



Courts and Adoption – Debate for Adjudication vs. Education

Adoptions in India have been provided for under two legislations – the Hindu Adoptions and Maintenance Act, 1956 (HAMA) and the Juvenile Justice (Care and Protection) Amendment Act, 2015 (J.J. Act). While there are several differences between the two statutes, one of the most striking dissimilarity between the two lies in HAMA not mandating a court order to legalize the adoption while the JJ Act requiring that an adoption would be legal only after a Court Order. Why would the two laws adopt such a radically different approach? What are the consequences for adopting under either of the Acts? What then should be the role of courts going forward? Let us take a close look of the genesis as well as provisions under each Act to answer the above questions.

HAMA is a personal law for the Hindus. All the parties to adoption under HAMA, i.e. the receiving parent(s), the giving parent(s) and the child have to be Hindus. A Legal Adoption is deemed to have taken place, as per provisions of law so long as the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption. **No court of law is required by HAMA to be engaged in the act of “receiving” and “giving”. At no point in time, do receiving or giving parents approach the Court of Law with an application to “receive” or “give”. They are empowered by HAMA to do the same – legally.**

It therefore sounds strange that in a bilateral matter bereft of any checks or balances (likes of which can be seen in JJ Act) a Court is not really adjudicating on adoption – but merely recording it. It can only offer legal credence to the underlying document, and not to the act itself. This leaves a gaping hole in adoptions executed under HAMA, as no court, judicial authority or any other third party was ever involved in the act of adoption. No court did any due diligence whether the parties to the adoption deed were indeed eligible to adopt. Whether adoption was indeed as per legal provisions of HAMA. **It merely assumes so.** By the time an adoption deed is executed, the adoption is already in force and irrevocable. The court can only accept or trash the adoption deed – not recognize or annul adoption itself. Of course, their establishing credence to the adoption deed facilitates many more legal processes like inheritance and succession for the person adopted – and it is to fill this gap that most parents seek to present an adoption deed before a court of law “post adoption” - because the COURT WAS ABSENT IN THE ADOPTION PROCESS TO BEGIN WITH!

Involving courts post-adoption has created such a stereotype that most parents continue to believe that it was the courts that legalized the adoption under HAMA. The truth however has been that for ages, courts have had no role in *legalizing* adoptions under HAMA. Whereas they should have had – considering that adoptions in HAMA are a bilateral agreement and a human life is involved.

Cut to the JJ Act, 2015. Apart from foundational differences with respect to HAMA, the JJ Act provides for very detailed guidelines for adoption as promulgated by Central Adoption Resource Authority (CARA). Under these guidelines, no adoption of an orphan, abandoned or surrendered child can take place in contravention of process laid down by CARA and without the engagement of intermediaries authorized therein for their respective roles. Over the years, CARA has infused so much transparency and rigor in the adoption process that it is impossible to have any bilateral adoption (except for some special categories). Each adoption necessarily routes through the agencies and intermediaries authorized as per CARA guidelines. There is stringent due diligence on who can adopt, and can be made legally free for adoption. In fact, some sections argue that stringent guidelines in fact are responsible for a massive dip in adoption figures in India, as it has become difficult to bypass the system. As a result, there are very few children being adopted under JJ Act as compared to HAMA, as the former enforces strict discipline and accountability.

One would presume that after such stringent scrutiny, executing a legal adoption should be a cake walk for parents. Quite the opposite! After more than a year of wait in getting their child, parents are getting stuck at courts – sometime for years – to get a legal adoption order, without which their adoption is not deemed legally executed. It is ironic that in JJ Act courts have been given a role to adjudicate on a non-adversarial adoption plea, where all the due diligence, scrutiny and monitoring has already been done by CARA. It is no longer a request by two individual parties (as in HAMA). As and when the case comes up before a court of law, they are merely left with the task of browsing through the reams of documents that the court did not prescribe. These have been painstakingly prepared by myriads of agencies like the DCPU, CWC, Adoption Agencies, CCIs, CARA etc. And the court is taking its own sweet time to go through these documents, and affix their stamp of “approval” – without any real value add.

