
Inter-country Adoption: Challenges And The Way Forward

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Abstract

The present paper discusses the concept of inter country adoption in India. Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. There are cases wherein the children are left abandoned, neglected, deserted or surrendered by their biological parents or where the biological parents could not afford the upbringing of their child and hence relinquish the rights over their child in favour of orphanages, adoption agency or children's home.

In such cases, adoption of children assumes pivotal importance as through the process of adoption, such children can be placed in the family system through which they can learn the necessary societal norms for their overall well being and development. The institution of family also helps in acquiring and retaining a sense of identity and security in such children. Thus, adoption is considered to be one of the efficient mechanisms of providing home to the homeless and child to the childless.

The paper further throws ample light on the international legislative framework of the intercountry adoption. It discusses the challenges pertaining to intercountry adoption such as identity issues, economic/ financial hardships, medical issues, physical or appearance

discomfort and limited or inaccurate information regarding child's background. Lastly, suggestions are provided to deal with the challenges relating to intercountry adoption.

Keyword: *Adoption, intercountry, children, family*

Introduction

Children deserve the best that mankind is capable of, especially in terms of providing a family where the loving care, affection and attention of the parents help the child to grow and develop to the fullest. "Adoption", the act of affiliation by which the relation of parentage is legally and permanently established between persons not so related by nature, has emerged as the best alternative in absence of the natural family. It fulfils not only the needs of the adopted child but also of the adopting parents. It is a way of conferring the privileges of parents upon the childless and advantages of parents upon the parentless.¹

International Adoption as defined in Black's Law dictionary² is an adoption in which parents domiciled in one nation travel to a foreign country to adopt a child there, usually in accordance with laws of the child's nation. International adoption became popular after World War II and escalated after the Korean conflict because of the efforts of humanitarian program working to find homes for

¹ Encyclopedia Britannica.

² Bryan A. Garner, *Black's Law Dictionary*, 53 (Thomson Reuters, New Delhi 8th Edn, 2015).

children left orphaned by the wards. More recently prospective parents have turned to international adoptions as the number of healthy babies domestically available for adoption has steadily declined. International adoption is also termed as transnational adoption or inter-country adoption. The European Seminar on Inter-country Adoptions, May 1960 defines Inter-country Adoption as an adoption in which the adopters and the child do not have the same nationality and wherein the habitual residence of adopters and the child is in different countries.³ In this type of adoption an individual or couple becomes the legal and permanent parent(s) of a child who is a national of a different country.

Inter-country adoptions are of two types. In the first place the reciprocity of recognition exists as enshrined in Hague Convention⁴ whereby due to an international treaty adoption taken place in one country is recognised in another country. In the second place, the reciprocity of recognition does not exist wherein two methods are used to effect an inter-country adoption. According to the first method the child must be adopted in the country of origin as a pre-condition for his/ her leaving the country of origin besides he/ she has to be adopted again in the receiving country according to local laws. Under second method the child needs special permission to leave the country of origin following which the child is adopted in the receiving country. India follows second method to effect the inter-country adoptions.

³ European Seminar on Inter-country Adoption, May, 1960

⁴ Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions, 1965.

Intercountry adoption must be differentiated from Trans-cultural and Inter-racial adoption, as the latter refers to adoption of a child by an individual or couple from a different race/ethnicity or comes from a different cultural set up that of the child. For illustration a Polish child being adopted by an English parent is a trans-cultural adoption and if an Australian couple adopts a Black child, it is a trans-racial adoption. However, these terms may mean same or overlap in many of the cases.

Intercountry adoption involves the transfer of children for parenting purposes from one nation to another and exhibits the extreme form referred to as 'stranger' adoption by contrast to relative adoption wherein a step parent adopts the child of his or her spouse or a member of the child's extended family adopts the child whose parents have died or unwilling to parent. These types of adoptions are generally uncontroversial as the adopted children stay within the traditional biological family network and the adoptive parents are normally considered as generous and caring who have taken responsibility of such children. Whereas in intercountry adoption adoptive parents and children represent lines of differences involving not only biology but also socio-economic class, race, ethnic and cultural heritage and nationality.

