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## A Study of Child Adoption Process Laws in India

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### Abstract

The reason why the concept of adoption was brought was to give the right to a family for the orphan, abandoned and surrendered (OAS) children. The objective behind bringing this concept was to secure the performance of one's funeral rights and to preserve the continuation of one's lineage. To restore the family life to a child deprived of his or her biological family, the concept of adoption was considered the best means. In the course of transit from the primitive to the modern age, the concept of adoption has undergone a radical change. Adoption, being mostly like other social institutions, is essentially a product of historical and evolutionary processes. Reforms related to the old Hindu law were seen, and one of them was in the guise of a codified law on adoptions, called the Hindu Adoptions and Maintenance Act, 1956. Section 2 of HAMA allows any person who comes within the definition of 'Hindu' to be eligible to adopt a child for adoption. Various progressive changes were brought by this new codified law, like adoption by female Hindu, the girl child being eligible for adoption, etc. Many international conventions on Human Rights expressly mention the positive duty in order to provide protection and assistance to children, like the Convention on the Rights of the Child, 1989 (CRC), which is a reservoir of various rights that are concerned with children. The concept of adoption does not apply to other communities like Muslims, Parsis and Christians. For that, they resort to the Guardians and Wards Act, 1890. Such a process makes him or her their child, not an adopted child. Under this, a child who turns 21 years old is no longer a ward and assumes individual identities. When it comes to the orphan, abandoned and surrendered children, these aforesaid enactments remain silent. For the adoption of these categories, there was as such no codified legislation, but the CARA and the legislature also framed the law. In order to consider all these categories, a laudable attempt was made by the Juvenile Justice (Care and Protection of Children) Act, 2000. The reason why such an attempt is commendable is that such an enactment allowed secular adoption of the child irrespective of his or her religious community. This enactment has given the right to all citizens to adopt and to all children to be adopted. As per the Supreme Court's directions, the Central Adoption Resource Authority (CARA), which is the current apex controlling body in matters relating to the matters of legal adoption, was established based on the judgment in *Lakshmi Kant Pandey v. Union of India*, where, under section 41(3) of the JJ Act, CARA has framed a set of guidelines. We also discuss the process of OAS adoption and define the power related to the District Magistrate and any other authority.

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**KEYWORDS:** Convention on the Rights of the Child, 1989, Guardians and Wards Act, 1890, Care and Protection of Children

## 1. WHAT IS ADOPTION

The permanent legal transfer of all parental rights from one person to another person or couple is called Adoption. There is no difference between the rights of adoptive parents and the Natural parents, and adopted children have all of the social, legal, emotional and kinship benefits of Natural children.

### 1.1 CAPACITY OF THE INDIAN MALE AND FEMALE RELATING TO ADOPTION

As already discussed, two legislations deal with the adoption of a child.

These legislations are:

1. The Hindu Adoption and Maintenance Act, 1956 and (HAMA).
2. The Juvenile Justice (Care and Protection of Children) Act, 2000.

The capacity of Hindu males and females to adopt a child is discussed under sections 7 and 8 of the HAMA, respectively.

### 2. ADOPTION IN INDIA UNDER HAMA<sup>[1]</sup>

The practice and custom of adoption in India dates back to ancient times. Though the objective with which the act is carried has differed, the act of adoption remains the same. Predominantly, adoption was considered a sacramental act. There has been an acute controversy not only among the writers but also among the judges, whether adoption has a secular motive that predominates or a religious motive that predominates.

Under the old Hindu Law, there were many rules relating to adoption which could be supported only on the basis that adoption was a sacramental act. In the presence of the submission of the Hindu Adoption & Maintenance Act, 1956, it has started clearly from all the religious and sacramental aspects of adoption and has made adoption a secular institution. All adoptions after 1956 are secular and valid, and for the validity must confirm the requirements of the act.

Moreover, adoption is not permitted in the personal laws of Muslim, Christians, Parsis and Jews in India. Perhaps, they usually opt for guardianship of a child through the Guardianship and Wards Act, 1890.

