

THE INDIAN LEGAL REGIME REGULATING INTER- COUNTRY ADOPTIONS

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ABSTRACT

The need for a specific legislation on the Inter- Country Adoptions (ICA) in India was stated in the 153rd Law Commission Report on ICA, 1994 which led to emergence of Central Adoption Regulating Agency (CARA) guidelines issued in various series of Laxmikanth Pandey's case which have also acted as source of regulation for inter country adoptions since 1990's. The paper highlights importance of ICA from the view point of NRI's and OCI's and foreigners living in reciprocating (Hague Convention relating to ICA countries) and non-reciprocating countries. The study also lists out the reasons for fall in the ICA statistics from India to Scandinavian countries. The aim of the paper is to analyze the provisions of Juvenile Justice Act, 2015 with respect to ICA and the comprehensiveness of the provisions incorporated thereby. The paper aims to provide remedies for the fallacies in the implementation of the Act and the role of CARA in dealing with ICA.

Keywords: Inter Country Adoptions, Juvenile Justice, CARA guidelines, Hague Convention

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Introduction

Based on the principles issued in *Laxmikant Pandey v. Union of India* [5], Indian Government has comprised a Central Agency - Central Adoption Resource Agency under protection of the Women and Child Welfare Ministry, to regulate Adoptions (both In-country and ICAs). The Agency is responsible for issuing guidelines and for regulating adoptions, both Domestic and ICA, in India. Presently, The Government of India has repealed the JJ Act, 2000 and re-enacted a new JJ Act, 2015.

This Act is a secular gender-neutral law for all the people in the society. Any one irrespective of their religion can adopt a child under this Act. This Act defines under Sec. 2 the terms like "adoption", "Best Interest of Child", "ICA", which are in consonance with Hague Convention. Moreover, Act describes "Central Authority" and gives it a status of "Statutory Authority" in the Country for regulating Adoptions. The Act primarily, prescribes procedure for ICA under a

separate chapter VIII. This Chapter deals with "Adoptions" that presents comprehensive requirements for adoptions and penalties for procedural non-compliance. Hence, the Provisions of the Act are based on the International Conventions and are in consonance with them, which clearly reflect a more Child-Centric Act. It also considers the principles of "Best Interest of the Child" clearly. [6] As per provisions of this Act, the child who is given in ICA is cleared with adoption procedure and formalities in child's origin country where court finally grants adoption deed to the Prospective Adoptive Parents under the Juvenile Justice Act, 2015.

The regulations even prescribe Post Adoption procedure. The whole system is now made virtual and every application is mandated to be followed by the Receiving Countries Authorized Adoption Agencies, thereby bringing in more transparency in the adoption process.

a. The Juvenile Justice Act, 2015

The Act has laid down the procedure relating to in-country and ICA of children. Section 58 lays down the In-country Adoption procedure. The CARA is given the status of an Authority for regulating Adoptions in India and is constituted under the Legislation of Juvenile Justice Act, 2015. Prior to this Act, it was not a statutory body. Nevertheless, currently the CARA is given statutory recognition under S.68 of the JJ Act, 2015 and S.80 provides for the punishments for those adoptions which do not follow the prescribed procedures as laid down by CARA Regulations. Even Sec. 81 prescribed Imprisonment for 5 years and fine of one lakh Rupees, if any person is involved in baby selling activities. The Stake Holders responsibilities and their duties are made clear under the Act. Hence, the present law regulating ICAs in India is Juvenile Justice Act, 2015 read with of Adoption Regulations of 2017 [7].

b. Adoption Regulations of 2017

These rules provide measures associated to adoption by relatives, both outside and within country. The procedure for adoption by step-parents has also been defined. It will help adopted children get their right of inheritance. This will additionally reinforce the programme of adoption by streamlining the adoption process. [8]

c. JJ Model Rules, 2016

Area as well as Capacity of institutions, clothing, bedding, toiletries, maintenance and disposal of child's records, the duties of Child Welfare Officer, appointments etc., roles and responsibilities of Store-Keeper in CCI's etc., are also laid down under the Model Rules, 2016.

These Rules act as a basis for determining the criteria for CCI, SAA's etc.

Similarly, the vulnerable nature of ICA was brought to the notice of Supreme Court in a Public Interest Litigation filed by an Advocate Lakshmikant Pandey in the year 1984. The Petition stated that the children and the parents involved (both biological and foster parents) in ICA are subjected to various kinds of human rights violations like child selling, Kidnapping of children, forging the documents of child and subjecting the children to flesh trade etc., The petitioner alleged that the private adoption agencies are operating without any guidelines and there is no law to regulate Inter Country Adoptions thereby subjecting the parties involved to long horrific journey.

