CHAPTER-4

THE INTERNATIONAL HUMAN RIGHTS DEPICTION:
THE HAGUE CONVENTION,
THE CONVENTION ON THE RIGHTS OF THE CHILD
&
INDIAN LEGAL SYSTEM PERTAINING TO CHILD ADOPTION
4.1 UNITED NATIONS INSTRUMENTS RELATING TO ADOPTION:

In 1959, the United Nations gave official recognition to the human rights of children by adopting the Declaration of the Rights of the Child 1959, a ten principle document. The Declaration set out certain principles relating to the rights of a child to a name and nationality and to be protected from practices which may foster religious discriminations

Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

**Principle 1, United Nation Declaration of the Rights of the Child 1959.**

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The child shall be entitled from his birth to a name and a nationality.

**Principle 3, United National Declaration of the Rights of the Child 1959.**

The child shall be protected from practices which may foster racial, religious, and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among people, peace, and universal brotherhood, and in full consciousness that his energy and talents should be directed to the service of the fellow men.

**Principle 10, United Nation Declaration of the Rights of the Child 1959.**

Besides, there were several general declarations, covenants, and Conventions, which stated the rights of children. The Declaration of Social and Legal Principles, relating to the protection and welfare of children with special reference to foster placement and adoption nationally and internationally 1986, also recognized that the primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family. It can be stated that foster placement should also be regulated by law.

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46 Article 10: Foster placement should be regulated by law.
The various declarations on the rights of the child were not binding on the
governments of the world. Therefore, an idea emerged about drafting a
treaty between the governments on the rights of the child which would be
more binding. Second, it was realized that the interests of children were
not necessarily identical with those of their guardians. The project to draft
a Convention started within the UN Commission of Human Rights; a
special working group was set up for the purpose under that body\textsuperscript{47}.

During the second reading of the draft Convention, four areas emerged as
what might be called highly controversial issues. These were the rights of
the unborn child, the right to foster care and adoption, freedom of
religion, and the minimum age for participation in armed conflict\textsuperscript{48}.

Objections to the freedom of religion and to adoption and foster care were
launched by the Islamic delegations, which found articles relating to them
in conflict with the Koran and with their national legislations.

According to Islamic law it is not possible for a child to be able to choose
a religion or to change his or her religious faith. This is a privilege
available only to adults. Similarly, the Islamic religion does not recognize
the right to adoption. In part, this position is based on a concept of

\textsuperscript{47}It was in commemoration of the twentieth anniversary of the Declaration of the Rights
of the Child 1959, that 1979 was designated as the International Year of the Child (IYC). As part of this celebration, Poland proposed that an international treaty be drafted which would put into legally binding language the principles set forth in the 1959 Declaration. The working group established by the Commission in 1979 completed its first draft of the Convention in February 1988.

consanguinity and inheritance within the interrelated extended family, which cannot and should not be altered or affected by the act of bringing an outsider into the family structure. Instead, the Islamic countries substitute the concept of *Kafala* as a method of caring for abandoned or orphaned children. Under *Kafala*, a family may take a child to live with them on a permanent legal basis, but that child is not entitled to use the family's name or to inherit from the family. The practice of *Kafala* would seem to be somewhat akin to permanent foster care.

The final text of the articles guaranteeing freedom of religion and the right to adoption and foster care is the result of very difficult and delicate negotiations\(^{49}\).

The principles that children have equal values as human beings, that the best interest of the child should be of primary consideration, that due weight should be given to the child's opinion, and that each child has rights are all of great importance\(^{50}\).

The Convention has also recognized the right of a child to have an identity and to grow up in a family environment. It also states that the parties to the Convention that permit the system of adoption must ensure that the best, interests of the child shall be the paramount consideration. The Convention also provides that there should be no discrimination of any

kind irrespective of the child's or his/her parents' or legal guardian's race, colour, sex, language, religion, biological, or other status.

Under the Convention, a committee is established to monitor the implementation and all state parties have to submit their first report to the committee within two years of ratification. There is also a link between reports by the states and discussions about assistance.

On 11 December 1992, India ratified the Convention\(^51\) and acquired an obligation to ensure that the rights enshrined under the Convention are protected in the country. It is the Government of India that is responsible for ensuring that the norms laid down in the Convention are adhered to in actual practice by enacting laws. International treaties do not automatically become part of the national law. They have to be incorporated into the legal system by appropriate law.\(^52\) Article 4 of the Convention provides that the state parties should review its legislation and ensure that the laws are consistent with the Convention\(^53\).

Therefore, we now have to make laws for adoption of all children without any discrimination. The various rights under the Convention are not ranked in order of importance but the Convention has an integrated approach and they interact with one another to form part of the same wholeness.

\(^{51}\) By the end of 1992, 117 countries have ratified the Convention on the Rights of the Child 1989. By 1996 it was raised to 185. Recently Somalia also ratified. Only USA has not ratified as of now.

\(^{52}\) The Constitution of India Article 253: Parliament has the 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.

\(^{53}\) See CRC Article 4.
India has also become a signatory to the Declaration of the World Summit for Children setting up goals for survival and child development for the year 2000. The survival and development goals of the World Summit for Children provide substance to the commitment to implement the provisions of the Convention\(^54\).

The Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption was adopted at the seventeenth session of the Hague Conference on Private International Law. India was also a participant at the deliberations.\(^55\) The Convention is to cover all inter-country adoptions between countries becoming parties to it, whether those adoptions are partly parent-initiated or arranged by public authorities, adoption agencies, or by private providers of adoption services. The Convention sets a framework of internationally agreed minimum norms and procedures that are to be complied with in order to protect the children involved and the interests of their parents and adoptive parents. Contracting states are free to maintain or impose requirements and prohibitions additional to those set out in the Convention.

### 4.2 INTERNATIONAL PRINCIPLES RELATING TO INTER-COUNTRY CHILD ADOPTION

\(^{54}\) The National Plan of Action for the Child formulated by the Government of India incorporates immediate as well as long-term goals for the year 2000 and outlines a time-bound strategy for achieving the targets.

\(^{55}\) This conference was convened at The Hague on 10 March 1993 at the invitation of the Government of Netherlands and was attended by government delegates of nearly sixty-nine countries including India. At the conclusion of the seventeenth session of the Hague Conference the participating states adopted the final text of the subject Convention.
Inter-country adoption is a subject of international law in several senses. First, because inter-country adoption involves the immigration of persons from one nation to another, it raises core national sovereignty issues with international law significance.

Second, inter-country adoption as a humanitarian matter implicates human rights issues, which have become a significant focus of international law.

However, two treaties will be reviewed:

1. The UN Convention on the Rights of the Child, hereinafter referred as CRC


4.2.1 OBJECTIVES OF THE CONVENTION

Hague Convention's objectives are as follows:

To establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect to its fundamental rights.56

Under Hague Convention, to ensure a system of cooperation among contracting states so that the safeguards are respected and thereby there

56 Article 1 of the Convention
is a prevention of abduction, sale, or traffic in children, and to secure the recognition of adoptions made in accordance with the Convention. The Convention is to apply to all adoptions between contracting states that create a permanent parent-child relationship\textsuperscript{57}.

The Child Rights Convention, CRC is probably the most relevant human rights Convention applicable to inter-country adoption. With the exception of the United States, nearly every sovereign nation, including India, adheres to the CRC. The Hague Convention is the most directly applicable treaty specific to inter-country adoption. India has adhered to the Hague Convention effective October 1, 2003, and the United States ratified in 2008\textsuperscript{58}. Much of international law, and especially human rights law, is arguably hortatory in nature, with little or no effective enforcement mechanism. The primary effect of broadly adopted human rights treaties is often to identify and express international ideals and standards, rather than to provide an effective means of enforcement. Thus, the CRC and the Hague Convention can be viewed as expressions of international ideals and standards. Given the lack of effective enforcement mechanisms, the line of applicability between ratifying and non-ratifying nations can become blurred, as the broad ideals of the Conventions can be used as standards to evaluate the conduct of even non-ratifying nations. In this sense, it is useful to discuss the CRC and the Hague Conventions.

\textsuperscript{57} Article 2 of the Convention
Convention in relation to the Andhra Pradesh adoption scandal\textsuperscript{59}, even though most of the relevant events occurred before Indian ratification of the Hague Convention, and the United States has not yet ratified either the CRC or the Hague Convention. The CRC and the Hague Convention remain the most relevant sources of international law pertaining to the Andhra Pradesh adoption scandals, even where those Conventions were not, in the strict legal sense, applicable.

4.3 CONVENTION ON THE RIGHTS OF THE CHILD: IN-COUNTRY AS WELL AS INTER-COUNTRY VIEWS ON CHILD ADOPTION LAWS

The CRC appears to take a very limited view of when inter-country adoption is appropriate. The critical text requires that state parties “recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” The CRC’s preference for in-country over inter-country adoption is compatible with the Hague Convention. However, the CRC also specifically prefers in-country foster care over inter-country adoption, and initially appears to favour in-country institutional care over inter-country adoption. These latter positions are more controversial, and appear to conflict with the Hague Convention.

\textsuperscript{59} Inside story of an adoption scandal, Arun Dohle, Dohle article final, 1/13/2009

"The Andhra Pradesh adoption scandals focused on suspicions of irregularities in an orphanage called Action for Social Development. Children whose adoptions had been held up by the American embassy were granted visas and allowed to travel to the United States”. Inter-country adoption from Andhra Pradesh was banned in 2001-02.
4.3.1 UNITED NATIONS CHILDREN’S FUND-UNICEF

It is notable, in this regard, that the United Nations Children’s Fund ("UNICEF") recently issued a public position on inter-country adoption which appears to favour inter-country adoption over in country institutional care. The statement cites both the CRC and the Hague Convention with approval. In regard to institutional care, however, UNICEF states:

"For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption."

