

## BEYOND BORDERS, BEYOND LAWS: INTER-COUNTRY ADOPTION FROM INDIA UNDER THE HAGUE CONVENTION AND THE JUVENILE JUSTICE ACT

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### Abstract:

**Intercountry adoption**, a growing practice where families adopt children from countries other than their own, has gained prominence. In 1993, the **Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption** was established. Its purpose is twofold: to ensure that intercountry adoptions prioritize the child's best interests and to prevent child abduction, sale, or trafficking. This research paper delves into the impact of the Hague Convention on intercountry adoption in India. By examining relevant literature and referencing provisions in the **Juvenile Justice Act**, the study assesses the effectiveness of the Hague Convention. Specifically, it analyzes adoption criteria, consent procedures, and post-adoption services influenced by the Convention. The research aims to shed light on the Convention's efficacy and its implications for the well-being of children involved in intercountry adoption. Additionally, the study will identify implementation gaps and propose recommendations for enhancement.

**Keywords:** Adoption, CARA, Hague Convention, Inter-country, Juvenile Justice

### Research question:

What is the influence of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993? What are some of the gaps in the law presently and what can be done to bridge it?

#### I. **Introduction:**

Adoption is defined as, "the creation by judicial order of a parent-child relationship between two parties who are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child"<sup>924</sup>.

In India, adoption offers a legal pathway for childless couples or individuals to establish a family. The legal framework permits adoption by Indian citizens or couples of Indian origin, following a defined process overseen by the central adoption authority. This process includes eligibility assessments, home studies, background checks, and a child matching

system. Notably, Indian law recognizes various adoption types, including intra-country, inter-country, and relative adoption, with distinct procedures for each. Inter-country adoption serves a critical purpose of providing a stable and caring environment for children in need. However, navigating the adoption process can be intricate and lengthy. Prospective adoptive parents must possess a comprehensive understanding of legal requirements and procedures before embarking on this journey. This research paper specifically focuses on the structure of inter-country adoption within the framework established by the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).

### Research Focus:

This research investigates the dynamics of inter-country adoption from India following its adoption of the Hague Convention in 2003. The analysis will explore how the Convention has

<sup>924</sup> ADOPTION, Black's Law Dictionary (11th ed. 2019)

impacted adoption procedures and assess its effectiveness in preventing child abduction and trafficking. Additionally, the research will examine the role of the Juvenile Justice Act (JJ Act) of 2015 in prioritizing the "best interests of the child" and promoting in-country adoption as a primary consideration. Finally, the paper will address the ethical considerations surrounding inter-country adoption, including cultural preservation and identity issues for adopted children, as well as the impact on birth families in India.

## II. Theoretical Backing:

This research paper delves into the multifaceted process of intercountry adoption, which intersects with various legal and ethical frameworks. A cornerstone of this analysis is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)<sup>925</sup>. The Hague Convention establishes a robust legal framework, prioritizing the best interests of the child and preventing child abduction, sale, or trafficking. Furthermore, it ensures that adoptions are authorized only by competent authorities and promotes transparent and ethical practices. In essence, the Hague Convention bridges international cooperation, child protection, and human rights principles within the context of intercountry adoption.

The United Nations Convention on the Rights of the Child (CRC<sup>926</sup>) also plays a pivotal role. Universally ratified with a few exceptions, the CRC recognizes children's inherent rights, including the right to adoption as outlined in Article 21. While leaving the decision to recognize and permit adoption systems to individual states, the CRC's principles guide intercountry adoption practices. Specifically, the CRC emphasizes the child's well-being, identity, and cultural heritage.

A Human rights approach further enriches the analysis. Intercountry adoption intersects with broader human rights norms, such as the right to family life and identity as enshrined in Article 8 of the European Convention on Human Rights<sup>927</sup> and Article 8 of the CRC. Ensuring that adoption respects these rights is crucial for maintaining ethical practices and safeguarding the well-being of children involved. Additionally, intercountry adoption intersects with social justice concerns, emphasizing equity in access to adoption opportunities regardless of nationality or socioeconomic status. Prioritizing fairness and equal treatment for all prospective adoptive families aligns with human rights principles and ensures that adoption processes uphold the rights and well-being of children across borders.

A child-centric approach underscores the paramount importance of prioritizing the child's well-being, safety, and development in adoption decisions. This aligns with human rights principles that safeguard children's rights to protection, education, and identity. Finally, ethical considerations and cultural competence are paramount in ensuring intercountry adoption practices respect cultural diversity and heritage. Acknowledging the child's cultural background and identity, as well as their right to maintain cultural connections, is essential for ethical practices<sup>928</sup>.