Citizens of India who are Hindus, Jains, Sikhs, or Buddhists are allowed to formally adopt a child. The Hindu Adoption and Maintenance Act of 1956 was enacted in India as a part of the Hindu Code Bills. It resulted in bringing a few reforms that liberalised the institution of adoption.

#### 2.1 HINDU LAW<sup>[2]</sup>

Hindu law is the only law that addresses an adopted child as being comparable to a natural child because of the belief that a son was indispensable for the spiritual as well as material welfare of the family. Earlier, Hindu law allowed only males to be adopted, and restrictions were imposed on Caste and Gotra. Under Hindu law, a female child could not be adopted. Moreover, only the male had the right to adopt, and the dissent of his wife was immaterial.

With the passage of time, such restrictions have changed. Gender biases have reduced to a great extent in today's modern society. At present, under modern Hindu law, every Hindu male or female has the capacity to make an adoption provided he or she has attained majority and is of sound mind. Mostly, all of these laws, rules and regulations have been itemised in the Hindu Adoptions and Maintenance Act of 1956.

### 2.3 HINDU ADOPTION AND MAINTENANCE ACT, 1956<sup>[3]</sup>

The Hindu Adoption and Maintenance Act, 1956, is a part of codifying and modernising Hindu law and was passed after independence. This act removes several gender-based discriminatory factors by reflecting the principles of equality and social justice. Sections 6 to 11 of the Hindu Adoption and Maintenance Act state clearly the essential conditions for the valid adoption.

#### Hindu Male

**Under Section 7 of HAMA, the following conditions are to be fulfilled to allow a Hindu male to adopt a child:**

1. He is a major
2. He is of sound mind

# The person who wants to adopt a child must not suffer from idiocy or insanity.

# The person who wants to adopt a child must have the capacity to understand the provisions of the Act.

# A strong presumption regarding the favouring of the mind is there.

# A person is said to be a person of sound mind if such a person is deaf and dumb but possesses the capacity of expressing themselves through gestures or signs.

3. As per the declaration of the competent court, he shall not adopt any child if he has a wife living at the time, except with her consent, unless and until the wife has renounced the world or her Hindu religion or has become of unsound mind.

# The consent is not necessary in case of divorce, but such consent is mandatory in case of judicial separation.

# Before the civil adoption, the consent must be obtained and not later on, where the proviso is disregarded adoption is not valid.

4. At the time of adoption, if a person has more than one wife, it is necessary to take the consent of all wives. In the case of Bhooloram & Ors. v. Ramlal & Ors.<sup>[4]</sup> A question was raised before the court whether it is necessary to take the consent of all wives if a person has more than one wife living at the time of adoption. It was held by the court that if a wife has absconded to any unknown place, she cannot be construed as dead unless the ingredients of section 7 of the Act are complied with.

## Hindu Female

### Section 8 of the HAMA enables the wife to adopt a child by fulfilling the following conditions:

1. She is a major

# A woman gets the capacity to adopt a child even if she is herself unmarried after she has completed the age of eighteen years.

# She is of sound mind.

# She is unmarried, or in case she is married, her marriage has been dissolved, or her husband is dead or has renounced the world or has been declared as incompetent by the competent court.

## 2.4 GUARDIANS AND WARDS ACT, 1890 <sup>[5]</sup>

The Hindu Adoption and Maintenance Act were mostly the guidelines for the Hindu society, and thus arose a need to make a law which was sensitive to the personal laws of another religion, which were not mentioned under the Hindu Adoption and Maintenance Act, 1956 and therefore the Guardians and Wards Act of 1890 were made. The Guardian Wards Act, 1890, was a law to replace all other laws regarding the same. It was the only non-religious universal law regarding the guardianship of a child and applies to all of India except the state of Jammu and Kashmir. This law is particularly applicable for Muslims, Christians, Parsis and Jews because their personal laws do not permit full adoption. It is applied to all children regardless of their race or creed.