Adoptive parents are relatively well off whites from richer countries and adoptive children are coming from less privileged ethnic and racial community from poorer countries of the world.⁵

⁵ Elizabeth Bartholet, "International Adoption, chapter in "CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE", edited by Lori

Presently the receiving countries are the countries of Western Europe, Canada, and the United States wherein issues such as higher rate of infertility and the increasing cost of infertility treatment provide an alternative to couples and usually in the country of origin an increase in population, extreme poverty, and poor economic status of parents result in the abandonment of children.⁶

Intercountry Adoption In India

India is signatory to both, the CRC and the Hague Convention. The primary law which relates to the issue of adoption under the Hindu System is the Hindu Adoption and Maintenance Act, 1956 (HAMA). The Juvenile Justice (Care and Protection of Children) Act, 2000 and all the Amending Acts (2006, 2010, and the latest being in 2015) guarantee those rights to an adopted child which are recognized under the Hague Convention. The 2000 Act did not, however, define adoption, and the term was added in the 2006 Amendment. This was a major development as up till adoption by a non-Hindu was guided by the Guardians and the Wards Act, 1890.

The question regarding the validity of inter-country adoption was first debated in the well-known case of *Re Rasiklal Chhaganlal Mehta*⁷ whereby the Court held that inter-country adoptions under Sec 9 (4) of the Hindu Adoptions and Maintenance Act, 1956 should be legally

valid under the laws of both the countries. The adoptive parents must fulfil the requirement of law of adoptions in their country and must have the requisite permission to adopt from the appropriate authority thereby ensuring that the child would not suffer in immigration and obtaining nationality in the adoptive parents' country.

The Supreme Court of India in a public interest litigation petition *Laxmi Kant Pandey v. Union of India*⁸ the Apex Court stated that every child has a right to love and be loved and only if a child is brought up in a family will he grow in an atmosphere of love and secure moral and material security. But if it is not possible for the biological parents or other kins to look after the child or if the child is abandoned by the family then adoption of the child is best way out for the security of the child and had framed the guidelines governing inter-country adoptions for the benefit of the Government of India.

A regulatory body, i.e., Central Adoption Resource Agency (CARA) was recommended and accordingly set up by the Government of India in the year 1989. Since then the CARA has been playing distinguished role in the matters related to intercountry adoption. It has come up with guidelines several times to streamline the process and procedure of intercountry adoption. The latest CARA guidelines are popularly known as Adoption Regulations, 2017 promulgated by the Government of India and notified on 16th January,

Askeland. ISBN # 0-313-33183-9. Greenwood Publishing Group Inc., (2005).

⁶ D. Howe, P. Sawbridge, and D. Hennings, "Half a Million Women", New York: Penguin, 1992.

⁷ AIR 1982 Guj 193.

⁸ AIR1984 SC 469

2017 in exercise of the powers conferred by the clause (c) of section 68 read with clause (3) of section 2 of the Juvenile Justice (Care and Protection of Children), 2015 (2 of 2016) and in suppression of the guidelines governing adoption of children, 2015. CARA Guidelines also states that intra-country adoption is preferred first. As per CARA Guidelines only three type of children is recognized as adoptable namely, those children who have been surrendered, those who are abandoned and those who are orphans and are under the care of some specialized adoption agency.

In the judicial pronouncement of *Craig Allen Coates v. State* through Indian Council for Child Welfare and Welfare Home for Children⁹ it was stated that if the adoptive parents fail to provide proper reasons and motive for adoption of the child from another country then the adoption would not be permitted. One of the issues which crop up in intercountry adoption is finding suitable potential parents for the child. In the case of *Karnataka State Council for Child Welfare v. Society of Sisters of Charity St. Gerosa Convent*¹⁰ the Apex Court expressed that finding Indian parents for adoption should be preferred so that the children grow up in native surrounding and retain their heritage and culture.

