

## INTER COUNTRY ADOPTIONS - INDIAN SCENARIO

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For every nation the greatest asset is its children. The destiny of a State mainly depends upon its moulding its future generations in their early years, which is obviously in shaping its children. As rightly said by John Milton, "Child shows the man as morning shows the day", it is the duty of the State to take special care in upbringing its kids in view of their emotional and intellectual bondage towards a nation and the role that they would play in shaping its future fortunes. That is why, there is a growing concern in the entire international community in upbringing the children and the special care to be taken by them to achieve the goal of "one world" of international law.

The realization and the concern of the nation-states to bring up their children in an atmosphere of love and affection and their future well being, resulted in taking various steps for their enrichment. Among the various declarations adopted, the League of Nations' Declaration on the Rights of the Child in 1924 was the first one to express the need in extending the protection, love, affection and care to be taken in the future welfare of children. However, due to the advent of Second World War and the demise of the League itself, the noble objectives which inspired by it were put in cold storage. But the establishment of the United Nations Organization and its landmark efforts in the promotion and well being of child welfare led

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to the adoption of the Declaration on the Rights of the Child by the General Assembly on 20<sup>th</sup> November, 1959 that set Standards to meet the goals of the Declaration. In 1989 the UN adopted the historic Convention on the Rights of the Child. The thrust of the Convention is in redeeming and securing the vast majority of the poor children of the world from the various guise and abuses. Its Further goals were to catalogue the rights of the child, restore the inherent dignity, rights and freedom and to help and promote in the child the sense of security, self-esteem and pride with roots in his native culture and environment, which are essential for the development of one's personality have been advocated. The Vienna Declaration and Programme of Action of the World Conference on Human Rights 1993, also stressed the need and steps to be taken by the States in ensuring respect in the protection and promotion of the rights of child.

In the Indian context Clause (3) of Article 15<sup>1</sup>, Art. 24<sup>2</sup>, and Clauses (e) and (f) of Art. 39<sup>3</sup> of the Constitution reflect the concern expressed by the framers in safeguarding the interests and welfare of the children. In tune with the constitutional objectives, the Government of India evolved a National policy for the welfare of the children and also constituted a National Children's Welfare Board with the Prime Minister as its Chairman in 1974<sup>4</sup>. The aim of the Policy and the Board is to provide focus on planning and review and proper co-ordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels, continuous planning, review and coordination of services relating to children.

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- 1 Art. 15 clause (3) enables the state to make special provisions for children.
  - 2 Art. 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous industry.
  - 3 Clauses (2) and (6) of Art. 39 provides that the state shall direct its policy towards securing inter-alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations and unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
  - 4 For the National Policy and for the structure, powers and functions of the board, Department of Social Welfare, No.1-14/74, CDD 22nd August, 1974. Also see child and law, vol. III 1979-80, Annex. C. pp.100-105; TSN Sastry : The Need for an Enactment on Foreign Adoptions, Academy Law Review, vol.22, 1988 at p.165

Among the various aspects that play an important role in shaping the personality of a child, primarily every child has a right to love and affection and to grow up in a congenial atmosphere of warmth and solicitude and of moral and material security. This is possible only if the child is brought up in a family. The most cordial atmosphere would naturally be that of the family of his biological parents. However, if for any reason it is not possible for the natural parents or the near relatives to take care of the child or a destitute child or if the parents are not willing to extend the material and moral support, the next best alternative is an adoptive family. Because, next to biological parents, the child would receive all the care and affection from the adoptive parents. But due caution is needed in opting for an adoption as an alternative to the original family and the primary importance to be kept in mind is the welfare of the child as enunciated by the Vienna Convention on the Rights of the Child.<sup>5</sup>

## II

The concept of adoption has been prevalent in Hindu society for centuries and is recognised by Hindu Law. Adoption is also known to the French, Spanish, Greek and Roman Systems of Law. But in a majority of States it is rather, a recent origin. In the Muslim society it is totally unknown. The act of adoption creates a legal relationship between a parent and child who may have never had any genetic relationship. This artificial relationship between the parent and child is created by law through the institution of adoption.<sup>6</sup> The system of adoption serves various material objectives of the foster parents as well as providing shelter to the child to grow up in a familiar atmosphere, rather than as an orphan or a destitute child.

