



Why to Avoid Adoptions under HAMA

Strange as it may sound, India has two contradictory yet perfectly legal laws to adopt a child.

Indians, or shall we say Hindus, have been adopting a child under the Hindu Adoptions and Maintenance Act, 1956 (HAMA) until the year 2000 when the Juvenile Justice (Care and Protection of Children) Act (JJ Act) started providing for adoptions. Until the advent of the JJ Act, only Hindus (including Jains, Buddhists and Sikhs) could legally adopt a child, and Indians of other faiths such as Muslims, Parsis and Jews could only take a child under their guardianship as per the Guardians and Wards Act 1890.

Initially the JJ Act was quite weak and offered merely a skeletal framework for adoption. This, coupled with lack of awareness ensured that majority of adoptions continued to take place under HAMA. The game changer came in the year 2014 when Supreme Court ruled that any person, irrespective of the religion, caste and creed, was free to adopt children under the provisions of the JJ Act. Subsequently the JJ Act was amended in 2015 to provide for more robust definitions, processes, regulations and guidelines for adoption.

One would have anticipated a huge uptake on adoptions with the new and enabling provisions through the 2015 amendments on the JJ Act. However, just the reverse happened. Adoptions not only slowed down under the JJ Act (2015) but dropped steeply in the past five years. While there is no official release from CARA on why adoption rate has been falling, the reasons are quite obvious to understand:

- The JJ Act demands accountability, transparency and auditability of children entering into the adoption stream and being placed with families. Many adoption agencies are not technology savvy, adequately staffed or process friendly to comply with this requirement. They are conditioned to deal directly with parents, maintain minimalistic

records and operate with frugal paperwork. Some of them are in far flung rural areas where compliance with technology-heavy process itself becomes daunting.

- JJ Act has taken away significant discretion away from the agencies in placing the child with the families. Left with a miniscule role in just adhering to the process, the adoption agencies have little motivation to place children in the new regime. Some prefer to play outside the arena, albeit discretely.
- The new legislation being secular, demands equal treatment to all the prospective parents – of any faith, class, caste, religion or even status – single or married. However, certain agencies owing their allegiance to their faith are not comfortable with placing children with single parents, and have in fact pulled out from the adoption domain altogether, e.g. the Missionaries of Charity chain has stopped placing children in adoption as they would not place their children in adoption with a single parent.
- Not just agencies, many parents too feel constrained in the new regime, as it does not allow them to “choose a child”, does not entertain their fancy for a particular child (typical ones being child to be of a fair complexion, of a specific caste, region or religion), mandates home study, imposes restrictions on number of profiles shown, refers children strictly as per seniority and even downgrades their seniority under specific situations.

Needless to say, both the agencies and the parents have found solace in the *good* (sic) old HAMA which is not just alive and kicking in terms of legality, but requires no such diligence, offers superb inconvenience in adoption as a transaction and meets all the preference parameters of prospective parents.

In the wake of growing discomfort with the transparency, accountability, auditability and limitations in parading children before a battery of parents, as required by the JJ Act, more and more parents (with or without agencies) are resorting to private adoptions facilitated by HAMA. HAMA seemingly meets all their expectations, legally, but sadly exposes them to larger risks. The risks and concerns are least highlighted by the touts whose only interest is to “broker” a child and make some quick money out of the desperation of parents and young birth mothers in placing the child under adoption. Before we unravel the risks associated in private adoptions, it becomes necessary to understand what HAMA is, what it can do, and more importantly what it does not do, to safeguard the interests of the families.

HAMA is an old law, the only law until the year 2000, legalizing adoptions for Hindus. It allows a Hindu couple / parent to adopt a Hindu child from another Hindu couple / parent. HAMA was perhaps meant to facilitate adoption between known set of parents, probably of a known child and under known circumstance. As a law, it is ill equipped to legalize mass adoptions between complete strangers, of a child with unknown medical profile and into a family whose antecedents are not known. Such seemed to be the reliance of HAMA on the (noble?) intentions of the parents, that it did not even warrant a legal decree to

legalize the adoption. Merely the act of giving and receiving the child constituted a legal adoption. All it required to legalize adoption was to record the act before a magistrate.

It is a common misconception that adoptions under HAMA are legalized with a court order. Far from it. HAMA does not even require a court order. The court order is required because adoption under HAMA itself DOES NOT PROTECT the rights of the child. The same have to be secured by way of a separate court order. The Adoption was perfectly legal without the court order also, but the Adoption Deed required to be presented in a court of law, for it gain any legitimacy, in the eyes of the law, and for any rights to be passed on to the child. This was the reason, that most judges asked plethora of questions when the adoption deed was presented before them, to ascertain that the adoption was carried out with principles of natural justice – and that the adoption deed was admissible as a valid evidence, to secure the rights of the child – since HAMA did not ensured that, even as legal adoption was already carried out. In case the judge was not satisfied, the adoption could not be reversed – only the rights of the child would not be vested in him/her – putting the child in a more vulnerable situation!

In last few years, several touts, middlemen / middle women, staff at adoption agencies, hospitals, nursing homes and any and every other place where a child could be “found” have been indulging in adoption rackets, weaning unsuspecting parents away from the CARA process, as envisioned in the JJ Act. Parents have been only too eager to switch sides, as an average wait for adopting an infant from CARA has only swelled to about 18 months. There are close to 16,000 parents registered for adoption with CARA. About 80% of them want to adopt a child below 2 years of age (the youngest category for adoption with CARA). Sadly, there are fewer than 300 children in this category all across India. The number drops to below 50 at times. Even the most law abiding parents run thin of their patience after a year or so, and that is when they are most vulnerable to offers from the touts. Having spent a fortune on alternate reproductive techniques, lost their prime waiting for a child, and more than a year with CARA, parents cannot really be faulted entirely for considering private adoption. More so when the deal includes a baby of their “choice”, option to see several babies before you decide, zero or minimal wait and no requirement for any follow up or paperwork. And in a perfectly legal way!