In conclusion, intercountry adoption operates within a complex web of theoretical frameworks. Human rights principles, a child-centric approach, and ethical considerations all play a crucial role in guiding policymakers, practitioners, and advocates to ensure that adoption processes uphold the rights and well-being of children across borders.

## III. Inter-country Adoption in India:

Inter-country adoption is a process by which a child is adopted by a family from a different country than the child's birth country. It involves

<sup>925</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993), [1994] 1870 UNTS 167.

<sup>926</sup> MARTA MAURÁS, *Public Policies and Child Rights: Entering the Third Decade of the Convention on the Rights of the Child*, 633 *The Annals of the American Academy of Political and Social Science* 52 (2011).

<sup>927</sup> European Convention on Human Rights, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

<sup>928</sup> Abhay Vikram Singh, *Theory Of Human Rights In Perspectives To Child Rights*, 73 *The Indian Journal of Political Science* 365 (2012).

the transfer of legal and physical custody of the child from the birth parents or the child welfare authorities in the birth country to the adoptive parents in the receiving country. The practice of intercountry adoption has a long history, dating back to the aftermath of World War II<sup>929</sup>, when many orphaned children were adopted by families in other countries. Inter-country adoption has been driven by a range of factors, including the increasing demand for adoptable children in wealthy countries, the lack of available adoptive families in some countries, and the perceived benefits of intercountry adoption for children and families.

Inter-country adoption can occur for several reasons, such as when the child is orphaned or abandoned, when the birth parents are unable or unwilling to care for the child, or when the child is deemed to be in need of special care or protection. Inter-country adoption is governed by international laws and treaties, as well as the laws of the birth country and the receiving country. The process can be complex and lengthy, and it involves several steps, including eligibility assessment of the adoptive parents, matching of the child with the adoptive family, preparation of the necessary documentation and legal procedures, and immigration and citizenship processes. The main aim of inter-country adoption is to provide a permanent and secure family environment for children who are unable to be cared for in their birth country.

Legally speaking, Inter-country adoption in India is governed by the Juvenile Justice (Care and Protection of Children) Act, 2015<sup>930</sup>, and the Guidelines Governing Adoption of Children, 2015, which were issued by the Central Adoption Resource Authority (CARA) under the Ministry of Women and Child Development.

The Juvenile Justice (Care and Protection of Children) Act, 2015, provides the legal framework for inter-country adoption in India. It

also defines inter-country adoption as, "adoption of a child from India by non-resident Indian or by a person of Indian origin or by a foreigner<sup>931</sup>". It sets out the eligibility criteria and the procedures for adoption by foreign nationals or non-resident Indians (NRIs), and it mandates that all inter-country adoptions must be processed through the central adoption authority, which is CARA. The Guidelines Governing Adoption of Children, 2015, provide detailed guidelines for inter-country adoption, including the criteria for eligibility, the procedure for application, the process of matching the child with the prospective adoptive parents, the documentation requirements, and the post-adoption follow-up procedures. In addition, India is a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, which is an international treaty that sets out the principles and standards for inter-country adoption to ensure the best interests of the child. India's adoption laws and procedures are aligned with the Hague Convention's guidelines and principles.

A notable case in this context is the case of *Lakshmi Kant Pandey v. Union of India*<sup>932</sup>. In its ruling, the Court emphasized that the lack of legislative oversight of international adoptions in India might be extremely harmful to Indian children, who could be exposed to abuses like profiteering or trafficking, for instance. The Court established a thorough framework of normative and procedural safeguards for regulating inter-country adoption in order to protect children's welfare and to ensure their security in a healthy, decent family life.

The Court did this in consultation with several social or child welfare institutions. Similarly, the *In Re Rasiklal Chhaganlal Mehta*<sup>933</sup> case established the legal framework for the recognition of inter-country adoptions in India and emphasized the importance of ensuring

<sup>929</sup> Kirsten Lovelock, *Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand in the Post W.W. II Period*, 34 *The International Migration Review* 907 (2000).

