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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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INTERNATIONAL ADOPTION: LEGAL CHALLENGES AND SAFEGUARDS

AUTHORED BY - UTHPREKSHA C

1. INTRODUCTION:

International adoption, or intercountry adoption, is the legal process whereby a child who is typically resident in one State is adopted through adults or couples who are typically resident in some other State, creating an enduring parent–child relationship across State borders. International adoption spans private international law and children's rights law, but creates complex questions with reference to jurisdiction, recognition of foreign judgments, conflict of laws, and the protection of children who are most in need of protection.

Globally, the practice has generally been informed by the United Nations Convention on the Rights of the Child (UNCRC), 1989¹ and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993², both of which uphold the “best interests of the child” as the overriding principle in adoption. India, while being a signatory to the Hague Convention, has developed its own protocol in the adoption procedure through the Juvenile Justice (Care and Protection of Children) Act, 2015³ and the Central Adoption Resource Authority (CARA) Guidelines⁴.

Despite the existence of international protections, there remain concerns with restraints on child trafficking, unauthorized financial gains, cultural dislocation, and improper follow-up after adoption. Indian jurisprudence in the seminal case of *Lakshmi Kant Pandey v. Union of India*⁵ established the importance of stringent protections in order to prevent exploitations but facilitate legitimate adoptions.

¹ United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

² Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

³ Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, Acts of Parliament, 2015 (India).

⁴ Ministry of Women and Child Development, *Central Adoption Resource Authority Guidelines Governing Adoption of Children*, 2022.

⁵ *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244.

The present paper critically examines the private international law challenges and protections in international adoption, with particular reference to the Indian response compared with other foreign jurisdictions. The debate tries to evaluate whether current protections within private international law more effectively balance the competing objectives of protection of the child and facilitation of family life across borders.

2. INTERNATIONAL FRAMEWORK:

International adoption is largely governed through an international model of conventions, treaties and soft law instruments that outline protection procedures for children and govern cooperation across international borders. Among the latter, the most prominent are the United Nations Convention on the Rights of the Child (UNCRC) of 1989, and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993 (Hague Convention on Intercountry Adoption).

The UNCRC identifies children as rights-holders, not as recipients of charity. The UNCRC sets out that the "best interests of the child" should always be the overriding consideration in any measure concerning children, including adoption⁶. Article 21 requires States to guarantee that the procedure of adoption will safeguard the children's well-being, avoid any undue financial benefit, and ensure continuity in rearing⁷. The UNCRC doesn't give detailed procedures in the case of intercountry adoption, granting the States much freedom in procedure. The absence of this detail gave rise to the formulation of a more special treaty.

The Hague Convention of 1993 created a general legal framework governing intercountry adoption with the formulation of cooperation procedures among the States⁸. Its general principles are:

- **Subsidiarity:** Intercountry adoption is only an option if there is no suitable family in the child's country of origin⁹.
- **Licensing of adoption agencies:** For ethical practices and to prevent trafficking¹⁰.

⁶ United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 3, 1577 U.N.T.S. 3.

⁷ Id., art. 21.

⁸ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

⁹ Id., art. 4(b).

¹⁰ Id., arts. 6–11.

- **Recognition of acts of adoption effected in other contracting States:** For the purpose of legal certainty¹¹.

While the Hague Convention has simplified protections, uneven ratification dilutes its effectiveness. Certain nations with large cadres of children available for adoption, like the Democratic Republic of the Congo and Ethiopia, have suspended or retreated from international adoption in response to allegations of abuse¹². Outside-the-Hague adoptions may be absent of the same protections and create parallel systems open to abuse.

Apart from treaty law, soft law documents like the United Nations General Assembly's Guidelines for the Alternative Care of Children (2009) emphasize that institutional care is only to be considered in exceptional situations, and adoption should preserve the identity, culture, and heritage of the child¹³. Though non-binding in nature, they influence the judgments of courts as well as policy structures.

However, the system is criticized for focusing more on legal processes than the actual lives of adopted children. After-placement tracking is often poor, particularly when children move to jurisdictions with weak tracking¹⁴. Second, although the Hague Convention concentrates adoption procedures in the capitals, the system is also criticized as fostering administrative barriers that slow placements while they conflict with the imperative that the child enjoy stability.

Overall, although the international legal framework sets out fundamental protections, uneven practice and differentiated application create significant lacunae. The following part will explain how the instruments intersect with India's legal system and how the courts attempt to reconcile international obligations with local interests.

