

# The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals

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## INTRODUCTION

Intercountry adoption has pressed into the public consciousness in two contradictory ways. On the one hand, intercountry adoption is presented as a heart-warming act of good will that benefits both child and adoptive family.<sup>1</sup> The child is characterized as a bereft orphan doomed to a dismal future within a poor country.<sup>2</sup> All the child needs is a chance and a home. The adoptive family's simple act of love in bringing the child to the promised land (the United States)<sup>3</sup> brings to the adoptive parents a harvest of love from the child while

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\* Professor of Law, Cumberland Law School, Samford University. My interest in the Indian adoption scandals and adoption reform arose from my personal experience as an adoptive father of two children who came through several of the implicated orphanages. The stories that my children and other older adoptees have told spurred me to dig deeper into the murky world of Indian adoption. My greatest thanks under these circumstances must be to my family: my wife, Desiree Smolin, and our adoptive and birth children, who have all lived in different and profound ways some of the personal affects of these scandals. Desiree has been my partner in trying to understand the complex issues raised by these scandals, and insisted that we not accept reassuring platitudes as sufficient answers. Many with personal experiences in adoption have shared their experiences and viewpoints; while I often could not directly credit or describe those experiences, they clearly inform this work. I am also grateful to the participants of the Fall 2003 Intercountry Adoption Law Conference at Texas Wesleyan Law School, and those who attended my presentation to the Cumberland faculty, for their feedback on my initial attempts to present some of this material in oral form. Finally, I wish to thank two Cumberland students, Ashley Mims and Vickie Willard, who have worked extensively with me on researching and understanding the Indian adoption scandals, as well as a third Cumberland student, John Strohm, who has assisted me through research on legal issues relevant to the Hague implementation process.

<sup>1</sup> See Kim Clark & Nancy Shute, *The Adoption Maze*, U.S. NEWS & WORLD REP., Mar. 12, 2001, at 60, available at LEXIS, News Library.

<sup>2</sup> See Kathy Boccella, *Family Forged amid Tragedy Gives Girls, Parents Chance to Live, Love*, MILWAUKEE J. SENTINEL, Mar. 23, 2003, at 11L, available at LEXIS, News Library.

<sup>3</sup> Jeff D. Opdyke, *Adoption's New Geography*, WALL ST. J., Oct. 14, 2003, at D1. ("The U.S. adopts more foreign children than all other nations combined.").

also enriching the nation with a dynamic diversity.<sup>4</sup>

Contrasted with the positive face of adoption are numerous scandals and horror stories concerning intercountry adoption. Adoption is portrayed as child trafficking or baby selling.<sup>5</sup> Shadowy figures buy, steal, or kidnap children from poor families in developing nations for sale to adoptive families in rich nations.<sup>6</sup> Corrupt agencies within the United States collect fees from prospective adoptive families and then fail to produce a child.<sup>7</sup> Pregnant women are shipped into United States territory in order to place children for adoption without coming under the jurisdiction of the immigration authorities.<sup>8</sup> This face of intercountry adoption is more akin to organized criminal activity than an act of love.

This Article uses the recurrent adoption scandals in Andhra Pradesh, India, as a case study of these two faces of intercountry adoption. The Andhra Pradesh adoption scandals are significant in several ways. First, their recurrent nature illustrates the difficulty of “reforming” intercountry adoption.<sup>9</sup> Second, the development within Andhra Pradesh of movements seeking to keep particular children within India, which have been engaged in legal and political conflict with prospective adoptive parents seeking to bring children to the United States, demonstrates the political and social hazards implicit in intercountry adoption.<sup>10</sup> This trajectory from scandal to the development of activist movements within sending countries willing to publicly question the legitimacy of intercountry adoption bears watching.

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<sup>4</sup> Karen S. Peterson, *Census Counts Adoptees: 1.6M Kids*, USA TODAY, Aug. 22, 2003, at 1A, available at LEXIS, News Library.

<sup>5</sup> Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov.-Dec. 2003, at 115, available at LEXIS, News Library.

<sup>6</sup> See generally Renuka Rayasam, *Special Overseas Delivery: U.S. to Simplify Rules on Foreign Adoptions*, ATLANTA-J. CONST., Dec. 3, 2003, at 1F, available at LEXIS, News Library.

<sup>7</sup> Clark & Shute, *supra* note 1, at 60.

<sup>8</sup> Walter F. Roche, Jr., *Playing on Mothers' Hopes*, BALT. SUN, Nov. 2, 2003, at 14A (reporting expectant mothers being flown to Hawaii to deliver their babies for adoption under the guise of preventing a life of poverty for the child), available at LEXIS, News Library.

<sup>9</sup> Editorial, *Children as Chattel*, THE HINDU, Apr. 29, 2001 (summarizing the 1999 Andhra Pradesh adoption scandals), available at LEXIS, News Library; see also *Another AP Orphanage Raided, 61 Infants Rescued*, at <http://www.rediff.com/news/2001/apr/26ap1.htm> (Apr. 26, 2001) (reporting the 2001 scandal).

<sup>10</sup> Raymond Bonner, *A Challenge in India Snarls Foreign Adoptions*, N.Y. TIMES, June 23, 2003, at A3, available at LEXIS, News Library.

The questions raised by the two faces of intercountry adoption are factual, legal, political, and ideological. Factually, the Andhra Pradesh adoption scandals, like those occurring elsewhere, exemplify the grave difficulty of attaining transparency in intercountry adoption.<sup>11</sup> Years after allegations are made, facts remain elusive. Legally, the Andhra Pradesh scandals illustrate the wide gap between the laws of intercountry adoption and the actual practices. Politically, the scandals reveal the manner in which different interest groups within sending and receiving countries employ their varying capacities for political mobilization.<sup>12</sup> Ideologically, the scandals evidence the complex and deep-felt responses and perspectives that surface as a result of the supposedly “simple” act of placing a child from one nation within a family in another nation.

The thesis of this Article is that there are systemic vulnerabilities in the current intercountry adoption system that make adoption scandals, such as the ones in Andhra Pradesh, India, predictable. Further, this Article suggests that currently there are no actors in the intercountry adoption system with the requisite information, authority, and motivation to prevent abusive or corrupt adoption practices. Under these circumstances, “reform” of the intercountry adoption system remains elusive and illusory, leading to cyclic and repetitive patterns of scandal.

Finally, the Article asks about possible sources or paths of reform sufficient to prevent recurrent scandals such as those in Andhra Pradesh. The Article suggests that the United States government is well positioned to alter the system and bring about significant reform. If the political will can be found, the United States government could use the implementation of the Hague Convention on Intercountry Adoption to create an accountability structure for intercountry adoption. The key to this structure will be a chain of accountability under which United States adoption agencies become responsible for the acts of their partner agencies and facilitators in sending countries.

Part I of this Article surveys ideals and laws relevant to intercountry adoption. Part II presents an overview of the complex

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<sup>11</sup> See generally Ravi Sharma, *Children as Commodities*, FRONTLINE (May 12–25, 2001), at <http://www.frontlineonnet.com/fl1810/18100350.htm> (last visited Feb. 5, 2005).

<sup>12</sup> See generally Gita Ramaswamy, *The Baby Harvest: Scandal over Westerners ‘Shopping’ for Children in India*, NEW INTERNATIONALIST, Aug. 2003, available at <http://www.newint.org/issue359/currents.htm> (last visited Feb. 5, 2005).

scandals which occurred in Andhra Pradesh, India. Part III analyzes the prospects for reform, and in particular, discusses the unique role that the United States government can play in reforming intercountry adoption.

## I. IDEALS AND LAWS

### A. *International Ideals*

Intercountry adoption is a subject of international law in several senses. First, because intercountry adoption involves the immigration of persons from one nation to another, it raises core national sovereignty issues with international law significance.<sup>13</sup> Second, intercountry adoption as a humanitarian matter implicates human rights issues, which have become a significant focus of international law.

An exhaustive scope of international law applicable to intercountry adoption is beyond the scope of this Article. However, two treaties will be reviewed: the Convention on the Rights of the Child (“CRC”)<sup>14</sup> and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Convention”).<sup>15</sup> The CRC is probably the most relevant human rights convention applicable to intercountry adoption. With the exception of the United States, nearly every sovereign nation, including India, adheres to the CRC.<sup>16</sup> The Hague Convention is the most directly applicable treaty specific to intercountry adoption. India has adhered to the Hague Convention effective October 1,

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<sup>13</sup> See generally Joanne Selinske et al., *Ensuring the Best Interest of the Child in Intercountry Adoption Practice: Case Studies from the United Kingdom and the United States*, 80 CHILD WELFARE 656 (2001).

<sup>14</sup> Convention on Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), 28 I.L.M. 1448 [hereinafter CRC]. This Article will not discuss the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography (OP-CRC). For an extensive discussion of the application of this treaty to intercountry adoption, see David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. (forthcoming March 2005).

<sup>15</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

<sup>16</sup> See Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 778 (2001) (noting that United States and Somalia are the only nations that have not ratified the CRC).

2003,<sup>17</sup> and the United States is preparing for implementation, possibly to begin in 2006.<sup>18</sup>

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 Convention in relation to the Andhra Pradesh adoption scandals, even though most of the relevant events occurred before Indian ratification of the Hague Convention,<sup>19</sup> and the United States has not yet ratified either the CRC<sup>20</sup> or the Hague Convention.<sup>21</sup> 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.

### 1. The CRC and Intercountry Adoption

The CRC appears to take a very limited view of when intercountry adoption is appropriate. The critical text requires that state parties “[r]ecognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot

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<sup>17</sup> HAGUE CONFERENCE ON PRIVATE INT’L LAW, STATUS TABLE 33: CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, *at*

[http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69) (latest update Oct. 18, 2004) [hereinafter HAGUE CONVENTION STATUS TABLE].

<sup>18</sup> BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, HAGUE CONVENTION ON INTERCOUNTRY ADOPTION, *at* [http://travel.state.gov/family/adoption/convention/convention\\_459.html](http://travel.state.gov/family/adoption/convention/convention_459.html) (Feb. 5, 2005).

<sup>19</sup> The Hague Convention was effective in India as of October 1, 2003. HAGUE CONVENTION STATUS TABLE, *supra* note 17. India has designated the Central Adoption Resource Agency, New Delhi, as Central Authority. HAGUE CONFERENCE ON PRIVATE INT’L LAW, AUTHORITIES, *at* [http://hcch.e-vision.nl/index\\_en.php?act=authorities.details&aid=186](http://hcch.e-vision.nl/index_en.php?act=authorities.details&aid=186) (last visited Feb. 5, 2005).

<sup>20</sup> *See* Vyver, *supra* note 16, at 778.

<sup>21</sup> The United States signed the Hague Convention on March 31, 1994, but has not yet ratified. *See* HAGUE CONVENTION STATUS TABLE, *supra* note 17.

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."<sup>22</sup> The CRC's preference for in-country over intercountry adoption is compatible with the Hague Convention. However, the CRC also specifically prefers in-country foster care over intercountry adoption, and initially appears to favor in-country institutional care over intercountry adoption. These latter positions are more controversial, and appear to conflict with the Hague Convention.<sup>23</sup>

It is notable, in this regard, that the United Nations Children's Fund ("UNICEF") recently issued a public position on intercountry adoption which appears to favor intercountry adoption over in-country institutional care.<sup>24</sup> 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.<sup>25</sup>

One could argue that, under the language of the CRC, institutional care is not a "suitable manner" for the permanent care of a child.<sup>26</sup> Therefore, a plausible interpretation of the CRC is that it prefers

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<sup>22</sup> CRC, *supra* note 14, art. 21(b), 28 I.L.M. at 1464.

<sup>23</sup> See William L. Pierce, *Accreditation of Those Who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children*, 12 J. CONTEMP. HEALTH L. & POL'Y 535, 538-40 (1996) (discussing conflict between CRC and Hague Convention). Pierce suggests that the CRC and an earlier United Nations Declaration "grew out of a knowledge of intercountry adoptions that were characterized by largely unregulated adoptions, a significant portion of which involved highly publicized abuses." *Id.* at 539-40. Pierce tried to reconcile the apparent conflict between the CRC and Hague Convention by suggesting that adoptions that comply with Hague norms and procedures would constitute a different kind of adoption than the "internationally unregulated adoption" referenced in the CRC. *Id.* at 540.

<sup>24</sup> UNICEF, UNICEF'S POSITION ON INTER-COUNTRY ADOPTION, at [http://unicef.org/media/media\\_15011.html](http://unicef.org/media/media_15011.html) (last visited Feb. 5, 2005) [hereinafter UNICEF'S POSITION].

<sup>25</sup> *Id.*

<sup>26</sup> CRC, *supra* note 14, art. 21(b), 28 I.L.M. at 1464.

intercountry adoption to in-country institutional care. By such interpretations, the international community is apparently working toward a harmonization of apparent conflicts between the CRC and the Hague Convention.<sup>27</sup>

Other provisions of the CRC pertaining to both national and intercountry adoption<sup>28</sup> 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:

(a) 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;<sup>29</sup>

(d) 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[.]<sup>30</sup>

The CRC thus seeks to ensure: (a) the use of the "best interests of the child" standard;<sup>31</sup> (b) 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 counseling "as may be necessary";<sup>32</sup> and (c) government safeguards against improper financial gain in intercountry adoption.<sup>33</sup>

Other provisions of the CRC do not directly address adoption, but nonetheless have important implications for a system of intercountry adoption. Article 7 states, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to

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<sup>27</sup> For additional discussion of the conflict between the CRC and the Hague Convention, see *infra* notes 58–66 and accompanying text.

<sup>28</sup> CRC, *supra* note 14, art. 21(c), 28 I.L.M. at 1464 (requiring safeguards for intercountry adoption equivalent to those existing in the state of national origin).

<sup>29</sup> *Id.* art. 21(a).

<sup>30</sup> *Id.* art. 21(d).

<sup>31</sup> *Id.* art. 3, para. 1, 28 I.L.M. at 1459.

<sup>32</sup> *Id.* art. 21(a), 28 I.L.M. at 1464.

<sup>33</sup> *Id.* art. 21(d).

know and be cared for by his or her parents.”<sup>34</sup> This provision is significant to intercountry adoption in several ways. First, like many human rights norms, the requirement of immediate birth registration is consistently violated, as over 30% of births worldwide are not registered, including nearly two-thirds of the births in South Asia.<sup>35</sup> The failure to register births 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.”<sup>36</sup> UNICEF thus implies that removal of a child from the birth 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.”<sup>37</sup>

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 biological parents. The secrecy associated with closed adoption has made it difficult or impossible for a child to “know” her biological 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 deny children information about their biological parents, particularly when a child seeks such information, violate the CRC.<sup>38</sup> 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

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<sup>34</sup> CRC, *supra* note 14, art. 7, para. 1, 28 I.L.M. at 1460.

<sup>35</sup> UNICEF reported that in 2000, 70% of births in sub-Saharan Africa, 63% in South Asia, 22% in East Asia and the Pacific, and nearly one-third in the Middle East and North Africa went unregistered. UNICEF, BIRTH REGISTRATION, at [http://www.unicef.org/protection/index\\_birthregistration.html](http://www.unicef.org/protection/index_birthregistration.html) (last visited Feb. 5, 2005).

<sup>36</sup> UNICEF’S POSITION, *supra* note 24.

<sup>37</sup> *Id.*

<sup>38</sup> See CRC, *supra* note 14, art. 8, 28 I.L.M. at 1460. See generally D. Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person’s Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT’L L. 587 (2001) (analyzing adoption information issues from both comparative law and international sources, including CRC).



intended to prohibit closed-record domestic adoption systems.<sup>39</sup>

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 birth parents.<sup>40</sup> 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.”<sup>41</sup>

This section also has a paradoxical relationship to intercountry adoption. Intercountry adoption involves the loss of a child’s original identity, nationality, name, and family relationships.<sup>42</sup> Thus, this provision once again underscores that intercountry 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 biological 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, “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.”<sup>43</sup> The question of reestablishing the identity of a child would specifically apply to

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<sup>39</sup> See Blair, *supra* note 38, at 642–56. It should be noted that the dispute over closed adoption systems concerns not only the best interests of the adoptee, but also issues related to the interests and wishes of birth parents.

<sup>40</sup> CRC, *supra* note 14, art. 7, para. 1, 28 I.L.M. at 1460.

<sup>41</sup> *Id.* art. 8, para. 1.

<sup>42</sup> See generally Stacie I. Strong, *Children’s Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT’L L.J. 163 (1995).

<sup>43</sup> CRC, *supra* note 14, art. 8, para. 2, 28 I.L.M. at 1460.

illegality in adoption. Intercountry adoption has been plagued by claims of illegality, including stealing or buying children from birth parents, and the forging of various documents related to the relinquishment, abandonment, or original identity of the child.<sup>44</sup> While this Article focuses on scandals that have occurred in Andhra Pradesh, India, over 40% of the forty most significant sending nations over the last fifteen years are effectively closed to intercountry adoption, generally due to “concerns about corruption, child trafficking or abduction.”<sup>45</sup> 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. Although the CRC seems to take a clear stand in favor of reestablishing the child’s original identity,<sup>46</sup> 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 overarching principle that, “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”<sup>47</sup> 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-

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<sup>44</sup> See, e.g., Kapstein, *supra* note 5, at 115; Thomas Fields-Meyer et. al., *Whose Kids are They?*, PEOPLE, Jan. 19, 2004, at 74, available at LEXIS, News Library.

<sup>45</sup> ETHICA, COMMENTS ON PROPOSED ICARE LEGISLATION (S 1934) 2, at <http://www.ethicanet.org/ICAREintro.pdf> (July 13, 2004). The report notes that there have been forty different countries of origin in the top twenty countries sending children to the United States over the past fifteen years. Of these, thirteen are “currently closed or effectively closed” (sending less than twenty-six children annually), while four are reportedly closed “temporarily” to “investigate concerns or establish new procedures.” *Id.* at 5. The report further notes that, “[v]irtually all of these countries closed due to concerns about corruption, child trafficking or abduction.” *Id.* at 2. India presumably would not be among the countries this report counts as closed, since only one state, and not the whole country was closed by the scandals described in this Article. As a matter of full disclosure, this author has served or currently serves on advisory boards for Ethica, which is an organization devoted to ethics in adoption. However, I had no part in the writing of the report in question.

<sup>46</sup> CRC, *supra* note 14, art. 8, para. 2, 28 I.L.M. at 1460.

<sup>47</sup> *Id.* art. 3, para. 1, 28 I.L.M. at 1459.

return of children abroad.”<sup>48</sup> 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.”<sup>49</sup>

In several provisions, the CRC addresses the situation of a child separated from his or her parents.<sup>50</sup> These provisions do not directly address adoption, and their general principles favoring 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 the severance of biological family relationships. Although the overall scheme of children’s rights strives to protect, maintain, and, where broken, reestablish relationships within the biological 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.<sup>51</sup> Thus, Article 12 of the CRC states:

1. 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.<sup>52</sup>
2. 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.<sup>53</sup>

The obvious application of this section to adoption would

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<sup>48</sup> *Id.* art. 11, para. 1, 28 I.L.M. at 1461.

<sup>49</sup> *Id.* art. 3, para. 1, 28 I.L.M. at 1459.

<sup>50</sup> *Id.* arts. 9 & 10, 28 I.L.M. at 1460–61.

<sup>51</sup> See generally David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 EMORY INT’L L. REV. 967, 973 n.13 (2003) (explaining division of CRC into protection, provision, and participation rights).

<sup>52</sup> CRC, *supra* note 14, art. 12, para. 1, 28 I.L.M. at 1461.

<sup>53</sup> *Id.* art. 12, para. 2.

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.<sup>54</sup> 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 birth 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.

## 2. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

As a treaty, the Hague Convention on Intercountry Adoption is only binding on the nations that ratify it. India recently ratified the Hague Convention, effective October 1, 2003.<sup>55</sup> The United States is working toward ratification, with draft implementing regulations released for comment on September 15, 2003.<sup>56</sup> Therefore, the Hague Convention did not directly apply to the periodic Andhra Pradesh adoption scandals. The Convention will become fully applicable to intercountry adoption between India and the United States only after both nations have ratified, and begun implementation of, the Convention, which apparently will not occur before 2006 at the earliest.<sup>57</sup>

The Hague Convention on Intercountry Adoption has two major features. On the one hand, the treaty establishes broad standards

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<sup>54</sup> See *id.* art. 5, 28 I.L.M. at 1459–60.

