

AN OVERVIEW OF INTERCOUNTRY ADOPTION WITH SPECIAL FOCUS ON INDIA

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Concept of Intercountry Adoption

According to *Black's Law Dictionary*, adoption is the act of one who takes another's child into his own family, treating him/her as his own, and giving him/her all the rights and duties of his own child. It is a juridical act creating between two persons certain relations, purely civil, of paternity and filiations. Intercountry adoption (hereinafter ICA) can be defined as adoption of a child by a person of another country.

The meaning of adoption as provided by the Central Adoption Resource Authority (CARA), reads as follows:

“Adoption” means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship.”¹

ICA, involving the transfer of children for parenting purposes from one nation to another, presents an extreme form of what is often known as “stranger” adoption, by contrast to “relative” adoption. Relative adoption refers to situations in which a stepparent adopts the child of his or her spouse, or a member of a child's extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely uncontroversial; children stay within the traditional biological family network, and the adoptive parents are generally thought of as acting

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¹ CARA, Ministry of Women and Child Development, Government of India, available at <http://adoptionindia.nic.in/index.htm>.

in a generous, caring manner by taking on the responsibility for these children.

International adoption is largely a phenomenon of the last half of the 20th century. The numbers and patterns of international adoption has changed over the years in response to the changing political attitudes of both sending and receiving countries, and the international community as a whole, and not simply to the objective needs of children for homes or the desire for prospective parents for the children. The poor countries of the world had long had an access of children for whom they cannot adequately care; children doomed to grow up in grossly inadequate orphanages or on the streets. The rich countries had always had an access of infertile adults who want to parent and relatively limited number of homeless children. Yet there was virtually no matching of these children with these adults until after the Second World War. That war left the predictable deaths and devastation, and left the plight of parentless children in the vanquished countries visible to the world at a time when adoption was beginning to seem like a more viable option to childless adults in more privileged countries who were interested in parenting.

In successive years different countries have decided whether or not to make their children available for adoption abroad based on some combination of perceived needs of homeless children, often precipitated by war, poverty or other forms of social crisis, and political attitudes, which can make international adoption unacceptable as a method of addressing children's needs regardless of the extent of those needs and the extent of social crisis.²

By contrast, in ICA adoptive parents and children meet across lines of difference involving not just biology, but also socio-economic class, race, ethnic and cultural heritage, and nationality. Typically the adoptive parents are relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world. ICA is characterized by controversy.³

² Elizabeth Bartholet, *International Adoption: Thoughts on Human Rights Issues*, 13 BHRLR, available at http://www.law.harvard.edu/faculty/bartholet/PUB_BUF_IA_2007.pdf.

³ *International Adoption in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE* (Lori Askeland ed., Greenwood Publishing Group Inc. 2005).

International Provisions for ICA

The United Nations Convention on Rights of Child, 1989, provides in Article 20 that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. In such situations, States Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, *Kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. Article 21 further states that States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary; recognize that ICA may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; ensure that the child concerned by ICA enjoys safeguards and standards equivalent to those existing in the case of national adoption; take all appropriate measures to ensure that, in ICA, the placement does not result in improper financial gain for those involved in it; promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

The Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) (hereinafter the Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. The Convention, which operates through a system of national Central Authorities, reinforces the United Nations Convention on the Rights of the Child (Article 21), and seeks to ensure that ICAs are made in the best interests of the child and with respect for his/her fundamental rights.

Provisions for ICA in India

In India, adoption has been an age old practice and performs a very important function in the society. In the *Smritis* literature, the law of adoption was parent based and not child based. The *Smrtikaras* suggested that only one son could be adopted for the continuation of the family line and to offer oblations to the deceased ancestors. The *Dharmasastras* deals in detail with the qualifications of the male child to be taken in adoption. The adopted son is uprooted from his natural family and transplanted in to adoptive family like a natural son. But at present, the law of adoption among Hindus is completely regulated by the Hindu Adoption and Maintenance Act of 1956.