4.3.2 THE UN CONVENTION ON THE RIGHTS OF THE CHILD-PREFERENCE TO INTER-COUNTRY CONTEXT

A. Various Relevant Articles

One could argue that, under the language of the CRC, institutional care is not a “suitable manner” for the permanent care of a child. Therefore, a plausible interpretation of the CRC is that it prefers inter-country adoption to in-country institutional care. By such interpretations, the international

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community is apparently working toward a harmonization of apparent conflicts between the CRC and the Hague Convention.

Other provisions of the CRC pertaining to both national and inter-country adoption provide basic standards, as follows:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall,

(i) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

(ii) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.

B. Interpretation of the Articles

The CRC thus seeks to ensure:

(i) The use of the “best interests of the child” standard;

61 Article 21, Convention on the Rights of the Child
(ii) Safeguarding of the process in which adults (such as parents) relinquish children for adoption, through a requirement of government approval, use of an “informed consent” standard for relinquishments, and the provision of counselling “as may be necessary”; and

(iii) Government safeguards against improper financial gain in inter-country adoption.

Other provisions of the CRC do not directly address adoption, but nonetheless have important implications for a system of inter-country adoption.

Article 7 states, “The child shall be registered immediately after biological and shall have the right from biological to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” This provision is significant to inter-country adoption in several ways. First, like many human rights norms, the requirement of immediate biological registration is consistently violated, as over 30% of biologicals worldwide are not registered, including nearly two-thirds of the biologicals in South Asia. The failure to register biologicals in sending countries makes it more difficult to document the age and family of origin of children, which unfortunately facilitates abusive adoption practices. Second, the child’s “right to know and be cared for by his or her parents” implicates adoption in several ways. Most directly, adopted children generally are not cared for by their parents, in apparent violation of the CRC. UNICEF plausibly explains this conflict by noting that children should
be cared for by their parents “whenever possible.” UNICEF thus implies that removal of a child from the biological family to an adoptive family would violate the child’s rights unless, after the offer or provision of relevant assistance, “a child’s family is unavailable, unable or unwilling to care for him or her.”

In addition, adoption—or at least closed adoption—has typically involved the destruction of any legal relationship or contact between the child and his or her parents. The secrecy associated with closed adoption has made it difficult or impossible for a child to “know” her parents even if she, as an adult adoptee, wishes to conduct a search. The CRC thus implicitly raises a question of whether systems of adoption that denies children information about their parents, particularly when a child seeks such information, violate the CRC. Presumably, defenders of closed adoption would argue that the best interests of children justify secrecy in adoption, while opponents would claim that openness is in a child’s best interests. Although issues regarding the best interests of children are difficult to resolve, it appears that the CRC was not intended to prohibit closed-record domestic adoption systems. Third, the right of a child to a “name” is a poignant reminder that adoption can involve the loss of the original name given to the child by the biological parents. According to the CRC, the vulnerability of children to having their names changed, concealed, or lost, legitimately or illegitimately, in the adoption process, implicates the rights of children. The CRC further states,
“State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

This section also has a paradoxical relationship to inter-country adoption. Inter-country adoption involves the loss of a child’s original identity, nationality, name, and family relationships. Thus, this provision once again underscores that inter-country adoption is, in certain respects, inherently destructive of the rights of the child. Of course, the phrase “family relations as recognized by law” reminds us that, in order to make a child eligible for adoption, the child’s family relationships are generally stripped of legal recognition. Adoption requires that a child be made, in some legal sense, an orphan—a child without legally recognized, living parents. The phrasing of the CRC makes it difficult to tell if the governmental act of legally dissolving the parent–child relationship violates the child’s rights, or instead falls into a loophole under the “as recognized by law” language of Article 8. Of course, an adoption that involves the unfortunate loss of some aspect of the child’s rights would still presumably be legal within the framework of the CRC, if overall the adoption was in the best interests of the child.

The CRC further states,

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63 Convention on the Rights of the Child
“Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

The question of re-establishing the identity of a child would specifically apply to illegality in adoption. Inter-country adoption has been plagued by claims of illegality, including stealing or buying children from biological parents, and the forging of various documents related to the relinquishment, abandonment, or original identity of the child.

Over 40% of the forty most significant sending nations over the last fifteen years are effectively closed to inter-country adoption, generally due to “concerns about corruption, child trafficking or abduction.” The question of what should be done with children caught up in such illegalities has thus become a concrete problem, plaguing governments, adoption agencies, and adoptive parents.\(^{64}\)

Although the CRC seems to take a clear stand in favour of re-establishing the child’s original identity, many find the issue much cloudier in the context of adoption. This provision of the CRC, of course, has wider application than adoption.

Moreover, Article 3 of the CRC creates an over-arching principle that,

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\(^{64}\)David M. Smolin, The Two Faces of Inter-country Adoption: The Significance of the Indian Adoption, Scandals, 2005, Seton Hall L. Rev. 403
"In all actions concerning children, the best interests of the child shall be a primary consideration."  

Thus, the CRC is subject to the interpretation that, for example, a “stolen child” should not be returned to his or her original family if doing so is contrary to the child’s best interests. The subjective nature of the “best interests of the child” standard renders disputable the proper outcome in virtually any difficult case, including instances of children illegally adopted.

Article 11 of the CRC, however, specifically states that “State Parties shall take measures to combat the illicit transfer and non return of children abroad.”

In a nutshell it can be said that, this provision could be directly applicable to situations in which children are illegally placed abroad for adoption. Once again, however, this provision could presumably be limited by the treaty’s command that “the best interests of the child” be “a primary consideration” in “all actions concerning children.” In several provisions, the CRC addresses the situation of a child separated from his or her parents. These provisions do not directly address adoption, and their general principles favouring the reunification or maintenance of family relationships are once again subject to the best interests of the child standard. In relation to adoption, these provisions are another reminder of the unusual nature of adoption in the context of child welfare, due to

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65 Article 3, Convention on the Rights of the Child
the severance of family relationships. Although the overall scheme of children’s rights strives to protect, maintain, and, where broken, re-establish relationships within the family, adoption seeks to legally sever those relationships, and replace them with a new set of family relationships. The CRC is notable for its definition of participation rights. The treaty goes beyond traditional definitions of rights that would protect or provide for the child, to establish the rights of children to participate in decisions affecting them.

Thus, Article 12 of the CRC states:

(i) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(ii) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The obvious application of this section to adoption would suggest that older-child adoption would sometimes require consideration of the views of the child.

The conceptual structure of the CRC suggests that as the child’s capacities develop, he or she would be given a greater degree of participation and even autonomy. Although the CRC does not require the consent of the child for all older-child adoptions, it is a fair reading of the CRC to require the child’s consent at some level of age or maturity. Thus, the CRC
indicates that all children capable of being consulted should participate by having their views considered, while some, older or more mature children, should participate through a requirement that the child must consent to any adoption.

Participation rights could be applied to other adoption issues as well. First, there is the question of which remedy to apply when a child has been illegally adopted. Second, there is the question of whether children should have access to information about their biological families, or even personal access to them. The CRC implicitly raises the question of whether, and to what degree, the child’s views should be heard, or even be dispositive of these issues.

4.4 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTION

As a treaty, the Hague Convention on Inter-country Adoption is only binding on the nations that ratify it. India recently ratified the Hague Convention, effective October 1, 2003. The United States is working toward ratification, with draft implementing regulations released for comment on September 15, 2003. Therefore, the Hague Convention did not directly apply to the periodic Andhra Pradesh adoption scandals. The Convention will become fully applicable to inter-country adoption between India and the United States only after both nations have ratified, and begun implementation of, the Convention. Present scenario is that USA in 2008 has ratified to the Convention.
4.4.1 VITAL FEATURES OF THE HAQUE CONVENTION

The Hague Convention on Inter-country Adoption has two major features. On the one hand, the treaty establishes broad standards and ideals for inter-country adoption in a manner analogous to other specialized human rights treaties. This aspect of the Hague Convention is most applicable to all nations, regardless of ratification, and will be explored in this part of the Article. The Hague Convention, however, also requires adhering nations to adopt specific procedural mechanisms and institutions designed to provide a specific means for achieving a system of adoption in accordance with the Convention’s broader ideals.
Diagram: 1.3 Process towards implementation

4.5. INTER-COUNTRY ADOPTION VERSUS IN-COUNTRY INSTITUTIONAL AND FOSTER CARE: HARMONIZING THE HAGUE CONVENTION WITH THE CRC:

The Hague Convention appears to implement a view that inter-country adoption can be superior to in-country institutional care. The preamble states that the child “should grow up in a family environment,” that nations should take, “as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,” and that “inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.

The recent UNICEF statement that “institutional care should be used only as a last resort and as a temporary measure” is an encouraging sign that the international community is recognizing that institutionalization can cause harms that violate the rights of the child. Given the comprehensive nature of the CRC, it would not take much creativity to find violations of the CRC in the long-term institutionalization of children in substandard conditions. It seems unlikely, however, that any international agreement would ever require nations to place children internationally. Whatever difficulties and rights violations children may experience in their countries of origin, it is doubtful that nation states can be expected to bind themselves to solve those problems by sending their children away. Thus, it is unlikely that international law would recognize a right of a child to be
adopted internationally, even if the law recognized that some children face severe deprivations of rights within their home countries.

Beyond the emerging international consensus condemning long-term institutionalization of children, and the preference for “family” care, are a range of difficult ambiguities. Initially, this issue may be analyzed in terms of a possible conflict between the CRC, which specifically prefers in-country foster care to inter-country adoption, and the Hague Convention, which can be read to prefer inter-country adoption over in-country foster care.

