



INDIA  
and  
HUMAN RIGHTS  
REFLECTIONS

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## RIGHTS OF THE CHILD VIS-À-VIS FOREIGN ADOPTIONS IN INDIA

T.S.N. SASTRY

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### **Introduction : International and National Concern for the Rights of the Child**

The importance of the welfare of a child need not be over emphasized in any civilized society. The prosperity of any society or a State mainly determined upon the health and well-being of its children. The children must be brought up in an atmosphere of love and affection and under the tender care and attention, so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect, and a balanced view of life with full appreciation and realization of the role which they should in the nation-building process without which the nation cannot develop and attain prosperity.<sup>1</sup> Hence children constitute as the paramount asset for the well-being of either international community or for a nation.

To protect and promote the rights of children independently as individuals of themselves, abolishing the customary practice of the parents around the world treating children as their property was first recognized by international law through the Geneva Declaration on the Rights of the Child in 1924 by the League of Nations. In order to extend further

impetus to the Declaration, the General Assembly of the United Nations in 1959 adopted another Declaration on the Rights of Children. The Declaration aims to promote the well-being of the child without any discrimination to sex, caste, creed, community, religion, race, and, expects States parties to take steps to protect the child by reason of his /her physical and mental immaturity, need special safeguards after birth.<sup>2</sup> Further, in order to promote and to create awareness across the globe about the importance of the rights of the children, the year 1979 was declared as the International Year of Child by the United Nations.

Furthermore, to meet the standards set in and to fulfil the principles proclaimed in the Charter of the United Nations, Universal Declaration of Human Rights, the two Covenants on Human Rights and the Declaration of Children, in the year 1989 the United Nations adopted a Convention on the Rights of Child for the protection and harmonious development of children by the States parties. The Convention apart from recognizing the Civil and Political rights, and, the Economic, Social and Cultural rights of children, mainly aims at extending protection from exploitation and abuse in abnormal or dangerous situations, and to help and promote in the child the sense of security, self-esteem and pride with roots in his native culture and familial surroundings which are highly essential for the development of one's personality.

The Vienna Declaration and Programme of Action, 1993 of the World Conference on Human Rights also highlighted the importance of the rights of children. Accordingly, it has requested all the States parties to ratify the Convention without exception and also made an appeal to take necessary legislative, executive, administrative, economic and other welfare measures be adopted keeping in mind the primary interest of a child.<sup>3</sup>

At the national level, the framers of the Constitution also expressed their concern in no uncertain terms for the upliftment of children in safe, secure and healthy manner through various provisions in the Constitution. Accordingly Article 15 (3) enables the State to make special provisions for children apart

from women. Article 24 explicitly prohibits child labour and hazardous employment of children. Article 39 (f) further directs the State in its policy towards the well-being of children. Hence, it is the duty of the State, that children be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and childhood and youth are protected against exploitation and against moral and material abandonment.

The Government of India in accordance with the provisions of the Constitution and to express its solidarity to the concern expressed by the framers of the Constitution, on the vital role of children in shaping the future destiny of the nation, adopted a National Policy for the Welfare of Children and constituted a National Children's Welfare Board with the Prime Minister as its chairman in 1974. The National Policy in unequivocal words expressing the importance of children as the foundation of the nation states that:

"The nation's children are supremely important asset. Their nature and solicitude are our responsibility. Children's programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with skills, and motivations need by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing in equality and ensuring social justice."<sup>4</sup>

To express the gratitude for the promotion and welfare of children, and taking into account the love and affection of Pandit Jawaharlal Nehru towards children, the Government of India has declared November 14 as Children's Day and celebrates it every year. Perhaps India is the only county to express such a commitment for the well-being of children's rights.

In spite of the lofty efforts both at the international and national mechanisms to protect and promote the welfare of

children, not even a single day passes without a notorious abuse of the tender age of children across the globe. Everyday tens and thousands of children are brutally exploited, seriously harmed, crippled, sexually abused, abandoned and sold like sheep and goats and becoming prey to the vicious acts of the unwanted elements and elders of the society. Among the various maladies that are plaguing the children, Foreign Adoptions is one such area wherein a great majority of Indian children are at risk, in spite of the clear-cut guideline laid down by the judiciary and the constitution of the Central Adoption Resource Agency (CARA). Taking into consideration of the maladies involved in foreign adoptions, a modest attempt is made in the chapter to throw light on the concept and necessity of adoptions in general, foreign adoptions in particular, and, to highlight the gray areas that exist in this area and the need for their regulation to protect human rights of the future generations of India from the inimical activities of foster placement agencies.