3. LEGAL FRAMEWORK OF INDIA:

International adoption in India is brought about through the delicate tuning of fulfilling the needs of international conventions and safeguarding children from being exploited. Albeit India had ratified the Hague Convention on Intercountry Adoption during the year 2003, the

¹¹ Id., art. 23.

¹² Kristen Cheney, *Ban on Intercountry Adoptions: A Debate on Ethics and Rights*, 36 J. Int'l Child & Fam. Welfare 41 (2019).

¹³ U.N. General Assembly, *Guidelines for the Alternative Care of Children*, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (Feb. 24, 2010).

¹⁴ Nigel Cantwell, *The Best Interests of the Child in Intercountry Adoption*, UNICEF Innocenti Insight (2014).

international adoption within the nation is controlled mainly through the Adoption Regulations framed under the Central Adoption Resource Authority (CARA) as well as the Juvenile Justice (Care and Protection of Children) Act, 2015.

3.1. Statutory Provisions -

The Juvenile Justice Act, 2015 identifies adoption as one of the favored means of rehabilitating children in need of care and protection¹⁵. Section 56 specifically makes both intra-country and inter-country adoption permissible while requiring the procedure to adhere to the Hague Convention and the CARA guidelines¹⁶. The Adoption Regulations, 2022 elaborate the procedure, among other requirements, including registration of prospective adoptive parents (PAPs), eligibility, referral, and protection measures against unlawful adoption¹⁷.

CARA, as the Central Authority as per the Hague Convention, regulates and monitors all intercountry adoptions¹⁸. Such adoptions can only be processed through agencies accredited by CARA, and foreign parents who desire to adopt should apply through the accredited bodies or the central authorities of their countries¹⁹. Such centralized regulation was aimed at checking the indiscriminate irregularities that characterized the 1970s and the 1980s when private agencies and intermediaries arranged dubious intercountry adoptions.

3.2. Judicial Intervention -

The Indian judiciary has played an important part in the evolution of adoption protection. The Supreme Court in *Lakshmi Kant Pandey v. Union of India* dealt with the problem of child trafficking and abuse in foreign adoption²⁰. The Court laid out stringent guidelines: adoptions should be routed through registered government agencies, biological parents should provide their consent voluntarily, and there should be review by the judiciary before the adoptions are finalized²¹. The judgment is the seminal precedent and was thereafter codified in the statutory scheme.

¹⁵ JJ Act, 2015, Statement of Objects and Reasons.

¹⁶ JJ Act, 2015, § 56.

¹⁷ Adoption Regulations, 2022, regs. 7–12.

¹⁸ Id., reg. 3; Hague Convention, art. 6.

¹⁹ Adoption Regulations, 2022, regs. 14–17.

²⁰ *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244.

²¹ Id. at 257–60.

Subsequent cases, including *Baby Manji Yamada v. Union of India*, while mainly related to surrogacy, emphasized the necessity of clarity in cross-border child care conflicts²². High courts in recent times have again asserted that the “best interests of the child” should always be the overriding principle, even in the event of allegations of procedural misconduct²³.

India's system is comprehensive but far from being inclusive. The extent of the process usually further delays placements and results in children staying in care longer than needed. The high thresholds for eligibility, including age restrictions and some exclusions of family forms, have been problematic in terms of being able to provide support for families, and may be seen as discriminatory. Furthermore, outside of placements, matching processes between child emigration and ‘post-placement checks’ are sporadic at best, and long term safety and welfare are also uncertain. Thus, while India's limits on protections are often robust, they are often also at least indirectly placed at the cost of appropriate timeliness of family placements.

4. COMPARATIVE ANALYSIS:

United States -

America is the largest receiving country for intercountry adoptions, though statistics have steadily fallen since the early 2000s²⁴. It became a party to the Hague Convention in 2008, implementing the provisions of the Convention through the Intercountry Adoption Act, 2000²⁵. It names the U.S. Department of State as the Central Authority, with accredited agencies in charge of the adoptions²⁶. Verification of foreign adoptions at judicial level is in most instances straightforward, and children entering under adoption visas acquire permanent residence²⁷.

Crucially, the U.S. system has been criticized for having instances of fraudulent practice in home countries, specifically Uganda and Ethiopia, where children were inappropriately classified as orphans²⁸. While measures are in place, the federal system occasionally makes it the achievement of uniform enforcement across the states.

²² *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

²³ *Anokha v. State of Rajasthan*, AIR 2004 Raj 286.

²⁴ U.S. Department of State, *Intercountry Adoption Statistics* (2022), <https://travel.state.gov>

²⁵ Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (U.S.).

²⁶ *Id.* § 101(a).

²⁷ Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(E) (U.S.).

