
PROVISIONS GOVERNING ADOPTION UNDER JUVENILE JUSTICE ACT, 2015: A CRITICAL ANALYSIS

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ABSTRACT

Adoption under the Juvenile Justice Act, 2015 is applicable to people of all religions in India. It is a means to protect the rights of a child, secure their basic needs and welfare and also help them rehabilitate. The Juvenile Justice Act 2015 aims to provide institutional care to the children in need of care and protection and adoption is one of the best means of such institutional and foster care. Chapter VIII of the Act deals with matters related to adoption and the provisions are beautifully designed to meet the best interest of a child. However, the article critically examines some of the provisions related to adoption and how they suffer from shortcomings. It is addressed that there cannot be any fallacy with respect to adoption of a child and therefore, the need to address and amend these shortcomings are important. Adoption under the Juvenile Justice System is studied at par with the other legislative frameworks governing adoption and some irreconcilable differences are found. Additionally, some of the very crucial provisions like inquiry, eligibility, procedure and passing of orders are analysed critically to understand the spirit behind framing such provisions and whether they can be interpreted harmoniously for effective implementation at ground levels. It is important to give weightage to the process of adoption and expedite it, but it should not result in continuous challenges to the validity of adoption due to differences with other legislations or hypothetical time periods as it would undermine the very spirit of the Act. It is also noteworthy that while deciding the applications of adoption and passing orders, the best interest principle should govern and the agencies and personnel dealing with such matters must have the required skill and expertise.

Key Words: Adoption, Juvenile Justice, best interest, care and protection, analysis, implementation.

Introduction

Adoption under the juvenile justice system is a means to protect the rights of a child (whether delinquent or neglected or abandoned) and secure their basic needs and welfare by letting them have a family to care and provide for them. From a moral perspective, it can be said that adoption is a tool that meets the need of a child to have a stable, loving family and on the other gives the joy of parenthood to the adoptive parents. Children if neglected can suffer from several emotional, physical and mental incapacities. They need the care of a family for their own wholesome development. In addition, no child should be put in a situation where he or she has to earn their own living in order to meet their basic needs of food and shelter. A family ensures that the child is looked after, their finances are managed, their education is paid for, amongst many other things

In general, adoptions are governed by the Hindu Adoption and Maintenance Act of 1956. However, this legislation is applicable only to Hindu parents and Hindu children who are to be adopted. The Act does not apply to Muslims, Christians and Parsis. The recourse available to them is the Guardians and Wards Act of 1890 which allows them to become guardians of such wards but up to the age of twenty-one. This clearly indicates that there is no provision of complete adoption for other religions under the Guardians and Wards Act. The Juvenile Justice Act, 2015 (hereinafter referred to as JJA, 2015) elaborately deals with 'adoption' under Chapter VIII of the Act. The Act aims to provide institutional care to the children in need of care and protection and adoption is one of the best means of such institutional and foster care. This article would analyse the key provisions pertaining to adoption under the Act and discuss its shortcomings. The article will also throw substantial light on the amendment brought in 2021 to the provisions governing adoption and whether it will strengthen the law on adoption or weaken it further.

Adoption under the Juvenile Justice Act, 2015

Adoption under the JJ Act, 2015 means the process through which the child is completely separated from his biological parents and becomes the lawful child of his adoptive parents, thereby securing all the rights, privileges and responsibilities attached to a biological child of the adoptive parents.¹ It is to be noticed that the predecessor Act used the term '*legitimate child*' and the same has been replaced as '*lawful child*' by the 2015 Act. This can definitely be

¹ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 2(2)

applauded as it goes on to reduce the stigma of words like ‘legitimacy’ and ‘illegitimacy’ attached to a child. The definition however can be criticized at the point where it uses the phrase ‘*biological child.*’ This is said because in an era when surrogacy is prevalent, the child might not be genetically or biologically related to his or her parents. It is unclear how those children would be included in such a definition and whether their rights would suffer due to such a fallacy. The lawmakers need to make necessary amendments to the definition keeping such scenarios in mind as well.

As the Act defines a child to be anyone who has not completed the age of eighteen years, it is clear that anyone below the age of eighteen years can be adopted as per the provisions of Chapter VIII of the JJ Act.

