

INTER COUNTRY ADOPTIONS: MYTH OR REALITY

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Abstract

Numerous parents are willing for a child in their life but are not able to due to some reasons. Here, “Adoptions” come into the picture. Adoption is nothing but a legal procedure through which a parent or parents are placed with a child who is not theirs by birth or they are not the biological mother or father of that child. Adoption acts as a core tool to enhance the strength of parent’s responsibilities and it transfers these responsibilities from the birth parents to the adoptive parents. This makes clear a fact that after the completion of this process of adoption there is no legal difference between the children who are adopted and those born to the parents. Now, this process takes place within a country, but when it crosses the national borders and the children are adopted from a different country and the adoptive parents are in a different country seeking the same, it is termed as an “Inter-Country Adoption.”

In the initial stages, it is attempted to find suitable adoptive parents for the child within the country, and if it is not possible then it becomes essential to give that child for adoption to foreign parents. This Research Paper aims to carry out an overall in-depth study of Inter-Country Adoptions and find out that legally it is a reality or just a myth.

Introduction

When it is not possible to find suitable adoptive parents for a child within the country, the child is given in adoption to foreign parents, and this is called “Inter-Country Adoption.” It means to place a child or kid for adoption outside his birth country. The laws are different in different countries so here both the parties should abide by the laws of their country relating to allowing Inter-Country Adoptions. The “Child Welfare Agency” is an organization that handles the procedure involved in Inter-Country Adoption. It can be traced that the rise of inter-country adoptions saw a huge boost in developments and attributes post World War II. The core purpose of inter-country adoptions at the very first instance is to *find suitable families* for the children who are abandoned or are orphans. The agenda as can be seen in the mid-1970 of inter-country adoptions was mainly motivated by the *need to find children for*

families. Inter-country adoption is a global phenomenon and its evolution has taken place through numerous international instruments.

Not following any element of a myth, inter-country adoption is a reality and involves the real legal procedure of adopting children across borders. Its position in the country of India has been considered through various case laws, national statutes, and Central Adoption Resource Authority which was established after the ratification of the 1993 Hague Convention. Inter-country Adoptions in India is being followed by the guidelines issued by the Government of the country in the year 2006 based on the principles and norms laid down by the Supreme Court in a series of cases.

Research Problem

Whether inter-country adoptions constitute more oversight than domestic adoptions and does it compromise with the child rights being legally it's a myth or reality.

Objectives

1. To carry out an in-depth and analytical study of international adoptions.
2. To bring out the actual role of money in such adoptions and its provisions in India.
3. To find out if inter-country adoptions are more of a myth or reality under Private International Law.

Research Questions

1. What are the basic requirements for Inter-Country Adoption?
2. What are the special challenges of parenting through Inter-Country Adoption?
3. What are the high-risk situations and abuses relating to Inter-Country Adoption?

Hypothesis

1. Any parent opting for an International Adoption need to fulfil certain legal requirements to succeed in the procedure of such adoptions. First of all, they must fulfil the requirements of their state of residence because each country has its laws. Also, both the parents as well as the children are supposed to fulfil the eligibility requirements associated with the Immigration process. Apart from this the child must be a true orphan and is abandoned in his country and difficulty in survival.

2. After adopting a child internationally, the parents get vested with numerous responsibilities and challenges. Taking care of the child's health is one of the major concerns and also to make interaction with local communities.
3. Some of the high-risk situations involved here are; legislation, child and family welfare policy, private adoptions, emergency, conflict and post-conflict situations, etc. Proper legislation is required to prevent abuses in international adoptions as in the countries where legislative provisions are inconsistent the child is at high risk. In a country where there is no policy for child and family welfare, the children are in terms of abuses in inter-country adoptions.

Methodology

This research paper is explanatory and also analytical. It has made the use of secondary data. The secondary data used in this project are books, online articles and YouTube videos.

Review of Literature

This research paper provides an in-depth study of Inter-Country Adoptions and an analytical overview of its aspects relating to the controversies of myth and reality. The **Hague Convention** is the core source here.

