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Inter-Country Adoption: An Under-Developed Jurisprudence in India

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ABSTRACT

The current article presents a study that focuses on the Inter-country adoption of children. In two contrasting approaches, intercountry adoption has pushed into the public consciousness. On one hand, intercountry adoption is portrayed as a heartfelt act of kindness that advantages both the kid and the adoptive parents. Numerous scandals and horror stories about intercountry adoption stand in stark contrast to the optimistic face of adoption. Adoption is represented as a form of child trafficking or a baby sale. Adoption, which many complications arise when a child is adopted from one country and then relocated to another. To tackle the negative situations and prevent them from occurring, the act of ICA works as the fundamental welfare of the child. The present work focuses on the analysis of the procedures of ICA in India and an assessment has been made to see if the laws are adequate to cope with the situation.

Keywords: *Inter-Country Adoption, International Laws, Indian Laws.*

I. INTRODUCTION

The concept of Inter-Country Adoption (ICA) has become the most controversial and contested phenomenon since the late twentieth century when the world has become a global village. The two faces of intercountry adoption create factual, legal, political, and ideological concerns. Intercountry adoption is portrayed on one hand as a heartfelt gesture of goodwill that benefits both the kid and the adoptive family. The youngster is depicted as a destitute orphan destined for a bleak future in a poor country. All the child requires is a chance and a place to call home. The simple act of love by the adoptive family in bringing the child to the promised land reaps a harvest of love from the kid while also nourishing the country with dynamic diversity. On the other hand, it is represented as a horrific event. Children are bought, stolen, or kidnapped from underprivileged families in developing countries and sold to adoptive families in developed countries. However, the conception of Inter-Country adopted in reality should represent the Idiom; *"*Home to Homeless and Child to Childless" [1-3].

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The need for Inter-Country Adoption has been molded in various ways throughout these years based on changing political and legal dimensions of receiving and sending countries. If analyzed the trend going on for years, the adoptive parents are generally from top developed and rich countries like the USA, Russia, and certain developed countries of EU, while the children are adopted from poorer countries like India, Africa, etc. with various ethnic and racial groups. The main reasons for such a situation are a population explosion, poverty resulting in a shortage of food in under developing countries. Here, the difference is not just of biology, but the entire change of socio-economic factors, culture, language between two whole countries. The process of ICA is very costly, hence various organizations have started working for the same. But, along with providing the child with a proper atmosphere, the ICA has side effects as well. Children are often put in danger by child trafficking, kidnapping, prostitution, etc. Hence, for the protection of children, various adoption laws were enacted at the national and international levels.

II. INTERNATIONAL LAWS

In some ways, intercountry adoption is a matter of international law. Initially, because inter-country adoption includes the immigration of people from one nation to some other nation, it raises important questions of national sovereignty and international law. Secondly, as a humanitarian issue, intercountry adoption raises human rights concerns, which have become a major subject of international law.

This article does not attempt to cover every aspect of international law that applies to intercountry adoption. Nevertheless, the "Convention on the Rights of the Child (CRC)" and the Hague Convention is discussed in brief as it is the major human rights convention during the inter-country adoption. The CRC is respected by practically every sovereign nation, including India. In addition, the Hague Convention on Intercountry Adoption is the most globally prevalent treaty. Since 2003, India has been a signatory to the Hague Convention. Most international humanitarian law, is arguably unstructured, with few or no effective enforcement mechanisms. Rather than providing an effective means of enforcement, broadly ratified human rights treaties often serve to establish and convey worldwide principles and standards. As a result, the CRC and the Hague Convention might be seen as representations of global values and standards. The distinction between ratifying and non-ratifying nations might become blurred due to the lack of effective enforcement measures, as the broad principles of the Conventions can be used as criteria to judge the behavior of even non-ratifying governments [4-6].

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(A) The CRC and Intercountry Adoption

When it comes to intercountry adoption, the CRC appears to have a rather narrow view. State parties are required to adopt the crucial text i.e., "recognize that inter-country adoption 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." The Hague Convention is congruent with the CRC's preference for in-country adoption over intercountry adoption. The CRC, on the other hand, favors in-country foster care to intercountry adoption and appears to prefer in-country institutional care over intercountry adoption at first. These latter stances are more contentious, and they appear to be in violation of the Hague Convention [7, 8].