<sup>55</sup> HAGUE CONVENTION STATUS TABLE, *supra* note 17.

<sup>56</sup> Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

<sup>57</sup> See BUREAU OF CONSULAR AFFAIRS, *supra* note 18.

and ideals for intercountry 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. These procedural aspects of the Convention are beyond the scope of this Article.

a. Intercountry Adoption Versus In-Country Institutional and Foster Care: Harmonizing the Hague Convention with the CRC

The Hague Convention appears to implement a view that intercountry adoption can be superior to in-country institutional care.<sup>58</sup> 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 "intercountry 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."<sup>59</sup>

Professor Sara Dillon has complained that the Hague Convention's preference for intercountry adoption over in-country institutional care is not mandatory because nothing in the treaty requires sending nations to follow this preference. Professor Dillon is concerned that neither the CRC nor the Hague Convention clearly establishes a child's right not to be subject to the severe harms of long-term institutionalization. She therefore asks whether children have a right to a family, and have a right to intercountry adoption in preference to institutionalization.<sup>60</sup> The recent UNICEF statement that "institutional care . . . should be used only as a last resort and as a temporary measure"<sup>61</sup> 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

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<sup>58</sup> See Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 209–10 (2003).

<sup>59</sup> Hague Convention, *supra* note 15, pmbl, 32 I.L.M. at 1139.

<sup>60</sup> See Dillon, *supra* note 58, at 199–215.

<sup>61</sup> UNICEF'S POSITION, *supra* note 24.

CRC in the long-term institutionalization of children in substandard conditions.<sup>62</sup> 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 intercountry adoption, and the Hague Convention, which can be read to prefer intercountry adoption over in-country foster care.<sup>63</sup> The recent UNICEF statement preferring intercountry 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.<sup>64</sup> Thus, upon closer analysis, the Hague Convention position on intercountry adoption versus foster care is also ambiguous, depending on whether a foster care arrangement can be considered a permanent family. Moreover, as previously stated, even if the Hague Convention prefers intercountry adoption over foster care, it does not impose that preference on sending nations.<sup>65</sup>

A preference for permanent family care over institutionalization therefore does not settle the issue concerning “foster care,” due to

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<sup>62</sup> Substandard institutionalization of the child would likely violate the child’s rights under various provisions of the CRC. See CRC, *supra* note 14, arts. 6, 20, 23, 24, 25, 27, & 28, 28 I.L.M. at 1460, 1464, 1465–67.

<sup>63</sup> Compare CRC, *supra* note 14, art. 21(b), 28 I.L.M. at 1464, with Hague Convention, *supra* note 15, pmbl, 32 I.L.M. at 1139.

<sup>64</sup> Compare UNICEF’S POSITION, *supra* note 24, with Hague Convention, *supra* note 15, pmbl, 32 I.L.M. at 1139.

<sup>65</sup> See *supra* text accompanying note 60.

the variety of caretaking alternatives available to children. The issue then becomes, which forms of child care, short of adoption or birth 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.”<sup>66</sup> Does such 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 birth families.

b. Setting Standards for Intercountry Adoption:  
Trafficking, Money, Consent, and Open Adoption

The Hague Convention shares with the CRC a concern for child trafficking and attempts to specifically ensure that adoption is not used as a means of child trafficking. Thus, one of the specific objects of the treaty is to “prevent the abduction, the sale of, or traffic in children.”<sup>67</sup> Toward that end, the Hague Convention requires that the “Central Authorities” who act on behalf of contracting states

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<sup>66</sup> See generally SOS KINDERDORF INT’L, THE CONCEPT, at [http://www.sos-childrensvillages.org/cgi-bin/sos/jsp/retrieve.do?lang=en&site=ZZ&nav=2.1&BV\\_SessionID=@@@@0706947969.1105047125@@@&BV\\_EngineID=cccdaddhmkifcfnckmdfkdfnj.0](http://www.sos-childrensvillages.org/cgi-bin/sos/jsp/retrieve.do?lang=en&site=ZZ&nav=2.1&BV_SessionID=@@@@0706947969.1105047125@@@&BV_EngineID=cccdaddhmkifcfnckmdfkdfnj.0) (last visited Feb. 5, 2005) (describing the SOS Village Organization); Prince Frederick, *Children Orphaned by AIDS, a New Challenge*, THE HINDU, Jan. 7, 2004, available at LEXIS, News Library.

<sup>67</sup> Hague Convention, *supra* note 15, pmb1, 32 I.L.M. at 1139.

“take . . . all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.”<sup>68</sup> Similarly, the Hague Convention forbids anyone from deriving “improper financial gain or other gain” from intercountry adoption,<sup>69</sup> limits payments to costs, expenses, and “reasonable professional fees,”<sup>70</sup> while forbidding “directors, administrators and employees of bodies involved in adoption” from receiving “remuneration which is unreasonably high in relation to services rendered.”<sup>71</sup>

The Hague Convention further mandates that required consents to adoption “have not been induced by payment or compensation of any kind and have not been withdrawn,”<sup>72</sup> and that the “consent of the mother, where required, has been given only after the birth of the child.”<sup>73</sup> Thus, the Convention specifically seeks to ensure that children are not bought, and that pregnant women are permitted to change their minds about adoption after childbirth. The Convention further requires that those who consent to adoption (such as birth parents) be “duly informed”<sup>74</sup> as to whether the adoption would “result in the termination of the legal relationship between the child and his or her family of origin.”<sup>75</sup> Thus, the Convention seeks to ensure that birth parents are not tricked into signing papers they do not understand.

The Convention does not take a position on closed versus open adoption, or the impact of adoption on the legal relationships between the child and his or her family of origin. Adoption within the United States has typically involved the destruction of any legal relationship between the family of origin and the child,<sup>76</sup> with the exception of stepparent adoption. The Convention appears open to the possibility of an adoption that does not destroy the child’s legal relationship with his or her family of origin. This matter seems to be

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<sup>68</sup> *Id.* art. 8, 32 I.L.M. at 1140.

<sup>69</sup> *Id.* art. 32, para. 1, 32 I.L.M. at 1143.

<sup>70</sup> *Id.* para. 2.

<sup>71</sup> *Id.* para. 3.

<sup>72</sup> *Id.* art. 4(c)(3), 32 I.L.M. at 1140.

<sup>73</sup> *Id.* art. 4(d)(4).

<sup>74</sup> *Id.* art. 4(d)(1).

<sup>75</sup> *Id.* art. 4(c)(1).

<sup>76</sup> See generally Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 998 (1995).



left to the domestic laws of each country involved.<sup>77</sup> As a practical matter, when children are taken out of their nation of origin, their opportunities for contact with the birth family can be sharply limited. However, in a surprising number of instances, contact is established between intercountry adoptees and their birth families. The possibility of continued contact, and of sending aid and assistance back to the family of origin, then become practical concerns. Thus, the Hague Convention's attitude towards open adoption is not as irrelevant as may first appear.

*B. United States Immigration Law*

A complete review of United States immigration law as it pertains to intercountry adoption is beyond the scope of this Article. For present purposes, the federal focus on "orphan" status is most relevant. The federal basis for admitting children into the United States for purposes of adoption is their status as a child who is an orphan. This requirement goes to the heart of legal and ethical principles related to adoption, for if a child is not an "orphan," then presumably he or she is not in need of a new family.

It is helpful, before analyzing the complex federal definition of "orphan," to recognize the different situations in which children might come to be considered orphans. The most obvious situation, of course, is when both parents are dead. Even this situation, however, is potentially equivocal. For instance, would it be proper for intercountry adoption purposes to consider a child whose parents have died to be an orphan, even though the child is being raised by relatives, such as grandparents, adult siblings, or aunts and uncles? Although such a child might fit a dictionary definition of "orphan," a legal definition designed to measure eligibility for intercountry adoption might exclude such a child.

Second, there is a class of children whose parents cannot be located, apparently due to natural disasters or armed conflict. Even though it may not be possible to confirm that the parents are dead in such instances, the child may be considered an orphan, since the parents are clearly unavailable. Once again, however, there remains an ambiguity as to whether a definition of "orphan" should exclude situations where other relatives are able and willing to raise the child.

Third, in some cases infants and young children are

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<sup>77</sup> See Hague Convention, *supra* note 15, art. 26(c), 32 I.L.M. at 1142; Blair, *supra* note 38, at 657.

anonymously abandoned, and it seems impossible to trace or find either of the birth parents. In these instances, a system of intercountry adoption might want to label children as orphans, even though it is almost certain that the parents are alive. In this instance, there is generally no issue concerning extended family, because the child generally lacks any family identity, and hence any identifiable set of relatives.

Fourth, there are instances in which one or two parents make a conscious decision to relinquish their child to a public or private institution concerned with child welfare. This situation also brings with it certain ambiguities. Was the act truly voluntary? Should the act of relinquishing a child be considered “voluntary” if based on poverty, or is there an obligation to provide sufficient assistance to allow the child to remain with his or her family? Did the parent (or parents) intend to fully relinquish all rights with respect to the child, or rather intend that an institution provide practical help to the child (food, clothing, shelter, education), while the child remained legally and psychologically a part of the parent(s)’ family?

Fifth, there are situations where one or both parents seek to place a child with a specific family for purposes of adoption. This could be done either on a direct family-to-family basis, or else through a public or private intermediary. It is a common procedure in domestic adoptions that a birth parent choose the adoptive family for her child, often from a portfolio of prospective adoptive families provided by an attorney or adoption agency. One advantage of such a procedure is that it ensures a direct transfer of the child from one family to another, avoiding institutionalization or foster care. However, it would seem peculiar to define a child who was transferred directly from a birth family to an adoptive family as ever having been an orphan. In addition, in the context of intercountry adoption, it could seem inherently exploitative, or an occasion for illicit child buying, to allow direct transfers of children from poor families in developing countries to comparatively wealthy adoptive parents from rich nations.

These possible circumstances under which a child may be classified as an orphan form a helpful context for analyzing the federal statute, which states:

The term “child” means an unmarried person . . . who is—a child, under the age of sixteen<sup>78</sup> at the time a petition is filed in his

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<sup>78</sup> The child can be sixteen or seventeen if he or she is a part of an adoptive

behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption . . . .<sup>79</sup>

The complex terms of this federal definition must be broken down into their elements to be understood. The circumstances under which a child is considered an orphan include: (1) the death of both parents; (2) the disappearance of both parents; (3) abandonment by both parents; (4) desertion by both parents; (5) separation from both parents; (6) the loss of both parents; (7) a sole or surviving parent incapable of providing support releases child in writing for emigration and adoption. These seven circumstances correlate to a large degree with the situations analyzed above, and thus it is interesting to see how the federal statute resolves the issues incident to each.

#### 1. Death of Both Parents

A child is considered an orphan when both parents are dead, and orphan status apparently applies even if the child is being raised by other relatives, at least so long as such other relatives do not legally become the child's parent(s). Therefore, where a child has lost both parents through death, but obtained a new parent, the child is no longer an orphan.

#### 2. Disappearance of Both Parents

The federal regulations state that:

Disappearance of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with

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sibling group which includes a child under sixteen. *See* 8 U.S.C. § 1101(b)(1)(F)(ii) (2000).

<sup>79</sup> 8 U.S.C. § 1101(b)(1)(F)(i) (2000). Alternatively, if the child resides in the legal custody of the adoptive parents for two years, the child could qualify for admission into the United States without first meeting the highly technical definition of orphan. However, few individuals are in a position to live overseas for two or more years in order to bring an adoptive child back to America. *See* 8 U.S.C. § 1101(b)(1)(E)(i)-(ii) (2000).

the laws of the foreign-sending country.<sup>80</sup>

The federal regulations attempt to guard against fraud under this circumstance largely through the requirement of reasonable efforts to locate the parent(s) by a competent authority of the foreign-sending nation.

### 3. Abandonment by Both Parents

The federal regulations specifically require that abandonment involve a willful act by both parents to forsake “all parental rights . . . without intending to transfer . . . these rights to any specific person(s).”<sup>81</sup> Accordingly, direct transfers by both birth parents to adoptive parents is expressly excluded from this definition. Indeed, the regulations go so far as to state that a relinquishment “for a specific adoption does not constitute abandonment.”<sup>82</sup>

Relinquishment of a child by both parents to a third party “in anticipation of, or preparation for, adoption” is within the definition only where such third party “is authorized under the child welfare laws of the foreign-sending country to act in such a capacity.”<sup>83</sup> The regulations also specify that placing a child in an orphanage, without more, does not constitute abandonment, so long as the parents “exhibit ongoing parental interest in the child.”<sup>84</sup>

### 4. Desertion by Both Parents

The federal regulations provide that desertion occurs when the “parents have willfully forsaken their child and have refused to carry out their parental rights and obligations,” resulting in the child becoming a “ward of a competent authority in accordance with the laws of the foreign-sending country.”<sup>85</sup> Apparently, desertion occurs when the State intervenes to terminate parental rights due to severe parental neglect.

### 5. Separation from Both Parents

The federal regulations define separation from both parents as the involuntary severance of the parent–child relationship “by action

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<sup>80</sup> 8 C.F.R. § 204.3(b) (2004).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

of a competent authority for good cause” shown.<sup>86</sup> The regulations require this to be a parental termination action that is “permanent and unconditional,” and also require that the parents be given notice and an opportunity to contest.<sup>87</sup> In practice, the term seems quite similar to that of “desertion” by both parents. Perhaps the difference is that “separation” involves all forms of abuse or neglect requiring government intervention in the form of termination of parental rights, while desertion is a specific form of neglect.

#### 6. Loss of Both Parents

The regulations define “loss from both parents” to mean the “involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority . . . .”<sup>88</sup> Thus, this category subsumes the situation where both parents are dead, presumed dead, or missing due to some major event.

#### 7. Sole or Surviving Parent Incapable of Providing Support Releases Child in Writing for Emigration and Adoption

The purpose of this section is apparently to allow one remaining parent, incapable of providing support to a child, to release a child for intercountry adoption, while at the same time forbidding this form of release in instances where a child has two parents. This distinction requires the regulations to define when a parent is a “sole or surviving parent.” The regulations define a “sole parent” as the mother of an illegitimate child, but only under limited circumstances, such as where the father has severed parental ties or released the child for intercountry adoption.<sup>89</sup> The regulations provide, however, that the “sole parent” category does not apply in countries that make no distinction between legitimate and illegitimate children. A “surviving parent” involves instances where one parent has died, and the child has not gained a new parent.<sup>90</sup> In either instance, the sole or surviving parent must be “unable to provide for the child’s basic

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<sup>86</sup> 8 C.F.R. § 204.3(b)

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

needs, consistent with the local standards of the *foreign sending country*.<sup>91</sup>

The complex federal definition of a child eligible for intercountry adoption therefore permits a single parent to release a child specifically for emigration and adoption, including release to a particular adoptive parent, while denying that same right to two-parent families. In addition, the regulations seek to prevent even a single parent from releasing his or her child specifically for an intercountry adoption, unless that parent is unable to meet the basic needs of the child according to that nation's standards. Thus, it would theoretically be impermissible for even a single parent to release a child for intercountry adoption merely to give that child the opportunity to live in the United States.

The regulations seem concerned with preventing intercountry adoption from becoming a means for economic immigration into the United States. The implicit policy is that a child should be an orphan within his or her national system, independent of any incentive to send the child to the United States. Presumably, the fear is that some parents in developing worlds would be willing to place their children for "adoption" merely to give them the opportunity for a better life.

In an effort to guard against adoption as economic migration, the regulations strip foreign birth parents of some of the options typically exercised by birth parents in the United States. Birth 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 two parents, and regardless of whether they could fulfill the child's basic needs themselves.

The current statute and regulations were drafted without regard to the impact of the Hague Convention.<sup>92</sup> An alternative statute, effective upon "entry into force" of the Convention, would provide alternative grounds for entry of a child into the United States from another Hague Convention nation.<sup>93</sup> This statute does not require that such a child fall within the existing definition of "orphan."

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<sup>91</sup> *Id.*

<sup>92</sup> 8 C.F.R. § 204.3(a)(1) ("It should be noted that this section was *not* drafted in connection with possible United States ratification and implementation of the Hague Convention . . .").

<sup>93</sup> See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 302(a), 114 Stat. 825, 838-39 (to be codified at 8 U.S.C. § 1101(b)(1)(G) effective upon United States entry into force of convention).

Instead, federal law would permit a child to come into the United States when both parents, or a sole or surviving parent, have “freely given their written irrevocable consent to the termination of the legal relationship with the child, and to the child’s emigration and adoption.”<sup>94</sup> In addition, where there are two living natural parents, they must be “incapable of providing proper care for the child.”<sup>95</sup> 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 intercountry adoption (either generally or with a specific adoptive family), at least so 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 intercountry 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 intercountry 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 for adoption. It is ironic, however, that the United States, upon implementation of the Hague Convention, would actually be relaxing its standards for regulating intercountry 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 birth parents in such nations more control and choice over the adoption process. Since domestic birth 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 birth parents should also have such options, even in relation to intercountry 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

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

high legal ideals and elaborate legal procedures for intercountry adoption in foreign-sending nations does not guarantee the legitimacy and reliability of those processes.

C. *Intercountry Adoption Under the Law of India*

The laws, ideals, and procedures governing intercountry adoption in India, in terms of that nation's role as a country of origin or sending nation, are impressive.<sup>96</sup> These laws, principles, and procedures are generally consistent with the Hague Convention, even though India only recently ratified the Convention, which entered into force on October 1, 2003.<sup>97</sup> If the practices were consistent with these laws and ideals, then recurrent scandals such as have occurred in Andhra Pradesh would be impossible.

1. Role of the Indian Supreme Court

The key documents summarizing the ideals and laws of India regarding intercountry adoption are found in the Supreme Court of India's 1984 *Laxmi Kant Pandey v. Union of India*<sup>98</sup> opinion and subsequent Supreme Court opinions elaborating and applying the principles of the original *Pandey* decision.<sup>99</sup> The case arose through a generalized claim of abusive intercountry 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 intercountry 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, birth or adoptive, of the same gender.<sup>100</sup>

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<sup>96</sup> For useful overviews of Indian adoption law, and related issues, see ASHA BAJPAI, ADOPTION LAW AND JUSTICE TO THE CHILD (1996) [hereinafter BAJPAI, ADOPTION LAW]; ASHA BAJPAI, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE (2003) [hereinafter BAJPAI, CHILD RIGHTS].

<sup>97</sup> See *supra* note 17 and accompanying text.

<sup>98</sup> *Laxmi Kant Pandey v. Union of India*, (1984) 2 S.C.C. 244 (India).

<sup>99</sup> There are four pertinent subsequent decisions of the Supreme Court of India: *Laxmi Kant Pandey v. Union of India*, (1985) Supp. S.C.C. 701; (1987) 1 S.C.C. 66; (1990) 4 S.C.C. 531; Unreported Judgments 1991 549.

<sup>100</sup> Hindu Adoptions and Maintenance Act, No. 78, §§ 7, 8 & 11 (1956), available at <http://indiacode.nic.in/fullact1.asp?tfnm=195678> (last visited Feb. 5, 2005). 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, Jaina, or Sikh by religion." A person who is a "Muslim, Christian, Parsi, or Jew" is explicitly excluded



A proposed uniform law of adoption, applicable to all religious communities, had been introduced in 1972, but dropped due to opposition from the Muslim communities.<sup>101</sup> A similar law exempting Muslims from application had been introduced in 1980 but also failed to gain enactment.<sup>102</sup> 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.<sup>103</sup> This Act did not provide for adoption, but rather for guardianship lasting until the age of majority.<sup>104</sup>

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 intercountry adoptions. Instead, the Court embraced intercountry 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, "[e]very 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."<sup>105</sup>

The Court created a series of preferred outcomes for children, roughly as follows:<sup>106</sup>

- (1) Child with biological family;<sup>107</sup>
- (2) Child adopted within India;<sup>108</sup>
- (3) Child adopted out of country by Indians residing abroad;<sup>109</sup>
- (4) Child adopted out of country by "adoptive couples where at

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from the coverage of the Act. *See id.* § 2.

<sup>101</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 246.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at 263.

