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Commentary

# Adoption Practices in India: Legalities and Challenges

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The National Commission for Child Rights recorded over 3,500 children who lost both their parents during the pandemic in India (The Wire Staff 2021).

## INTRODUCTION

The second wave of COVID-19 ruptured families across India. Despite widespread media coverage, the conversation overlooked a demographic worst affected by it, namely children. According to a Lancet study by Bachman et al. (2021), last year saw 11,34,000 children lose their primary caregivers to COVID-19 globally. This figure includes at least one parent or custodial grandparent. The National Commission for Child Rights recorded over 3,500 children who lost both their parents during the pandemic in India (The Wire Staff 2021). However, the Lancet report documents a much higher number of children orphaned, reporting 1,16,263 minors who lost their parents between March 2020 and April 2021. In contrast, the number of children who lost primary or secondary caregivers was 1,86,972 (Bachman et al., 2021) (Table 1 and 2 below).

**Table 1: Loss of primary caregivers in India**

<b>Number</b>	1,19,170
<b>Rate per 1000 children</b>	3

**Table 2: Loss of primary or secondary caregivers**

<b>Number</b>	1,86,972
<b>Rate per 1000 children</b>	5

**Source:** Bachman et al. (2021)

This trend led to a new sub-category of bereaved children, referred to as the ‘COVID orphans’. With COVID orphans as its main point of departure, this commentary highlights the need to engage in extensive and informed dialogue around adoption in India, presently informed by neglect, misinformation, and prejudices. The first part of the paper provides an overview of the complex legalities surrounding adoption in India. Subsequently, the second half identifies a series of unaddressed challenges gripping adoption discourse that rely heavily on a parent-centric approach. This commentary outlines the need for a child-centric approach to adoption where the State and the society are equal stakeholders in creating a holistic approach towards adoption in India.

## LEGAL OVERVIEW

Adoption practices in India are primarily informed by the Hindu Adoption and Maintenance Act of 1956 [HAMA] and Juvenile Justice (Care and Protection of Children) Act of 2000 [JJ]. Both legislations have different provisions and objectives. HAMA is the statute that governs the adoption of and by Hindus. The definition of ‘Hindus’ here is expansive as it includes Buddhists, Jains, and Sikhs. It gives an adoptive child all the rights of a natural-born child, including the right to inheritance. In contrast, while Islamic jurisprudence does not prohibit adoption, Muslim personal law also does not recognise an adoptive child as equivalent to a natural-born child. According to the Muslim Personal Law (Shariat) Application Act of 1937, Muslim couples are only permitted to be legal guardians of the adoptive child. The adoptive child does not have the right to inherit the property of the adoptive parents. These provisions are based on Islamic jurisprudence derived from Shariat<sup>1</sup>, which states that a child’s connection is never severed from their biological parents. Therefore, adoptive parents are merely trustees of the child and not their natural parents (Sodha 2018), and once the child becomes an adult, the guardian-ward relationship ceases to exist.

Until the Juvenile Justice Act of 2000, the Guardians and Ward Act of 1980 [GWA] was the only means for non-Hindu individuals to become guardians of children from their community. However, since the GWA appoints individuals as legal guardians and not natural parents, guardianship is terminated once the ward turns 21 and the

<sup>1</sup> Shariat is a body of law based on Islamic theology, derived from the Holy Quran and the Hadith.

ward assumes individual identity. Under the GWA, foreigners wishing to adopt an Indian child would have to undergo a tedious process with no clear regulations to monitor the procedure.<sup>2</sup> The enactment of the secular JJ Act in 2000, amended in 2006, 2011, and 2015 resolved many contradictions that the previous legislations presented. The provisions of the act decree that persons belonging to all religions can adopt children without constraints from their personal laws, thereby granting the rights and privileges of a natural-born child to the adoptive child. Per the Muslim Personal Law, The JJ Act brings Muslim prospective-parents into the fold who could previously only become legal guardians. While it has addressed the unevenness of the previous legislations, in practice, the Act still leaves loopholes related to succession and inheritance unaddressed.<sup>3</sup>

