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"Should Adoption Be A Part Of Personal Laws*?"* *A Critical Analysis Of Law Of Adoption In The Light Of Shabnam Hashmi V. Union Of India*

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Adoption of a child is an ancient practice and was known to the Greeks. In Greece[1] the earliest adoption laws were provided in a practical way. The rules were simple where an adult of sound mind and childless could only go for adoption. Three different forms of adoption were recognized. Firstly it was adoption inter-vivos, secondly through the testamentary manner and thirdly some relative could adopt the child in the name of the deceased. It is in these three types that adoption was structured. Except the first type where there was a contract between living individuals, the motive of other two type of adoption was to perform certain religious practices.[2] Adoption was resorted to only where there was no natural born child.

Though the institution of adoption was known, it was not used in the roman period and later became unknown and then as a practice developed much later in the modern period. The concept of guardianship in the form of alumni existed. Abandoned children were taken away for slavery. When many children were abandoned in the church, the system got institutionalized and the concept alumni or guardianship got more importance. With this institutional care developed the system of placing the kids back into families. In the modern period that is in the 19th century the system of adoption was brought back. But from the beginning India and China had the system governed by personal laws. The uniform law of domestic adoption in China came in the year 1981. Even initially Common law did not permit adoption. Illegitimate children were looked down by the society. Then church had promoted this institution of adoption.

Adoption is defined as a civil death of a child in the natural born family and the legal birth of the child in the adopted family. Thus it is only a mere transplantation of the child from one family to another family. It is a pious deed by which both a child without a home and parents without a child would find happiness. It may be a blessing for one or for both.

While analyzing the history of adoption law in India, it is quite clear that the ancient Hindu law believed that a son[3] was needed for the performance of religious practices and for continuation of the lineage[4]. Adoption of female child was neither recognized nor prohibited. Therefore people rarely adopted a female child. Women didn't have the freedom to adopt. This shows that the Hindu culture though recognized adoption; it was not free from gender injustice. Religious importance given to this act has lead to the personal law dominance over it.

With Hindu Adoption and Maintenance Act 1956, gender justice was provided and women got the freedom to adopt. It provides for adoption of both a boy and a girl. This Legislation is said to have adopted a secular object of adoption. In Sandhya v. UOI[5], honorable judiciary said that this legislation has a mythological and secular mission. But is it really secular in nature? It is religion specific. Secularity here is only with respect to adoption of child of any gender. Otherwise it is a law for hindus. Instead of personal law dominance there was a need to bring it under general laws so that every person irrespective of religion could have adopted. If proper initiatives would have been taken during the period of codification of laws, adoption would not have been a part of personal laws. Among hindus it became a part of personal laws because of the importance of the customary practice of sonship that existed in families, property and future marriage laws that was based on personal laws.

With the enactment of Hindu law of adoption gender related issues were removed. So a male and a female child could be adopted. Married couples need to adopt with the consent of the spouse. A widower, widow, spinster and a bachelor can adopt a child. Further the law prohibits a person having a naturally born or adopted male or female child from further adopting the child of same gender. Why should this be a prohibition?

[1] Code of Hammurabi
[2] http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf
[3] Sonship: that was recognized in twelve different forms in the ancient period for spiritual reasons. Manu also defines adoption as a substitution of a son.
[4] As already decided by Privy council in Rama Subbaya v. Chenchu Rammayya, 'that the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property is a mere accessory to it.' Similar opinion was given in another judgment of Chandreshekhar Mudaliar v. K. Mudaliar.
[5] AIR 1998, Bom 228.

What if the person has a child born naturally after the adoption? Parental bias attitude will come even then. However there are cases of celebrities like, Sushmita Sen[6] promoting the institution by adopting two daughters. Technically not permitted by hindu law. She initially adopted the second daughter through Guardianship and Wards Act 1890. Then fought for her parental right and was successfully granted by Bombay High court. For common man the rule is otherwise. Different laws for different people. Sandhya v. UOI is a case where this provision of Hindu Adoption and Maintenance Act was challenged to be violative of Art 14 and 21 of the constitution. Honorable judiciary declined the arguments saying the provisions are constitutionally valid.

When the Islamic law is analysed, the religion was not against the concept of adoption. If Sunnah is accepted as a source and Quran is silent on adoption, Prophet had set an example by adopting a slave Zayd as his son. Islam follows practices of charity. It believes in helping the poor, needy and destitute. It has not objected to the practice of adoption but does not favour in giving the name of the parent to the child. Zayd was known as, Zayd-bin- Haritha, as he was Haritha's son. When his natural father called him back he refused to leave Prophet and thus his father disowned him. It was then Prophet gave his name to him. After the holy revelation of Quran, giving one's name to the adopted was not accepted. As these verses explain:

"Nor has He (Allâh) made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But God tells the truth, and He shows the way. Call them by (the names of) their fathers, that is better in the sight of God". (33:5)

After revelation Zayd was known by his earlier name.[7] When adoption law in Islam is analyzed adoption is permitted but name of the adopted father should not be given. It does not expressly prohibit a person from inheriting the property of the adopted father. However father is free to give one third of his property.

