

# **Implementing Article 3 of the United Nations Convention on the Rights of the Child: Adoption In and From South Asia.**

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## **A Introduction**

Nepal has experienced an increase in intercountry adoption in recent years. Following the opening up of authorisation to arrange adoptions, the number of child centres offering children for adoption significantly increased after 2000. The emergence in the 1990s of new ‘sender’ countries, such as India and, more recently, Nepal and the troubling absence of well-implemented and enforced regulations on intercountry adoptions in and by sending countries is the focus of this chapter. It examines how India and Nepal interpret and apply Article 3. India ratified the UN Convention on the Rights of the Child in December 1992 and has experienced significant political and economic changes, including its population exceeding one billion.<sup>1</sup> After ratifying the UNCRC, Nepal experienced a debilitating civil war between 1996 and 2006 and continues to suffer from political instability.<sup>2</sup> Underpinning this chapter is discussion of the extent to which the state can regulate intercountry adoption effectively. It is important to note that the chapter does not focus on the highly contentious issue of whether intercountry adoption contributes to the welfare of the child or increases their suffering. In looking at intercountry adoption from Nepal and India domestic adoption will be discussed for it is the preferred approach under the UNCRC and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.<sup>3</sup>

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<sup>1</sup> UN Convention on the Rights of the Child, 20 November 1989, in force 2 September 1990, 1577 UNTS3 (hereafter UNCRC).

<sup>2</sup> A new Constitution, replacing the Interim Constitution 2007, was brought in to effect on 20 September 2015. Riots broke out in areas of Nepal leading to interethnic violence and bloodshed.

<sup>3</sup> The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, in force 1 May 1995, 51 ILM 1134 (hereafter, the Hague International Adoption Convention).

## **B The Rise of Intercountry Adoption**

From the early 1990s the number of intercountry adoptions began to accelerate.<sup>4</sup> Transnational or intercountry adoptions originated in the aftermath of World War II and the Korean War.<sup>5</sup> During the 1990s the list of ‘sending countries’ changed. The change in the ‘sending countries’ reflects a complex range of political, social, and economic factors. Volkman notes that with the exception of South Korea, most of the ‘sending countries’, China, Russia, Guatemala, Ukraine, Romania, Vietnam, India and Cambodia all became active participants in intercountry adoption during the 1990s.<sup>6</sup> The same decade that saw the sending countries all sign the UNCRC.

Article 21 of the UNCRC is the basis of the regulatory framework for intercountry adoption ensuring that the ‘best interests’ of the child must be the ‘paramount consideration’ in any adoption system. In particular, intercountry adoptions should be subject to the same safeguards and standards applicable to domestic adoptions. Under the Optional Protocol on the sale of children, child prostitution and child pornography added to the UNCRC in 2000,<sup>7</sup> all contracting states are required to criminalise the improper inducement of consent and to introduce laws and state programmes to deter the sale of children.<sup>8</sup> In 1993, the Hague Intercountry Adoption Convention created a framework of standards and practices for intercountry adoption to achieve and further the goals of the UNCRC. Under the Hague Intercountry Adoption Convention, contracting states are required to implement the standards and practices set out by introducing governmental accreditation or approval of adoption facilitators. Specifically, contracting states are required to establish central authorities to oversee its requirements. Over the past two decades, sending and receiving states have

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<sup>4</sup> P. Selman, ‘Trends in intercountry adoption: Analysis of data from 20 receiving countries, 1998–2004’ (2006) 23(2) *Journal of Population Research* 183, at 183.

<sup>5</sup> See B. Tizard, ‘Intercountry adoption: A review of the evidence’ (1991) 32(5) *Journal of Child Psychology and Psychiatry* 743, at 743. UNICEF *Intercountry Adoption*, 31 July 2014, available at: [www.unicef.org/media/media\\_41918](http://www.unicef.org/media/media_41918). Last accessed 6 July 2015.

<sup>6</sup> T.A. Volkman, *Cultures of Transnational Adoption* (Durham and London: Duke University Press, 2005) p. 1.

<sup>7</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A.Res. 54/263, annex II, U.N. Doc. A/RES/54/263 (May 2000) (hereafter the Optional Protocol).

<sup>8</sup> *Ibid*, Arts. 3, 9 – 10.

undertaken reforms of their intercountry adoption practices.<sup>9</sup> However, there are major challenges, as we will see illustrated by Nepal, to ensuring that regulatory systems are sufficient to ensure that intercountry adoptions are conducted in a manner that does serve the best interests of children.

Although UNCRC Article 21 and the Hague Intercountry Adoption Convention permit intercountry adoption, both emphasise the need to exhaust domestic adoption or fostering before placing a child for intercountry adoption. This preference for domestic adoption recognises the child's right to an identity that may be lost through intercountry adoption. As Yngvesson notes in her ground breaking ethnographic study of intercountry adoptees, 'many are identified or have self-identified as ethnically or racially different from their adoptive parents'.<sup>10</sup> However, it is significant that UNICEF in 2005, then again in 2014, appears to favour intercountry adoption over in-country institutional care. In 2005, UNICEF stated that:

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 that best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption.<sup>11</sup>

The emphasis in this statement on the 'best interests' of the child as the 'guiding principle' underscores the centrality of this principle to the UNCRC and Article 3.

### *Best Interest Principle and Intercountry Adoption*

UNCRC Article 3 sets out the principle that 'the best interest of the child' shall be a 'primary' consideration in 'all actions concerning children'.<sup>12</sup> Guidance on the interpretation and

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<sup>9</sup> For example, in the UK the Adoption (Intercountry Aspects) Act 1999, and, in Ireland, the Department of Health and Children, *Adoption Legislation: 2003 Consultation and Proposal for Change*. (Dublin: Department of Health and Children, 2005). Similarly, in the United States, the Intercountry Adoption Act 2000, 42 U.S.C.14901- 14954 (2000).