<sup>930</sup> THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, § 56 & 59, No. 2, Acts of Parliament, 2016 (India)

<sup>931</sup> THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, § 2(34), No. 2, Acts of Parliament, 2016 (India)

<sup>932</sup> *Lakshmi Kant Pandey v. Union of India*, 1984 AIR 469

<sup>933</sup> *In Re Rasiklal Chhaganlal Mehta*, AIR 1982 Guj 193

that the adoption is in the best interests of the child and subject to strict regulation and oversight to prevent exploitation and trafficking. The court also laid down certain conditions for the recognition of foreign adoptions in India, such as:

- The adoption must be legal and valid under the law of the foreign country.
- The adoption must be in the best interests of the child.
- The welfare and interest of the child must be given paramount consideration.
- The adoptive parents must be eligible to adopt under Indian law.

#### **Problems in Inter country-adoption:**

While inter-country adoption can provide a loving and stable home for a child, it also raises several legal and ethical issues that can lead to problems.

One of the main problems in inter-country adoption is the lack of proper regulation and oversight. In many cases, there is a lack of uniformity in the laws and procedures governing inter-country adoption, which can lead to confusion and uncertainty for prospective adoptive parents and children. This can also make it difficult to ensure that the adoption process is fair and transparent and that the best interests of the child are always prioritized.

Another problem is the potential for exploitation and trafficking of children. In some cases, unscrupulous intermediaries may take advantage of the vulnerabilities of birth parents or adoptive parents to profit from the adoption process. This can result in the illegal trafficking of children and can put the child's welfare and safety at risk. Furthermore, there is a risk of cultural and identity loss for the child. Adopted children may struggle to adapt to their new culture and may experience a loss of their cultural identity and heritage. This can have a significant impact on their emotional and

psychological well-being, as well as their sense of self.

Another issue is the potential for abuse and neglect of adopted children. In some cases, adoptive parents may be ill-prepared or ill-equipped to deal with the needs and challenges of an adopted child. This can lead to instances of abuse or neglect, which can have serious consequences for the child's welfare and safety. Finally, inter-country adoption can also raise issues related to citizenship and legal status. Adopted children may face difficulties in obtaining citizenship or legal status in their new country, which can result in a lack of access to education, healthcare, and other essential services.

To address these problems, it is essential to have a robust legal and regulatory framework for inter-country adoption. This framework should prioritize the best interests of the child and ensure that the adoption process is fair, transparent, and subject to strict regulation and oversight. Additionally, it is crucial to ensure that prospective adoptive parents are thoroughly vetted and prepared for the challenges of adoption. This includes providing them with appropriate training and support to ensure that they are able to provide a loving and stable home for the child.

Moreover, it is necessary to establish effective mechanisms for monitoring and enforcement to prevent abuse, neglect, and exploitation of adopted children. This can include regular inspections and visits by social workers, as well as strict penalties for any violations of the adoption laws and regulations.

Recognizing the importance of stricter guidelines in cases of inter country adoption, measures were taken at an international level. One of the outcomes of these measures is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993<sup>934</sup>.

<sup>934</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993), [1994] 1870 UNTS 167.

#### IV. The Hague Convention, 1993:

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, also known as the Hague Adoption Convention, is a multilateral treaty that aims to regulate and standardize inter-country adoptions to ensure the best interests of the child are protected. The convention was adopted in 1993 in The Hague, Netherlands, and has been ratified by over 100 countries. The Hague Adoption Convention sets out a number of important provisions, including requirements for the consent of the birth parents or legal guardians, the establishment of central adoption authorities in each country, the provision of counselling and information to prospective adoptive parents, and the recognition of adoptions carried out in accordance with the convention.

One of the key provisions of the Hague Adoption Convention is the requirement for a "best interests of the child" assessment. This means that before an inter-country adoption takes place, the child's welfare and best interests must be given paramount consideration<sup>935</sup>. This includes taking into account the child's background, culture, and any special needs or requirements they may have. Another important aspect of the Hague Adoption Convention is the requirement for cooperation and communication between countries. This includes the establishment of central authorities in each country to oversee inter-country adoption, the sharing of information and documentation between countries, and the provision of assistance and support to adoptive parents and children. The Hague Adoption Convention has been successful in improving the regulation and oversight of inter-country adoptions and in protecting the best interests of children. It has helped to reduce the incidence of illegal and unethical adoption practices and has facilitated the recognition of inter-country adoptions in different countries.

#### **Optimizing the Framework: Addressing Implementation Challenges:**

Despite its many provisions, the Hague Adoption Convention is not without its loopholes and challenges. One of the key challenges is the uneven implementation of the convention across different countries.