Other provisions of the CRC provide basic standards for both national and international adoption. Other sections of the CRC define basic standards for both national and international adoption, such as States Parties who recognize and/or permit the adoption system must ensure that the child's best interests are taken into account first. The CRC aims to ensure: (a) the application of the "best interests of the child" standard; (b) the protection of the process by which adults relinquish children for adoption, including the requirement of government approval, the use of an "informed consent" standard for relinquishments, and the provision of "as may be necessary" counseling; and (c) government protections against inappropriate monetary benefit in intercountry adoption [9].

Article 7 of CRC states "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." In a number of ways, this provision is important for intercountry adoption. The need for immediate birth registration, like many other human rights principles, is frequently disregarded, with over 30% of births globally not being registered, including nearly 2/3 of newborns in South Asia. The failure of sending countries to register births makes it more difficult to document children's age and family of origin, which unfortunately allows abusive adoption procedures [10].

A general principle is created by Article 3 of CRC, which states "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration." As a result, the CRC could be interpreted to mean that a "stolen child" should not be returned to his or her original family if doing so would be against the child's best interests. Because of the subjective character of the "best interests of the child" criteria, the right decision in practically any challenging situation, including cases of children who have been illegally adopted, is debatable.

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Furthermore, Article 11 of CRC states, "State Parties shall take measures to combat the illicit transfer and non-return of children abroad" This clause could apply directly to circumstances where children are improperly put for adoption abroad. However, the treaty's order might potentially limit this provision once again by the command, "the best interests of the child" be "a primary consideration" in "all actions concerning children" [11, 12]

(B) Hague Convention

The Hague Convention on Intercountry Adoption is a convention that is only binding on countries that have ratified it. The Hague Convention was recently accepted by India, and it became effective in the year 2003. There are two main elements of the Hague Convention on Intercountry Adoption. On the one hand, the treaty, like previous specialized human rights accords, defines broad norms and principles for intercountry adoption. This part of the Hague Convention applies to all countries, regardless of whether they have ratified it. The Hague Convention, on the other hand, compels signatories to adopt specific procedural methods and institutions in order to achieve a system of adoption that is consistent with the Convention's greater goals [13-15].

Intercountry adoption looks to be preferable to in-country institutional care, according to the Hague Convention. It states that the child, "should grow up in a family environment" and the country should take "as a matter of priority, appropriate measures to enable the child to remain in the care of hisor her family of origin," and that "intercountry adoption may offerthe advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin" [16].

Professor Sara Dillon has expressed her dissatisfaction with the Hague Convention's preference for intercountry adoption over in-country institutional care, claiming that nothing in the treaty binds sending countries to follow this preference. Professor Dillon is worried that neither the Convention on the Rights of the Child nor the Hague Convention explicitly establishes a child's right to be free from the serious harms of long-term institutionalization. As a result, she wonders if children have a right to a family and whether they have the option of intercountry adoption rather than institutionalization. Given the CRC's broad scope, it wouldn't take much imagination to identify CRC violations in the long-term institutionalization of children in deplorable conditions. Any international agreement requiring governments to place children overseas, however, is doubtful. Whatever obstacles and violations of children's rights they may face in their home nations, nation-states are unlikely to be obligated to fix those problems by moving their children elsewhere. As a result, even if international law recognized that certain

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children face significant deprivations of rights in their native nations, it is unclear that international law would recognize a child's right to be adopted overseas.

The Hague Convention, like the CRC, is concerned about child trafficking and works to guarantee that adoption is not used as a means of trafficking children. Therefore, the aim of the treaty is to "prevent the abduction, the sale of, or traffic in children." To that, the convention requires the "Central Authorities" who act on behalf of contracting states "take . . . all appropriate measures to prevent improper financial orother gain in connection with an adoption and to deter all practices contrary to the objects of the Convention." Similarly, the Hague Convention prohibits anybody for "improper financial gain or other gain" from intercountry adoption.

The convention's article 4 outlines the responsibilities of the state of origin. It states that an adoption under this convention will take place only if the competent authorities of the state of origin certify that the child is fit to be adopted, which will be determined after considering the child for in-state adoption, and that the authorized person/institutions whose consent was required for such adoption have given their free will consent, in the absence of that confirming the inter-country adoption is best for the child's interest. Also, if the child's biological mother is still alive, her consent has been obtained after the child's birth, the child's age and maturity have been considered for the matter of adoption, and he has been duly counselled about the consequences of adoption, and if mature enough, his will and choice have been taken into account.