Inter-country Adoption: A Global Phenomenon

When considered relatively, it can be said that inter-country adoption is a new phenomenon and it can be traced in the purpose of placement of displaced children in some western countries and the United States. Prof. **B.C. Nirmal** is one of his articles that makes mention of some Hollywood and Bollywood stars. It has become a trend globally to adopt intercountry children. Earlier, inter-country adoptions were guided by the **Humanitarian Law**. As far as our nation is concerned, as far as **South-African** nations are concerned, as far as **Asian-African** nations are concerned, the kids which are adopted are being represented by sometimes the marginalized sections of the society. Be it India, **South Africa, Uganda, Sudan** or any other nation, this has become the time-tested trends these days.

According to **Alstein & Simon**, inter-country adoption is nothing but a philanthropic response of North America to Europe's devastation in **World War II** which had resulted in

thousands of orphaned children. Until the year 1970, the main source of children in America was the states of Europe. In the initial stages, inter-country adoption was a phenomenon limited to a small number of children and fewer countries but now it has become a phenomenon that involves more than 30,000 children in one year who move between over a hundred countries and most of these countries today have been affected by the inter-country adoption, whether as States of origin, receiving States or as both.

Various commentators convey that post World War II, the practice of inter-country adoption has occurred in two waves. Wherein, the first wave started just after the war and lasted until the mid-1970, the second wave occurred in the 1970s. The first wave had a motivation for inter-country adoptions in regards to the needs to find families for orphaned, abandoned, or neglected children. The second wave from the 1970s motivated inter-country adoptions with the need to find children for the families such as childless couples. It can also be said that the first wave was supply-driven, but the present wave is demand-driven and this is because of various underlying factors such as; reduction in fertility rates in the West and also the number of healthy infants available domestically decreased. Though there are huge differences in the terms of both these waves both of them take shape through broader *socio-political-economic* realities. If the first wave was concerned with the suitability of child migrants with the policies of foreign adoption of the receiving states, the present wave focuses on the needs of childless couples, and the welfare of the adopted child. It can be understood that the domestic children not being available for adoption is now assisting to shape the government's policies regarding inter-country adoption. For sure, inter-country adoptions bring happiness by filling the hollow gaps in the life of orphan children and childless couples as after adoption both the child and the parents get a complete and happy family but it also has a dark side that can destroy the nation.

It should also be noted that in the initial stages, inter-country was participated by the immigration policies and laws of the receiving states. This legislation of immigration for the migration of children for adoption was mainly temporary and reactive. Only after the 1970s, it moved its path towards permanent provisions in the receiving countries as proper legislation. But, inter-country adoption has always been targeted by abuse. Various receiving countries such as Canada and the United States endorsed independent adoptions and they paid very little attention to how the child is procured and limited their roles to **naturalization**

and **immigration**. This was the point from when the inter-country adoptions began to be seen as a fulfilment of national needs and the welfare of adopted children was in the consideration of secondary priority. With the increasing demand for children, in the receiving nations, a **Black Market** has emerged. This finally gave rise to the sale and trafficking of children and this situation, unfortunately, did not change even in the 1980s and 1990s. As a result, the demand for children increased and the corruption started rising on the part of the intermediaries who managed to supply. Inter-country adoptions give rise to Anti-Social elements. Some people might be involved in the process of taking and giving kids across borders and they are not authorized to carry out this activity according to the law of that land. This leads to child trafficking {Inter-State Child Trafficking}. Sometimes, illegitimate means are used to procure children for the needs of needy persons of these nations and a large amount of money is being paid for children by adopted parents to the intermediaries. Therefore, the practice of inter-country adoptions is also being abused by individuals and groups for the sale and trafficking of children. One of the European Seminar on Inter-Country Adoptions in 1960 defines the concept as “An adoption in which the adopters and the child do not have the same nationality as well as in which the hierarchical rigidity of the adopters and the child is in different nations”.