²⁸ U.S. Dep’t of State, *Adoption Scams and Fraud* (Apr. 7, 2014), https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-scams-and-fraud.html

Relatively to India, the U.S. system focuses more on ensuring efficient facilitation of adoptions, although in some cases, at the cost of monitoring.

France -

France, a country of civil law, is also a major receiving country and a signatory to the Hague Convention since 1998²⁹. Adoption is both regulated by the Civil Code and the Family Code, and the Ministry of Foreign Affairs is the Central Authority³⁰. French law draws a clear line between simple adoption (with maintenance of contact with the biological family) and plenary adoption (with severance of all pre-existing contacts)³¹. Intercountry adoptions are possible only through accredited agencies or through bilateral agreements with origin States³².

France's system is rigidly centralized, hence reducing the likelihood of illegal adoptions. It is, on the other hand, faulted for being too rigidly bureaucratic, putting many intending parents off. Relative to India, France is more intent on maintaining cultural attachments and ensuring no adoption occurs without exhaustive searching for domestic solutions.

Ethiopia -

Ethiopia was among the globe's top senders of children for international adoptions, principally into Europe and America. In 2018, though, it enacted Proclamation No. 1070/2017, which banned intercountry adoptions in general³³. The action came following reports of wholesale trafficking, coercion of the parents, and lack of adequate monitoring upon overseas adoption³⁴.

Though the ban was done for the children's safety, it was blamed for driving the adoptions underground and sealing the channels for the children who are without families³⁵. In comparative terms, India never banned international adoptions but opted for stringent regulation through its CARA. The Ethiopian paradigm is one of increased

²⁹ Hague Conference on Private International Law, *Status Table: Hague Adoption Convention*, <https://www.hcch.net>

³⁰ Code Civil [C. civ.] [Civil Code] arts. 343–370 (Fr.).

³¹ Id., art. 360.

³² Ministère de l'Europe et des Affaires étrangères, *Adoption Internationale: Cadre Juridique* (2021).

³³ Federal Democratic Republic of Ethiopia, Proclamation No. 1070/2017 (Ban on Intercountry Adoption).

³⁴ Kristen Cheney, *Disrupting Intercountry Adoption: Ethiopia's Ban and Its Consequences*, 38 *Childhood* 442 (2020).

³⁵ UNICEF, *Intercountry Adoption: Ethiopia's Experience* (2019).

protectionist but maybe unintentionally refusing children the chance of being brought up under the family environment.

Insights -

Internationally, the Hague Convention is the unifying system, although it is administered variably. The United States leans toward efficiency, sometimes at the cost of oversight; the Ethiopian nation maintains the prohibitionist approach, mirroring basic distrust of international adoptions. India's model falls mid-range—enforcing Hague standards through CARA but adversely criticized for procedural pace.

This comparative examination reveals that there is no one-size-fits-all best practice, but the overriding challenge remains the same: striking a balance between safeguarding the child against abuse and the right of the child to early placement in a permanent family.

5. SAFEGUARDS & CHALLENGES:

The international system implements protections such that intercountry adoptions are undertaken for the child's best interest and with regard for the rights of the adoptive and genetic parents. The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (Hague Adoption Convention) is the model treaty for the purpose. It institutes the principle of subsidiarity and mandates that local solutions, such as placement within the child's own family or community, be considered first before intercountry adoption³⁶. A fundamental safeguard is the selection of Central Authorities for receiving and sending states alike. Such organizations verify the adoptability of the child, free and informed decision of the biological parents without coercion or material rewards, and the matching process itself³⁷. Such mechanisms are designed at preventing child trafficking and commodification under the guise of adoption. In the same vein, the United Nations Convention on the Rights of the Child (CRC), 1989 via Article 21 underlines the paramountcy of the necessity for the child's best interests as the only consideration, instilling the rule of law, ethics, and culture sensitivity into the practice of adoption³⁸.

³⁶ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 4, May 29, 1993, 1870 U.N.T.S. 167.

³⁷ Id. art. 6.

³⁸ Convention on the Rights of the Child art. 21, Nov. 20, 1989, 1577 U.N.T.S. 3.

Despite such protections, severe issues exist. Non-universal ratification of the Hague Convention facilitates adoptions happening outside of its protective umbrella and often through unofficial intermediaries or private channels. Even among signatory states, national implementation varies: where the Dutch and French possess effective monitoring systems subsequent to the adoption, Indian monitoring only goes sparingly beyond pre-adoption protocols³⁹.