However, ICA is a novice concept in India and is yet to gain much ground. The Supreme Court of India, while supporting ICA, in the case of *Laxmikant Pandey v. Union of India*⁴ laid down certain guiding principles which were to be followed in the cases of ICA. It was held necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the people, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide the child a life of moral and material security, or the child may be subjected to moral and sexual abuse or forced labour or experimentation for medical or other research, and may be placed in worse situation than that in his own country. The apex court further went on to lay down certain prerequisites for foreign adoption. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by social or child welfare agency recognized or licensed by the government of the country in which the foreigner is a resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social welfare agency in India working in the area of ICA or by any institution or centre or home to which children are committed by the juvenile court.

The Supreme Court also insisted upon the age within which a child should be adopted in case of ICA, and held that if a child is to be given in ICA, it would be desirable that it is given in such adoption before it completes the age of 3 years. Such a ruling was delivered by the Supreme Court because it felt if a child is adopted by a foreign parent before he or she attains the age of 3, he or she has more chances of assimilating to the new environment and culture. Another

⁴ A.I.R. 1984 S.C. 469.

important rule framed by the Court during the course of judgement was:

“Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedures which must be followed in such a case, resort had to be taken to the provisions of the Guardian and Wards Act, 1890 for the purpose of felicitating such adoption.”

The Bombay High Court *In re Jay Kevin Salerno*⁵ iterated that:

“[W]here the custody of a child is with an institution, the child is kept in a private nursing home or with a private party for better individual care of the child, it does not mean that the institution ceases to have the custody of the child.”

Therefore it may be submitted that in the absence of any explicit legislation on the subject, the Supreme Court has played a pivotal role in regulating the adoption of tendered aged children to foreign parents.

However, at the international level, India has signed the Hague Convention on Intercountry Adoption, 1993 on January 9, 2003 and ratified the same on June 6, 2003 with a view to strengthening international cooperation and protection of Indian children placed in ICA. ICA processing in Hague countries is done in accordance with the requirements of the Convention; the United States of America (U.S./U.S.A.) implementing legislation, the Intercountry Adoption Act of 2000 (IAA); and the IAA’s implementing regulations, as well as the implementing legislation and regulations of India. For the purpose of implementation of the Convention in India, Ministry of Social Justice and Empowerment is functioning as the administrative ministry and Central Adoption Resource Authority (CARA) as the central authority, which functions as an autonomous body under the Ministry of Women and Child Development. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and ICA. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated /recognized adoption agencies.⁶

At national level, India has prepared a National Policy for children in 1974 under which Ministry of Social Justice and Empowerment (now

⁵ A.I.R. 1988 Bom. 139.

⁶ *Supra* note 4.

known as Ministry of Women and Child Development) and has got the mandate to enact laws regarding welfare of children. The Juvenile Justice (Care and Protection of Children) Act, 2000 is a landmark in this regard. This Act has incorporated the provision of adoption of child as an alternative to institutional care.

The Supreme Court of India has laid down that every application from a foreigner or NRI (non-resident Indian) or PIO (person of Indian origin) (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the government or a department of the foreign government to sponsor such cases in the country in which the foreigner is resident. The foreign agency should also be an agency “authorized” by CARA, Ministry of Social Justice and Empowerment, Government of India. No application by a foreigner or NRI or PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

Criteria for Foreign Prospective Adoptive Parent/s (FPAP)

- Married couple with 5 years of a stable relationship, age, financial and health status with reasonable income to support the child should be evident in the Home Study Report.
- Prospective adoptive parents having composite age of 90 years or less can adopt infants and young children. These provisions may be suitably relaxed in exceptional cases, such as older children and children with special needs, for reasons clearly stated in the Home Study Report. However, in no case should the age of any one of the prospective adoptive parents exceed 55 years.
- Single persons (never married, widowed, divorced) up to 45 years can also adopt.
- Age difference of the single adoptive parent and child should be 21 years or more.
- A FPAP in no case should be less than 30 years and more than 55 years.
- A second adoption from India will be considered only when the legal adoption of the first child is completed.
- Same sex couples are not eligible to adopt.

In the case of *In re Rasiklal Chhaganlal Mehta v. Unknown*⁷, the Supreme Court of India held that when a court is dealing with

⁷ A.I.R. 1982 Guj. 193.

intercountry adoptions, it must bear in mind the principles incorporated in the report of the European Expert Group on ICA organized jointly by the European Office of the Technical Assistant Administration, United Nations and International Social Service, before making an order in such a case. The Court must ensure in such proceedings that the adoption is legally valid as per the laws of both the countries, that the adoptive parents fulfill the requirement of the law of adoption of their country, that they have the requisite permission to adopt, if required, from the appropriate authorities in their country, that the child will be able to immigrate to the country of the adoptive parents and that he will be able to obtain the nationality of the parents. If these facts are not established, what will result is either an “abortive adoption” having no validity in either country or a “limping adoption”, that is to say an adoption recognized in one country but having no validity in another, leaving the adopted child in a helpless condition. Such an unfortunate situation must, in any event, be avoided.