Whenever natural parents offer a child for adoption or the child is abandoned, in its interest, every effort must be made first to find adoptive parents for it, within the country. Because such adoption would be clear of any future problems to the child in adjusting itself with the new environment

5. Art. 21 of the convention states that states parties that recognise and permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.....

6. Dicey and Morris: Conflict of Laws (10th edn.) 1980, p. 490.

especially cultural, racial or linguistic differences. If there is no possibility to trace a family within the country of origin of the child, then the child can be made available for adoption to foreign parents instead of allowing the child to grow up in an orphanage or in unpleasant circumstances. This system of adoption is known as foreign adoption or inter-country adoption. The concept of inter-country adoption is rather new compared to the ordinary system of adoption and is recognised by several countries. Although India is not a party to the Hague Convention on Foreign Adoption 1965, it has recognised foreign adoptions since long. The Convention on the Rights of the Child too provides for inter-country adoption. However in all respects, inter-country adoption ought to be permitted only in the best interest and future welfare of the child without having any ulterior motives.<sup>7</sup>

Accordingly Foreign Adoption or Inter-Country Adoption means, taking a child as one's own voluntarily with respect for the rights of the child of one country to another by legally appointed foster parents. According to the Indian Council of Social Welfare foreign adoption is a situation where, "the adopters and the child do not have the same nationality and as well as in which the habitual residence by the adopters and the child is in different countries".<sup>8</sup>

### III

Though the institution of inter-country adoption is not new to India, there is no law in regulating foreign adoptions. In a country where at least 2,000 children are annually given in for foreign adoption, there is every possibility that the children adopted by foreign parents could be employed for several inimical activities. As stated by Paul Harrison,<sup>9</sup> majority of the Indian children is vulnerable to misdeeds of foreign parents or agencies in the name of

7. Art. 21 of the Convention. Also see; *Laxmi Kant Pandey v. Union of India*, 1984 2 SCC 244; *Jayantilal v. Asha*, AIR 1989 GUJ 152; *John Abraham Memorial Bethanay Home v. All concerned*, 1996 (2) HLR AP 293

8. Quoted by Justice P.D. Desai in *Re Rasik Lal Chhaganlal Metha*, AIR 1982 Guj 193 at 196.

9. For the observations of Paul Harrison; *Laxmi Kant Pandey v. Union of India*, 1984 2 SCC 244 at 252 para 7.

inter-country adoption due to the dereliction of the Government to pass a legislation.

Although, adoption is recognised among Hindus, there was no law in the country regulating the institution of adoption among them uniformly until the government enacted the Hindu Adoption and Maintenance Act in 1956. There is no provision either in the Hindu Adoption and Maintenance Act or in the Guardians and Wards Act 1890, for passing an order for foreign adoption by the courts. However, the courts are empowered to appoint a foreign national as a guardian of an Indian child first and then to pass an order for inter-country adoption order under the Guardians and Wards Act<sup>10</sup>. A court has a tremendous responsibility in passing such an order and must carefully consider various aspects before passing such an order. Stressing the point, Justice Desai discussed the considerations which should be followed by courts in passing foreign adoption orders in future<sup>11</sup>.

Taking into consideration of the well being of the Indian Children and to prevent the misuses of the voluntary agencies involved in the area, basing on the article on the horrors of foreign adoptions in the country and the other developing states by Paul Harrison in a foreign magazine "the Mail", Mr. Laxmikant Pandey, an advocate of the Supreme Court of India filed a writ petition in the Apex Court as a public interest litigation. Moved by the plight of the children and to protect their future welfare and to discharge the mandate of the constitution that has showered upon the judiciary in the absence of a legislation, the Supreme Court had taken steps and framed widespread rules and regulations to eradicate the inclement motives of some of the voluntary organizations offering Indian children to foreign nationals in its exhaustive and continuous judgements.<sup>12</sup> It is beyond the scope of this paper to discuss all the judgements of the court in detail. However, a brief analytical survey crystallizes the guidelines framed by the court.