Article 5 outlines the responsibilities of the receiving state, stating that an adoption under the convention may only take place after the receiving state's competent authority certifies the eligibility and suitability of prospective adoptive parents for the adoption, that they have been counselled by the authority as and when necessary, and that the child is or will be authorized to enter and reside permanently in the receiving state.

According to Article 14, a person habitually residing in a Contracting State may only apply for adoption through the Central Authority of the state in which they habitually reside. Prospective adopters would be unable to apply directly to the Central Authority or any other public authority in the child's state of origin. After the application has been submitted to the receiving state's Central Authority, the authority must certify that the prospective adopters are entitled to adopt in accordance with Article 5 of the convention. A report on the situation will be created and sent to the state of origin. While the state of origin would send the receiving state, the certified certificate establishing the child's eligibility for adoption, which would include the

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child's background, social environment, special needs, medical history, and other information.

Article 28 clarifies that the convention will not affect the laws of the state of origin, which may require that the child's adoption take place only in the state of origin, where the child was habitually a resident, or prohibit the child's transfer to the receiving state before the adoption process is completed. As a result, Central Agencies play a critical function under this Convention. Their responsibilities include, among other things, enforcing the convention and ensuring the safety of children undergoing inter-country adoption. ICA is supervised and administered in India by the Central Adoption Research Authority (CARA), which was established by the Supreme Court after child trafficking and prostitution issues reached a peak. CARA has developed a number of guidelines to address the flaws in the Indian adoption system. Regarding this, a section is described in the later part of the article.

III. INDIAN LAWS REGARDING INTER-COUNTRY ADOPTION

Intercountry Adoption (ICA) is a relatively new notion in India, with no formal legislation to promote it. In India, decisions on ICA issues are made based on precedents established by the Supreme Court to control ICA, referring to the Indian Constitution and the Guardian and Wards Act, 1890. The legislature has attempted to regulate ICA on several occasions in the past [17, 18].

(A) The Supreme Court of India's Role

The Supreme Court of India's 1984 Laxmi Kant Pandey v. Union of India judgement, as well as later Supreme Court opinions clarifying and applying the ideas of the original Pandey case, are essential papers defining India's beliefs and regulations addressing intercountry adoption. The action stemmed from a broad allegation of abusive intercountry adoption practices, and it was recognized as public interest litigation. The Supreme Court of India was so asked to prohibit or severely restrict intercountry adoption from the start. At the time, the legal status of adoption was a little hazy. The Hindu Adoptions and Maintenance Act of 1956 gave Hindus limited authority to adopt Hindu children, although adoption was forbidden if the adoptive parent already had a kid of the same gender, whether by birth or adoption. The government introduced the Adoption of Children Bill, 1980, which included clauses 23 and 24 that made ICA illegal. Because of the tremendous resistance of Muslim communities, the law was never passed. However, the need for an Inter-Country Adoption Act was strongly highlighted in the 153rd Law Commission Report in 1994, but no care was taken. As a result, persons or situations that did not come under the Hindu Adoption and Maintenance Act's restricted legislative definitions, such as non-Hindus wishing to adopt within India and most foreigners seeking to

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adopt, were left to the terms of the "Guardians and Wards Act" of 1890. This Act did not allow for adoption, but it did provide for guardianship until the child reached the age of majority [19, 20].

The absence of explicit statutory provisions for non-Hindu adoptions could have been used by the Supreme Court of India to justify a sweeping prohibition of most intercountry adoptions. Instead, the Court endorsed intercountry adoption in terms that were ultimately enshrined in the Hague Convention. Child welfare seems to be the Court's major motivation and concern. Therefore, the supreme court stated, "[e]very 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" [21]

Adoption is recognized by the Supreme Court of India, as well as the State High Courts, as a form of corrective action for neglected and abandoned children. The Gujarat High Court recognized in Rasikalal Chhaganlal Mehta that ICA will have some detrimental effect on child trafficking rackets and child selling for profit; however, rejecting the entire ICA process because of this would be a hasty step. In the lack of legislation, the court was directed to follow the guidelines set forth by several national and international organizations. It further said that the adoption must be legal in both countries involved. Otherwise, it would be an abortive adoption (which has no legal standing in any jurisdiction) or a limping adoption.

