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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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AN OVERVIEW OF THE INTERNATIONAL LAWS ON ADOPTION

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Abstract

Adoption is one of the most common customary practices in the world. All the societies do not substitute non-consanguineous relationships as analogous to blood relations, but all of them recognise some kinds of alternative family care systems. Adoption, being the most popular alternative family system, causes great concern to the international community. Therefore, international laws gradually develop universal standards of child protection in the institution of adoption. This paper discusses how the international laws relating to adoption evolved; what are the standard protections mandated for the States; and how adoption historically a system that gave a family a child, evolved to a system that gives to a child a family.

Introduction

Adoption serves many purposes: it fulfils man's desire for the celebrations of his name, for the perpetuation of his lineage, for providing security in old age, and for dying in satisfaction that one has left an heir to one's property; it provides orphan and abandoned children with the love and care of the family and the name of the parents. The institution of adoption has not been limited within the boundaries of a State. The nineteenth century witnessed two World Wars, the Korean War and the Vietnam War, which caused a surge in cross-border child adoption. Eventually, intercountry adoptions became a concern for all the States. A record number of children were abducted, trafficked, and laundered for the purpose of illegal adoption, which obliged the States to make a common agreement to protect the interests of the child in the incidents of intercountry adoptions.

In modern times, all child laws are founded on the principle of the 'Best Interest of the Child'. The

'Best Interest of the Child' is one of the core principles¹ of the UN Convention on the Rights of the Child, 1989 (hereinafter referred to as the CRC).² Among the four core principles of the CRC, the 'Best Interest of the Child' principle is pertinent for the system of adoption. The CRC is a universal, all-encompassing international child law. In this Convention, two provisions – Article 20 and 21, mentioned 'adoption'. These provisions laid down the primary guidelines of the alternative family care institutions in the protection and development of the children. 'Adoption', being the most popular form of alternative care, receives special focus. Whereas, Article 21 is specifically dedicated to intercountry adoption. Later on, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (hereinafter referred to as HCIA)³ was drafted on the foundation of Article 21 of the CRC. The 'Best Interest of the Child' being the fundamental principle of child protection and development is the foundation of the 'adoption-related' international law. The 'Best Interest of the Child' in adoption means to give primacy to the interest and well-being of the child where he or she is being adopted, which also means not to give a family a child but to give a child a family.

In light of the above-mentioned discussion, this paper tries to understand how 'adoption' as an alternative family care institution is evolved under international laws.

Adoption introduced under international laws

The international laws affirm the superiority of the family environment. Both the Universal Declaration of Human Rights, 1948 (hereinafter referred to as the UDHR) and the Covenants establish the status of the family as the natural and fundamental group unit of society. Article 16(3) of the UDHR states:

¹ The four guiding principles of the CRC are: non-discrimination; the best interests of the child as a primary consideration in all actions concerning children; the child's inherent right to life, and State Parties' obligation to ensure to the maximum extent possible the survival and development of the child; and the child's right to express his or her views freely in all matters affecting the child, with those views being given due weight.

"Frequently asked questions on the Convention on the Rights of the Child" *UNICEF*, available at: <https://www.unicef.org/child-rights-convention/frequently-asked-questions#:~:text=The%20guiding%20principles%20of%20the,of%20the,of%20the%20child%3B%20and%20the>

² Among the four core principles of the CRC, the 'Best Interest of the Child' principle is pertinent for the system of adoption.

³ Convention on Protection of Children and Co-operation in respect of Intercountry Adoption adopted by UN General Assembly Resolution 41/85, of 3 December, 1986.

Hague Conference on Private International Law, "33. Convention on Protection of Children and Co-operation in respect of Intercountry Adoption" *HCCH*, available at: <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Article 10(1) of the International Covenant on the Civil and Political Rights, 1966 (ICCPR) reaffirms:

“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”

Article 23(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), again, maintains:

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

The Covenants strongly place emphasis on the family, though they do not define what is meant by family, *i.e.*, the biological parents, extended family, or both.

The Covenants particularly recognise the vulnerability and dependence of children. Although the obligations contained in the ICCPR do not, specifically, address children who live outside their family environment, there are various provisions of immediate relevance to alternative care institutions. The only child-related provision of the ICCPR is Article 24. It provides:

- “1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.”

Whereas, the ICESCR under Article 10(3) directs:

“Special measures of protection and assistance should be taken on behalf of all children and young

persons without any discrimination for reasons of parentage or other conditions.”

