

INTERCOUNTRY ADOPTION AND THE OTHER SIDE OF THE COIN

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INTRODUCTION

Adoption is an act of taking another's child into his own family and giving him/her all the rights and duties as his child.^[1] The concept of adoption was never novel or unknown in India, the Indian mythology has set out several instances that indicate that Indians are accustomed to the concept of adoption. To take a reference, in the famous epic of Ramayana, Sita the daughter of King Janak was an adopted child. King Janak and his wife Sunaina found Sita in a furrow by the field, being a childless couple both King Janak and his wife brought Sita home as their daughter and raised her very gracefully. Similarly, Rama's sister and daughter of King Dashrath and Kaushalya were given for adoption Romapad of Anga and his wife Vashini who was also the sister of Queen Kaushalya. Once again, another character from the epic of Mahabharata i.e Kunti was an adopted child of her parents. It is said that princess Kunti was given away by her father Sursen to his childless friend Kuntibhoj who renamed her as Kunti (before that her name was Prutha). We are all well aware that Lord Krishna is better known more as Yashodanandan by the name of his foster mother Yashoda than his biological mother Devki. The illustrations could go on and one can get convinced that for ages the process of adoption is prevalent and is used to give a homeless child home and family and alternatively gives a childless family a child. Thus, the process of adoption since ancient times is used to balance the physical and psychological family environment and to the desirous parents' chances to become parents and experience family growth.

Though the prevalence of the concept of adoption is ancient, however, the concept of inter-country adoption is relatively new. Adoption is overall a lengthy and patience consuming procedure and involves various issues such as the family of the adoptive parents, the internal relationship of such parents, the fairness in their purpose, religion, a caste which altogether puts forth the major issue i.e. the compatibility of the child with their adoptive parents and specifically in case of intercountry adoption the process becomes even more complicated as well as fragile at the same time. This compatibility is not only about physical or economic but also about the mental health of both adoptive parents as well as the child to be adopted. Not only is this, but there are also other innumerable criteria and compliances about age, gender, etc. of the child to be adopted which needs a lot of due diligence. Thus, the situation becomes tougher when it comes to inter-country adoption. Moreover, issues such as Transracial issues and conflict of laws make the process not only lengthy but also complicated. As a Supplementary to aforesaid, India does not have uniform and concrete legislation to govern the process of inter-country adoption and due to the absence of any firm law, such adoptions are governed by the Rules and Regulations as amended periodically.

ORIGINATION OF INTER-COUNTRY ADOPTION

The concept of inter-country adoption emerged after the cold war era and came as an ad hoc. The poor countries of the world have long access of children for whom they cannot have adequate care as a result children are fated to grow up as an orphan in orphanages or are detained to remain and grow up on streets without proper food and shelter. The rich countries had always had access to infertile adults who want to parent relatively homeless children. Despite the scenario, there was virtually no match of the children with these adults until the Second World War. The war left the predictable deaths and devastations and the plight of parentless children in the vanquished countries visible to the world at the time when adoption was beginning to seem like a more viable option to childless adults in more privileged countries who were interested in parenting. The concept gained recognition in the last half of the 20th century, however, the numbers and patterns along with the attitude of the adoptive pattern have changed over the years which are mainly due to response to the changing political attitudes of

both sending and receiving countries. In the following years' political attitude can make international adoption unacceptable as a method addressing children's needs regardless of the extent of those needs and the extent of social crisisⁱⁱ.

LAWS IN INDIA GOVERNING ADOPTIONS

In India Adoptions are governed mostly under these three laws:

- a. The Hindu Adoption and Maintenance Act 1956
- b. Guardians and Wards Act of 1867
- c. Juvenile Justice Act of 2005

As stated earlier there are no specific or uniform laws governing adoptions in India, specifically, when it comes to Inter-country adoptions, we lack a unified legal framework. India being a diversified and secular nation witnesses the existence of multiple religions each having its laws. When it comes to family matters or domestic issues each religion has its theories and laws derived from their personal laws. For instance, Hindu Personal Laws are derived from Vedas, Smritis, Shrutis etc while the Muslim laws are derived from Shariat's, Quran etc. whereas personal laws in the case of Christians are derived from their sources of religious customs and traditions as specified in the Bible. Similarly, every religion has its laws which somewhere make a uniform contention that the rules of law are the words of God and are confirmed by the superhuman beings who have extreme wisdom and strength or have enjoyed the guidance of equivalent quality. Though the customs and personal laws are occasionally challenged, yet these laws exist in harmony and in consensus with the constitutional provisions which states that the state has no religion and that all the religions must be respected equallyⁱⁱⁱ and are followed in its practical sense especially in the matters of family and marriages. Personal laws are also applicable in the case of adoptions as there are no uniform regulations regarding the same. Adoptions in Hindu are specifically governed under the Hindu Adoption and Maintenance Act 1956 which broadly answers the questions such as, who may take and adopt. Who may give an adoption? Who may be given in adoption? The greatest setback of this Act is that it only regulates the adoptions in the case of Hindus and is applicable only for Hindus; the act is silent on inter-country adoptions and does not cover adoptions under other

