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### INTER COUNTRY ADOPTION A STUDY OF SUPREME COURT GUIDELINES

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#### ABSTRACT

Inter country adoption is the most sensitive, controversial and complex aspect of adoption. It involves a variety of principles and procedures over migration, citizenship, the socio-economic situation of adoptive parents matching parents with child and acceptance of child in a different community and culture. It



requires the participation of the adoptive agency as authorities in the overseas countries. First of all we have to know the antecedents of adoption.

**KEYWORDS** :controversial , Hindu Law , religious necessity and religious believes .

#### INTRODUCTION:

"I did not come out of my mother.  
I do not have my father's No one in my family looks like me.  
People are always surprised.  
I think we are a happier family.  
Then if we were all kings and queens.  
We are so lucky we all found each other.  
That's what being adopted means".  
By: Pamela Espeland and Marilyn Waniek

The origin of custom of adoption is Hindu Law; five kinds of adopted sons were recognized. These were Krita (Son Bought), A Paviddha (The deserted Sons), Svayam Datta (The son self given), Kriirima (The son mage) and Dattaka (The adopted son who is seen as the reflection of the natural son) out of the five kinds of adopted sons, only two survive today, namely the dattaka from Prevalent throughout India and the Kritirima from which is confined to Mithila and adjoining districts.

The object of an adoption is a mixed, being religious and secular. According to Mayne, the recognition of the institution of adoption in early times had been more due to secular reasons than to any religious necessity and religious beliefs or motive was only secondary. As the time moved on, primary object of adoption was not the gratification of the ancestors by necessary that- annual offerings and, therefore, it was considered necessary that the offer should be as much as possible a reflection of a real descendant and had to look as much like a real son as possible and certainly not be one who would never have been a son.

Yanjanvalkya says: Because continuity of the family in this world and the attainment of the heaven in the next are through sons, son's son and son's grandsons, therefore, women should be loved and protected.

### **Meaning of Adoption and Inter Country Adoption: -**

"Adoption" means the 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 relationship. Adoption of orphan, abandoned and surrendered children in India is governed by a set of guidelines notified by Government of India.

Manu defines an adopted son as follows "A son equal in caste and affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as Dattrima (Datta) son". Thus adoption is the transplantation of a son from the in which his is born, to another family where he is given by the natural parents by way of gift.

Hindu believed that one who died without having son would go to hell called poor and it was a son only who could save the father from hell. This belief was one of the reasons to beget a son.

### **Inter Country Adoption:-**

Means adoption which takes place between two countries. Inter country adoption involves two countries one, the state of origin and the receiving State. In inter country adoption adopted child goes from origin state to receiving state.

### **Legislative Provisions to Adoption:**

#### **-The Hindu Adoption Maintenance, 1956:-**

The preamble of Hindu Adoptions and Maintenance Act, 1956 states that the Act codified as well as amends the old Hindu Law of adoption and maintenance.

As far as adoption is concerned, in Vijaya Jakhshmana Vs. B.T. Shankar.

The Supreme Court held that the objective of the Act was not only to amend but also to codify the law reinvading adoption and maintenance and also give overriding effect to provisions of the Act over any text, rule or interpretation of Hindu Law custom or usages inconsistent with it. The growth of the law and custom of adoption was mainly to be found in the ancient Hindu belief that a son was necessary for the spiritual salvation of the father, and of the ancestors.

### **Requisites of a valid of adoption:-**

Sec. 7, Sec. 8, Sec. 9 and Sec. 11 of the Hindu Adoptions and Maintenance Act, 1956 lays down the requirement of a valid adoption.

### **The Juvenile Justice Act, 2006:-**

The Juvenile Justice Act is not a standalone law on adoption, but brings in adoption as one of the mechanisms by which abandoned or abused children could be rehabilitated. The focus in this Act as regard adoption is on providing a rehabilitative mechanism for children. This Act has sought to lay down a procedure where by children can be given up in adoption. It envisages the setting up of Juvenile Justice Board's district level committees under a District Magistrate with special experience in child welfare to give children is adoption. Accordingly, this Act a 'Child' is a person who has met completed 18 years of age, which is an improvement on the Hindu Adoptions and Maintenance Act, in which 'child' is a person who has completed 15 years.