## 2.5 CAPACITY TO ADOPT UNDER JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT <sup>[6]</sup>

A couple or a single parent can adopt an orphan, abandoned and surrendered child (OAS). Nothing in this act shall apply to adoptions under HAMA. By virtue of section 37 of the JJ Act, 2015 and regulation 2022 child welfare committee can declare a child legally an orphan, abandoned, or surrendered, free from adoption and also allows children up to the age of 2-18 Years for adoption.

The capacity of males and females under the Juvenile Justice Act, 2015, can be grouped under the umbrella term prospective adoptive parents, as mentioned under section 57 of the JJ Act 2015 and regulation 5 of AR, 2022.

### Rule 5: Eligibility criteria for prospective adoptive parents <sup>[7]</sup>

(1) The prospective adoptive parents shall be physically, mentally, emotionally and financially capable; they shall not have any life-threatening medical condition, and they should not have been convicted of any criminal act of any nature or accused in any case of child rights violation.

(2) Any prospective adoptive parent, irrespective of their marital status and whether or not they have a biological son or daughter, can adopt a child subject to the following, namely: —

- (a) The consent of both spouses for the adoption shall be required in case of a married couple.
- (b) A single female can adopt a child of any gender.
- (c) A single male shall not be eligible to adopt a girl child.
- (3) No child shall be given in adoption to a couple unless they have at least two years of a stable marital relationship, except in the cases of relative or step-parent adoption.
- (4) The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding, for example Up to 2 years, 85 years, 40 years. Provided that the minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty-five years.
- (5) In the case of a couple, the composite age of the prospective adoptive parents shall be counted.
- (6) The age criteria for prospective adoptive parents shall not be applicable in the case of a relative Adoptions and adoption by step-parent.
- (7) Couples with two or more children shall only be considered for special needs children as specified in clause (25) of regulation 2, and hard-to-place children as stated in clause (13) of regulation 2, unless they are relatives or step-children.
- (8) The prospective adoptive parents have to revalidate their home study report after a period of three years.
- (9) The seniority of the prospective adoptive parents who have not received a single referral within three years shall be counted from their date of registration, except those who have crossed composite years of one hundred ten years.

