Women. Under the aforementioned Act, Christians are only permitted to adopt foster children. A foster child is free to sever all of his ties once he reaches adulthood. Furthermore, the child in question lacks the legal entitlement to inherit.

## **VII. CONCLUSION**

In conclusion, the motivation behind adoption is to full fill the parental dreams of individuals who are looking to start families while simultaneously giving children a secure and loving home. It creates legal ties that resemble those of biological families, advances inclusivity, and looks out for the child's best interests. Adoption laws need to be reviewed and updated in order to guarantee the child's best interests, expedite the process, and increase transparency.

It's important to remember that different jurisdictions may have different adoption procedures, as well as different requirements and particular steps. To guarantee a lawful and fruitful adoption, prospective adoptive parents should adhere to the policies and procedures set forth by the applicable adoption authority in their jurisdiction.

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