
INTERCOUNTRY ADOPTIONS: A COMPARATIVE ANALYSIS BETWEEN INDIA AND US LAWS

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ABSTRACT

Adoption can be defined as the process through which an orphan, abandoned and surrendered child gets parents in his life and so does a childless couple get a child in their life. As the world has become a global village and the people and cultures are getting unified so as such is expected from the laws as well. When it comes to adoption, there are of 2 types, largely the domestic adoption regulated by the domestic laws of the country and secondly is the intercountry adoption regulated by the country of the parents and child in their own capacity. To maintain the process of such an adoption, the Hague Adoption Convention 1993 was established and till today's date it has been ratified by 99 countries so far. Even after ratification and making laws on this concept the post adoption regulation in the adopted countries becomes difficult due to non-availability of unified set of laws. This research work predominately will focus on the concept of intercountry adoption under private international law from the lines of India and US laws. It will enclose the aspects of intercountry adoptions while referring to its advantages and disadvantages followed by a brief discussion on the different intercountry adoption laws in India under the legislations such as the Hindu Adoptions and Maintenance Act, 1956, Guardians and Wards Act, 1890, Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 and CARA, a statutory body recognized by the Ministry of Women and Child development. Whereas, when it comes to US it will discuss about the Intercountry Adoption Act, 2000 and the agency which regulates such adoption. Moreover, the article has also kept an eye on the international instruments such as CRC and Hague Convention on intercountry adoptions. Thereafter, the article will also throw some light on certain judicial pronouncements to make the picture of intercountry adoption clearer and more precise. Lastly, the article will address the need of unified set of laws when it comes to international adoption so as to make the process more transparent and accountable for people while discussing how this process is a beneficial step for vulnerable children around the world.

Keywords: Child, Inter country Adoptions, CARA, International Adoption Act, Juvenile Justice Act.

Introduction

*“The child cannot wait,
Right now is the time his bones are being formed,
His blood is being made and
His senses are being developed.
To him we cannot answer tomorrow
His name is Today.
His/her needs are to be met here and now.¹”*

Every child has the right to be loved and to be cared and live in an environment which assures its overall development and welfare. It is believed that such kind of environment can be provided by biological parents in the first place. But due to any unforeseen reasons if this is not possible, adoption is considered to be the second-best choice to provide the favorable environment to the child. When it comes to adoption, it is the process by which a parentless child gets parents in his life and a childless couple gets child in their life. It is of 2 types. The first is the domestic adoption which is governed by the domestic laws of a particular country. While the other is the international adoption, popularly called as the intercountry adoption.

Historical Background

Intercountry adoption was initially brought into practice to adopt the child victims of World War II and Vietnam War². It was considered in the first place because no child should be left deprived of parents and family love. Ironically, this adoption process became a world-renowned practice and demanded the legal fraternity to take the issue into their hands, so as to avoid any miscarriage of the deed.

It is a process in which both the parents and child belong to different countries and they need to complete the adoption process of both the countries in order to successfully opt for intercountry adoption. Such kind of adoption has become a global phenomenon. Thus, to

¹ The famous quotation is from Nobel Laureate Gabriel Mistral

²Judith Masson, Intercountry Adoption: A Global Problem or a Global Solution, 55 JOURNAL OF INTERNATIONAL AFFAIRS 141-166 (2001)

regulate its process the Hague Adoption Convention, 1993 was established. This convention is within the framework of private international law, which deals with the unification and harmonization of laws between different countries on certain aspects. Every country signatory to this convention has their own way of dealing with international adoption, which makes it tedious to understand the concept as a whole. When it comes to intercountry adoptions in India, it is currently dealt by Juvenile Justice Care and Protection of Children) Amendment Act, 2021 which has recently undergone through certain amendments regarding adoptions. Also, such adoption process is carried out by CARA (Central Adoption Resource Authority) which ensures in the smooth process of adoption and is also dealing with the responsibility of post adoption process. Whereas, on the other hand, US is considered to be largest receiving country when it comes to such kind of adoptions. This is probably because of the presence of an entire legislation on such concept. Therefore, making it mandatory to follow the prescribed rules and regulations. Even though both the countries have signed and ratified the convention the way they deal with intercountry adoption process is different due to lack of unified set of laws on this concept. Thus, making it difficult to regulate the process of post adoption in the adopted countries as complying with different set of laws becomes a tedious task. Therefore, posing as a challenge to protect the children from the cons of intercountry adoptions.

