

THE
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LAW REVIEW

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THE NEED FOR AN ENACTMENT ON FOREIGN ADOPTION

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The main objective of adoption is to provide a child to the childless. Adoption as we know is, "to take as one's own child voluntarily with the rights of the child".¹ The act of adoption creates a legal relationship between a parent and child, who have had no genetic relationship previously. The artificial relationship between parent and child is created by law through the institution of adoption.² The basic concept of adoption carries some special objectives.³ The system of adoption is not new in countries like India, Rome and Greece, and it dates back from ancient times. In modern times more countries are recognizing the system in their legal systems. It varies from country to country and according to the personal laws of the parties.

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1. *Chambers 20th Century Dictionary* (1985).
2. Diecy & Morris, *Conflict of Laws* (10th edn., 1980), p.490.
3. The objectives are:
 - (a) To protect the adoptive parents in old age;
 - (b) To continue the name of the adoptive family;
 - (c) To perform customary and religious ceremonies of the adoptive family;
 - (d) To create legal and social status of the adoptive family; and
 - (e) To inherit the properties of the adoptive family.

Like ordinary adoption, the concept of foreign adoption or inter-country adoption is also gaining momentum in Conflict of Laws. The concept of foreign adoption is rather a new one, but recognized by many countries including India, although not a party to the Hague Convention on Foreign Adoptions of 1965. Foreign adoption means taking as one's own child, voluntarily with the rights of the child who does not belong to that country. According to the Indian Council of Social Welfare, a 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."⁴ Although the concept of foreign adoption is modern, it is facing lot of problems, specially in the developing countries and particularly in a highly populated country like India. Paul Harrison clearly depicts the problems thus:

... a large number of children in the rural areas, (are suffering from) "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realization of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health, care and disease and illness caused by starvation, impure water and poor sanitation.⁵

India confronts special problems owing to the legal vacuum existing in this area. The child, who is said to be the backbone of a country, is facing lot of problems owing to the dereliction of the Government to develop the law in relation to foreign adoptions to eradicate trafficking in children by foreign adopters. The profiteering motives of the voluntary organizations arranging such adoptions have yet to be discouraged even after the necessity for a 'legislation' felt by the Supreme Court in *Laxmi Kant Pandey*.⁶

The object of this paper is to throw some light on the present legal position on foreign adoption and the exigency of legislation to monitor such adoption.

4. Quoted by Justice P. D. Desai in *In Re Rasiklal Chhaganlal Metha*, A.I.R. (1982) Guj. 193, 196.

5. Quoted in *Laxmi Kant Pandey v. Union of India*, A. I. R. (1984) S. C. 469, 476.

6. *Laxmi Kant Pandey's Case*, A. I. R. (1984) S. C. 469-94; A. I. R. (1986) S. C. 272-81; A. I. R. (1987) S. C. 232-40.

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The system of adoption is a well established and recognized institution among Hindus only. Other communities in India have recognized it as a customary process for special purpose only.⁷ Even Hindus had no uniform law of adoption prior to 1956, but now it is regulated by the Hindu Adoption and Maintenance Act, 1956. There is no provision either in the Adoption and Maintenance Act, 1956 or in the Guardians and Wards Act, 1890 or any law for passing an order for foreign adoption by courts. But the courts are empowered to act in their discretion in appointing a foreign national as guardian of an Indian child and to pass an order for adoption under Guardians and Wards Act, particularly in cases of orphans, destitutes, refugees and abandoned children keeping in mind the future welfare of the child. A court in exercising the discretion in appointing a foreign parent as guardian must carefully consider many points in all possible ways. Stressing the point, Justice Desai discussed the considerations, which should be adverted to by courts in passing foreign adoption orders.⁸ In addition to the agenda specified by the learned Judge, the Supreme Court further elaborated the considerations which should be taken into account by courts, in *Laxmi Kant Pandey*.

In exercising the discretionary power with nonadvertance to the basic principles, Justice Desai sharing his views with Cheshire,⁹ expressed his fear that a foreign adoption might result in an 'abortive adoption' having no validity in either country or a 'limping adoption' may be possible. The learned Judge further observed that "an adoption recognized in one country but having no validity in another," might leave the child in a helpless and hapless condition.¹⁰ Accepting the views of the learned Judge fully, the Supreme Court held that the courts in future must be vigilant in passing foreign adoption orders.

7. The Christians and the Parsees (the latter call it *pallak*) in India recognize adoption for certain religious ceremonies, though there is no such institution in their communities. For details, see R. J. Rao, "A Uniform Law of Adoption," 17, *J. I. L. I.* 287-88 (1975).