religions. Similarly, the Juvenile Justice Act 2005 provides for the protection and adoption of abandoned children but does not contain any particular provisions regarding inter-country adoptions. The Guardian and Wards Act 1890 specifies whenever a prospective foreign adoption parent is required to apply being appointed as guardian of the child^{iv} before district court^v which will pass the order prayed for it if satisfied that the order is for the welfare of the minor^{vi}, however, the act applies to the religions other than Hindu and there is no specific mention in the act about the extent to which the provisions of the act^{vii} are applicable. Thus, the struggle due to lack of proper laws and uniform provision continues as the discrepancies involved are many.

ROLE OF INTERNATIONAL CONVENTIONS

A child temporarily or permanently deprived of his or her family environment or in where own best interest cannot be allowed to remain in that environment and is entitled to special protection and assistance provided by the state^{viii}. The convention of UNCRC also states that children have the right to care and protection if they are adopted or are in foster care, the first concern must be for their well-being and the same rules should apply whether they are adopted in the country where they were born, or if they are taken to live in another country^{ix}. The Convention protects the children against their families and safeguards them from the risks of illegal and immoral adoptions or such adoptions that are done against the will of the children. The convention has laid down two principles^x: a) Establishing safeguard to ensure that transnational adoption is in the best interest of the child b) To establish a system of co-operation between the contracting states to ensure that the safeguards are respected another subsidiary principle which states that transnational adoption can be adopted only when the safety of the child cannot be ensured, but first of all place, parent of the child within the country of origin must be given the primary consideration^{xi}. The Convention has emphasized the Central Authority of the respective nations to ensure that the child is matured enough and of a proper age to be adopted and that the child shall be informed about the adoption and its consequences, further, the convention also states that the child should be introduced well to his adoptive parents and the consent of the child must be taken (giving proper weight to the opinion to and

wishes of the child) care is also taken concerning the mental health of the child as same should remain protected throughout the process and that there should not be the presence of any force or coercion or inducement. Privacy of the child and his origin and his other personal and private details which ought to be considered as sensitive and application is one of the sensitive issues which need to be taken care of and protected to prevent any further complications. Thus, the Convention also states that privacy must be maintained about the child's origin, his or her medical history, and the information about the real parents of the child^{xii}. The United Nations Conventions on Rights of the Child also seeks to ensure that Inter-Country Adoptions should be made in the best interest of the child and with respect for his or her fundamental rights^{xiii}. As per this convention, the rights of the child while in care of his or her parents are safeguarded, only when such care and the rights of the child is found not protected within their boundaries is at that time the option of adoption must be exercised.

Apart from the Convention on Child Rights and the Hague Convention, several other international instruments protect the rights of the child in cases of international adoption. Some of these are the European Convention on Adoption of Children, 1967, Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, 1984, and the European Convention on the Exercise of Children's Rights (ECECR).

EFFECT OF LANDMARK JUDGMENT PASSED BY THE INDIAN SUPREME COURT

In the absence of any legislation, the Supreme Court of India has played a pivotal role in regulating the adoption of tendered age children to foreign parents. In, 1984 Shri Lakshimikant Pandey through public interest litigation^{xiv} challenged the genuineness based upon a news item published in a British Newspaper highlighting the sale of babies in West Bengal wherein it was found that being the procedural part correct in international adoption, the intention behind the act was money. The Supreme Court examined the procedure then being followed and also examined the guidelines given by the Hon'ble Delhi High Court and the Hon'ble Bombay High Court. Apart from this the Supreme Court also issued directions to the placement agency not

to receive an amount from foreign parties over what will be fixed by the district court, such amount shall not exceed the expenses as incurred by the placement agency. In furtherance of the same, the Supreme Court also examined the Adoption of Children Bills 1972 and 1980 concerning those provisions which were for the inter-country adoptions and that what norms or precautions government has taken to protect the interest and safety of children? In further view and after considering the provisions under Indian Constitution and Indian National Policy on Children (1974), the apex court also referred to the international conventions, declarations, and draft guidelines and revised the guidelines for the adoption in 1995 which are in force as of now. Accordingly, the revised guidelines are based on the three principles which are as under:

- a. Adoption is the best institutional support for the rehabilitation of children^{xv}.
- b. The child develops best in his/her cultural and social milieu. Thus, the placement of a child through adoption is an indigenous setting would be ideal for his/her growth and development. Inter-country adoptions should thereafter resort to only when all efforts to place the child with adoptive parents residing in India unsuccessful^{xvi}.
- c. In matters assuming adoption whether within the country or abroad, the welfare and interest of the child shall be paramount^{xvii}.

The revised guidelines also provide for the setting up of an institution to promote and regulate inter-country adoptions with various checks and balances. Such an institution would be responsible for regulating the inter-country adoptions and the regulation will provide for abandoned and surrendered children who can be given in an inter-country adoption under court orders^{xviii}. Such children should be the ones found only in institutions and welfare agencies and nowhere else. In case of any children found abandoned on street or at a place other than such agencies or institutions then the same shall be taken immediately to such agencies and institutions and they shall be admitted with them only after which they can be given for adoption. Such agencies are called placement agencies (P.A) and shall be registered with Central Adoption Resource Agency (CARA)^{xix}.

ROLE OF CENTRAL ADOPTION RESOURCE AGENCY (CARA)

CARA the name itself suggests is the centralized agency that is part of the Ministry of Welfare, Government of India looking after all aspects of adoption. All the agencies that are responsible for examining the all-important procedural aspect of an inter-country adoption are called Scrutinizing Agencies (S.A), such agencies are registered agencies under CARA. The guidelines^{xx} lay down criteria for the composition and duties of such agencies. Adoption by a foreign parent can take place only on an application by such parent being processed and forwarded by a foreign sponsor social child and welfare agency recognized as such in its own country and listed by CARA for inter-country adoptions in India.

The revised guidelines lay down detailed criteria and modalities for recognition and de-recognition by CARA of all Indian agencies and listing and de-listing of foreign sponsoring agencies. The Supreme Court in this regard has also laid down that every application from foreigner/ NRI/ PIO (as applicable) deserving to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the Government Department of Foreign government to sponsor such cases in the country in which the foreigner is resident. The foreign agency should also be an “authorized” agency in India^{xxi}.

Despite the Government putting immense efforts to regulate and channelize the intercountry adoptions, yet there are malpractices, kidnapping, and corruption under the umbrella of adoption continues and circumferences the system in such a way that the entire regulatory procedure becomes paralyzed. In the year 2018, a survey was carried out jointly by SAA(Specialised Adoption Agencies), WCD (Women and Child Development), and the Central Adoption Resource Authority (CARA) upon which few glaring irregularities were discovered in the process which also included premature deaths of children and unhygienic in their care centers. The survey was carried out based upon the complaints against such SAA who were found to be out of the required standards. Complaints were also received against such SAA by CARA and after further investigations, it was found that such SAAs are not even registered with CARA and are running illegally. The registration of such agencies has been held mandatory under the Juvenile Justice Care and Protection of Children Act, 2005. The children are not taken care of by the care centre and the realities are far more bitter than what come into

the light. There were also various instances wherein the children suffer abuse and hardships from their adoptive parents who have settled abroad or are foreign nationals. As far as intercountry adoptions are concerned there is high demand by developed countries from the developing countries for the adoption of children which paves the way for the creation of a "black market". The poor who could not afford to raise children is contacted by the agencies mostly by those agencies which are unregistered and are run illegally, the poor get attracted by the huge amounts paid by the adoptive parents of such rich and developed countries. Apart from frauds and mismanagement in the procedure, various social hurdles become a big question. The adoptive parents often have choices about race, gender, etc. which sometimes becomes a major issue as the agencies find it extremely difficult to match these choices. CARA has started the application process online however, that has again created few technical complexities taking the rate of adoption downwards. Previously, a prospective parent could visit an Agency or an authorized agent for adoption, this process was regulated by individual states. However, in 2016 to speed up the tedious procedure and to reduce the delay to a certain extent, and also to make the process more transparent, the entire adoption process was made online and was brought under the preview of CARA.^{xxii} The child selection process has become easy as adoptive parents can select a child by sitting at their place and without visiting the agencies. Though this feature is time-saving yet the main drawback of this feature is that the adoptive parents, unlike the earlier system, cannot interact with the child personally as meeting a child personally and interacting with them would make a difference.

