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INTER COUNTRY ADOPTION: INDIAN CONCEPT

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ABSTRACT

Child is the face and future of the country, and sometimes adoption is the issue through which the child has to face a lot of problems. A child who has no family, should be given up for the process of adoption. In some cases where nobody is coming forward for the process of adoption, in such a case the child can be considered for transnational adoption i.e. inter country adoptions. Though in India we do not have strong laws regarding the inter country adoptions and it is time to safeguard the lives of the children who are given up for inter country adoptions.

KEYWORDS: *Adoption, Inter country adoption, CARA, Guardianship & Ward's Act.*

INTRODUCTION

Adoption involves the creation of the parent-child relationship between individuals who are not naturally so related. The adopted child is given the rights, privileges, and duties of a child and heir by the adoptive family.¹ According to Section 2(3) of Draft Guidelines Governing Adoption of Children, 2014 as well as Section 3 of the Guidelines Governing Adoption of Children, 2015,² "Adoption" means a process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship³.

It is a twofold process, wherein a family who doesn't have a child gets to have a child who they can call their own and on the other hand a child who doesn't have a family or in some cases already has one but still is given away for adoption gets to have a new family where he inherits all the legal rights and duties as their natural one. However, the Juvenile Justice (Care and Protection of Children) Act, 2000,⁴ did not define adoption" but by the amendment of 2006 that the meaning thereof came to be expressed in the following terms: 2(aa)-"adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached

¹ The free dictionary, available at: <http://legal-dictionary.thefreedictionary.com/Adopting+parent>

² Adoption Procedure, Chapter-I, Preliminary, The Guidelines Governing Adoption of Children, 2015. available at: <http://cara.nic.in/>

³ Section 2 (3) of Draft Guidelines Governing Adoption of Children, 2014, available

at:
http://www.wcd.nic.in/CARA%20Guidelines_for_Website_2014.pdf

⁴ The Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000)

to the relationship".⁵ Henry Campbell Black, in Black's Law Dictionary (Second Edition), re-echoed the definition of adoption as an act of one who takes another's child into his own family, treating him as his own, and giving him all the rights and duties of his own child.⁶

Adoption is basically the legal act where a child with or without parents is placed with another family to whom he wasn't initially born into. It can be considered as a statutory process wherein a child's legal rights and duties are replaced with the adoptive parents and a parent-child relationship is formed between them who aren't related by birth.

HISTORICAL DEVELOPMENT OF ADOPTION LAW

Adoption in Roman law was a very ancient institution having its root in ancestor worship. The maintenance of the family "SACRA" observance in honor of the ancestor of the family, was regarded as the highest significance and when a man was old and was likely to die without a child to carry on those observance, he was permitted to abrogate some other independent person "a pater familias and thereby make him a son".⁷ Adoption in a wider sense may be termed as a social practice where a child who belongs to one family by birth acquires another family as his new family which is socially and ethically equivalent to the natural ties which succeeds the older ones.

The first primacy for a child is to be cared for by his or her own parents which can enshrine by the Article 3, which states that everyone has the right to life, liberty and security of person.⁸ Since adoption was

⁵ Section 2(aa)- Define Adoption, The Juvenile Justice (care and Protection of Children) Act, 2000 (Act No. 56 of

2000), available at: http://www.wcd.nic.in/sites/default/files/jjactamedment_0.pdf

⁶ 4 Henry Campbell Black ,Black's Law Dictionary (Second Edition), available at: <https://smhttp-ssl-70271.nexcesscdn.net/wp-content/uploads/2015/04/Blacks-Law-Dictionary.pdf>

⁷ Dr Hari Dev Kohli, *Supreme Court On Hindu Law* 64 (Universal Publications)

⁸ Article 3 of U.N. Declaration, (United Nations General Assembly Declaration on social and legal principles relating to the protection and welfare of children, with special reference to foster placement and adoption nationally and internationally) provides that everyone has a right to life liberty and security of person.

primarily a spiritual act in ancient Hindu law adoption of daughter was not favored so also the women did not have the right to adopt⁹ consequently, it can be concluded that adoption was surrounded by many conditions. Now it is maintained and regulated by the Hindu Adoption and Maintenance Act, 1956.¹⁰

KINDS OF ADOPTION

Adoption can be classified into two categories:

- a) Inter Country Adoption
- b) Intra Country Adoption

a) INTER COUNTRY ADOPTION

Inter country adoption is the process where a child can be adopted from a different country other than his own country by way of legal procedure and bring the child to his own country to live permanently with them. Under the inter country adoption the child and the parents belong to different nations.

b) INTRA COUNTRY ADOPTION

Intra Country Adoption refers to the situation where the child is placed for adoption in the same country where he was born. This can be done through the help of foster care or any private agency. Intra country adoption also can be said to be domestic adoption. Domestic adoption it is circumstances, becomes a permanent member of another family. In some cases the birth parents make the decision regarding the selection of the adoptive family.