In L.K. Pandey's case [9] where a child was living with birth parents who had consented to provide their child in adoption to a known foreign origin couple, Apex Court has taken a diversion from its guidelines made in. In *Smt. Anokha v State of Rajasthan* [10], Court held that Inter Country Adoptions are to be dealt by filing an request under section 7 of the Guardian and Wards Act 1890. [11] It was held that the Guidelines in L.K. Pandey's Case were mostly to regulate Orphan, Abandoned and Surrendered children. It was further held that the Guidelines were laid to see that the malpractices are not carried by the Placement Agencies and other Child Care Institutions involved in ICAs. CARA is set up to check the performance of these placement agencies as per the laid guidelines.

The same principle laid down in L.K. Pandey's Case was re-iterated in *Karnataka State Council for Child Welfare case law* wherein Justice Pasayat, upheld the value of "Best Interests of the

Child” thereby upholding guidelines laid down under Laxmikanth Pandey’s Case over the legal provisions of Sec. 7 of GAWA. Supreme Court while rejecting the special leave petition held that as the guidelines are not adhered while dealing with a request submitted under section 7 which is to be read with Section 17 of the Guardians and Wards Act, 1980. [12]

I. REASONS FOR THE FALL IN INTER COUNTRY ADOPTIONS IN INDIA

The basic reason for the fall in the figure of Inter Country Adoptions from India by Scandinavian Countries [13] is due to its much adverse publicity relating to illegal adoptions in the past (Smolin (2005) [14] and Dohle (2008) [15]. Peter Selman highlights that there can be an upsurge of adoptions in number of a child with special requirements, children with siblings and children above 5 years of age from Asian Countries including India (Selman, 2012b)[16]. As it has been observed that since 2012, CARA has announced its plan to increase the numbers of In Country Adoption thereby giving Principle of Subsidiarity more prominence. Indian Prospective Adoptive Parent’s (Henceforth addressed as PAP’s) and NRI PAP’s are given preference and limit is set out on children to be given in domestic adoptions than Inter Country Adoptions. But, children with special needs and children with siblings and children above 5 years are not reserved or fall under limitation.

Another important aspect for us to note is that with the legislation in place in India and with properly established ICA procedure, the receiving countries can turn towards India thereby overlooking the negative publicity. China and Korea who are top sending countries have also implemented strictly under their laws, the ‘Principle of Subsidiarity’, hence, India which is a

Hague Convention Country and also having ICA law in its place comprehensively can attract receiving countries to adopt from India. Only on the strict implementation of the Enactment regulating ICA, there will be a rise in the numbers of ICA in India.

II. NRI’S TO BE TREATED ON PAR WITH INDIAN RESIDENTS

According to Sec 59 (2) read with Regulation 14 of Adoption Regulations 2017, NRI-s should be treated at par with Indian residents i.e. they will be given preference over Foreigners to adopt Indian orphaned, abandoned or surrendered. As per the set of laws structured by the system, children above five years, as well as those with physical and mental disability, and, siblings, will be preferred for ICA (Principle of Subsidiarity is applied under the Act).

According to Sec. 59 (3) of the Act, irrespective of their religion, an NRI or a foreigner living abroad can apply to adopt an adoptable child from India to a Central Authority (CA) or an Authorized Foreign Adoption Agency (AFAA), or an involved administrative national division of their usual dwelling, as per regulations framed by the Authority. As stated by the Central Adoption Resource Authority, numerous adoption publicity agencies or placement firms are engaged in fraudulent activities of child adoption to foreign couples without the consent of child’s birth parents/ guardians which is a distant prospect due to the subsequent explanations:

1. No child can be placed for adoption unless affirmed lawfully eligible for adoption by the Child Welfare Committee (CWC), which is possible post obtaining the permission from the child’s guardian or

his/her birth parents. This legitimate confirmation is taken as a surrender deed. An abandoned child is announced to be lawfully free for adoption by CWC following its investigation and only after it has shown that the child's legitimate guardian or his/her birth parents are untraceable.

2. A child may only be adopted by a foreign couple post receipt of the CARA 'No Objection Certificate' (NOC) adoption orders from the Court of Justice concerned, the passport for the child issued by local passport office and the exit permit from the Regional Registry Office of Foreigners (FRRO)

Prior to each paper being released, there are stringent verifications done to guarantee the guard of best interest of child.

3. Sections 80 and 81, and Subsections 56(5), 65(4), prohibit and prevent the adoption agencies from performing any such misconduct or malpractice. [17]

The law needs to be more precise in this concept as there is every possibility that the receiving Non – Hague Convention Country may not take care of the child as the Adoption Deed of the Child given in India may not be recognised or considered to be legal in the Non-Hague Convention Country and the receiving State may not feel obligated to take care of the welfare of the child. As the Indian Embassy does not have certain set of guidelines in case of disruption, there is a possibility that the child can be sent back to India and again placed in Institutions. Embassy is not clear as to what needs to be done when the situation is not suitable for the welfare of the child, there is every possibility that the Child Rights are violated when the child is sent to Non-Hague Adoption Convention Countries.

