
WIDOWS AND THEIR RIGHTS WITH RESPECT TO ADOPTION IN MODERN INDIA

ISHITA MISHRA

Abstract: This essay's aim is to assess and critically observe the position of widows in today's society with respect to adoption. This essay will talk about the power of the widow to adopt and the restrictions imposed on the same under the different schools of Hindu Law in particular the Mithila, Bombay, Madras, Benares and Bengal. This essay will also evaluate the position of Hindu women, especially widows under the Hindu Adoptions and Maintenance Act, 1956. It will discuss who a widow is in Hindu law, Vasistha's text, its various interpretations, define express authority of the husband and then move on to elucidate on the modern adoption laws that are followed by Hindus and applicable to Hindus in India post 1956.

Introduction: The word widow finds its origins in Old English *widewe* from Indo-European root meaning 'to be empty.' In Hindi a widow is called a *vidhva* from the Sanskrit *vidh*, which means to 'be destitute.' This term is used to refer to a woman who has lost her husband and has not remarried. The origin words and their respective meanings hint towards the patriarchal ancestries and negative connotations this word carries. A Hindu woman was expected to give up all the worldly pleasures on the death of her husband. A widow was to dress modestly in a white coarse cotton sari without a blouse and have a shaven head. Many Hindus also participated in the practice of Sati.

Sati was a tradition that required the Hindu widow to devote herself to a appalling fatality by burning herself with or on her husband's pyre. Sati is said to have Vedic origins. A passage^[1] of the Rig Veda has been translated by Colebrook, which talks about a practice like Sati. The same reads as, "Om: Let these women not to be widowed. Good wives adorned with collyrium, holding clarified butter consign themselves to fire. Immortal, not childless, not husbandless, excellent; let them pass into the fire whose original element is water." ^[2] However the interpretation of this passage has been criticized by academics like Professor Wilson and Professor Maxmuller who believe that Vedic texts have been mistranslated and have been wrongly applied to arrive to this conclusion. They claim that Sati was unknown in Vedic times. Customs and practices like Sati tell us that widows in the Hindu society have always been mistreated and have been kept on the fringes of the society. Manu says that, "Until her death, let her be patient of hardships, self controlled, and chaste and strive to fulfill that most excellent duty which is prescribed for wives who have one husband only...At her pleasure let her emaciate her body by living on pure flowers, roots and fruit; but she must never mention the name of another man after her husband has died." ^[3] These lines inform us of the arduous lives widows were forced to lead. Even in the modern society widows continue to face difficulties because of social stigma attached to their status. Take for example the heartbreaking conditions in which thousands and lakhs of Hindu widows stay in holy towns like Haridwar and Benares.^[4] Widows in India are victimized by stigmatization and by the followers of so-called

Hinduism. This bias against widows is evident not only in daily life but also in legislations that relate to inheritance, maintenance and adoption. This essay will limit itself to addressing the question of widows and adoption.

Adoption By Widows: Different Schools Of

Interpretation: All schools of Hinduism have based their adoption practices with respect to widows on Vasistha's text. The text says that, "Nor let a woman give or accept a son unless with the assent of her lord." The various schools of Hinduism have interpreted this text in different ways. There is divergence of opinions between the different schools. Adoption by widows is entirely dependent on the interpretation and there is lack of unanimity, albeit efforts have been made to reconcile these differences, they still persist and are legally recognized. As a result different states have different rules.^[5]

In Mithila, a widow cannot adopt at all. Mithila believes that assent of the husband should be given at the time of adoption. However, as husbands cannot assent to adoption requests in the case of widows; widows are not allowed to receive a son in adoption. Vachaspati Misra says that, "A woman has no power to adopt a son even with the assent of her husband for she cannot perform the rites of adoption. The prohibition on adoption stems from the widow's inability to perform religious rituals.

In the Bengal School, the same text is interpreted to say that the wife needs permission from the husband for adoption in his lifetime. This permission nevertheless is capable of taking effect after his death. This permission or assent may be express or implied and cannot be implied from the mere absence of a prohibition to adopt. Also, the wife is not treated as an agent of the husband in the process of adoption. She has the full and individual right to adopt on her own yet assent of her husband becomes critical as it is given in Vasistha's text. The Benares School upholds the same conditions on adoption when it comes to widows as that of Bengal. The Mahratta School is governed by the Mayukha and Koustoobha treaties. They explain the text by asserting that this condition is to hold good for only those adoptions that take place during the husband's lifetime. This school is also called the Bombay School. Here the widow is allowed to adopt without the assent of her

husband unless there was an express or implied prohibition to the contrary. The women have been allowed to adopt in Nilkantha's view because, "Even a woman has like the Shudhra, authority to adopt, because of the text 'women and Shudras are governed by the same rules.' "[7] Widowed women are encouraged to seek permission from their father, or in his absence of that of her clansmen.

In the Madras School, which is also called the Dravida School, a widow may adopt without her husband's authority, but with the assent of her *sapindas* if the husband and wife still stayed separately. If they were joint then she had to obtain the consent of his undivided coparceners.

Hence in conclusion we see that in the Mithila school no consent was sufficient and the widow could not adopt under any circumstances. In the Bengal, Madras and Benares schools, she may act as an agent on behalf of her husband and may adopt under an authority from her husband. Lastly, in the Bombay School, the widow is allowed to adopt even without any authority.