The UN Declaration on the Rights of the Child, 1959

The UN Declaration on the Rights of the Child, 1959 does not contain any provision specifically dedicated to child adoption. Principle 6 mentions the need for alternative family care but it does not give further explanation on the forms of such care. It provides:

“[s]ociety and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support.”

The UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986

The 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, specifically concentrated on adoption, and it was mentioned in different parts.⁴ This Declaration was divided into three parts:

- A. General family and child welfare;
- B. Foster placement; and
- C. Adoption.

It is noteworthy that Article 5 also states the principle of the best interests of the child.

Part C incorporates principles common to adoption, later adopted in the CRC. It is necessary to remember here that this Declaration was specifically drafted to lay down the common principles for alternative family care, *i.e.*, foster care and adoption. Also, it was made for domestic and international programmes. The CRC and the Hague Convention on Protection of Children and Co-operation in

⁴ United Nations, Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, proclaimed by General Assembly Resolution 41/85 of 3 December 1986, available at: <https://searchlibrary.ohchr.org/record/18403?ln=en>

Respect of Intercountry Adoption, 1993 (hereinafter referred to as HCIA).⁵ To discuss how the institution of adoption evolved in the international regime, the 1986 Declaration and HCIA are more significant than the CRC, as the CRC is a general child-related law. In the 1986 Declaration Part C, Articles 12-25 focuses on adoption. An overview of Part C is as follows:

1. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his or her biological family.⁶
2. If the biological parents want to surrender a child, sufficient time and adequate counselling should be given to understand the consequences of their act.⁷ But in no circumstances should an adoption be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available.⁸ The child should at all times have a name, a nationality, and a legal guardian.⁹
3. All States, through their legislation and services should ensure that the child becomes an integral part of the adoptive family.¹⁰ Therefore, it is the primary responsibility of the concerned adoption authorities or agencies to select the most appropriate family for the particular child concerned.¹¹ Adoption procedures should be flexible enough to meet the child's needs in various situations.¹² In each State, placements should be made through authorised agencies competent to deal with intercountry adoption services and provide the same safeguards and standards as are applied in national adoptions.¹³
4. Governments should determine the adequacy of their national services for children and recognise those children whose needs are not being met by existing services. For some of these children, intercountry adoption may be considered a suitable means of providing them with a family.¹⁴ While considering intercountry adoption, the concerned authorities should

⁵ Convention on Protection of Children and Co-operation in respect of Intercountry Adoption adopted by UN General Assembly Resolution 41/85, of 3 December, 1986.

Hague Conference on Private International Law, "33. Convention on Protection of Children and Co-operation in respect of Intercountry Adoption" *HCCH*, available at: <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>

⁶ *Supra* Note 3 at Art. 12.

⁷ *Id.* Art. 15.

⁸ *Id.* Art. 23.

⁹ *Id.* Art. 25.

¹⁰ *Id.* Art. 16.

¹¹ *Id.* Art. 14.

¹² *Id.* Art. 13.

¹³ *Id.* Art. 21.

¹⁴ *Id.* Art. 19.

check – the legal validation of the adoption is assured in the countries involved;¹⁵ the State's policy, legislation, and services are designed to protect the children concerned;¹⁶ child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality.¹⁷ The States should establish a joint vigilance system to prevent proxy adoptions¹⁸

The CRC, 1989

196 countries are parties to the CRC, including every member of the United Nations excepts the U.S.¹⁹ *The CRC mentions adoption only in two Articles.* Article 20(3) and 21 of the CRC were developed on the foundation laid down by the 1959 and 1986 Declarations. The 1986 Declaration, especially, was entirely adopted. Article 20 clauses (1), (2), (3) are general provisions of adoption. Article 21 clause (a) is also stipulated norm for both domestic and international adoption; clauses (b), (c), and (d) are applicable, specifically, to intercountry adoption.

Articles 20 and 21 concern the situation of children without parental care. Compared to many other issues covered by the CRC, it has a long history in international law. Most of the States do not have comprehensive monitoring tools and standards to ensure that alternative care institutions, nor do the State reports include precise, disaggregated data for children living outside their family environment.²⁰ During the General Discussion of the CRC Committee, several international agencies started formulating a set of proposed guidelines for children in need of 'alternative care'.²¹

The scope of Article 20 is apparently quite clear. It requires States Parties to provide alternative care

¹⁵ *Id.* Art. 24.