It is important to note that 2015 saw a moment of transition in the adoption process with the introduction of the Child Adoption Resource Information and Guidance System [CARINGS]. The system acts as a centralised digital database of adoptable children and prospective parents [PAPs]. CARINGS aims to facilitate maximum adoptions by creating a smooth process without delays. It is expected to bring transparency and efficiency to the pre-existing adoption machinery. Further, provisions under the new guidelines allow PAPs to register online, upload documents, determine their eligibility, and track the status of their applications, among other functions (Bajpai 2017).

## CHALLENGES AND UNADDRESSED ISSUES

### a) A Long Wait, Declining Statistics, and Institutional Apathy

Data shows that while more than 29,000 prospective parents are willing to adopt, just 2,317 children are available for adoption (Pandit 2020b). This suggests a wide gap between PAPs and children, which may increase the length of the adoption process. Although the main focus of the CARINGS mechanism is to quicken the process of adoption, the waiting period is growing longer. Despite a sizable population of orphan children in the country, only a small fraction is available for adoption. This discrepancy occurs because out of approximately 3 crore children abandoned, only 2,61,000 are under institutionalised care accounting for a meagre 0.87% (Bhandare 2018). However, not all Child Care Institutions [CCI] in India are registered under the law. Including unregistered ones, there are a total of 8,000 CCIs (Kalra 2018). There is a great cost of not penalising unregistered CCIs. Children in unregistered institutions are vulnerable to poor care, physical violence, sexual abuse, and trafficking. Since these organisations are not registered, there is no functional mechanism to monitor their activities and hold them accountable.

### b) The Case of Children Being Returned

Between 2017-19, Central Adoption Resource Authority [CARA] faced an unusual upsurge in adoptive parents returning children after adopting. According to data

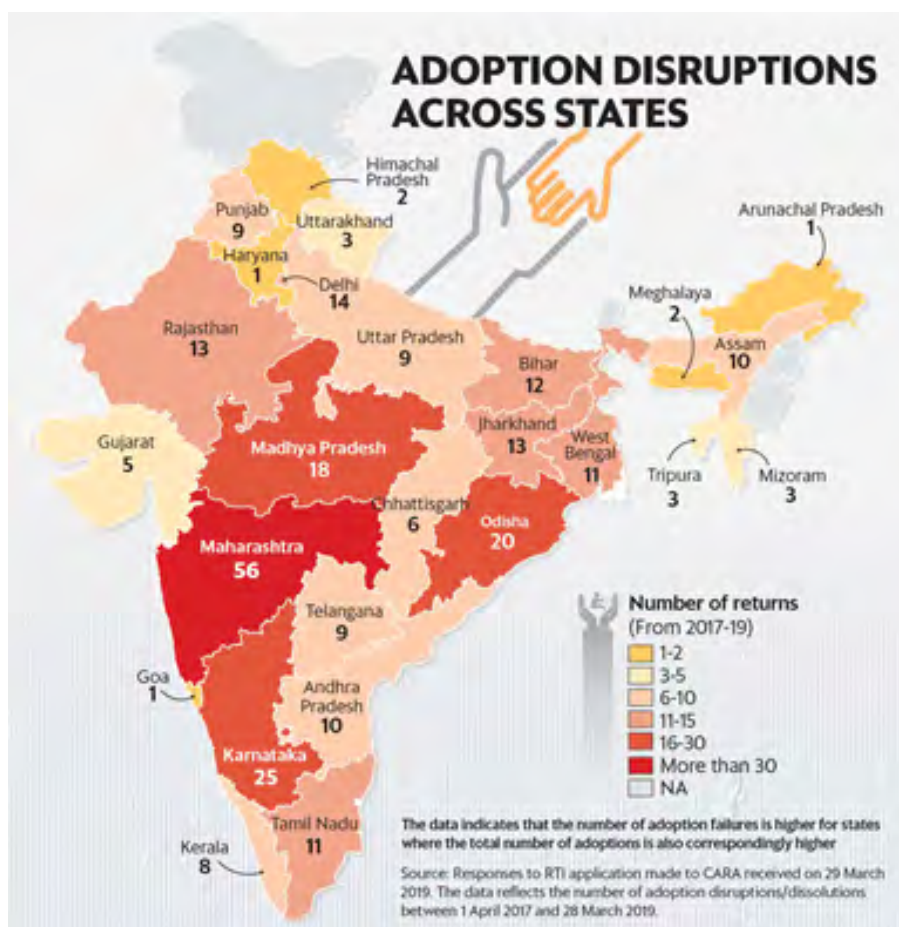
<sup>2</sup> See Bajpai's (2017: 63) for more information on the GWA complications that foreigners face when wishing to adopt an Indian child.