### **Concept of Adoption**

It is a well established fact that the balanced development of a child in shaping its personality is always available only within the family. The most cordial atmosphere would naturally be that of the family of the child's biological parents. If for any reason, it is not possible for a child, the next best alternative then is familial surroundings. Highlighting the importance of a family in shaping the personality of a child, the World Conference on Human Rights has rightly stated, "the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection."<sup>5</sup>

Hence, the responsibility for providing care and attention to children, which includes orphaned, abandoned, neglected, and abused, rest mainly with the family. However in view of broad social changes, due to urbanization, industrialization, influence of foreign culture and various other aspects, it is not possible always for a child to have the support of family. In such situations, the next best alternative to a child is an adoptive family. In view of the social and economic character

of the Constitution, the responsibility lies upon the government to extend support to destitute children. Hence the Government of India always supports adoption, than placing a child in a foster placement agency.

In the beginning very few countries like, India, France, Rome, Spain and Greece only recognized the institution of adoption. However, today a great majority of States are extending the legal recognition to the institution of adoption. In spite of the recognition by the international community, unfortunately the Muslim world is still out of the purview of adoption, refuses to recognize it either morally or legally.

Traditionally adoption has been widely accepted and followed in India and also recognized by Hindu law and regulated by the Hindu Adoption Act, 1956. Adoption means, "to take into one's family through legal means and bring up as one's own child."<sup>6</sup> The act of adoption creates a legal relationship between a parent and a child, who have had no genetic relationship. Further, it ensures a satisfaction to parents who crave for children for biological, emotional, physical, spiritual and social reasons. Adoption certainly provides a child all the material and other social, emotional necessary security for its proper development. Adoption being an important alternative next to biological family, it extends the care and protection to abandoned, destitute or neglected children. For this reason, the Convention on the Rights of Child, 1989 also recognizes the institution of adoption.<sup>7</sup>

Whenever a child is offered for adoption in the best interest of the child, all efforts should be made to find out adoptive parents within the same country to the extent possible. Because a child can develop quickly in its own cultural, social, religious, and, linguistic background easily. It is, therefore, becomes the responsibility of all the institutions and agencies involved in the welfare activities of abandoned, destitute and neglected children to find out a suitable family for in-country adoption. In case, if all the efforts to place a child with adoptive parents residing in India proved to be unsuccessful, the next best alternative they can resort to is foreign or inter-country adoption as recognized by international law of human rights.

### **Foreign Adoptions: Indian Scenario**

The concept of foreign adoptions is of contemporary origin and recognized by several countries including India. Foreign adoption is an aspect of private international law and also popularly often referred to as inter-country adoption. Foreign adoption means, adoption of a child belongs to one country by the parents of another country. According to the Indian Council of Social Welfare, a foreign adoption means, "...where, the adopters and the child do not have the same nationality as well as in which the habitual residence by the adopters and the child is in different countries."<sup>8</sup> However, a foreign adoption has to be preferred only in the best and future welfare of a child and also meets the safeguards and standards equivalent to that of a national adoption and does not result in improper financial gain for the agencies involved in it.<sup>9</sup> Though it has been recognized by several countries, there are certain issues which are centrifugal to foreign adoptions especially, with respect to choice of law, jurisdiction of the courts and the recognition of foreign adoption orders. In order to remove the difficulties centred round the area, the Tenth Hague Conference of Private International Law had adopted a Convention in 1965, popularly referred to as Hague Convention on Foreign Adoptions.<sup>10</sup>