### **International Law on Adoption: An Over View**

A radical shift from the ancient laws and practices to the contemporary laws and practices on adoptions in most states in the world has caused profound Vmp.vCt on international law on adoption. The development of this concept reflected in the international efforts is protecting the children from exploitation and advancing their welfare as the paramount consideration and these efforts have been manifested In the international instruments. There are as under:-

- 1) The Geneva Declaration of the Rights of Child of 1924.
- 2) Declaration of the right of the child adopted by U.N. General Assembly on November 20, 1959.
- 3) Draft guide lines of procedure concerning inter country adoptions formulated by expert group and adopted by the economic and social council of U.N. in its 20th Session.
- 4) The Hague convention of 1956.
- 5) The U.N. declarations on social and legal principles relating to the Protection and Welfare of Children, 1986.
- 6) U.N. convention of the Rights of the Child of Nov. 20, 1989.
- 7) Private International Law convention on Protection of Children and co-operation in respect of inter country adoption. Final Act, at the Hague Conference 29th May, 1993.

### **Purpose of Inter-Country Adoption**

The rational for inter country adoption is simple- Every child deserves a home of his own. It is in the child's interest that it has to be taken out of the country, then so beit. In India, we have no legislation that deals with inter country adoption. This short coming was noticed by the Supreme Court in the case of Laxmikant Pandy Vs. Union of Indio, where the court laid down few principles covering the rules of inter-country adoption.

The constitution gives paramount consideration to the welfare of children.

Clause (3) of Article 15 enables the State to make special provisions.

Article 23 prohibits traffic in human beings and forced labour."

Article 24 provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clause (e) and (f) of Article 39 provide that the state shall direct its policy towards securing, interalia, that the -lender age of children is not abused, that children are not forced by economic necessity to enter avocations unsuited to their age and strength and that they are given facility to develop in a healthy manner and is conditions of freedom and dignity and child hood and youth are protected against exploitation and against moral and material abandonment.

It is shocking that a staggering no. of about 18 millions destitute and abandoned children in India are lying several orphanage scattered all over the country. It is estimated that each year 50,000 children become destitute and get abandoned by helpless parents and unwed mothers in over country. Hundred of them die from malnutrition and disease due to lack of clean water and in adequate sanitation. Poverty and illiteracy are age old his-torical problems rooted in our social and cultural set up. There impact is new felt and experienced by a large no. of children elimination of poverty and education to all would take some years but in the mean live in the lurch.

In principle every child has right to love and be loved and children are a "supremely important national asset" and the future well being of a nation depends on how its children grow and develop. Adoption is great help in alleviation of the misery of the destitute children. For abandon children adoptive parents are the next best substitute for the biological parents. If it is not possible to find suitable adoptive parents for the child with in country it may become necessary to give child in adoption to non resident Indians, failing which to foreign parents rather than allow the child to grow up in an orphanage where it will have no family life and love and affection of parents and quite often, in socio economic conditions prevailing is the country, it might have to lead the life of a destitute, half-clad, half hungry and suffering.

In India adoption is not popular and the adopter generally chooses a healthy and fair male child. Girls are not usually taken in adoption; foreigners on the other hand do not have any reservation about sex, color of the skin or state of the child's health.

Despite progressive statutory and made or during the last 4 years, the no. of children given to foreign adoptive parents were as :-

Years	Inter Country Adoption
2000	1364
2001	1298
2002	1066
2003	1024

These dismally low reported figures of adoption show that further changes need to be made to facilitate adoption. Both social values and laws need rethinking.

Inter country adoption is the most sensitive controversial and complex aspect of adoption. It is values a variety of principles and procedures over migration, citizenship, the socio-economic situation of adoptive parents matching 'parents with the child and acceptance of the child in a different community and culture. Similar views have been expressed by the New South Wales; Law Reform Commission on inter country adoption.

In the interest of child, it is necessary to regulate inter country adoption by legislation and by strict collaboration between qualified and authorized state and social authorities.

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. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated /recognised adoption agencies.

### **Parent's Corner**

CARA encourages Prospective Adoptive Parents (Indian Nationals residing in India) are advised to register with the recognized adoption agency in their country of residence. Prospective Adoptive Parents residing abroad have to move through CARA enlisted foreign agencies/central authorities. CARA provides facility for online registration and status tracking to the parents.

### **Agency Corner**

All existing child care institutions housing orphan, abandoned and surrendered children are required to register with the State Government and apply for recognition as Special Adoption Agency(SAA) as per provisions of the JJ Act. After being recognised as SAA, such agencies should register under CARINGS to be part of CARA network. CARINGS would facilitate linkages between agencies to ensure early rehabilitation of the child.

