Divided Dharma and Adoption Laws in India

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In India, the law of adoption is governed by the Hindu Adoptions and Maintenance Act, 1956 (HAMA). This act regulates the adoption of Hindus, Buddhists, Jains, and Sikhs. This article will also discuss the process of adoption, which includes the qualifications and requirements of both adopter and adoptee. The analysis will include how modern-day Indian adoption statutes, in particular, the HAMA, do not reflect the practices and guidelines traditionally held in Hinduism, Buddhism, Jainism, and Sikhism. Furthermore, as evidenced by court cases, these religious and contemporary laws fail to reflect actual desires of the Indian people.

Introduction

The birth and upbringing of Kabir, the beloved 15th century Indian poet and saint, has long remained a mystery. Revered by Hindus, Muslims, and Sikhs, it is rumoured that he was born to an unwed Brahman woman who abandoned him at birth. Found by a lake in Varanasi, he was adopted and raised by Muslim weavers.1

Had Kabir been born and raised in modern-day India, his adoption by Muslim parents would have been illegal. The law of adoptions in India, governed by the Hindu Adoptions and Maintenance Act 1956, hereafter referred to as HAMA, forbids such interreligious adoptions. This act regulates the adoption of Hindus, Buddhists, Jains, and Sikhs. For the purposes of this paper, I refer to adoption specifically in terms of its feasibility, which includes the qualifications and requirements of both adopter and adoptee.

This paper will explore how modern-day Indian adoption law, particularly the HAMA, do not reflect the practices and guidelines traditionally held in Hinduism, Buddhism, Jainism, and Sikhism. As evidenced by court cases, these religious and contemporary laws fail to reflect the realities of the Indian people and their desires. Islamic adoption has been excluded from this research as it is conceptually recognized to be limited guardianship and is not covered under the HAMA.

Hindu Religious Law and Adoptions

Hindu law is significantly unstructured, pulling its authority from a variety of sources with varying degrees of influence contingent upon the region and time period. The lack of formalities in the recognition of Hindu law, even prior to the British attempt to codify it under colonial rule,

transformed the law to what we consider to be Hindu law today. Political scientist Fukuyama addresses this transformation well, maintaining that,

In their application of “Hindu” law, the British misunderstood the role of law in Indian society. They believed that the Dharmasastra was the equivalent of European ecclesiastical law, that is, religious as opposed to secular law that was codified in written texts and uniformly applicable to all Hindus… At that point, traditional Hindu law was a living tradition collapsed.²

While there is guidance from the ancient texts of the Vedas and the Manu, priests, and other sources of written and customary law, reconciling the primacy of any one source of another is a difficult task. The principle of lawfulness in Hinduism itself, dharma, has evolved continuously over the centuries, even prior to the formal codification of Hindu law. According to Fitzgerald:

Dharma includes all aspects of proper individual and social behaviour as demanded by one’s role in society and in keeping with one’s social identity according to age, gender, caste, marital status, and order of life. The term dharma may be translated as “Law” if we do not limit ourselves to its narrow modern definition as civil and criminal statutes, but take it to include all the rules of behaviour, including moral and religious behaviour, that a community recognizes as binding on its members.³

In accepting this definition of dharma, or Hindu jurisprudence, the emphasis is on the role of caste and community in Hindu law. In many cases, panchayat, a traditional community-centric political system popular in the region, determined the customary outcome of social issues within their village councils.⁴

I. Defining Adoption in Hindu Religious Law

As reflected in the Yajur Veda, through one of the srutis, or commonly attributed as ‘that which was heard’,⁵ adoption can be justified through Hindu mythology, when the God Atri bestowed his son to the sonless Aurva:

Atri gave his son to Aurva who longed for a son (was sonless)… Atri performing the Yaga of giving his son to Aurva who was sonless became a precedent and a Vedic authority for Dattaka.⁶

This act between deities outlined principles for the Dattaka system of adoption; notably, this only

⁵ ibid.
Outlined adoption guidelines for sons, in which five out of twelve different types could be adopted. Certain types had to be adopted as lower caste and it was strongly preferred that the adopted son be already related by blood, however distantly.

Adoption served a purpose other than continuing lineage and the wellbeing of the family and estate. In the Hindu rituals of a funeral, the son is expected to light the pyre for his father’s cremation and to ‘offer Pinda and Udaka to the father and his ancestors when they had departed for the other world, and by these Sraddha offerings at regular intervals to sustain them in the spirit-world’.

Furthermore, the strictness in the application of the Dattaka system evolved throughout the centuries. As a case in point, during the Kali period, or the present period (after 700 BC), only the aurasa (natural-born) and dattaka (given) sons are accepted. This essentially undermines the twelve different types of adoption and the caste distinctions, overruling Smriti or textual sources as guidance. Many historians attribute this change to the rise of Buddhism, which sought to eradicate the caste system and apply equality. This relaxation of rules demonstrates the continuous and evolving interpretation of Hindu law based on the changing desires and values of society.