<sup>104</sup> Guardians and Wards Act, No. 8, § 41 (1890), available at <http://indiacode.nic.in/fullact1.asp?tfnm=189008> (last visited Feb. 5, 2005).

<sup>105</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 251.

<sup>106</sup> The Central Resource Adoption Agency also has incorporated this priority list in their guidelines on intercountry adoption. *See* CENT. ADOPTION RES. AGENCY, MINISTRY OF SOC. JUSTICE & EMPOWERMENT, INTER COUNTRY GUIDELINES § 4.5, at <http://www.cara.nic.in/carahome.html> (last visited Feb. 5, 2005) [hereinafter CARA GUIDELINES].

<sup>107</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 251.

<sup>108</sup> *Id.* at 252.

<sup>109</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 712-14.

least one parent is of Indian origin”;<sup>110</sup> and

(5) Child adopted out of country by person(s) who are not of Indian origin.<sup>111</sup>

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.”<sup>112</sup> 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.”<sup>113</sup> 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 socioeconomic 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.<sup>114</sup>

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.”<sup>115</sup> 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

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<sup>110</sup> *Id.* at 714.

<sup>111</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 252.

<sup>112</sup> *Id.*

<sup>113</sup> CRC, *supra* note 14, art. 20, para. 3, 28 I.L.M. at 1464.

<sup>114</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 252.

<sup>115</sup> *Id.*

and lack of sanitation . . . .”<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup>

## 2. Intercountry 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 intercountry 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.<sup>119</sup> The procedures and institutions for foreign adoption envisioned by the Supreme Court can be summarized as follows:

### a. Relinquishment of the Child by Birth Parents

Where the birth parents are known, they are to be counseled and told that if the child is adopted, they will have no further contact with the child.<sup>120</sup> There is to be no duress to coerce relinquishment of a child, and birth parents are given three months after relinquishment to change their minds and reclaim the child. In addition, birth parents are not permitted to make a decision regarding adoption “before the birth of the child or within a period

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 276.

<sup>118</sup> *Id.* at 266–67.

<sup>119</sup> *Id.* at 260–63.

<sup>120</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 268.

of three months from the date of birth.”<sup>121</sup> 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 biological 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 biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development.<sup>122</sup>

If the birth parents are not known, an effort must be made by the institution having care of the child to “try to trace the biological parents of the child.”<sup>123</sup> If the birth 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 birth parents.<sup>124</sup> The Court’s second *Laxmi Kant Pandey* opinion stated, 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.”<sup>125</sup>

b. Child Is Offered for Adoption to Prospective Indian Adoptive Parents: Proposal for Voluntary Coordinating Agencies

The Indian agency is required to make “every effort . . . to find placement for the child by adoption in an Indian family.”<sup>126</sup> 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

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<sup>121</sup> *Id.* at 268–69.

<sup>122</sup> *Id.* at 268.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 705.

<sup>126</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 271.

provide . . . .”<sup>127</sup>

The Supreme Court, in its second *Pandey* 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.<sup>128</sup> This concept was modeled after an experimental program in Bombay.<sup>129</sup> 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.<sup>130</sup>

c. The Central Adoption Resource Agency (CARA)

The Supreme Court proposed the creation of a Central Adoption Resource Agency:

[I]t 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.<sup>131</sup>

d. Agencies

i. Indian Agencies

The Supreme Court was quite clear that:

[I]t should not be open to any and every agency or individual to

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<sup>127</sup> *Id.* at 272.

<sup>128</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 713.

<sup>129</sup> *See id.*

<sup>130</sup> *Id.* at 714.

<sup>131</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 271.

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 . . . .<sup>132</sup>

Indeed, the Court specifically directed that the Government of India 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).<sup>133</sup> 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 . . . .”<sup>134</sup> The Court was concerned that recognizing agencies set up only for adoption would “degenerate into trading.”<sup>135</sup> 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.”<sup>136</sup> The Indian government was to send the list of recognized agencies to foreign governments and state courts.<sup>137</sup>

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

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<sup>132</sup> *Id.* at 269.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 270.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 269–70.

<sup>137</sup> *Id.* at 271.

child is proposed to be given in inter-country adoption.<sup>138</sup>

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.”<sup>139</sup> 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.”<sup>140</sup> The Court emphasized, in this regard, that the recognized agency was responsible for preparation of the child study report, including a medical report.<sup>141</sup> Thus, the Court rejected the use of recognized agencies as “a post office or conduit pipe for the benefit of an unrecognised agency.”<sup>142</sup>

The Indian agencies were given a variety of critical tasks, beyond the care of the children, including: (a) 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;<sup>143</sup> (b) 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;<sup>144</sup> and (c) prosecuting the guardianship petition in the local court.<sup>145</sup>

## ii. 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 birth to adoptive families, which the Indian Supreme Court, somewhat surprisingly, has permitted.<sup>146</sup> The Court further required the

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<sup>138</sup> *Id.* at 270.

<sup>139</sup> *Laxmi Kant Pandey*, (1987) 1 S.C.C. at 69.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 270–71.

<sup>144</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 703–04.

<sup>145</sup> *Id.* at 704.

<sup>146</sup> *See infra* Part I.C.4.

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 . . . .”<sup>147</sup>

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.”<sup>148</sup> 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.”<sup>149</sup> 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.<sup>150</sup>

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 biological child.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup>

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

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<sup>147</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 267.

<sup>148</sup> *Id.* at 265.

<sup>149</sup> *Id.* at 264.

<sup>150</sup> *See id.* at 267.

<sup>151</sup> *Id.* at 263.

<sup>152</sup> *Id.* at 265–66.

<sup>153</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 267.



overseeing the process to its culmination in a successful legal adoption.

e. Scrutiny

Scrutiny agencies were to assist the local court in evaluating whether “it would be in the interest of the child to be given in adoption to the foreign parents.”<sup>154</sup> A “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.”<sup>155</sup>

f. 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 1890 Act. The adoption would only go forward if the local court found the foreign adoption to be in the interests of the child.<sup>156</sup> 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.<sup>157</sup>

3. The Indian Supreme Court Addresses Money and Corruption

The Indian Supreme Court repeatedly expressed concerns about the possibility that foreign adoption could become a form of “profiteering and trafficking in children.”<sup>158</sup> The Court constructed a number of safeguards against these evils. First, as noted above, the Court forbade independent adoptions as a way of reducing occasions where a foreigner, “in his anxiety to secure a child for adoption,” could “be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the

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<sup>154</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 702.

<sup>155</sup> *Id.* at 702–03.

<sup>156</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 269–77; *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 702–04, 713–14.

<sup>157</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 263, 266, 277.

<sup>158</sup> *Id.* at 264, 270, 273.

agency . . . .”<sup>159</sup> This safeguard relies heavily on the integrity of foreign agencies as buffers against corruption. Second, the Court forbade representatives of foreign adoption agencies working in India from “scouting for children” or receiving children directly from birth parents, “in order to prevent taking of children from needy parents by offering them monetary inducement . . . .”<sup>160</sup> Third, the Court required that recognized Indian agencies “maintain proper accounts which shall be audited by a chartered accountant at the end of every year.”<sup>161</sup>

Fourth, the Court placed limits on the amount of money that Indian agencies could recover:

[T]he social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding 60 Rs per day [approximately \$1.25] (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child.<sup>162</sup>

The Court required such bills to be submitted to and paid by the foreign agency, presumably in the hope that such an intermediary role would guard against “profiteering.”<sup>163</sup>

The Court also permitted the Indian agency to recover a maximum of 4000 rupees (approximately \$90), to cover “legal expenses, administrative expenses, preparation of child study report, preparation of medical and I.Q. reports, passport and visa expenses and conveyance expenses . . . .”<sup>164</sup> The Court’s 1987 supplemental judgment raised this limit to 6000 rupees, based largely on increases in visa fees by the United States and other countries, and the “high fees charged by lawyers.”<sup>165</sup> The Court also stated that “surgical or medical expenses” are “recoverable . . . against production of bills or

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<sup>159</sup> *Id.* at 265; *see supra* text accompanying note 149.

<sup>160</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 707.

<sup>161</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 270.

<sup>162</sup> *Id.* at 273.

<sup>163</sup> *Id.*

<sup>164</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 711.

<sup>165</sup> *Laxmi Kant Pandey*, (1987) 1 S.C.C. at 75.

vouchers.”<sup>166</sup>

The Court regarded the various limits on adoption costs to be revisable by the Indian government.<sup>167</sup> CARA regulations as of 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.<sup>168</sup> 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.<sup>169</sup>

Fifth, 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.”<sup>170</sup> This requirement presumably was intended to preserve the “voluntary” nature of the “donation.”<sup>171</sup>

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. The Indian Supreme Court on Family-to-Family Adoption

The elaborate institutional apparatus for intercountry adoption created by the Supreme Court of India seems largely based on a distrust of Indian child welfare agencies. This is illustrated by the Court’s treatment of direct agreements between Indian birth parents and foreign adoptive parents. The Supreme Court stated in the first *Laxmi Kant Pandey* decision:

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children

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<sup>166</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 711.

<sup>167</sup> See *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 273.

<sup>168</sup> CARA GUIDELINES, *supra* note 106, § 4.38(ii).

<sup>169</sup> *Laxmi Kant Pandey*, (1985) Supp. S.C.C. at 710–11.

<sup>170</sup> *Laxmi Kant Pandey*, (1984) 2 S.C.C. at 273.

<sup>171</sup> *Id.*

sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare.<sup>172</sup>

Thus, virtually the entire edifice of procedural safeguards erected by the Indian Supreme Court for intercountry adoption is apparently inapplicable in instances where an Indian family hands a child directly over to a foreign family for purposes of adoption.

A recent case from the Supreme Court of India, *Smt. Anokha v. The State of Rajasthan*,<sup>173</sup> 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.”<sup>174</sup> 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.<sup>175</sup> The local court, however, rejected the guardianship petition because of the failure to adhere to the normal procedures for intercountry 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 central Indian government. The State High Court agreed with the local court.<sup>176</sup> The Supreme Court of India, however, citing language from the first *Pandey* decision and other precedents, held that the guardianship petition should be granted.<sup>177</sup>

The Supreme Court of India noted that the *Pandey* case had been initiated by a letter “complaining of mal-practices indulged in

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<sup>172</sup> *Id.* at 264.

<sup>173</sup> *Smt. Anokha v. State of Rajasthan*, 2003 SOL Case No. 809 (India), available at <http://www.supremecourtonline.com/cases/9192.html> (Feb. 5, 2005).

<sup>174</sup> *Id.* para. 2.

<sup>175</sup> *Id.* paras. 2–3.

<sup>176</sup> *Id.* paras. 5–6.

<sup>177</sup> *Id.* para. 17.

by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents.”<sup>178</sup> The implication was that the *Pandey* decision was inapplicable where Indian agencies were not involved in the transfer of the child from birth to adoptive family. The Court specifically quoted the language from *Pandey* stating that, where children were still living with their biological parents, the parents “would be the best persons to decide whether to give their children in adoption to foreign parents.”<sup>179</sup> 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.”<sup>180</sup>

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; and (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.<sup>181</sup> These reporting obligations terminated upon finalization of the adoption in Italy.<sup>182</sup> 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 birth families to unrelated foreigners. The economic imbalance between the hundreds of

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<sup>178</sup> *Id.* para. 8.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* para. 17.

<sup>182</sup> *Id.*

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 birth 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 dowries to marry, is obvious. “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 birth 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 birth 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 birth 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 intercountry 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.”<sup>183</sup> 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

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<sup>183</sup> *Id.* para. 15.

with often desperate poverty, that birth 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 birth 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 child.”<sup>184</sup> 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 intercountry 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 birth 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.<sup>185</sup>

Nevertheless, United States law does apparently allow a “sole or surviving parent . . . incapable of providing the proper care” to “in writing irrevocably release[] the child for emigration and adoption,”<sup>186</sup> even where the child is directly transferred from birth to

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<sup>184</sup> *Id.*

<sup>185</sup> See *supra* Part I.B.

<sup>186</sup> 8 U.S.C. § 1101(b)(1)(F)(i) (2000).

adoptive family. The issue in the *Anokha* case, however, would have been whether the mother was “incapable of providing the proper care,” meaning “that a sole or surviving parent is unable to provide for the child’s basic needs, consistent with the local standards of the *foreign sending country*.”<sup>187</sup> This question may have been fairly debatable both ways in *Anokha*. On the one hand, a poor widow in India left with five girls and one boy could appear to be in a very precarious position. On the other hand, the Indian Supreme Court opinion does not describe the financial situation of the family in any detail. It is possible that there was some provision for basic needs, or that some of the children were old enough to work and contribute to the family. Indeed, if the widow had been completely destitute, presumably she would have been forced into abandoning all of her children, not merely transferring one out of six to a foreign family.

As explained above, 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.<sup>188</sup> 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 intercountry adoption.<sup>189</sup> Although the Indian government may view local courts as a sufficient safeguard for intercountry adoption, in

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<sup>187</sup> 8 C.F.R. § 204.3(b) (2004).

<sup>188</sup> See *supra* Part I.B.

<sup>189</sup> The Hague Convention states:

There shall be no contact between the prospective adoptive parents and the child’s parents . . . until the requirements of Article 4, sub-paragraphs a to c, and Article 5, sub-paragraph a, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Hague Convention, *supra* note 15, art. 29, 32 I.L.M. at 1143.



family-to-family direct transfer cases, it seems likely that the Hague Convention would require a greater role for the central government.

##### 5. Institutional Development of the Indian System for Foreign Adoption

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 dated 9-5-1990."<sup>190</sup> CARA was designed to "deal with all matters concerning adoption," as "[i]n the Government of India all matters related to adoption shall be dealt within the Ministry of Welfare."<sup>191</sup> 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."<sup>192</sup>

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."<sup>193</sup> 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."<sup>194</sup> In addition, 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.<sup>195</sup> CARA also grants "enlistment of foreign agencies,"<sup>196</sup> and effectively determines

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<sup>190</sup> CARA GUIDELINES, *supra* note 106, § 2.1.

<sup>191</sup> *Id.*

<sup>192</sup> CENT. ADOPTION RES. AGENCY, MINISTRY OF SOC. JUSTICE & EMPOWERMENT, ABOUT CENTRAL ADOPTION RESOURCE AGENCY, at <http://www.cara.nic.in/carahome.html> (last visited Feb. 5, 2005).

<sup>193</sup> CARA GUIDELINES, *supra* note 106, § 5.2.

<sup>194</sup> *Id.* § 5.4(b).

<sup>195</sup> *Id.* § 5.4(i).

<sup>196</sup> *Id.* § 6.2.

which foreign agencies may sponsor “applications of foreign adoptive parents for adopting an Indian child.”<sup>197</sup> Both foreign agencies and Indian agencies should be run “on a non-commercial, non-profitable basis.”<sup>198</sup>

CARA approves all foreign adoptions, as its regulations require the recognized Indian agency to “apply to CARA for getting a clearance for the child.”<sup>199</sup> Approvals by CARA of specific placements are called “No Objection Certificates” (“NOC”).<sup>200</sup> 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.<sup>201</sup>

In addition, CARA guidelines implement the Supreme Court’s directions for Voluntary Coordinating Agencies (“VCA”).<sup>202</sup> 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.<sup>203</sup> 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 . . . .”<sup>204</sup> 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.”<sup>205</sup> 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.<sup>206</sup> Scrutinising agencies “should not be involved in the placement of children in adoption.”<sup>207</sup>

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<sup>197</sup> *Id.* § 6.3(i).

<sup>198</sup> *Id.* §§ 5.4(f) & 6.2(iii).

<sup>199</sup> *Id.* § 2.14.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* § 2.18.

<sup>202</sup> *See id.* § 7.1.

<sup>203</sup> *See id.* § 7.1(f).

<sup>204</sup> *Id.* § 7.4.

<sup>205</sup> *See id.* § 8.1.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* § 8.3(iii).

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.”<sup>208</sup> 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.<sup>209</sup>

Although CARA plays a comprehensive regulatory role in relation to the other actors in Indian adoption, CARA has not fulfilled the Supreme Court’s expressed wish that it match prospective adoptive parents with Indian agencies and available children. 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.<sup>210</sup> 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 center of the system and would only have avoided corruption if CARA itself had proven incorruptible.

#### 6. Analysis of the Indian Adoption System

The most obvious feature of the Indian system for foreign adoptions is its bureaucratic layering of multiple institutions that must approve each adoption. Within this system, CARA not only approves each foreign adoption, but also approves the Indian agency, foreign agency, VCA, and scrutinising agency involved in each adoption. A foreign adoption usually only proceeds when all of these entities—Indian agency, foreign agency, CARA, VCA, scrutinising agency, and local court—in some manner approve the adoption. In

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<sup>208</sup> *Id.* § 8.5(7).

<sup>209</sup> *Id.* § 8.8 (between 450 and 500 rupees for foreign agencies and 150 rupees for domestic adoption).

<sup>210</sup> *See* Laxmi Kant Pandey v. Union of India, (1984) 2 S.C.C.244, 271.

addition, it would also be necessary to procure traveling permissions from immigration authorities. The Indian government has thus added multiple layers of regulation to the basic procedures, under the Guardians and Wards Act of 1890, under which a local court reviews a guardianship petition. These multiple layers of review often appear duplicative; for example, VCAs exist to ensure efforts to place a child within India, but the issuance of an approval (NOC) by the VCA is then subsequently reviewed by CARA, the scrutinising agency, and the local court. Does it really take three entities to determine whether a prior entity approved an adoption?

The tendency towards bureaucracy and multiple layers of approval may be typical of the way that the Indian government has traditionally functioned, particularly prior to recent liberalization of the economy. While such a scheme may appear to provide multiple layers of safeguards against abuses in adoption, in the context of Indian society it may instead simply provide multiple layers of corruption. Asha Bajpai, an Indian family law teacher writing about adoption in India, commented:

The procedures involved in inter-country adoption are too complicated. Though the intention is to screen the genuine cases the procedures give rise to a lot of bureaucracy. . . . Bureaucratic controls, are too complex and hence there is a tendency towards violations. Since checks and balances are done by Government officials there is a likelihood of a lot of corruption.<sup>211</sup>

By creating a system where multiple institutions must approve each adoption, within the context of a system often suffering from corruption through bribery and personal connections, safeguards can instead become opportunities for abuse. The system of adoption can become one where, in order to get an adoption through the system, an individual has to either have certain personal connections, or else be willing to “grease palms.” Once it becomes apparent that approvals are based on such personal connections or monetary inducements, incentives to follow the rules may disappear.

These possible difficulties with corruption are exacerbated by the introduction of foreign money into the system. The per capita income within the United States is \$35,060, while that of India is \$480.<sup>212</sup> A computer programmer working in the burgeoning

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<sup>211</sup> BAJPAI, ADOPTION LAW, *supra* note 96, at 170.

<sup>212</sup> Daniel H. Pink, *The New Face of the Silicon Age: How India Became the Capital of the Computing Revolution*, WIRE, Feb. 2004, at 7, available at <http://www.wired.com>

computer industries of Hyderabad, India, could expect to earn around \$8000 annually, while a project manager might raise that figure to \$11,000.<sup>213</sup> Thus, amounts of money that might seem insignificant to American adoptive parents could be enormously corrupting in India.

Some might argue that the use of bribes or personal connections to secure necessary approvals for adoptions within a society where such behavior is common does not necessarily distort the adoption system. After all, within India it may sometimes be the case that a government official or agency personnel will demand extra payment for providing an entirely proper approval or service. Such requests may be common within a system where persons with authority seek extra payments for performing their normal tasks as a means of supplementing their salary. "Greasing" a system may simply cause it to perform its assigned task somewhat more quickly than would otherwise be the case. Given the importance of time in the life of a child, and the negative effects upon the child's welfare of delays in the adoption process, some might argue that "greasing" the system by whatever means are available is ethically defensible. An adoption under such conditions, it could be argued, still accomplishes the fundamental good of placing an orphan within a suitable family. Others would argue that an otherwise proper adoption involving illicit payments to government actors or agencies could be characterized as a kind of trafficking in children, and thus fundamentally unethical.