Presently there are 72 RIPA's which undertake both In-Coutry as well as Inter-Country Adoptions and 254 SAA's which undertake only In-Country Adoption.

### **Judicial Guidelines on Inter Country Adoption In India: -**

Apart from the principles laid down by the international conventions our courts have also laid down certain guide lines regulating inter country adoption.

The Supreme Court on a letter addressed to it in public interest took cognizance of malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents.

Earlier attempt made by the Gujarat High Court for laying down guidelines was not comprehensive. Incidentally it may be mentioned that the procedure to be followed by the court in disposing of applications for adoption of Indian children by foreigners was laid down by the High Court of Bombay and High Court of Delhi. Under rules and instructions and by the High Court of Gujarat by certain observations made for the same purpose.

### **Laxmi Kant Pandey Vs. Union of India: Inter Country Adoptions**

In Laxmi Kant Pandey's case the facts were that a letter addressed by the petitioner, an advocate containing of mal practices indulged in by social organizations and voluntary agencies engaged in the work of offer of Indian children In adoption to foreign parents. The letter referred to a press reported based on "Empirical investigation carried out by the staff of a reputed foreign magazine". Called The Mail and alleged that not any Indian children of tender age are under the guise of adoption. Exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they genuine and where these children are not placed in the shelter and relief homes, they in course of time become beggars and prostitutes for want of proper care from their alleged foreign parents.

The petitioner accordingly sought relief restraining Indian based private agencies from carrying out further activity of routing children for adoption abroad and directing Govt. of India the Indian Council for Child Welfare and Indian Council for Social welfare to carry out their obligations in the matter of adoption of Indian Children by foreigner parents. The letter was treated as a writ petition by the Hon'ble Supreme Court and notice was issued to the Union of India, the Indian Council for Child Welfare and Indian Council for Social Welfare to appear and assist the court in laying down principles

and norms which should be followed in cases of inter country adoptions.

The Supreme Court observed that when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption. Finally every effort must be made to find out adoptive parents for it with in the country. The normative and procedural safeguards which should be followed so far as a foreigner wishing to take a child in adoption is concerned the Supreme Court laid down the following principles:-

- 1) That every application from foreigner desiring to adopt a child must be sponsored by a Social Child Welfare Agency recognised or licensed by the Govt. of the country in which the foreigner is residing. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in urea of inter country adoption or by any institution or centre or home to which children are committed or by the Juvenile Court.
- 2) That every application of a foreigner for taking a child in adoption must be accomplished by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photo graph of the family and other particulars showing the social and financial status of the foreigner and his declaration and appropriate security that he will maintain the child and provide for his education and upbringing.
- 3) That the Govt. of India should prepare a list of social or child welfare agencies licensed or recognized for inter country adoption by the Govt. in various foreign countries and supply couples of such list to the various High Courts in India as also to the Social or Child Welfare agencies operating in India the area of inter country adoption under license or recognition from the Govt. of India.
- 4) That if the biological parents are known they should be property assisted in making a decision about relying wishing the child for adoption by the institution or centre or home for child care or social or child agency to which the child being surrendered. The biological parents should be told all consequences of the adoption. They should not be subjected to any duress in making a decision about relinquishment.
- 5) That every recognized social or child welfare agency must maintain a register in which the names and particulars of all the children proposed to be given in inter-country adoption though it must be entered and must prepare a child study report through a professional social worker giving all relevant information in regard to the child So as to help the foreigner to come to a decisions whether or not to adopt the child and to understand the child.
- 6) That the social or child welfare agencies which is looking after the child selected by a prospective adoptive parent may legitimately receive from such adoptive parents maintenance expenses at a rate not exceeding Rs.60/- per day (subject to revision by the Ministry of Social Welfare Govt. of India from time to time) from the date of selection of the child by him till the date child leaves for going to its new home.
- 7) That the child should be given in adoption so for as possible before it completed the age of 3 years. But where the child is above the age of 3 years his wishes may be ascertained.
- 8) That biological parent should not have any opportunity of knowing who are the adoptive parents taking the child in adoption, therefore, notice of the application for guardianship should not be given to biological parents.
- 9) That the proceedings should be held by the court in camera and they should be regarded as confidential and as soon as an order is made an application the entire proceedings including the papers and documents should be sealed.