<sup>3</sup> Christian children in India are governed by the The Indian Succession Act of 1925 [ISA] which regulates the devolution of property. The ISA only recognises relationships by consanguinity (descended from the same ancestor). Therefore the rights of children adopted under the JJ Act by Christian parents is unclear.

from CARA's RTI reply, 60% of all children returned were girls, 24% were children with special needs, and many were children older than six (Rao 2019). The primary reason these 'disruptions' occur is that disabled children and older children take much longer to adjust to their adoptive families.

According to CARA's CEO, Lieutenant Colonel Deepak Kumar, older children find it challenging to adjust to a new environment because institutions do not prepare or counsel children about living with a new family. This is a problem specific to domestic adoptions because, unlike foreign countries, India does not have an efficient institutional support system for adoptive parents and children to guide them through the process. Moreover, children with special needs are usually not treated with compassion and empathy in foster homes and ultimately find it even more challenging to adjust to adoptive families.

The CARINGS system lists 'hard to place'<sup>4</sup> children under the 'immediate placement' category to help PAPs bypass long waiting times if they are comfortable adopting from the list. Without effective counselling, parents and children are psychologically unprepared, which can be a reason why disruptions are rising. Noting this, Lorraine Campos, assistant director of Palna, one of the oldest adoption homes in Delhi, says that while the CARINGS system may have streamlined the adoption process, it has also taken the compassion out of the process (Khan 2019).



Source: Bagchi (2019)

<sup>4</sup> 'Hard to place' is an ambiguously defined category of children. The label constitutes children who have been returned, are older than five years, or are differently-abled.

### **c) Disability and Adoption**

In January 2020, CARA held a national consensus to discuss the possibility of improving and streamlining the adoption process. Among other points of discussion, CARA stated that the institution prepared a classification of children with special needs, spanning fourteen sub-categories. The categorisation would enable PAPs to understand the children's needs better and enhance their chances of adoption (Pandit 2020a). The need for such categorisation arose due to the falling numbers of adoption of children with special needs. According to the latest available data shared by CARA, only 40 children with disabilities were adopted between 2018 and 2019, accounting for approximately 1% of the total number of children adopted in the year (Ministry of Women and Child Development 2020). Annual trends reveal that domestic adoptions of children with special needs are dwindling with each passing year. At the same time, foreigners adopting children with special needs is steadily rising. According to Kumar, Indian PAPs, faced with a long waiting period for a 'healthy' baby, end up adopting children with disabilities as a last resort (Chandra 2018). The cultural aversion towards children with special needs results in most of them being referred to overseas PAPs. This scenario puts the children at the risk of being permanently shifted to another country, making them more vulnerable than before.

