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ANALYSIS OF INTER COUNTRY ADOPTION LAWS IN INDIA

By: Nayana J M

ABSTRACT

The practice of adoption has been prevalent in various prehistoric societies since ancient times. The primary intentions of adoption have usually been having a child for its affection, having a child for social security, protecting children who have nobody to care for them. This practice has been present in India in various religious forms too. Inter country adoption, as a concept, has also been existent for a very long time to fulfill these same concerns. Over the years, after the world witnessed certain gruesome acts over war and destruction, and when a lot of children were not taken care of in certain parts of the world, some developed countries increased the trend of inter country adoption and the practice has been growing ever since. This paper will analyze the growth of the practice of inter country adoption, the growth of laws which regulate it at an international level; and how, at the domestic level, India, which is relatively new to the practice, has inculcated and implemented these laws over the decades.

KEYWORDS

Adoption, inter country, child, international laws, India, CRC, Hague Convention

I. HISTORY OF INTER COUNTRY ADOPTION

The concept of adoption between different countries gained momentum in the 1940s, as a part of humanitarian action, after the heinous events of Second World War, the Vietnam War and the Korean War. This was the time when a lot of young children of servicemen had lost their parents and had no one to look after them. The idea of having adoptions taking place between different countries was popularized because of the unique economic benefits that it gave, such as limitations posed by domestic adoption opportunities were overcome, fertility associated with stalling marriages increased along with its success rates, high cost of infertility treatment was avoided and due to this childless couples across the globe were attracted to this alternative.

With the advent of this growing practice of inter-country adoption in the global community due to the major receiving countries such as the United States, Canada, Europe, etc., various international treaties and conventions came up. This is majorly dealt by the Convention on the Rights of the Child, 1989, the Hague Convention on the Protection of Children and Co-operation, 1993 and the revised CARA

Guidelines, 2017. The first ever statute specifically on the subject of adoption of children, as unanimously agreed by most countries, is the Massachusetts Adoption of Children Act, 1851.¹

II. WHAT IS INTER COUNTRY ADOPTION

Inter country adoption is essentially a process where “one can adopt a child from a country other than his own through permanent legal means, and bring that particular child to one’s own country of residence to live with himself permanently.”² This process is similar to domestic adoption in the way that both of them consist legal transfer of parental rights from the child’s biological parents to the new parents or guardians.

In the landmark case of *Lakshmi Kant Pandey v Union of India, 1984*³, the Supreme Court emphasized on the importance of “every child’s right to love and to be loved”. The court said that an atmosphere of love and security is imperative. In instances where children cannot be taken care of by their biological parents, for the purpose of security of the child, adoption will be ideal. The court passed the verdict stating: “When the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country...If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socio-economic conditions prevailing in the country, it might have to lead the life of a destitute, half-clad, half-hungry and suffering from malnutrition and illness.”⁴ In this case the court laid down detailed norms to be followed for overseas adoption of children.

III. INTERNATIONAL LEGISLATIONS

The basic rules governing the subject matter of adoption of children is set by the **United Nations Convention on the Rights of the Child (UNCRC)**. CRC was signed in 1989 as an international human rights treaty that oversaw the political, economic, cultural, civil and health concerns of children across the globe.⁵ The Convention has 196 parties to it along with about 40 ratifications and these are bound by international law.⁶ Article 1 of the Convention states that “every human being below the age of eighteen

¹ Sokoloff, Burton Z. “Antecedents of American Adoption”, The Future of Children, Vol. 3, No. 1, 1993

² Inter-country Adoption, Bureau of Consular Affairs, United States

³ Lakshmi Kant Pandey v Union of India, AIR 1984 SC 469

⁴ Dr. Subhash Chandra Singh, “Adoption Law in India: Need for a Fresh Look”, Central India Law Quarterly (Vol. 15, 2002)

⁵ Convention on the Rights of the Child, United Nations Commission on Human Rights, 7 March 1990, E/CN.4/RES/1990/74

⁶ *How the Convention on the Rights of the Child Works*, UNICEF, <https://www.unicef.org/child-rights-convention/how-convention-works>

years unless under the law applicable to the child, majority is attained earlier”.⁷ Inter country adoption is specifically standardized by the **Hague Convention on the Protection of Children and Co-operation in Respect of Inter Country Adoption** or the **Hague Adoption Convention**. The Convention has about 101 ratified countries and focuses primarily on issues of international adoption, child trafficking, child laundering, child abduction, etc., and aims to protect children involved in abuse and exploitation.⁸