Christianity was never against adoption. In India, Christian community believed that there was no adoption till Phillip Alfred Malvin v. V.J. Gonsalves. It was in this case that the canon laws were referred to check if religion permits adoption. The lawmakers should have tried to bring this noble act out of the umbrella of personal laws. For all those who do not have a law of adoption under the personal laws could go in through Guardianship and Wards Act 1890. The problem with the legislation was one could only become guardian and not parent of the child. An effort to bring a uniform law of adoption was made through, "The Adoption of Children Bill, 1972" which was not approved due to religious opposition. Then again, "The Adoption of Children Bill, 1980" was initiated but the act had become unsuccessful. There was religious opposition to it too. This Bill aimed to provide for an enabling law of adoption applicable to all communities except for Islamic religion. The opposition was from the Parsi community, Bombay Zoroastrian Jashan Committee. Thus the common adoption bill failed to materialize.

This noble deed has nothing to do with religion. Since property and the family matters are governed by religion, adoption also falls under personal laws. The law of adoption was strengthened with the CARA guidelines only after India faced major adoption scams followed by the decision in Laxmikant Pandey v. UOI. The law of adoption was liberalized with Juvenile Justice Act, 2000 expanding to incorporate the law of adoption in it.

It is losing its significance due to new wave of surrogacy being followed by society. Society feels more secure in surrogacy as the child belongs to the couple by blood. It is always better to provide and develop the life that is already there in the orphanages and other destitute homes than bringing a new life to this world. Providing a home to the orphan is the best act of humanity. More people in India go for surrogacy as in India it is cheap and there is no law to govern it. Moreover it is free from religion.

There is no uniform law for adoption in India. With the remarkable judgment of Shabnam Hashmi v. UOI, 2014 the solution for the same has been provided. In 2014 Shabnam Hashmi v. UOI laid down the judgment which should have come long back. Nevertheless, right to adopt and be adopted has become a part of fundamental right. Person from any religion can adopt under Juvenile Justice Act 2000[8]. This case was a struggle of the petitioner Ms Shabnam Hashmi from 2005 when she understood that she has only guardianship rights over a young girl adopted by her. She was granted only guardianship rights as Muslim Shariat law did not permit adoption on similar lines as Hindu law. She fought for the right of a human being to adopt and be adopted as fundamental right. This judgment permits all future parents, irrespective of their religious background could go ahead for adoption under the Juvenile Justice Act 2000. This is a secular act for adopting children under the prescribed procedure.

CARA has laid down the procedure for inter-country and intra- country adoption. Why should the noble act of adoption be a part of religion? Why should we have so many legislations governing

[6] http://zeenews.india.com/entertainment/celebrity/sushmita-sen-granted-legal-adoption-of-second-daughter_51424.html

[7] www.al-islam.org/articles/adoption-islam-sayyid-muhammad-rizvi, last visited on 10/7/2015.

[8] The Juvenile Justice Act, 2002 defines adoption in Section 2(aa) where it confers upon the adoptive parents and the child all rights, privileges and responsibilities that are attached to a normal parent child relationship.

an area like adoption? There is Hindu Adoption and Maintenance Act 1956, Juvenile Justice Act, Guardianship and Wards Act and further we use CARA guidelines for facilitating adoption. Instead of having so many laws there should be one common law of adoption. It should not be based on gender or religion. Moreover to avoid adoption scams stringent measures should be a part of the legislation. We have come to a time period where our law makers should be thinking of uniform law of adoption with strict penal provisions in case of human right violations.

In the US most of the states have made their law based on the uniform adoption law. It is not a fundamental right to adopt.[9] Most of the states permit one of the two types of adoption, either open or closed[10]. Some states permit both. The rules laid down are not based on any religion as such but is uniformly made. The adoptive parents can proceed with the process of adoption only if there is permission granted by the court based on the investigatory report.

Will these issues settle with drafting of UCC? Uniform civil code in India is difficult to be put into practice but through adoption a step towards it can be initiated. It all started with religion as seen in the ancient greek period or hindu culture. But now with the changing circumstances it is always better to associate it with welfare mechanism of the state and release it from religious shackles. Judiciary has taken brilliant steps towards attainment of the goal in above mentioned judgments like Shabnam Hasmi and Philip Alfred Malvin. Instead of encouraging surrogacy as a practice, state should motivate adoption by bringing a uniform law of adoption and help the children in need of a home. Judiciary supports the system and the existing laws are there, the need is to structure it and apply uniformly. As Judiciary has done its duty and now legislature needs to proceed ahead by providing an, "UNIFORM LAW OF ADOPTION" as it is the need of the hour.

[9] Lindley v. Sullivan, 889 F.2d 124 , https://www.law.cornell.edu/wex/adoption

[10] An open adoption permits the birth mother to select her child's adoptive parents. A closed adoption, meanwhile, results in the birth mother relinquishing all rights over the child and allows a state administrative agency to conduct the selection process. Some jurisdictions also permit the parents in an open adoption to maintain their visitation and contact rights.