The recent UNICEF statement preferring inter-country adoption over institutionalization is ambiguous on this question of foster care. The UNICEF statement does not mention foster care specifically, but seeks placement of children in a “family environment” and a “permanent family setting.” The UNICEF statement contains language that is very similar to that of the Hague Convention, which also speaks generally of a “suitable family” and “permanent family,” without specifically referring to foster care.

4.5.1 A CLOSE ANALYSIS OF INTER-COUNTRY AND FOSTER CARE ADOPTION:

The Hague Convention position on inter-country adoption versus foster care is also ambiguous, depending on whether a foster care arrangement can be considered a permanent family. Even if the Hague Convention prefers inter-country adoption over foster care, it does not impose that
preference on sending nations. A preference for permanent family care over institutionalization therefore does not settle the issue concerning “foster care,” due to the variety of care taking alternatives available to children. The issue then becomes, which forms of child care, short of adoption or biological families, should be considered “permanent family” care. Within the United States foster care has often been associated with the negative features of the foster care system, including multiple moves from one foster family to another. Such weaknesses in the United States foster care system are not necessarily universal. To make matters even more confusing, there are some forms of apparently “institutional care,” such as SOS Children’s Villages, which seek to offer children a permanent “family” with a “mother” and “siblings.” Such type of care, if of sufficiently high quality, come within international condemnations of permanent institutional care for children, or is it considered a “permanent family”. Questions concerning the status of child care arrangements short of full adoption are likely unanswerable, due to the underlying debate over whether the loss of identity involved in traditional closed adoption is truly superior to some kind of open adoption, permanent guardianship, long-term foster care, kinship foster care, or other arrangement whereby children preserve their original identity and relationship to their families of origin while still being raised primarily by another “family.” Thus, the consensus that children need a family environment, and the condemnation of starkly institutional forms of permanent care, cannot settle the status of various traditional and innovative forms of alternative
child care for children who cannot be raised within their biological families.

In an effort to guard against adoption as economic migration, the regulations strip foreign biological parents of some of the options typically exercised by biological parents in the United States. Biological parents in the United States are generally able to place their children with the adoptive families of their choice, acting either independently or through various intermediaries, regardless of whether there are parents, and regardless of whether they could fulfil the child’s basic needs themselves. In addition, where there are two living natural parents, they must be “incapable of providing proper care for the child.” This new standard would substantially weaken the protections against adoption as a form of economic immigration. First, it would now be possible for both parents to specifically choose an inter-country adoption (either generally or with a specific adoptive family), at least as long as they could not provide for the child’s basic needs. In addition, if there was only one living parent, that parent could choose inter-country adoption even without a demonstration that the parent was unable to provide for the child’s basic needs.

Interestingly, this new, alternative definition of a child eligible for inter-country adoption does not literally require the child to be defined as an orphan. It is possible to read too much into this. Presumably, the law would still require that children be in need of a family before being eligible

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66 The Two Faces Of Inter-Country Adoption: The Significance Of The Indian Adoption Scandals, David M. Smolin, Seton Hall Law Review Vol. 35:403
for adoption. It is ironic, however, that the United States, upon implementation of the Hague Convention (signed in 2008), would actually be relaxing its standards for regulating inter-country adoption in the critical area of defining which children are eligible for adoption.

The obvious explanation for this weakening of standards is reliance on other Hague nations to ensure the propriety of relinquishments. If one assumes that foreign-sending nations that adhere to the Hague Convention can be relied upon to ensure proper relinquishments, then arguably it makes sense to offer biological parents in such nations more control and choice over the adoption process. Since domestic biological parents have the option of choosing adoptive families for their children, and may relinquish a child for adoption even if they are financially capable of supporting their child, there is an argument that foreign biological parents should also have such options, even in relation to inter-country adoption. Unfortunately, the premise that foreign-sending nations who join the Hague Convention will have reliable procedures regarding relinquishments seems overly optimistic.

As the following examination of the law of India will demonstrate, the existence of high legal ideals and elaborate legal procedures for inter-country adoption in foreign-sending nations does not guarantee the legitimacy and reliability of those processes.
4.5.2 SIGNIFICANCE AND RELEVANCE OF THE HAGUE CONVENTION TO INDIA

The objectives and provisions of the Convention reiterate and elaborate what is clearly contained in the Constitution of India, the National Policy for Children 1974, the United Nations' Convention on the Rights of the Child 1989, and the Supreme Court guidelines for inter-country adoption laid down in the Laxmikant Pandey judgments and Guardians and Wards Act 1890. For instance, Article 4 of the Hague Convention states that an adoption within the scope of the Convention will take place only after the possibilities for placement of the child within the state of origin of the child have been given due consideration. It also provides for consent of the child where possible, and counselling of the child and the parents, and ensures that such consent has not been induced by payment or compensation of any kind.

As per the Supreme Court guidelines followed in India, first priority is given to in-country adoption and where this is not possible inter-country adoption may be resorted to in the interest of the child. If the parents are known, they should be properly assisted by the social or child welfare agency in making decision about relinquishing the child. The Supreme Court also imposes a duty upon the recognized social or child welfare agency through which the foreigner wants to adopt a child to make sure that the child is free for adoption. It also provides that for children above

seven years, their wishes may be ascertained if they are in a position to indicate any preference.

Article 6 of the Hague Convention states that there should be designated a central authority to discharge the duties which are imposed by the Convention. In India, the Central Adoption Resource Agency (CARA) has also been set up with similar functions\textsuperscript{68}.

The CARA guidelines have been formulated to ensure what has been stated in Articles 7, 8, 9, 16, 18, 19, 20, 21, 22, and 23 of the Hague Convention. Articles 10, II, 12, and 13 of the Hague Convention provide for accreditation to the competent bodies and norms for registration of agencies for inter-country adoptions. Under the prevalent Supreme Court guide-lines, directions have been given to the ministry of social welfare of the Government of India and of the states to recognize and license suitable agencies within the country. These could be further streamlined to ensure, that the right kinds of agencies are involved.

Every application from a foreigner desiring to adopt a child from India must be sponsored by a social worker or child welfare agency recognized or licensed by the government of the country in which the foreigner is resident.\textsuperscript{69} Article 15 of the Hague Convention provides what we call the home study report, which has to accompany every application of the foreigner. There are similar provisions laid down in the Supreme Court guidelines and the guidelines of the task force.

\textsuperscript{68}Refer to the role of the CARA in CARA guidelines
Article 24 of the Hague Convention states that the recognition of adoption may be refused in a contracting state only if the adoption is manifestly contrary to its public policy taking into account the best interests of the child. This clause is the general escape clause, which allows any of the Convention's provisions to be disregarded when observance would be manifestly contrary to the public policy. This clause probably adds little to a power of exception which any of the contracting states would already have under the general rules of public policy, which operate over and above the framework of the Convention.

India should accede to this Convention, as it will oblige India to formulate legislation on inter-country adoption.\(^70\) It will ensure that the child will not be abused in the receiving country, as we will be sending our children to those countries which are parties to this Convention. Besides, the Convention does not intervene in the personal laws of the country\(^71\).

In an era when a pro-children development strategy has been adopted by the government, the accession of this Convention—which conforms to our Constitutional mandate\(^72\) And our national norms and procedures for inter-country adoption—is desired. This Convention is compatible with Indian laws both in letter and spirit and therefore needs to be ratified so that we have a law on inter-country adoption that will contribute to the

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\(^70\) The Hague Convention, Article 28, allows the enactment of law.  
\(^71\) See the Hague Convention, Article 37.  
\(^72\) See The Constitution of India, Articles 15(3), 23, 24, 39, 45, and 46.
international legal regime on adoption and in the cause of justice to the child.

4.6 SUPREMACY OF THE APEX COURT

The key documents summarizing the ideals and laws of India regarding inter-country adoption are found in the Supreme Court of India’s 1984 *LaxmiKant Pandey v. Union of India* opinion and subsequent Supreme Court opinions elaborating and applying the principles of the original *Pandey* decision. The case arose through a generalized claim of abusive inter-country adoption practices and was treated as public interest litigation.

The Supreme Court of India was thus invited, at the outset, to prohibit or sharply restrict inter-country adoption. The statutory position of adoption was rather tenuous at that time. The Hindu Adoptions and Maintenance Act of 1956 provided limited authority for Hindu persons to adopt Hindu children, but adoption of a child was prohibited if the adoptive parent already had a child, biological or adoptive, of the same gender. A proposed uniform law of adoption, applicable to all religious communities, had been introduced in 1972, but dropped due to opposition.

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73 (1984) 2 SCC 244 (India)

The definition of a Hindu under the Act includes not only a person of the Hindu religion “in any of its forms or developments,” but also a “Buddhist, Jain, or Sikh by religion.” A person who is a “Muslim, Christian, Parsi, or Jew” is explicitly excluded from the coverage of the Act.
from the Muslim communities. A similar law exempting Muslims from application had been introduced in 1980 but also failed to gain enactment. Therefore, persons or situations not falling within the limited statutory definitions of the Hindu Adoption and Maintenance Act, including non-Hindus seeking to adopt within India, and most foreigners seeking to adopt, were left to the provisions of the Guardians and Wards Act of 1890. This Act did not provide for adoption, but rather for guardianship lasting until the age of majority.\textsuperscript{76} The Supreme Court of India could have relied on the absence of explicit statutory provisions for non-Hindu adoptions as the basis for a broad prohibition of most inter-country adoptions. Instead, the Court embraced inter-country adoption in terms quite consistent with those later expressed in the Hague Convention. The Court’s primary rationale and focus appeared to be child welfare. Thus, the Court stated that, “every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family.”