Later, in Laxmikant Pandey Vs. Union of India, the Supreme Court established specific criteria for ICA. It is regarded as a watershed decision because it is the first time any ICA rules have been proposed. The court also stated that because the primary goal of adoption is to improve people's lives, proper care and measures must be taken before placing a child for adoption in another nation. The court listed several scenarios in which a kid could be harmed and left completely alone in a foreign country, such as adoptive parents being unable to care for the child due to poor economic conditions, the child being subjected to moral and physical abuse, or the child being forced to work. As a result, the court stated that [22],

1. The adoption application by a foreigner desiring to adopt a child from India should bemade through a government-recognized or licensed child or child welfare agency of the country of which the said foreigner is resident.
2. The application by the foreigner taking the child for adoption should not be made directlyto social welfare agencies working for ICA in India.

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3. Also, a desirable age limit has been set by the court, within which it is more likely for a child to accept change in culture and new environment after adoption. The desirable age of adoption is before the child completes 3 years of age.

4. In absence of any statutory provision in India for the adoption of a child by foreign parents,reliance has been made on the provisions of the Guardians and Wards Act, 1890 to felicitatesuch adoption.

(B) The Central Adoption Resource Agency (CARA)

CARA is a self-governing entity within the "Ministry of Women and Child Development". CARA is a nodal organization that looks after in-country as well as ICA of Indian children. Through its recognized agencies, it deals with the adoption of abandoned, surrendered, or orphaned children. CARA defines adoption as "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" [23].

In "Laxmikant Pandey Vs. Union of India", the Supreme Court identified CARA as the government authority under which not just Indian adoption agencies, but also adoption agencies in foreign parents' home countries should be recognized and authorized when seeking for adoption. As a result, adoption can only take place between CARA-recognized organizations in both countries. The establishment of CARA was justified because it would create a government platform where foreign parents could express their desire to adopt, hence regulating competition among adoption agencies. In the same case, the Supreme Court justified the creation of a "Central Adoption Resource Agency."

(C) Adoption Procedure for Non-Resident Indian, Overseas Citizen of India, and Foreign Prospective Adoptive Parents

The CARA lays down procedures for "Foreign Prospective Adoptive Parents, Non-Resident Indians, Overseas Citizen of India" for Adoption. Provision 14 of the CARA states that non-resident Indians should be treated equally to resident Indians when it comes to adopting orphaned, relinquished, or abandoned children in India. Intercountry adoptions must follow the same procedure as domestic adoptions, according to Provision 17. The Criteria for Foreign Prospective Adoptive Parent are outlined in Provision 5 (Figure 1), they are as follows:

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Age of the child	Maximum composite age of prospective adoptive parents (couple)	Maximum age of single prospective adoptive parent
Upto 4 years	90 years	45 years
Above 4 and upto 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

Figure 1 Criteria for Provision 5

- The home study report must include a good evaluation of the adopting couple's solid relationship for at least 5 years, their financial stability, and the child's proper health care.
- When adopting newborns or small children, the combined age of the adoptive parents should be no more than 90 years old. In certain instances, such as when the child is significantly older or has special needs, this provision can be eased. If one of the parents is over the age of 55, the adoption will be denied.
- Single parents who are unmarried, divorced, or widowed can adopt until they are 45 years old if they are unmarried, divorced, or widowed.
- There should be at least a 25-year age difference between the single parent and the child.
- The adoptive parents should be between the ages of 30 and 55 years old.
- Only after the legal process for the first adoption has been completed will a request for a second adoption be considered.
- Couples with three or more children are ineligible to adopt.
- Adoption is not available to couples of the same sex.

IV. CONCLUSION

The Hindu Adoption and Maintenance Act, 1956 is the only adoption statute in India along with the Regulations laid by CARA. There exists no concrete law for the adoption for other communities. The Guardianship and Ward Act, 1890 provides an indirect path of adoption to the other communities by becoming the guardian at first and then adopting the child in the receiving country. The Juvenile Justice (Care and Protection of Children) Rules, 2016 provides guidelines for Intercountry adoption of children. Adoption of Indian children by foreign parents

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is an issue with a lot of controversies and loopholes resulting in both things. Firstly, Indian orphans get a secure and loving home in a foreign country from their adoptive parents. But, at the same time, Inter-country adoption has resulted in the abuse of children by treating them like domestic servants, prostitutes, beggars, or for human trafficking.