Bombay High Court in *Varsha Sanjay Shinde & Anr. v. Society of Friends of the Sassoon Hospital*

*and others*¹¹ held that once a child is approved by an Overseas couple after the due procedure is followed, the same child cannot be shown to other Indian parents and that such Indian Parents then cannot claim any right or priority to get the child merely because they are Indian Parents and preference should be given to them over Overseas Indians and Foreign Couples. Although the main issues was decided the Court kept the petition pending in order to see the compliance of directions given by the Court for giving the child to the Overseas Indian Couple and to ensure that the Indian Parents (Petitioners) also get a child expeditiously.

International Legislative Framework: The Convention On The Rights Of The Child, 1989 And The Hague Convention, 1993

Internationally the Convention on the Rights of the Child (CRC) deals with issues associated with intercountry adoption. It is also regulated by the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993 and the same been ratified by majority of countries in the world. Article 21 of the CRC requires the adopting parents to ensure that the child who is being adopted enjoys the same level of standards and projection to those who are existence in the case of national adoption.¹²

¹¹ Writ Petition no. 9227 of 2013 Decided on 18th October, 2013

¹² Article 21(c), The Convention on the Rights of the Child, 1989.

⁹ 162(2009) DLT 605
¹⁰ ILR 1991 KAR 3543

The CRC recognizes the importance of real parents and family in the life of a child and emphasizes that the State should assist them in safeguarding the rights of the child in case of difficulties faced by them. Despite best efforts by the State and it is found that the child is still suffering the care of a family that the concept of alternative care of the child comes into the picture.¹³ Hence intercountry adoption should be opted only when the State is found to be unable to ensure that the child cannot be cared for in a proper manner in the country of origin. The Committee on the Rights of the Child which ensures compliance with CRC has expressed its concern over violation of intercountry adoption standards in many countries and suggested that the Hague Convention be ratified by them.

The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) is an international agreement to safeguard intercountry adoptions. Concluded on May 29, 1993 in the Hague, the Netherlands, the Convention establishes international standards of practices for intercountry adoptions. The Convention aims to prevent the abduction, sale of, or trafficking in children and it works to ensure that intercountry adoptions are in the best interests of children. The Convention recognizes intercountry adoption as a means of offering the advantage of a permanent home to a child when a suitable family has not been found in the child's country of origin. The

¹³ Article 20, The Convention on the Rights of the Child, 1989.

Hague Convention is based on two principles governing the protection of the children intended to be given in international adoption, namely, establishing of safeguards to ensure that intercountry adoption is in the best interest of the child and to establish a system of cooperation between the contracting states to ensure that the safeguards are respected.¹⁴

According to the Convention, the system of cooperation is to be regulated by the Central Authority of the contracting country who deals with the matter of adoption and serves as a principal agency for intercountry adoption issues with other countries. The Hague Convention further lays down the subsidiary principle that states that intercountry adoption should be adopted only when the safety of the child in the State of origin cannot be ensured yet first of all placement of the Child within the country of origin must be given the primacy.¹⁵ Other guidelines of the Hague Convention look into the fitness of the adoptive parents, a restriction on private adoption, prohibition of contact between the adoptive parents and the real parents before the child has been pronounced adoptable by the Central Authority and ratification of the Hague Convention by all the countries.

The Convention require the Central Authority to ensure that the child is mature enough and of proper age to be adopted, the child has been

¹⁴ Preamble and Article 1, The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993.

¹⁵ Article 4, The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993.

informed about the adoption and consequences of such adoption and the consent of the child has been taken and it has not been taken through inducement by compensation or payment of any kind.¹⁶The information of the child's origin, his or her medical history and information regarding the real parents of the child should be preserved but access to such data should be restricted.¹⁷ The monitoring of the Hague Convention is the responsibility of the Special Commission which comprises all the signatories.¹⁸

Challenges In Intercountry Adoption

Fathomless challenges surface when the child joins the new home and the adoptive family experiences the special parenting needs and responsibilities pertaining to nurturing of the child adopted from another culture. Health and development issues may be faced in the early years while issues related with adoption, identity and racism do call for parental attention as the child grows. The adoptive families require support which may include adoptive parent support groups, interaction with local ethnic communities, visits to the child's country of origin, programmes run by the adoptive agencies and support to ethnic heritage by adoptive parents groups and parenting resource materials such as books, video tapes etc. Openness in adoption may provide for additional support for families of children who have found

homes through transnational adoption and for adopted adults. However, the local adoption laws and policies may hinder exchange of information allowing the contacts between birth parents and their children given in adoption. Those who support transnational adoption face hard realities at times. On the one hand media sensationalize transnational adoption in the matters of child abuses, trafficking etc. and present minority of criminal cases as norms governing the field while on the other government bureaucracy is not willing to address even simple reforms which could solve the limited problems faced by concerned.