The Court created a series of preferred outcomes for children, roughly as follows:

\begin{enumerate}
\item Child with family;
\item Child adopted within India;
\item Child adopted out of country by Indians residing abroad;
\end{enumerate}

\textsuperscript{76} Guardians and Wards Act, No. 8, § 41 (1890), visited last at http://indiacode.nic.in/fullact1.asp?tfnm=189008 (last visited Feb. 5, 2005).
(4) Child adopted out of country by “adoptive couples where at least one parent is of Indian origin”; and

(5) Child adopted out of country by person(s) who are not of Indian origin.

Although this priority list may appear nationalist in orientation, the Court grounded these priorities in concerns with the greater difficulties that adoptive children face in assimilating to their adoptive families in situations involving “cultural, racial or linguistic differences.” Interestingly, the CRC, although created some years later, specifically states that in adoption, “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.” Therefore, the Court’s preference that Indian children be adopted by Indian parents, whether residing in India or elsewhere, later found support in the world’s most significant treaty on children’s rights. At the same time, the Court was willing to countenance foreign adoption, even by non-Indians, in order to save children from certain fates. The Court stated that,

"If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socio-economic conditions prevailing in the
country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness 77."

The Court pointed out that such conditions would “prevent the realisation of a child’s full human potential making the child more likely to grow up uneducated, unskilled and unproductive,” with a life “blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation.”

The Court stated that allowing foreign adoption was consistent with India’s National Policy on Children because it would permit otherwise “destitute, neglected or abandoned” children to realize their full potential, and to live a “healthy, decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation.”

The Court was unflinching in its assessment of the conditions under which many in India lived and was willing to countenance the loss of some of India’s children, if necessary to save them from such a fate.

The far-ranging opinion of the Court showed broad familiarity with a variety of adoption issues. For example, regarding older-child adoption, the Court noted that it is easier for younger children to become “assimilated and integrated” into their new environment and that “a problem may also arise whether foreign adoptive parents would be able to win the love and affection of” older children.

77 Laxmikant Pandey, (1984) 2 SCC 252
Similarly, the Court’s procedures specifically provided for the event of disruption; that is, the failure of an adoption after placement into the adoptive family but prior to finalization of the adoption.

Inter-country Adoption Institutions and Procedures Delineated by the Indian Supreme Court Much of the Court’s opinion involved the creation or recognition of an elaborate set of procedures and institutions for inter-country adoption, which the Court constructed despite the lack of a statutory framework beyond the Guardians and Wards Act of 1890. The Court’s procedures and institutions deliberately built upon those which had been implemented in certain local areas within India, particularly Bombay, Delhi, and Gujarat.

The procedures and institutions for foreign adoption envisioned by the Supreme Court can be summarized as follows:

**4.6.1 RELINQUISHMENT OF THE CHILD BY BIOLOGICAL PARENTS**

Where the biological parents are known, they are to be counselled and told that if the child is adopted, they will have no further contact with the child.

There is to be no duress to coerce relinquishment of a child, and biological parents are given three months after relinquishment to change their minds and reclaim the child. In addition, biological parents are not permitted to make a decision regarding adoption “before the biological of the child or within a period of three months from the date of biological.
In regard to the documentation of relinquishments, the Court stated: But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its parents, it is necessary that the institution or centre or home for child care or social or child welfare agency to which the child is surrendered by the parents, should take from the parents a document of surrender duly signed by the parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the parents and their address but also information in regard to the biological of the child and its background, health and development.

If the biological parents are not known, an effort must be made by the institution having care of the child to “try to trace the parents of the child.”

If the biological family is not found, then the child is regarded as “an orphan, destitute or abandoned child” and considered free for adoption without any need for consent by the biological parents.

In the second *Laxmi Kant Pandey* the honourable court stated opinion, however, that “no children who are found abandoned should be deemed to be legally free for adoption until the Juvenile Court or the Social Welfare Department declares them as destitutes or abandoned.”
4.6.2 CHILD OFFERED FOR ADOPTION TO PROSPECTIVE INDIAN ADOPTIVE PARENTS: PROPOSAL FOR VOLUNTARY COORDINATING AGENCIES

The Indian agency is required to make efforts to find placement for the child by adoption in an Indian family. The child cannot be made available for foreign adoption until a two month period of making the child available for adoption within India has passed, unless the child is handicapped or is in a bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide.

The Supreme Court, in its review for the second time in Pandey’s decision, proposed the use of a “voluntary Co-ordinating agency” within each state or large city to coordinate and facilitate efforts to locate adoptive parents for children within India.

This concept was modelled after an experimental program in Bombay. Perhaps as an inducement, the Court suggested that the period of time for seeking an adoptive family within India be reduced to three to four weeks, if such a system was functioning.

4.6.3 THE CENTRAL ADOPTION RESOURCE AGENCY (CARA): THE CATALYST

The Supreme Court proposed the creation of a Central Adoption Resource Agency; it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption
Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency.

4.6.4 ROLE OUGHT TO BE PLAYED BY THE AGENCIES AS PER APEX COURT

A. INDIAN AGENCIES

While explaining the role of CARA, Supreme Court clearly jotted down the role of Voluntary Agencies in bringing Adoption smoothly. The Supreme Court stated vehemently that, adoption should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating.
The Supreme Court specifically directed that the Government of India to create a list, within three months, of recognized agencies, beyond the two regarded as already recognized, *Indian Council of Social Welfare* and *Indian Council for Child Welfare*.

The Court found it desirable to only recognize agencies engaged in the work of child care and welfare since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme.

The Apex Court was concerned that recognizing agencies set up only for adoption would *"degenerate into trading."* The Court also suggested that agencies be examined to determine if they had,

"Proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family."

The Indian government was to send the list of recognized agencies to foreign governments and state courts.

**Networking between recognized and unrecognized agencies**

The Court did discuss the issue of networking between recognized and unrecognized agencies, as follows,
Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption.

It was later alleged that this networking privilege was abused, as “unrecognised agencies are using recognised placement agencies as post offices for processing cases in respect of children which are in the custody of the unrecognised agencies with which the recognised agencies have nothing to do.” The Court rejected this practice, ruling that recognized agencies could not process a guardianship application for a foreigner unless the child had been in their custody for at least one month prior to the “making of the application.”

“The Court emphasized, in this regard, that the recognized agency was responsible for preparation of the child study report, including a medical report.
Thus, the Court rejected the use of recognized agencies as “a post office or conduit pipe for the benefit of an unrecognised agency.”

The Indian agencies were given a variety of critical tasks, beyond the care of the children, including:

(i) creating a detailed child study form, including identifying information, information about original parents, a health report prepared by a physician, and information as to the physical, intellectual, and emotional development of the child;

(ii) determining if the child is legally free for adoption, including any necessary investigation—if the parents surrender the child, the agency must oversee the taking of valid relinquishment documents; and

(iii) prosecuting the guardianship petition in the local court.

B. PIVOTAL ROLE OF FOREIGN AGENCIES

The Supreme Court of India prohibited independent adoptions, in which foreigners apply directly to the Indian agency without the use of an agency from their home country. One exception to this prohibition concerns direct transfers of children from biological to adoptive families, which the Indian Supreme Court, somewhat surprisingly, has permitted. The Court further required the Government of India to “prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the government of each foreign country where children from India are taken in adoption.”
The Court gave several important tasks to foreign agencies:

**First**, the Court made foreign agencies responsible for the preparation of a home study report on the adoptive family. This process ensures that the adoptive parents will be suitable parents for the child and will be “able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption.”

**Second**, foreign agencies would act as a buffer between the adoptive family and Indian agencies and individuals, in order to avoid illicit monetary demands. In this way, the Court hoped to “reduce, if not eliminate altogether the possibility of profiteering and trafficking in children.”

Finally, foreign agencies undertook the task of providing supervision and security for the child between the time of arrival in the foreign country and finalization of the adoption.

The Court was quite aware that the absence of a broader Indian adoption statute meant that many adoptive parents would only receive guardianship within India. The Court only wanted foreign adoption to occur when the child would be fully adopted under the laws of the recipient nation, with rights equivalent to those of a child.

The foreign agency was to ensure that such an adoption was legally possible, and to monitor the well-being of the child prior to finalization of
the adoption. The foreign agency was responsible for ensuring finalization within two years of arrival, sending regular progress reports on the child prior to adoption, and sending the adoption order to the Indian agency. In the event of disruption of the adoption prior to finalization, the foreign agency was responsible to “take care of the child and find a suitable alternative placement” with the approval of the Indian agency.

Thus, the Court did not want to send Indian children overseas, under a mere Indian guardianship order, without having a legally recognized agency within the receiving country responsible for overseeing the process to its culmination in a successful legal adoption.

4.6.5 INTRICACIES OF PROCEDURE POST-ADOPTION AND GENESIS OF SCRUTINY AGENCY

Scrutiny agencies were to assist the court in evaluating whether, it would be in the interest of the child to be given in adoption to the foreign parents or not. Scrutinizing agency must be an expert body having experience in the area of child welfare and it should have nothing to do with placement of children in adoption for otherwise objective and impartial evaluation may not be possible. With Indian context, it is important to know the governmental structure of child development agencies.
On the Apex is **Central Ministry of Women and Child Development**, under which CARA, State Welfare Development and Judicial Scrutiny Agency works.\(^7^8\) This can be described in hierarchy.