II. Buddhism, Jainism, and Sikhism

Without delving into the nuances of Buddhist, Jain and Sikh legal jurisprudence, it is certain that all three religions lack recognised personal laws. Much of this relates to the colonisation of India and the British lack of interest in understanding and defining religious laws other than that of Hinduism and Islam. As such, Buddhists, Jains, and Sikhs, were generally subjected to Hindu laws. Sezgin states that: ‘it must also be remembered that during the colonial period, the laws of Sikhs, Jains and Buddhists were usually applied as part of custom in accordance with the rulings of Privy Council in London’.

The argument that Buddhism, Jainism, and Sikhism can be categorised as ‘Hindu’ relies on the assumption that they are simple offshoots of Hinduism, as though they are merely different sects of Hinduism. While the three religions have roots in the subcontinent, they are fundamentally different from Hinduism and one another. The majority of worshippers within these communities would identify themselves as belonging to a religion unique to Hinduism. The British did eventually identify Sikhism as a separate religion from Hinduism, and subsequently made changes to the law through the Privy Council’s creation of the Anand Marriage Act (1909) and the Punjab Laws Act (1972), which identified customary laws for Punjabis, particularly Sikhs.

Each of these religions lacks emphasis on formalities, notably in the absence of a contrasting dharma, legal system, or codification of laws. For example, traditional Sikhism has no concept of personal laws or, more fundamentally, legal jurisprudence. In recent times, particularly amidst Hindu-Sikh tensions, the Sikh community has struggled to unify and agree on personal laws that might potentially be applied to them. According to Sirdar Kapur Singh, a renowned Sikh scholar and philosopher, ‘Sikhism has no corpus of civil law of divine origin’, implying that there is no

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7 ibid 244.
8 ibid 99.
10 ibid.
divine origin in terms of Sikh personal laws. Such a position makes the task of developing contemporary personal laws for the Sikh community even more difficult and more controversial to justify.

Jainism, in contrast to Sikhism, bears some similarity to Hinduism in the sense that it has a variety of sources that ultimately influence its own dharma, or legal principles:

Together, the śrāvakācāras and the nītiśāstras form the Jain equivalent of the Hindu dharmaśāstras. But their focus is more on ethics and ritual than on statecraft and personal law, which are traditionally kept outside the religious law and left to local custom, desācāra.

In the colonial era, the British only recognised the Jains as a separate religion in the mid-19th century, at which time they attempted to codify Jain law in a similar fashion to Hindu law. While Jainism does not have such express legal concepts and notions as those which exist in Hinduism, it is essential to note that there are some concepts around personal laws in which “Jain texts also contain many original conceptions, especially on the rights of widows to inherit and to adopt a son, coloured throughout by the Jain value of non-violence”. In fact, adoption is not viewed through as spiritual a lens in Jainism as it is in Hinduism, particularly when it comes to funeral rites.

Note that while each of these religious communities have been granted Indian national minority status and have been officially recognised as separate religions, they are still subjected to modern laws, loosely based on Hindu dharma, including HAMA.

The Hindu Adoption and Maintenance Act

While it is helpful to classify adoption laws in India as within Tamanaha’s tenets of a religious normative system, this is also difficult as the majority of the Indian legal context is still structured under the common law system. While aspects of Hindu religious law do exist in the current Indian legal system, much of it is through codification or applied customarily at a local level. This mixed legal system, as Palmer describes, “is one in which two or more legal traditions, or parts thereof, are operating simultaneously within a single system”. Furthermore, Merry states that legal pluralism creates a multitude of highly complex legal problems, including “the need to decide when a subgroup’s law applies to a particular transaction or conflict...particularly family law”. As such, the predominantly common law legal system in India does not reflect societal values, which includes the 78th Act passed by India’s Parliament, the Hindu Adoption and Maintenance Act of 1956.

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13 ibid 11.
I. HAMA Rules and Intentions

In 1956, eleven years after India’s Independence, HAMA was passed by the Indian parliament, overriding then any “text, rule or interpretation of Hindu law or any custom or usage” as well as “any other law in force” previous to the commencement of this act. The purpose of this act is not merely to rewrite old customs and usages regarding adoptions, but also to instil uniformity of the law among Hindus.

The Act overrides old customs, sources, and practices traditionally utilised within Hinduism. The most obvious of these is that girls may be legally adopted under HAMA, a reality that was not acceptable under the ancient Dattaka system of adoption. The Act also requires the child, or the adoptee, to be considered a ‘Hindu’ by definition, but does not require the child to be of a similar caste or a blood relative as referred to in ancient systems. However, the idea of *sui juris*, both a Western and Hindu concept, is still preserved within HAMA, which states that the adopter must be of sound mind or mental competence as necessitated within the Yajur Veda and the Dattaka systems.

Perhaps the most notable preserved custom under HAMA is that married women cannot directly adopt a child, which can be done only with the consent of her husband. This is similar to the Dattaka system, which does not generally allow a woman to adopt, especially if her husband is deceased. The estate, lineage, and funeral rites would have already been, respectively, redistributed, ended, and conducted by an alternative. However, under HAMA in 1956, an unwed, divorced, or widowed woman may adopt – a very modern, westernised approach that is especially advanced for the India of the 1950s.