8. *Supra* n. 4 at 193-96.

9. Commenting on the problems in foreign adoptions, in the application of the choice of law rules, Cheshire said that "the courts of the applicant's country cannot make an order, if the child is domiciled abroad, unless the court satisfies that the order will be in accordance with the law of the child's domicile. This is other wise described as a 'limping infant'. See Cheshire & North, *Private international Law* (10th edn., 1979), p. 466.

10. *Supra* n. 4 at 196.

It is necessary to examine the relevant provisions of the Guardians and Wards Act which are relevant in passing foreign adoption orders. Sections 7 to 11 and 17 of the Act are generally applied by courts in appointing a foreign national as guardian to a child and passing the foreign adoption orders. Section 9 (4) of the Hindu Adoption and Maintenance Act, 1956 also empowers a court to appoint a guardian to a minor child in its discretion.¹¹

According to section 7 (1) read with section 17 of the Guardians and Wards Act in appointing a guardian, a court must thoroughly satisfy itself that the order will promote the future welfare of the child in all possible ways. If the court comes to such a conclusion after considering the case in all its dimensions, then it can exercise its discretion to appoint a foreign national as guardian and can pass a foreign adoption order. Section 17 (3) and (5) somewhat restrict the powers of courts in appointing guardian against the wishes of the child, if the child is in a position to express his ideas, but the final discretion is left to the court in considering the future welfare of the child.

The term 'the future welfare of the child' is not an easy concept. In considering the future welfare of the child, Lindely, J. rightly observed that "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."¹² In measuring the future welfare of the child it has been observed that "unless the desire of a parent to have his child coincides with the welfare of the child, such desire must be subordinated to welfare consideration."¹³ The Bombay High Court further elaborated the point that "what would be best for securing the welfare and happiness of the minors should be the most paramount consideration in appointing a guardian."¹⁴

11. Section 9 (4) of the Hindu Adoption and Maintenance Act, 1956 specifies that "where both the father and mother are dead, or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the present age of the child is not known, the guardian of the child may give the child in adoption with the consent of the court."
12. *In Re Mc. Grath (Infant)*, [1893] 1 Ch. 148.
13. *In Re Adoption Application*, 41/61, [1963] Ch. 315.
14. *In Re Gulbai and Lilbai*, (1908) I. L. R. 32 Bom. 50. See also B. B. Mitra's *Guardians & Wards Act* (1980), p. 116.

The sections of the Act, viz., 7, 8, 9, 10, 11 and 17 delineate the powers of the court, the persons who are entitled to apply for guardianship, the jurisdiction of the court in entertaining an application, the form, procedure of filing an application before a court. Sections 7 and 17 provide the guidelines to protect the future welfare of the child while appointing a foreign national as guardian.

Although the said Act is guiding the courts in exercising their discretionary powers in making a foreign adoption order, the difference of opinion existed among the courts. This situation is prevailing because of the dereliction of the Government in filling up the legal vacuum in this area, the controversial opinions among the courts clearly visualize the picture how uncertain the law is, and depicts the total confusion and the wilderness and helplessness of the courts.

The Madras High Court in exercising its discretion opted in favour of the foreign adoption in appointing a foreign national as guardian to an unclaimed Indian child.¹⁵ The Gujarat High Court also used its discretion after considering many points and shared the view of the Madras High Court.¹⁶ While the Allahabad High Court on the contrary opined that the court lost its jurisdiction the moment the child move out of the country. Hari-swarup, L. J. however conceded that if the Government of India issued a passport to the child and the Government of Denmark issued a visa (since the adopted parents were citizens of Denmark) then the court had no saying in the matter.¹⁷ The controversial opinions among the courts clearly stress the need for a set of rules governing foreign adoption.

Supreme Court Judgment:

At last upon the initiation of a writ petition by Laxmi Kant Pandey, the Supreme Court opened its eyes and realised the problems involved in foreign adoptions and has taken the initiation to frame the rules and regulations and to provide a clear cut law to eradicate the unlawful motives of some of the voluntary organizations offering Indian children to foreign nationals.

15. *In re Sister Gemma*, A. I. R. (1970) Mad. 262-63.

16. *Supra* n. 4.

17. *Trine Holst Thomsen v. The Children's National Institute*, A. I. R. (1974) All. 95.

The Court after careful examination of the case, expressed its dissatisfaction over the Government's dereliction in passing a 'legislation' to eradicate the unlawful activities in this area. The Court has taken the lead, in its protracted historical verdict laid down, the rules, regulations and suggested the safeguards to be followed not only by the courts but also by the Government and the social and other various organizations engaged in offering Indian children to foreign parents to protect and promote the future welfare of the child. It is beyond the scope of this paper to deal with the entire judgment of the Court. A brief analytical study visualizes the main idea behind the historical judgment of the Court.