Various failed efforts were made for the statutory enactment of ICA in past years. Starting with the Adoption of Children's Bill in 1980, which did not turn into an act because of political reasons. Also, the 153rd law commission report had suggested having specialized legislation for regulating Inter-country adoption which shall be secular and uniform with the main motive of child welfare, to which as well, no hitch was paid. But the judiciary in this context has played a vital role in the effective working of the ICA, starting with the implementation of guidelines laid down in the 1993 Hague Convention. The judiciary in this context has been given unlimited jurisdiction for dealing with the matter as there doesn't exist any law to provide an outline. This can have two effects, the first one being "The welfare of children cannot be determined in straight jacket formula", but on the other hand, the absence of statutory law creates chaos and high chances of children being a victim of malpractices. U.K. has a separate law dealing with ICA of children namely the Child Adoption Act, 2006; that explicitly deals with adoption and adoption-related issues. This law gives power to the British Parliament to limit the adoptions if they go against public policy. Proper legislation going in parity with The Hague convention and CARA guidelines in India would surely result in effective implementation of ICA.

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V. REFERENCE

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3. Jeff D. Opdyke, Adoption's New Geography, WALL ST. J., Oct. 14, 2003, at D1. ("The U.S. adopts more foreign children than all other nations combined.").
4. See generally Joanne Selinske et al., Ensuring the Best Interest of the Child in Intercountry Adoption Practice: Case Studies from the United Kingdom and the United States, 80 CHILD WELFARE 656 (2001).
5. Convention on Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), 28 I.L.M. 1448 [hereinafter CRC]. This Article will not discuss the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography (OP-CRC). For an extensive discussion of the application of this treaty to intercountry adoption, see David M. Smolin, Intercountry Adoption as Child Trafficking, 39 VAL. U. L. REV. (forthcoming March 2005).
6. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].
7. CRC, supra note 15, art. 21(b), 28 I.L.M. at 1464.
8. See William L. Pierce, Accreditation of Those Who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children, 12 J. CONTEMP. HEALTH L. & POL'Y 535, 538–40 (1996) (discussing conflict between CRC and Hague Convention). Pierce suggests that the CRC and an earlier United Nations Declaration "grew out of a knowledge of intercountry adoptions that were characterized by largely unregulated adoptions, a significant portion of which involved highly publicized abuses." Id. at 539–40. Pierce tried to reconcile the apparent conflict between the CRC and Hague Convention by suggesting that adoptions that comply with Hague norms and procedures would constitute a different kind of adoption than the "internationally unregulated adoption" referenced in the CRC. Id. at 540.
9. CRC, supra note 15, art. 21, 28 I.L.M. at 1464 (requiring safeguards for intercountry

adoption equivalent to those existing in the state of national origin).

10. CRC, supra note 15, art. 7, para. 1, 28 I.L.M. at 1460.
11. CRC, supra note 15, art. 11, para. 1, 28 I.L.M. at 1461.
12. CRC, supra note 15, art. 3, para. 1, 28 I.L.M. at 1459.
13. Hague Convention Status Table, supra note 17.
14. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).
15. See Bureau Of Consular Affairs, supra note 19.
16. Hague Convention, supra note 16, pmbl, 32 I.L.M. at 1139.
17. For useful overviews of Indian adoption law, and related issues, see asha bajpai, adoption law and justice to the child (1996) [hereinafter bajpai, adoption law]; asha bajpai, child rights in india: law, policy, and practice (2003) [hereinafter bajpai, child rights].
18. See supra note 18 and accompanying text.
19. Laxmi Kant Pandey v. Union of India, (1984) 2 S.C.C. 244 (India).
20. There are four pertinent subsequent decisions of the Supreme Court of India: Laxmi Kant Pandey v. Union of India, (1985) Supp. S.C.C. 701; (1987) 1 S.C.C. 66; (1990) 4 S.C.C. 531; Unreported Judgments 1991 549.
21. Laxmi Kant Pandey, (1984) 2 S.C.C. at 251.
22. The Central Resource Adoption Agency also has incorporated this priority list in their guidelines on intercountry adoption. See cent. adoption res. agency, ministry of soc. justice & empowerment, inter country guidelines § 4.5,
23. CARA GUIDELINES, supra note 107, § 2.1.

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