¹⁶ *Id.* Art. 20.

¹⁷ *Supra* Note 8.

¹⁸ *Id.* Art. 22.

¹⁹ United Nations Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en

²⁰ International Social Service/UNICEF, Improving Protection for Children Without Parental Care. A Call for International Standards, A Joint Working Paper 4 (UNICEF, New York/Geneva, 2004), available at: <https://bettercarenetwork.org/sites/default/files/attachments/Improving%20Protection%20for%20Children%20Without%20Parental%20Care.pdf>

Also, CRC Committee, Concluding Observations: Mexico, 42nd Session, 8-9 (UN Doc. CRC/C/MEX/CO/3, 2006), <https://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.MEX.CO.3.pdf>

²¹ Nigel Cantwell and Anna Holzscheiter, *Article 20: Children Deprived of Their Family Environment*, 4 (Martinus Nijhoff Publishers, Leiden, 2008).

for children who live outside their family environment. But determining who should be the beneficiary of Article 20 was a complicated task. The term ‘children without parental care’, generally, seems to be the most widely used phrase for children covered under Article 20. However, the drafters of the CRC had a wider group of children in mind than only those ‘living without their natural or biological parents’. Consequentially, the Committee on the Rights of the Child placed a burden on children deprived of a broader family environment in a variety of families, such as the nuclear family, reconstructed family, joint family, single parent family, common-law family, and adoptive family.²²

Historical background of Article 20

In 1978, Poland submitted a proposal to the Commission on Human Rights as a solution to the vulnerability of children living outside their family environment. It stated that ‘Society and the public authorities shall have the duty to extend particular care to children without a family’.²³ Until 1991, this article continued to be unofficially headed ‘special protection measures for parentless children’, when it was reformulated by the CRC Committee as ‘children deprived of a family environment’.²⁴ The change in wording to a less restrictive descriptor already indicates a significant shift in approach.

During the drafting of the CRC, another contentious issue was to find alternative solutions for children without parental care. The US delegation emphasised that the most desirable form of alternative care was ‘permanent adoption of the child.’ Finally, in the 1982 session of the Working Group, the delegation of India for the first time introduced a list of alternative care possibilities, ‘inter alia, foster placement, and placement in community and State child care institutions’.²⁵ Followingly, the introduction of a variety of possible alternative care solutions was generally accepted by the other delegations. Keeping in mind the Islamic States, 12 delegations²⁶ mentioned the tradition of ‘kafala’,

²² CRC Committee, Day of General Discussion on Children Without Parental Care, UN Doc. CRC/C/153, 2006 (March 17, 2006), available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2005.doc>

²³ First Polish Draft contained in ECOSOC, 1978 report of the Working Group to the Commission on Human Rights, Office of the UNHCR, Legislative History of the Convention on the Rights of the Child 522 (UN Doc. E/CN.4/1292, 1978), available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/LegislativeHistorycrc2en.pdf>.

²⁴ *Ibid.* at 526.

²⁵ *Ibid.* ECOSOC, 1982 Report of the Working Group to the Commission on Human Rights, 530 (UN Doc. E/CN.4/1982/90/Add. 7, 1982).

²⁶ These 12 States were: Argentina, Australia, Brazil, China, France, Italy, the Netherlands, Pakistan, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and Portugal.

Supra Note 20 at 31.

and also, inserted the term ‘if necessary’ preceding ‘placement in suitable institutions’.²⁷

The ‘Best Interest of the Child’ under Article 20

Article 20 is one of several in the context where the general principle enshrined in Article 3 – ‘the Best Interests of the Child’ shall be a primary consideration’ in all actions concerning children – is explicitly repeated.²⁸ Here, the repetition is designed to establish a clear link with the removal of the child from parental care in his or her best interests, as foreseen and laid down under Article 9.

Historical background of Article 21

In a letter dated January 17 1978, Poland submitted the first draft of the CRC to the UN Commission on Human Rights. But it did not refer to adoption. Barbados and Colombia, in their respective comments on the Polish proposal, first brought attention, which was the origin of Article 21. The amendment proposed by Barbados dealt with adoption in general and formulated the basic conditions for a child to be declared adoptable. Barbados proposal was as follows:

On the other hand, Colombia focused on intercountry adoption and the application of the principle of non-discrimination between the foreign adopted children and the children of the adopting State. It stated:

“Having analysed articles I to X, we find that they reproduce the content of the ten articles of the Declaration of the Rights of the Child which were adopted by the United Nations General Assembly in 1959, and to which the following might be added: ‘a child who is adopted by nationals of a country other than his country of origin shall enjoy the same rights as are accorded to children of the country in which he is adopted.’”