Laws pertaining to Intercountry Adoptions in India

International adoptions, also popularly called as intercountry adoptions can be defined as a process through which a childless couple gets a child and vulnerable and orphan children get parents in their life. Every country has a different way of dealing with such kind of adoption. In general, there are 2 types of adoptions, domestic and international. Here the former refers to the adoption process carried within the country and are governed by the domestic laws. Whereas, in the latter kind such adoption is governed by the adoption laws of both countries i.e., of that country from which the parents belong and other of those from where the child belongs. Having the same notion and purpose and same set of laws for international adoption becomes a tedious task. Thus, looking at such a problem the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption i.e., Hague Adoption Convention, 1993 was formed so as to control the intercountry adoption processes.

This convention has been ratified by 99 countries and India is one among them³. To ratify a convention means that you are obliging to make certain laws on this particular concept in your domestic legislations. Thus, as India has ratified this convention it puts an obligation on India under Article 253 of Indian Constitution⁴ to make certain laws on intercountry adoptions in the country. This convention is based on 2 principles which aim towards the protection of child who are directed towards international adoption⁵;

- 1) To establish certain safeguards to ensure that intercountry adoptions is been opted looking at best interest of the child.
- 2) To establish a system of cooperation between the states who are party to intercountry adoption for the smooth functioning of the process⁶.

Moreover, apart from these principles the convention puts an obligation on the central authority of countries to act as a principal agent while dealing with the issues of intercountry adoptions⁷. To add on, this convention relies on the subsidiary principle which means that, before opting for international adoption, efforts need to be taken by the authorities to place the child within the ambit of domestic adoption and look at the best interest of the child⁸. Apart from it, the convention also laid down certain rules and regulations to look into the fitness of the parents⁹,

³ Marvel & Alexandra, *The U.S. Convention and Co-operation on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights through the Legal Strata*, 1996, JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (FALL), pp. 309-328

⁴ Article 253 of Indian Constitution- Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body

⁵ Marvel & Alexandra, *The U.S. Convention and Co-operation on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights through the Legal Strata*, 1996, JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (FALL), pp. 309-328

⁶ Ibid

⁷ V.C. Govindaraj, *THE CONFLICT OF LAWS IN INDIA: INTER-TERRITORIAL & INTER-PERSONAL CONFLICT* pp 42 (Oxford University Press 2017)

⁸ Article 4 of Hague Convention on Intercountry Adoptions, 1993- Requirements for Intercountry Adoptions

⁹ Article 4 (d) of Hague Convention on Intercountry Adoptions, 1993- have ensured, having regard to the age and degree of maturity of the child, that

- (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
- (2) consideration has been given to the child's wishes and opinions,
- (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
- (4) such consent has not been induced by payment or compensation of any kind.

the maturity and the concern of child to be given for such an adoption¹⁰. Thus, this convention is considered to be the watch dog for intercountry adoptions and all the ratified countries are under obligation to frame certain laws on this concept based on the lines of convention.

Apart from this convention, there is another international instrument which governs the intercountry adoptions in indirect manner. It is the Convention on Rights of Child (CRC). India has ratified this convention in the year 1992¹¹. Thus, accepting to frame certain laws with regards to rights of child in the country.

According to Article 21 (c) of CRC it states that, adopting parents need to ensure that the adopted child enjoys the same level of standards of care as of those children who are placed in the domestic adoption¹². It also emphasis on the role of parents and family in the life of child and endures their roles in the upbringing of the child. In case, this is not possible, it also provides for the option of alternative care for the child¹³.

Further, when it comes to intercountry adoption laws in India there is no separate legislation on such concept rather it is governed primarily by Juvenile Justice (Care and Protection of Children) Act, 2015 and a statutory body named as CARA. But earlier, before this setup got into the picture the concept survived in the country under the lieu of Guardian and Wards Act, 1890 and Hindu Adoption and Maintenance Act, 1956.