Such adoptions can be classified into two categories; (1) Adoption which has taken place in one country by an international treaty recognized by the other country. (2) An adoption in which the child is adopted first in the country of origin then the child is again adopted in the receiving country. Two international conventions emerged during 1980-90 and they dealt with inter-country adoptions. These two conventions were the 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of the Children and the 1989 UN Convention on the Rights of the Child. But, same as the previous Conventions, they drastically failed. After this came the Hague Convention on the Protection of Children and Co-operation in Respect to Inter-country Adoption, and for the first time expressly endorsed the practice of inter-country adoption.

International Standards For Inter-country Adoption

There are international instruments under which are found numerous international standards for inter-country adoptions such as the **Geneva Declaration on the Rights of the Child, 1924; UN Declaration the Rights of the Child, 1959; The Hague Convention on Private**

International Law, 1965; the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1985; the UN Convention on the Rights of the Child, 1989. The Hague Convention inhere relates to the applicable law, jurisdiction, and recognition of official orders given by the government relating to adoption.

Talking **Article 18 of the 1985 Declaration**, urges the government to formulate and establish legislation, supervision, and policy to protect the children involved in inter-country adoption. This kind of adoption should only take place when the government has established these measures in the states concerned. Further, **Article 20** states that the placement in these adoptions should be safeguarded and should be equal to that of national adoptions and there should not be a single case in which these placements result in any improper financial benefits for the agencies involved in it. The child's legal and social interests should be protected. Then, **Article 22** conveys that the child before adoption must be legally free and the consent of the competent authorities is also mandatory. The legal validity of inter-country adoptions in each country is assured by **Article 25**. **Article 24** talks about the equal attention that should be given to the laws of both the state of origin and the receiving state when the nationality of the child and the parents is different¹.

Convention on the Rights of the Child, 1989, the **Magna Carta of Child Rights** also acts as an international standard for inter-country adoption. A majority of the provisions of this Convention focuses on the issues relating to the separation of the child from his/her parents and the illicit non-return or transfer of the child abroad. The Human Rights treaties, both universal as well as regional consists of the provisions relating to in-country and inter-country adoptions. A rich *corpus* is developed by the European Commission and the Court of Human Rights which is based on Articles 8, 12, and 14 of the European Convention for Human Rights (ECHR) and Fundamental Freedom wherein the court has stressed upon a particular weight on the best interests of the child which can even override the interests of the parents. In *Salguero de Silva Mouta* the court had held that ECHR held it discriminatory under its Article 14 the treatment of a homosexual applicant who claims parental authority

¹ https://www.researchgate.net/publication/8027545_International_adoptions_Myths_and_realities
<https://www.natcom.org/communication-currents/adoption-real-mother-debunking-adoption-myths-age-contested-immigration>
<https://www.jstor.org/stable/1602404?seq=1>

over his daughter from his ex-wife based on sexual orientation. After an ultimate analysis, it is made clear to state that it is up to the political will of the state which is contracting to regulate, define, and act on the irregularities.

Law Relating to Inter-country Adoption in India

When it comes to India, the preamble of the country's Constitution takes the pledge to secure the citizens of India including children from social, economic, and political perspectives. This constitution along with providing a lot of fundamental rights to the adult citizens and the children also provides authority to the state to formulate special provisions for the children such as Article 21A provides the right to children for elementary school education. These and several other provisions of the Indian Constitution conveys that how anxious were the constitution-makers regarding the safeguard and protection of the welfare and interests of the children in the country. It is found out that a child's priority is to be cared for by his/her parents. Adoption only enters the scene for the care and overall development of a child when care by his/her parents is unavailable. This process of adoption permanently terminates the legal relationship of that child with his/her biological parents. After adoption, a new relationship between the child and the parents emerges and it grows to depend on both the parties. The court held inter-country adoptions to be valid under *Sec 9(4) of the Hindu Adoptions and Maintenance Act, 1956* in a well-known case of *In Re Rasikal Chhanganlal*.