In January 2011, India implemented new procedures to provide more centralized processing of ICAs. In addition to the new guidelines, prospective adoptive parents should be aware of all Indian laws that apply to ICA. A child can be legally placed with the prospective adoptive parents under the Hindu Adoption and Maintenance Act of 1956, the Guardians and Wards Act of 1890, or the Juvenile Justice (Care and Protection of Children) Act of 2000.

Post Adoption/Post Placement Reporting

Some courts in India require regular follow-up visits and post-adoption counseling by a licensed social worker until the child has adjusted to his/her new environment. The follow-up visits are generally for a period of 1 year or as directed by the court. Copies of the follow-up reports should be sent to the District Social Welfare Officer or other concerned state government department, Voluntary Scrutinizing Agency, and the court where the adoption or guardianship order was obtained. CARA also requires adoptive parents to submit post-placement reports on the child through their adoption service provider to CARA and the Recognized Indian Placement Agencies (RIPA).

Problems Relating to ICA

It has been widely contended that in the absence of any concrete legislation, ICAs should be disallowed. In a certain public interest litigation (PIL), which was filed by a Thane based NGO, *Advait*

Foundation, and Pune based NGO, *Sakhee*, in which CARA was made to appear as the respondent party, the Supreme Court Bench headed by Justice Aftab Alam issued a notice to the centre government seeking direction to the government to ban ICAs in the absence of any law regulating it. The apex court also sought response from the government on holding a comprehensive probe on the alleged ongoing adoption racket in the country. The PIL claimed that the country lacks proper law for protection of the rights of children up for adoption and, hence, Parliament of India be directed to enact proper laws and amend the Juvenile Justice Act, 1986.⁸

International adoptions have an illustrious facade, conjuring images of couples saving a hungry, orphaned child and living happily ever. While imagining international adoptions as a corrupt business is abhorrent, connections to child trafficking have recently arisen. Accordingly, the state department reports that though Americans adopted 22,991 international children in 2004, the implementation of the Convention brought about a precipitous drop to 9,319 adoptions in 2011.⁹

The term “child laundering” expresses the claim that the current ICA system frequently takes children illegally from birthparents, and then uses the official processes of the adoption and legal systems to “launder” them as “legally” adopted children. Thus, the adoption system treats children in a manner analogous to a criminal organization engaged in money laundering, which obtains funds illegally but then “launders” them through a legitimate business.¹⁰

Due to both faulty bookkeeping and deliberate manipulation, there is no reliable source on how much adoption corruption takes place. Therefore, it is impossible to concretely determine whether actions reduce corruption, as the only available statistic is the number of children adopted abroad. According to Michael Thorner, the Hague Conference’s Director of the International Centre for Judicial Studies and Technical Assistance, with international adoption, most of the problem is that people often view the decrease in international adoptions as a negative effect of the ICA convention. There’s actually

⁸ Press Trust of India, *Supreme Court Issues Notice to Centre on Banning Intercountry Adoption*, NDTV, May 4, 2012, available at <http://www.ndtv.com/article/india/supreme-court-issues-notice-to-centre-on-banning-inter-country-adoption-206511>.

⁹ Gina Kim, *International Adoptions’ Trafficking Problem*, HPR (June 20, 2012).

¹⁰ David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children* (ExpressO Preprint Series, Working Paper No. 749, 2005).

a drop in adoptions because more proper procedures with more safeguards are actually being added.¹¹

The persistence of tracking problems, profit motives, and demand for children ensures that corruption in ICA will remain. This does not mean however that international authorities should give up fighting adoption corruption. Michael Thorner has further said that there have been real successes and looking to the areas where there has been success, where there has developed effective transnational partnership, an attempt should be made to model along the lines of where there has been achievement.¹²

Further, adopting a child from a country faced with serious conflict or an emergency situation presents many challenges that can threaten the well-being of the child. UNICEF's position on cases of children separated from their parents and communities during war or natural disasters is that such children should not be considered for ICA, and family tracing should be the priority.

