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CAN ADOPTION LAWS INCORPORATE REVOCABILITY? AN ANALYSIS OF SECTION 15 OF THE HINDU ADOPTION & MAINTENANCE ACT, 1956

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I. ABSTRACT

Adoption Laws in India constitute a part of various laws ranging from Personal Laws like the Hindu Adoption and Maintenance Act, 1956 to a secular code of the Juvenile Justice Act, 2015. Section 15 of the Hindu Adoption and Maintenance Act states that a valid adoption made under this Section cannot be revoked in any chance. This implies that such adoptions are irreversible in nature and once done, cannot be revoked. Once an adoption is made, the adopted child may face several hardships in the adopted family, causing a violation of his fundamental rights. These hardships may include discrimination of the adopted from the biological child, if any, lack of access to resources, emotional ill-treatment and so on. Due to such hardships and irrevocability of adoptions, the child maybe continues to stay in a perpetually hostile environment which becomes unhealthy. The authors contends that there is a need to incorporate revocable adoptions withing the ambit of Section 15 of the Act and the same can be done by way of an exception clause which may incorporate revocability, by giving power to the judiciary to declare an adoption revoked if needed. The authors have reviewed judicial precedents that support the thesis of revocable adoptions, and research articles The case laws reviewed adjudicate over child welfare principles and lay down its priority over other issues in a family dispute. The authors also suggest solutions facilitating revocability of adoptions so as to award a better protection to adopted children from infringement of their rights.

II. KEYWORDS

Adoptions, Child Welfare, HAMA, Revocability

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III. INTRODUCTION

The Hindu Adoption and Maintenance Act, 1956 is a central legislation in the realm of Personal Laws for Hindus and contains codified practices for adoptions and maintenance of members in a Hindu Joint Family. The Act provides for various adoption and maintenance provisions, which the authors contend, have certain underlying problems in the contemporary times. One of the issues in this particular is the provision that provides for irrevocable adoptions.³

Adoption Law as per Section 15 of the Hindu Adoption & Maintenance Act provides that a valid adoption made under the Section can't be revoked. However, adopted children do face hardships in their respective households after a certain point of time, to which they don't have any remedy.

The authors contends that the current provision does not incorporate the aspect of reversible adoptions. While statistics confirm that there is a need to consider the same due to increasing problems post adoption, the provision has not been seen to cover this issue. The authors rely on the thesis that Section 15 of the Hindu Adoption and Maintenance Act, 1956 does not incorporate the aspect of revocable adoptions and there is a need to provide the same.

The paper broadly deals with the research question as to how does Section 15 of the Hindu Adoption and Maintenance Act incorporate the concept of revocable or reversible adoptions? This study is conducted to assess the need of incorporating revocable adoptions in Section 15 of the HAMA in order to rectify the problems faced by adopted children in their adopted households.

The Researcher has adopted doctrinal methodology. An analysis of existing literature has been conducted in order to arrive at a suggestion put forth by the authors. The authors have reviewed judicial precedents that are valid for the current thesis of adoptions being revocable, and research papers and articles- both Indian and International. The case laws reviewed adjudicate over child welfare principles and lay down its priority over other issues in a family dispute. The approach for data collection was grounded approach of data collection.

The researcher has collected existing literature from various sources on the topic of adoptions and child rights, with a central focus on post-adoption issues. Data was collected from secondary sources such as Hon'ble Supreme Court judgments, law journals and existing statistics pertaining to post-adoption problems faced by children. This data is primarily

³ Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), s. 15.

important to substantiate the thesis of the researcher. The data so collected was analysed textually as the research includes determining what the existing literature has got to say about the research problem in the present context.

The paper begins with providing the existing legal framework for adoption in India, which are basically irrevocable in nature. It then proceeds to provide a justification as to why should adoptions be revocable in the first place using different philosophies and theories of law. It then looks at the judicial opinions in these matters and how different critics have laid down their thoughts on revocable adoptions that support the central argument of this paper. Lastly, the authors have provided their humble suggestions to the thesis.

IV. EXISTING LEGAL FRAMEWORK FOR ADOPTION

In this paper, the researcher shall deal with the adoptions that are carried out according to the Hindu Adoption and Maintenance Act, 1956. The Hindu Adoption and Maintenance Act is a central legislation for Hindu religion covering various aspects of adoption and maintenance. Section 15 of the Act states that an adoption made under this legislation which is valid cannot be reversed in any circumstance. This sets the base for the fact that adoption laws and irrevocable or irreversible in nature. The provision states that neither the adoptive parents, any third person nor any adopted child can reverse such an adoption made under this Section.