INTER COUNTRY ADOPTION: MEANING

Inter country adoption is the process where the child belongs to another country. It may also be referred to as transnational adoption which denotes the situation wherein the child who's adopted by the individual or couple is a national of a different country. Further the adoptive parents should meet the required procedure for the adoption of the child according to the country from where they belong and of the country from where the child is being adopted. For example: If a child of Indian origin is adopted by foreign parents, in such a case the child must have left for the other country with the permission of the country where he is a national of and further after arriving in the other country he shall be given the citizenship of that country where his adoptive parents belong to.

⁹ J.C. Hall, *Sources of Family Law*, 87 (University Printing House, Cambridge 1966)

¹⁰ The Hindu Adoption and Maintenance Act, 1956 [Act No.78 of 1956] 21st December, 1956

Inter-country adoption defined under section 2 (18) of CARA¹¹ guidelines of 2015, in the following words “Inter-country Adoption” means adoption of a child or children by persons having status of Non Resident Indians or Overseas Citizens of India or Persons of Indian Origins or Foreign Nationals; An inter-country adoption is seen as one where the change in child’s original residential country is required. An international adoption applies to an adoption that involves parents of a nationality other than that of the child, whether or not they reside and continue to reside in the child’s habitual country of residence .International adoption involves the transfer of children for parenting purposes from one nation to another.

In addition to this, The 1993 Hague Convention on Inter Country Adoption provides the safeguards and rights for the abandoned and orphans. The Juvenile Justice (Care and Protection of Children) Act 2000 which was further amended in 2006 and the Model Rules (2007) is supposed to be the basic law for matters related to children including rehabilitation of abandoned and orphans.

INTER COUNTRY ADOPTION WITH RESPECT TO INDIA

The concept of inter country adoption has basically no definite provision in the existing laws in India except a slight mention in the Guardianship and Wards Act, 1980.¹² Whereas the provisions mentioned under the act also do not link with the concept of inter country adoption directly and no real scenario regarding the procedure of inter country adoption is specified. To clear the vagueness some significant efforts should be made. Further in this context two very important bills were prepared by the parliament in respect to the issues regarding adoption outside the country.

The Constitution of India gives supreme attention to the welfare of the children for example:

¹¹ Central Adoption Resource Authority (CARA) is an autonomous body under the Ministry of Women & Child Development, Government of India. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003, available at: <http://cara.nic.in/>.

¹² The Guardianship and Wards Act, 1980, available at: <http://ncpcr.gov.in>

Clause (3) of Article 15¹³ enables the State to make special provisions for children. Article 23¹⁴ prohibits the traffic in human beings and forced labor. Article 24¹⁵ provides that no child below the age of 15 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Law is the system which serves the purpose of check and balance and also clarifies the vagueness regarding any matter pertaining to the society. Further the two bills proposed and adopted were **The Adoption of Children Bill, 1972** and **The Adoption of Children Bill, 1980**. As it was observed that according to Islam, adoption is not a choice in Muslim’s so they were against the enactment of this particular bill. The bill of 1972 was introduced in the Rajya Sabah but it was later on withdrawn. The reason being that the Muslim’s were opposing the enactment, and for a uniform law of adoption if the bill was passed then it would have been applicable to all the communities including the Muslim’s. However after 8 years another bill was passed it was the bill of 1980. Some of the features of the bill were:

- a) **Social Welfare Organization clause 17** of the bill lays down that no institution or organization can make any arrangement for adoption of an Indian child by foreign parents unless such institution or organization is licensed as a social welfare institution.¹⁶
- b) **Consent is compulsory.**¹⁷ It was given in the bill that no provisional adoption order can

¹³ The Constitution of India, 1950, Article 15 talks about the prohibition of discrimination of religion, caste, sex or place of birth: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (3) Nothing in this article shall prevent the State from making any special provision for women and children.

¹⁴ *Ibid* at Article 23: (1) Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes and, in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

¹⁵ *Ibid* at Article 24: No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

¹⁶ The Adoption of Children Bill, 1980

¹⁷ *Id.* at Clause 8

be made in respect of an Indian child except with the consent of the parents or guardian of such child and if such child is in care of any institution, except with the consent of the institution given on its behalf by all the persons entrusted with or in charge of its management, but the District Court can dispense with such consent if it is satisfied that the persons whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated the child or has persistently failed without the reasonable cause to discharge his obligation as parent or guardian or cannot be found or is incapable of giving such consent or is withholding consent unreasonably. When a provisional adoption order is made by the District Court on the application of a person domiciled abroad, such person would be entitled to obtain the care and custody of the child in respect of which the order is made and to remove such child for the purpose of adopting it under the law or within the country in which the order is made and to remove such child for the purpose of adopting it under the law within the country in which he is domiciled.¹⁸

c) **Provisions for taking and sending a child it laid down two important things:-**

1. Except under the authority of an order under section 24, it shall not be lawful to any person to take or send out of India a child who is an Indian citizen to a place outside India for the adoption of the child.