The traditional methods of these international treaties and conventions had to take an updated approach towards the 20th century on account of increasing abuses and exploitation related to adoption of children which were being reported in various countries especially Romania, where women believed in loaning children to others; and other places which reported “baby trafficking” such as Peru, Paraguay, Brazil, Colombia, Sri Lanka and Honduras⁹; and the scandal which took place in India in Andhra Pradesh.¹⁰

III.1. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

The CRC is globally accepted and implemented into legislations of various democracies. Article 21 of the Convention states that it must be “ensured that the child concerned in inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.”¹¹ The primary emphasis that the convention places is on the pertinence and the role that the parents and family has to play as every child’s primary caregivers. It urges on the states to take up the responsibility of guiding the parents and guardians when they face obstacles in accomplishing their responsibilities. Even when all such efforts are put in by the State and the guardians, if the child ends up being “deprived of his or her family environment” and as a result of that, cannot further grow in the same environment in consideration of the child’s best interests, it becomes the responsibility of the State to operatively “ensure alternative care for the child”.¹²

The **Committee on The Rights of The Child** is an expert group which is in charge of monitoring and reporting on the implementation of the activities of the United Nations Convention on Rights of The Child.¹³ It is one of the most important human rights treaty based bodies in the United Nations.¹⁴ The

⁷ Article 1 on The Convention on the Rights of the Child, Website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations, 20 November 1989

⁸ Preamble, Hague Convention on Private International Law, Hague Convention on the Protection of Child and Co-operation in Respect of Intercountry Adoption, 29 May 1993

⁹ *Regulation of Inter Country Adoption: Can The Abuses Come To An End?* By Jorge L. Carro, 18 HASTINGS INT’L AND COMP. L. REV. 121, 144 (1994)

¹⁰ *The Two Faces of Inter Country Adoption: The Significance of Indian Adoption Scandals*, Seton Hall Law Review Thirty-Five, Number Two, (2005): 403-493

¹¹ Article 21 on The Convention On The Rights Of The Child, Website Of The Office Of The United States High Commissioner For Human Rights OHCHR, United Nations, 20 November 1989

¹² Article 20 The Convention On The Rights Of The Child, Website Of The Office Of The United States High Commissioner For Human Rights OHCHR, United Nations, 20 November 1989

¹³ United Nations Convention On the Rights of The Child, New York: United Nations Treaty Collection, 1989

committee has been continuously expressing its concerns over the intercountry adoption standards violations that many countries have been witnessing and has strongly been recommending in all of its reports to urge all the nations following through inter-country adoption to ratify the Hague Convention of 1993, which would prove to be a productivity of addressing the problems.

III.2. THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The **Hague Adoption Convention** is extremely vital because of the International an inter-governmental recognition that it provides to intercountry adoption, thereby ensuring that such adoption in itself has legitimate recognition in all the party nations. The Preamble of the Convention states *“Intercountry adoptions shall be made in the best interests of the child and with respect for his or her fundamental rights and to prevent the abduction, the sale of, or traffic in children and each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.”*¹⁵

The Hague Convention has two fundamental unequivocal objectives aimed at protecting children from illegal practices with respect to intercountry adoption, which are:

- *“to establish safeguards to ensure that inter-country adoption takes place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law”;*
- *“to establish a system of cooperation among Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”*¹⁶

The Hague Convention indispensably furthers the treaty for the CRC, exclusively for intercountry adoption and aids its implementation. It acts as a private law instrument, thereby putting in place procedures, mechanisms and guarantees that support the compliance of the State and their obligations under the relevant provisions of the CRC. The Hague Convention has established systemized co-operation where every party nation has a “Central Authority” which is responsible for overseeing adoptions related to its country and serving as the pivot point on intercountry adoption issues along with its counterparts in

¹⁴ OHCHR, Human Rights Bodies, www.ohchr.org

¹⁵ Preamble, Convention on the Protection of Child and Co-operation in Respect of Intercountry Adoption, Website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations, 20 November 1989

¹⁶ Preamble and Article 1 of the Convention on the Protection of Child and Co-operation in Respect of Intercountry Adoption, Website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations, 20 November 1989

various other states.

The Hague Convention emphasises on the “subsidiarity principle” and its concrete application where it sets out procedures based on the premise that a child can be given the opportunity for intercountry adoption only if “*the child is adoptable*”¹⁷ and “*it is determined that possibilities for placement of the child within the state of origin have been given due consideration*”¹⁸ as stated under Article 4 of the Hague Convention. The convention also necessitates the determination of fitness of the children, prohibition of non-regulated adoptions, commitment to ensuring free and informed consent for adoption without any inducement of the children and the prospective adoptive parents through the Central Authority or any other accredited agency.