The corrupting power of money, however, goes far beyond the question of whether bribery *ipso facto* converts adoption into "baby-selling" or trafficking. Money not only speeds up the system, but also alters its fundamental workings. The availability of large amounts of foreign money for foreign adoption can systematically tilt the system, at every stage, toward intercountry adoption. The presence of money can subvert the fundamental principles of intercountry adoption, which favor the maintenance of the child within the birth family, where feasible, and favor in-country adoptive placement over intercountry adoption. Because foreign money is available, Indian agencies may be transformed from social welfare organizations assisting families and orphans to foreign adoption profiteers scouting the countryside for children. Instead of offering counseling, services,

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</wired/archive/12.02/india.html> (last visited Feb. 5, 2005).

<sup>213</sup> *Id.* at 1, 7.

or help designed to allow a child to remain within her birth family, agencies will systematically offer money to birth parents to induce relinquishment. Agencies will thus go into the business of deliberately producing “paper” orphans, who when placed in foreign adoption become an immensely profitable product. Similarly, obstacles to in-country adoption will be systematically constructed when proportionately huge amounts of money can be made for foreign placements. Agencies will prefer to place a child out-of-country and receive literally thousands of dollars—a year’s salary for a middle class Indian—rather than place the child in-country and receive less than \$100.<sup>214</sup> Thus, money subverts the basic principles of the CRC, Hague Convention, and Indian law.

The combination of a system where permissions/approvals are commonly based on money or personal connections, with a large monetary incentive toward foreign adoptions, can lead to a systematically corrupt adoption system. Money is used to procure approvals and false paperwork in questionable cases, not merely to speed proper approvals. And within such a system, it can become virtually impossible to tell which adoptions were legitimate, and which were not, as the system may operate in largely the same way for both. Both involve the use of personal connections or bribery for approvals, and both involve disproportionately large monetary incentives toward intercountry adoption. The question of whether children really were orphans needing a home, or could have been placed in-country, can be obscured in a system already corrupted by the power of money and personal connections.

Given the differential economic scales between the United States (and other receiving countries) and India, even the modest sums which the Indian government permits Indian agencies to recover for foreign adoptions could be corrupting. The limits of \$2.25 per day and \$225 reimbursement for expenses<sup>215</sup> are still substantially greater than what is available for in-country placements, and could in themselves tilt the system away from its principles disfavoring foreign placements. On the other hand, it could be argued that there are unique costs applicable to foreign adoption that justify these higher reimbursements. At present, however, the higher reimbursement

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<sup>214</sup> See FRANCIS ABBOTT, MY GIFTS FROM INDIA 49 (2003) (noting that Indian agencies receive \$12 to \$25 per domestic adoption, as compared to \$2500 to \$5000 per intercountry adoption, creating incentive for illegal conduct).

<sup>215</sup> See *supra* note 168.

schedules for foreign adoption is insignificant compared to the other sources of foreign money that are coming into the system. One obvious source is the permission under Indian law for “voluntary donations.” The Supreme Court of India had specified that such sums were not to be paid until the child had traveled to the foreign country.<sup>216</sup> In practice, it appears that such fees have provided a loophole by which to completely bypass the attempts under Indian law to limit the impact of foreign money on the adoption process.

It has become commonplace for United States placement agencies, who deal directly with American parents, to charge foreign fees that are far higher than the maximum reimbursements. Thus, while according to CARA regulations one would expect foreign fees of substantially less than \$1000, it is far more common for such fees to fall within a range of \$6500 to \$12,500.<sup>217</sup> One justification for such “foreign fees” lies in part in the concept of “voluntary donations.” The difficulty, of course, is that a listed or required “donation” is not truly “voluntary.” Other difficulties flow from the failure of United States placement agencies to break down their foreign fees. The agencies may view some of those foreign or Indian fees as covering matters beyond the regulations of the Indian government, such as the costs United States agencies incur in operating a program in another country. It is not clear how much of this money is paid to the Indian agencies in question, although estimates from the Andhra Pradesh scandal indicate that Indian agencies there were receiving between \$2000 and \$7000 per intercountry adoption.<sup>218</sup> In addition, it is often unclear whether “donation” money actually goes to improve the orphanages in question, or simply enriches particular individuals. These uncertainties make it very difficult to determine up front whether United States agencies are operating in literal conformity to Indian law, but also make it obvious that the behavior of United States

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<sup>216</sup> See *supra* notes 170–71 and accompanying text.

<sup>217</sup> The author has collected the advertised fees of a number of United States placement agencies for adoptions in India; a summary and substantiating documentation is on file with the author.

<sup>218</sup> See ABBOTT, *supra* note 214, at 49 (\$2500 to \$5000); Ravi Sharma, *A Business in Babies*, FRONTLINE (Apr. 28–May 11, 2001) (reporting that Indian agencies admit to receiving at least \$3000 per baby, plus “liberal donations” and claiming that Indian agencies actual obtaining \$7000 per baby and receive money abroad), at <http://www.frontlineonnet.com/fl1809/18090460.htm> (last visited Feb. 5, 2005); Shireen, *Hyderabad Cops Unearth Another Child Trafficking Racket* (Mar. 31, 1999), at <http://www.rediff.com/news/1994/mar/31ap.htm> (\$2000 to \$3000).

agencies can create the incentive and opportunity to violate the letter and spirit of the law.<sup>219</sup>

Of course, beyond the issue of listed fees lies the possibility that foreign personnel are making covert payments to Indian agencies. Even modest payments by United States agencies to foreign agencies or others could be highly influential in securing the desired result: quick access to “legally” adoptable children. This danger is exacerbated by the custom some United States agencies may have of paying country coordinators a “per case” fee, turning such coordinators into economic free agencies. Thus, if a United States country coordinator were to “kick back” a modest portion of his or her own fee to an individual in India, it could be highly persuasive in securing favorable access to adoptable children.

One might compare intercountry adoption between the United States and a developing nation like India to the problem the United States faces sharing a border with a developing nation like Mexico. The economic lure of the United States makes even substantial enforcement efforts entirely inadequate to the task of policing the border between the United States and Mexico. In the context of adoption, however, while enforcement efforts have been historically quite lax the economic lure of violating the law is equally attractive.

## II. THE STORY OF THE ANDHRA PRADESH ADOPTION SCANDALS

### A. *Questions and Perspectives*

The story of the Andhra Pradesh adoption scandals is difficult to tell in large part because so many of the facts remain subject to significant dispute. In addition, the various actors in the story—United States adoption agencies, adoptive parents, older adoptees, Indian agencies and persons subject to investigation and legal action, Indian social justice activists, and various United States and Indian government officials—would likely tell the story in vastly different ways.

At the heart of the scandals are claims of a systematic criminal conspiracy to obtain illicit profits from intercountry adoption.<sup>220</sup> This conspiracy would subvert the governing legal standards for intercountry adoption at every turn. Instead of making reasonable

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<sup>219</sup> See *supra* note 217.

<sup>220</sup> See Ramaswamy, *supra* note 12.



efforts to keep children with their birth families, scouts would approach families and employ various means, including (but not limited to) the buying of children, to induce families to relinquish their children.<sup>221</sup> Documents necessary to the processing of intercountry adoption, including relinquishments, identity papers and child study forms, refusals to adopt by prospective Indian adoptive parents, and death certificates of parents would be fabricated, falsified, or obtained under false pretenses.<sup>222</sup> Prospective Indian adoptive parents would be pushed aside in favor of foreign adoptive parents.<sup>223</sup> Indian legal principles requiring fees to be limited and “donations” to be voluntarily given after the child leaves India would be subverted by the requiring of fees and payments to Indian agencies and individuals far in excess of legal standards, and vastly disproportionate to normal pay scales for such work in India. The conspiracy, in short, would amount to buying Indian children for a pittance from impoverished and vulnerable Indian birth families, and selling them for a fortune (in Indian terms) to foreign adoptive families.<sup>224</sup>

There has never been a comprehensive investigation by Indian or United States authorities as to the accuracy of such charges. As we shall see, however, at various points in time government actors have given the charges substantial credence and acted, at least temporarily, as though the charges were true. The failure of a systematic accounting of the accuracy or extent of the scandal has enabled differently situated actors to tell the story in vastly different ways.

Apologists for intercountry adoption, including some United States agencies, Indian agencies, and foreign adoptive parents, might respond to the claims of a systematic criminal conspiracy as follows: It is true that one or two of the Indian orphanages were sloppy in their paperwork and may even have illegally acquired children for adoption. It is true that some of these individuals were “in it for the money.” It is probably also true that some poor birth parents were

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<sup>221</sup> See generally WOMEN DEV. & CHILD WELFARE DEP'T, GOV'T OF ANDHRA PRADESH, ACTION TAKEN REPORT ON ADOPTION, at <http://www.reachouthyderabad.com/newsmaker/bs21.htm> (May 2001) [hereinafter ANDHRA PRADESH, ACTION TAKEN REPORT].

<sup>222</sup> Ramaswamy, *supra* note 12.

<sup>223</sup> See Sharma, *supra* note 218.

<sup>224</sup> See Gita Ramaswamy & Bhangya Bhukya, *The Lambadas: A Community Besieged: A Study on the Relinquishment of Lambada Girl Babies in South Telangana*, 4-5 (2001) (on file with author).

paid some money. However, India has literally millions of children in need of adoption due to abandonment, poverty, the shame associated culturally with illegitimate birth, and cultural discrimination against female children. Indeed, female infanticide is prevalent in India.<sup>225</sup> In some instances, the female children who were “bought” for modest sums would otherwise have been victims of female infanticide.<sup>226</sup> In other cases, the modest funds provided to birth families could be seen as an act of charity. In any event, the need for intercountry adoption is clearly great. In addition, adoption has not yet attained broad cultural acceptance in India, and the cultural burdens of raising a girl in India make it particularly unlikely that one could place female children within the country. There simply are not adequate in-country adoptive families to meet the needs of India’s children. It is true, of course, that there is a great deal of corruption in India,<sup>227</sup> and therefore it is inevitable that some bribery and corruption is involved in processing adoption cases. However, the cultural predominance of corruption in India is no reason to leave Indian children to suffer from infanticide, abandonment, starvation, living in the streets, being raised under horrific conditions in institutions, or other such fates.<sup>228</sup>

Apologists for adoption from India may also assert that the scandal was politicized and exaggerated by Indian activists opposed to international adoption. Many such apologists believe that some of the Indian orphanages implicated at later stages of the scandal were wrongly accused, or guilty only of the kinds of corruption necessary to accomplish the job of saving children within a society where corruption and bribery are ubiquitous.

The specific factual disputes implicated by the conflicting views of the scandals are as follows: (1) Did the wrongdoing encompass

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<sup>225</sup> See *Glaring Gender Bias in Sale of Infants*, THE HINDU, Apr. 3, 1999, available at LEXIS, News Library [hereinafter *Gender Bias*]. For statistics on the millions of missing females in India, generally viewed as an effect, in part, of female infanticide, see *infra* text accompanying note 354.

<sup>226</sup> See *Gender Bias*, *supra* note 225; *Selling Infants*, THE HINDU, Apr. 11, 1999 (offering the statement of the accused, Peter Subbaiah, “We are giving them a new lease of life. They would have otherwise become victims of female infanticide. We provide them with all the comforts and ensure a better life.”), available at LEXIS, News Library.

<sup>227</sup> See generally Raymond Bonner, *In India, a Battle over Adoptions*, INT’L HERALD TRIB., June 24, 2003, at 1, available at LEXIS, News Library.

<sup>228</sup> See Shabnam Minwalla, *Insensitive System Consigns Children to Life in Bleak Institutions*, THE TIMES OF INDIA, Feb. 4, 2001, available at LEXIS, News Library.

most or all of the Indian orphanages and agencies placing children for intercountry adoption, or did it only involve one or two? (2) What percentage of the children being placed in intercountry adoption needed a family, and what percentage were “made orphans” for the purposes of profiting from adoption, but otherwise would have remained within their birth families? (3) What percentage of the children placed in intercountry adoption could have been placed for adoption within India, if the proper efforts toward in-country adoption had been made? (4) How many children’s lives were lost due to the placement of children in institutions, and how many lives were saved from infanticide?

Alongside of these factual questions rests a difficult ethical dilemma, which can be described as the problem of the “second choice.” Most would agree that the “first choice” for a system of intercountry adoption would embrace the ideals, principles, and laws that can be harmonized from international, Indian, and American law. Such rules would guarantee that: (1) relinquishments were voluntary, and not induced or coerced; (2) reasonable efforts were made to keep children with their birth families; (3) in-country adoption was favored over intercountry adoption; (4) profiteering from adoption was eliminated; (5) decisions were made without regard to bribery or corruption. It appears to many, however, that these broadly embraced principles are simply not attainable in many of the sending countries, such as India, Cambodia, and Guatemala. The issue then becomes one’s fall-back position, or second-choice. Many adoptive parents and agency personnel insist that the intercountry adoption system must be kept open and functioning despite even pervasive corruption violative of the fundamental principles of intercountry adoption. They argue that the good of saving or helping individual children is the preeminent good, to be prioritized above all other norms implicated by adoption. On this basis, shutdowns of individual countries are always opposed, and indeed any reforms that would slow down the processing of intercountry adoptions are found wanting. The “second” choice of much of the intercountry adoption world, in short, is a corrupt system that continues to process adoptions, rather than a shutdown or slowdown of the current system. By contrast, some would argue that if the fundamental principles that ethically validate intercountry adoption cannot be implemented, then the second-choice is to shut down or significantly slow down the current system. They argue that the harms that a corrupt adoption system causes to children, birth

families, and adoptive families outweigh the good of ensuring the placement of individual children overseas.<sup>229</sup>

The factual and values questions understandably become intertwined whenever there is an adoption scandal. Those whose second choice is a corrupt adoption system will, of course, factually tend to minimize the scope and seriousness of the corruption involved. In the end, however, it would seem that many would prefer a functioning and highly corrupt intercountry adoption system to a shutdown. By contrast, those who perceive possible harms in even a cleanly run intercountry adoption are likely to seize upon any evidence of illegality as confirmation that the intercountry adoption system is pervasively corrupt and needs to be shut down.

Beneath the conflict over the best second-choice lie ideological differences. Ideologically, there are divisions over the desirability of intercountry adoption that parallel, to some degree, the debate within the United States over the placement of African-American children in white families. For example, some—including adult adoptees—are beginning to voice concerns about placing Asian children in white families. Concerns are raised that Asian children lose, or seek to suppress, their own Asian identities in the process of adapting to their adoptive, white families.<sup>230</sup> Others express concern that intercountry adoption is another form of exploitation of poor or vulnerable nations by rich nations, comparable to colonialism, or exploitative forms of child trafficking. From these ideological perspectives, intercountry adoption is suspect at best. By contrast, others perceive adoption generally as a kind of “pro-life” good, and interracial or intercountry adoption as a way of practicing a positive form of diversity. Thus, both “conservative” and “liberal” political values can lead to a generally positive ideological evaluation of intercountry adoption.

Another set of ideological issues, with parallel versions under various political and religious perspectives, will also impact the choice of the second-best. For many individuals of various political and religious perspectives, removing a child from a society can be justified

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<sup>229</sup> Bonner, *supra* note 10, at A3.

<sup>230</sup> Adult Korean adoptees have been active in sharing their concerns and experience. See *AFTER THE MORNING CALM: REFLECTIONS OF KOREAN ADOPTees* (Dr. Sook Wilkinson & Nancy Fox eds., 2002); KATY ROBINSON, *A SINGLE SQUARE PICTURE: A KOREAN ADOPTEE'S SEARCH FOR HER ROOTS* (2002); *SEEDS FROM A SILENT TREE: AN ANTHOLOGY BY KOREAN ADOPTees* (Tonya Bishoff & Jo Rankin eds., 1997); JANE JEONG TRENKA, *THE LANGUAGE OF BLOOD* (2003).

based on the propensity of that society to harm the child, due to the child's gender, caste, socioeconomic status, religion, or race. For example, both conservatives and liberals are shocked by the manner in which females in many societies suffer intense forms of discrimination, limitation, and perceived denigration literally from the womb to the grave. Gender-selective abortion, female infanticide, and the gender-based denial of an education merely lead the list of well-publicized harms against girls in various non-Western societies. Generally "liberal and tolerant" individuals in rich, Western societies may be loathe to leave, or return, a female child to her fate within those societies, and thus see intercountry adoption as a compelling good, for it places the female child within a society where she can realize her potential. Similarly, for some evangelical or fundamentalist Christians, removing a child from an overwhelmingly non-Christian culture into a Christian home may be a compelling spiritual good, for it can lead to the child's eternal salvation. These views, whether secular or religious, liberal or conservative, are problematic because they can virtually justify taking any child from his or her family, culture, nation, and people in order to achieve some greater secular or religious salvation. Such views tend to be whispered, rather than shouted, because while they include some high ideals, they explicitly or implicitly involve sweeping denunciations of entire cultures, nations, peoples, and religions.

The ways in which individuals characteristically think or solve problems also may impact the analysis of the second-best. The difference parallels that between a public health or economics approach, which concentrates on global, demographic, and statistical effects, and that of a physician or social worker, who may concentrate on helping one individual or family at a time. Those who characteristically analyze systemic effects will tend to perceive a corrupt adoption system as a self-perpetuating process, and will want to determine whether the system as a whole, if allowed to continue, will do more harm than good.<sup>231</sup> Those who concentrate on the individual will see the good of intervening to "save" an individual child, or each individual child, as paramount, without even calculating the total impact of the system as a whole over time.<sup>232</sup> The

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<sup>231</sup> See Gregory Katz, *No Place to Call Home: Baby Trafficking, Backlash Derail Dreams of Better Life for Orphans*, DALLAS MORNING NEWS, Mar. 21, 2004, at 1A, available at LEXIS, News Library.

<sup>232</sup> See *id.*

possibility of leaving a child to his or her fate, in order to stop a corrupt system from operating, will seem highly immoral to some even if the system is in fact harming many children.<sup>233</sup>

*B. Chronological Narrative of the Andhra Pradesh Adoption Scandals*

The Andhra Pradesh adoption scandals can be presented as a chronology of increasingly serious, cyclical adoption scandals. Although it is possible to begin the story earlier, it is convenient to begin with the events of 1995–1996. During that period a particular individual working in the United States embassy in Madras (now called Chennai), began to hold up intercountry adoptions based on suspicions of irregularities. The suspicions centered around an orphanage called Action for Social Development (“ASD”), run by Sanjeeva Rao. Prospective adoptive parents generally responded by continuing to seek the adoption and emigration of “their children.” It appears that eventually the children whose adoptions had been held up by the American embassy were granted visas and allowed to travel to the United States. Some children were transferred away from ASD to other orphanages due to the allegations.<sup>234</sup>

The next phase of the scandal broke in March and April of 1999, and once again involved Sanjeeva Rao and his orphanage, ASD.<sup>235</sup> This time, another individual, Peter Subbaiah, who ran the Good Samaritan Evangelical and Social Welfare Association, was also implicated.<sup>236</sup> The primary accusation concerned buying babies from a tribal group called the Lambada. The Lambada were a traditionally nomadic people, now settled into hamlets (called tandas) and surviving primarily through subsistence farming and farm labor, often under conditions of severe poverty. The Lambada had previously practiced the custom of a bride price, but had adopted the culturally predominant Indian dowry system, which requires the family of the bride to pay a substantial sum to the groom’s family in order to arrange her marriage.<sup>237</sup> In addition, the Lambada were said to believe that the third, sixth, and ninth child was, if a girl,

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<sup>233</sup> See *id.*

<sup>234</sup> My account of the 1995–96 scandal is based on discussions with prospective adoptive parents and agency personnel. This scandal does not appear to have been extensively covered in either the Indian or the foreign press.

<sup>235</sup> Shireen, *supra* note 218.

<sup>236</sup> *Selling Infants*, *supra* note 226.

<sup>237</sup> See *Gender Bias*, *supra* note 225; Ramaswamy & Bhukya, *supra* note 224, at 23–26.