10. Sections 7 to 11 and 17 of the Act generally are exercised by the courts in appointing a foreign national as a guardian and to pass inter-country adoption order.

11. *Supra* n 8.

12. *Laxmi Kant Pandey v. Union of India*, AIR 1984 SC 469; AIR 1986 SC 272; AIR 1987 SC 232; AIR 1992 SC 118.

1. The court after a careful investigation of the malpractices involved in the area, held that in future, the Government should regulate the activities of these agencies.
2. Agencies that are recognized by the government only should be allowed to participate in processing the foreign adoption applications.
3. Every application must be accompanied by a Home Study Report of the foster parents and an undertaking by the foreign adoptive parents that they will adopt the child according to the law of their country within a period of not more than two years from the time of the arrival of the child in their country.
4. Every foreign agency engaged in the activity of adoption can have an Indian national as its representative in India as a full time employee and such agent must fulfill the qualifications prescribed by the court.
5. The Foreign Child or Social Welfare Agency must undertake the responsibility that in case of disruption of the family of the foreigner before adoption can be affected, it will take care of the child and find out a suitable alternative placement for it with the approval of the Indian Social or Child Welfare Agency concerned and report such alternative placement to the court handling guardianship proceedings.
6. At the lower level of the judiciary, the court held that in future instead of the District Courts, Family Courts established under the Family Courts Act 1984 are only entitled to deal with foreign adoption orders.
7. The court further held that the courts should take due care in passing the orders and the future welfare of the child into consideration and that should be the primary objective before passing the order.

As highlighted by the court, the future welfare of the child is an important aspect. It is not so easy to arrive at a conclusion in determining the concept of future welfare of the child. As rightly pointed out by Lindely J., "the welfare of the child is not to be measured by money or by physical comforts. The words must be taken in their widest sense. The moral and religious

welfare of the child must be considered as well as its well being. Nor can ties of affection be disregarded"<sup>13</sup>

Basing on the exhaustive judgements and the comprehensive guidelines laid down by the Apex Court, the Government of India immediately framed the guidelines to be followed by all the agencies in future and constituted a Department of Women and Child Welfare Development. Further the Union of India also constituted a Central Adoption Resource Agency to coordinate the activities of the various agencies recognized by it and to update the list of agencies for inter-country adoption of Indian Children. As on 31 December, 2001, there are 73 Indian Placement Agencies and 13 Voluntary Coordinating Agencies are recognized by CARA.

#### IV

The judgments of the court are exhaustive enough in tackling the problems of Indian children offered for foreign adoptions. It had, however, left certain questions unanswered. One such issue is, if a familiar disruption takes place after the child is adopted, what would be the situation of the child?<sup>14</sup> The reasons best known to the learned judges, they kept themselves away from dealing with this aspect, by simply specifying that on adoption, the child would acquire the nationality of its adoptive parents and would then be entitled to all the rights of a national in that country. Then one should construe that the government of that country would take remedial measures. Is it legally binding on them? If no action is taken what would be the fate of the child?

To these questions, the possible answers may be, the Government of India while issuing a Passport or the Court passing an order of foreign

13. In *Re Mc Grath (infant)* 1893 1 Ch. 148; also see in *Re Gulbai and Lilbal*, 1908, ILR 32 Bom 60; *UR Choudhari. The Guardians and Wards Act 1890*, 2002, pp. 155-161.