There are various other international treaties and conventions which have regulations on the protection of rights of children including **Holt International Children’s Services, European Convention on the Adoption of Children, 1967, Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, 1984, European Convention on the Exercise of Children’s Rights (ECECR), 1996**, and many others.

IV. ADOPTION LAWS IN INDIA

Like most significant prehistoric societies across the world, the custom of adoption dates back to ancient times in India. The intentions for adoption have varied over centuries from having a humanitarian motive of caring for a destitute child, to needing a caretaker in old-age, to having an heir on one’s property after the death, and to a mere your natural desire for having a kid for affection.¹⁹ However, the laws governing adoption aren’t uniform for all the country’s citizens and instead are governed by personal laws with the respect to the various thriving religions in the country. It is considered as a sacred act according to cultural practices. The Hindus in the country have laws for adoption in the **Hindu Adoption and Maintenance Act, 1956 (HAMA Act)**; and Muslims, Parsis and Christians are governed by the **Guardians and Wards Act, 1890** for the purpose of adoption. In Indian legislations, citizens who are Hindus, Jains, Sikhs, or Buddhists have the right to legally adopt a child. However adoption in itself is not allowed in religions of Christianity, Islam, Judaism and Parsis in India, which is why they take resort to guardianship of a child through the Guardians and Wards Act, 1890.

Adoption is defined under Section 2 (aa) the **Juvenile Justice (Care and Protection of Children)**

¹⁷ Article 4 (a) of The Hague Convention On Protection Of Children And Co-Operation In Respect Of Intercountry Adoption

¹⁸ Article 4 (b) of The Hague Convention On Protection Of Children And Co-Operation In Respect Of Intercountry Adoption

¹⁹ Kusum, *Family Law Lectures – Family Law I*, Lexis Nexis Butterworths, Wadhwa, Nagpur (2nd edn., 2008)

Amendment Act, 2006, as “*the process through which the adopted child is permanently separated from his biological parent and becomes the legitimate child of his adoptive parents with all right, privileges and responsibility that are attached to the relationship*”.²⁰ As per the international obligations of all Hague Convention member countries, the Act guarantees rights to an adopted children. The Amendment in the Act recognized “legitimate child of his adoptive parents, with the rights, privileges and responsibilities attached to the relationship”. Furthermore, by virtue of Rule 33 (2) of the Guidelines published by Notification dated 24.6.2011 state that Section 41 (3) of the Juvenile Justice Act would regulate all matters relating to inter country adoptions, which were made in exercise of power under Section 68 of Juvenile Justice Act.

V. UNIFORM CIVIL CODE FOR ADOPTION IN INDIA

Implementing a uniform civil code in India has a subject of heated discussions for decades in the Indian legislative platforms. It is argued that since laws relating crimes and punishment, laws relating to contracts, and laws relating to trade and commerce are uniform to all the citizens, there must be uniform and standard laws legislative for governing personal and family matters too. This would ensure equal treatment to all the citizens, reduced confusion in dealing with adoptions among multiple religious practices and laws, more emotional stability to the adoptive parents and the adopted child, reduced fear of legal insecurity among non Hindus.²¹

Since India is a signatory to the CRC, it becomes imperative that it ensures uniformity in the rights of adoptive children for their enhancement and protection. Furthermore, it a directive principle of state policy to bring about uniformity in the laws in India. Having a uniform civil code will not violate the fundamental right to religion, as claimed by various parties arguing against the premise. Introducing a civil code will ensure equality among Hindus and non Hindus and further, eradicate gender bias among who can adopt and who be adopted.²²

VI. INTER COUNTRY ADOPTION IN INDIA

The debate of validity of inter country adoption was, for the first time, raised in the case of *In Re Rasiklal Chhaganlal Mehta, 1982*, where the court held that under Section 9 (4) of the Hindu Adoptions and Maintenance Act, 1956, adoption was to be considered to be considered legally valid as per the laws of the both the countries involved.²³ The adoptive parents must ensure that the child does not face immigration issues, by adhering to the requirements of adoption in their native country.

²⁰ Section 2 (aa) of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006

²¹ Parashar, A., 1992. *Women and family law reform in India: Uniform civil code and gender equality*, SAGE Publications Pvt. Limited.