Intercountry Adoptions via lens of Hindu Adoptions and Maintenance Act, 1956

The concept of adoptions is defined under chapter II of the Act. It talks briefly about the concept

¹⁰ Article 30 of Hague Convention on Intercountry Adoptions, 1993- (1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

¹¹ Dillon Sarah, *Making Legal Regimes for Inter-Country Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague, 2003 Convention on Inter-Country Adoption*, BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL, pp. 179-257

¹² Article 21 (c) of CRC- Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption

¹³ Article 20 of CRC- A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

of adoption from section 5 to 17. Under this act adoption as a concept is nowhere defined. But then this act governs the adoption process taking place within the ambit of Hindu law. So, when it comes to the intercountry adoptions, this concept for the first time was debated in the case of **Re. Rasiklal Chaganlal Mehta Case**¹⁴. In this case the court held that, intercountry adoptions are legally valid under section 9 (4) of the HAMA Act¹⁵ and are also valid as per the laws of both the countries. In all it meant that, the adoptive parents need to complete the requirements of adoptions in their country and in the child's country and to obtain the requisite permission to do so from the appropriate authority. But as mentioned above, this act only governed adoptions under the Hindu law. So, to govern the process of adoption into non- Hindus the Guardian and Wards Act, 1890 was touched upon.

Intercountry Adoptions via lens of Guardian and Wards Act, 1890

Under this act when it comes to adoptions as Christians, Parsis and Muslims do not recognize adoptions. Therefore, the adoptive parents need to stay as guardians for the adopted child as per this act¹⁶. So, when it comes to intercountry adoptions under this act, the same mentioned principle was applied by the court of law. In the case of **Laxmikant Pandey.V. UOI**¹⁷, this case was brought in the court of law through public interest litigation by a lawyer stating that in the name of intercountry adoptions many social organizations are working with foreign parents by offering children to them and engaging in malpractices. This is exploiting the lives of children and putting their life at risk. Looking upon at the gravity of matter the Supreme Court suggested for the formations of a body to look into the procedure of intercountry adoptions in the country and for the time being until and unless there is no law in the picture regarding this concept, adoption by foreign parents will be taken care by the Guardians and Wards Act, 1890 and they will be considered as guardians of the adoptive child under this act. Moreover, the apex court also emphasized on Article 15 (3)¹⁸ and 39 (f) ¹⁹ of Indian Constitution.

¹⁴ AIR 1982 Guj. 193

¹⁵ Section 9 (4) of HAMA Act- 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 parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

¹⁶PalakJain,IntercountryAdoption,available at <https://www.lawctopus.com/academike/inter-country-adoption/>

¹⁷ 1984 AIR 469

¹⁸ Article 15 (3) of Indian Constitution-Nothing in this article shall prevent the State from making any special provision for women and children

¹⁹ Article 39 (f) of Indian Constitution-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

So, under this act, guardian is defined under section 4 (2) stating that, it a person who is giving the responsibility of taking of another person or his property or both²⁰. Moreover, under section 7 the courts use its powers to make the order of guardianship²¹, under section 8 it mentions the name of persons who are applicable to ask for the order and so for the intercountry adoption, section 8 (1) becomes important²². Lastly, under section 17 it talks about the matters which the courts take into consideration while appointing the guardian²³.

Thus, looking at the development of intercountry adoptions in the country the court in the case of *Re. Jay Kevin Salerno*²⁴ stated id the child is in care of an institution, or a private nursing home or with a private party for better upbringing (referring to foreign parents) it does not mean that the state's responsibility is over. Thus, in the absence of concrete legislation the Supreme Court needs to fame certain guidelines for the overlooking of children adopted by foreign parents.

Intercountry Adoptions via lens of Juvenile Justice (Care and Protection of Children) Amendment Act, 2021

Now, looking at the concept of intercountry adoptions and its wide acceptance in the country, this concept was initially placed within the Juvenile Justice (Care and Protection of Children) Act, 2000 but nowhere the term adoption was defined²⁵. It was in the subsequent amendments that the concept was brought more into the picture. Therefore, the current act in the country on the juveniles is the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 and this was recently amended with regards to adoptions in 2021²⁶.

So according to this act the concept of adoption is mentioned under chapter VIII of the act. Whereas, adoption as a concept is mentioned under section 2 (2) of the act²⁷. So now when it comes to intercountry adoption, it is mentioned under section 56 (4) which states that

²⁰ Section 4 (2) of Guardian and Wards Act, 1890- "guardian" mean's a person having the care of the person of a minor or of his property, or of both is person and property

²¹ Section 7 of Guardian and Wards Act, 1890-Power of the Court to make order as to guardianship.

²² Section 8 (1) of Guardian and Wards Act, 1890- the person desirous of being, or claiming to be, the guardian of the minor.

²³ Section 17 of Guardian and Wards Act, 1890- Matters to be considered by the Court in appointing guardian.