### Rule 3. Fundamental principles governing adoption <sup>[8]</sup>

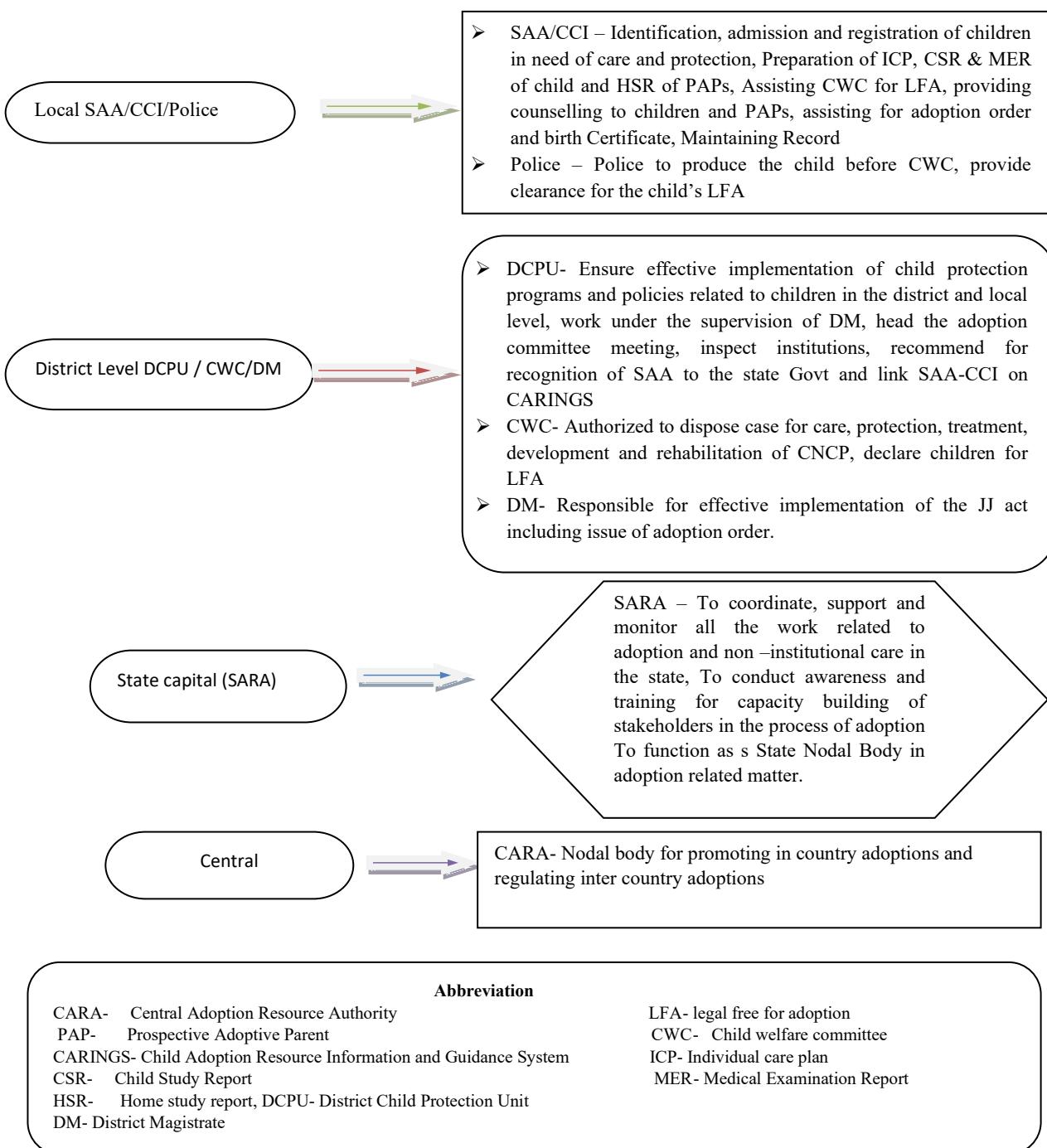
The following fundamental principles shall govern adoptions of children from India, namely: —

- (a) The child's best interests shall be of paramount consideration while processing any adoption Placement.
- (b) Preference shall be given to place the child in adoption with Indian citizens, with due regard to the principle of placement of the child in their own socio-cultural environment, as far as possible;
- (c) All applications for adoptions shall be registered on the Designated Portal, and confidentiality of the same shall be maintained by the Authority.

## 3. CARA (CENTRAL ADOPTION RESOURCE AUTHORITY) <sup>[9]</sup>

CARA is a statutory body under the Ministry of Women and Child Development, Government of India. It functions as the central or nodal body of the adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoption in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by the Government of India. CARA primarily deals with the adoption of orphans, adoption and surrendered children through its associated/recognised adoption agencies.

### 3.1 FLOW CHART ON FUNCTIONING OF CHILD PROTECTION SYSTEM FOR OAS CHILD<sup>[12]</sup>



01. Registration by PAPs (Prospective adoptive Parents) on the designated portal & uploading of documents within 30 days (Schedule VI Part 1)
02. Home study of PAPs by SAA/DCPU within 60days & uploading the same on the portal (Schedule VII)
03. Online referral of child to PAPs, which is to be reserved by PAPs within 48 hours. (PAPs can also reserve a child

- directly through Immediate Placement/Special needs/Seven days for RI/NRI/OCI PAPs tab)
04. Adoption Committee Meeting Assessment of suitability of PAPs with the child reserved. Minutes of the meetings as per Schedule XXVII.
05. Matching of reserved child& acceptance by PAPs on the portal within 30 days from the date of reservation of the

child. PAFC (Pre-adoption foster care) Physical Custody of child (Schedule VIII).