2. Any person who takes or sends a child out of India to any place outside India in contravention of subsection (1) or makes or takes part in any arrangement for transferring the care and custody of any person for that purpose shall be punishable with an imprisonment for a term, which may extend to six month or with fine or with both.

d) Procedure for inter country adoption¹⁹ - one of the relevant clause which talks about the

important provisions regarding the inter-country adoption are as follows:

1. If upon an application by a person not domiciled in India, the district court is satisfied that the applicant intends to adopt a

child under the law of or within the country in which he is domiciled and for that purpose desires to remove the child from the India either immediately or after an interval, the court may make an order authorizing the applicant to remove the child for the purpose aforesaid and give the applicant the care and custody of the child pending his adoption as aforesaid: The proviso of the clause²⁰ talked about the certificates issued by the central government in the following words:- provided that no application shall be entertained unless it is accompanied by certificate by the central government to the effect that-

(i) The application is in its opinion of fit person to adopt a child.

(ii) The welfare and interest of the child shall be safeguard under the law of the country of domicile of the applicant.

(iii) The applicant has made proper provision by the way of deposit or bond or otherwise in accordance with the rules made under this act to enable the child to be sent back to India, should it become necessary for any reason.

2. The provisions of this relating to an adoption order shall, as far as may be, apply in relation to a provisional adoption order made under this section. These are the relevant provisions of the bill of 1986, but it also did not get the assent of the necessary organ of government so it remains a bill and therefore not enforceable.

The Guardianship and Wards Act, 1890: The relevant provisions which are related to inter country adoption are —Section 11, 17 and 26, which have the bearing on the procedure to be followed for the purpose of carrying through inter-country adoption.²¹

The foreign persons who wish to be appointed as the guardian of the child whom they wish to adopt should make the application to the court, and also for to take the child with them to their country after they are appointed as the guardian of the child. Further in the absence of Indian law regarding the adoption of child by foreign parents, it can be brought into effect by applying the laws of the country of the foreign parents. However, the adopted child with Indian nationality would not be allowed to be taken out of India by his foreign parents until and unless they are appointed as his guardian by the court of law and the permission of the court is also required to take the child away

¹⁸ Paras Diwan, *Law of Adoption, Minority, Guardianship and Custody* 111 (Wadhwa and Company, Allahabad, 2ND edn 1993)

¹⁹ Clause 24 of the Adoption of Children Bill, 1980

²⁰ *ibid*

²¹ Guardianship and Wards Act, 1890

according to the provisions of The Guardian and Ward Act, 1890.

Juvenile Justice (care and protection of Children) Act, 2000:

The provisions of the Juvenile Justice (care and protection of Children) Act, 2000 came into existence after the Juvenile Justice Act, 1986 was repealed which dealt only with neglected and delinquent juveniles. The JJ Act, 2000, however did not define adoption earlier, but it was after the amendment of 2006. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Government.²² Under the section 41 (3) of the JJ Act, 2000 all the matters relating to adoption were made applicable.

Presently in India inter-country adoption is governed by the Guidelines of CARA²³ modified in 2011.²⁴ In order to facilitate the implementation of the norms, principles and procedures relating to the adoption of children laid down by the Honorable Supreme Court in their judgments *L. K. Pandey v. Union of India*²⁵.

“There are fundamental principles which govern the in-country and inter-country adoption, such fundamental principles shall govern adoptions of children from India, namely:

- (a) The child's best interest shall be of prime importance while deciding any placement.
- (b) Preference shall be given to place the child in adoption within the country.
- (c) Adoption of children shall be guided by set procedures and in a time bound manner.
- (d) No one shall derive any gain, whether financial or otherwise, through adoption.”²⁶

CONCLUSION

Adoption is a process through which the emptiness of two lives can be curbed; it is a solution to complete the lives of the parents wanting to adopt the child and the child itself who has no parental care. A

child without any parental love and care will only live like an object and will crave for the love and affection. Adoption is a bridge which connects two lives to a single platform. It is the only cure to complete the lives of the two different sides of the coin, wherein a child who lacks parental care would be adopted by a family, and on the other hand the adoptive parents they will have a child in the family to complete their lives and would possess the same feelings as of a father and the mother of the child.

The concept of inter country adoption refers to where a child belonging to one country can be adopted by nationals of a foreign country. In India the inter country adoption laws are silent & due to this lacuna the problem is growing and one can do nothing to put a restrain on it. Now is the time to work on the guidelines of the apex court with regard to the inter country adoptions as the pain shall not be released if there is no medicine for the same.

²² Juvenile Justice (care and protection of Children) Act, 2000 (clause 41 (3))

²³ The Central Adoption Resource Authority was designated as Central Authority by the Ministry of Social Justice & Empowerment on 17.7.2003 for the implementation of the Hague Convention on Protection of Children & Cooperation in respect of Inter-country Adoption (1993).

²⁴ CARA guidelines available at:http://adoptionindia.nic.in/guideline-family/Part_I.pdf

²⁵ AIR 1984 SC 469

²⁶ CARA (Section 3)