In India, there is no legislation dealing with foreign adoptions. There is no provision even in the Hindu Adoption and Maintenance Act, 1956, or in the Guardians and Wards Act 1890, or in the Juvenile Justice Act, 2000. However, the courts are guided by Sections 7-11 and 17 of the Guardians and Wards Act, 1890, whenever a foreigner wants to adopt an Indian child and by the Hague Convention on Foreign Adoptions even though India is not a party. Although the said Act, and the provisions of the Convention are guiding the courts in exercising their discretionary powers in passing a foreign adoption order, there exists a difference of opinion among the various High Courts in the country.<sup>11</sup> This is because of the dereliction of the government to regulate the issues involved in the area and to enact a comprehensive legislation. Fortunately even though, there is no legislative regulation on this area, the situation is better than yester years in view of the



guidelines laid down by the apex court in *Laxmikant Pandey v. Union of India*.<sup>12</sup>

### **The Guidelines of the Supreme Court**

Thanks to the public spirited lawyer, Mr. Laxmikant Pandey on whose initiation, the apex court took a lead role to halt the profiteering motives of various voluntary agencies involved in offering Indian children to foreign parents, and, framed certain guidelines to be followed in the future interest and welfare of children in the absence of a legislation. Since the judgment is too exhaustive, a few specific aspects are only mentioned.

- In view of the malpractices involved in the area, the court held that in future the activities of the agencies involved in foreign adoption be regulated through a permanent mechanism.
- In future the agencies recognized by the Government (which includes Indian as well as foreign) only should participate in foreign adoptions.
- Any prospective applicants opt for adoption the application has to be routed through a proper foreign agency, along with a home study report and an assessment of the adoptive parent's capacity to handle the trans-racial, trans-cultural, and, trans-national aspects of such adoption.
- The social or child welfare agencies must send progress reports in a quarter to the Indian Social or Child Welfare agencies until the application for guardianship can be declined by the court.
- Natural parents of a child be assisted by the agencies in taking a decision about the relinquishment of the child for adoption be informed of the chances of foreign adoption, and be allowed to review their decision within 90 days.
- If any disruption takes place in the prospective adoptive family of the foreigner before adoption can be affected,

the foreign agencies should find out an alternative family within the same country and report it to the court handling guardianship proceedings.

- If any orphan, destitute or abandoned child has come to any institution, all efforts be made by such agency within three months to trace the biological parents before declaring the child free for adoption after completing the procedures prescribed by the court.
- The foreign social or child welfare agency should have an Indian citizen as its representative with a degree or diploma in social work and in child welfare. The representative should work only for one agency and a paid employee of such organization having power of attorney to act in India on behalf of such foreign agency for all practical purposes.
- All the children offered for foreign adoption must accompany a child study report for the consideration of the prospective parents.
- The courts should take due caution and care before passing an order appointing a foreigner as a guardian keeping in mind the future welfare of the child as a primary aspect.

As rightly pointed out by the apex court, the future welfare of the child is a vital aspect, and always should be borne in mind before appointing any foreigner as a guardian. In the words of Lindely, J., "the welfare of the child is not to be measured by money or by physical comforts only. The word must be taken in its 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>

Taking into consideration, the seriousness with which the malpractices are employed by various child and social welfare agencies, and the anguish expressed by Supreme Court on the lackadaisical attitude of the government, the Government of India constituted a Central Adoption Resource Agency (CARA) in 1990, under the supervision of Ministry of Social and Family

Welfare. Accordingly CARA will act as a clearing house to promote in-country adoptions; regulate inter-country adoptions. No child or social welfare agency can process the application in the competent court for inter-country adoption without obtaining the "No Objection Certificate" from CARA. CARA has also been empowered with vast powers to issue guidelines to all the social or child welfare agencies to be followed, to cancel the licences of any agencies, if found guilty to inspect, regulate, monitor and issue directions to all the adoption agencies in the country.<sup>14</sup>

### **Critical Appraisal**

There is no doubt that the continuous judgments and the guidelines issued by the apex court are exhaustive enough to regulate the foreign adoptions in the country. But at the same time, the relaxations given by the court with respect to few aspects as requested by the various organizations need to be regulated. The court in its second judgment considering the difficulties presented by the adoption agencies with respect to the restriction of foreign parents visiting India, before approving the child for adoption as stated in its first judgment has relaxed. The reasons presented before the court and the concession extended by it that the prospective parents need not visit India and stay with the child seems to be right. However, taking into consideration, the future welfare of the child and to access the mentality of the parents, it would have been better at least they are asked to be interviewed personally by the Head of the Indian Mission of the country of the prospective parents. Basing on the assessment of the Head of the Mission, a confidential report can be sent to CARA. Only if the report is positive, CARA should issue a no objection certificate. Instead of prescribing such a safety measure, the court has given a blanket permission to the prospective foreign parents not to visit the country, not to stay with the child and permitted them to adopt an Indian child merely depending on the homestudy report of the foreign adoption agencies. In this type of situation, there is every possibility for obtaining a favourable home study report from a foreign agency by the agencies in India interested in making money illegally.