![Diagram: 1.4 Hierarchy of CARA](image)

Under landmark judgment of **Laxmikant Pandey** by the Honorable Supreme Court, the court has sought help of scrutiny agencies to advise judiciary to marshal out the petitions filed for adoptions and foster care under GAWA/HAMA/Juvenile Justice Act. It is the responsibility of the

\(^7^8\) A.S. Shenoy Chairman Adoption Scrutiny Committee, Indian Council of Social Welfare, “Role of Scrutiny Agencies in Adoption of Children from India”
scrutiny agencies to complete the scrutiny work in time by verifying the related documents of the child to be adopted and submit to courts before prescribed date. To ensure that all documents produced are genuine. To ensure that children in given for adoption from approved licensed placement agencies. Whether the institution processing the cases in the receiving country has recognition from the government of India. To verify the relinquishment deed for ascertaining the child is legally free for adoption. To ensure CARA guidelines are adhered fully in adoption process. To conduct scrutiny by qualified social workers and also Submit observation report to the court within the time frame given by the court.

4.6.6 LOCAL COURTS

Once an adoption had been found acceptable by the Indian agency, the Voluntary Coordinating Agency (“VCA”), and CARA, and with the advice of the scrutinizing agency, the local court would evaluate the guardianship petition under the GAWA 1890 Act. The adoption would only go forward if the local court found the foreign adoption to be in the interests of the child. The court, however, could only grant guardianship for the purposes of the child being brought to the foreign country, where the foreign guardians were expected to complete an adoption under their own law.

The Indian Supreme Court repeatedly expressed concerns about the possibility that foreign adoption could become a form of “profit[ing] and traffick[ing] in children.” The Court constructed responsible to “take care of the child and find a suitable alternative placement” with the
approval of the Indian agency. Thus, the Court did not want to send Indian children overseas, under a mere Indian guardianship order, without having a legally recognized agency within the receiving country responsible for overseeing the process to its culmination in a successful legal adoption. The Court also stated that “surgical or medical expenses” are “recoverable against production of bills or vouchers.”

The Court regarded the various limits on adoption costs to be revisable by the Indian government. CARA regulations as per October 2003 limit per day maintenance expenses to 100 rupees, about $2.25 per day, and the expense limitation is 10,000 rupees, about $225. The Court emphasized that the court granting the guardianship order should review and sanction the amounts to be paid to the Indian agency as a “greater safeguard” and because the various limits created by the Court were outer limits not automatically awarded. The Court also discussed the important issue of voluntary donations by foreigners to Indian agencies. The Court permitted such voluntary donations, above and beyond the limits set for maintenance, medical, and other expenses, but stated that such donations shall be received after “the child has reached the country of its adoptive parents.” This requirement presumably was intended to preserve the “voluntary” nature of the “donation.” The Court therefore attempted to balance the need to safeguard against profiteering and child trafficking against the need to allow agencies providing for children to meet their expenses and accept donations.
4.7 CHILD ADOPTION TREACHEROUS JOURNEY FOR SOME: VARIOUS PROCEDURES FOR VARIOUS SITUATIONS

Safeguards for the child travelling out of country with adoptive parents are of vital importance. In order to keep things under scrutiny, agencies work towards it.

A recent case from the Supreme Court of India, *Smt. Anokha v. The State of Rajasthan* ⁷⁹ applies these comments from the Pandey decision to a specific dispute. *Anokha* concerned a family-to-family transfer of a child for purposes of adoption. The couple hoping to adopt was from Italy and had been coming to India for twenty years, hiring Sumer Singh Yadav as a taxi driver to “tour the country.” In 2000, Sumer Singh Yadav died in an accident after dropping the Italian couple off at their destination. The widow, Anokha, was left with their six children, including five daughters. The Italian couple, then childless, offered to adopt one of the girls, named Babu Alka, and the mother agreed. A guardianship petition, relying upon the Guardians and Wards Act of 1890, was filed in the local court and various relevant documents pertaining to the suitability of the Italian couple as adoptive parents were submitted. The local court, however, rejected the guardianship petition because of the failure to adhere to the normal procedures for inter-country adoption, including sponsorship by an Italian child welfare agency recognized by the Indian government and the issuance of a no objection certificate (“NOC”) by the

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⁷⁹ 2003 SOL Case No. 809
Indian government. The Rajasthan High Court agreed with the local court. The Supreme Court of India, however, citing language from the first Pandey decision and other precedents, held that the guardianship petition should be granted. The Supreme Court of India noted that the Pandey case had been initiated by a letter “complaining of mal-practices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents.”

The implication was that the Pandey decision was inapplicable where Indian agencies were not involved in the transfer of the child from biological to adoptive family. The Court specifically quoted the language from Pandey stating that, where children were still living with their parents, the parents “would be the best persons to decide whether to give their children in adoption to foreign parents.”

The Court then explained, “The reason is obvious normally, no parent with whom the child is living would agree to give a child in adoption unless he or she was satisfied that it would be in the best interest of the child. That is the greatest safeguard.”

The Indian Supreme Court did demand a few safeguards for the child in the Anokha decision. In particular, the Supreme Court required that the foreign couple –

(1) file an affidavit with the local court undertaking to adopt the child within two years and to produce the child, if required,
until proof of adoption was filed with the local court;

(2) deposit with the local court a sum sufficient to pay the child’s return airfare to India with the amount to be returned once the child was adopted;

(3) submit to the local court annual reports, with photographs, concerning the child’s welfare and education and inform the local court of any changes of address.

These reporting obligations terminated upon finalization of the adoption in Italy. These requirements adapt to a direct family-to-family adoption the usual protections applicable to foreign adoptions during the period between the granting of a guardianship petition in India and the issuance of a full adoption decree in the foreign country. Nonetheless, the pre-guardianship protections provided in Pandey, which go to the question of whether the child will be given to the foreign family for purposes of adoption, remain inapplicable to direct family-to-family adoption agreements.

It seems odd that the Indian Supreme Court did not focus more attention on the obvious possibility of abuse implicit in direct transfers of children from Indian biological families to unrelated foreigners. The economic imbalance between the hundreds of millions of poor Indians and well-off citizens of wealthy nations such as Italy arguably casts a long shadow of exploitation over any such transfers of a child. The Italian couple in question in the Anokha case very likely had an annual income greater than fifty times that of the biological family, even before the death of the
father; once the father died, this gap could have grown to one hundred
times. Along with this gap, the struggle to survive of an Indian widow
with six children, five of whom would require high some of money to
marry.

Helping a family by taking a child away from her mother is arguably an
extraordinarily cruel form of assistance. If the Italian family was simply
concerned for the well-being of the family of their former taxi cab driver,
it would have been well within their means to financially assist the family
without taking their child away from them. The very cost of the plane
ticket for the child—an estimated 50,000 rupees according to the Court,
about $1100—would likely have made a significant difference in the life of
this family, and certainly would have provided for any needs of the child
for a number of years, if she had remained in India with her family. In
addition, the risks of child-selling in direct transfers of children from poor
Indian biological families to comparatively wealthy foreigners seem
significant. It would seem very difficult to prevent “under the table”
direct payments made, in essence, as payment for a child. Intentional
child-buying under the guise of adoption therefore seems a danger
inherent in this form of adoption. Unintentional child buying is another
danger, as money “given” to biological families as gifts or voluntary
donations, which may appear gratuitous and kind to foreigners, could be
interpreted as inducements to consent to adoption. Once again, the
extreme economic imbalance between many Indian biological families and
wealthy foreign families creates a severe danger of exploitation, in this instance in the form of intentional or unintentional child buying.

The apparent answer of the Supreme Court of India to these inherent dangers of family-to-family handovers of children for inter-country adoption is twofold. First, the Court refers to the “rights and choice of an individual to give his or her child in adoption to named persons, who may be of foreign origin.”

Although the Court does not elaborate on this point, the concept of a right to transfer parental rights to others is both suggestive and disturbing. Viewed positively, this right of transfer may embody the desire, in a society with often desperate poverty, that biological families be given a full range of choices in fulfilling their parental obligations, including that of providing for their children through choosing appropriate adoptive parents. Second, the Indian Supreme Court explicitly relies on the role of local courts, under the 1890 Guardians and Wards Act, in ensuring:

(1) the voluntariness of the relinquishment;

(2) the lack of “any extraneous reasons such as receipt of money” for the relinquishment;

(3) proper notice to the biological family of the significance of such relinquishment;

(4) the suitability of the adoptive parents; and

(5) that “the arrangement would be in the best interests of the
The point of the Court seems to be that, whatever the dangers involved in direct transfers of children from Indian families to foreign adoptive families, the involvement of the local courts in evaluating guardianship petitions remains a sufficient safeguard.

The ultimate lesson of the Supreme Court’s treatment of direct family-to-family transfers is, therefore, that the Court distrusts Indian voluntary agencies to such a degree that it perceives even more dangers of abuse when they are involved than when they are absent.

In the Court’s view, the presence of such Indian agencies, acting as intermediaries or making decisions on behalf of a child, precipitates the necessity of elaborate protective measures beyond the usually sufficient procedures of the local court.

Whatever the Supreme Court of India may have held regarding such direct transfers of children for inter-country adoption under Indian law, however, is not dispositive of the question under either United States law or international law.

For instance, if in the Anokha case, the adoptive family had been United States citizens seeking entry for the child into the United States, it would have been debatable whether the child qualified as an “orphan” under present United States immigration law. If a direct transfer between biological and adoptive family had been attempted while the father was
alive, clearly it would have been impermissible because United States law would not consider such a child an orphan for immigration purposes.

United States immigration law would grow more lenient on precisely this point once the Hague Convention entered into force. Federal law at that point would clearly permit a direct transfer from a widow to an adoptive family, as in the *Anokha* case, without proof of an inability to meet the child’s basic needs.