“inauspicious.”<sup>238</sup> They were allegedly prone both to female infanticide, and also to selling, for very modest sums, some of their female infants.<sup>239</sup> Press accounts in India referred to their “fair complexion” as making them more attractive to foreign parents,<sup>240</sup> although it is not clear whether this reflected Indian, rather than American, prejudices.<sup>241</sup>

The 1999 scandals began with the arrest of two women who were alleged to be acting as scouts or intermediaries in the purchase of children.<sup>242</sup> Although some reports styled these women as “social workers,”<sup>243</sup> they were charged with buying Lambada infants for relatively small sums (\$15 to \$45), and then receiving significantly larger sums (\$220 to \$440) from the orphanages for the children.<sup>244</sup> Press reports indicated that the orphanages received \$2000 to \$3000 for each child placed in intercountry adoption.<sup>245</sup>

As a result of the 1999 scandals, Sanjeeva Rao and Peter Subbaiah were arrested and placed in prison. The government conducted dramatic raids to “rescue” the children from the

<sup>238</sup> Azizur Rahman, *Girls Pay Price of Being Born Poor*, SYDNEY MORNING HERALD, May 7, 2001, available at 2001 WL 18183443.

<sup>239</sup> See, e.g., *Gender Bias*, *supra* note 225.

<sup>240</sup> *Selling Infants*, *supra* note 226.

<sup>241</sup> Indian sources clearly consider dark-complexioned children more difficult to place. For example, the Andhra Pradesh High Court noted, without embarrassment, that Indian parents rejected children for adoption who were reportedly “black in complexion.” *John Clements v. All Concerned*, (2003) 4 ANDHRA LAW TIMES 644, para. 35. (Andhra Pradesh H.C.) (on file with author). The court was concerned with fraud—that prospective Indian parents were shown a sick and dark-skinned child whom they would reject, and then that paperwork was attached to a different, more desirable child. *Id.* The court did not seem to criticize the desire of Indian parents for light-skinned children. Similarly, the CARA Web site currently describes the special needs of one child as “[d]ark complexion squint eyes.” CENT. ADOPTION RES. AGENCY, MINISTRY OF SOC. JUSTICE & EMPOWERMENT, LIST OF SPECIAL NEEDS CHILDREN LEGALLY FREE FOR ADOPTION, at <http://www.cara.nic.in/carahome.html> (last visited Feb. 5, 2005). Although many Americans interested in adopting children from India may not be concerned with complexion, this may not be universal. I recall one United States adoption agency which, in trying to persuade me to accept a certain referral from India, pointed out the light complexion of the child as a desirable characteristic. For various reasons (including my unease with the agency), we declined that referral.

<sup>242</sup> See T. Sunil Reddy, *Rescued Children Fight Diseases, Face a Future of Uncertainty*, INDIA EXPRESS, Apr. 5, 1999, available at <http://www.indianexpress.com/ie/daily/19990405/ige03066.html> (last visited Feb. 5, 2005).

<sup>243</sup> See, e.g., *id.*; *Selling Infants*, *supra* note 226.

<sup>244</sup> See Reddy, *supra* note 242 (author’s conversion of rupees to dollars).

<sup>245</sup> Shireen, *supra* note 218.

orphanages, taking 172 children from Rao's orphanage and 56 from Subbaiah's orphanage, the vast majority from each being female.<sup>246</sup> The "rescue" of these children turned into a fiasco. It is reported that ten children died shortly after being moved into government care.<sup>247</sup> While some claimed the children died from preexisting conditions, others indicated that the fault was the government's. Some suggested that the parade of government officials "visiting" the children had been a source of disease and infection.<sup>248</sup> Efforts to reunite the children with their birth parents were generally unsuccessful, and it appeared that the Lambada parents generally did not want their children back.<sup>249</sup> The government investigation allegedly revealed that most of the relinquishment documents were forged, with the signatures provided by thumb impressions of office attendants. The documents were alleged to be generally fraudulent in regard to the identities and original locations of the children.<sup>250</sup>

The scandal caused a severe temporary slowdown of adoptions from Andhra Pradesh, but eventually the flow of adoptions from the state resumed. Sanjeeva Rao and Peter Subbiah were released from prison, apparently without ever being formally tried. Rao eventually was able to reopen his orphanage.<sup>251</sup> Scouts resumed buying children among the Lambada, although perhaps working with somewhat more discretion. By the spring of 2000, a year after the scandal, there was a press report that the Lambadas were still selling their infants to "the same people who purchased children last year."<sup>252</sup> Government help

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<sup>246</sup> Reddy, *supra* note 242.

<sup>247</sup> *Another Child Dies in Hospital*, THE STATESMAN (India), Apr. 6, 1999, available at LEXIS, News Library; *Three Infants Die, Three More Critical*, THE HINDU, Apr. 3, 1999, available at LEXIS, News Library; *Three Rescued Babies Die in Hyderabad*, THE STATESMAN (India), Apr. 2, 1999, available at LEXIS, News Library; see also *Infants Rescued from Illegal Creches Face Uncertain Future*, THE HINDU, Apr. 17, 1999 (reporting the death of nine rescued children), available at LEXIS, News Library.

<sup>248</sup> See *Infants Rescued from Illegal Creches Face Uncertain Future*, *supra* note 247; Reddy, *supra* note 242; *Selling Infants*, *supra* note 226; *Three Infants Die, Three More Critical*, *supra* note 247.

<sup>249</sup> See Sharma, *supra* note 218.

<sup>250</sup> *Id.*; Charge Sheet in CR. No. 89/1999, at 3 (IX Metropolitan Magis. Ct., Hyderabad 1999) (on file with the author).

<sup>251</sup> *Orphanage Director Held, CID Begins Probe*, THE TRIBUNE (India), Apr. 24, 2001, available at <http://tribuneindia.com/2001/20010424/main5.htm> (last visited Jan. 9, 2005); see generally W. Chandrakanth, *Adoption Starts from the Womb*, THE HINDU, Apr. 28, 2001, available at LEXIS, News Library.

<sup>252</sup> S. Gopinath Reddy, *Year After Scandal, Andhra Villagers Begin Selling Children Again*, INDIAN EXPRESS, May 1, 2000, available at <http://www.indianexpress.com/ie/daily/20000501/ina01059.html> (last visited Feb. 5, 2005).



to ease the desperate plight of the Lambada apparently never appeared.

A number of orphanages operating in 1999 had been left untouched by the scandal. These included a Roman Catholic orphanage, Tender Loving Care (“TLC”), run by an Indian nun, Sister Maria Theresa; an evangelical Christian orphanage, John Abraham Bethany Memorial, operated by a Christian couple, Mahender and Savitri Kumar; another Christian orphanage, Precious Moments, operated by Anita Sen, wife of a Director General of Police; and a Hindu orphanage, Guild of Service. Many foreign agencies chose to continue working in Andhra Pradesh, or even to open new programs there, apparently based on the relatively quick and successful processing of cases there. For example, in December 2000 a large Canadian adoption agency, Children of the World, announced that it had reached an understanding with two orphanages in Andhra Pradesh, apparently including the Bethany orphanage. A four member Canadian delegation visited India, the delegation including one Indo-Canadian. A Canadian government official commented that the two orphanages had been investigated to ensure “there is no trafficking of children and it is not a profit-making organization as our ethics are very strict.” The Canadian official noted their demand for a “strict code of ethics,” and their satisfaction that, “[t]he way they adopt children in India is pretty strict for us.”<sup>253</sup>

About three months later, in late March and early April 2001, a new adoption scandal flared up in Andhra Pradesh. The scandal began with the March 22, 2001, arrest of Christopher Vinod, who was traveling by car with three infants.<sup>254</sup> The case also involved the adjoining State of Karnataka, located to the west of Andhra Pradesh. A large number of Lambada had settled in a poverty-stricken area that lay along the Andhra Pradesh–Karnataka border, and Vinod identified two of the children with him as having come from the Karnataka side of the border. Vinod implicated Sister Maria Teresa’s TLC orphanage, as well as the Bethany orphanage, in a scheme of purchasing infants from the Lambada for placement in intercountry

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<sup>253</sup> Ajit Jain, *Canadian Agency to Adopt Indian Orphans*, at <http://newsarchives.indiainfo.com/2000/12/20/20orphanage.html> (Dec. 20, 2000). For the aftermath, discussed *infra*, see *Quebec Halts Adoptions from India* (CBC news broadcast, May 5, 2001).

<sup>254</sup> Sharma, *supra* note 218.

adoption.<sup>255</sup> It appeared that a split had arisen among various groups involved in these practices, in part arising from the divorce of the Kumars, who had operated the Bethany orphanage. Savitri Kumar retained the orphanage, while her ex-husband, Mahender, allegedly was working with Peter Subbiah and/or Sanjeeva Rao. Some claimed that a rivalry between the two groups caused the arrests. The immediate results, however, were apparently dramatic for both groups.<sup>256</sup>

On April 6, government authorities came to arrest Savitri. She reportedly told them that she was going to offer prayers, and then slipped out a back door.<sup>257</sup> Charges were filed against her, and the government issued increasingly large rewards for information leading to her capture. Police raided her orphanage, and “rescued” sixty children, moving them to government orphanages and hospitals.<sup>258</sup> Sensational charges developed from a report that one of the children was missing corneas from both eyes, leading to speculation they had been harvested from the child for sale.<sup>259</sup> Lurid reports of graveyards of dead babies also emerged,<sup>260</sup> along with related claims that Savitri had altered identities of infants, taking the identities of the dead for the living.<sup>261</sup>

Press reports indicate that there was at least one child reunited with her birth family. Sahvi Begum, a three-year-old child who had been in Savitri’s Bethany home, was discovered among the “rescued” children in the government home by her parents.<sup>262</sup> Six months

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Orphanage Director Held, supra* note 251.

<sup>259</sup> Rahman, *supra* note 238.

<sup>260</sup> See, e.g., *Stolen Infants Adopted Here*, SUNDAY AGE (Melbourne), May 6, 2001, at 5, available at LEXIS, News Library; Syed Amin Jafri, *59 Infants Rescued From Another AP Adoption Centre* (Apr. 22, 2001), at <http://www.rediff.com/news/2001/apr/22ap1.htm>.

<sup>261</sup> See Charge Sheet in CR. No. 13/2001, at 13 (IX Metropolitan Magis. Ct., Hyderabad 2001) (on file with author) (charging that in the Bethany orphanage “dead children were shown alive and whenever substitute children of similar age are received in the Home they were kept in the place of dead children to avoid break in the process of adoption so as to expedite the process of selling the children for monetary consideration”); *NCW Report on Adoption Scam Castigates State, CARA*, at <http://news.indiainfo.com/2001/05/08/08sellgirls.html> (May 8, 2001) (on file with author) (noting that adoption clearance certificates were issued in names of deceased infants at Bethany orphanage).

<sup>262</sup> Syed Amin Jafri, *Missing Girl Among Children Rescued in Tandur* (May 1, 2001), at <http://www.rediff.com/news/2001/may/01ap1.htm>.

earlier, Sahvi's family had reported her missing and filed a police complaint. Her reunion with her family produced some poignant drama, as the government home initially refused to release her to her parents, even when they came a second time accompanied by a member of the legislature and the press. The child rushed to embrace her mother upon spotting her, but the government workers separated them. The government home had the legislator placed in prison, although she was later released. The press reported that the child was finally reunited with her mother after "completion of requisite formalities."<sup>263</sup> Given the degree of corruption in India, one wonders if those "formalities" could have included some kind of bribe. The press did not resolve the mystery of how Sahvi Begum ended up in the Bethany orphanage, but the reports were indicative of fraud: the orphanage had renamed her "Reena," and in "adoption papers . . . declared her as an orphan."<sup>264</sup> Begum's Bethany-prepared paperwork stated that she had been a resident of the Bethany orphanage since 1999, despite the fact that she had lived with her family until late 2000.<sup>265</sup> Thus, it appeared that the Bethany orphanage had created a false name and history in order to prepare her for adoption.

Children of the World, the large Canadian adoption agency that had started an India program in December 2000, reportedly had fifteen couples in the process of adopting a child from the Bethany orphanage when the scandal closed the orphanage. The agency publicly defended Savitri and her orphanage, claiming Savitri would not have bought children because an average of ten children were "left on her balcony every day."<sup>266</sup> Nonetheless, the province of Quebec suspended adoptions from India due to the scandal.<sup>267</sup>

Authorities subsequently arrested Sanjeeva Rao again, and raided his reopened Action for Social Development orphanage. Thirty-four children were taken from ASD; twenty-two were transferred to Sishu Vihar (the government orphanage), and twelve were hospitalized.<sup>268</sup>

The scandal spread further when authorities arrested Anita Sen,

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<sup>263</sup> *Id.*

<sup>264</sup> Syed Amin Jafri, *Adoption Home Tampered with Children's Records* (May 2, 2001), at <http://www.rediff.com/news/2001/may/02jafri.htm>.

<sup>265</sup> *Id.*

<sup>266</sup> *Quebec Halts Adoptions from India*, *supra* note 253.

<sup>267</sup> *Id.*

<sup>268</sup> ANDHRA PRADESH, ACTION TAKEN REPORT, *supra* note 221.

who operated the orphanage Precious Moments, on the grounds of an evangelical Christian Bible school.<sup>269</sup> The press made much of the fact that Sen's husband was prominent within the police department.<sup>270</sup> Initially, one of the primary charges against Sen was that she lacked the CARA registration necessary to place children in intercountry adoption.<sup>271</sup> Her defense was apparently that she had the proper registration within Andhra Pradesh to run an orphanage, and was lawfully routing her adoptions through the Indian Council of Social Welfare, a CARA-approved organization.<sup>272</sup> Sen's lack of CARA registration thus presented the issue of the networking of non-CARA child welfare organizations with CARA-approved organizations. Under the rules of the Indian Supreme Court, it would seem that such networking was only legal if the child was physically moved to the CARA-approved organization.<sup>273</sup> While this issue could be seen as more a matter of technical compliance than fundamental ethics, other more serious charges against Sen emerged. It has been claimed that Sen had taken a variety of older children under false pretenses, including offers to educate the child, or provide the mother with a job, and instead had fraudulently changed the child's name, identity, or status, and offered the child for intercountry adoption.<sup>274</sup> Thus, while Sen was seen by some as helping others out of Christian conviction, anti-international-adoption activists claimed that she was stealing children from their families in order to profit from hefty foreign adoption fees.

Indian press reports of the 2001 scandal were generally critical of the state government of Andhra Pradesh. It was obvious to most that the government had failed to respond adequately to the 1999 scandals, particularly since the 2001 scandals involved precisely the same charges, and some of the same individuals and orphanages.<sup>275</sup> The propensity of the government to take short-term measures against such scandals, while ultimately allowing the same abusive

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<sup>269</sup> See *High Drama at Adoption Centre*, THE TIMES OF INDIA, Apr. 28, 2001, available at LEXIS, News Library.

<sup>270</sup> See, e.g., *54 Children Rescued in Andhra Adoption Racket Bust*, THE TIMES OF INDIA, Apr. 27, 2001, available at LEXIS, News Library; *Orphanage of IPS Officer's Wife Raided, 61 Rescued*, HINDUSTAN TIMES, Apr. 26, 2001, available at LEXIS, News Library.

<sup>271</sup> See *supra* note 270.

<sup>272</sup> See *High Drama at Adoption Center*, *supra* note 269.

<sup>273</sup> See *supra* notes 138–42 and accompanying text.

<sup>274</sup> Ramaswamy & Bhukya, *supra* note 224, at 3–4.

<sup>275</sup> See *Children as Chattel*, *supra* note 9.

practices to resume within a few months, was repeatedly noted by the press.<sup>276</sup> Thus, the government came under some pressure to prove that it would finally do something about the adoption scandals that would stop their reoccurrence.<sup>277</sup>

The Chief Minister of Andhra Pradesh at that time, Chandrababu Naidu, is particularly well-known in the West, where he has an enviable reputation as the CEO of Indian politicians.<sup>278</sup> Naidu has carefully groomed an international image as a businessman-statesman, who governs Andhra Pradesh via his laptop, while making Andhra Pradesh's capital city, Hyderabad, into "Cyberabad," an international center for information technology ("IT").<sup>279</sup> Naidu's reputation stemmed from his advocacy of a certain kind of globalization for Andhra Pradesh, whereby the workings of government would be modernized through the use of IT, and the government would nurture the growth of a globally-connected, private IT industry. Naidu has associated himself with major Western figures like Bill Gates and Bill Clinton, while forming strong alliances with international organizations such as the World Bank.<sup>280</sup>

Naidu's critics complain that his pro-globalization policies have not benefited the majority of the people of Andhra Pradesh, who remain poor farmers or laborers. From this perspective, Naidu has sold out his people to wealthy foreign interests.<sup>281</sup> Given the populist tenor of Indian politics, where politicians often try to win office by promising the masses government largess, Naidu's international connections and pro-business economic policies left him politically vulnerable. (Indeed, Naidu later would be swept from power in the May 2004 elections.)<sup>282</sup> Naidu was presumably quite unhappy about

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<sup>276</sup> See *id.*

<sup>277</sup> See Ramaswamy & Bhukya, *supra* note 224, at 12.

<sup>278</sup> See H.S. Balram, *In Two Smart Moves, CM Wins over Rivals & Hushes Critics*, THE TIMES OF INDIA, Sept. 3, 2001, available at LEXIS, News Library.

<sup>279</sup> See Amrit Dhillon, *No One Saves for a Rainy Day Now*, TIMES (London), Feb. 4, 2004, available at LEXIS, News Library.

<sup>280</sup> Haroon Siddiqui, *He Turned Around a Failed State*, TORONTO STAR, Jan. 30, 2003, at A25, available at LEXIS, News Library.

<sup>281</sup> See generally, *YSR Vows to Restore Pre-1999 Power Tariff*, THE HINDU, Sept. 11, 2003, available at LEXIS, News Library.

<sup>282</sup> See Syed Amin Jafri, *I Was Misled About Public Mood: Chandrababu Naidu* (May 27, 2004), at <http://im.rediff.com/news/2004/may/27tdp.htm> (noting that Naidu's Telugu Desam Party party held only forty-seven assembly and five Lok Sabha seats, the lowest in the party's twenty-one-year history). Interestingly, even economic and business analysis after the election highlighted the failure of Naidu's technology-focused policies to produce broad-based economic growth. Despite Naidu's

the recurrent intercountry adoption scandals, which could serve to remind voters of a particular ugly aspect of globalization: the sale of poor Indian children to rich foreign families.

In April 2001, Naidu's government announced a series of actions apparently intended to evidence a comprehensive approach to addressing abusive adoption practices. The government decree banned the relinquishment of children on the "grounds of poverty, number of children and unwanted girl[s]." <sup>283</sup> Procedures for handling "abandonments" of children were also altered. <sup>284</sup> Thus, Naidu hoped to prevent abuses of two major legal means by which children become eligible for adoption—relinquishment and abandonment. In typical fashion, Naidu proposed "computerization" of all adoption records, and the development of software "to monitor all cases and bring transparency." <sup>285</sup> The reward on Savitri's head rose from around \$2200 to over \$11,000. More than \$110,000 was authorized for the care of the almost 200 children who had been taken from the orphanages. Selected Lambada boys and girls were to be trained to carry to the Lambada hamlets a government script on adoption, to be performed in the Lambada language and employing song and dance. A meeting of police superintendents and collectors in the affected districts was proposed to discuss the problems and circumstances causing the sale of girl children, and means for "effective control." The Government would restore the rescued children "to their biological parents if they can be traced." <sup>286</sup>

The government's actions must be seen in the context of the activists, who emerged through the various Andhra Pradesh adoption scandals as opponents of intercountry adoption. These anti-intercountry-adoption activists were an apparently loosely organized collection of social activists, with a background of working on behalf of women, the poor, tribals, dalits, or labor unions. For the activists, intercountry adoption had become another form of the familiar problem of the exploitation of the vulnerable by the powerful. They further viewed intercountry adoption as another form of "trafficking." The activists were effective in putting pressure on the

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international reputation, Andhra Pradesh was apparently falling behind the rest of India in its economic growth. See G. Ramachandran, *Lessons from Andhra Pradesh*, THE HINDU BUSINESS LINE, May 12, 2004, available at 2004 WL 75191946.