Here, it is necessary to mention that for the other provisions, the right of Best Interests is ‘a primary consideration’, but in respect of adoption (Article 21) it is further strengthened. Article 21 states that

²⁷ Travaux Préparatoires, Report of the Working Group to the Commission on Human Rights 58 (UN Doc. E/CN.4/1989/48), available at: <https://digitallibrary.un.org/record/57437?ln=en>

²⁸ “UNHCR Guidelines on the Formal Determination of the Best Interests of the Child”, UNHCR 9 (Geneva, May 2006), available at: https://childhub.org/sites/default/files/library/attachments/436_48_EN_original.pdf

‘the best interest of the child shall be the paramount consideration’.²⁹

Norway proposed an improvement on the Colombian paragraph on intercountry adoption, which suggested to include³⁰ –

1. the State’s responsibility to establish a child protection policy and legislation;
2. the obligation to proceed through authorised agencies;
3. the principle of non-discrimination between domestic and intercountry adoption;
4. the validation of consents and proceedings in the countries involved; and
5. the right of the child to a name, nationality, and legal guardian.

India ratified the CRC on December 11, 1992.³¹ Consequently, India incorporates the said principles into all its child-related laws and schemes.

The ‘Best Interest of the Child’ under Article 21

Argentine, French, and Norwegian delegations had received the task of drafting a compromise text on intercountry adoption. The insertion of the ‘Best Interest of the Child’ principle in this Article itself was an initiative of them.³² Nevertheless, it was decided that this principle was of general application to all kinds of alternative care and should not be limited to intercountry adoption only.³³

Why ‘paramount consideration’?

Article 21 reproduces the general principle of Article 3(1) of the CRC within the agenda of its specific scope of application. It provides that ‘the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.’ It has to be stressed that in the rest of the CRC, the ‘Best Interests of the Child’ is ‘a primary consideration’, but Article 21 is the only place in the CRC where the principle is ‘the paramount consideration’. Moreover, here ‘Best Interests of the Child’ are ‘the’,

²⁹ CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 10 (February, 2013), available at: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf

³⁰ Travaux Préparatoires, UN Commission on Human Rights: Report of the 38th Session, 61-62 (UN Doc. E/CN.4/1982/30/Add.1), available at: <https://digitallibrary.un.org/record/31890?ln=en>

³¹ “The United Nations Convention on the Rights of the Child (UNCRC) & Indian Legislations, Judgements & Schemes” 9 *NHRC* (2019), available at: https://nhrc.nic.in/sites/default/files/UNCRC_2020.pdf (last visited February 2, 2023).

³² *Supra* Note 29 at 62.

³³ *Supra* Note 26 at 58-61.

not 'a' like the rest of the CRC.³⁴

It is also inspired, directly, by Article 5 of the 1986 UN Declaration, which establishes that 'in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.' But the 1986 UN Declaration, being a Declaration, was not binding, as the CRC is, and it provided that the 'Best Interests of the Child' 'shall', and not only 'should' be the paramount consideration. The 'paramount consideration' means that the child's interests must take precedence over any other interests,³⁵ in particular those of his or her birth parents, prospective adoptive parents, accredited adoption bodies, or the concerned States. This happened because some delegations expressed their concern that just a reference to the 'Best Interests of the Child' would allow for other interests, including the child's parents' interests, to interfere in the adoption process. As a solution to this issue, the delegation of the Netherlands³⁶ suggested that the 'Best Interests of the Child', for adoption, must be 'the paramount consideration'. Canada,³⁷ and Finland³⁸ were among the countries that promoted this proposal. Article 5 of the 1986 Declaration had a potentially wider application than to foster care and adoption alone. It covers 'all matters relating to the placement of a child outside the care of the child's own parents'.