Moreover, the JJ Act, 2015 does not deal comprehensively with disruptions and dissolutions of the families who have adopted from Non-Hague Convention countries prior to the year 2015. This silence can actually make the adopted child who was adopted on Guardianship deed under Guardian and Wards Act can be deprived of the Citizenship of the receiving Country. Hence a proper set of guidelines are to be issued to the Indian Embassies situated in these Non-Hague Convention Countries to check for the well-being of the child who is taken abroad on the Guardian Deed issued by Indian Courts. The Act and the guidelines should be clear about the children who are adopted prior to the 2015 Act.

III.SUGGESTIONS

a. Effective Application of the JJ Act, 2015 from ground level :

As held in *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. State of Tamil Nadu* [18]., Inspection Committees are to ensure that CCI's are registered within the time frame set by Judiciary or the concerned Authorities i.e., before 31st December, 2017. In order to see that there are no Human Rights violations of the parties involved in ICA, checks and measures should be at every stage of the adoption right from the Government Hospitals till SAA as provided under JJ Act, Model Rules, 2016. Effective implementation of JJ Act, 2015 and Model Rules, 2016 can minimize to a great extent the violations of the rights of the parties involved.

Proper Training to the personnel involved is mandatory crucial for application of provisions of the Act: As JJ Act, 2015 is a recent one, proper

training has to be provided to the persons involved in Adoption procedure and thereby make their roles and duties clearly understandable. Proper training is essential for effective implementation of the Act. Rules should be framed by CARA and training should be provided by experts in the areas of adoption at various levels for stake holders involved. The roles of the personnel involved shall be clearly communicated so as to avoid puzzlement.

PAP's shall be provided with Counselling and the information of their application status through Online portal: NRI's and foreign PAP's rather solely depending on AFAA in their receiving country alone, they should be provided with the updated information of their status through an online portal and also counselling shall be undertaken by Indian authorities in order to clear any dilemmas or queries of the PAP's. This can build up the confidence in PAP's and can develop a positive opinion on the Child's Country of Origin. Moreover, through counselling one can encourage foreign PAP's to adopt children with distinct requirements, older age children and also children who have siblings. Along with Online procedure, Counsellors along with lawyers and Psychologists should be appointed at the Central level in order to counsel the PAP's on various issues.

Bilateral Treaty to be concluded with Non-Hague Adoption Convention countries for safeguarding the rights and welfare of the child: Juvenile Justice Act, 2015 does not comprehensively deal with the disruption and dissolution cases of children adopted by NRI's or OCI's residing in Non-Hague Convention countries. Primary duty should be rested on receiving State to look into the welfare of the child and also to naturalize the adoption of the child as per the receiving country

laws. Indian Government shall enter into Bilateral Treaty with Non-Hague Convention countries for the welfare and to safeguard the rights of the adopted child. This is an important step to impose duty on the receiving State.

Observing the legal and judicial regime regulating ICA in India, it can be concluded that the effective implementation of the JJ Act, 2015 will safeguard interests and rights of the child and also the parties (Parents, both adoptive and biological) involved in Inter Country Adoptions. True intent of JJ Act, 2015 can be brought out only if the implementation is done well by the authorities.

IV. CONCLUSION

As observed, many nations have accepted ICAs as the sensible solution to the problem of two distinct groups of people:

- a) Couples in need of children
- b) Children in need of families

Inter- country adoptions "involve questions of jurisdiction and choice of law that relates to the conditions and consequences of adoption. [19]"Today, many countries have enacted laws to govern the process of international adoption including India.

As, the UNCRC has helped to highlight the importance of safeguarding the best interest of the adopted child which now is the founding principle behind the guidelines and provisions in the various multilateral and bilateral instruments, India has become a designated Country in the eyes of all the Receiving nations who are members of the Organisation post the ratifying of the Hague Convention in 2003. Accordingly, the formalities as prescribed under Hague Conventions are now duly fulfilled by India as per the procedures prescribed under JJ Act, 2015.

Hence, there need not be any kind of immigration issues like those in earlier days i.e. before 2015. The formalities relating to ICA and Inter Country Relative Adoptions are to be performed in accordance with Juvenile Justice Act, 2015, which is in consonance with the Act.

However, the increasing complexity and magnitude of ICAs over the past decades has invited the attention of the international community who have joined hands for greater international cooperation pertaining to the facilitation of ICAs. This also entails a greater emphasis on the continuing need to protect the interest and look after the wellbeing of the adopted child as this is the primary aim of adoption policies

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