In India, the Hindus carry on the process of adoption like spiritual and temporal facts. Such kinds of adoptions are guided through spiritual instead of temporal considerations and are governed by the Hindu Adoption and Maintenance Act, 1956. The guidelines which can govern inter-country adoptions were framed by the Supreme Court of India in a public interest litigation petition of *Laxmi Kant Pandey V. Union of India*. When talking about the Mohammedan Law, they don't recognize this concept of adoption rather they follow the custom of adoption and are carried on by several cases held by the High Court. The social integration of children is looked upon by the Juvenile Justice (Care and Protection of Children) Act, 2000. This act provides certain ways through which the social welfare of a child can be recovered which include adoption, foster care and sponsorship. ²The District Courts and the chartered High Court have been provided inherent powers by the Guardian

² <http://docs.manupatra.in/newslines/articles/Upload/AAE0786F-285D-424E-B557-16F742371D48.pdf>
<https://onetrackinternational.org/toolkit-items/international-laws-and-standards/>

and Wards Act, 1890 to appoint guardians to the adopted sons and the minors. The provisions of this act are also applicable in case of inter-country adoption and Section 7 looks into the suitability of a guardian who will favour the welfare of the minor and will be directly appointed by the court. Many times the adoptive parents fail to properly and convey the motive of making adoption as held in *Mr. Craig Allen Coates V. State* with the help of the **Indian Council for Child Welfare and Welfare Home for Children.**

In India, the procedure of adoption is not simple but complex. This is because the Indian families keep their choice the priority while selecting babies to adopt. Babies who are handicapped, have medical issues, are of dark complexion or are not well nourished do not find a family or home in the country of India. Other issues relate to the reduced number of infants coming into adoption and this number is much below the desired one, the healthy babies are also being sent abroad as the foreigners have fewer reservations when talking about such children. According to 'Alomo Lobo', as he says; "One reason, I strongly suspect, is that we are losing many children to the parallel system of illegal adoptions, through hospitals and nursing homes." It can be clearly stated that inter-country adoption is full of legal, ethical, and moral issues and they are in serious need of exploration. But the adoption in India consumes a lot of time and is an expensive procedure.

International Instruments

There are various international instruments to govern and regulate inter-country adoptions. Let's discuss them in detail.

1. The Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoption

The 1965 Hague Convention and the other laws and rules have the purpose to establish rules of jurisdiction which are uniform in nature for the regulation of abandonment issues relating to inter-country adoptions. To enter into force, an international agreement is pending to gain support which is a necessary element. Switzerland and Austria have already ratified the Convention, but still and additional ratification is required to make the agreement binding. One of the major supports provided by the Hague Convention is that it allows any nation to ignore any such provision which clashes with its public policy. But, on the other hand, the

Hague Convention faces failure in harmonizing the laws of foreign states due to an exception vested in it that devours the rule and puts restrictions in the satisfaction of nationalistic viewpoints and this restriction is stretched to such an extent that its usefulness becomes extreme doubtful. Thus, this agrees to fall short in its aim of centralizing and unifying the procedure of inter-country adoption. This Convention still provides guidance relating to the definitional issues but its primary function remains in the jurisdictional and judicial matters. The issue which prevents the ratification of the 1965 Hague Convention is the narrow applicability of its provisions. And, the Convention also provides in the jurisdiction which is concurrent in the process of adoption to the adopter in his country of habitual residence and his national country.

2. 1986 U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally

The issues relating to child and family welfare, domestic problems, foster care, and the concerns of inter-country adoption that were left unaddressed by the international agreements are addressed by the twenty-four articles of the U.N. Declaration. Same as Hague Convention, this Declaration is criticized for the way how it treats inter-country adoptions. Out of various criticisms, there are three major ones to look into. (1) A provision under this declaration indirectly favours foster care within the child's country of origin when taken into cases are considered for inter-country adoptions. What this provision does is that it keeps inter-country adoption as the very last option for the kids who cannot be put into foster homes or adoptive homes in their native country. This can lead to psychological damages of the children due to experiences and the commentators' favour to keep the child in his/her country of origin. (2) With a major reason for ambiguity of principles, this Declaration has drastically failed in its purpose to make the process of inter-country adoptions a standard one. As an example, the declaration provides decision-making powers to the 'competent' authorities regarding the placements of inter-country adoptions but fails to give a proper definition of 'competent' in its context. Also, Article 20 prevents 'improper financial gain' but again it fails to provide its true meaning because the placement decisions according to the declaration will be made by the 'competent' authorities. (3) Finally, the same article also provides that the placement decisions should be governed by 'safeguards and standards of national adoption'

and again it foolishly predicts that every country involved in an inter-country adoption have already formulated various safeguards and standards and even it is true an additional precaution is always required to fulfil the special needs of the children.