For example, some countries have been slow to ratify the convention or have not implemented its provisions fully or consistently. This can create gaps in the regulation of inter-country adoptions and can make it easier for unethical or illegal practices to occur. Another challenge is the potential for abuse and exploitation of adopted children<sup>936</sup>. While the Hague Adoption Convention requires that the best interests of the child be prioritized in all inter-country adoptions, there are still concerns that some adoptive parents may use adoption as a means of trafficking or exploitation. For example, some adoptive parents may seek to adopt children for labour or sexual exploitation, or may abuse or neglect children once they are adopted.

There are also concerns about the impact of inter-country adoption on the birth families and communities. In some cases, children may be removed from their families without sufficient cause or without adequate efforts to support the family and keep them together. This can lead to a loss of culture, identity, and community for the child and can have long-term negative impacts on their well-being<sup>937</sup>. Finally, there are challenges related to the implementation of the Hague Adoption Convention itself. For example, there are concerns that some central authorities may not have the resources or capacity to fully implement the convention's provisions, or may be influenced by corruption or other external factors.

<sup>935</sup> Sonja van Wichelen, *Moving Children Through Private International Law: Institutions and the Enactment of Ethics*, 53 *Law & Society Review* 671 (2019).

<sup>936</sup> Judith Masson, *Intercountry Adoption: A Global Problem or a Global Solution?*, 55 *JOURNAL OF INTERNATIONAL AFFAIRS* 141 (2001).

<sup>937</sup> Leslie Doty Hollingsworth, *Does the Hague Convention on Intercountry Adoption Address the Protection of Adoptees' Cultural Identity? And Should It?*, 53 *SOCIAL WORK* 377 (2008).

Overall, while the Hague Adoption Convention has helped to improve the regulation and oversight of inter-country adoptions, there are still significant challenges and loopholes that must be addressed<sup>938</sup>. Efforts are needed to ensure that the convention is fully implemented across all countries, that the best interests of the child are always prioritized, and that the potential for abuse and exploitation is minimized. "The Hague Convention: The Problems with Accession and Implementation" by Annette Schmit<sup>939</sup> discusses the issues related to the Hague Convention on the Civil Aspects of International Child Abduction. The article notes that despite the Convention's aim to protect children from wrongful removal or retention across borders, it faces challenges in both accession and implementation.

The Juvenile Justice Act (JJ Act) of 2015 in India doesn't directly incorporate specific provisions of the Hague Convention. However, both the JJ Act and the Hague Convention share the goal of protecting children and ensuring their well-being.

The JJ Act doesn't directly reference the Hague Convention but works alongside it to achieve similar goals. Both the JJ Act and the Hague Convention prioritize the "best interests of the child" as the paramount principle in adoption decisions<sup>940</sup>. This translates to ensuring the child's safety, well-being, and finding a loving and permanent home. The JJ Act also establishes a framework for child protection and adoption within India, while the Hague Convention sets international standards for inter-country adoption. They work together to ensure a smooth process for children placed internationally. Most importantly, however, the JJ Act led to the establishment of CARA, which acts as the central authority for all inter-country adoptions in India. CARA ensures compliance

with Hague Convention regulations while managing the in-country adoption process.

The JJ Act emphasizes finding permanent placements for children within India before considering inter-country adoption. This aligns with the Hague Convention's objective of exploring all in-country possibilities before international placements<sup>941</sup>.

The JJ Act also prioritizes efforts to reunite children with biological families whenever possible. This aligns with the Hague Convention's aim to prevent unnecessary separation from birth families. The JJ Act sets eligibility criteria for adoptive parents, both domestic and international. This ensures that potential adoptive parents are suitable to provide a loving and stable home for the child.

A primary point of contention is the vagueness of the term "best interests". The JJ Act emphasizes the "best interests" of the child as a guiding principle. However, the term lacks precise definition within the Act. This vagueness opens the door to subjective interpretation by various stakeholders involved in adoption proceedings. The Act does not provide clear criteria for determining what constitutes the child's best interests. As a result, decisions may vary based on individual perspectives, cultural biases, and personal judgments.

While the JJ Act outlines adoption procedures, it lacks robust post-adoption monitoring mechanisms. Without effective supervision, the welfare of adopted children—especially those placed internationally—remains uncertain.

The Hague Convention places paramount importance on the child's best interests. It seeks to ensure that transnational adoptions prioritize the well-being of the child above all else. The Convention mandates safeguards to prevent child abduction and trafficking. Contracting States<sup>942</sup>, including India, must establish designated Central Authorities to supervise and

<sup>938</sup> PETER H. PFUND, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 Family Law Quarterly 53 (1994).