The HCIA, 1993

The HCIA is the 'only' international law dedicated to the institution of adoption. This Convention has been an endeavour to lay down practical and procedural guidelines to implement the theoretical concept of the 'Best Interest of the Child'. It was developed by the Hague Conference on Private International Law, which is an intergovernmental organisation situated in the Hague, Netherlands. The Conference was concluded on May 29, 1993 and entered into force on May 1, 1995.³⁹ As of

³⁴ "Innocenti Digest No. 4. Intercountry Adoption" *UNICEF*, 5 (Florence, 1998), available at: <https://www.unicef-irc.org/publications/pdf/digest4e.pdf>

³⁵ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* 296 (UNICEF, New York, 2nd edn., 2002),

³⁶ *Supra* Note 26 at 22, 59.

³⁷ *Id.* at 34.

³⁸ *Id.* at 60.

³⁹ "Full Text: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption" *HCCH*, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>

2022, 105 States has ratified the Convention.⁴⁰ This Convention does not allow the State Parties to exercise ‘reservation’ against any provision.⁴¹ Whosoever the members of it are all the provisions are mandatorily applicable to them.

Objectives

The preamble to the HCIA states:

‘Intercountry adoptions shall be made in the best interests of the child and with respect for his or her fundamental rights and to prevent the abduction [sic. should be "abduction of"], the sale of, or traffic in children and each State 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.’

The main objectives of the Convention are set out in Article 1. It declares:

‘to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law, to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children, to secure the recognition in Contracting States of adoptions made in accordance with the convention.’

Characteristics

The HCIA was developed to give effect to Article 21 of the CRC by adding substantive safeguards and procedures to the broad principles and norms stipulated in the CRC. The aim of the substantive and procedural safeguards is to ensure that intercountry adoptions should take place in the best interests of the child. The HCIA laid down only minimum standards, and State Parties are suggested to improve these standards. Based on the principles of the CRC, it echoes the importance of the family environment for the well-being and development of children.

The main concerns with intercountry adoptions are child abduction, child laundering, and child trafficking. The HCIA aims to prohibit an organised crime, *i.e.*, the buying and purchasing of children

⁴⁰ “Status Table, Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption” *HCCH*, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>

⁴¹ *Supra* Note 4 at Art. 40.

for the purpose of intercountry adoption. Therefore, it provides greater security, predictability, and transparency for all parties to the adoption. The HCIA asks the States to establish a system of cooperation between the authorities of the member States. The characteristics of the HCIA can be summarised as follows:

1. ‘Best Interests of the Child’ shall be a paramount consideration

The HCIA gives effect to Articles 3 and 21 of the CRC. In this Convention, the ‘Best Interests of the Child’ are ensured by stipulating that:

- a. the State Parties should give due consideration to the principle of subsidiarity;⁴²
- b. the mother should consent in giving the child to adoption only after the birth of the child;⁴³
- c. the prospective adoptive parents are eligible and suitable to adopt,⁴⁴ and the child is legally adoptable;⁴⁵
- d. the child and the child’s parents’ right to preserve the adoption information and their right to secrecy should be respected.⁴⁶

2. Principle of subsidiarity

In the HCIA, ‘subsidiarity’ means that a child should, whenever possible, be raised by their birth family or extended family.⁴⁷ If that is not possible, the State of origin should try to arrange other forms of permanent family care. Keeping in mind, the ‘Best Interests of the Child’, intercountry adoption be considered only after due consideration has been given to suitable national solutions.⁴⁸ Institutional care should be considered a last resort for a child.

3. Safeguards to protect children from abduction, sale, and trafficking

The State Parties are responsible to establish safeguards to prevent the abduction, sale, and trafficking of children for the purpose of adoption. It also asks the States to incorporate rules that include:

⁴² *Id.* at Preamble states:

‘Recognising 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’.

⁴³ *Id.* at Art. 4(c)(4).

⁴⁴ *Id.* at Art. 5(a)(b), 15(1).

⁴⁵ *Id.* at Art. 16.

⁴⁶ *Id.* at Art. 30.

⁴⁷ *Id.* at Art. 4(b).

⁴⁸ *Id.* at Art. 17.