During or following a natural disaster or civil unrest, children are particularly vulnerable to separation from their family, exploitation and the possibility of trafficking. In these extreme cases, children can be abducted or illegally taken from their parents or sold to agencies that handle ICA for personal financial gain.

Situations involving corruption, political unrest or severe destruction caused by an emergency situation can make children more vulnerable and may result in ICA placements that do not ensure the best interests of the child. Thus, people considering ICA from a country where there is corruption concerns or a recent emergency situation should be very cautious.

Moreover, as more nations prohibit ICA or raise costs and regulatory hurdles, the cost of adoption soars upward, making it even more likely that there will be corruption in an ever smaller number of nations that do permit ICA.¹³

Human rights activists in the ICA arena have spoken with a relatively singular voice—a voice that is generally critical of international adoption, calling either for its abolition, or for

¹¹ *Supra* note 9.

¹² *Id.*

¹³ Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733 (2010-11).

restrictions that curtail its incidences in ways that are often seen as harmful to children, limiting their chances of being placed in nurturing homes with true families and condemning even those who are placed eventually to unnecessary months and years in damaging institutions. Also, opposition to ICA that purports to be grounded in children's human rights tends to be more politically palatable and thus persuasive, than arguments grounded in a country's nationalist claims of ownership rights over its children, or nationalist pride in not appearing unable to care for its children.¹⁴

Critics of the ICA system say that it promotes the illegal buying and selling of children. The claim is that the high demand in the developed world for children in the developing world creates a "black market in kidnapped babies".¹⁵ While at first ICA was a type of humanitarian response to the needs of "the child", now the focus has shifted to potential parents unable to have children. In other words, the right to be a parent—not the right of a child to have a family—is the primary motivating force behind ICA in "receiving" countries. While there is no necessary connection between this shift and a decrease in benefits for the child, it does, unfortunately, have the capability of leading to practices that promote the good of the potential parents to the detriment of the adopted child and his biological parents.

In a certain crude sense, the developing world has become a provider of healthy infants for developed nations. For developing countries feeling at the economic mercy of the developed world, ICA may seem like being taken advantage of—this time for their children—yet further. The line between receiving and sending countries is the same line that is between rich and poor, developed and developing. By "exporting" children—clearly an unappealing designation of ICA—some feel that the developing world is allowing itself to be stripped of yet another natural resource.

Another claim that ICA is focused on parents in the developed world is based on the fact that placing a child in a foreign country strips her of her culture and heritage. Despite any attempts by the adoptive parents to incorporate their child's native culture into the home, removing a child from his country of origin makes inaccessible to him an integral part of who he/she is. The international community acknowledges that cultural identity is very important, and

¹⁴ *Supra* note 2.

¹⁵ John Triseliotis, *Intercountry Adoption: In Whose Best Interest?* in *INTERCOUNTRY ADOPTION: PRACTICAL EXPERIENCES* 123 (Michael Humphrey & Heather Humphrey eds., New York: Routledge 1993).

international standards always favour placing adoptable children—whenever possible—within those children’s home countries for that reason. But the question then becomes: when a home in the child’s country of origin is impossible, is it more valuable to have culture, or a family? The international community—as represented by United Nations decisions—certainly seems to favour the latter.¹⁶

The Hague Convention is also not devoid of shortcomings. If the Hague Convention is recalled, it is seen that it is simply a tool that allows states to better manage relations amongst themselves. It is about putting in place a system of cooperation, just as the title of the Convention suggests. The Hague Convention does not in itself seek to replace a state’s internal laws, nor cover all the loops that a child must theoretically go through to be considered in need of ICA. When we look more closely at it, adoption misconduct clearly takes place well before the steps in the adoption covered by the Convention have even commenced. To give a simple example: If one falsifies the civil status of a child by erasing its birth family and thereby has it declared abandoned, a review of its file will not raise any doubts about the child’s adoptability. Clearly it is not the Hague Convention that deals with how official documents must be kept, or with the consequences of their misuse. Nevertheless, if misconduct is not identified, a Convention adoption can still be duly conducted, despite the circumstances of the case being a lie from the very beginning.¹⁷

Conclusion and Suggestions

It is therefore to be noted that many malpractices are prevalent in the system of ICA. Also, the law relating to international adoption is overwhelmingly negative in the sense that it focuses almost entirely on the bad things that can happen when a child is transferred for adoption from one country to another, as opposed to the good things. It reflects the general negativity of all adoption laws regarding the transfer of a child to adoptive parents, but adds a layer of additional negativity related to the particular issues involved in international adoption. Thus, often the law prohibits ICA altogether.