If all legal formalities and procedures are followed by a couple intending to adopt, an adoption becomes exempt from cancellation or transfer of any kind. The adopted child, if he or she feels like, cannot go back to the biological family or the place of residence from which he/she was translocated. From the perspective of parents, despite any hardship or an unforeseen circumstance, an adoption is immune from revocation. Similarly, an adopted child cannot be given for adoption again i.e., for the second time.

Both biological parents and adoptive parents cannot reverse such an adoption. Even as per Section 10, a child who has been adopted previously cannot be sent back for adoption.⁴ Similarly, once an adoption is made under this Act, the adopted child's relations and ties from his or her biological family are severed completely.⁵ In their essence, these sections are said to facilitate transfer of liabilities and responsibilities from biological parents to adoptive parents.

⁴ Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), s. 10 (ii).

⁵ Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), s. 12.

However, the fact that adoptions are irrevocable also has its set of legal and social justifications and it becomes a significant principle of the Act. The essence of Section 15 is said to revolve around the stability and sanctity of legally valid adoptions. It places an emphasis on the need for certainty and security in an adopted child's lives and the importance of upholding their rights and identities.

Once an adoption is recognized by the HAMA, it is meant to be permanent and a bond that is said to be pure between the child and the adopting couple. This principle ensures that the adopted child's rights well-being is secured and the adoption thus made is not at stake due to post-adoption decisions of the adoptive parents regarding the status of adoption. The principle of irreversible adoptions is said to be grounded on the best interest of the child. It thus ensures a constant stabilized and nurturing environment which becomes necessary for the child's development as an individual.

A counter argument to the central hypothesis of this paper thus stands that a revocable adoption might lead to the child in a state of emotional turmoil and distress as there is a literal shift in parents to that child, if put in a lay man's language. It has further serious implications such as a change of the child's identity over again and his sense of belongingness to the family he initially was with. Further, allowing adoptions to be completely revocable could undermine the legal security of the child and the commitment which the adoptive parents undertake.

However, a primary contention and argument of the authors is that adoptions should be revocable pertaining only so certain cases. A way to go about this could be enacting a particular exception to the existing Section 15 of the HAMA, whereby through some mechanism, adoption can be reversed in cases of children facing hardships in their adopted households. There can be instances where the legality of adoptions could be revisited in exceptional circumstances where it is found out that the child is facing shortcomings related to financial aspects, upbringing, mental conditions etc.

There can be 2 broad instances relating to such hardships, pre-adoption and post-adoption. This paper focusses on post-adoption issues faced by the child at the adoptive household. These problems can include a wide range of problems such as lack of nurturing childhood, violation of basic aspects of liberty and choice, financial and mental stresses in growing stages etc. All these cases should be subjected to strict legal scrutiny to ensure that the child's interests are of paramount importance and no adoption is revoked arbitrarily as well. Courts in various cases

have laid down child welfare as the fundamental focus in adoption related issues.⁶ However, Section 15 and 12 of the HAMA are seen to stay silent on this.

V. THEORETICAL JUSTIFICATIONS FOR REVOCABLE ADOPTIONS

The authors rely on various philosophical theories as well to support the hypothesis of this research. The fact that adoption laws should have a revocability clause is contended in order to keep the interest of the child in mind. The rights of a child might be affected in adopted households due to various reasons. If such an adoption is never contended or attempted or be solved, such an instance would lead to a violation of the fundamental rights of the child. There stands a conflict here between fundamental rights of the child and existing legal framework setting irreversible adoptions.

The very fundamental theory relied upon is the natural law theory by ancient Greek philosophers Aristotle and Plato. Plato's natural law theory ensures justice and ethical conduct to ensure harmonious functioning of all stakeholders in the society.⁷ On the other hand, Aristotle's natural law theory states that natural law is inherently present in human nature⁸. John Locke on the other hand, says that Natural Law theory includes protection of basic human rights like Right to Life, Liberty, Possessing Property. He asserts that such rights are intrinsic and inalienable in nature. All such rights are acquired by the basic virtue of being a human being. The natural law theory becomes essential to refer to for the current research problem as we deal with adoption laws.