1. Identity issues

International adoption also reflects a larger, growing trend toward multiracial and multi-ethnic families, who face unique challenges in the upbringing of children of different ethnic and racial heritages. Research suggests that same-race and trans racially adopted children begin to become aware of racial differences, as well as their adoptive status, as early as 4–5 years of age). As trans racial adoptees grow older, they develop a more coherent understanding of what it means to look physically different from their parent. At the same time, they may begin to experience feelings of loss of birth culture and family history and the growing awareness of racism and discrimination in their everyday lives. This feeling of loss, in turn, has been found to be associated with greater depressive symptoms and lower self-worth among domestically and internationally adopted preadolescents. Similarly, uncertainty about one's ethnic identity and perceived

¹⁶ Article 4 (d), The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993.

¹⁷ Article 30, The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993.

¹⁸ Special Commission on the Practical Operation of the Hague Convention of 29 May 1993.

discrimination are related to greater psychological distress and lower self-esteem among international adoptees. Many studies report international adoptees' confusion about their race, ethnicity, and cultural identity, and experiences of racism and discrimination¹⁹

2. Economic/Financial hardships

In many cases, poverty and financial hardships often drives biological parents or family to give away the child for having financial gains or because of the belief that adoption of the child will have better future prospects for him /her. This leads to permanent removal of a child from the original family and handed to a completely different and unknown family having different culture, language, ethnicity etc. This may lead to many difficulties for the child whether social or medical.

3. Medical issues

Many researchers have shown that internationally adopted children face greater risk of possible exposure to infectious diseases or other illness, malnutrition²⁰ or failure to thrive, which adoptive parents may not be fully aware of or prepared for at the time of adoption. Many children may display developmental delays or cumulative cognitive deficits depending on their age, the impact of the quality of care they have received prior to adoption, or the length of pre-adoption institutionalisation ²¹These children face learning a new language under great communicative pressure and are likely to need specialised

assistance in developing the particular knowledge essential to thriving in their new cultural context ²²

4. Physical or appearance discomfort:

Another report suggested that adjustment problems among their children at approximately the same levels as were reported by the parents of interracial adopted whites. Yet, evidence also showed that extra-family forces, for example societal racism, did negatively impact adjustment outcomes. Particularly, experiences of discrimination generated feelings of appearance discomfort. The research suggested that black and Asian children, who appear unmistakably different from whites, are most likely to encounter such societal discrimination. Again, this can result in social anxiety and depression for the child.

5. Limited or inaccurate information about a child's background

Ideally, the intending parent or couple should be provided with accurate and detailed information about the child that has been matched with family. However, it's important to understand that this information may not always be available. Also, information provided by the country of birth about the child's background, age and health may not always be complete or accurate. Some overseas countries have limited capacity to investigate and assess a child's social and medical background. In some cultures, there remains a social stigma about children born to unmarried parents. This sometimes leads to children being abandoned and/or a lack of information being recorded to

¹⁹(Mohanty&Newhill, 2005; Silverman, 1997; Vonk, 2001).

²⁰Altemeier, 2000.

²¹Juffer et al., 2005; Mason & Narad, 2005; Serbin, 1997; Weitzman & Albers, 2005.