The court in its second supplemental judgment considering the hardships presented by the applicants with respect to the time limits set by it in the earlier judgments for various categories of children to be declared free for adoption was reviewed and reduced accordingly. But as some of the agencies involved in the process are only interested in making money then considering the future welfare of the child, the procedure prescribed by the court needs certain amendments. First, the court relaxed the rule to obtain a release order by a Juvenile Court or Social Welfare Department or the District Collector that the child is free for adoption in cases where a child is relinquished by its biological parents or an unwed mother. It has been suggested that it would be sufficient to procure an adoption order by simply filing the Deed of Relinquishment before the competent court. In view of the maladies exist in, due to various social, lingual, economic and political factors there is every possibility that some agencies may fraudulently obtain a Deed of Relinquishment from the biological parents or an unwed mother without informing the consequences of relinquishment. To stop such evil designs, it would be better to examine the parents personally by the competent court to satisfy it self that the Deed of Relinquishment has been executed by them voluntarily on their own knowing all the consequences of executing such a deed. To a certain extent it will act as a guard to reduce the evil designs of the profit-making tendency of the agencies involved in the trade. Secondly, in the case of destitute or abandoned children, it is the responsibility of the child or social welfare agency to lodge a complaint before the local police to trace the natural parents or guardians, the moment they found a child. Basing on the information, the Inspector General or the Commissioner of Police concerned has to conduct an enquiry to ascertain the biological parents within a month. In the meanwhile the social or child welfare agency may approach the Juvenile Court, Social Welfare Department or the Collector of the District to declare the child free for adoption. The above authorities upon the receipt of police report may pass an order that the child is free for adoption, if the biological parents of the child are not traced. The procedure prescribed by the court seems to be

sufficient to protect the future welfare of a child still there is every possibility to misuse the norm in various ways and means. At times the agencies may bribe the police or may influence them to issue a report without conducting a proper inquiry. In case if the police took up the case seriously to conduct a proper and thorough investigation, the natural parents may be bribed by the adoptive agencies not to reveal the truth, or through political or any other means may bring in pressure on the police to submit a report that they could not trace the biological parents of the child. In order to prevent the misuse of the provisions, the child's identity be published in newspapers and be telecasted through at least State run television channels for a proper identification of the biological parents. Though this measure is not acceptable to the apex court, in the best interest of the child it should be made compulsory as a part of the inquiry. Further, a high power committee be constituted at district level consisting of the District and Sessions Judge as the Chairman and one or two advocates, academicians or social workers as members to supervise the investigating procedure of the police before they submit the report to the appropriate authorities.

Apart from these measures, another aspect which needs meritorious consideration is that every competent court before passing a foreign adoption order should ask the agencies to produce the child in the court physically or if for any reason, if the child cannot be produced in a court physically, the concerned judge or an advocate appointed by the judge should visit the premises personally to see the child. This step is necessary in view of fake identities and birth certificates of the children produced by several agencies.

Further, though the Government of India constituted CARA empowering with vast powers still maladies exist in this area due to lack of seriousness on the part of the official machinery of CARA in implementing the procedures many of the Indian children's fate is hanging in fire as it is happening in Andhra Pradesh<sup>15</sup> and in other parts of the country<sup>16</sup> at the mercy of powerful voluntary agencies involved in trading or selling babies for hefty sums in the name of doing social service by matching childless couples with abandoned couples.