²⁴ AIR 1988 Bom 139

²⁵ PalakJain, IntercountryAdoption, available at <https://www.lawctopus.com/academike/inter-country-adoption/>

²⁶ <https://www.indialawoffices.com/legal-articles/inter-country> available at Indian Law Offices

²⁷ Section 2(2) of the JJ Amendment Act, 2021- "adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

intercountry adoptions will be regulated by this act and it needs to be done as per the provisions of this act²⁸. Further, the procedure for the same is mentioned under section 59 of the act²⁹.

Firstly, it states that, if the orphan, abandoned or surrendered child is being unable to place in domestic adoption within 60 days from such condition, then such child will be directed towards intercountry adoption,

Secondly, NRI's in such conditions will be given priority over the foreign parents in case of such kind of adoptions,

In the case of *Karnataka state council for child welfare.V. Society of sisters of charity, St. Gerosa Convent*³⁰ the court held that, Indian parents are preferred before foreign parents looking at welfare of the child so that the child can grow up in Indian surroundings and can retain its culture and heritage.

Thirdly, NRI or Indian living overseas irrespective of any religion may opt for such kind of adoption to the appropriate authority. Here, in this case the appropriate authority means CARA as mentioned under section 2 (7)³¹ and defined under section 68 of the act³².

In the case of *Varsha Sanjay Shinde and Anr.V. Society of friends of the Sasson Hospital and Ors*³³ the court held that, once a child is fixed by the overseas Indian couple or foreign parents such child cannot be shown to other Indian parents just on the preference of being of same nationality.

Fourthly, the appropriate authority must then prepare the home study report of such and on adoptive parents as per the procedure set by the authorities.

Fifth, upon finding the application and its details to be bono fide the adoptive parents are appointed specialized adoption agency where the children for intercountry adoption are listed

²⁸ Section 56 (4) JJ Amendment Act, 2021- All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.

²⁹ Section 59 of JJ Amendment Act, 2021- Procedure for inter-country adoption of an orphan or abandoned or surrendered child

³⁰ AIR 1994 SC 658, 1995 Supp (4) SCC 529

³¹ Section 2 (7) of JJ Amendment Act, 2021- "Authority" means the Central Adoption Resource Authority constituted under section 68

³² Section 68 of JJ Amendment Act, 2021- Central Adoption Resource Authority

³³ Writ Petition no. 9227 of 2013 Decided on 18th October, 2013

out.

Sixth, the specialized adoption agency then sends the medical and other reports of the selected child to the adoptive parents and immediately a court order is obtained for the same which talks about the no objection certificate.

Seventh, upon the receiving the passport of the child the authority shall direct this information to the immigration authorities and the receiving country.

Eighth, the adoptive parents will only get the child the person when the passport and visa ready at hand. Thus, this is how the adoption process is carried out under this act. This process is long and very cumbersome to follow. Therefore, looking at the need of the hour there were amendments done particularly to chapter VIII to ease down the process of the intercountry adoption in the country in year 2021.

The amendments done to Juvenile Justice (Care and Protection of Children) Act, 2015 and now called as amendment act, 2021 with regards to adoptions are as follows:

- 1) Earlier, the adoptions were issued by the courts who exercised the power of civil courts in the country. But now after the amendment such power can be exercised by JMFC and JMSC as well.
- 2) Earlier, if a party was aggrieved by the adoption order it had to wait for 30 days to appeal which can be heard by the district magistrate. But post amendment, such powers are granted to divisional official so as to speed up the adoption process³⁴.
- 3) Now, when it comes to intercountry adoption, it has been asked to make certain laws with regards to this concept under the HAMA Act, 1956. Moreover, earlier the adoptive parents had to approach the court for no objection certificate but now they can directly approach CARA for the same³⁵.
- 4) Earlier, the adoptive parents had to complete 2 years mandate period to take the adopted child with them. But now post amendment they can inform the Indian diplomatic officers of the same with proper intention and 2 weeks before their departure to travel

³⁴ Section 58 of the Principal Act was amended in 2021 by adding word 'District Magistrate'

³⁵ Issued by Adoption Amendment Regulations, 2021 under CARA

with the adopted child. Thus, instead of CARA, the diplomatic missions will look at the post adoption process and security of the child in the receiving country³⁶.

This is all done looking at the lengthy process, post adoption negligence and process to be followed. So, when a child is into picture making the rules and regulations smoother and fast is the need of time.