<sup>283</sup> ANDHRA PRADESH, ACTION TAKEN REPORT, *supra* note 221.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

government to act against intercountry adoption, and in working to influence public opinion.<sup>287</sup>

A primary point of conflict developed over the fate of the children seized from the orphanages. The Andhra Pradesh activists worked energetically to prevent any of these children from being placed out of the country, claiming that they should either be returned to their birth families or else adopted within India. By contrast, many Western prospective adoptive parents who had been matched with particular children, and had passed to varying degrees through the many stages of Indian adoption, sought to “bring their children home,” as they sometimes (and controversially) put it. Although the government claimed to allocate substantial sums to the care of the “rescued” children, many Westerners regarded Sishu Vihar, the government orphanage, as a hell-hole.<sup>288</sup> Each side demonized the other. The Western “parents” considered the activists cruel ideologues willing to sacrifice the children for the sake of their cause. The activists considered the Western “parents” selfish, rich, and privileged foreigners who thought their money and skin color could buy them Indian children.<sup>289</sup>

The children caught in the middle included some who had been seized from the orphanages in the spring of 1999, along with those seized from the orphanages in 2001. The most publicized case, at least in the West, was that of “Haseena.”<sup>290</sup> Haseena was born in July 1999 and allegedly relinquished by her mother to Sister Teresa Marie’s TLC orphanage in January 2000. Haseena’s adoption by Sharon Van Epps and her husband, John Clements, an American couple in their mid-thirties, was approved by CARA on March 23, 2001, just as the 2001 adoption scandal was breaking. Sharon Van Epps came to India and met Haseena about a year later, in the spring of 2002, when Haseena was a little more than two and a half years old. Describing the moment when she first met Haseena, Sharon Van Epps noted, “I felt like something I’d been missing my whole life that I didn’t even know I’d been missing had been found.”<sup>291</sup> Sharon Van Epps then began the long vigil of remaining in India, visiting Haseena regularly, and working actively to get Haseena’s adoption

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<sup>287</sup> ABBOTT, *supra* note 214, at 54–55 (quoting *Deccan Herald* and describing activists).

<sup>288</sup> *Id.* at 84–85 (“Sishu Vihar is a living hell . . .”).

<sup>289</sup> See Bonner, *supra* note 10, at A3; Katz, *supra* note 231, at 1A.

<sup>290</sup> See Bonner, *supra* note 10, at A3.

<sup>291</sup> *Id.*

approved. On May 28, 2003, the State moved Haseena from the TLC orphanage to the government orphanage, Sithu Vihar, and subsequently began denying Sharon Van Epps visitation.<sup>292</sup>

The family court in Hyderabad denied the guardianship petition of the Van Epps, and the case was eventually appealed to the High Court of Andhra Pradesh.<sup>293</sup> The court issued an extensive opinion, which had the effect of affirming the family court's denial of guardianship.<sup>294</sup> The court's far-ranging opinion indicated that the state's highest court generally credited the accusations against adoption agencies operating in Andhra Pradesh.<sup>295</sup> In regard to Haseena, the court noted that the attorney for the Van Epps conceded violations of the Indian adoption guidelines.<sup>296</sup> In addition, the High Court appeared to believe that Haseena had been misrepresented as having a deformed foot in order to procure the necessary "refusals to adopt" by prospective Indian adopters.<sup>297</sup> The court refused to accept the argument that the principles of equity supported the granting of the guardianship. Noting the claims that the Van Epps had themselves done nothing wrong, and had bonded to the child after receiving CARA approval,<sup>298</sup> the court stated that accepting that argument would be "giving seal of approval to the fraud played by the placement agencies and the casual approach of approval . . . by the officials of VACA and CARA."<sup>299</sup> The court noted that, "on previous occasions also, large scale violations committed by the placement agencies in case of inter-country adoptions came to light. But the Government instead of taking remedial measures allowed the malpractices to go on unabated."<sup>300</sup> The court then noted that "[t]he society welcomes such agencies which come forward to render help to the society, though not at their cost, but they can never be allowed to become business centers for extracting as much money as possible, which amounts to granting license to

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<sup>292</sup> *Id.*

<sup>293</sup> John Clements v. All Concerned, (2003) 4 ANDHRA LAW TIMES 644, para. 4 (Andhra Pradesh H.C.) (on file with author).

<sup>294</sup> *See id.* para. 75.

<sup>295</sup> *See id.* paras. 29–32, 34–35, 43–44.

<sup>296</sup> *Id.* para. 36.

<sup>297</sup> *Id.* paras. 27–28 (noting findings and observations of the family court).

<sup>298</sup> *Id.* para. 36.

<sup>299</sup> *Id.* para. 44.

<sup>300</sup> *Id.*



those agencies for trafficking in Indian children.”<sup>301</sup>

The court’s refusal to allow an equitable exception for the Van Epps did not merely rest on a need to respond vigorously to the wrongdoing of the agencies. In addition, the court specifically rejected the argument that the “prospective foreign parents” were completely innocent. The court criticized the parents for employing “backdoor methods in securing the child,” and implied that upon learning of the “fraud” they should have “walked out of the muddle and . . . allowed the law of the land to be implemented.”<sup>302</sup> Thus, instead of crediting the parent’s long vigil and elaborate efforts to obtain custody of Haseena, the court suggested it would have been more ethical to leave the mess behind, leaving the Indian laws and legal system to deal with the situation.

The Andhra Pradesh High Court questioned the assumption that Haseena would be better off in the United States:

In India the marriage is considered sacrosanct, while it is a contract in western countries. Stable and secure family life is a remote possibility in those countries. It is on record that these foreign parents are willing to adopt female children only, but not male children. If the marriage between the adoptive parents breaks down, it is not known what will happen to the child. In fact, we repeatedly asked the counsel appearing for CARA and VACA whether any study was made with regard to the welfare of the children adopted by foreign parents, but we could not get any reply.<sup>303</sup>

The court was similarly unimpressed with the argument that the TLC was a religious organization serving the poor:

It is submitted . . . that the . . . agency is being run by Nuns without expecting any monetary benefit and they are doing their best to serve the destitute, abandoned and relinquished children. . . . [W]e are constrained to observe that the Nuns who relinquished the world and who dedicated themselves for the

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* para. 45.

<sup>303</sup> *Id.* para. 47. Interestingly, there is at least one published study of outcomes for children from India adopted and raised in the United States. All of the children had been adopted between 1973 and 1987 from Mother Theresa’s Missionaries of Charity. The outcomes could be regarded as mixed, with 46% identified as special-needs children by their parents. The authors of the study emphasized “subjective” markers of adoption success. See Joan F. Goodman & Stacy S. Kim, “Outcomes” of Adoptions of Children from India: A Subjective Versus Normative View of “Success”, ADOPTION Q., Dec. 2000, at 3–4.

service of society are also getting influenced by the unethical methods adopted by certain agencies who made their institutions as business centers and we do not wish to further comment except saying that [the] agency did not conform to the guidelines for the reasons best known to them.<sup>304</sup>

The court's willingness to rule against the Van Epps may have been influenced by the presence, before the court, of prospective Indian adoptive parents. Thus, the case was presented not as a question of whether Haseena would remain an orphan, but rather as a kind of custody battle between prospective American and Indian adoptive parents. Haseena was presented, both before the court and in the press, as caught between India and America, with the court's decision being in part a question of which nation was a more fit place to be raised. Thus, ironically, an intercountry adoption case, which is usually seen (in the West) as about providing homes for otherwise abandoned or relinquished orphans, was presented as more of a traditional child custody dispute. Haseena's problem—the reason she was remaining in Sishu Vihar—was not that no one wanted her, but rather that too many people wanted her.<sup>305</sup> Under these circumstances, it would have been difficult for the court to have ruled in favor of the Van Epps, for the implication would have been that an Indian child wanted by Indian parents was better off leaving India for America.

In addition, the court's opinion evidences a desire to send a clear message against profiteering and corruption in intercountry adoption. The lack of follow-through in the prosecution of the offending agencies meant that the appellate courts in India were largely left with cases like Haseena's as their opportunity to act against corruption in intercountry adoption. Perhaps if the High Court had been given other opportunities to act against intercountry adoption, it might have been less inclined to use the Haseena case to send a clear message. At the same time, the court could act against intercountry adoption in the Haseena case, and still believe that Haseena herself would not be harmed, but indeed would ultimately be placed with an appropriate Indian family.

Despite the court's statement that the Van Epps should have

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<sup>304</sup> *Clements*, (2003) 4 ANDHRA LAW TIMES 644, para. 33.

<sup>305</sup> *See id.* para. 77 (discussing Indian wishing to adopt Haseena who sought to implead in the case, and who appeared before the court); Bonner, *supra* note 10, at A3 (noting controversy regarding Indian couple seeking to adopt Haseena).

walked away from the “muddle,”<sup>306</sup> the last part of the court’s opinion evidenced some respect for Sharon Van Epps’ motherly love of Haseena. The court specifically recited the equitable consideration that Sharon Van Epps had been staying in Hyderabad for eighteen months and had “developed so much love and affection towards the minor girl.”<sup>307</sup> Noting that the Indian applicant seeking to adopt Haseena had “represented . . . [that] he is not particular to adopt . . . Haseena only,”<sup>308</sup> the court left it to the authorities below to possibly consider a new petition from the Van Epps to adopt Haseena, assuming that “there are no other Indian parents who are willing to adopt this child . . . [and] the guidelines are scrupulously followed.”<sup>309</sup> Thus, while the High Court affirmed the family court’s denial of the Van Epps’ petition, it kept the door theoretically open to the filing of a new petition.

From the Van Epps point of view, the court’s openness to a new petition may have seemed like a cruel gesture. Why deny this petition and then speak of starting over again, while Haseena languished in Sishu Vihar? Moreover, it should have been clear to all involved that the activists would ensure that there would always be Indian families seeking to adopt Haseena, giving her prominence as a test case.<sup>310</sup> Thus, the conditions for reopening the case seemed exceedingly unlikely to occur. In fact, after the Haseena case, the Indian press increasingly publicized the existence of hundreds of Indians waiting to adopt children in Andhra Pradesh, who were being discouraged from doing so by overly strict guidelines or simple foot-dragging by the authorities. Despite the Western understanding that Indians would not want to adopt—and especially would not want to adopt girls—it appeared from the Indian press that there was a pent-up demand within Andhra Pradesh to adopt children, both male and female.<sup>311</sup> Ironically, it turned out that Indians were being subjected to stricter requirements than foreigners, which had the effect of

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<sup>306</sup> See *Clements*, (2003) 4 ANDHRA LAW TIMES 644, para. 45.

<sup>307</sup> *Id.* para. 76.

<sup>308</sup> *Id.* para. 77.

<sup>309</sup> *Id.*

<sup>310</sup> Cf. Bonner, *supra* note 10, at A3 (noting the charge that the Indian couple who came forward to adopt Haseena did so due to “external pressures” from foreign adoption opponents, rather than from “love and affection for the child”). The point is not that these charges were necessarily correct, but rather that the Van Epps would have expected the activists to be able to come forward with prospective adoptive parents in test cases.

<sup>311</sup> See Katz, *supra* note 231, at 1A.

artificially suppressing adoption of Indian children within India. For example, Indians seeking to adopt faced requirements of infertility or childlessness, or were denied access to the range of children available for adoption. In addition, the income requirements applied to Indian applicants had the affect of rendering the majority of Indian families in Andhra Pradesh ineligible to adopt. Thus, many families who could, in Indian terms, provide reasonably well for a child, were considered ineligible to adopt. Despite these roadblocks, there were apparently hundreds of Indian parents in Andhra Pradesh formally registered and waiting to adopt. Thus, the activists pressed the authorities to speed up their processing of adoptions by Indians, and particularly to place the contested children remaining in Sishu Vihar.

Haseena was eventually placed with an Indian family in 2003, after the Van Epps had exhausted their appeals.<sup>312</sup> The activists pointed to her placement, and that of many others of the “rescued” children, with Indian parents, as evidence that there were indeed Indian homes available for the children, if only the corrupting power of foreign money could be eliminated. Many Western parents continued to assume, however, that intercountry adoption was necessary to meet the needs of Indian children. Some pointed to the willingness of Americans to adopt special needs and older children, and argued that these children, at least, could not be placed for adoption within India. Some American agencies, however, began to publicize what they characterized as a new openness to domestic adoption within India, even noting that this new development was causing a reduction in the numbers of children available for intercountry adoption.<sup>313</sup>

The fallout of the Andhra Pradesh scandal continued into 2004, as Indian children continued to be subjects of custody battles between prospective foreign parents and the activists. Like other bitter custody disputes, the parties were often unwilling to compromise and yet each blamed the other for extending the struggle. The extensions of the struggles were particularly unfortunate for the children, as it generally meant that they remained in either Sishu Vihar, or else in a private orphanage. The unwillingness to compromise was likely heightened by each side’s

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<sup>312</sup> See *id.*

<sup>313</sup> See Laura Lucas, *Four Families Show the Evolution of Adoption in India*, at <http://www.holtintl.org/hifamilies/archive/India0307.shtml> (last visited Feb. 5, 2005).

lack of authority to enter into a binding settlement determining the fate of the children. Unlike a traditional custody dispute, where a father and mother could agree on custody issues and be confident of court approval, neither the prospective adoptive parents nor the activists had real authority to settle the cases. If the prospective adoptive parents withdrew their petitions or failed to appeal, they would become legal strangers to the child they had sought to adopt, and would have no assurance that the child would be placed in a good home. The prospective adoptive parents could reasonably fear that the children would be subject to political or bureaucratic delays dooming them to grow up in orphanages, or would be placed in inappropriate homes with those who came forward to adopt just to make a political point. Since the activists did not control the governmental processes, they could not guarantee a positive outcome in the cases, however much they believed that such outcomes were possible in India. Similarly, if the activists stopped fighting against the granting of guardianship to the foreign parents, they had no way of knowing what happened to the children. While the activists' fears that the children would fare badly in America or other rich nations seemed ludicrous to the foreign parents, those fears had been echoed by the Andhra Pradesh High Court, and were apparently real. Moreover, the harm of a child being sent to America, while Indian prospective parents waited in vain for children to adopt, could not be remedied if children were placed in foreign homes.

Unfortunately, the fears of the activists for the fate of children sent to America were accentuated by the case of a three-year-old girl named Priyamvada, who was under the care of Sister Teresa's TLC orphanage. An American woman named Gail Hunt had obtained approval from CARA prior to April 2001, but the family court refused guardianship (as in Haseena's case). As in Haseena's case, an Indian couple selected the child for adoption, but the case was stalled as the foreign adoption petition was appealed. Gail Hunt had originally applied to adopt Priyamvada as a single mother, but in the interim she married an individual named Steven Showcatally. Unfortunately, in March 2004, as the appeal was still pending, Showcatally was charged with homicide in the death of the couple's adopted Guatemalan toddler, Gustavo.<sup>314</sup>

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<sup>314</sup> Mara H. Gottfried, *Father Charged in Baby's Death*, PIONEER PRESS (St. Paul), Mar. 19, 2004, available at 2004 WL 56312081; Paul Gustafson, *Woman's Adoption Attempt Criticized*, STAR TRIBUNE (Minneapolis), Apr. 9, 2004, at 1B, available at LEXIS, News Library; *US Woman's Husband Charged with Murder*, THE HINDU, Apr. 3, 2004, available

The reported facts evidenced a classic and fatal case of battered child syndrome involving serious head injuries. On Tuesday, March 16, 2004, Showcatally brought Gustavo home from daycare, and became frustrated with the child's diarrhea, which required him to repeatedly bath and change the boy, who was soiling his clothes and towels. Showcatally called Hunt on the telephone, and reported to her that there had been an accident in the tub and that Gustavo's head was swelling. Hunt reportedly told Showcatally to meet him at the hospital. Gustavo was brought to the operating room shortly after arrival, but died that evening. When investigators pointed out that the child's injuries were inconsistent with Showcatally's story that he had dropped the boy once while washing him in the tub, he admitted that he had dropped the child twice more intentionally, after the accidental drop. Showcatally reported that he had called his wife when he noticed that "the baby's eyes were twitching and rolling back in his head."<sup>315</sup>

Oddly, TLC pushed for an emergency hearing regarding Gail Hunt's petition to adopt Priyamvada around April 1, 2004, less than two weeks after the death of Hunt's son Gustavo. The story of Gustavo's death, and the link to Gail Hunt and the Priyamvada case, broke in the Indian press a few days later. Somebody had located the United States news stories about the death of Gustavo, which included Gail Hunt's name, and made the connection. The Indian press appeared indignant that TLC and/or Hunt would seek to push the adoption of Priyamvada forward under such circumstances. The assumption of the Indian press seemed to be that there had been an attempt to sneak the case through without informing the authorities in India of this change in Hunt's home situation.<sup>316</sup> After the story broke in India, Sister Teresa announced that she was withdrawing the petition for foreign adoption. Sister Teresa's claim was apparently that this was in response to the death of Gustavo, rather than in response to the negative publicity. Sister Teresa then told the press she would be releasing the child for in-country adoption, with the suggestion that the child be placed with relatives of one of the nuns, who wanted to adopt her. The activists, however, had their own candidates, a couple who had earlier come forward to adopt the

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at LEXIS, News Library [hereinafter *Husband Charged with Murder*].

<sup>315</sup> Gottfried, *supra* note 314.

<sup>316</sup> See *Husband Charged with Murder*, *supra* note 314.

child.<sup>317</sup> Thus, the battle over Priyamvada would continue as the agency and activists recommended different Indian adoptive families. Sister Teresa did not explain why it was so easy to find a domestic adoptive placement now, despite the legal determination several years earlier, when Priyamvada was much younger and hence more adoptable, that there were no such placements available.

As the aftermath of the scandal continued into 2004, the family court was consistently denying guardianship petitions for the “rescued” or pipeline children. It became increasingly unlikely that any of these children would be leaving India for adoptive placements, and increasingly clear that litigating the cases would do no more than further delay domestic placements. In the meantime, the system of processing new cases of intercountry adoption out of Andhra Pradesh became effectively shut down. No approvals for adoptions from the state were granted by CARA during the one-year period from August 2003 through July 2004, presumably because the requests were not being made.<sup>318</sup> Apparently, even the Guild of Service, an orphanage apparently untouched by the scandals, virtually ceased placing children outside of India.

The odd demographic picture of Indian adoption continued after the closing of intercountry adoptions from Andhra Pradesh. Andhra Pradesh adoptions have varied sharply over the last ten years. During the period from 1991 to 1993, Andhra Pradesh had been a fairly insignificant state for intercountry adoption, placing only 119 children (an average of forty per year) over that three-year period. Even then, however, the dysfunctional official domestic adoption system had fallen behind the scant intercountry adoption numbers, with only seventy-six domestic adoptions over the same three-year period.<sup>319</sup> By the year 2000, the year sandwiched between the two major Andhra Pradesh adoption scandals, Andhra Pradesh was placing around 200 children in a single year, placing second among all Indian states.<sup>320</sup> Now, post scandal, Andhra Pradesh is not placing

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<sup>317</sup> See Gustafson, *supra* note 314, at 1B.

<sup>318</sup> CARA has been placing approvals (NOC) information on their web site on a monthly basis. See CENT. ADOPTION RES. AGENCY, MINISTRY OF SOC. JUSTICE & EMPOWERMENT, ACTUAL CASES OF CHILDREN GIVEN NOC, at <http://www.cara.nic.in/actualcases.asp>. (Dec. 2004) (monthly reports and cumulative totals on file with the author).

<sup>319</sup> See BAJPAI, ADOPTION LAW, *supra* note 96, at 178–79.

<sup>320</sup> See BAJPAI, CHILD RIGHTS, *supra* note 96, at 42; Ramaswamy & Bhukya, *supra* note 224, at 12.

any children internationally. By contrast, Maharashtra, which includes the famous city of Bombay (now called Mumbai) and borders Andhra Pradesh, has been consistently a leader in Indian intercountry adoption statistics.<sup>321</sup> Although the state represents approximately 9% of India's population,<sup>322</sup> during the year 2000, and again in the one-year period ending July 31, 2004, Maharashtra was responsible for approximately 40% of all intercountry adoptions.<sup>323</sup> Even more intriguing, the relatively small city of Pune, located in Maharashtra, which represents between 2.5% and 3.75% of India's population,<sup>324</sup> accounts for approximately one-quarter of all intercountry adoptions.<sup>325</sup> Oddly, despite these comparatively high numbers of foreign placements out of Maharashtra, the Indian press reported a shortage of children available for domestic adoption within the state.<sup>326</sup> In the meantime, the activists apparently hoped that they could build on their work in Andhra Pradesh, and achieve their goal of a nationwide moratorium on intercountry adoption.<sup>327</sup>

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<sup>321</sup> See BAJPAI, ADOPTION LAW, *supra* note 96, at 177–79 (Maharashtra represented one-third of all official adoptions—domestic and intercountry—during period from 1991 to 1993, including 12% of all intercountry adoptions).