14. The similar question was raised by the Author in his earlier works on this area; For details TSN Sastry supra n. 4 at pp. 162-164; "Foreign Adoptions in Conflict of Laws", See Research papers on various aspects of International Law, ML dissertation of the author, 1987, Dr. V.S. Krishna Memorial Library, Andhra University, Visakhapatnam.

adoption must insist that the foreign social or child welfare agency in that country should give an undertaking to monitor the adoptive parents and in turn should get an undertaking from the parents of the adoptive child to inform it in the case of disruption in the family. Then such agency should take the responsibility to find an alternative family in accordance with the law of that country. Another alternative is that all the children adopted by foreign families should be asked to register with the Indian Mission in that country. The Mission should be informed by such agency and the family regularly about the position of the family and the child, till the child attains majority. In case if the child is a minor and the agency could not find any alternative family in that country, then the Mission should take steps to send back the child to the Indian Agency which sponsored the child. In this regard, the citizenship of the child should be continued until the child attains majority. This type of arrangement would certainly go a long way in protecting the interests of the child and its future welfare, though the court refused to accept such a proposition of continuing the nationality of the child after the adoption is legally affected according to the law of that country.

The court in one of its successive judgements, relaxed the condition that the foreign foster parents need not visit India and stay with the child for obvious reasons. The factors considered by the court and the relaxation specified thereafter may be reasonable, still in the interest of the child and to know the mentality of the parents, they should be asked to be interviewed by the Head of the Indian Mission personally in his premises. Along with the family report, the report of the Head of the Indian Mission also should be made compulsory and be filed before the court passing the order of inter country adoption.

The court in its third judgement in 1987, stated that in the case of destitute children the District Collector should make an inquiry through police to trace the parents of the child before passing an order of availability of the child for adoption. Though the procedure prescribed by the court appears to be fool proof, still certain modifications are necessary. This is because at times the natural parents may be bribed by the adoptive agencies not to reveal the truth or the political or any other kind of pressure that may



be put on the police to submit a report without even making a proper inquiry. In order to prevent this misuse, the child's identity must be published in news papers and be telecast in the Government run television channels for proper identification. Though this measure is not accepted by the Apex Court it should be made compulsory in inquiry. Further the State CBCID may be involved in conducting such inquiry. These steps will certainly help in conducting a real investigation by the investigating agencies to trace the biological parents of the destitute child and also eliminate all the doubts with respect to the investigating procedure.

In spite of the exhaustive judgement of the Apex Court and the guidelines framed by the Government of India there are various malpractices taking place in the country and several agencies had thrown to the wind the guidelines of the court dealing with inter country adoption for want of foreign currency. When this aspect was brought to the knowledge of the court, the court itself expressed its dissatisfaction over the functioning of some of the agencies and the attitude of the Government Departments of the Union, States and the Union Territories in its 1992 judgement. Further, the fate of the children and the behaviour of the working conditions of the agencies highlighted by Radha Venkatesan and Ramya Kannan<sup>15</sup> in the State of Andhra Pradesh clearly depict the maladies that still exist in the area of inter country adoption and highlights the necessity of a comprehensive legislation to deter the fake agencies in protecting the future welfare of the children of a great nation.

Is it not the duty of the Government to discharge its constitutional and international obligations in protecting the future welfare of the Indian children? When a National Policy of Children had been adopted long ago, why is there a lackadaisical attitude of the Government in enacting a law in tune with the policy? It is high time that the Government of India enact a comprehensive legislation to prevent any unwanted trafficking of Indian children and to frame stringent penal provisions to deter fraudulent agencies. While enacting such legislation the government should not show any

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15. Children as Commodities. *The Hindu*, 3 March (TN Edn.) 2002 pp. 16-17

discrimination towards race, religion, caste, sex, etc. The legislation should be comprehensive enough to cover the interest of children of all the religions including Muslims in tune with the constitutional mandate of Art. 44 of the Directive Principles of State Policy. Further, broad-based monitoring bodies have to be constituted consisting of experts from different fields like Judges, Lawyers, Police Officials, Academicians, Women experts from Social and Child Welfare fields and representatives of the concerned Ministry, leading personalities and members of the general public from various walks of life to oversee the activities of the various agencies and to render suggestions to the Government at the Union and State level. Enacting a legislation and the constitution of high level expert committees will certainly go a long way in protecting the future welfare of the children. Let us hope that the Government will wake up from its slumber at least now to ensure the rights of future generations of this country to which it committed constitutionally and internationally.