Intercountry Adoptions via lens of CARA (Central Adoption Resource Authority)

Central Adoption Resource Authority, hereinafter referred as CARA is a statutory body recognized by Ministry of Women and Child development to keep a check on intercountry adoptions in the country. It was formed in 1990 after the landmark judgement of *Laxmikant Pandey.V. UOI*³⁷ where it was stated by the court of an institution to regulate the process of intercountry adoption in the country. So, it primarily deals with adoption of orphan, abandoned and surrendered children in the country. This was stated in the case of *Dr. Abha Agarwal.V. CARA*³⁸ wherein there was a contention pertaining to the child who is willing given up for adoption by his biological parents. The court held that such a child will be considered within the ambit of surrendered child and hence comes within the ambit of CARA.

As per the guidelines of CARA, whosoever foreigner, NRI or overseas Indian wishes to adopt a child from the country needs to be sponsored by the either by social or child welfare agency which has been licensed by government and needs to register with CARA³⁹. Moreover, these guidelines also encourage domestic adoption and when no last pursuit is left for the child then international adoption comes into picture⁴⁰. In the case of *Mr. Craig Allens Coates.V. State through Indian council for child welfare and welfare home for children*⁴¹ it was held by court that if the adoptive parents failed to prove their intention of adoption, then such would be barred from the process on the grounds of malafide intention. Thus, demanding more stricter guidelines from CARA for such adoption processes.

³⁶ Ibid

³⁷ 1984 AIR 469

³⁸ (W.P. NO. 2701 of 2012 & W.P. No. 3279 of 2012 (the two petitions were clubbed together and disposed as one) decided on 24 Jan 2013)

³⁹ Dr. Achina Kundu and Ayushi Kundu, *An overview on intercountry adoption with special focus on India*, BHARATI LAW REVIEW 42-54 (2013)

⁴⁰ Ibid

⁴¹ (162(2009) DLT 605)

Hereinafter, when the central authority is referred it comes within the purview of section 2 (11) of the JJ Amendment Act, 2021 which states that the country is the party to Hague Adoption Convention, 1993⁴². So, when it comes to CARA it is defined under section 68 of the act. It states that, this body is into existence to promote intercountry adoptions and to facilitate and coordinate the process of state adoption process agency⁴³. Further, it states that CARA has been enshrined to regulate, carry out the procedure of intercountry adoption as per Hague Adoption Convention, 1993⁴⁴.

When it comes to the procedure for intercountry adoption as carried out by CARA it is as follows:

- 1) The prospective adoptive parents need to register online on www.cara.nic.in
- 2) Then they have to select preferred Adoption Agency for Home Study Report and State
- 3) Consequently, they will be allotted with a user ID and password is generated
- 4) They are asked to upload the requisite documents within 30 days of registration online
- 5) After furnishing all the required documents, registration number generated by CARA
- 6) The Specialized Adoption Agency conducts Home Study Report of the prospective adoptive parents and uploads it on CARA website within 30 days from the date of submission of requisite documents.
- 7) The suitable prospective adoptive parent is selected for the child.
- 8) Subsequently, they visit the adoption agency within 15 days from the date of reservation and finalize the child.
- 9) The prospective adoptive parents take the child in pre - adoption foster care and file for no objection certificate to CARA as per the amendment done in 2021.

⁴² Section 2(11) of JJ Amendment Act, 2021- means the Government department recognized as such under the Hague Convention on Protection of Children and Cooperation in Inter-country Adoption (1993)

⁴³ Section 67 of JJ Amendment Ac, 2021- State Adoption Resource Agency

⁴⁴ Section 68 of JJ Amendment Act, 2021- Central Adoption Resource Authority

- 10) The adoption order is issued by the district magistrate as per 2021 act. This is followed by the follow up process as mentioned in the act.

*(Procedure is available on the official website of CARA- <https://cara.nic.in/>)*⁴⁵*

Thus, looking at the above-mentioned legislations and procedures it can be concluded that the Indian laws pertaining to intercountry adoptions are very cumbersome and not effective in its functioning. Moreover, none of the laws speak about the post adoption process which is utmost important so as to track the wellbeing of children in other country. This is because, every piece of law has its own way of dealing with this concept which makes it difficult to follow up a single method. Moreover, certain amendments have been done to the act in recent times but still there is a long way to go so as to make such kind of adoptions easier and smoother.