<sup>939</sup> Schmit, Annette. "The Hague Convention: The Problems with Accession and Implementation." *Indiana Journal of Global Legal Studies* 15, no. 1 (2008): 375–95. <https://doi.org/10.2979/gls.2008.15.1.375>.

<sup>940</sup> Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 *The Future of Children* 89 (1993).

<sup>941</sup> Hiromi Ishizawa et al., *Constructing Interracial Families Through Intercountry Adoption*, 87 *SOCIAL SCIENCE QUARTERLY* 1207 (2006).

<sup>942</sup> Andrew C. Brown, *International Adoption Law: A Comparative Analysis*, 43 *The International Lawyer* 1337 (2009).

support adoption processes. These authorities play a critical role in assessing the child's best interests. Despite the Convention's intentions, challenges persist:

**Subjectivity:** The term "best interests" remains subjective, allowing for varying interpretations.

**Cultural Context:** Different cultural norms and values influence what is considered in a child's best interests.

**Lack of Clarity:** The Convention does not precisely define the term, leaving room for ambiguity.

**Enforcement:** Ensuring consistent adherence across countries remains a challenge.

Essentially,

While both the JJ Act and the Hague Convention recognize the significance of the child's best interests, their practical implementation faces hurdles. Addressing these loopholes requires:

- **Clear Guidelines:** Providing specific criteria for assessing best interests.
- **Robust Monitoring:** Strengthening post-adoption monitoring to safeguard children.
- **Global Cooperation:** Collaborating across borders to harmonize interpretations and practices.

In the complex landscape of inter-country adoption, striking the right balance between legal frameworks and the child's well-being remains an ongoing endeavour.

#### V. **The Way Forward:**

Despite the few loopholes in the Hague Convention, it has been an important convention that has changed the way inter-country adoption has been perceived across the world. It must be kept in mind that international law tends to be of a soft law nature, implying a hindrance in legally enforcing it. After a careful analysis of the flaws, the below mentioned steps could potentially be considered in order to make the current

provisions better and on the whole, improve the safeguards for the children.

- i. **Strengthen the monitoring and reporting mechanisms:** The Convention needs to establish stronger monitoring mechanisms to ensure that the provisions of the Convention are being followed. This could be achieved through regular reporting from each signatory country on their implementation of the Convention, as well as the creation of a central database to track all intercountry adoptions.
- ii. **Enhance the role of the Central Authority:** The Convention requires each signatory country to establish a Central Authority responsible for the implementation of the Convention. However, in some countries, the Central Authority is not adequately resourced or lacks the necessary expertise to effectively carry out their duties. Strengthening the Central Authority's capacity would help to ensure that intercountry adoptions are conducted in accordance with the Convention's principles.
- iii. **Improve pre- and post-adoption services:** Many adoptive families face significant challenges after the adoption process has been completed. Therefore, the Convention should require signatory countries to provide adequate pre- and post-adoption services, including counselling, support, and education to adoptive parents and adoptees.
- iv. **Ensure greater transparency and accountability:** The Convention should require signatory countries to provide greater transparency and accountability in their adoption practices. This could be achieved through the establishment of an independent body to oversee the

implementation of the Convention and ensure that all intercountry adoptions are conducted transparently and in the best interests of the child.

- v. Increase cooperation between countries: The Convention should promote greater cooperation and communication between signatory countries to facilitate the sharing of best practices and the resolution of disputes related to intercountry adoptions. This could be achieved through regular meetings and consultations between Central Authorities, as well as the establishment of a forum for stakeholders, including adoptive parents and adoptees, to share their experiences and perspectives.

VI. **Conclusion:**

While inter-country adoption can provide a loving and stable home for a child, it also raises several legal and ethical issues that must be addressed. By establishing a robust legal and regulatory framework and prioritizing the best interests of the child, it is possible to ensure that inter-country adoption is a safe and viable option for children in need of a loving home. However, there are still challenges and concerns related to the implementation of the convention. Some countries have been slow to ratify the convention, while others have not fully implemented its provisions. There are also ongoing concerns about the potential for abuse, neglect, and exploitation of adopted children, and the need for ongoing support and assistance for adoptive families. Overall, the Hague Adoption Convention represents an important step forward in the regulation and oversight of inter-country adoptions, but ongoing efforts are needed to ensure that its provisions are fully implemented and that the best interests of the child are always prioritized.