The Supreme Court observed that these principles and guidelines must be followed as giving a



child in adoption to foreigner parents.

#### **In Anakha Vs. State of Rajasthan:**

However, as Supreme Court in this case held that there guidelines do not necessarily apply when the adoption involves a child who is living with the biological parents.

#### **In Githa Hariharan Vs. R.B.I. :**

Supreme Court held that, Hindu Law has shown no signs of decrepitude and it has its values and importance even today. As such, the Hindu law of adoption which was always meant to facilitate the process of adoption and protect the rights of both the adopter and the adopted has emerged as a model law in this area.

Thus through this judgment the Hon'ble Supreme Court has tried to eliminate the possibility that the children made available to foreign parents by way of inter country adoption are not suspected to abuse and with the welfare of the child being of paramount importance the steps so enshrined in the judgment are able to afford a new home to such children were not only they find the family full of love and affection but also opportunity which will develop in such children mental, physical and spiritual abilities otherwise to denied to them. And this has been apply summed up by "Gabriela Mistral" enable laureate in the following lines.-

We are guilty of many errors, many faults,  
But our worst crime is abandoning the children  
Neglecting the fountain of life,  
Many of the things we need can wait,  
The child cannot  
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"

India Lacks Guidelines on Inter-country Adoption by Biological Parents: HC Told The Delhi High Court was today told that the Centre needs to frame guidelines concerning inter-country adoptions where biological parents are directly giving their child for adoption.

A bench of justices B D Ahmed and Siddharth Mridul was told that "the Centre has stopped halfway in framing adoption guidelines only for orphaned, abandoned and surrendered children through state agencies while there are no guidelines for direct adoption where parents give their children in adoption directly to another couple."

Senior advocate Maninder Acharaya, appointed amicus by the court, submitted before the bench that "Somebody did not think about it holistically. There is no state intervention or state agency for direct adoption while adoptions of orphaned or surrendered kids are governed by laws relating to juveniles and by Central Adoption Resource Authority (CARA)." She also submitted that in absence of any guidelines, Hague Convention applies, to which India is a signatory.

"Hague convention makes state intervention mandatory for any kind of adoption. We (India) have no guidelines for direct adoption by biological parents. There is a complete void. Centre has only

cared to deal with adoption of orphaned, abandoned and surrendered child through state agencies.

"Since Parliament has not made any act or law concerning the subject borrowing from the Hague Convention, courts can apply the Convention," she submitted.

The court is hearing two petitions concerning direct inter-country adoption.

In one of the petitions, a woman doctor residing in the US had adopted a child from a couple in Uttar Pradesh and got the adoption deed registered. However, when she applied for the passport of the child, she was told that it could be issued only after she obtains a no objection certificate from CARA. When she approached CARA, her request was refused without citing any reasons.

The second petition deals with the adoption of a child of a single mother by a couple staying in the US

### **CONCLUSION: -**

In view of the above discussion especially as there is no codified law on inter country adoption; there is imminent necessity to have enactment regulating inter country adoption. Adoption is so widely recognized that it can be characterized as an almost worldwide institution with historical roots traceable into antiquity. Moral sense of society compels us to search a solution to the problems of the abandoned children, for abandoned children adoptive parents are the next best substitute for the biological parents. In inter country adoption two countries are involved one, the state of origin or sending state and two, the receiving state. Therefore, there are two Central Authorities of two states which are necessary contracting parties for inter country adoptions. These Central Authorities grant or require granting recognition to voluntary organizations or agencies on certain stipulations and conditions on the basis of the work experience, professional's skills and integrity in the field of adoption of children by foreigners of course, even the diplomatic missions of both countries are also involved in the process. These are some important aspects which are taken into consideration in classifying the normative safeguards in inter country adoption. Great care has to be exercised in permitting the child to be given in adoption to foreign parents. It must be ensured that inter country adoptions do not lead to abuse or exploitation of children. The possibility of profiteering and trafficking in the children must be eliminated.

The above discussion shows that there is need for inter country adoption law. Finally, there is a demand for a uniform law regulating adoption in general, particularly regulating the demand for adoption of abandoned children by foreigner parents. The proposed laws should regulate adoption of a child with the consent of the biological parents or in the case of an abandoned child with the consent of the child welfare agency recognised for the purpose of inter country adoption. The consent given should be free from duress or inducement.

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