Laws pertaining to Intercountry Adoptions in US

The United States of America is considered to be the originator of intercountry country adoptions⁴⁶. Thus, it can be perceived that there are large number of US families adopting children from other countries and vice versa. From the political point of view, it is very difficult to get the senate ratify international agreement. Thus, US ends up signing many multilateral and bilateral agreements⁴⁷. For example, US bilateral agreement with Vietnam on intercountry adoptions 2005, United Nations Convention on the Rights of the Child⁴⁸, etc.

Therefore, it signed and ratified the Hague Adoption Convention in 1994 pertaining to intercountry adoptions. Thus, making certain laws regarding intercountry adoptions in the country based on the lines of this convention. This led to the development of Intercountry Adoption Act, 2000 in US. This act formally came into force in the country in April 2008⁴⁹.

Intercountry Adoptions via lens of Intercountry Adoption Act, 2000

⁴⁵ Procedure for intercountry adoption under CARA available at <https://cara.nic.in/>

⁴⁶ Aditya Rajasthani and Reuban Philip Abraham, *A comparative analysis of adoption and domicile in Canada, USA, UK and India*, 3 COMMONWEALTH LAW REVIEW JOURNAL (2017)

⁴⁷ Ibid

⁴⁸ Position of US on CRC- The US signed but the Senate has not ratified because of State's rights to execute children (minors tried as adults). This was deemed unconstitutional by Supreme Court in 2005 but the Senate has not reversed its position.

⁴⁹ Andrew C. Brown, *International Adoption Laws- A Comparative Analysis* 43 3 INTERNATIONAL LAWYER (2009)

The traces of the Hague Adoption Convention, 1993 can be seen in the Intercountry Adoption Act, 2000 in the following ways, such as;

- 1) The US Department of State is considered to be the central authority to take up and look into the matters of international adoptions in the state⁵⁰.
- 2) Any person or agency interested to give in for such an adoption needs to be accredited with the state.
- 3) The definition of child was amended in Immigration and Nationality Act so as to incorporate the view of the convention⁵¹.

This act does not function and operates independently. Rather, to opt for intercountry adoption in US one needs to fulfill certain requirements as mentioned under other legislations. Such as for a person or a couple to opt for international adoption needs to be accredited by the state and for this they need to comply with the standards as mentioned under section 96.7 of Title 22 the US Federal Code⁵². This code also governs the foreign relations of the state⁵³. In this section, there is vivid discussion on the type of agencies which can receive accreditation for the individuals who want to opt for such an adoption, the guidelines to go forwards with the same. Therefore, these guidelines are formed on goals of Hague Adoption Convention and IAA⁵⁴. But here one thing needs to taken care of that is, the person or the couple adopting in US have dual domicile that is; both of the country and state and they need to furnish the proof for the same⁵⁵.

When it comes to Intercountry Adoptions Act, 2000 it has different procedure for immigrating children and emigrating children. Such is mentioned under section 301 and 303 of the acts. This is done keeping in mind the cumbersome process and lengthy procedure which is followed looking at this kind of adoptions.

⁵⁰ Ibid

⁵¹ INA Act, section- 101(b) (1)- an “unmarried person under 21 years of age who is a: Child born In-Wedlock (meaning that the child was born to two married individual)

⁵² Section 96. 7 of Title 22 of US Federal Code- Responsibilities of Accrediting Agencies.

⁵³ Andrew C. Brown, *International Adoption Laws- A Comparative Analysis* 43 3 INTERNATIONAL LAWYER (2009)

⁵⁴ Ibid

⁵⁵ Aditya Rajasthani and Reuban Philip Abraham, *A comparative analysis of adoption and domicile in Canada, USA, UK and India*, 3 COMMONWEALTH LAW REVIEW JOURNAL (2017)

Firstly, when it comes to the procedure of children immigrating to United States⁵⁶, it is as follows:

- 1) The NOC needs to be granted by the state secretary regarding the acceptance of such adoption after furnishing the domicile documents of adoptive parents and receiving appropriate notification of the same from the child's country of origin.
- 2) This certificate granted by the state secretary is considered as the conclusive evidence for such adoption to be accepted legally in US.

From, this procedure it can be derived that such children migrating to US have easy entry and the major paper and procedure work needs to be done by the contracting country or origin country rather than the receiving country.