The other factor that needs serious consideration is the mental health of the parents, their relationship as husband and wife, and their stability of marriage. These factors affect the mental health of any child irrespective of being adopted or not and would have a lasting effect on the minds of the children. The basic objective of adoption is the welfare of the child if that is not offered by the present guardians then the same can be secured from the adoptive parents.

In the year 1984, during a press conference held after the 1984 Supreme Court judgment, Adi Patel from *Tere des Hommes India* stated "laws can be made and broken, but the implementation of the laws by the Government requires public pressure to make them effective."^{xxiii}

In most cases when children are taken away from their families and given for adoption, they end up being better than they were before. So, should we consider that adoption is the only better option and the feelings and emotions of the parents and family of such children should be ignored? The answer is difficult as this would mean believing only one side of the picture while ignoring the other. Awareness of such issues from the grass-root level is very significant. As stated above, there cannot be a second thought that the government and CARA has played a major role and continues to fine-tune the adoption system and may update and modify the guidelines as and when needful. However, the fact cannot be ignored that agencies are still indulged in the malpractices while formally remaining inside the framework. For instance, in Andhra Pradesh, it was found out that payments were directly made to the birth families when gone through agencies. After thorough investigation and findings of involvement of grass root level, interlocutory adoptions from Andhra Pradesh were stopped. This is just one example out of many, there are various other examples in various parts of the country, and even though intercountry adoptions are permitted in that part unlike Andhra Pradesh the situation is far from being smooth and safe.

The formation of various agencies, making various regulations for regulating intercountry adoption might not be helpful completely. Such regulations and rules sourced after validation from such authorized agencies create a binding effect on parents and leaves them powerless and without support to most of their parents are from the extremely poor section of the society. The need is not for being more strict rules or making the process stricter but to create awareness. This awareness should be from the grass-root level in sending countries. The agencies must try to make the foundation strong by appointing such agencies who can trace out the roots of the child given for adoption and check the veracity of such adoptions. The Agencies should also form such authorities or delegations which can check the origin of the child and can help to send such children back to their families who are victims of the malpractices committed by agencies that are not registered and run illegally. Another important aspect is the strong documentation and scrutiny of such documentations which would put a check on the corruption in the process. Lastly, uniformity of regulations in case of inter-country adoption, the agency must function under such legislation which will be uniform and shall not be diverse. This will help in regulating the inter-country adoption more uniformly and clearly. After all,

the exercise of adoption is to secure the safe and better future of the child either by birth parents or by adoptive parents and nothing else can be held primary.

ENDNOTES

^{i[1]}Black Law Dictionary

ⁱⁱ Elizabeth Barthelot, International Adoption: Thoughts on Human Rights Issues, 13 BHRLR available at http://www.law.harvard.edu/faculty/barthelet/PUB_BUF_IA_2007.pdf.

ⁱⁱⁱ Article 14 Equality before law -The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

^{iv} Section 9 of the Guardian and Wards Act 1890

^v Section 4 of the Guardian and Wards Act 1890

^{vi} Section 7 of the Guardian and Wards Act 1890

^{vii} Supra

^{viii} Article 20, United Nations Conventions on Rights of Child, 1989.

^{ix} Hague Convention, Preamble and Article 1

^x Hague Convention, Article 4

^{xi} Hague Convention, Article 4(d)

^{xii} Hague Convention, Article 30

^{xiii} Article 21, United Nations Conventions on Rights of Child.

^{xiv} Lakhmikan Pandey vs UOI AIR 1984, 469

^{xv} Revised Guidelines, 1995 No. 1.6 (hereinafter referred to as R.G 1.6 Indicating sixth guidelines of the first chapter) at 4

^{xvi} R.G 1.6 at 5

^{xvii} Ibid

^{xviii} R.G 4.20 at 27

^{xix} R.G 5.1,5.2 at 34

^{xx} Supra

^{xxi} Central Adoption Resource Authority, Ministry of Women and Child Development, Government of India available at http://www.adoptionindia.nic.in/guide_inter_country_chap4

^{xxii} Circular dated 13.01.2016, F.No 1-65/2014-CARA issued by CARA

^{xxiii} Terre des Hommes & Indian Association for Promotion of Adoption, child's rights to family, a search for alternative strategies within the country,(1984).