Thus, these are the flaws relating to definitions under this Declaration which makes it an essential instrument to carry on the facilitation process of the procedure of inter-country adoption.

3. 1989 U.N Convention on the Rights of the Child

Another instrument keeping links to inter-country adoptions was the one unanimously approved by the United Nations in November 1989. This UN Convention on the Rights of the Child (1989 Convention) provides numerous rights to the children relating to cultural, civil, economic, social, and political issues. Regarding the ratification of this Convention, more than 150 countries have ratified apart from the United States which has not yet sent its treaty to Congress for its approval. The capabilities of this Convention to keep control over child trafficking became a suspect due to the tragedy in Romania. Article 25 of this Convention holds protection against child trafficking, and their sale & abduction but it has no significant force as it relies and works upon the national laws to provide the legal measures specifically. Moving on, Article 21(b) is a vague provision because it keeps inter-country adoption as an alternative of child care and this hind the government to implement simple adoption and this is due to its definitional shortcomings. Another big issue that hinders the achievement of a unified system of inter-country adoption is that the UN Convention's nature is supplementary as it is not properly implemented. The core reason behind this problem is that the Convention does not fixes its enforcement and it is not mandatory to adhere to its provisions and so the countries feel free to substitute their laws according to which the child's best interests would be served.

Procedure for Inter-country Adoption³

When one wishes to make an inter-country adoption from India, a specific procedure as formulated needs to be followed. In the very first step

³ <http://www.legalservicesindia.com/articles/adopt.htm>
<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process.html>

(1) An application of adoptions needs to be filed to the *Child Welfare Agency* which is recognized by the Indian Government in the country of origin of the applicant. In the next step

(2) The agency will then ask for certain important details of the applicant's family wherein it will appoint a social worker who will visit his home and meet his family members. The purpose of doing this is to find out whether the family adopting the child will be able to give financial and emotional support to the adopted child. After this, the social worker will prepare a report and this report is termed as 'Home Study Report.' This report consists of certain details such as family background, the relationship between the family members, employment status of the couple, health details of the family, economic status, and proper reasons for the desire to adopt a child, etc. After the complete review of the application, the home study report needs to be completed which is done by the agency social worker. The home study is a kind of interview process where the social worker helps and assists the couple to determine their ability to parent a child and the applicant learns about adoption.

Home Study Report: It is a complex and crucial document which is prepared by a social worker who is appointed by the agency with a purpose to evaluate a prospective parent and contains the following details; (a) Social status and family background, (b) Description of home, (c) Standard of living, (d) Current relationship between husband and wife, (e) Couple Relationship and their family members.

(3) After the Home Study report is finalized and prepared, the Home Study report along with the original application is required to be sent to a recognized Indian Placement Agency from the Social Welfare Agency of their country in a direct manner. Another such report is the Child Study report which is a report containing the details about the child such as; the age, sex, how the child was brought, name, etc. Once the application of the applicant is received, the recognized Indian Agency examines the Home Study report and matches it with the Child Study.

(4) Once, the Child Study Report and Home Study Report gets matched by the agency, the agency sends the child's details along with his photograph and medical report to the agency of their country. Then these details are shown to the adopters and once they approve the adoption of the child, the Indian Placement Agency processes the case with the competent

court for their guardianship after getting clearance from the Indian Government. Within a stipulated time, guardianship is awarded to the adopting parents by the competent court.

(5) Then, the Indian Agency obtains the visa and passport for the child after getting the court's order. After this, the child leaves the country with an escort or with the adoptive parents themselves to his/her new home.

(6) No extra fees are charged from the applicant by the agency apart from the maintenance fees incurred in keeping the child in the agency and these charges are accordingly directly fixed by the court based on the recognized agency's representations.