The Court in laying down the principles held that hereafter the recognised agencies (those who were recognised by the Government of India) were only eligible to participate in the foreign adoptions and also held that those agencies who were engaged in giving Indian children to foreign parents must be made parties responsible to the act. The motto behind in laying down this principle is, that they will be aware of the responsibilities in dealing with the foreign adoptions, because the courts or the Government may question or punish them, at anytime if any fraud is identified in offering an Indian child to a foreign family. If it is a recognised agency, then it is presumed that they will take care in all respects to protect and promote the future welfare of the child in all possible ways.

The social and child welfare agencies engaged in this area, before offering a child for foreign adoption, should find a prospective adoptive family within the country. Stressing this point, the Court shared its view with the International Council of Social Welfare and held that this would avoid the trans-racial, trans-cultural and trans national problems.¹⁸ The motive behind the Court in laying down this principle is appreciable. But in practice how far the decision of the Court will overcome the predominant problems like religion, sex, caste, creed and community, which are in-built in our society and who will come forward to adopt a child without questioning the above factors. It also creates a lot of problems to the organizations engaged in this area. So the organizations feel it is better to encourage foreign adoptions.

18. See *Laxmi Kant Pandey*, A. I. R. (1984) S. C. 469,477.

The judgment quite concise in terms of tackling the problems from various facets, and it left certain questions unanswered. One such question that arises in our mind is, what will happen to a child, if in the course of time a disruption occurs in the family after the effect of adoption had taken place? For reasons best known to the learned Judges, they kept themselves away from dealing with this important aspect. Should we then construe that the local government would take remedial measures under such circumstances? Is it binding on them? Is it a legal obligation on their part?

To these important questions two possible answers may be suggested. One is that the Government of India while issuing a passport or the court while passing a foreign adoption order must issue instructions to the social or child welfare agency in that foreign country, to monitor the adoptive parents and request them to inform the agency if any disruption happens in the family after the adoption has taken place. Then the social or child welfare agency in that country must step in to safeguard the future welfare of the child and also should take up the responsibility to search for an alternative adoptive family in that country. Another possible alternative is that the foreign government should get involved in the matter and make sufficient provision through its welfare departments to provide a suitable home for the child in the event of the familial disruption, after the adoption had taken place.

In spite of the absence of any law, the learned Judges¹⁹ with their ample experience have taken the pains in laying down the rules and regulations and safeguards to eradicate the unlawful activities committed by some of the voluntary organizations engaged in this area. One must appreciate the positive judgment of the Court in framing the safeguards promote the welfare of the child and to protect from the evil effects of some of the voluntary organizations. The Court in its all the three judgments expressed that it was not only its idea in laying down the principles to protect and promote the future welfare of the child, but also to support the United Nations Human Rights Commission as well as other international organizations and the national policy of the Government of India to protect the future welfare of the child.

19. The Judges are P. N. Bhagwati, R. S. Pathak and Amarendranath Sen, J. J.

International Organization's Efforts:

Since 1924 onwards the World Organization (The League of Nations and the United Nations) are adopting the principles for the promotion of the future welfare of the child through their declarations and conventions. The General Assembly of the UN adopted and proclaimed the Declarations of the Rights of the Child in November 20, 1959, upon the initiation of the UN Social Commission in accordance with the principles of the UN Charter and the Universal Declaration of Human Rights.²⁰

The Declaration adopted by the General Assembly contains a code of conduct with a set of ten principles for the well-being of the child.²¹ The Declaration through its preamble specifies that the child by reason of her physical and mental immaturity, needs special safeguards and care including appropriate legal protection, "before and after birth" and that "mankind owes to the child the best it has to give". All the ten points of the Declarations aim to promote the well being of the child without any discrimination to sex, caste, creed, community, religion and race etc. To this effect the UN had already declared the year 1979 as the International Year of the Child to celebrate the twentieth anniversary of the adoption of the Declaration of the Rights of the Child.

The Economic and Social Council and also the Commission for Social Development of the UN adopted a draft declaration in 1979, based upon the Expert Group Committee's declaration in 1978, containing the principles, "for the protection and welfare of the children with special reference to foster placement and adoption nationally and internationally" and submitted to the General Assembly requesting its perusal to evolve suitable principles.²²

The Draft Declaration submitted by the agencies is a most welcome feature in promoting the future welfare of the child, specially in inter country adoptions. The members of the World Organization with a positive outlook must accept the declaration and strengthen the law and should support the governments to tackle the problems in eradicating frauds involved in this area.