06. Filing of adoption application by SAA within 5 days & Scrutiny by DCPU within 5 days (Schedule IX Part 1 & Schedule XXVIII)
07. DM issues the Adoption order within 60 days (Schedule XXXIII). DCPU uploads the adoption order on portal.
08. Post-adoption follow-up by SAA/DCPU for 2 years from the date of PAFC (Schedule XII)

### 3.4 PROCEDURE IN COUNTRY RELATIVE ADOPTION [10]

01. DCPU uploads verification along with Family Background Report on Portal (Schedule XXI)
02. SARA re-verifies the application and uploads it on portal.
03. CARA issues & uploads pre approval Letter (Schedule XXV Format-1)
04. The PAPs (Through DCPU) file adoption application (Schedule IX Part-4 & Schedule XXX)
05. DM issues the Adoption order within 60 days (Sch. xxxiii). DCPU uploads the adoption order on portal.

### 3.5 PROTOCOL/STEPS FOR FOSTER ADOPTION FOR CHILDREN ALREADY PLACED IN FOSTER CARE [11]

01. Registration of foster Parents by DCPU on Designated Portal (Documents required Pan Card, Birth certificate of foster parents, Residence proof, Income Proof, Medical fitness of parents, Marriage Certificate, Consent of biological/adopted child of foster parent, Foster Parents undertaking, Social Investigation Report {SIR})
02. Registration of child by DCPU on Designated Portal (Documents Required Medical [MER], child Study Report [CSR], Legally Free for adoption [LFA], CWC foster care Placement order, Consent of foster Child, Last month of progress report)
03. DCPU recommended the proposal to SARA.
04. SARA recommended the proposal to CARA.
05. CARA to issue Pre approval letter and forward the proposal to DCPU.
06. SARA sends the proposal to DCPU.
07. DCPU finally sends the application to DM for the adoption order.

### 3.6 Procedure Adoption by Step Parent

01. Registration by step Parent on Designated Portal & Uploading of documents. (Schedule VI part 5)
02. DCPU Uploads verification report on the Portal.
03. SARA re verification application and uploads it to the portal.
04. CARA issues a Pre-Approval Letter (Schedule XXV Format-2)
05. The PAPs (through DCPU) file adoption application (Schedule IX Part5& Schedule XXXII).
06. DM issues the Adoption Letter within 60 days (Schedule xxxiii). DCPU uploads the Adoption Order on the Portal.

### CONCLUSION

In this way, we will describe both types of adoption under the HAMA and the JJ Act with Regulation 2022. After this matter, I will discuss some differences between both provision or describe the practical provision in this way.

Sl. No.	HAMA,1956	JJ act with Regulation 2022
1.	Only for Hindus	A Secular act
2.	Same sex children cannot be adopted	No such conditions
3.	Children up to 15 years of age can be adopted	Children up to 18 years of age can be adopted
4.	HAMA is meant to facilitate adoption between the known set of parents.	No such scope under the JJ Act.
5.	Registered deed finalises adoption; court permission is required in some cases.	An adoption order finalises adoption, Registered deed is not required.
6.	An OAS child in SAA/CCI belongs to the State and cannot be adopted under HAMA.	OAS Children can be adopted under the Act with the involvement of Authorised agencies and authorities
7.	Adoptions under HAMA are direct and open Adoptions.	Adoptions made in accordance with the JJ Act are closed adoptions, especially those involving OAS minors.
8.	Both the biological and adoptive parents are responsible for protecting the child's welfare and best interests.	The best interests of the child are ensured due to the built-in mechanisms in the JJ Act through the involvement of authorities and recognised agencies.
9.	The procedure of providing and taking an adoption is all that depends on the adoptive parents and the biological parents; no time frame for selecting or reserving a child is given.	Timelines are well-defined for reserving a referred child by the Prospective Adoptive Parents (PAPs)
10.	Under HAMA, inter- country adoption of only NRI/OCI PAPs has been facilitated under the Adoption Regulations (Chapter VIII).	All inter- country adoptions of OAS children and relatives have been facilitated under the Act and the Adoption Regulations 2022.

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