(7) Finally, when the child reaches the new home and the new family, the adoptive parents adopt the child under the prevailing laws of that country.

Adoptions from Non-Hague Countries

Though there has always been a massive growth in the number of countries who have ratified the Hague Convention, still the majority of adoptions internationally take place outside the legal framework of this Convention.

These Non-Hague countries following the inter-country adoption procedures are more open to allowing growth in the number of children being adopted abroad. A clear example can be the ICAs from Ethiopia which has shown substantial growth from the past few decades wherein in the initial years the number was only up to a few hundred in each year has now grown to a high number of more than 4000.

This clearly states that the Non-Hague countries are more attractive partners to the inter-country adoptions. If this scenario continues, the true aim of inter-country adoptions will again be severely compromised.

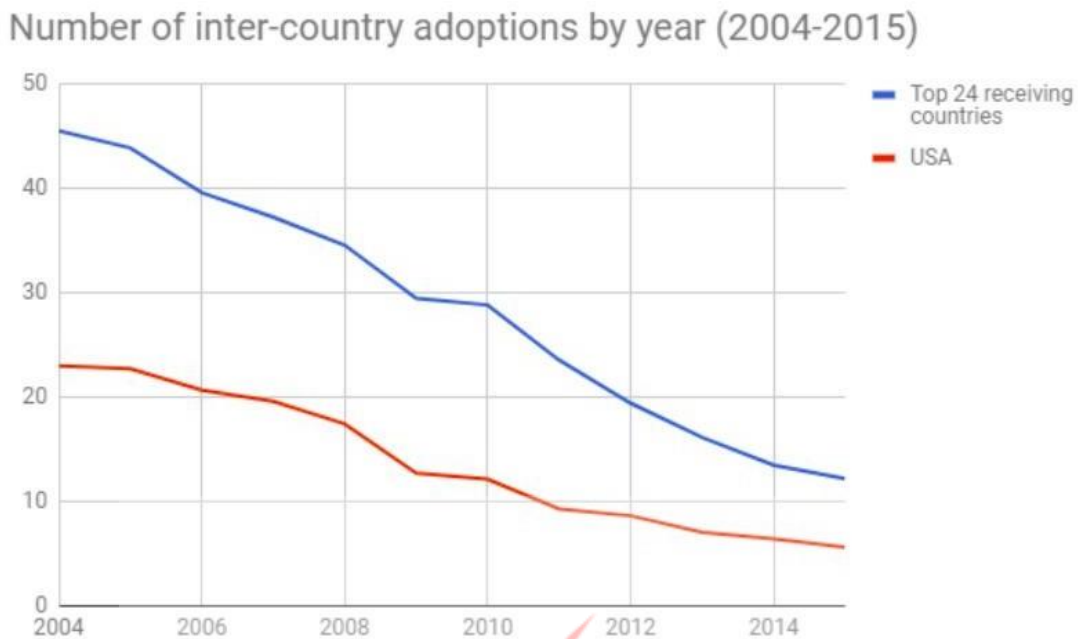


Figure 1. Source: Helman P. 2017 Global Statistics for Intercountry Adoption: Receiving States and States of origin 2004-2015⁵⁷