<sup>322</sup> See OFFICE OF THE REGISTRAR GEN., CENSUS OF INDIA 2001: PROVISIONAL POPULATION TOTALS: MAHARASHTRA, at <http://www.censusindia.net/profiles/mah.html> (created Apr. 4, 2001).

<sup>323</sup> See BAJPAI, CHILD RIGHTS, *supra* note 96, at 42 (517 of 1364, or 37.9%, in 2000); *supra* note 318.

<sup>324</sup> See OFFICE OF THE REGISTRAR GEN., CENSUS OF INDIA 2001: CITIES WITH MORE THAN ONE MILLION POPULATION, at <http://www.censusindia.net/results/millioncities.html> (created Sept. 13, 2001) (2001 population of Pune—2,540,069); OFFICE OF THE REGISTRAR GEN., CENSUS OF INDIA 2001: URBAN AGGLOMERATIONS/CITIES HAVING POPULATION OF MORE THAN ONE MILLION IN 2001, at [http://www.censusindia.net/results/miilion\\_plus.html](http://www.censusindia.net/results/miilion_plus.html) (created July 25, 2001) (2001 population of Pune greater metropolitan area—3,755,525); OFFICE OF THE REGISTRAR GEN., CENSUS OF INDIA 2001: PROVISIONAL POPULATION TOTALS: INDIA, at <http://www.censusindia.net/results/resultsmain.html> (created Apr. 5, 2001) (2001 population of India—1,027,015,247).

<sup>325</sup> See *supra* note 318 (23.6% in one year period ending July 31, 2004).

<sup>326</sup> See Roli Srivastava, *Adoption Agencies Faced with Shortage of Children*, THE TIMES OF INDIA, Mar. 13, 2004, available at LEXIS, News Library.

<sup>327</sup> See Katz, *supra* note 231, at 1A (stating that the goal of activist Gita Ramaswamy is to shut down all intercountry adoptions in India within two years).



### III. REFORMING INTERCOUNTRY ADOPTION: BRINGING PRACTICE INTO ROUGH CONFORMITY WITH LEGAL PRINCIPLES AND IDEALS

#### A. *Intercountry Adoption Is Not a Self-Regulating, Self-Correcting System*<sup>328</sup>

The ongoing Indian adoption scandals illustrate the persistent gap between law and practice. The difficulty is not merely that there are abuses, but rather that under the current system the abuses can become systematic. It is not merely that there are systematic abuses, but that most of the affected parties are in some manner “bought off” into accepting the system despite those abuses. Upon examination, it seems clear that most of the parties involved in intercountry adoption possess strong motivations to favor even a systematically abusive adoption system over no system at all. Thus, intercountry adoption is not a self-regulating or self-correcting system. This principle can be demonstrated by analyzing the respective roles of the various parties to intercountry adoption.

##### 1. United States Agencies Possess Financial and Ideological Incentives to Bring Children to the United States, Regardless of Allegations of Abuse

United States agencies involved in intercountry adoption possess strong financial and ideological incentives to keep cases flowing through the pipeline, regardless of credible allegations of abuse. Financially, agencies depend on successfully moving children from other countries to the United States. Ideologically, while agencies typically pay lip service to the legal preferences for maintaining children in their country of origin, many well-meaning agency personnel are strongly committed to the goal of “saving children” through adoption. Thus, from the agency perspective the goal of correcting abuses, even where honestly accepted as a positive value, almost always gives way to the higher value, financial and ideological, of keeping children moving through the system. United States agency personnel generally do not appear to report their knowledge

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<sup>328</sup> Some of the concepts and text in this section are adapted from the comments I submitted to the State Department on their proposed Hague regulations. See David M. Smolin, *Comments to Regulations Implementing the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the Convention) and the Intercountry Adoption Act of 2000 (the IAA)*, Docket No. State/AR-01/96 (Nov. 5, 2003) (on file with author).

of irregularities and abuses to the authorities, and may even use various means to try to prevent or discourage adoptive parents from sharing their own knowledge of improprieties. United States agency personnel are financially or ideologically motivated to “believe the best,” doubt negative reports, minimize abuses, and keep the system open and running at all costs even when abuses become apparent.

These propensities are well illustrated in the Andhra Pradesh adoption scandal. Although a detailed examination of agency behavior is beyond the scope of this Article, it seems evident that United States agencies played no role in reporting, reducing, ending, or limiting systematic corruption within the Andhra Pradesh adoption system. Instead, agencies were willing to continue placing children out of Andhra Pradesh so long as the Indian and American government authorities were willing to continue processing cases. While there is no way to account for the numbers of purchased, kidnapped, or improperly relinquished children who were “placed” for adoption by United States agencies, the numbers seem to have been significant. The numbers apparently would have been substantially higher, if not for the sporadic intervention of Indian authorities. United States adoption agencies were either unwitting or witting parties to trafficking in children. Significantly, despite the scandals, United States agencies only stopped accepting new referrals for placements after the system itself closed down, after the 2001 scandals. Moreover, there is no evidence that a single United States agency has ever taken any significant action to report, prevent, or remedy the many instances of corrupt adoption practices to which they have been witting or unwitting parties.

To this day, United States agencies continue to advertise to prospective United States parents foreign fees and orphanage “donation” sums which appear contrary to both the letter and spirit of Indian law.<sup>329</sup> This willingness to violate the letter and spirit of the law is not a mere technicality, as it is precisely the presence of inordinate sums of money that create the incentives and conditions within India to profiteer from adoption.<sup>330</sup> Although it may be Indian agencies and individuals who have been most directly involved in improperly obtaining children for adoption, it is Western dollars that

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<sup>329</sup> See *supra* note 217.

<sup>330</sup> See, e.g., ABBOTT, *supra* note 214, at 49 (noting that while private orphanages received between \$12 and \$25 for domestic adoptions, Peter Subbaiah “and the like” were receiving \$2500 to \$5000 per adoption from the United States and other countries, an “obvious motivation in their illegal actions”).

have provided the incentives that fuel systematic adoption corruption. Although United States agencies may not intentionally buy or traffic in children, they are responsible for systematically creating monetary incentives that fuel the purchase and sale of children under the guise of adoption.<sup>331</sup>

The current system of adoption virtually guarantees that United States agencies will continue to fuel abusive adoption practices. Within a largely unregulated system of adoption, the agencies willing to overlook or even participate in abusive adoption corruption practices will remain and “succeed” in securing significant numbers of adoptions. Agencies concerned about corruption will tend to leave or avoid abuse-prone situations, such as those present in India, Guatemala, or Cambodia,<sup>332</sup> leaving the field to those willing to play the game and do whatever it takes to “bring the children home.” Within abuse-prone areas, agencies that deal with corrupt orphanages and facilitators who illegally obtain children will often have a competitive advantage because they will have access to larger numbers of paper-adoptable children. To make matters worse, within the world of intercountry adoption it is often the abuse-prone areas that produce, on a statistical basis, some of the highest rates of intercountry adoption. The classic example of this phenomenon is Guatemala which, despite its relatively small population of less than fourteen million, has become one of the most significant sending nations,<sup>333</sup> while also developing a reputation as a haven for

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<sup>331</sup> The activists in India, seeing the central role of money, go beyond my claim that American money inadvertently supports trafficking, to a stronger claim. Activist Ramaswamy contends that, “American adoption agencies that charge \$15,000 or much more for an adoption in India knowingly support baby trafficking [and that] [m]uch of the money goes to Indian adoption agencies to lubricate the system so babies will be available.” Katz, *supra* note 231, at 1A (quoting Ramaswamy).

<sup>332</sup> *See id.*

<sup>333</sup> The population of Guatemala as of 2004 is commonly estimated at 12.7 million, although other sources list figures somewhat higher. *See, e.g.*, BBC NEWS, COUNTRY PROFILE: GUATEMALA, at [http://news.bbc.co.uk/1/hi/world/americas/country\\_profiles/1215758.stm](http://news.bbc.co.uk/1/hi/world/americas/country_profiles/1215758.stm) (last updated Nov. 16, 2004). Despite this small population, Guatemala placed 2219 children in the United States in fiscal year 2002, 1609 in 2001, and 1518 in 2000. *See* BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S., at [http://travel.state.gov/family/adoption/stats/stats\\_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html) (Feb. 5, 2005). The United States received 6186 children from Guatemala in the five years between 1997 and 2001, out of a total of 8913 placed internationally by Guatemala during those years. PROCURATOR GENERAL’S OFFICE, ADOPTION PROCESS IN GUATEMALA: 1997–2001, at <http://www.casa-alianza.org/EN/human-rights/illegal-adop/statistics/list9701.shtml> (last visited Aug. 13, 2002) (on file with author).

profiteering attorneys or middlemen who buy or kidnap babies.<sup>334</sup>

While the broad middle range of reputable adoption agencies within the United States officially decries corrupt practices, these agencies also consistently choose to involve themselves in adoption systems where such corruption is rampant, without taking significant remedial steps to avoid becoming complicit in child trafficking. The better agencies, those who are in it for the cause rather than for the money, ultimately believe that playing the game is a necessary evil toward the good of saving children. In the end, however, such high-mindedness does little more than pad the pockets of those in sending countries who are more forthrightly using adoption as a “business center,” in the words of the Andhra Pradesh High Court.<sup>335</sup>

Within the current adoption world, an agency that has strong scruples about avoiding involvement in adoption profiteering, corruption, or questionable practices in obtaining children would have difficulty functioning within a number of the sending countries. Some of the larger agencies might be able to avoid many of these difficulties by running their own orphanages and social service agencies within the sending countries. In this way, an agency could ensure that true efforts really were made to assist families in keeping their children and in seeking domestic placements. Smaller agencies that have to rely on the work of others within sending countries will generally have difficulty guaranteeing their work.

The history of the Andhra Pradesh scandals indicates that Westerners networking within a sending country such as India may overestimate their capacity to identify honest, non-corrupt partners. A part of this difficulty is cultural, as definitions of what counts as “honest” and “non-corrupt” may differ significantly across cultures. A further difficulty is that the very presence of the Western agency may create opportunities and temptations to profiteer that affirmatively corrupt previously honest entities. Within the context of Andhra Pradesh, it is possible that some of the more established orphanages

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<sup>334</sup> See *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, U.N. Comm’n on Human Rights, 56th Sess., Provisional Agenda Item 13, U.N. Doc. E/CN.4/2000/73/Add.2 (2000) (on file with author); Sara Olkon, *The Business of Selling Babies? Guatemala Leads Latin America in the Number of Illegal Adoptions*, MIAMI HERALD, June 4, 2000, at 1L. For a defense of adoption from Guatemala, see Hannah Wallace, *After Months of Being Closed, Adopted Families May Now Travel to Guatemala for Their Children*, at <http://www.rainbowkids.com/2003/10/news/guatopens.shtml> (Oct. 1, 2003).

<sup>335</sup> See *supra* note 304 and accompanying text.

and social service agencies, which possessed in some instances significant religious motivations, may have continued indefinitely as honest efforts in service to the poor, had they not been presented with the lucrative possibilities of placing children internationally. Finally, the financial opportunities of intercountry adoption may have induced some within India to go into the “adoption business” as a highly profitable racket requiring little more than the capacity to charm Westerners, bribe Indians, and create a network for obtaining children from desperately impoverished and vulnerable families. The costs of orphanage care, within a society where orphanage workers could be paid less than a dollar a day, could be paid out of the profits of such an operation. Given the potentially high profits, a corrupt individual could run a reputable orphanage offering decent care, which would show well to foreigners, and still walk away with, in Indian terms, a small fortune. Thus, a wide range of persons, from the initially honest servant of the poor, to a charming opportunist who knows how to tell Americans what they want to hear, might appear completely honest and well-intentioned to an American. Thus, Americans who believe they can pick out trustworthy persons in the adoption context are likely engaged in wishful thinking.

A further difficulty is that some Indians serving as middlemen in such schemes could possess cultural attitudes that allow them to buy children or engage in other abusive practices without experiencing any sense of guilt or wrongdoing. Some middle class or wealthy Indians may possess a starkly negative (they might say “realistic”) view of the poor, “backward” worlds of lower-class India, composed of tribals, scheduled castes, poor farmers, servants, and laborers. From this perspective, moving children from such “backward” circumstances to the immeasurably richer developed world may seem like bestowing a great benefit, no matter what means are employed to wrest children from their families. Any losses to birth families could easily be minimized through a worldview that looks with relative disdain at the lifestyle of those birth families, who are, after all, sometimes guilty of selling (or even killing) their own children. It would be relatively easy for Westerners, who are easily shocked by the life and circumstances of the poor of India, to feel that they are in common cause with their Indian collaborators in moving children from great deprivation to adoptive homes in America, while overlooking the willingness of those collaborators to buy or even steal children. From the Western perspective, after all, it is “their world,” and their job to get things done in a way that is culturally suitable.

Thus, the tacit agreement between United States agencies and their Indian counterparts is that the end justifies the means, and that the ugly means will be left within the discretion of those who know India best, the Indian agencies and facilitators.

The paradox of the adoption world is that one can systematically buy and steal children from their parents, get rich in the bargain, and still feel like a hero, as though one had at great personal risk repeatedly rescued children from burning buildings. Within a world gripped by the myth of saving a child, virtually every other value becomes expendable. Those who believe the myth, or only pretend to believe it, find that, within the adoption world, even the most egregious sins and illegal conduct are excused so long as they successfully move children from third-world deprivation to first-world luxury.

Thus, to expect adoption agencies, or any organization dominated by adoption agencies, to stop abusive adoption practices is akin to expecting an immigration rights group to patrol America's borders. Even where such a group is aware of technically illegal behavior, it would be more apt to excuse the behavior on behalf of the greater good or right of immigration. Thus, any adoption system that relies on adoption agencies to police themselves, or peer accreditation systems to regulate the agencies, is doomed to be ineffective in stopping abusive adoption practices.

## 2. United States Adoptive Parents Are Poorly Situated to Discover, Prevent, Investigate, or Report Abusive Adoption Practices

Adoptive parents are very poorly situated to police the system of intercountry adoption. Their primary motivation is to become the parents of a child. They rely for their information primarily on adoption agencies, which tend to minimize irregularities and shield them from the actual workings of the system. Their contacts with the foreign country are often of short duration, and sometimes tightly scripted. Even when they become aware of irregularities, or gain extensive knowledge of the system, they easily become embroiled in efforts to "get their children out" regardless of those irregularities.

The Andhra Pradesh adoption scandals illustrate these principles. Most of the Western parents who accepted placements from Andhra Pradesh presumably believed that "their child" was a true orphan and "their agency" reliable. Many were presumably never informed about the existence of prior scandals in the state, and

if they were informed they were presumably reassured that this would not affect their adoptions. As each of the scandals broke—in 1996, 1999, and 2001—prospective adoptive parents to varying degrees collaborated with one another in mutual efforts to “bring their children home.” Some made heroic efforts, spending extensive amounts of time in India, with mixed results. Although these parents became heroes within the adoption community for their efforts, and were sometimes respected by some within India, there is no evidence that any of them worked, either individually or collaboratively, to reform the adoption system or remedy the wrongs done in the name of adoption.<sup>336</sup> Their heroic efforts were concentrated on completing their adoptions, or helping other Western prospective adoptive parents do the same. There was understandably little time or appetite left to try to change the system, even when they came to understand some of its flaws. Of course, most of the prospective adoptive parents with affected children were unable or unwilling to travel to India for extended periods of time. They became reliant on others for their information, as they sought answers from afar to various questions: Was Peter Subbaiah a good man being maligned for religious and political reasons, or was he really guilty?<sup>337</sup> Where is “my child?” Was my child bought? Whatever information or rumors were circulated among Western prospective adoptive parents, there was no organized effort to have a voice in repairing the Indian adoption system.

Experience outside of Andhra Pradesh has confirmed that only a small minority of Western adoptive parents become seriously interested in efforts to reform adoption, even after being personally impacted by adoption scandals.<sup>338</sup> When they do so, they face various obstacles: threats of libel suits from their agency, ostracism and criticism from adoption communities that view them as a threat to the continued operation of the system, and contractual gag provisions. Even if they go so far as to sue their agencies, adoptive parents are likely to either settle the suits, and then become subject

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<sup>336</sup> See, e.g., ABBOTT, *supra* note 214, at 43–112 (describing efforts of Francis Abbott and other American parents to bring children out of adoption scandals to America); *supra* notes 290–312 and accompanying text (discussing extraordinary efforts of Sharon Van Epps to complete her adoption of Haseena).

<sup>337</sup> See ABBOTT, *supra* note 214, at 44–53 (arriving at starkly negative conclusions about Subbaiah).

<sup>338</sup> This conclusion is my own, after talking with parents and agency personnel impacted by adoption scandals in a number of countries.

to gag agreements as part of the settlement, or else lose the suit based on contractual disclaimers of responsibility for what occurs in foreign countries. In any event, it appears that very few lawsuits have ever been brought against agencies for trafficking in children; the typical lawsuit instead complains about undisclosed conditions of the child. Thus, American courts have not yet recognized the harm to adoptive parents resulting from the “adoption” of a trafficked, stolen, or bought child. The alternative of approaching government authorities in the hope of a remedy or some official action is understandably frightening to adoptive parents, who wonder about possible negative effects on their adopted children. Will their child have her United States citizenship revoked or denied, or be taken from the adoptive family and shipped back to her country of origin, if the family comes forward with evidence of trafficking? And in the rare event where adoptive parents have attempted to approach government authorities, they have sometimes experienced a lack of interest in investigating and pursuing their cases. Thus, adoptive parents who do possess significant knowledge of improprieties rarely share it in any way likely to produce change.

3. Some Sending Nations Are Unwilling or Unable to Prevent Significant or Systemic Abusive Adoption Practices

Not all sending nations are equally prone to significant adoption scandals or abusive adoption practices. The list of nations significantly affected by such difficulties in the last few years include Cambodia, Guatemala, India, Romania, and Vietnam. One of the primary difficulties in these scandal-prone nations is their inability, or unwillingness, to enforce legal and ethical norms related to intercountry adoption. The question is why some nations seem to be constantly mired in adoption scandals and improprieties, while adoption systems in other sending countries seem to function more ethically.

Although poverty is a very significant factor in creating the conditions for abusive intercountry adoption systems, it is not a sufficient cause. First, not all poor nations have become havens for abusive adoption practices. Second, significant sectors of Indian society are quite economically and technologically advanced. India is a nation-state representing one of the world’s great civilizations, the largest democracy in the world and the world’s second-most populous nation. India is a land filled with poverty and poor people, and its



per capita income of \$480<sup>339</sup> is certainly low, but it would be wrong to simply label it a poor and backward nation. The technological, cultural, intellectual, and economic resources of India are extensive and impressive. A nation capable of inspiring the fear that it will capture, through “out-sourcing,” America’s high technology jobs,<sup>340</sup> presumably has the capacity to develop an adoption system with greater integrity.

Why, then, has India had such difficulty in creating a more transparent and ethical intercountry adoption system? To understand the problem, it may be helpful to view the issue of India’s role as a sending country for intercountry adoption from an Indian perspective. Although it may not be apparent to outsiders, the adoption issue, within the broader scheme of the fate of India’s children, is completely insignificant. India has been sending between four hundred and six hundred children a year to the United States,<sup>341</sup> and the total number being sent to all countries (including the United States) is approximately one thousand to thirteen hundred children annually.<sup>342</sup> In a nation with 157 million children between zero and six years of age, and more than twenty million births per year,<sup>343</sup> thirteen hundred children a year leaving the country for intercountry adoption can have no statistical effect, whether on population or on any category of public health or social welfare. The same would be true even if India managed to send ten times as many children as it presently does to other countries for intercountry adoption. Thus, although India’s children face, on a broad

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<sup>339</sup> Pink, *supra* note 212.

<sup>340</sup> See *id.*; Manjeet Kripalani & Peter Engardio, *The Rise of India, and What it Means for America*, BUSINESS WEEK, Dec. 8, 2003, at 66, available at LEXIS, News Library.