But then when it comes to the procedure of children emigrating from United States⁵⁷, it is as follows:

- 1) When a child residing in US or if the country of origin is US and a child is moving to foreign country then the accrediting agency which is looking into the procedure must ensure that the background study of the child is completed. Further, the agency has tried to place the child within the domestic adoptions and was unable to do so. Thus, has opted for international adoption.
- 2) While enlisting child for such adoption, the agency has done complete background check of the adoptive parents in the receiving country.
- 3) Moreover, to grant order for such adoptions, orders from both the state and country are required. So, when it comes to state orders the documents which need to be furnished are the background study report on the adoptive parents of the child in the receiving country conducted by the respective authorities, declaration by the receiving country allowing for the permanent residing of the child in their country.
- 4) Lastly, when it comes to country orders, they are given by the United States Central Authority stating that, they look into the orders of the state and rectify if needed and

⁵⁶ Section 301 of the Intercountry Adoptions Act, 2000- Adoptions of Children immigrating to United States.

⁵⁷ Section 303- Adoptions of Children emigrating from United States

approve of it and for this the time period is of 180 days.

Thus, it can be inferred that the US gives and ensure the welfare of its children who are emigrating from the place of origin and moving to a foreign land.

In the case of *Trower.V. Blinken*⁵⁸ the court held that, the threshold inquiry is required of the background of the child and prospective adoptive parents before any international adoptions take place and also the NOC provided by the accrediting agency needs to be considered as evidence to go forward with such kind of adoption.

In the case of *Croyle.V. United States*⁵⁹, the court held proving the domicile of the prospective adoptive parents is the mandatory requirement for the intercountry adoptions in the United States.

Further coming to the criticisms of IAA it can be seen that, even though US has been successful in combating the cons of such adoption but then it has no measures when it comes to adoptions of child from the non-signatories members of Hague Adoption Convention. Moreover, the post adoption process has proved to be dicey to be followed and on such US laws are silent. Lastly, the prospective adoptive parents need to have domicile which makes this process a little tedious in nature. Therefore, making intercountry adoption colder and more unapproachable.

Intercountry Adoption Accreditation and Maintenance Agency- An Instrument on Check

The intercountry adoption accreditation and maintenance agency also popularly called as IAAME is entrusted with the responsibility of intercountry adoptions in USA⁶⁰. Putting it in general sense, it is like CARA of India. It is headed by the US State department. It is responsible for accreditation, approval and monitoring the activities of child and prospective adoptive parents. In all it maintains the list of all the accreditation agency which have been giving the approval for carrying out international adoption in the country.

As such it is not a statutory body but it is an entity in its own which is independent of its functioning. It is the first step to be cleared to opt for intercountry adoption in United States.

⁵⁸ *Trower v. Blinken*, 4:22-CV-00077-JAR (E.D. Mo. Jun. 3, 2022)

⁵⁹ *Croyle .V. United States* 908 F.3d 377, 380

⁶⁰ Intercountry Adoption and Accreditation and Maintenance Entity (IAAME) available at <https://www.iaame.net/>

After this step, the role of state and country followed by the NOC comes into picture.

Lastly, this instrument is considered to be a watchdog for the international adoption irrespective of being immigration or emigration. It is an instrument which check and ensures that all the requirements for such adoptions are completed and the best interest of the child is considered and given the utmost priority.

Intercountry Adoptions: A Beneficial Step for the Vulnerable Children Around the World

Intercountry Adoptions have become a global phenomenon. Largely under such kind of adoptions there is a pattern which has been observed. It is that vulnerable children from developing and underdeveloped countries are directed towards this adoption into the developed countries⁶¹. But then the process involved with intercountry adoption is quite complex. This is due to the different set of laws and policies in each country. Ultimately, such a difference gives birth to the pros and cons of intercountry adoptions.

The benefits of intercountry adoptions are as follows:

- 1) The reason behind increase in number of intercountry adoptions is probably the decreased number of healthy children born in the developed countries because of the lifestyle and certain environmental factors⁶².
- 2) The decreased birth rate or probably the low birth rate, high cost of infertility treatment and the cumbersome procedure of domestic adoptions in the country led to international adoption⁶³.
- 3) Whereas on the other hand, children from underdeveloped or developing countries are considered for intercountry adoption because of poverty, lack of contraceptive methods, increased birth rates and the lack of child policy rules in those countries. So according to international instruments and UN in the year 2021, India became the third largest

⁶¹Gabriela Misca, The “Quiet Migration”: Is Intercountry Adoption successful intervention in the lives of vulnerable available at https://www.researchgate.net/publication/262828937_The_Quiet_Migration_Is_Intercountry_Adoption_a_Successful_Intervention_In_the_Lives_of_Vulnerable_Children-

⁶² Franek P & Cuthbert D, *History repeating... disaster-related intercountry adoption and the psychosocial care of children*, SOCIAL POLICY AND SOCIETY 429-442 (2012)

⁶³ Herrmann K, *Reestablishing the humanitarian approach to adoption: the legal and social change necessary to end the commodification of children*, FAMILY LAW QUARTERLY 44(3) 409-428 (2010)

country in the world to send children for intercountry adoptions surpassed by South Korea and Colombia just by few margins⁶⁴.