20. *The UN and Human Rights*, (UN Publication, 1984) p. 110.

21. *Ibid.*

22. *Ibid.* and *supra* n. 19.

The International Council on Social Welfare also approved a declaration relating to the foreign adoptions in its Brighton (U.K.) Conference in 1982, based upon the draft guidelines provided by the Regional Conference on Asia and Western Pacific held in Bombay in 1981 for the protection and promotion of the future welfare of the children in relation to foreign adoptions. The Government of India also agreed to support the convention and signed the convention.²³

The Tenth Hague Conference on Private International Law also adopted a Convention on Foreign Adoption in 1965, with a motto to promote the future welfare of the children, specifying the rules, regulations and safeguards to be followed by the States.²⁴

The 'National Policy' of the Government of India :

1. The National Policy in its introduction clearly visualizes the objectives of the Government of India to protect and to promote the future welfare of the children of India.
2. The policy also aims to give high priority to maintenance, education and training to orphans and destitute children.
3. A National Children's Board was also constituted according to the Policy under the chairmanship of the Prime Minister of India to work in co-ordination with various organizations to provide the multiplicity of services striving to meet the needs of the children.
4. The Policy further emphasized the vital role of the voluntary organizations have to play in various fields for the promotion and welfare of the children with the support of the Government of India.
5. The Policy also stressed that the Government will make necessary legislation in developing the welfare of the children.²⁵

Recommendations :

1. In passing a legislation relating to foreign adoption the Government should not make any discrimination in relation to race, sex, religion,

23. *Supra* n. 19 at 475.

24. For the details of the Hague Convention refer Graveson's article on "The Tenth Session of the Hague Conference" *ICLQ* Vol. 14 1965, pp. 537-38.

25. Government of India, Department of Social Welfare, No. 1-14/74- CDD, 22nd August, 1974; also refer *Child and Law*, Vol. III 1979-80, Annexure C pp 100-105.

caste, creed and community, as laid down in the Constitution in Article 15 (1).

2. It is already high time that the policy makers in New Delhi should evolve a comprehensive foreign adoption Act in order to prevent unwanted trafficking and profiteering indulged by some of the voluntary organizations in this field. The Supreme Court was also bewildered to know that there was no law on this subject available. In fact the Constitution itself expresses its concern over children's welfare as stipulated in Article 15(3) which states that "Nothing in this article shall prevent the State from making any special provision for women and children." Article 39 (f) of the Directive Principles of State Policy is more explicit in its tone and tenor and states that "children are given opportunities and facilities 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."

3. While giving licence to the child welfare agencies, the Government (Ministry of Social Welfare particularly) should not only evaluate the competency of such organizations, but also supervise effectively the functioning of those organizations.

4. To avoid the delay in passing foreign adoption orders in the lower courts (generally District Courts) the Government should establish separate children welfare courts like the *Lok Adalats*, because in our country not only the lower courts but also the higher courts are also facing many problems in disposing of the cases owing to heavy litigation pending before them for over many years.

5. The Government must also take the initiative to sign and ratify the Hague Convention on Foreign Adoptions to avoid the problems (such as like choice of law, test of domiciliary and recognition of foreign judgments) with at least the countries that have signed and ratified the Hague Convention in promoting the future welfare of children.

6. The Government must also take the initiative, to establish the Regional Children's Boards under the authority of the National Children's Board to eradicate the unlawful activities of some of the voluntary organizations interstate transfers of the children within the country.

Conclusion

Although the Government passed many legislation for the future welfare of the children and in its 'National Policy' assured to promote and protect the welfare of the children, they are not adequate. Simply by merely declaring a 'National Policy' and constituting a National Children's Board without effective implementation is not a sufficient safeguard to promote the future welfare of the child. The Government has already accepted to promote the future welfare and to safeguard the interest of the children given in foreign adoption. A mere declaration of its support to the International conventions is certainly not adequate to protect and promote the future welfare of the children. Is it not therefore the duty of the Government to protect and promote the interests of the children, as stressed in the Directive Principles of the State Policy? Is it not the duty of the legislature to honour the ideas, stressed by the judiciary for a clear cut enactment to fill the yawning gap in foreign adoption?

It is already high time that the Government should wake up from its slumber, to fulfil the aspirations embodied in the Constitution, and of the people of India and immediately pass a 'legislation' without showing any discrimination towards religion, race sex, caste, creed and community and to avoid further criticism. This would also prevent the unlawful activities indulged by some of the voluntary organizations and protect and promote the interests of the Indian children and also save them from being misused by the foreigners.