Clash with the Hindu Adoption and Maintenance Act (HAMA)

Section 56 of the Act states that nothing in the Act will apply to the adoption of children under HAMA. On one hand where, JJA governs all religions and communities, HAMA on the other hand only applies to Hindus. This means that a Hindu can choose to go for adoption under either of the legislations. However, there exist some irreconcilable differences between the two Acts that make it difficult for both the Acts to exist simultaneously when Hindus are involved in the process of adoption.

- The biggest clash arises on the issue of ‘age.’ The JJA allows any child below the age of eighteen years eligible for adoption. However, the age limit for adoption under HAMA is fifteen years. This would mean that an adoption of a Hindu child aged sixteen years by Hindu parents would be valid under JJA but the same would be invalid under HAMA.
- The JJA does not bar any parents having natural children of the same sex from adopting under the Act. The HAMA, however does bar such an adoption. This means that if they intend to adopt a child having the same sex as that of their natural child, it would be prohibited under HAMA.
- Section 56 of the JJA provides that children of one relative can be adopted by another relative irrespective of the religion. However, an exception to this rule would be the adoptions made under HAMA.² This provision brings some very obvious questions to one’s mind. It is quite ambiguous if there is a case of adoption of a child above the age

² The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 56

of fifteen years but below the age of eighteen years to be given in adoption to a relative under JJA.

All of such ambiguities can lead to challenging the validity of such adoptions. In such scenarios, it is submitted that the courts while deciding the validity of adoptions must adhere to the principle of best interest and imbued under JJA which is a more wholesome piece of legislation when it comes to determining the best interest of a child.³

Process of giving in adoption under the JJA, 2015

It is pertinent to note that the provisions governing adoption will only come into play once a child who is abandoned (deserted by biological or adoptive parents)⁴, orphan (without a biological or adoptive parents or a legal guardian)⁵ or surrendered (relinquished by the parent due to physical, social and emotional factors beyond their control)⁶ is declared *legally free for adoption* under the Act. This is done by the committee after making due inquiry under section 38 of the Act. Only such children are declared legally free for adoption:

- The parents of an orphaned or abandoned child cannot be traced in spite of all efforts and there is no one to take care of such a child.⁷
- If the institution caring for a surrendered child applies to the committee of declaring the child legally free for adoption.⁸
- Child of mentally retarded parents or an unwanted child of a sexual assault victim.⁹

Section 38 also provides for the period within which a child is declared free for adoption. The period is two months if the child is below the age of two years and four months if the child is above the age of two years. The basis for providing such different time periods seem without any reason. On the contrary, it is better seen that infants or younger children have more and quicker chances of getting adopted than comparatively older children. In such scenario, it is important to bring older children into the system of adoption as quickly as possible and increasing their chances of a faster adoption. Therefore, the time period for declaring a child legally free for adoption should be the same in all scenarios. At the same time, it is also alleged

³ VED KUMARI, THE JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT 2015 CRITICAL ANALYSIS 55 (Lexis Nexis 7th ed. 2021).

⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 2(1)

⁵ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 2(42)

⁶ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. Sec. 2(60)

⁷ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 38(1)

⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 38(2)

⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 38(3)

that the time period of two months for doing a detailed inquiry and put in efforts to trace the parents or guardians might come across as insufficient. A lacuna of this would be that if there is no trace of parents within these two months and a child is given in adoption, there might be a possibility that the biological parents on hunt for their lost child may lose them forever.

Second proviso to section 38 states that no criminal action under the Indian Penal Code can be taken against those biological parents who have abandoned or surrendered a child. Although the spirit of having such a provision is that biological parents should not be reluctant while approaching the institutions under JJA if they wish to abandon the child, however it cannot be ignored that this goes against the right of a child to be known and cared for by his or her parents guaranteed by Article 7 of the Child Rights Convention.¹⁰ A collision in this regard arises with the Indian Penal Code that provides punishment to any parent or guardian who abandon their child of below twelve years of age.

In light of the above shortcomings, it is articulately placed that as it is important to give weightage to the process of adoption and expedite it, it should not result in continuous challenges to the validity of adoption due to differences with other legislations or hypothetical time periods as it would undermine the very spirit of the Act.