<sup>341</sup> See, e.g., EVAN B. DONALDSON ADOPTION INST., INTERNATIONAL ADOPTION FACTS, at <http://www.adoptioninstitute.org/FactOverview/international.html> (last visited Feb. 5, 2005) (indicating 503 Indian adoptions in America in 2000 and 543 in 2001); William L. Pierce, *Finding American Homes: For U.S. Families, International Adoption Is at an All-Time High*, NATIONAL REVIEW ONLINE (Oct. 24, 2002), at <http://www.nationalreview.com/comment/comment%2Dpierce102402.asp> (indicating 412 Indian adoptions in fiscal year 2002).

<sup>342</sup> See, e.g., BAJPAI, ADOPTION LAW, *supra* note 96, at 179 (stating that there were 3331 intercountry adoptions in three year period from 1991 to 1993; Rahman, *supra* note 238 (quoting CARA Head stating that 7315 children were adopted internationally over last six years)); Ramaswamy & Bhukya, *supra* note 224, at 12 (estimating that there are 1000 intercountry adoptions per year); *supra* note 318 (summary of last eight months’ CARA figures show 708 approvals over eight month period).

<sup>343</sup> See OFFICE OF THE REGISTRAR GEN., PROVISIONAL POPULATION TOTALS: INDIA, *supra* note 324.

demographic basis, many significant issues, *from India's perspective* intercountry adoption is not a solution to any of those problems.

To illustrate the insignificance of intercountry adoption for India, consider the legitimate concerns raised by India's sex ratio of 933 females per 1000 males, which drops to 927 females in the zero to six age group.<sup>344</sup> India is "missing," within the zero to six age range, nearly six million girls.<sup>345</sup> Whether this is caused by sex-selective abortion, female infanticide, or a general failure to allocate food, medical care, or other essentials to girls, it is certainly a legitimate societal concern. In this context, although efforts to save female children are sometimes seen as a positive purpose of intercountry adoption, the significance of moving approximately six hundred to seven hundred girls a year out of the country is hardly a way to remedy the problem of India's female population. Aside from the absurdity of shipping away girls in a society lacking in females (about two-thirds of intercountry adoption placements out of India are girls),<sup>346</sup> the fact remains that the numbers involved in intercountry adoption are so small that they have no demographic significance. The same exercise could be done in regard to other problems affecting India: the numbers affected by malnutrition, illegal child labor, trafficking, or other wrongs simply are not going to be significantly affected by intercountry adoption, even if one assumed that every single child involved in intercountry adoption was being saved simultaneously from every single possible wrong befalling India's children.

From this perspective, it would be irrational for India to devote very much in the way of resources or effort in living up to international legal ideals for adoption. In a land facing innumerable social problems, the allocation of scarce government resources and attention to those problems is critical. In a land with hundreds of millions of impoverished people, questions of the best path to economic development should be preeminent. Creating a system to ship a small number of "orphans" out of the country can hardly be a national priority.

The attitude of Western adoptive parents to India's problems may seem rather peculiar. Americans who are overwhelmed by the

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<sup>344</sup> *Id.*

<sup>345</sup> See BAJPAI, CHILD RIGHTS, *supra* note 96, at 455–56 (describing status of girl children in India, and noting that the sex ratio worsened from 1991 to 2001).

<sup>346</sup> See *supra* note 318.

poverty and apparent degradation experienced by masses of people in India somehow seem to feel it a noble response to spend between \$10,000 and \$20,000 adopting an individual child, while leaving behind, in the orphanages, on the streets, and in the villages, tens of millions of similarly situated children. The arbitrariness of selecting an individual child for such rescue, while doing little or nothing for those left behind, does not seem to bother most. The odd effect might be compared to responding to a massive famine by selecting one starving individual for a donated diet of caviar and champagne. Obviously, the cost-effective, rational response to a famine is to erect a feeding station for the masses with low-cost, basic nutrition, not helicopter a few individuals out of the country so they can dine in ethnic restaurants in America.

One answer to the question of why India has not developed a more transparent and efficient system of intercountry adoption, then, would be that it would be irrational to make such a system a national priority. A second answer is the nature of the obstacles to the construction of such a system. The primary obstacles are probably not financial, as India could, if it chose, charge foreign agencies and adoptive parents sufficient fees to fund the administrative and oversight costs necessary for a well-functioning system. The primary obstacles to India developing an effective system of intercountry adoption are cultural and legal. Even a cursory examination of those obstacles should illustrate the point.

First, India has yet to develop an efficient, humane, and transparent system of domestic adoption. The current statutory bases for domestic adoption, the Hindu Adoption and Maintenance Act of 1956, and Guardians and Wards Act of 1890, severely limit the capacities of Indians to adopt Indian children, due to limitations based on the existence of other children in the adoptive family, or the religion of the adoptive parents.<sup>347</sup> Those laws reflect longstanding cultural obstacles to the broad acceptance of formal adoption as a way of building a family. In addition, it is questionable whether the formal system of adoption has any connection or relevance to the majority of Indians, who may have limited access, financially or culturally, to initiating formal legal processes, and who may handle “adoption” instead through informal, community-based processes.

There are ongoing efforts in India to address the inadequacies

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<sup>347</sup> See *supra* notes 100–05 and accompanying text.

of the formal system of domestic adoption, in part through the enactment and implementation of new laws. In addition, adoption does seem to be gaining social acceptance. Nonetheless, the bureaucratic implementation of reform often comes very slowly in India. At best, it will likely be a decade before domestic adoption within India achieves significant reform affecting most of the nation.<sup>348</sup>

The lack of a functional system of official domestic adoption within India is starkly evident from a statistical comparison with the United States. In the United States, a country with a population of approximately 295 million people,<sup>349</sup> there are approximately 50,000 adoptions per year out of the foster system alone, which does not include children placed directly from birth parents to adoptive parents or through private agencies.<sup>350</sup> By contrast, India, with over one billion people, officially reports less than 2,000 domestic adoptions per year.<sup>351</sup> Thus, on a per capita basis, official domestic

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<sup>348</sup> The Juvenile Justice (Care and Protection of Children) Act, §§ 40–45 (2000) includes provisions on adoption that could be used to authorize a (possibly partial) system of adoption not subject to the limitations of the Hindu Adoption Act. Apparently these provisions have not yet been generally implemented. See BAJPAI, CHILD RIGHTS, *supra* note 96, at 46–47. However, in January 2005, a district court judge in New Delhi ruled that intercountry adoptions should be processed under the Juvenile Justice Act, rather than under the Guardians and Wards Act of 1890. This ruling appears to be effective only locally, and thus will not change adoption procedures in the rest of the country. The ruling will, however, add to the national debate over the role of the Juvenile Justice Act in India's adoption system. See *Complete Adoption Formalities in India*, TIMES OF INDIA, Jan. 19, 2005, available at LEXIS, News Library; *Foreign Adoptions: Juvenile Justice Act to Apply*, at <http://cities.expressindia.com/fulstory.php?newsid=114298> (Jan. 18, 2005); see generally Parvathi Menon, *A New Act and Some Concerns*, FRONTLINE (May 26–June 8, 2001), at <http://www.frontlineonnet.com/fl1811/18110630.htm> (last visited Feb. 5, 2005).

<sup>349</sup> See U.S. CENSUS BUREAU, U.S. AND WORLD POPULATION CLOCKS (estimating a U.S. population of 295,222,486), at <http://www.census.gov/main/www/popclock.html> (last visited Jan. 6, 2005).

<sup>350</sup> See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2001 ESTIMATES AS OF MARCH 2003, at <http://www.acf.hhs.gov./programs/cb/publications/afcars/report8.htm> (last visited Feb. 5, 2005).

<sup>351</sup> See BAJPAI, ADOPTION LAW, *supra* note 96, at 179 (stating that there were 3611 domestic adoptions in India during three year period from 1991 to 1993); BAJPAI, CHILD RIGHTS, *supra* note 96, at 41 (noting in-country adoptions ranged from 1330 to 1870 in the years 1996 to 2000); Bonner, *supra* note 10, at A3 (reporting that there were 1200 domestic adoptions in 2002). Curiously, one source quotes a higher number of around 4000 per year; even if this is accurate, the per capita domestic Indian adoption rate would be quite low. Cf. Rahman, *supra* note 238 (quoting Dev Barman of CARA to the effect that 25,000 domestic adoptions were approved in last

adoption appears at least one hundred times more common within the United States than in India. This disparity seems likely to remain significant even if one takes into account the significant gaps in India's adoption statistics, which apparently only include adoptions by CARA-approved agencies.<sup>352</sup>

The lack of an effective system of domestic adoption within India means, in itself, that India cannot at present create a truly lawful system of intercountry adoption. The law, after all, both nationally and internationally, requires that intercountry adoption be a last resort *after* domestic adoption. This principle requires that efforts be made to adopt a child domestically prior to attempting intercountry adoption. Those efforts to adopt a child domestically, however, are hampered by a domestic adoption system that artificially suppresses and limits domestic adoption. Thus, even where it is factually accurate, *on an individual basis*, that sincere efforts were made to place a particular child domestically, *on a system-wide basis* adequate efforts to place a child domestically cannot occur until domestic adoption is at least as accessible as intercountry adoption. Indeed, how can India satisfy legal requirements to favor in-country adoption, when under current law there are many situations where a family that would be ineligible to complete an adoption domestically, could legally complete the adoption if they were foreign and adopted through the intercountry adoption system?<sup>353</sup>

Another cultural obstacle to reform of India's intercountry adoption system is the predominance and acceptance of corruption within Indian society. It is not as though corruption and bribery were

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<sup>352</sup> Apparently all of the available statistics on domestic adoption in India come from CARA, which only receives reports from CARA-approved agencies. See, e.g., BAJPAI, CHILD RIGHTS, *supra* note 96, at 41 (listing CARA as source for statistics on domestic adoption from "recognized agencies"). Agencies that do not place children internationally generally do not seek recognition from CARA and therefore do not report their adoptions to CARA. Thus India, like the United States, lacks a formalized mechanism for gathering nationwide domestic adoption statistics.

<sup>353</sup> For example, twins or other sibling groups with children of the same gender cannot be adopted domestically within the terms of the Hindu Adoptions and Maintenance Act of 1956. See Hindu Adoptions and Maintenance Act, No. 78, § 11 (1956), available at <http://indiacode.nic.in/fullact1.asp?tfm=195678> (last visited Feb. 5, 2005). In intercountry adoption, by contrast, individuals can avoid these limitations by obtaining guardianship from India, and then relying on their own adoption laws to finalize the adoption, regardless of limitations relating to religion or gender. Thus, the odd situation is created where an adoption which would be denied to an Indian under domestic adoption is allowed to a foreigner through intercountry adoption.

uniquely associated with adoption. To the contrary, corruption is a pervasive part of Indian life. Corruption is so pervasive as to be normative in many spheres; thus, it takes an extraordinary effort for India to construct systems that are less subject to the taint, distortion, and inefficiencies of corruption. This effort to create situations where corruption is less pervasive can occur within India when there are very strong incentives, as in the development of major industries, such as the IT sector. But is it worth it to India to make these heroic efforts in regard to intercountry adoption, which lacks both humanitarian and economic benefit for the nation as a whole?

An additional cultural obstacle to the development of a lawful system of intercountry adoption in India is the complex relationships among different groups within India. Generally speaking, Western agencies will network with Indians who are literate, speak English, have access to telephones, computers, and the internet, and thus come from India's middle or wealthy classes. Many of the children being placed for adoption, however, come from tribal groups or scheduled castes, or at least from the hundreds of millions of poor farmers and laborers who comprise India's poorer classes. The mothers of these children will generally speak only Indian languages, be illiterate, and have little access to modern means of communication. Even with the best of intentions, it would be very difficult to create non-exploitative relationships across the class, caste, and other social boundaries that divide Indian adoption workers from birth families.

Finally, an additional obstacle to creating a system of lawful intercountry adoption in India lies in the difficulties of protecting the rights of poor, Indian women. The severe gender imbalance within India, under which there are approximately thirty-five million missing females (933 females for every 1000 males),<sup>354</sup> is the most obvious sign of the many difficulties suffered by India's women. The combination of being female, and a member of a caste, tribe, or social group traditionally disadvantaged in Indian society, places hundreds of millions of India's girls and women in a starkly vulnerable position. The fundamental requirements of a lawful relinquishment, under which each parent makes an individual and free choice, arguably do not fit the realities of the lives of these women. Is it correct, for example, to view the mother as an autonomous agent in trying to decide whether to place her child, when her family and group view

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<sup>354</sup> See *supra* note 324 (reporting data from 2001 Indian census).

her as bound to follow the dictates of her husband and mother-in-law? What does “choice” mean when an individual faces chronic malnutrition and debt? And how does even an Indian from outside of the social group establish a respectful, non-exploitative relationship with both the individual woman, and her family and group, when that very family and group may be cruelly oppressing the woman?

There are, then, multiple daunting difficulties that must be overcome to establish an intercountry adoption system in India that meets the standards of national and international law. The point is not that establishment of such a system is impossible, but rather that it would require sustained and heroic efforts. It is not at all clear, however, that such heroism would be best spent on adoption. Indeed, it would arguably be irrational for India, or Indians, to make the herculean efforts required to overcome these obstacles for the sake of constructing a better intercountry adoption system. If one had the capacity to overcome legal gaps, cultural prejudices, corruption, misunderstandings across class lines, and the powerlessness of poor Indian women, one could perform far greater miracles in India than sending a thousand children a year out of the country.

*B. The United States Government Is the Primary Actor Capable of Reforming Intercountry Adoption*

1. The Andhra Pradesh Activists Have Succeeded in Shutting Down, Rather than Reforming, Intercountry Adoption

If it is true that the intercountry adoption system is not self-regulating, and that the primary actors involved lack the power or incentive to prevent abuses, then from where can reform come? Initially, one can see in the Andhra Pradesh story the possibility that reform could come from activists in sending countries who put pressure on their governments to act. The difficulty with this thesis is that the Andhra Pradesh activists have succeeded more in shutting down the intercountry adoption system than in reforming it. It is sometimes unclear, in any event, whether the activists are simply ideologically opposed to sending Indian children out of the country, even if such adoptions were done in accordance with the principles of national and international law. Even if the activists were committed to reforming, rather than shutting down, the system,

there is little indication that they would be capable of overcoming the obstacles to such reform noted above.<sup>355</sup> Activists cannot single-handedly overcome legal barriers, cultural prejudice, pervasive corruption, and the powerlessness of poor Indian women. Nor can activists ensure that the many players in the intercountry adoption system perform honestly and efficiently. As a protest movement, it is much easier to shut the system down than to reform it. For activists, shutting down a system primarily requires that one persuade one of the many authorities who must approve each adoption to consistently deny such approvals. At the present time, for example, the courts of Andhra Pradesh, including both the family court and the High Court, appear sufficiently hostile to intercountry adoption to make it difficult for new cases to proceed.<sup>356</sup> Even the Indian courts, however, seem largely powerless to reform, rather than shut down, India's intercountry adoption system.

2. The United States Government Should Reform Intercountry Adoption by Creating an Accountability Structure Which Holds United States Adoption Agencies Legally Responsible for the Actions of Agencies and Individuals with Whom They Work in Sending Nations

Among the actors involved in intercountry adoption, the United States government is the entity best situated to bring about significant reform. There are several reasons why the United States is well situated for this role. First, the United States is the largest recipient nation,<sup>357</sup> giving it a unique stake in the global adoption system. Second, the United States government is already involved, as an immigration matter, in intercountry adoptions, and under the Hague Convention, federal responsibility for intercountry adoption will become an international treaty obligation. Third, the United States government generally has a presence in the various sending countries, and thus has agents able to investigate matters occurring in other countries. Finally, unlike many sending nations, the United States government does not have to overcome any essential legal or cultural obstacles within American society in order to enforce the fundamental standards of intercountry adoption.

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<sup>355</sup> See *supra* Part III.A.

<sup>356</sup> See *supra* notes 293–318 and accompanying text.

<sup>357</sup> See, e.g., Pierce, *supra* note 23, at 537; Kapstein, *supra* note 5, at 115.



The primary difficulty faced by the United States government has been a lack of political will to enforce the relevant legal norms. This lack of political will stems from at least two sources: first, the understandably low priority of intercountry adoption for the federal authorities, and second, the political pressures created by the adamant demands of American adoptive parents and agencies, who generally urge that adoptions be completed and entry into the United States approved even in situations involving serious violations of the norms governing adoption.

The transitions involved in United States ratification of the Hague Convention provide the opportunity for the United States government to take up the task of reforming intercountry adoption, by taking the political high ground against those within the American adoption community who lobby for the status quo. The political battle within the United States will concern the question of the "second-choice," as some argue that the global adoption pipeline must be kept open at all costs, despite credible charges of illegality and abuse, and others argue that abusive adoption practices must be stopped even if this means sometimes slowing or stopping adoptions. The hope that can be offered at this point is that the United States government is capable of substantially improving the global adoption system, if it can summon the political will to do so.

Assuming the political will to act affirmatively to reform intercountry adoption, the next question is one of method. The United States government should use the Hague implementation process to create an accountability system. The United States government would anchor this accountability system by holding United States adoption agencies to account through the Hague process of government accreditation of agencies. Critical to this accountability structure would be multiple legal devices by which United States adoption agencies would themselves be held accountable for the actions of agencies and individuals with whom they worked in the sending countries.

Within the current adoption system, United States agencies generally escape all accountability for scandals and abuses by disclaiming any responsibility or control over the acts of their partner agencies and facilitators in other countries. For example, the United States agencies who were involved in placing children through Sanjeeva Rao's ASD orphanage, or Peter Subbaiah's Good Samaritan orphanage, or the Kumar's John Abraham Bethany orphanage, apparently considered themselves free of any responsibility or liability

*even if those Indian individuals and agencies were guilty of child trafficking or other violations of adoption norms.*

By contrast, the United States government should work to create an adoption system in which United States agencies are liable for these kinds of fundamental violations of the legal and ethical norms governing adoption. Of course, United States agencies will respond that they cannot control or be responsible for what occurs in countries like India. This kind of claim has become so familiar within the adoption world that its irresponsible and unethical nature is not clearly recognized. It is an argument, it should be noted, which is not accepted in other situations involving cross-border provisioning of services or goods. No American company providing customer service to Americans through a call center in India could disclaim responsibility for privacy violations, sloppy work, or rudeness, because “we can’t control what happens in India.” No American company employing software programmers or financial analysts in India could avoid fundamental ethical norms because “we can’t stop corruption in India.” No importer of goods into the United States would be permitted to disclaim product liability responsibility for defective products based on the argument that we “can’t control the way things are made in China.” In a connected, interdependent world, it is normative that professionals, organizations, and industries involved in cross-border work are responsible for the integrity and quality of the service or good, regardless of how many nations were networked and involved in providing or creating the service or good. Responsibility for adoption is not less significant or important than these other responsibilities, and there is no reason that institutions and individuals working in adoption services should be able to disclaim their normal responsibilities in such brazen fashion. It is absurd to have an industry present itself to adoptive families as highly ethical, and involved in placing orphans into loving homes, and then to allow the industry to disclaim responsibility when it turns out that it has instead been involved in creating orphans and breaking apart families.

Thus, the legally enforced position of the United States government should be that adoption agencies in the United States are legally accountable for the actions of their partner agencies and facilitators working within sending countries. Some United States agencies may withdraw from some adoption fields because of this exposure to greater liability and responsibility. Some may be unable to obtain liability insurance at reasonable rates, particularly if they

place children from certain high-risk nations. In the longer term, however, only agencies that are willing to be held responsible for their entire network of service providers can be trusted to exercise the great responsibility of moving children across borders.

The exact legal and institutional mechanisms by which systems of accountability can be built into the global adoption system are beyond the scope of this Article. The question is complex, and requires additional and intricate analysis.<sup>358</sup> The thesis of this Article, however, is that adoption scandals, like those in Andhra Pradesh, illustrate the necessity of building such systems of accountability into the global adoption system. Without such systems of accountability, one can virtually never know, when holding an adopted child, whether the child was an orphan needing a home, or a beloved daughter or son illicitly taken from a home. Without accountability, the pretty face of adoption as a loving act that fills a real need in a child's life will, all too often, turn out to be no more than a mask covering over ugly realities of trafficking, profiteering, and needless tragedy.

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<sup>358</sup> Some initial suggestions are found in my comments on the proposed Hague regulations. See Smolin, *supra* note 328. I intend to elaborate on this issue of providing accountability in a subsequent work.