### **d) Manufactured Orphans and Child Trafficking**

In 2018, Ranchi's Mother Teresa's Missionaries of Charity came under fire for its "baby-selling racket" after a nun from the shelter confessed to selling four children (Press Trust of India 2018). Similar instances are becoming increasingly common as the pool of children available for adoption shrinks and waitlisted parents grow restless. According to CARA's chief, Deepak Kumar, traffickers try to get hold of babies before parents—often unwed mothers—make it to government departments to surrender the child. These rackets usually source children from poor or marginalised families, and unwed women coaxed or misled into submitting their children to trafficking organisations. The organisations then create legal paperwork which makes the 'orphaned' child available for the market. Such children are referred to as "manufactured orphans" or "paper orphans" (Yeh, Ng, and Prasanna 2020). Prospective parents, tired of the excruciating wait, pay lakhs of rupees for the manufactured orphans. In 2016, police forces shut two agencies in Maharashtra for selling babies for anywhere between INR 2,00,000 and 6,00,000 (Srivastava 2016). Without strict adoption regulation and CCIs, child trafficking continues to thrive in the underbelly of the Indian adoption machinery.

### **e) LGBTQ+ Parenthood and Reproductive Autonomy**

Despite the constant evolution of the definition of a family, the 'ideal' Indian family nucleus still constitutes a husband, a wife, and daughter(s) and son(s). In February 2021, while addressing petitions seeking the legal recognition of LGBTQI+ marriages, the Union government opined that LGBTQI+ relationships could not be compared to the "Indian family unit concept" of a husband, wife, and children. Further, the government argued that "In our country, despite statutory recognition of the relationship of marriage between a biological man and a biological woman, marriage necessarily depends upon age-old customs...societal values." (Mandhani 2021).

The invalidity of LGBTQI+ marriages and relationships in the eyes of the law obstructs LGBTQI+ persons from becoming parents because the minimum eligibility for a couple to adopt a child is the proof of their marriage. To negotiate these unfavourable legalities, illegal adoptions are becoming increasingly common among transgender communities. In some places in Tamil Nadu, people who cannot take care of their children leave them with the transgender community (Muringatheri 2000). Moreover, provisions under the Surrogacy (Regulation) Bill of 2020 and Assisted Reproductive Technology (Regulation) Bill of 2020 completely exclude LGBTQI+ families, stripping them of their reproductive autonomy. Therefore, the journey for most PAPs belonging to the LGBTQI+ community ends before it can even begin.

## CONCLUSION

During the pandemic, social media was flooded with unwarranted sharing of pictures and contact details to facilitate the adoption of COVID orphans, particularly children from low-income families. Such acts placed COVID orphans outside the legal ambit of safe institutional care and consequently diminished the prospects of legal adoption, potentially exposing them to illegal flesh trade, human trafficking rackets, and forced labour. In this context, Indian policymakers need to have a conversation around the otherwise neglected topic of not just COVID orphans but adoption in India as a whole.

As discussed above, several different legislations protect children in India, but their lax implementation in addition with delays in addressing problems leads to institutional inefficiency. Despite the introduction of the CARINGS system, tensions within pre-existing legislation remain unresolved. Moreover, socio-cultural complexities and the lack of a socio-legal framework continue to inform adoption practices in the country that lead to unfavourable realities for children whose welfare is categorically de-prioritised. This is especially true for children who were surrendered, abandoned, or unlawfully trafficked. Along with the need to strengthen the institutional mandates, the adoption ecosystem needs to transition from a parent-centric perspective to a child-centric approach. Within the existing policy framework and the everyday dialogue, adoption is perceived as a means to fulfil the need for parents to build a family transcending the biological norms of kinship, as per the needs and requirements of the parents (Kumar 2013). As a result, the child's perspective and interests are excluded from the adoption process. On the contrary, there is a need to adopt an inclusive approach that focuses on the needs of a child to create an environment of acceptance, growth, and well being, thus recognising children as equal stakeholders in the adoption process.