Adoption By Jain Widows: Jains observe the custom in which a widow is entitled to adopt without her husband's authority. This rule is well established through judicial decisions. The Jain widow also does not require the consent of her *sapindas*. [8] As this custom is so well established in the entire country except in Punjab and Madras, the burden of proof lies not on those who stress it but on those who claim an exception to it.

Adoption Under Husband's Express Authority: Every Hindu individual of sound mind who has reached the age of discretion may assent to his wife adopting a son to his name after his death, except in the areas where the Mithila School is followed.

The assent to adopt may be imparted to the wife verbally, [8] or in writing. If such authority is provided in writing then it must be registered and if it is not registered then it should be willed. [9] Such assent can also be conditional to the extent that this condition is not illegal in itself. Whatever conditions or otherwise are mentioned by the husband must be followed to the tee. Authority will be valid only if it is followed to the tee. As in the case of *Sudarasivudu v Adinarayana*, [10] it was seen that the husband had instructed that the adopted son be from the same *gotra* as he is. The adoption of any other boy had been held as invalid.

Adoption Without The Husband's Authority: Only in the states of Bombay and Madras can a widow adopt without the assent of her husband.

In the Madras School the widow may adopt without any authority from her husband if there is no express or implied prohibition on her doing the same. In this case, it is necessary that she should not have separated from her husband. If the couple had separated then in this circumstance, the widow would have to obtain permission from her father in law. If the father in law is deceased then she will have to obtain the consent of her

husband's closest *sapindas*. The woman need not take into account every *sapindas'* view point but must muster a majority opinion within the *sapindas*. The Supreme Court in the *Tahsil Naidu v Kulla Naidu* [11] case decreed that only the consent of the nearest *sapindas* who are capable of making an informed, intelligent and honest judgment in the issue. [12] The assent of the *sapindas* is required because women are seen as incapable of taking independent action.

Adoption in the Bombay School is on similar lines only here the prohibition, if any, has to be explicit. In *Sitabai v Govindrao's* [13] case it was held that mere refusal did not amount to prohibition and hence could not stop a widow from adopting a child.

Modern Law: Ever since 1956, the Hindu Adoptions and Maintenance Act of 1956 regulate adoption within Hindus. The main aim of adoption is to create a legal relationship between two strangers akin to that of real blood. As it is a legally recognized form of affiliation, it was needed to regulate it to make it fairer for all the participating members. Requirements as suggested under previous laws were discarded and women were treated in *equali jura*.

After the coming of this act a widow was now able to adopt a son or daughter to herself in her own right. With these new provisions in order, there was no question of the *sapindas'* consent or depriving him of his reversionary interest or the motive for the adoption by the widow did not arise. This act was applicable to Hindus, Buddhists, Jains and Sikhs and any adoption made in contravention of this act was considered as void. It supersedes previous laws and lays down the whole new law of adoption among Hindus in India. However this act does not have retrospective application.

This act's primary objective is to take care of the welfare of the child. This act lists down the various prerequisites for a valid adoption. If these are not met then the adoption is declared as invalid. The person who has to adopt should have the capacity and also the right to take in adoption. [14] The person who is giving up a child for adoption should have the right to do the same and the person who is being offered for adoption should also be capable of being taken in adoption and such an adoption should be made in compliance with all other conditions mentioned in this chapter. By capacity, this law wants to take into consideration two aspects of any Hindu female or male. The first is that the person is of sound mind and the second that the person is not a minor and has attained majority. Also husband and wife are not allowed to adopt if they are cohabitating without the permission of either party. Adoption in a household has to be a mutual decision. [15]

Adoption by widows became an individual and an independent right unlike in the past. In the past, authority from the husband or other male family members was required as females were not considered able enough to be capable of taking and executing their

own views and decisions. Moreover, the son adopted was adopted to the dead husband and not to the woman. The woman only acted as an intermediary in the entire process of adoption even though one party that is the husband was dead before adoption. All the prohibitions that were enforced onto the women because of *Shastric* law were no longer applicable in case of adoptions. Now there were no obstacles in the path of adoption of a child after the death of the husband.

The adoptee now becomes the son or daughter of the family. They have the same status as that of a natural born child with all the benefits and the incidents of that status. This equivalent status has been imparted to fulfill the major aim of the act that is to ensure the welfare of the adopted children.

The widow now adopts a child to herself and not to her deceased husband. However, if she wishes to adopt a child to her dead husband then the provisions of this act will not hold good. The *Shastric* laws will apply and the widow would have to have specific authority by the

husband to adopt to him and in the absence of such an authority then the adoption by the widow to her husband would not be validated as is established in the case of *Rajendra Kumar v Kalyan*.^[16]

Conclusion: Hence we see that Hindu smritis and codified Hindu law before the Hindu Adoptions and Maintenance Act, 1956 varied from region to region. Each region had its own interpretation of Vasistha's text, which resulted in a myriad of perspectives towards adoption by widows. This is the important conclusion or inference that we can make from the reading of this analysis of how adoption was regulated for widows in the Indian subcontinent.

We also see how after the passing of the act the procedure of adoption especially for women and widows now has become more and more equitable. Now men and women irrespective of their status as widows or widowers can adopt children in a fair, transparent, straightforward and uniform manner.

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Ishita Mishra, First Year, B.A LLB (Hons), The West Bengal National University Of Juridical Sciences, 12 LB Block Sector III Salt Lake Kolkata 70098, ishitamishra@gmail.com