Eligibility of Adoptive Parents

Section 57 of JJA, 2015 lays down the eligibility criteria for the prospective adoptive parents:

- They shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child.¹¹

This provision can be criticised for using somewhat ambiguous phrases. There can be circumstances when a prospective adoptive parent is mentally and physically fit and highly motivated but financially not as sound. Would it mean that they would not be allowed to adopt under the Act? There can be several child support and other organisations to meet their child's basic needs. Again, what would be the degree of mentally alert and how does the committee decide whether a prospective parent is mentally alert. It is understandable to have 'mentally sound' as a criterion but mentally alert comes across a little vague. Similarly, 'highly motivated' is something that cannot be decided for anybody. To have such criteria for eligibility not only makes the

¹⁰ VED KUMARI, THE JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT 2015 CRITICAL ANALYSIS 124 (Lexis Nexis 7th ed. 2021).

¹¹ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 57(1)

provision a little ambiguous but also gives a lot of discretionary power to the authority to reject the applications of prospective adoptive parents without any substantial reason.

Other conditions for eligibility of prospective parents are:

- Consent of both spouses, if a couple looks to adopt under the Act.¹² These are the Central Adoption Resource Authority (CARA) regulations, 2015.
- Single or divorced person can adopt as per the regulations framed for adoption by the authority.¹³

This provision has failed to mention ‘widow’ or ‘widower’ but it should be perceived that this category is included in the bracket of ‘single’ people under the provision. The Act also appears to be silent on couples in live-in relationships and it is unclear whether they will come under the bracket of ‘single’ or ‘couple’.

- Single male is prohibited from adopting a girl child.¹⁴

There appears to be no reason of such discrimination of the ground of sex. While single men are barred from adopting a girl child, there is no such prevention for a single woman to adopt a male child. It has also been subtly ignored that even boys can face sexual exploitation in today’s times and therefore, if it is aimed to protect girl children from any such exploitation, why should there be no such protection for boys?

It is submitted that it should instead be checked that there is no possibility of a potential abuse of any child at the hand of their adoptive parents in any circumstances.

- The CARA guidelines also mention that there should be minimum twenty-five years of age gap between the adoptive parent and the adopted child.
- The guidelines make it clear that a person above the age of fifty years cannot adopt under the JJ Act.

In light of the above submissions, it is clear that there is a need to carefully examine the provisions and regulations with respect to the eligibility criteria in terms of how they can be implemented in reality. In no circumstances, should any criteria be a hindrance to getting a child his or her homely abode.

Analysis of the procedure for adoption

¹² The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 57(2)

¹³ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 57(3)

¹⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 57(4)

The Act provides for three kinds of adoptions: (a) In-country adoption by Indian parents living in India, (b) Inter-country adoption, and (c) Inter-country adoption by relatives.

All these adoptions are made by an order of the court under section 61 of the Act and the court will issue such order only if it finds that the adoption is for the child's welfare, the child is happy to go for such an adoption, and that there is no involvement of any money or consideration paid for such adoption.¹⁵ However, it is heavily criticised that there is no penalty mentioned in the section if any such violation is made. Finally, all the formalities of adoption are mandated to be completed within four months.¹⁶

This segment will specifically deal with some of the provisions related to inter-country adoption. The Act emphasises that in order to secure the best interest of the child, he should be given in adoption in the same social and cultural environment as his. However, if the child fails to go for in-country adoption, the agencies can declare him free for inter-country adoption. Section 59 of the Act deals with inter-country adoption. One of the major provisions that catches the eye is the Proviso to Section 59(1) which states that children with mental and physical disability, siblings and children above the age of five years should be preferred to be given in in-country adoption. The need for such a proviso arose as the data clearly enumerates how Indian parents mostly want to go for a healthy infant, more preferably a male and the rest mostly are not found eligible for an in-country adoption.

Section 59(2) also mentions that NRIs and Overseas Indian citizens should be given a priority over foreigners for an inter-country adoption. However, the hierarchy amongst an NRI, person of Indian origin, and overseas citizen of India is not laid out in the section.