Section 15, as mentioned earlier, states that adoption validly made under the Act cannot be reversed.⁹ But, in cases of children facing hardships in their adoptive households, this section lacks an exception clause. At adoptive households, when children undergo such troubles, their fundamental rights such as Right to Life¹⁰, Choice¹¹, Liberty¹², a fruitful childhood¹³ etc, are infringed upon.

⁶ *S.L. Mohini v. Virendra Kumar*, AIR 1977 SC 1359

⁷ Huntington Cairns, "Plato's Theory of Law", 56 *HARV. L. REV.* 359 (1942).

⁸ Max Salomon Shellens, "Aristotle on Natural Law", 4 *NAT. L.F.* 72 (1959).

⁹ Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), s. 15.

¹⁰ Constitution of India, 1950, art. 21.

¹¹ Constitution of India, 1950, art. 19.

¹² *Supra* note 8

¹³ Law Commission of India, "259th Report On Early Childhood Development And Legal Entitlements" (August, 2015)

The purpose of adoption is welfare of the child such adopted. The principle that has been kept in mind even by the judiciary is the fact that child welfare is of paramount importance. The child's interests have to be upheld as the most vulnerable person in this entire stake is the adopted child. Every adopted parent has certain responsibilities and duties towards the adopted child. There are various aspects as to conform to natural law principles for a child. The child has to be treated with dignity and should be subjected to discrimination as against a biological child, if present in the family.¹⁴

This is also enrooted in Locke's "Two Treatises of Government"¹⁵, supporting natural law. Adopted children shouldn't face such hardships. Another application of the natural law theory is considering what is best for the child. It involves protecting the child's best interests. Natural law focusses a lot on well-being of individuals, both physical and mental.¹⁶ An environment around the child has to be safe and nurturing for his livelihood. Natural law theories also talk about moral responsibilities of the adoptive parents. This comprises the consideration of the adopted child as their own and not act in a way that's detrimental.

The theory also imbibes the concept of families and communities and establishes social constructs that are essential for the child growth.¹⁷ The child must face a flourishing childhood where social ties as well, are given considerable importance.¹⁸ Other rights of the child, in relation to natural law, includes freedom of expression, choice, basic education etc. It is pertinent to note that even if the child's family has been changed, the rights a child has are still the same. It is crucially important for the child for the adoptive parents and the law to recognize and safeguard natural rights of the child. There should be a supportive environment for the child to grow.

The natural rights previously enlisted are often subjected to the possibility of being violated and therefore natural law theory becomes important to consider and then frame a suitable solution. Sometimes, adoptive constructs do not function the way they were previously intended to.¹⁹

¹⁴ James W. Byrne, "The Basis of the Natural Law in Locke's Philosophy", 10 *CATH LAW*. 55 (1964).

¹⁵ Britannica, The Editors of Encyclopaedia. "Two Treatises of Government". Encyclopedia Britannica, 9 Oct. 2023, <https://www.britannica.com/topic/Two-Treatises-of-Government>, Accessed 14 October 2024.

¹⁶ *Ibid*.

¹⁷ Henry Mather, "Natural Law and Liberalism", 52 *S. C. L. REV.* 331 (2001).

¹⁸ Clare Huntington, "Rights Myopia in Child Welfare", 53 *UCLA L. REV.* 637 (2006).

¹⁹ Elsbeth Neil, "Making Sense of Adoption: Integration and differentiation from the perspective of adopted children in middle childhood", 34 *CYSR*. 409 (2012).

Such disruptions are challenging to the adopted child at multiple levels and it affects the basic livelihood of the child and hampers the most important years of growth in a child's life. It also affects the sense of attachment which the child has with its adoptive parents which might further aggravate as well if the adoptive family is from an altogether different background. In cases of friction such as those aforementioned, there exists no remedy in law to correct it.

VI. OPINION OF THE JUDICIARY IN CHILD WELFARE CASES

The opinion of the judiciary in its precedents particularly talks about the custody of the child in various family disputes, and the same is according to the Hindu Guardianship and Wards Act, 1956. However, the set of principles that have been evolved through these cases are important and can be extended to adoption issues as well. These cases ultimately decide upon what's best for the interests of the child and the same is out first while deciding upon matters.²⁰ Various judgments of the High Courts and the Hon'ble Supreme Court have seen to prioritize child rights over rights of other parties in the suit.