- 4) Thus, by opting for intercountry adoptions for such children it fulfills certain objectives such as, the childless couple gets child, the child from a relatively poor setup gets a new purpose in life and can build a better future.

But there are also several challenges attached to intercountry adoptions such as:

- 1) The first and foremost challenge attached to intercountry adoption is of illegal activities carried out in the name of such adoptions. They are child laundering, human trafficking, child labour etc. Thus, looking at the growing menace attached to this convention the Supreme Court in 2012 has asked the center to ban intercountry adoptions in India until and unless a concrete set of laws considering it are brought into picture⁶⁵. Thus, it led to the entry of intercountry adoptions in the JJ Act.
- 2) The process is quite lengthy and cumbersome, due to unavailability of unified laws on this concept.
- 3) The problem of post adoption identity is massive. This is because the adoptive parents have to complete both the adoption process of the contracting country and the receiving country and in case if such is not done then it leads to another set of problems for the children.
- 4) The process of post adoption is quite difficult as it is not possible to monitor the activities of child in the adopted country. Thus, this is regarded as the post adoption negligence.

Therefore, this type of adoptions has both pros and cons attached to it. Looking at the challenges it is easy to solve them as long as certain stringent actions and collective efforts are taken at the global level. Whereas on the other hand, the benefits of such an adoption cannot

⁶⁴United Nations on Intercountry Adoptions- available at <https://www.un.org/en/development/desa/population/publications/pdf/policy/child-adoption.pdf> via <https://adoption.org/top-5-international-adoption-countries>

⁶⁵ Supreme Court orders to ban intercountry adoptions in India in 2012 available at <https://www.ndtv.com/india-news/supreme-court-issues-notice-to-centre-on-banning-inter-country-adoption-480830>

be overlooked as it offers great deal of living and sustenance for the vulnerable children in the global world. **Suggestions and Conclusion**

The suggestions which can be provided for this research paper are as follows:

- 1) The laws pertaining to intercountry adoptions in India are not limited to a particular legislation rather they are divided and adjudicated under different set of laws. Thus, looking at the development of the international adoption and its popularity, India should opt to make a particular legislation on this concept.
- 2) In this manner, India will be obligated towards the convention under article 253 of Indian Constitution and CARA, the statutory body will also be kept on check while dealing with the matters of intercountry adoptions.
- 3) Moreover, when it comes to US, though they have a legislation on intercountry adoption but it needs amendments so as to gel in with the developments around the world. Moreover, having 50 states altogether and bringing their opinions on the same front foot becomes a challenging task.
- 4) Lastly, intercountry adoptions are criticized for the cons attached to it such as trafficking, child labour etc. But when it comes to pros of this concept no such awareness is spread about it and on large scale such kind of adoptions are disregarded due to the problems attached to it. Therefore, on the global level awareness must be spread regarding this adoption so that no child is left homeless and without a family.
- 5) From a general point of view there is a need of concrete mechanism under all the laws on adoptions around the world regarding the process of post adoption and follow up. This will help to curb down the cons of adoption and will also ensure the wellbeing of the child.

The concept of intercountry adoptions is a developing concept on the global level. Though all the signatories to the Hague Adoption Convention, 1993 promote that, domestic adoptions need to be given priority and if such is not possible then the child can be directed towards the international adoption. But in all, such adoptions are acting as a beneficial step for the vulnerable children around the world as such kind of adoptions provide the children for having a better life, education and environment which is not accessible back in their home countries.

Moreover, coming to the laws on this concept they are twisted and needs to be revised. In fact, in some countries they demand for separate legislation in order to make the lives of children easy and to pace the intercountry adoption process. Lastly, when sensitive issues like international adoptions comes into picture, priority needs to be given to children as providing them safe and sound future is the utmost responsibility of all the countries.

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