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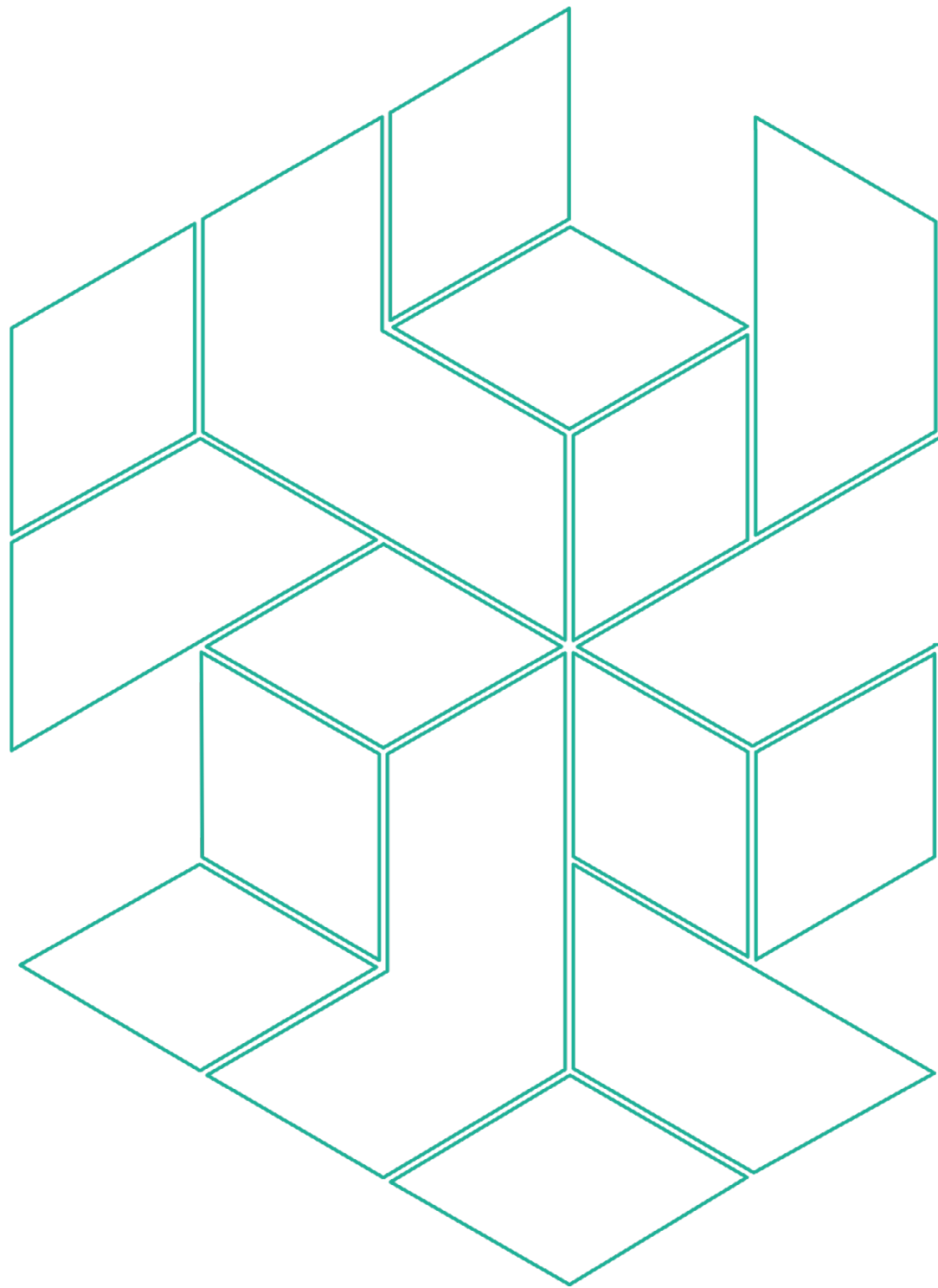
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