The judicial decisions have been seen to differ from what the existing legal framework for adoption states and hence, the researcher feels the need for adoption law as per Hindu Adoption and Maintenance Act to be reconsidered to incorporate revocability as an exception clause. The judgments of these courts differ based on facts and circumstances of each case and they are seen to align with the natural law principles of Plato, Aristotle and Locke.

The courts have moved from strictly interpreting the legislation in place, be it a personal law, to considering what's best for the child. The courts have given judgments for even cases dealing with the Juvenile Justice Act and other personal laws, however for the purposes of this paper, only those cases involving Hindu Law have been reviewed.

Let's assume, a couple has adopted a child, however due to unforeseen instances, the couple is set to get a divorce and the child's custody is at stake. Even if the Court awards the custody to either parent. However, in the long run, the child is only witnessing one parent.

A similar case was of the case of **S.L Mohini v. Virendra Kumar**²¹, where the Hon'ble Supreme Court held that "welfare of the child is of paramount importance." The Hindu Minority and Guardianship Act provides for appointment of a Court appointed guardian; however, this means that the adoption effect is reversed as none of the parents are given the

²⁰ See *Gita Hariharan v. Reserve Bank of India*, AIR 1999 (2) SCC 228

²¹ AIR 1977 SC 1359

custody of the child. However, this was not considered by the Court in this case. However, the child's interest was prioritized and welfare of the child assumed importance of all other aspects.

A similar stance was held by the Apex Court in **Gayatri Bajaj v. Jiten Bhalla**²², which also gave child's rights the prime importance. The Hon'ble Supreme Court had previously also considered the child's happiness and passed a verdict accordingly.²³ In 1984, the Hon'ble Supreme Court had held that welfare of a child should assume supremacy and prevalence over claims of either parents if the child custody is the issue being dealt with.²⁴

One of the importance pronouncements came in the **Gita Hariharan**²⁵ case where the Apex Court took into account the best interests of the child. The challenge in this case was parental rights in accordance with the rights of the child. The Court followed natural law principles and upheld child's rights.

The case of **Gaurav Nagpal v. Sumedha Nagpal**²⁶ placed the rights of the child and his welfare aspect over and above the rights and demands of the parents. This case laid down a couple of significant principles, according to which, both aspects of legality and humanity should be looked upon by courts before coming upon a verdict in cases of child rights in families, and secondly, the child's ethical and moral welfare should be looked upon.

In the same year, the Supreme Court advanced another principle that welfare of the child should, for a matter of fact, be guiding principles of the court to decide upon.²⁷ In almost all cases mentioned, the Courts have gone a step ahead to interpret various conflicts in law and have come up with the child welfare principle. The Courts have been considering the facts and then giving verdicts accordingly. There have been various judgements contributing significantly to the hypothesis of this paper. The Gaurav Nagpal²⁸ case emphasizes on ethical and moral welfare of the child which abets the basic idea of natural law principles being supreme over personal law provisions.

Section 15 of the HAMA should be re-looked from the lens of Gaurav Nagpal case in order to incorporate the facet of revocable adoptions. The Courts while deciding child custody often relied on various doctrines such as doctrine of "Intimate Contact" and "Closest Concern".

²² (2012) 12 SCC 478

²³ *Rosy Jacob v. Jacob A Chakramakkal*, 1973 AIR 2090

²⁴ *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu*, 1984 AIR 1224

²⁵ *Gita Hariharan v. Reserve Bank of India*, AIR 1999 (2) SCC 228

²⁶ AIR 2009 SC 557

²⁷ *Nil Ratan Kundu & Anr vs Abhijit Kundu*, (2008) 9 SCC 413

²⁸ Supra note 24 at 7

However, post the case of **Prateek Gupta v. Shilpi Gupta**²⁹, the Apex Court held that such doctrines were persuasive and not absolute. The child's interest assumed greater protection. All these cases point out the need to incorporate revocability in adoption laws in order to ensure greater protection for the adopted child, in cases of hardships post adoption.

VII. EXISTING LITERATURE SUPPORTING REVOCABLE ADOPTIONS

For the purposes of this paper, various articles have been reviewed that deal with adoption laws in various other domestic legal systems as well. Researchers have claimed that different legal systems regulate the institution of adoption differently. Different foreign laws allow adoption to be revoked.³⁰ Maria Diago in *Revocable Adoptions & Spanish Law*³¹ iterates on the hypothesis that adoptions are revocable or should be revocable in nature. However, the paper talks about this from the view point of adoptive parents and their unilateral wish to revoke the adoption.