- a. protect birth families from undue pressure and exploitation;⁴⁹
- b. ensure that only those children in need of a family may be adopted;⁵⁰
- c. prevent improper financial or other gain and corruption;⁵¹ and
- d. regulate the accredited bodies and individuals involved in the adoption process in accordance with the HCIA standards.⁵²

4. Recognition of adoption decisions

One of the achievements of the HCIA is to establish a system of automatic recognition of intercountry adoptions among the member States. According to Article 23, every adoption certified to be made in accordance with the HCIA is recognised ‘by operation of law’ in all other State Parties.⁵³ The reason for introducing this condition is that the provision for the protection and vigilance of the adopted children and whether they would acquire citizenship in the receiving State have disputed and contested in several court cases in many States. The 1986 Declaration explicitly formulated provisions to protect the adopted children’s interests from falling into a state of incertitude.⁵⁴ Article 21 of the CRC also reflects the same concern. Hence, the provisions of the HCIA have been carefully and proficiently drafted to eliminate the need for a procedure for the recognition of adoption decisions or re-adoption in the receiving country, which immediately provides certainty in relation to the status of the child.⁵⁵ This certainty is introduced by adopting a model form for the Article 23 certificate, which attests the conformity of an intercountry adoption with the Convention requirements.

5. Post-adoption matters

The HCIA acknowledges that forming a family through adoption is a long-term process. It mandates post-adoption services, which include counselling and support, search for⁵⁶ origins, periodic post-adoption reports to the State of origin, and remedies for disruption or dissolution⁵⁷ of the adoption.

⁴⁹ *Id.* at Art. 4(c)(1),(2),(3).

⁵⁰ *Id.* at Art. 4(a),(b).

⁵¹ *Id.* at Art. 1(b), 4(c)(4), 32.

⁵² *Id.* at Art. 6.

⁵³ Also, *Id.* at Art. 5(c) declares:

The competent authorities of the receiving State –

‘have determined that the child is or will be authorised to enter and reside permanently in that State.’

⁵⁴ *Supra* Note 4 at Art. 24, 25.

⁵⁵ *Id.* at Art. 26, 27.

⁵⁶ *Id.* at Art. 21.

⁵⁷ *Id.*

The HCIA also directs that before finalising an adoption, the child shall be probationary placed with the adoptive family to check the suitability of the parties.⁵⁸ To prevent The HCIA also maintains the privacy and secrecy of the parties involved in an adoption. It preserves any information concerning the child, including the identity of the child's parents, the child's medical history, and the right to have access to this information.

6. Role of authorities

The HCIA mandates to establish Central Authorities for all State Parties and develop a system to regulate all the adoptions through the Central Authorities.⁵⁹ The Central Authorities are the nodal bodies of the respective States. They are primarily responsible for adoptions. The HCIA imposes general obligations on the Central Authorities, such as:

cooperating with one another through the exchange of general information concerning intercountry adoption;⁶⁰

- a. eliminating obstacles to the application of the Convention;⁶¹ and
- b. deterring all practices contrary to the purpose of the Convention.⁶²
- c. allowing the Central Authorities to perform some of their functions through the adoption accredited bodies,⁶³ as long as they are supervised, accredited, and authorised in accordance with the Convention. It also allows other competent authorities to take part in the adoption procedure according to the Convention.⁶⁴

Conclusion

Adoption is an institution that provides an alternative family care environment for a child. But this is not a universal fact. Hence, it creates a permanent parent-child relationship. In practice, there are several types of alternative care systems that exist in different societies, but many of them do not have non-consanguineous relationships analogous to blood relations. Nevertheless, all cultures agree that

⁵⁸ *Id.* at Art. 20.

⁵⁹ *Id.* at Art. 6.

For India, the Central Authority for adoptions is the Central Adoption and Resource Agency (CARA).

⁶⁰ *Id.* at Art. 7(1), 15(2), 16(2), 31.

⁶¹ *Id.* at Art. 7(2)(b).

⁶² *Id.* at Art. 8, 24.

⁶³ The adoption accredited bodies in India are Specialised Adoption Agencies, Child Care Institutions, District Child Protection Unit, Child Welfare Committee.

⁶⁴ *Supra* Note 4 at Art. 23.

there is no alternative to the family environment for raising a child. Hence, from the discussion, two conclusions can be drawn:

1. keeping in mind different cultural practices, the international community has made an inclusive list of alternative care, which includes foster care, *kafala*, domestic and intercountry adoption, and institutional care. Under Article 20, the States are responsible to determine what kinds of alternative care should be promoted in a State.
2. the aim of international laws has been to protect the 'Best Interest of the Child' in every possible situation. In the case of intercountry adoption, it is 'paramount' because it involves the risk of transferring the children to another country in an alien cultural setting.

To accommodate all the types of alternative care systems, modern international law recognises a range of child-care systems. The aim and ambition of the international community is to provide the Best Possible Care to every child living in different parts of the world.