By contrast, there are almost no laws or policies that focus on the devastating damage to children’s life prospects that come from

¹⁶ Lara Kislinger, *Intercountry Adoption: A Brief Background and Case Study*, available at www.adoptionpolicy.org/pdf/backgroundCS.pdf.

¹⁷ Hague Conference on Private International Law, The Netherlands, *The Grey Zones of Intercountry Adoption International Social Service*, Adoption Information Document No. 6 (June 17, 2010), available at http://www.hcch.net/upload/wop/adop2010_info6e.pdf.

spending months and years on streets or in the kinds of institutional conditions that typify the world's orphanages. There are millions and millions of homeless children worldwide living and dying in these situations, and there are limited prospects in the near term for doing better by them in their home countries. Yet, there are almost no laws or policies requiring that children in need, without parents or with absent parents, be identified and be freed up for adoption if there is no reasonable likelihood that they will soon be able to live with their parents.

Accordingly, the general legal picture is one in which the law places multiple barriers between children who need homes and parents who might provide them. Recent developments indicate moves in certain divergent directions, some making international adoptions more difficult to accomplish, and others making it somewhat less difficult. There is no move, however, to transform international adoption regulation to focus more significantly on the positive, so that for children who need adoptive homes, as many as possible are placed, as promptly available.

While providing shelter to orphans, deprived and destitute children and giving a child to childless couples, it also succumbs to many evils such as corruption, ill-treatment of the child by ways such as child trafficking, child exploitation, misuse of the dignity and innocence of the child, and also strips the child of his native culture and values. However, ICA is a practice that has gained popularity over the years, and there is every reason to believe this trend will continue. For couples (or individuals) whose country of residence has few healthy babies available for adoption, going outside the country for a child is a desirable option. It is also desirable from the perspective of the child, who usually comes from a country with more available children than potential adoptive parents.

The future of ICA will be determined by the perceptions of its success held by officials and the public in the children's countries of origin. Safeguards contained in the Hague Convention on ICA, a multilateral treaty of cooperation and controls now being considered for ratification by countries around the world (including U.S.), will help reassure all parties that the rights of the children and birth parents in an ICA are respected. The Convention should put to rest some of the fears (e.g., the children are being used as organ donors) that make the process unstable and deny the love of a permanent family to children who could benefit from adoption.

Policy makers in both sending and receiving countries need to facilitate the adoption process so that it better serves the needs of the

prospective adopters. The primary reason to do this is not because it will promote their interest in parenting, although that interest should be recognized as perfectly legitimate, but it will maximize the numbers of parents for the children in need. Bureaucratic barriers serve to drive prospective parents away, either away from parenting altogether, or in the world of reproductive technology, where they are seen as having rights to become parents by pretty much whatever means they choose, including the purchase of eggs, sperms, pregnancy and childbirth services, and where they will be producing new children, rather than giving homes to existing children in need.

Policy makers must also address the baby buying and kidnapping issues that exist in the international adoption world. The opponents of international adoption have grossly exaggerated the scope of these problems, using them deliberately to promote restrictive adoption rules to suit their larger anti adoption agenda.

Policy makers also need to link their new adoption reform moves with efforts to improve conditions for the children who will not be adopted, and for their birth parents. Opponents of international adoption are correct in arguing that it can never provide homes for all the children in need, and that we must address the issues of poverty and injustice that result in children being abandoned in large numbers in the poor countries of the world.

Keeping in mind the large scaled child trafficking in the world, the Rights of the Child, 1989 convention requires that ICA will receive only the last priority while searching for the foster home. Like any other types of adoption, ICA can be expensive, time consuming and uncertain. Hence, not only statutory, but also moral upliftment should be instilled among the people of the international village, with special importance on the value of children. If the challenges involved in ICA can be taken care of, then ICA will give thousands of families' joy and satisfaction, as it has already fulfilled dreams of many.