Section 60 of the Act talks about inter-country adoption by a relative living abroad from their relative living in India. An ambiguity arises if it happens to be a Hindu family, whether such an adoption will be governed by the JJ Act or the HAMA. A special obligation put under this section is to facilitate contact of the adoptive child with their siblings or parents from time to time. There is no clear reason for putting such an obligation here as similar obligation has not been mandated for other adoptions under the Act. As the adoptive parents become the real

¹⁵ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 61

¹⁶ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016. sec. 62

guardian of the child, they should be free to decide whether and with whom they want the child to meet or establish contact and such mandate only interferes with their right as a parent.¹⁷

Amendment brought in 2021

The amendment brought to the JJA in 2021 gave substantial amount of power to the District Magistrate to deal with adoption matters. Earlier, the power to pass orders related to adoption remained with the civil court. However, there were significant delay in disposing of matters related to adoption. And therefore, the parliament deemed it fit to give the powers in this regard to the District Magistrate. Now, as the article demonstrates matters related to adoption requires a lot of judicious inquiry and application of mind at several stages. The provisions are also framed in such a way where the authority needs to check the fulfillment of eligibilities and criteria given, ensure the principle of best interest and other applicable regulations and guidelines.¹⁸ The question is whether a District Magistrate has the expertise to deal with child related matters as precisely and technically as a special body or agency would have done. Another issue is that District Magistrates often have time crunches and several tasks at hand and might not be able to apply mind as judiciously as an adjudicatory body.

In addition, India is a signatory to the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption, 1993 which clearly enumerates that a person dealing with matters of inter-country adoption must be qualified by ethical standard, training, experience and must have the integrity, professional competent, integrity and accountability required for such matters.¹⁹ The Beijing Rules, 1985 also iterate that for dealing with the issues related to juvenile, the personnel do not only need to be professionally educated but also have periodical training, refreshment and orientation courses.²⁰ It is highly debatable that a District Magistrate already burdened with a plethora of tasks has the expertise and time to deal with adoption matters efficiently, and whether they would be in the position to go through regular training and education for the same.

¹⁷ VED KUMARI, THE JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT 2015 CRITICAL ANALYSIS 141 (Lexis Nexis 7th ed. 2021).

¹⁸ Maharukh Adenwalla, *Amendments to JJ Act irrational, harm children's interests: A lawyer writes*, THE NEWS MINUTE (July, 26, 11 AM), <https://www.thenewsminute.com/article/amendments-jj-act-irrational-harm-children-s-interests-lawyer-writes-153239>

¹⁹ Aayushi Swaroop, *Adoption' Under The Juvenile Justice Amendment Bill, 2021 - An Analysis*, MANUPATRA (July, 24, 1 PM), <https://articles.manupatra.com/article-details/Adoption-under-the-Juvenile-Justice-Amendment-Bill-2021-An-Analysis>

²⁰ *ibid.*

Conclusion

Adoption under the Juvenile Justice Act, 2015 is applicable to people of all religions and community. It does not only take 'child in need of care and protection' into consideration for adoption but also recognizes that 'child in conflict with law' should also avail the benefits of adoption provisions under the Act. The provisions are a huge blessing for religions other than Hinduism who could not go for formal adoption before the enactment of the JJA. However, it also cannot be denied that the provisions suffer from certain shortcomings and lacunae and they go on to interfere with the implementation of the Act at ground levels.

The most evident clash comes with the Hindu Adoption and Maintenance Act, certain provisions of which clash with the JJA. It is analysed that in such cases, weightage should be given to the JJA due to its wider application. The process of inquiry under section 38 is also studied and few discrepancies with respect to the time durations have been pointed out. Further, substantial attention is drawn towards some ambiguities in the provisions related to eligibility of adoptive parents and a need for clarification very much exists. The procedure for adoption, especially inter-country adoption also has some grey areas which might interfere with the implementation of the Act. It is important to address them accordingly. Finally, the amendment that has given the power to pass adoption orders to the District Magistrate suffers from some fallacies and ground reality checks. It is submitted that the implementation of the same would not be an easy task. It must also be noted that while the legislative framework gives supervisory powers to several agencies under the Act, the rules for implementing them are contained in the Regulations. The Regulations need to complement the legislative framework for effective implementation. At last, adoption under JJA is a great measure for care, protection and rehabilitation of children and therefore must be implemented effectively.