INTERNATIONAL TRENDS IN CHILD ADOPTION

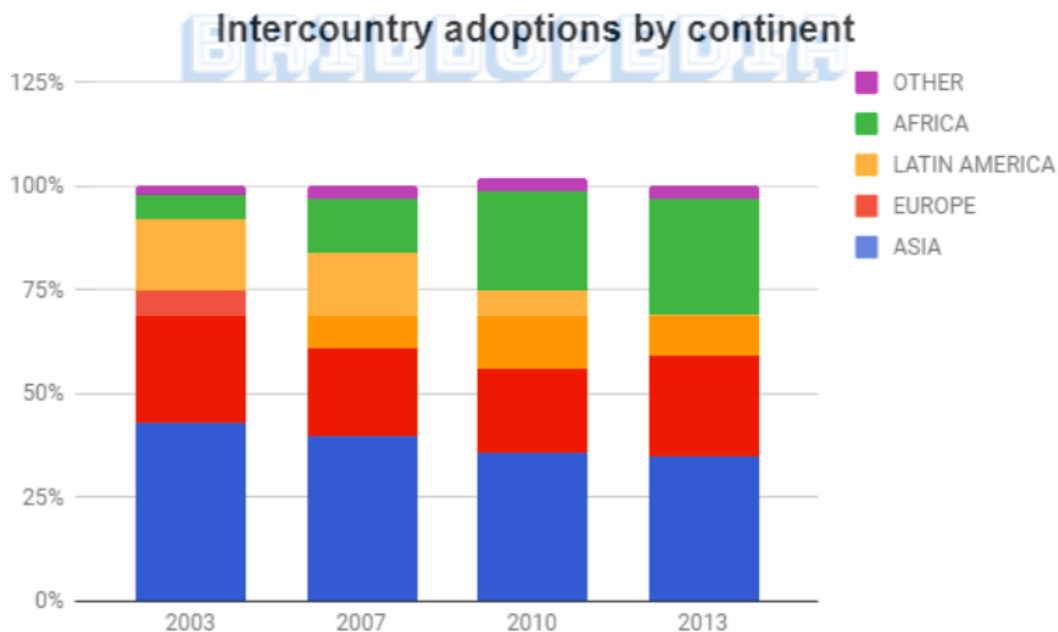
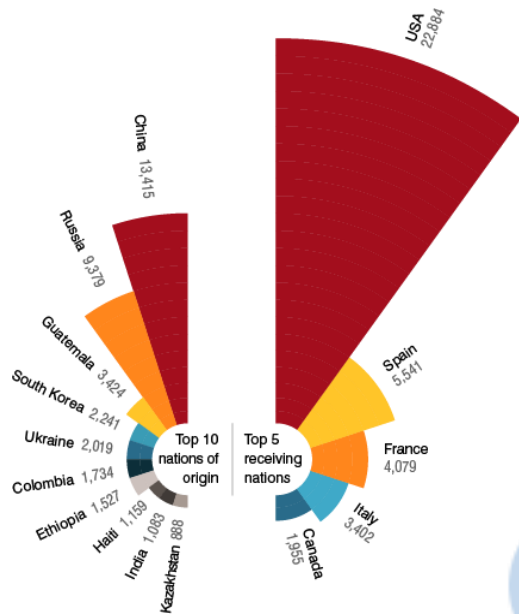