II. Non-Hindus as ‘Hindus’

As previously mentioned, the term ‘Hindu’ in this act refers to ‘any person who is a Hindu by religion’, ‘any person who is a Buddhist, Jaina or Sikh by religion’, and ‘to any person who is not a Muslim, Christian, Parsi or Jew by religion’. The act later explains that,

[The term] ‘Hindu’ shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

There are three significant issues with defining Hindu in this manner. Firstly, it implies that Muslims, Christians, Parsis, and Jews already have adoption laws established and therefore are able to make use of and abide by them. Secondly, by establishing that anyone who is not a Muslim, Christian, Parsi, or Jew by religion is bound by this Act would imply that Buddhist, Jains, and Sikhs, who are not Hindus by religion, are already bound by this Act. The inclusion of Buddhist, Jains, and Sikhs in such a catch-all definition of ‘Hindu’ caused significant confusion and communal strife, despite later disclaimers that the term ‘Hindu’ may not include Hindus by religion. Finally, it appears as though the Act acknowledges that there are religious differences.

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17 The Hindu Adoption and Maintenance Act 1956.
18 *ibid.*
19 *ibid.*
but refuses to treat Buddhists, Jains, and Sikhs as separate legal communities. As discussed, Buddhists, Jains, and Sikhs take their own approach to personal laws; however, having different laws for different communities within one nation creates inequalities and competing tiers of standing citizenship and rights. This is a reflection of Buddhists, Jains, and Sikhs standing as a minority in India, but not necessarily as they wish to see themselves.

III. Court Cases and Trends under HAMA

In a report by the National Judicial Academy, it was found that there was a high degree of flexibility when it came to judicial interpretation of HAMA. For example, in the case of *Mst Deu v. Laxmi Narayan*, an adult woman who was adopted as a child had to surrender her inheritance and investments she was awarded through her mother’s will as the courts rule her adoption had been invalid, despite the correct paperwork and procedures. They found that her separated mother did not gain the consent of her husband prior to the adoption. As of 2010, the HAMA was amended with respect to such inequality, and now treats men and women equally in the adoption process. A woman no longer needs permission or consent from her husband to adopt a child, as they both have equal rights in the process. That is, both husband and wife must consent to the adoption, and it is no longer the burden of the wife to attain the consent of her husband.

More recently, the courts have begun to prioritise the interest of the child and the state in their rulings of legal adoptions. For example, in the HAMA 1956, it is stated that an adopter cannot adopt a child of the same sex if they already have a child of that sex within their household. Recent cases have seen the law develop in this regard, as in the case of *Darshana Gupta v None and Ors*, which held that the plaintiff could adopt a second daughter supported by judicial reasoning that the HAMA was constructed for a different social scenario and time, in which the Acts were ultimately intended ‘harmoniously to ensure rehabilitation and social reintegration of orphaned, abandoned and surrendered children’.

While the HAMA and the Indian legal system regarding personal laws seek to reform society’s adoption practices and customs, it ultimately fails. As an example, the high incidence of foeticide, especially of female infants, is still commonplace in India despite the relative legal ease of adoption. The legal feasibility of being able to give up a daughter for adoption or receive a daughter through adoption, has not reframed Indian society’s views of female infants. As demonstrated by the statistics from the Central Adoption Resource Agency (CARA), legal adoptions of Indian orphans, both in-country and inter-country, have plummeted by fifty percent in the last five years. This attests to the fact that legal adoptions are not currently a popular trend.

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25 *ibid*.
or priority in Indian society.

**Conclusion**

The codification and interference by British colonisers misplaced much of the body of traditional religious law for Hindus, Buddhists, Jains, and Sikhs. This interruption or disillusionment has prevented the vast majority of these worshippers from living by their religious laws. As such, their values are also not aligned with their respective religious laws, nor with such modern ones such as the HAMA. The wide gap created by traditional religious laws, the British interpretation and attempted codification of these laws, the ‘progressive’ nature of modern laws, and the desires of the people have resulted in a further divergence, as demonstrated by the diminishing number of legal adoptions. While HAMA may periodically project the remnants of traditional Hindu religious law, especially the Dattaka system, it is ultimately more aligned with Western principles that also do not reflect contemporary social values in India.

More recently, the introduction of the Juvenile Justice (Care and Protection of Children) Act 2015 may lead to a more secular and smoother approach to adoption for inter-country adoptions.\(^{28}\) Section 35 of the Act emphasises the need to ‘declare the child legally free for adoption’ after institutional inquiries and procedures have been followed. Furthermore, the Act incorporates the Hague Convention regarding adoption as well as fundamental principles for the care and protection of children.\(^{29}\) It also states in s 56(3) that the Act does not apply to the adoption of children under HAMA. In essence, this may create adopted children of two worlds—one that is bound by outdated colonial and religious rules, and the other that is secular in nature, adhering to international guidelines.

\(^{28}\) Juvenile Justice (Care and Protection of Children) Act 2015.  
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