²² Sharma and Sharda Girijesh. "Uniform Civil Code and Adoption Laws in India."- *Islamic Law and Law of the Muslim World Paper*, 08-41 (2008)

²³ In Re Rasiklal Chhaganlal Mehta, AIR 1982 Guj. 193

Following this, in *Laxmi Kant Pandey v. Union of India, 1984*, the Supreme Court set up guidelines for governing intercountry adoptions, and based on its recommendations, set up a regulatory body called the **Central Adoption Resource Agency (CARA)** in the year 1989. In the case of *Mr Craig Allen Coastes v State Through Indian Council for Child Welfare and Welfare Home for Children, 2009*, the court established that in a situation where the adoptive parents cannot establish a genuine motive for adopting a child from a different country, the entire production process would become invalid and further be declared as mala fide and instructed CARA to ensure stricter guidelines in this regard.²⁴

After the Bombay High Court judgement in *Varsha Sanjay Shinde and Another v Society of Friends of the Sassoon Hospital and Others, 2013*,²⁵ the Supreme Court set up detailed guidelines for in country and inter country adoptions, which were to be read and applied in consonance with the Guidelines of 2011, which dealt with all concerned agencies such as RTA, Specialised Adoption Agencies, SARA, ARC, AFAA, etc.

VII. CENTRAL ADOPTION RESOURCE AUTHORITY (CARA)

CARA is an autonomous body set up under the **Ministry of Women and Child Development, Government of India** which looks after in country and inter country adoptions. The guidelines set by CARA necessitate on certain aspects which encourage in country adoption rather than intercountry adoption, and that the latter is only to be taken as a resource when a child cannot find any suitable home in the native country. As per these guidelines, all the **Child Care Institutions** within the nation must be registered under Section 34 (3) of the Juvenile Justice Amendment Act, 2006.²⁶ The kara guidelines provide instructions on what types of children can be considered as adoptable, which include orphans abandoned children and surrendered children.

The CARA guidelines deal with certain pertinent problems caused by intercountry adoptions such as trafficking in the guise of transnational adoption, post adoption negligence, post adoption domestic succession, post adoption identity crisis, et cetera. Although these guidelines are coherent and in detail, what the lacking is having the force of law. These guidelines mention nothing about any penal actions against people who violate these laws, therefore, many unrecognised adoption agencies and child trafficking agencies find loopholes and find an easy way out. These guidelines also do not necessitate regular checks at adoption agencies, which lead to further problems. Due to such fallacies in implementation, the CARA Guidelines do not get recognized to be very efficient.

²⁴ Mr Craig Allen Coastes v State Through Indian Council for Child Welfare and Welfare Home for Children, 162 (2009) DLT 605

²⁵ Varsha Sanjay Shinde and Another v Society of Friends of the Sassoon Hospital and Others, Writ Petition no. 9227 of 2013 Decided on 18th October, 2013

²⁶ Section 34 (3) of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006

VIII. POTENTIAL SOLUTIONS TO THE EXISTING PROBLEMS

In order to handle the existing problems in inter country adoption laws within India, certain changes can be made in the CARA guidelines. The guidelines must include necessary awareness programmes being arranged for poor needy women who wish to give the child up for adoption. The licensing procedures present for adoption agency must be made more stringent. In case of non-compliance or violation of the regulations, penal sanctions must be included within the law. There must be laws which state that once an inter country adoption takes place, the child must receive the nationality of their adoptive parents, in order to avoid the risk of identity crisis. The guidelines must implement a vigilant approach in case of emergency situations to prevent possible exploitation of international obligations and ensure its compliance at all times. There must be laws included when non-Hague Convention countries would be encouraged to ratify the convention. At all times, it must be made mandatory, to check the bilateral relationship of India with the country which it would be entering into an adoption case.

IX. CONCLUSION

International conventions and treaties have come up over a long time to address pertinent issues in the subject matter of adoption, and in the course of the same, they have set standards and safeguards which are essentially directed towards determining the adaptability of children in the healthy way, considering inter country adoption only for the right reasons, making sure that every child being adopted does not suffer or be abused, and to ensure that the process of adoption is carried out in a safe and legal manner. Most countries across the globe, and India, have come to understand that in certain cases transnational adoption may become the optimum solution for orphan children to start fresh lives in different countries. However, it must also be understood that in situations where the domicile country lacks proper legislation, violations of the rights of these children are bound to take place. Therefore, India too, like various other countries, immediately needs to make better laws and guidelines for intercountry adoption. Therefore it is pertinent to introduce a uniform and stringent procedure which can be implemented in the nation, making the process of intercountry adoption easier and upholding the human spirit. At the same time, it must be appreciated that Indian judiciary and courts are taking slow and steady steps towards eliminating legal policies, reducing emotional stress for the children and the parents, and achieving these goals as set by international legislations.

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