Thus, the United States government would entrust to the foreign-sending government the entire task of prohibiting exploitative transfers of children from widows to United States adoptive parents. It is unclear, however, whether the Indian government’s treatment of the *Anokha* case was consistent with its obligations under the Hague Convention. The Indian government’s decision to virtually eliminate the role of the central government, and especially that of CARA, in family-to-family transfers does not seem to fit with the Hague Convention, which has no such exception. Indeed, the Hague Convention could be read to forbid, or at least strictly regulate, direct family-to-family transfers of children for purposes of inter-country adoption. Although the Indian government may view local courts as a sufficient safeguard for inter-country adoption, in family-to-family direct transfer cases, it seems likely that the Hague Convention would require a greater role for the central government.
4.7.1 FUNCTIONS OF CARA AND ITS EMERGING AGENCIES

The foreign adoption system outlined by the Indian Supreme Court had been largely based on those developed locally within certain parts of India. Nonetheless, the Supreme Court’s activism led to the development and coordination of a national system for foreign adoption. The Central Adoption Resource Agency (“CARA”), proposed by the Court, was created on June 28, 1990, “under the aegis of the Ministry of Welfare in pursuance of Cabinet decision.” CARA was designed to “deal with all matters concerning adoption,” as “in the Government of India all matters related to adoption shall be dealt with in the Ministry of Welfare.” The directions of the Indian Supreme Court were codified into CARA guidelines. CARA perceives itself as having a “principle aim . . . to encourage in country adoption,” while also being “engaged in clearing inter country adoption of Indian children.”

Under CARA regulations, Indian agencies must receive recognition by CARA in order to either “give a child to foreign parents for the purpose of adoption” or to “submit an application to an Indian court under the Guardians and Wards Act, 1890, for declaring a foreigner as a guardian of an Indian child.” Indian agencies involved in foreign adoption also should be licensed by the State “under the provisions either of the Women and Children Institutions (Licensing) Act, 1956 or the Orphanages or Charitable Institutions (Supervision and Control) Act, 1960.” In addition to, Indian agencies applying for recognition from CARA should have the
recommendation of their state government for such work, although CARA may override a State’s refusal to recommend. CARA also grants “enlistment of foreign agencies,” and effectively determines which foreign agencies may sponsor “applications of foreign adoptive parents for adopting an Indian child.” Both foreign agencies and Indian agencies should be run “on a non-commercial, non-profitable basis.” CARA approves all foreign adoptions, as its regulations require the recognized Indian agency to “apply to CARA for getting a clearance for the child.” Approvals by CARA of specific placements are called “No Objection Certificates” (“NOC”). Indian courts cannot grant guardianship to foreign parents unless CARA has first granted the NOC, with the possible exception of circumstances where CARA has failed to respond to the application “within the time limit specified” in the guidelines. In addition, CARA guidelines implement the Supreme Court’s directions for Voluntary Coordinating Agencies (“VCA”). Local VCAs are responsible for promoting adoption within India, and for issuing an NOC when efforts to place the child within India have been unsuccessful. The various local VCAs are themselves required “to seek recognition from CARA by means of an application which shall be routed through the State Government . . . .”

The VCA review and issuance of an NOC precedes CARA review, and provides CARA with evidence that sufficient efforts to place a child within India were made. CARA guidelines similarly reflect the Supreme Court’s instructions regarding “scrutinising agencies.” The scrutinising agency is
appointed by the local court reviewing the guardianship petition. The Indian Council for Social Welfare and the Indian Council of Child Welfare may serve as scrutinising agencies; local courts may also appoint other entities as scrutinising agencies from those recognized by CARA for this purpose. Scrutinising agencies “should not be involved in the placement of children in adoption.” Scrutinising agencies review all facets of the case, including issues pertaining to the voluntariness of the surrender of the child and the accuracy of the child study form. Additionally, they ensure that adoptive parents are “really interested” in accepting special needs and older children and guard against illicit profiteering. Also, they ensure proper clearances by VCA and CARA and determine whether the adoption is “in the best interests of the child.” Scrutinising agencies may charge for their review, with the ordinary rate amounting to approximately $10 to $11 per case for foreign cases, and a little more than $3 for Indian cases.

In the judgment Supreme Court of India expressed that CARA should match prospective adoptive parents with Indian Agencies and available children but it seems that although CARA has played a comprehensive regulatory role in relation to Indian adoption still it has not played its role in some criteria. The Supreme Court of India had envisioned a system in which foreign agencies initiated their contacts with CARA, who in turn matched them with Indian agencies. Instead, foreign agencies and prospective adoptive parents generally make direct contact with Indian
orphanages, which subsequently seek CARA approval for specific placements. This direct contact between foreign and Indian agencies in arranging specific adoptions has been a mixed blessing, simultaneously creating opportunities for initiative, efficiency, and corruption. A system in which all placements were based on matches or referrals made by CARA could have created a logjam at the centre of the system and would only have avoided corruption if CARA itself had proven incorruptible.

4.7.2 THROUGH THE EYES OF APEX COURT

In *Lakshmi Kant Pandey v. Union of India*, the Supreme Court has laid down the normative and procedural safeguards to be followed in the matter of inter-country and in-country adoptions. Pursuant to the judgment, the Ministry of Welfare, Government of India has issued certain guidelines in 1989. These guidelines were subsequently revised in 1995 pursuant to the recommendations made by a Task Force constituted by the Government of India under the Chairmanship of Justice P.N. Bhagwati, former Chief Justice of India. The object of the revised guidelines is to provide a sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court of India in a series of orders passed in Lakshmi Kant Pandey's case. Under the revised guidelines, the Government of India in the Ministry of Welfare has set up a Central Adoption Resource Agency (CARA) to act as a clearing house of information in regard to children available for in-country and inter-country adoption and to regulate, monitor and develop programmes for the
rehabilitation of children through adoption. Similarly, in *St. Theresa's Tender Loving Care Home and Ors. vs. P. Jamuna and Ors.*⁸⁰ (01.05.2003 – APHC), there were allegations on CARA issuing NOC (No Objection Certificates) for inter-country adoptions without applying its mind as to the suitability of the proposed parents for the child and without making all possible efforts to put the children in Indian Home as required by its guidelines. The adoptive parents have no specific reasons for adopting an Indian child and they were obviously encouraged to go for adoption only to claim certain tax benefits thus, the State of Andhra Pradesh and CARA are acting under pressure from embassies, of western countries and also Union Ministry of State for Social Justice and Environment. CARA had been issuing No Objection Certificates dubiously for inter-country adoptions and denying permissions for in-country adoptions. In the case the petitioners claimed that the applications for impleadment had been filed with mala fide intention to defame. It was also pointed out that CARA guidelines had been prepared in accordance with the decision of the Supreme Court in Lakshmi Kant Pandey's case and were being strictly followed. The State Government was taking due care in the matter. In case the implead petitioners desire that some changes are required in the CARA guidelines, instead of getting themselves impleaded in individual proceedings, the proper course for them would be to approach the appropriate authorities.

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⁸⁰ 2003(4)ALD36, 2003(4)ALT337
4.7.3 CARA’S REVISED GUIDELINES: FROM 1982 TO 1995


The Government of India issued the Revised Guidelines for Adoption of Indian Children vide notification dated the 29th May 1995 after examining subsequent directions laid down by the Supreme Court of India and the recommendations of the Task Force constituted under the Chairmanship of Justice P. N. Bhagawati, retired Chief Justice of Supreme Court of India. Subsequently, the Government of India converted the Central Adoption Resource Agency into an autonomous body with effect from the 18th March, 1999. It 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). The Ministry of Women & Child Development has of late been mandated to look after the subject matters ‘Adoption’ & ‘Juvenile Justice (Care & Protection of Children) Act, 2000’ pursuant to 16th Feb. 2006 notification of Govt. of India regarding reallocation of the Business.

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Draft guidelines on adoption of Indian children without parental care, Central adoption resource authority. Ministry of women & child development, Government of India
Under CARA guidelines\textsuperscript{82} of the revised guidelines deals with the functions of CARA. The functions include receiving of applications along with requisite documents of foreigners desirous of taking Indian children in adoption through a recognised social or child welfare agency in the foreign country or through an organisation owned or operated by the Government in that country; to forward the applications to one of Indian social or child welfare agencies; to receive names and particulars of children available for adoption who are under the care of Indian social or child welfare agencies recognised by CARA and to maintain a register containing the names and other particulars of such children; to receive periodical data from the agencies about the children admitted and the children given in adoption, in-country as well as inter-country; to monitor and regulate the working of agencies; to receive data from competent Courts about children whose guardianship has been awarded in favour of foreign adoptive parents; to obtain periodical progress reports of children from foreign adoptive parents as well as from recognised social or child welfare agencies in foreign countries and to take such follow up action as deemed necessary; to assist the Courts to cross-check or re-verify the information furnished to them by various sources including the placement agencies and scrutinising agencies or to provide an independent advice in matters relating to adoption of children etc.

\textsuperscript{82} Chapter 2.13, CARA guidelines
Chapter III deals with the role of the State Governments\textsuperscript{83}. Under the guidelines the State Government is to monitor the adoption programme within its jurisdiction and co-ordinate the activities of placement agencies, Voluntary Co-ordinate Agencies (VCAs) established in the State and Scrutinising Agencies. The guidelines also detail about the role to be played by the recognised Indian agencies (Chapter IV), recognition of Indian agencies for adoption (Chapter V), role of enlisted foreign agencies for adoption (Chapter VI), Voluntary Coordinating Agencies (VCAs) (Chapter VII), Constitution of scrutinising Agencies (Chapter VIII).