Another perspective put forth by the authors in this paper aligns with the hypothesis that adoptions must be revocable if it is indeed in the best interests of the child, only on certain specific occasions. The paper also furthers another suggestion that a final Court judgment can terminate or revoke the adoption as the case maybe, again, for certain specific issues relating to child's welfare.

Various researchers have noted the fact that adoption laws required morphosis to some extent. The need for change on account of procedural disparities that exist, as for instance, inter-country adoptions need to be looked at. Such laws should involve the opinions of the children too and not just the parties involved in such adoption.³²

Further, the consent of adoptive parents should be revocable for the purposes of adoption and this kind of an allowance should be given only if the judiciary backs it by its decision, and as for the child, his interests can never be static.³³ A rigid pattern cannot be followed, even it comes to adoptions being revocable or not and while deciding what's best for the child.³⁴

²⁹ 2017 SCC OnLine SC 1421

³⁰ Maria del Pilar Diago, "Revocable International Adoption and Spanish Law", 6 *SYIL* 79 (1998).

³¹ *ibid.*

³² S Aarthi Anand and Prema Chandra, "Adoptive Laws-Need for Reform", 4 *Economic and Political Weekly*, 3891, (2002).

³³ AN Maluccio, "Natural vs. Adoptive Parents: Divided Children and the Wisdom of Solomon", 57 *IOWA L. REV.* 171 (1971).

³⁴ *ibid.*

Margaret Burt in her research sets forth a claim that child welfare should be of paramount importance and be taken into account considering facts of the case.³⁵ This paper also argues that “if child’s rights are getting affected because of parental causes or phenomenon’s, the adoption needs to be reconsidered along with the rights of the child.” The paper also goes on to portray an instance and critiques rightfully by considering revocability of 2 adoption cases where the mothers of the adopted children had become insane. In cases of conflicts between adoptive parents, including custodial conflicts, children are better off staying away from both the parents.³⁶

This furthers the interests of the child and safeguards any future violation of the rights of the child. The central argument of this paper is directly in line with the hypothesis of the researcher’s paper that “in an adopted household, the child should not be shadowed with ill effects caused as a result of family disputes, custodial matters, conflicts between adopted children and parents etc” which furthers the notion that adoption laws could be reversible and not stern per se. The current provisions of the HAMA are seen to be silent on this.

The paper by Moorehead also suggests State intervention in those situations where there is a parental neglect and abuse on part of the adopted child.³⁷ Welfare of the child is in fact a non-negotiable factor and CARA guidelines stressing on familial environment for the child should also be considered by the law makers while deciding upon laws relating to revocability of adoptions.³⁸ All of the abovementioned literature has one common and noteworthy aim which is to act in the welfare of the child. The literature supports the idea of revocable adoptions in scenarios where the revocability is the best outcome happening to child and where his interests are protected.

VIII. SUGGESTIONS AND CONCLUSION

The authors suggests that adoption laws should be reversible in nature with a strong emphasis on the Hindu Adoption and Maintenance Act, 1956. Since, the Act is a central personal law for Hindus, adoptions under this law are carried out even in the contemporary times. Section 15 may be suggested to be reconsidered by the law makers and be provided with an exception clause stating that where the Court feels that an adopted child is facing certain hardships in the

³⁵ Margaret A. Burt, “Child Welfare Law”, 58 *Syracuse L. REV.* 697 (2008).

³⁶ James Donald Moorehead, “Of Family Values and Child Welfare: What Is in the Best Interests of the Child”, 79 *MARQ. L. REV.* 517 (1996).

³⁷ *ibid.*

³⁸ *Supra* note 30

adopted household that causes an overt infringement of his fundamental rights, and such a dispute is brought in front of the Court, such adoption can be revoked to protect the best interest of the child. Such a legal reform will definitely have its own consequences.

The stakeholders involved in this majorly would be the adopted child and the adoptive parents of such a child. If the best interests of the child are to be kept in mind by the judiciary, a backing from the legislature is required, especially when the current scenario is opposing the same. The child may have to face certain initial issues with adjusting to any new environment, however it will aid him over time. If the long run is visioned, revocability will be aimed at protection of the child's rights at a future date being the best possible outcome of such a familial displacement.

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