Another perennial problem is the risk of child trafficking and pretended consent. Ethiopian and Ugandan reports describe the scenario of children being illegally declared orphans for international placements⁴⁰. In India, procedural intricacies and bureaucratic delays under the Juvenile Justice (Care and Protection of Children) Act, 2015 and CARA guidelines discourage prospective adoptive parents, de facto promoting the utilization of informal channels⁴¹. These institutional weaknesses jeopardize safeguards and highlight the value of increased harmonization and accountability among the adoption processes.

6. CASE STUDIES:

6.1. India: Lakshmi Kant Pandey v. Union of India (1984) –

The pioneering Indian case of *Lakshmi Kant Pandey v. Union of India* established the foundations for basic safeguards for intercountry adoptions. The petitioner, a social worker, raised concerns over child trafficking under the cover of adoption. The Supreme Court of India held that although the adoption of children by foreign nationals is permissible, it must always remain the very last option only after the potential for placement of the child within the nation itself is eliminated⁴². The Court told the government to prepare detailed guidelines, subsequently executed through the Central Adoption Resource Authority (CARA), with an emphasis on the interest of the child, vetting the adoptive parents for suitability, and monitoring foreign adoption organizations⁴³.

³⁹ Dutch Central Authority for International Children's Issues, *Annual Report on Intercountry Adoption* (2021); Ministère de l'Europe et des Affaires étrangères (France), *L'Adoption Internationale: Rapport Annuel* (2020).

⁴⁰ U.S. Dep't of State, *Adoption Scams and Fraud* (Apr. 7, 2014), https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-scams-and-fraud.html

⁴¹ Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016, INDIA CODE (2016); Central Adoption Resource Authority (CARA), *Adoption Regulations*, 2022 (India).

⁴² *Lakshmi Kant Pandey v. Union of India*, (1984) 2 S.C.C. 244 (India).

⁴³ Id. at ¶¶ judgement; Central Adoption Resource Authority (CARA), *Adoption Regulations*, 2022 (India).

The case remains the linchpin of Indian adoption jurisprudence, yet enforcement continues to be problematic. Delays, inconsistent compliance with the rules of CARA, and allegations of corruption weaken the safeguards contemplated by the Court. The case illustrates the possibility of judicial intervention for the creation of a system compatible with international standards, but it documents the difficulty of transforming principle into practice.

6.2. Ethiopia: Bar on Intercountry Adoption (2018) -

Ethiopia was among the leading source countries for intercountry adoptions, primarily into Europe and the United States. Following an epidemic of reports of coercion of the parent at childbirth, forgery of documents, and failure of effective post-placement monitoring abroad, however, the Ethiopian government enacted Proclamation No. 1070/2017 and brought it into effect in the year 2018, prohibiting all intercountry adoptions. The government cited the measure as necessary for the protection of the vulnerable children from abuse and the strengthening of national child protection mechanisms.

Even though the ban offset the dread of human trafficking, it is argued that it created unintended consequences. Thousands of institutionalized children missed the potential of stable foreign families, and the adoption process was driven underground with cumulative levels of unlawful placements. Comparativists note that rather than an absolute ban, the Ethiopian nation might have secured increased protection through the Hague form of the treaty.

Both these case studies reflect divergent strategies: India followed a judicially led model of regulation to harmonize international commitments with national interests, and Ethiopia chose prohibition as a protective strategy. Both strategies reflect the trade-offs between the welfare of the child, the sovereignty of the state, and international harmonization in the field of intercountry adoptions.

7. CONCLUSION:

Adoption across borders continues to be a highly complex problem that sits at the intersection of humanitarian care, international private law, and country sovereignty. Treaties and norms like the Hague Convention and the CRC, while providing basic guarantees, have spotty enforcement left large gaps. A comparison of the Indian and Ethiopian experience shows the

reality of both bans and rules, both intended to protect children, at times, getting the balance of protection and openness wrong.

In order to make safeguards more effective, the states must harmonise the national law with international conventions and their effective implementation. In India, it would be accomplished through the rectification of procedural deficiencies under the Juvenile Justice Act and empowering CARA for oversight beyond the pre-adoption process. At the global level, the Hague Convention must be ratified worldwide and technical assistance for the states lacking institutional capacity must be provided. This would promote uniformity, reduce irregularities, and render children not vulnerable for their exploitations.

Finally, systems of intercountry adoption must prioritize openness and accountability. Post-adoption follow-up, cooperation beyond borders, and online record-keeping might encourage trust and reduce avenues for abuse. Concurrent investment in protective services for children at the national level would make intercountry adoption a last resort and not an alternative for better national protection systems. Together, such reforms can strike a balance between the best interests of the child and the logic of private international law.

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