Under the revised guidelines, the State Government is required to separately maintain a list of all agencies handling in-country and inter-country adoption of children and it is required to identify those institutions/ agencies, which have children who are legally free from adoption. The State Government is required to recognise the Indian Adoption Agencies for in-country adoption as per the procedure laid down and is also required to forward applications of Indian Agencies seeking recognition for inter-country adoption to the Central Adoption Resource Agency after proper verification according to the criteria laid down in the guidelines. Before a guardianship certificate is issued by the Family Court, a letter of relinquishment, VCA clearance, no objection certificate from CARA and other relevant documents such as the home study of the proposed guardians, no objection certificate from the agency which has scrutinised the application of the proposed foreign guardians, as also the

\textsuperscript{83}Chapter 3 of CARA guidelines
approval from the scrutinising agency in India who scrutinises the applications, namely Indian Council of Child Welfare are required. It is only thereafter the Court is required to decide whether guardianship should be granted or not. In case there are any objections in respect of any proposed guardianship application, the same can be raised by the appropriate authority before the Family Court. The authorities are such which have been noticed by the Supreme Court in its decision in *Indian Council Social Welfare v. State of A.P*\(^4\).

From a close scrutiny of the CARA guidelines, it appears that a very stringent and adequate procedure has been laid down in the matter of in-country and inter-country adoptions of children to safeguard the interest and welfare of the children.

### 4.7.4 CONTROVERSIES HOVER AROUND INTERNATIONAL ADOPTION

Inter-country Adoption has become much more controversial than what used to be the case. As a result of this, there have been many moves to "clean up" inter-country adoption that often seem to have a polarizing effect between agencies and adoptive families. In addition, legislators, NGOs, and other interest groups have been prone to jump on the bandwagon of increased regulation in attempts to repair the causes that have led to the unfortunate minority of adoption cases mired by poor practices and controversy. Inter-country adoptions are subject to more oversight and controls than are domestic adoptions. Prospective parents

\(^{44}\text{MANU/SC/0989/1999, (1999) 6 SCC 365}\)
must conform to the requirements of their state of residence and each
country has its own laws that must be satisfied as well. Both the parents
and the children must also meet eligibility requirements of the
Immigration and Naturalization Service before the child is issued a visa.
To enter the U.S. with a preference visa as an "adoptable orphan", a child
must be a true orphan, be unconditionally abandoned, or have a sole
surviving parent who is unable to care for him. Typically, an inter-country
adoption takes 9 to 18 months to complete, after a social worker gathers
a complete set of information regarding the prospective adoptive family,
attitudes toward adoption, and the type of child desired. The information
seeking process and final report are referred to as a home study. A
review of the research of outcomes for children adopted internationally
finds that the children generally do quite well. Attachment, identity, and
comfort with adoption issues are generally reported to be good.
International adoptee typically finds racial discrimination issues to be
more troubling than issues stemming from adoption.

In a book by Jagannath Pati, Pal Ahluwalia in one of the papers written
in that book differentiates between trans-racial and trans-national
adoptions and points out that both forms of adoption are prevalent in the
US and the UK these days. The children adopted through this method face
racial discrimination but are very resilient. The benefits of trans-racial
adoptions are also being questioned. Author also states significant

85 Jagannath Pati (ed), Adoption--Global Perspective and Ethical Issues. New Delhi: Con-
cept Publishing Company. 2007
consequence that adoptive parents are aware of the racism faced by their adopted children. It is also to be noted that the new trend of celebrating the culture and heritage of the adopted child has come under criticism as being a form of racism. The rates at which international adoptions disrupt or lead to the return of the child to the pre-adoptive environment are equivalent to those for domestic adoptions. A joint report by the United Nations and United Nations International Children’s Emergency Fund (now United Nations Children’s Fund) (2002) estimates that the numbers of At any given moment, an estimated 100 million children located around the world have children with no parental care maybe as high as 65 million in Asia, followed by Africa (34 million) and Latin America and the Caribbean (8 million). The causes are many, but a majority of these children are the product of civil war, overpopulation, famine, poverty, abandonment, or as is the case in China, a devaluation of girls. The United States remains, by far, the primary receiving nation of orphaned children, followed distantly by other Western nations, including France, Canada, and Germany.

4.8 POLICIES AND REQUIREMENTS

Adoption policies for each country vary widely. Items such as the age of the adoptive parents, financial status, marital status and history, number of dependent children in the house, sexual orientation, weight, psychological health, and ancestry are used by different countries to determine what parents are eligible to adopt from that country.
Items such as the age of the child, fees and expenses, and the amount of travel time required in the child's biological country, can also vary widely from one country to another.

Each country sets its own rules, timelines and requirements surrounding adoption, and there are also rules that vary within the United States for each State. Each country and often each part of the country, also sets its own rules about what type of information will be shared and how it will be shared (e.g. a picture of the child, child's health). Reliability and verifiability of the information is also variable. The laws of different countries vary in their willingness to allow international adoptions. Some countries, such as China and Korea, have relatively well-established rules and procedures for international adoptions, while other countries expressly forbid it. Some countries, notably many African nations, have extended residency requirements for adoptive parents that in effect rule out most international adoptions. One reason internationally adopted girls far outnumber boys is that children from China now constitute more than one-quarter of the children adopted internationally by U.S. citizens and most of these Chinese children are girls. China and Russia have Replaced South Korea as the Primary Countries from Which U.S. Citizens Adopt Though U.S. citizens adopted children from 106 different countries in 2001, nearly three-quarters of all children came from only five sending countries. There are some statistics which shows these trends;
Between 1971 and 2001, U.S. citizens adopted 265,677 children from other countries.\textsuperscript{86}

Graph 1.5: Adoption in U.S from 1971 to 2001 from other countries

Most countries require that a parent travel to bring the child home; however, some countries allow the child to be escorted to his or her new homeland.

\textsuperscript{86} www.adoptioninstitute.org/visited on 10 feb 2011
4.9 INTERNATIONAL ADOPTION AFTER A DISASTER: A BOOSTER DOSE TOWARDS CHILD ADOPTION

Of special note to international adoption are campaigns for adoptions that occur after disasters such as hurricanes, tsunamis, and wars. There is often an outpouring of adoption proposals in such cases from foreigners who want to give homes to children left in need. While adoption may be a way to provide stable, loving families for children in need, it is also suggested that adoption in the immediate aftermath of trauma or upheaval may not be the best option. Moving children too quickly into new adoptive homes among strangers may be a mistake because with time, it may turn out that the parents have survived but were unable to find the children, or there may be a relative or neighbour who can offer shelter and homes. Providing safety and emotional support may be better in those situations than immediate relocation to a new adoptive family. There is also an increased risk, immediately following a disaster, that displaced and/or orphaned children may be more vulnerable to exploitation and child trafficking.

4.10 CONSCIENTIOUSNESS OF BEEN A LEGAL GUARDIAN

This aspect is very important because if care is not taken in selecting the parents then it may lead to trafficking in children. It must be stated in this respect that the provisions of Guardian and Wards Act, 1890 are applicable in case of Inter-Country adoption.
Section 7 of the said act provides that, when the district court is satisfied that appointment of the guardian will be for the welfare of the minor, it appoints one. But the person appointed should come under any of the four categories mentioned in the section 8 of the act.

These four categories are:

a) any person desirous of being guardian of the minor;

b) any relative or friend of the minor;

c) the collector of the district within whose jurisdiction the minor resides or in which he has property;

d) the collector having authority with respect to the class to which the minor belongs.

The foreign parents desirous of making the adoption of an Indian child makes an application to the court for being appointed guardian of the person and property of the child whom he wishes to take in adoption and on being appointed the guardian, for leave of the court to take the child with him to his country for taking it in adoption. As because most of the children sought to be adopted are destitute and orphans, notice under section 11 of the act has no specific meaning. In their case there is no agency, which can look into the question whether the proposed adoption will be in their welfare, or not. Thus, the Delhi High Court rules provide that, a notice should be sent to Indian Council of Child Welfare whereas the Bombay and Gujarat High Court rules provides for notice being sent to Indian Council for Social Welfare. Every child welfare agency is required
to get license. They are also required to maintain a register in which the names and particulars of all the children proposed to be given in Inter-Country adoption through it should be kept. The child welfare agency processing the adoption must place sufficient material before the court to satisfy that the child is legally available for adoption. It is imperative that the application for adoption of an Indian child by a foreigner should be sponsored by a social or child welfare agency recognized and licensed by the government of the country in which the foreigner is a resident.

There are three reasons for this.

a) It will reduce the possibility of profiteering and trafficking in children.

b) The court won’t be able satisfy itself about the eligibility of the parents unless it is sponsored by the agency of the country in which the foreigner resides.

c) In case, adoption is made without the intervention of any agency, there would no authority or agency, which could be made responsible for supervising the growth of the child.

These agencies are required to submit a Home Study Report that includes amongst others the following a) Source of referral b) schooling facilities c) current relationship between husband and wife etc. Along with this report the agency is also required to send a photograph of the family and a declaration stating that the family is willing to adopt the child in accordance with the law prevailing in their country. In case, child's parents exist, then they should be properly assisted in making a decision
about giving away the child in adoption to foreign parents by the child welfare agency to which the child is surrendered for making arrangement for its adoption. If the child is an orphan or destitute child then the agency must try to trace its parents before giving in adoption. If the agency is a non-registered agency, then it must contact a registered agency for giving in adoption. The district court is required to dispose of all the application at the earlier but in no case later than two months from the date of filing of an application. Section 17 of the Guardian and Wards Act, 1890 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor.

In a Bombay High Court Case, In Re: Minor Reshma\textsuperscript{87}, the question of appointing a foreign national as guardian for the purpose of adoption of minors was discussed. In this case court stated that, No Court in a State will entertain an application for appointment of a foreigner as guardian of a child which has been brought from another State if there is a social or child welfare agency in that other State which has been recognised by the Government of India for inter-country adoption. If there is no recognised, social or child welfare agency in that State where the child is found or obtained, the child shall be transferred to a recognised social or child welfare agency at the nearest place in the immediate neighbouring state.