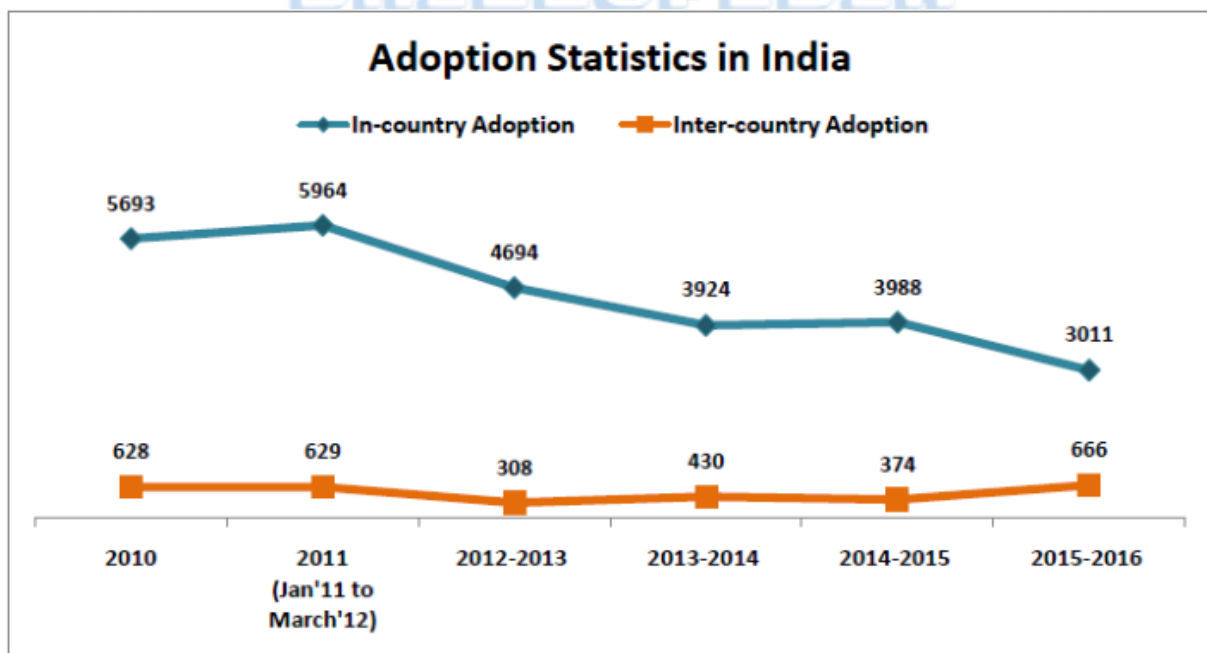
Figure 2. Source: Peter Selman (2015)⁷⁶

CHILD ADOPTION TRENDS IN AFRICA

DATA SHOWUNG THE ORIGIN AND RECEIVING COUNTRIES OF INTER-COUNTRY ADOPTIONS:-



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IN-COUNTRY AND INTER-COUNTRY ADOPTION TRENDS IN INDIA

Conclusion & Suggestion

In the final words, based on such in-depth analysis, it can be confidently said that inter-country adoption is a kind of phenomenon on an international level that can never be considered as a myth. The evidence of its reality is very conveniently laid upon in the international instruments and the Indian laws and their legal frameworks. The concept of inter-country adoption lays down a very sweet and healthy purpose of fulfilling family needs of the two parties wherein the two parties involving the childless couples (the adoptive parents) and the child who is abandoned or is orphan and is not able to get the care of his/her biological parents. Upon the completion of the procedure of inter-country, both the parties get happiness because the parents get a child and the gap in their life is fulfilled as they get a complete family. On the other hand, the child gets the love and care of mother and father and his/her life takes a new turn. In short, the child gets a whole new family and a whole new life after the adoption is completed.

But as everything, including the legal phenomenon in this world, has a darker side, inter-country adoptions also brings with it its negative and devil side. This negativity of inter-country adoption directly and in the majority impacts the rights and interests of the child being adopted or in general. In nutshell, it can be said that the welfare of the children is drastically hampered and their mental health consisting of psychological elements faces severe damage. This happens due to an emerging **Black Market** which has taken place due to the increasing demands of the children on an international level. This black market simply ruins the life of the kids by giving birth to criminal acts such as; child abduction, child trafficking, international child trafficking, etc. These actions are made possible due to the involvement of intermediaries or middlemen which consists of the people not legally allowed or authorized by the laws of that country to carry such activities. This is because for the will of having a child, the childless couples agree to pay huge amounts of money to these intermediaries and these people make so much money out of it. Another major reason for the drastic growth of this black market is the weak and incapable laws, especially in India.

The sole purpose of inter-country adoption is to find a family and suitable parents for the orphan and abandoned children to safeguard their interests. Numerous international instruments such as the UN Convention on Child Rights and Hague Convention work under the perspective of inter-country adoption and is ratified by the government of India. The core

principle is that “the best interest of the child should be protected.” This is because the nation’s children are the supreme important case. The laws working internationally in every nation work to ensure four major things; (1) to make sure that the adaptability of children in every way and always determined in the right manner, (2) there should be right and proper reasons for carrying out an inter-country adoption, (3) the right and the suitable person should only be provided with the guardianship of every child, (4) the adoption should always be carried out in a prescribed way.

Every international instrument, laws, and legal frameworks discussed herewith should be critically examined and necessary amendments should be made to eradicate the negative side of this phenomenon and the child’s rights and interests are secured and protected and his welfare is not at risk. Inter-country adoption is a very useful and pure concept for forming families with love and affection and will become more perfect if its negatives are removed permanently.



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