

## ABSTRACT

### LAW RELATING TO ADOPTION OF INDIAN CHILDREN BY FOREIGNERS\*

by

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Adoption can be made for various purposes that could be religious, social and economic. Accordingly adoption is compelled by various reasons. An issue less person, especially a Hindu, needs a child, preferably a male, for fulfilling certain religion obligations/requirements under personal law of him. Similarly a destitute or abandoned child has to be given in adoption considering its future. In this fashion it could be social and economic as the society is still in the ugly grip of female aversion due to so many social problems including dowry, which often results in female infanticide or abandonment of female children.

<sup>1</sup> The Hindu Adoptions and Maintenance Act, 1956 (HAMA) regulates adoptions among Hindus exclusively. The person adopting, the person adopted, the person giving in adoption all have to be Hindus.<sup>1</sup> Futile attempts were made in 1972 and in 1980 to enact a uniform law of adoption.<sup>1</sup> The Non-Hindus like Christians, Parsis, and Jews could adopt a child through the procedure under the Guardians and Wards Act (8 of 1890), which is hardly a substitute for an exhaustive adoption law.<sup>1</sup> The Juvenile Justice (Care and Protection of Children) Act, 2000<sup>1</sup>, which replaces the Juvenile Justice Act 1986, contains provisions relating to in-country adoptions. The JJ Act envisages setting up of Juvenile Justice Board – district level committees under District Magistrate with special experience in child welfare,<sup>1</sup> to give children in adoption according to guidelines laid down by state government.<sup>1</sup> It allows parents to adopt more than one child of each sex and recognises the single parent. A person who has not completed 18 years of age is a child under the JJ Act whereas under HAMA a child is a person who has not completed 15 years of age. Thus the JJ Act brought in same improvements in the field of in-country adoptions<sup>2</sup>. It is of interest to note that JJ Act recognizes adoption as an important process in the rehabilitation and social reintegration of children who are abandoned. However, the JJ Act excludes from its purview those children who have been voluntarily relinquished by their biological parents. It also does not speak about the process of inter-country adoption.

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<sup>1</sup> Gazetted on December 30, 2000, and became law on April 2001. Herein after JJ Act.

<sup>2</sup> For a comment on the difficulties of the Act. See Parvathi Menon, "A New Act and Some Concerns", *Frontline* Vol 18(ii) May 26- June 2001.

### Inter Country Adoption:

The inter-country adoption what we speak of today often takes place when a foreign couple adopt an Indian child mostly an abandoned or destitute child. Since it often involves adoption of a destitute or abandoned child, inter-country adoption becomes an important one from the child's point of view.

There could be umpteen number of reasons like swadeshi claim that it amounts to selling babies to foreigners, the children are abused in foreign country etc. However, one glaring fact is that only foreigners are willing to accept unwanted and disabled children. In fact it is estimated that annually at least 1,800 children are adopted by foreigners and in 2000 alone about 217 children, 183 of them are girls were sent for inter country adoption from the state of Andhra Pradesh itself<sup>3</sup>. This highlights the socio-economic and cultural importance of inter-country adoption. The word "inter country adoption" gives an impression that adoption takes place between two countries or nationals of two countries. But it is not so. A foreign couple is appointed as the guardian of a child in India and they take the child to their respective country and adopt the child under their own municipal law. Therefore the word 'inter-country adoption' is itself misleading because as such no actual adoption takes a place within Indian Territory. For this purpose only it is preferred to call it as Adoption of Indian Child by Foreigner<sup>4</sup>.

Given the importance and complication involved in such adoptions, it is sad that no legislated law exists in this field to govern such adoptions. In the absence of any legislative legislation, inter-country adoptions are governed at present only by judicial legislations.

### Judicial Response:

Though the Government Twice attempted to bring about a legislation covering adoptions, presumably due to the opposition of the Muslims both the attempts failed resulting in the creation of legal vacuum. As if to fill the vacuum created by the obvious lack of political will on the part of the government, the Supreme Court of India when its attention was drawn through a public interest litigation to the prevailing pathetic conditions regarding inter-country adoption, came out with a set of guidelines even as early as 1984 itself. It is in Lakshmi Kant Pandey v Union of India<sup>5</sup>, the Supreme Court came out with a set of guidelines to be followed in inter-country adoptions. It will not be an exaggeration to say that this decision became a forerunner to later judicial legislations like in.

<sup>3</sup> "Children As Commodities" The Hindu dated 3<sup>rd</sup> March 2002.

<sup>4</sup> However, Inter Country adoption and adoption by foreigners are used interchangeably.

<sup>5</sup> AIR 1984 SC 469.

D.K. Basu v State of West Bengal<sup>6</sup> where the Supreme Court gave 11 commandments (guidelines) to be followed in effecting an arrest and in Visaka v State of Rajesthan<sup>7</sup> where the Supreme Court spelled out the guidelines governing sexual harassment of women in working places. In those days when judicial activism was not so popular the Supreme Court's action of laying down the "principles and norms" regarding inter-country adoptions was also then met with criticism that it is an instance of excessive judicial legislation which would if pursued further would give rise to first rate constitutional crisis<sup>8</sup>. Any way the fact that remains is at present inter-country adoptions are governed only by judicial legislations. And it is proposed here to discuss such judicial principles that form the jurisprudence of inter-country adoptions in this paper.

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<sup>6</sup> AIR 1997 SC 610.

<sup>7</sup> AIR 1997 SC 3011.

<sup>8</sup> Sampath B.N, "*Lakshmi Kant Pandey v Union of India: An Instance of Excessive Judicial Legislation*" AIR 1985 Jour 105 at 110.