²²Gindis, 2005; Mohanty&Newhill, 2005.

protect unwed mothers. This, in turn, opens the way for a child's circumstances to be misrepresented, based on the notion that a younger child with an uncomplicated social and medical background has a greater chance of being adopted.²³

Hence, the future of transnational adoption will be decided by the perception of its success held by the associated officials and the public in the adopted child's country of origin. Thanks to many countries around the world who are considering to ratify the provisions of Hague Convention on Inter-country Adoption and a multilateral treaty of cooperation and controls and the same may reassure the parties involved that the rights of the children and birth parents associated in transnational adoption are honoured. It is expected that the Convention should put an end to the fears pertaining to abuses of adopted children as organ donors, child pornography and child prostitution etc. which make the process unstable and deny the love of a permanent family to the children who could get benefit from adoption. Of course keeping in mind the large scale criminal cases related with child trafficking around the world, the Rights of the Child, 1989 Convention requires that the Intercountry adoption will receive only the last priority while searching for the foster home for thousands of homeless children around the globe. Intercountry adoption may be highly expensive, time consuming and uncertain. If the hurdles and challenges associated with

intercountry adoption are taken care of, then it will innumerable families joy and satisfaction of parenting.

Way Ahead And Suggestions

International adoption could serve as a life changing process for the parent who is adopting along with the child by securing his/her future with better care. Challenges and difficulty associated with International adoption can be tackled well if handled with responsibility. Below are few suggestions –

a. Cultural socialization²⁴ refers to the manner by which parents address ethnic and racial issues within the family, specifically, the ways parents communicate or transmit cultural values, beliefs, customs, and behaviours to the child and the extent to which the child internalizes these messages, adopts the cultural norms and expectations, and acquires the skills to become a competent and functional member of a racially diverse society (R. M. Lee, 2003). Adoption agencies and authority must check if the parent or individual is prepared to adopt the child mentally, especially when it is a transnational/racial/cultural adoption. Training and guidance should be given by such authority which will prepare the parent to handle the child with responsibility.

b. Sensitization: Places like schools, hospitals and colleges must be utilized well to sensitise students and staff regarding racial differences. This will solve the problem to a large extend and

²³Available at: <https://www.intercountryadoption.gov.au/thinking-about-adoption/considerations/challenges/>.

²⁴Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2398726/>.

possibility of discrimination or bullying with the child by his/her neighbours, peers, employer etc. Besides all personnel dealing with intercountry adoption need to be seriously sensitized so that revised guidelines are followed in letter and spirit in which they were laid down.

Conclusion

Inter-country or transnational adoption may become the best option for orphan children to start a fresh life in a new country. But when the country of domicile for these children does not have any proper law to show them their destiny, violation of their rights is very much definite to take place. The country desperately needs better laws and guideline for inter-country adoption. The authorities need to ensure thorough checks of every adoption agency to ensure that they are protecting the child's rights as has been provided in the constitution and the Juvenile Justice Care and Protection Act, 2015. Every child has a right to life, home and education. It is essential that the authorities not only make laws to provide safer transnational adoption to the children but also to ensure safety of the child even abroad.

The malpractices involved in inter-country adoption actually do not lie in the established procedures but primarily with men who man the system. The real solution lies in men mending themselves. The de-humanized bureaucracy and people in authority need to re-imbibe human values. It is further suggested that every child should be included in a DNA data bank right after birth, and this should be mandatory and not an option.

Several Indian families who lost their children in international adoption cases have travelled abroad after having discovered that their children are residing in Europe. But to no avail, as the courts in EU countries have unfortunately not allowed such verifications or reunions based on the argument that it can be traumatic for a child to be confronted with its past. But had DNA tests already been done, nevertheless, it would have been easier to identify who the biological parents of those children are. There is no guarantee that children get a better life in the West and if citizens of the Western countries want to help the orphans and the abandoned children then they can come and stay with them and perhaps help in the reunification process during which a mother and her child are provided help.

The solution is not to separate the child from the mother thereby exposing it to a lifelong traumatic experience exemplified in the case where the death of a three-year-old adopted girl from India, Sherin Mathews, in Texas in the United States has sent shock waves across the globe and once again highlighted the vulnerable situation of adopted children. Sherin, who had a developmental disability supposedly choked on the milk forcefully administered by her adoptive father. The police is still investigating the case and this is just one among many adoption scandals that are tormenting Western countries.²⁵

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²⁵ Mrutyuanjai Mishra in Mind The Gap, Times of India, October, 27, 2017.