\textsuperscript{87} (1987) 89 BOM LR 225
However, it shall be open to a recognised social welfare agency to transfer the child to another State to its associate institution or to its branch after completion of inquiry regarding destitution of the child by (a) Juvenile Court or (b) Social Welfare Department or (c) the Collector, as the case may be.

And the court said that no Juvenile Court in the State shall handover custody of any minor to any foreign national directly or indirectly and no foreign national can present a case of Guardianship for the purpose of adoption without going through the recognised social welfare agencies and without undergoing said stipulated periods of the minor with VCA/PCA or any such recognised social agency for finding for the child Indian adoptive parents first. The Juvenile Courts were also directed to give directions to the Institutions where the children are kept on remand to register such children with VCA/PCA or any such agency working for Indian adoptions.

A child/children belonging to Institutions or child welfare agencies in Maharashtra which has not been recognised by the Government can be proposed for inter-country adoption by the recognised social welfare agency provided such children are kept with the recognised social welfare agency or Institutions for at least 30 days under the direct supervision and custody of such recognised agency.
Requisite qualifications for a representative of a foreign social or child welfare agency:

(a) He should be an Indian citizen with a degree or diploma in social work coupled with experience in child welfare.

(b) He should not be working on a free lance basis.

(c) He should be acting only for one foreign social or child welfare agency.

(d) The sphere of his operation should be preferably limited to a particular geographical area.

(e) He should have a general power of attorney to act in India on behalf of the foreign social or child welfare agency.

(f) He should have the authority to operate banking accounts in the name of the foreign social or child welfare agency with the permission of the Reserve Bank of India.

(g) He should not be permitted to go scouting for children or to receive children directly from parents.

(h) He should be allowed to act as representative only if he is recognised as such by the Central Government and such recognition may be given by the Central Government subject to the condition that the various aforesaid requirements are complied with by such representative.

First preference is to be given to the parents of Indian nationality. In the case of legitimate children the total period within which Indian parents
must take their decision will be five months from the date the Voluntary Coordinating Agency (VCA).

The main function of the Council of Social Welfare or Council for Social Welfare or any other recognised agency in the Inter-Country adoption is to help the court in finding what is for the welfare of the people. For this purpose the council prepares a report called 'Child Study Report'. This report contains legal and social data regarding the child. The report should also contain an assessment of child's behavioural pattern and its intellectual, emotional and physical development. It should also contain the recent photograph of the child, information about original parents.

It is another aspect needs to be taken care of when a person wants to adopt a kid of another country. It is always advisable to use a reputable agency with experience in Inter-Country adoption. Although the quality can vary, the adoption agencies are regulated by state government. If the child is given in adoption without the help of the agency then there are possibilities of involvement in the illegal sale of children, loss of confidentiality, infringements upon the child’s right to privacy and permanency. Therefore, it is always desirable to give the child in adoption through a reputed licensed adoption agency.

**Article 39 and 44 of the Indian Constitution**, calls for the protection of children and youth from material and moral exploitation. In an effort to evolve a uniform civil code, the government of India introduced an
Adoption of children's Bill, 1972. But the Muslim community opposed it. Keeping in mind the large-scale child trafficking in the world, The Rights of the Child, 1989 Convention requires that Inter-Country adoption will receive only the last priority while searching for the foster home. Like any other types of adoption, Inter-Country adoption can be expensive, time-consuming and uncertain.

4.11 CONCEPTUALIZING IN-COUNTRY ADOPTION: FOR INDIANS ADOPTING IN INDIA

Indians adopting in India can get very young babies as the adoption procedure is shorter. It should not take more than 4-6 months after one decide which baby he/she wants to parent. The first thing to do is to register with a local Adoption Agency or with the State Adoption Cell. The agency will make a home study report and decide if you are capable of rearing a child - in terms of our financial and emotional capabilities. Once a child is selected, matching the description required by the parents, then the paperwork starts. Agencies of course prefer to give a child matching the physical description of the parents. For example, any preference given for particular skin colour or any other preference may or may not be taken into consideration or it might take slightly longer in the procedure.

There is a set procedure for adoption given under CARA guidelines. This procedure is mandatorily and standard in nature. It can be understood

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88 Legal Service India, Article by Soura Subha Ghosh, IVth year law, Symbiosis Society's Law College, Pune
clearly by dividing it in different stages. As the process proceeds, stage of adoption also gets higher.

**Diagram 1.6: Different stages of adoption as per CARA**

<table>
<thead>
<tr>
<th>CARA: DIFFERENT STAGES OF ADOPTION PROCESS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Stage I</strong></td>
</tr>
<tr>
<td>- Prospective adoptive parent(s) should register themselves with the local RIPA / LAPA or Adoption Coordinating Agency or with the State Adoption Cell.</td>
</tr>
<tr>
<td><strong>Stage II</strong></td>
</tr>
<tr>
<td>- A home study report of the prospective adoptive parents will be prepared by the social worker of the Agency. To allay the fears and apprehensions of the prospective adoptive parent(s), pre-adoptive counselling sessions will be undertaken by the social worker during the preparation of the home study report. Assessing the ability of a couple to parent a child not born to them is of crucial importance in a successful adoption. Therefore, their suitability to care for an unrelated child is assessed through this home study and counselling. Documents relating to the financial and health status of the prospective parent(s) will be part of the Home Study Report.</td>
</tr>
<tr>
<td>- In case of Inter-State adoption applications by parent(s), they will be accompanied by Home Study prepared by a qualified social worker working in a RIPA/LAPA. Where State Govt.’s have officially delegated such work for its Officials, the Home Study Report could be prepared by the concerned Official.</td>
</tr>
<tr>
<td>- Criteria for eligibility of parent(s) will be adhered to, as stated in Para 1.1.7.</td>
</tr>
<tr>
<td>- The Agency will make a suitable reference from amongst the admitted children legally free for adoption. If no suitable child is available, the family will be referred to the ACA.</td>
</tr>
</tbody>
</table>
Stage III
- After a Home Study has been accepted and approved, a child will be shown to the parent(s). The agency will take care to match a child meeting the description, if any, desired by the parent(s).
- In case of placement of older children (above the age of 6), both written and verbal consent of the child will be obtained.

Stage IV
- Once a successful matching has been done, the agency will file a petition in the Court/JJB for obtaining the necessary orders under the relevant Act. The above process will normally be completed in 6-8 weeks.

Adoption Act
- The child can be legally placed with the parent(s) under HAMA/GAWA/JJ-Act 2000. The prospective parents should be informed about the different Acts available and the ramifications of each one. It would be left to them to decide as to which Act they would like to file their petition under, provided that they are eligible to do so under the chosen Act. As stated above, the prospective parents must be made to fully understand the status of their adoption under each Act.

Follow up visits
- Once an order has been issued, it should be followed by regular follow-up visits and post adoption counselling by the social worker till the child is adjusted in the new environment. The follow up should preferably be for a period of one year at-least or as directed by the Court/JJB. Copies of the follow-up reports will be sent to the District Social Welfare Officer/concerned State Government Department, concerned Scrutiny Agency and the Court/JJB from where the order was obtained.

Source: CARA
4.12 PROSPECTIVE ADOPTIVE PARENTS: NON RESIDENT INDIANS

A child’s first right is to go within the family. By virtue of ratification of the Convention on Rights of the child, Govt. of India has recognized the child’s right to a family especially within its own family members and familial-cultural milieu. With Hague Convention on Inter-country Adoption coming into force in India w.e.f. 1.10.2003, it has been obligatory for Central Adoption Resource Authority to come out with Guidelines on Family Adoptions so that children in crisis family situations are not deprived of a caring family. These guidelines are valid for NRI’s staying abroad and are interested in adopting child India within the family. Since family adoption has to deal with families of both sides, it is mandatory for both the sides to understand the procedural requirements before initiating such proposal. The purpose is to enable a child to get a loving and caring family within his/her clan group when such placement is considered as best alternative in the given situation. Family adoption will be allowed in exceptional situations where the child to be adopted has a special situation as a result of parent/s death or adoption is thought up for certain situation benefiting families of both side without compromising child’s best interest.

For the purpose of qualifying adoption of a relative’s child, the prospective adoptive parent should be Indian born in India and staying abroad either with Indian or Foreign citizenship. For such family adoption, the relation should be limited to first degree of relationship from both adoptive
parents and biological parent’s family tree. Requirements of age criteria and Home Study Report shall be as per In-country Guidelines issued by Central Adoption Resource Agency, Govt. of India.

In case of eventuality or extraordinary circumstances, a second adoption from India may be considered only when the legal adoption of the first child is completed.

In case of Non-Hague counties, the legal measures for finalization of adoption should be as per the concerned country’s laws.

As for procedure, Home Study report of the foreign prospective adoptive parents, certificate of eligibility is required at the primary level. Then only suitability to adopt from the concerned central authority and approval from the appropriate authority is contested. In the end, an appropriate court order from the competent court in favour of the proposed adoption from the country of origin is required to carry out the adoption process.

It is also essential to note that at least one parent needs to hold foreign citizenship as most countries (United States) do not allow to adopt from another country unless one is a citizen. It is also ideal if the other parent has an Indian passport as this exempts the prospective parent from an ACA clearance. This saves time and paperwork. Overall, parents of Indian descent are preferred, even if they hold foreign citizenship. While the CARA site says that at least at least one parent has to hold an Indian
passport to get ACA exemption, this one says that all parents of Indian
descent can claim this exemption.

Generally all adoptions have following steps to follow:

Diagram 1.7: Mandatory requirements as per CARA