The pathetic conditions of children and their misuse by the agencies involved in foreign adoptions are presented by the media time and again certainly raises the eyebrows of people about the functioning of and the attitude of the Government of India. The Government should not deter from its commitment in the promotion and welfare of the children by simply constituting CARA and washing off its hands. The Government, especially the Ministry of Social and Family Welfare should review the situation and caution CARA for its lackadaisical attitude in its functioning about the future welfare of children. Furthermore, the Government of India should immediately take steps to establish branches of CARA in every State to monitor effectively the activities of the agencies in each State. If financially the suggestion may not be feasible to have an office of CARA in every State, at least in the Four Regions four Sub-offices can be opened to monitor the activities in that region and to assist the Central Office in New Delhi.

Apart from the above, the CARA has to specify the periodicity of its monitoring functions such as inspection of the social or voluntary agencies, the periodical meeting of Voluntary Coordinating Agencies, evolve suitable programmes to train the social workers and others involved in foreign adoptions with specific modules to tackle the illegalities. The Ministry of Social and Family Welfare should evolve programmes to disseminate in all the national languages through television and radio and distribute pamphlets highlighting the importance of children in the nation building and the responsibility of the community in protecting the future generations and also about the importance of adoptions in general and foreign adoptions in particular with respect to destitute or abandoned children.

### **Conclusion**

As rightly pointed out by the Supreme Court in its second supplemental judgment, it is not possible to eradicate the maladies exist in the field of inter-country adoptions altogether, we can reduce the miseries by acting swiftly. With the co-operation and co-ordination of the governments of Union of India, State and Union Territories and the society it can be

curbed to a maximum extent. The need of the hour is to deal sternly with the muscle and money power that is playing a big role and treating children as goods and exporting them to various foreign countries in the name of providing security to their future through the institution of Foreign Adoptions. The Government of India should come forward to enact a legislation taking into consideration of various opinions and suggestions rendered by academicians and people who are interested in the promotion and future welfare of children. Being a party to the international conventions and declarations on human rights in general and of children in particular, and to fulfil its constitutional obligations, is it not the responsibility of the government to enact a comprehensive law to halt the horrors faced by millions of children? If any attempt is made in this direction, such a legislation should be comprehensive enough to cover the interests of children of all the religions including Muslims without any fear or favour to discharge its constitutional mandate under Art. 44 of the Directive Principles of State Policy and should not eliminate or keep postponing things unlike the Children's Bill which was watered down. If legislation is enacted, it should have broad based provisions to constitute monitoring bodies at the Union and State levels empowered to periodically review the activities of CARA, VCA and other agencies and to render suggestions to the government for further steps to be taken to prevent any maladies. Such a body should consist of Judges, Lawyers, Police Officers, representative from Social and Child Welfare organizations, Academicians having expertise in the area, and women representatives, under the chairmanship of the Ministers' of Social Welfare at the Union and State level.

Though it is viewed by a section of scholars and by the Government that the existing guidelines laid down by the Supreme Court and the procedures adopted by CARA are sufficient, in view of the gaps that still exist in the area and the malpractices adopted by various agencies, a legislation with strict penal provisions for the violators certainly go a long way and would deter the agencies in committing grave illegalities. As all of us are well aware that we have inherited this country

not from our forefathers but from the future generations, we are answerable to them. And the responsibility further lies on the shoulders of everyone of us that we should hand over this country in the safest form to our future generations to the maximum extent possible, if not at least the way we inherited from our forefathers. Hence in the best interest of the nation and to protect the supreme asset (i.e., the children) of the country, it is necessary to lend a helping hand in moulding their future in a free and evil free society. Let me conclude with a fervent appeal once again,<sup>17</sup> to the Government of India that it should come forward to enact a law at the earliest to see the smiles on the faces of the children of this country.

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11. *Re Sister Gemma*, AIR 1970 Mad, 262; *Trine Holst Thomson v. The Children's National Institute*, AIR 1974 All.95; For a detailed discussion, see T.S.N. Sastry "The Need for an Enactment on Foreign Adoption", *The Academy Law Review*, Vol. XII, No. 2, 1988, p. 157 at 159-61.



12. AIR 1984 SC 469; AIR 1986 SC 272; AIR 1987 SC 232; AIR 1992 SC 118. Since the facts and the Judgment of the court are well aware and exhaustive, only important guidelines stated by the Supreme Court are only mentioned.
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