Delay is hardly a reason to seek liberty from courts for adoptions in JJ Act, it is merely a side effect. The real reason is that there is virtually no role for judges remaining. What’s worse, their contribution has largely been detrimental. For, the travesty and ordeal of parents just does not end here. The judiciary, seemingly feeling left out at their lack of involvement in adjudicating adoptions under HAMA, appears to be over enthusiastic when a “case” for adoption comes up before them in JJ Act – that cannot be *legalized* without their “order”. And order they do pass – in all colors and formats – as and when they pass!

There are judges who order parents to pay lacs of sums not just to adoption agencies, but to unrelated schools. There have been orders where parents have been asked to take an insurance policy or make investments of tens of lacs or rupees – before confirming adoption order – in blatant violation of any law of the land – as no laws requires that. Then there are judges who seek all kind of assurances from single parents. All this happens because judges have been used to seeing adoption files from HAMA, where no diligence was carried out before the case came to the court. Unfortunately, they didn’t have an authority to ask any questions there. Here in JJ Act, they have been given the authority to ask the questions, but honestly, the need does not exist.

There is hardly any role for any third party, leave aside a court of law, when a Home Study has been done, a seniority has been established, a limited number of referrals has been institutionalized and a profile

chosen by parents has to be accepted. Neither the “receiving” nor the “giving” parents even know each other. Even the child is referred by CARA. Parents do not even have the discretion to opt for a particular child. Parents register online in CARINGS, CARA’s online system, and accept one of the three profiles made available to them. They cannot even influence which profile they will get shown, and they can only accept only one profile at a time. Not accepting a profile that they reserved for viewing puts them at bottom of the wait list. None of this was required under HAMA and still there was no judge asking some basic questions. All of these precautions have been defined under JJ Act and yet comes a judge, asking all basic questions once again – oblivious of the role played by the intermediaries. One wonders what remains to be adjudicated by a judge after this. If at all, there is any malpractice or service deficiency by any of the intermediaries, CARA should be closely monitoring, assessing and penalizing the erring parties – not a court. For there is no dispute involved. Even if there were a dispute with respect to the system mandated by CARA and an aggrieved party, those cases could go in appeal to a court of law. Not all. Certainly not for a mechanical approval by a judge.

Sadly, our judges seem to be unaware of all of these developments. CARA spends a humongous amount of time in educating and sensitizing these judges so that they can pass adoption orders. And pass them timely.

It is time we reflect what we want from our judiciary in respect of adoption. A mere clerical role of recording an adoption already executed via adoption deed as an evidence, where lot more due diligence should actually have been conducted in an adversarial suite (under HAMA) or an avoidable and redundant role of duplicating questions already addressed by half a dozen agencies, over a period of an year or so in a non-adversarial plea, further delaying the execution of adoption. This in addition to thousands of cases the judiciary is already burdened with.

The answer lies in automating the legality with the executive soon as all the processes have been complied with. This requires zero exception to compliance, heavy penalties for malpractices and fool proof belief in our processes. Last thing we need is another monitoring agency to check if the processes were followed or not – definitely not the courts. Logically speaking, courts have no role in adjudicating adoptions under the JJ Act.

Radical? Outrageous?? Dangerous??? Well we have already examples from our Passport, Adhaar Card, Driving License, Voter Id Card etc. which are perfectly legal documents issued by respective executive organizations unequivocally establishing our nationality, identity and privileges. None of these is less important a dimension as a citizen of India. Yet none of these requires a court of law to endorse the veracity of their processes or the end document. And we don’t feel any more unsafe in their endorsement without courts. Why then adoptions?

Judiciary oversight, along with associated whims, fancies, ignorance, egos and delays is an avoidable overhead that the adoption ecosystem in the JJ Act can happily live without. May be allocate some of it to adoptions under HAMA, and families will really benefit! Changing laws is a different story, though.

The change has to come not just from our policy makers, but also from our community of parents who have been conditioned to think of courts synonymous with a legal adoption. So much so that they balk at mere thought of relieving the judiciary of this redundant role – where they are not adding any value at best, and slapping frivolous conditions in adoption orders at worst.

Let us leverage courts for what they do best – adjudicate – not to educate themselves at the expense of our families.