Looks like a win-win.

Except that apart from being technically legal, private adoptions under HAMA as applied to mass scale adoptions brokered through an intermediary offer no respite, surety or even safe passage of child’s rights into the family where it goes. They are simply a time bomb ticking to explode. Here is why parents need to stay away from them:

1. Unlike the JJ Act, there is no home study on the parents in private adoption. There is no diligence to establish if the parents can support the child financially, physically or

emotionally. On the contrary, private adoptions could attract all sorts of parents – whether ready for adoption or not, in absence of a qualification. The child may actually be risked into a family that may not support it, if their expectations are not met. Unlike the JJ Act, private adoption under HAMA is irrevocable, and child is left with no legal status, if abandoned the second time over. A child legally adopted under HAMA cannot ever be adopted again, legally.

2. Parents adopting privately are not counseled. Their biases and prejudices may not be addressed. The transition of a child in the family goes unmonitored. There is no support system, should the child need help. The child often fails to meet myriad expectations of parents, often a result of stereotypes created by Bollywood and fiction. Private adoptions tend to be hasty, hush-hush, fiduciary in nature – and this reflects in the upbringing of the parents. The entire focus is on the act of adoption, and not the child. Quite often such parents don't even share the fact of adoption with the child, until the child is an adult, and their defensive posturing around adoption lowers the self-esteem of the child.
3. The antecedents of the child and the mother are not known. There is no medical history or bona fides of the relationship between the child and the mother. The child could actually be trafficked into adoption, and the same mother may be impersonating for several children. The child could even have serious medical issues, unknown to the birth mother or adoptive family. Apart from the difficult situation that the parents may go through, lack of medical assessment can actually put the child at greater risk of health – unknown to parents.
4. Most private adoptions involve an infant. It is possible that the child is stolen from the birth mother and trafficked into adoption. Adoptive parents could inadvertently be accomplice to a crime that they are even unaware of. If the law really catches up with them, the child would be in a riskier situation with parents accused of criminality and facing legal punishment.
5. Most parents adopting privately tend to see several children before they choose the child they wish to adopt. This practice not only being unethical and inhuman, can also cause severe distress as parents find it difficult to come out of their baby-shopping mindset, and may carry the guilt for long.
6. Unlike JJ Act, there is no cooling off period after the child is placed into adoption. Should the birth parent / mother decide to go back on adoption, the adoptive parent would land into a precarious situation. They may even be slapped a case of child trafficking or kidnapping (even if adoption deed has been executed). Apart from the intermediary's introduction, they have virtually no defense for adopting a child from an unknown source.
7. The intermediary is not a State agent, and cannot be relied upon in maintaining the secrecy of adoption, as mandated by law. Knowing both the birth parent and the adoptive family, there are high chances of them blackmailing the either.
8. As only Hindus can execute adoption under HAMA, the touts may impersonate birth parents as Hindus to execute adoption. Such adoptions would be null and void. If the

deed cannot be admissible as a legal evidence, the child may be bereft of its rights, for life.

9. Private adoption of any orphaned, abandoned or surrendered children is illegal as per JJ Act– even if it be presented as legal by the touts. As a result, if the child requires to travel abroad, CARA will not issue an NOC, as such NOC is issued only to children adopted through CARA, under the JJ Act. A shortcut in the past will haunt the family in future, limiting career, socialization and networking prospects.
10. As more and more parents turn to private adoption, there is a sustained demand outside of the CARA process. As a result, even those children who could have been placed into adoption through CARA, find their way into the gray market – making it tougher for parents abiding by the law. Their wait only increases multifold, for every child that is placed into adoption – outside of CARA. The answer lies in parents recognizing the risks of private adoptions under HAMA and staying away from the same. As parents revert back to diligent, accountable and transparent adoption process in the JJ Act, the demand for children outside the CARA process would weaken. This will mean that more children will enter the CARA process – especially designed for impersonal, mass scale adoption, with the checks and balances in place.

So it is not just about the legal transaction of adoption. HAMA has severe limitations that have since been addressed in the JJ Act. Adoption under HAMA, though legal, is fraught with above risks that are grave and preposterous. Instead of getting lured with faster adoption, parents need to desist from private adoptions under HAMA.

Yes, it is a weakness of the system that two laws exist. Ideally Sec 56(3) of the JJ Act stating that “Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956” should not have been inserted – but it was more to allow for adoptions under HAMA to continue until JJ Act became robust enough. Else we would have been stuck with one inadequate law replacing another inadequate law (HAMA).Remember, regulations for adoptions under JJ Act have progressively evolved. It is a matter of time before either this section or HAMA is junked.

But if parents continue to adopt under HAMA, they shall be setting themselves up for long term risks. Risks that are mitigated by design under the JJ Act; but the risks that the parents adopting under HAMA shall continue to live with – EVEN LONG AFTER HAMA IS GONE.

Hope we as a community discharge our responsibility in making the RIGHT choice rather than the CONVENIENT choice. As more and more parents wean away from HAMA (naturally or through proper guidance), the gray market through HAMA will die its own death – which it should considering the risks involved.

HAMA is just too lethal, considering all the more that it is legal! Stay away!!