<sup>10</sup> B. Yngvesson, *Belonging in an Adopted World: Race, Identity and Transnational Adoption*. (Chicago: Chicago University Press, 2010), p. 175.

<sup>11</sup> UNICEF, 'Intercountry Adoption', Press Release, 26 June 2015:

[http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html)

<sup>12</sup> UNCRC, Art. 3 (1).

application of ‘the best interest of the child’ is set out in General Comment No.14.<sup>13</sup> In the area of intercountry adoption, the meaning and interpretation of ‘best interests’ underlies an intense debate between proponents of intercountry adoption, notably Bartholet, who argues that over-regulation impedes intercountry adoption to the detriment of children.<sup>14</sup> By contrast, Smolin argues that the current system of intercountry adoption violates the human rights of children due to the ineffective regulation of the placement process.<sup>15</sup> Seeking to provide a balance, Dillon recommends that there is a need for an international network for intercountry adoption as a human rights imperative because of its potential to provide homeless and children in state institutions an opportunity to ‘exercise their right to a family’.<sup>16</sup>

In 2000 the Parliamentary Assembly of the Council of Europe expressed concerns about intercountry adoption. In Recommendation 1443, the Council stated that it wanted to ‘alert the European public opinion to the fact that, sadly, international adoption may prove to be a practice that disregards children’s rights and that does not necessarily serve their best interests’<sup>17</sup>. More recently, in 2012, the Council again noted in Resolution 1909, para. 4, that:

...persisting reports of cases of intercountry adoption where the best interest of children has evidently not been the paramount consideration or where their human rights have been severely violated. Certain children fall victim to ‘child laundering’ practices, involving the abduction and sale of children, the coercion or manipulation of birth parents and their family environment, falsification of documents and bribery. Both sending and receiving countries involved in intercountry adoptions must ...live up to their responsibilities to prevent and fight such criminal activities at a global level.<sup>18</sup>

Therefore, the responsibility for ensuring the best interests of the child is placed squarely on the both the sending and receiving countries. In the UK and the USA the regulatory process for

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<sup>13</sup> Committee on the Rights of the Children, *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.

<sup>14</sup> See E. Bartholet, ‘International adoption: Thoughts on the human rights issues’ (2007) 13 *Buffalo Human Rights Law Review* 151, at 153-158. Bartholet is challenged on her approach in J. Oreskovic and T. Maskew ‘Red thread or slender reed: Deconstructing Professor Bartholet’s mythology of international adoption’ (2008) 14 *Buffalo Human Rights Law Review* 7.

<sup>15</sup> D.M. Smolin ‘Intercountry Adoption as Child Trafficking’ (2004) 39 *Valladolid University Law Review* 281, at 321 – 325.

<sup>16</sup> S. 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’ (2003) 21 *Boston University International Law Journal* 179, at 186.

<sup>17</sup> Council of Europe, ‘Intercountry adoption: Respecting children’s rights’, Recommendation 1443. 1 March 2002.

<sup>18</sup> Council of Europe (2012) ‘Intercountry adoption: ensuring that the best interests of the child are upheld’, Resolution 1909, para.4. Text adopted by the Standing Committee, acting on behalf of the Assembly, 30 November 2012.

approval of intercountry adoptions is well documented and supplemented by UK and US official guidance on intercountry adoption from specific sending countries, including in the UK a block on all intercountry adoptions from Nepal. Describing the process for ensuring that the best interests of the child are paramount, Cantwell argues that ‘determining the best interests needs to be a thorough and well prescribed process directed, in particular, towards identifying which of two or more rights-based solutions is most likely to enable children to realize their rights’.<sup>19</sup> Mr Justice Brennan perceptively commented that ‘the best interest approach depends on the values systems of the decision maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of power’.<sup>20</sup> As we will see this presents challenges for the effective implementation of Article 3 in weak states, such as Nepal, which lack the ability to enforce rules or guidelines and in which values systems run counter to the UNCRC

Whilst the ‘best interests of the child’ is a general principle of the UNCRC, its meaning continues to be ambiguous. It is widely accepted that this presents a significant challenge for implementation, in particular, when the best interests of a child are to be the ‘paramount consideration’ in decisions about intercountry adoption. In these situations, the best interests of the child and the decisions about whether or not to allow intercountry adoption have to be balanced with a range of human rights.<sup>21</sup> Yet as highlighted by the Council of Europe, amongst others, disregard for the best interests of the child is a major concern in relation to intercountry adoptions. In the following section, we turn to consider domestic and intercountry adoption in Nepal and India.

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<sup>19</sup> N. Cantwell, J. Davidson, S. Elsley, I. Milligan, and N. Quinn, *Moving Forward: Implementing the ‘Guidelines for the Alternative Care of Children*. (Glasgow: Centre for Excellence for Looked After Children in Scotland, 2012), at p. 10.

<sup>20</sup> *Secretary of the Department of Health and Community Services v J.W.B and S.M.B (Marion’s Case)*[1992] HCA 15; [199] 175 CLR 218, para. 14.

<sup>21</sup> Recognising the human rights of birth parents and the wider rights of children to their own identity, implicit within which is a right to their ‘culture’.

## C Adoption in and From South Asia

### *Nepal: Civil Strife, the Internet and Adoption Tourism*

The recent history of Nepal serves to illustrate a major challenge for the effective implementation of the UNCRC. Nepal emerged as a kingdom in the eighteenth century under the Shah dynasty. By the mid-nineteenth century political power was held by members of the Rana family. Following a coup in 1951 the Rana regime was ended and a move towards a parliamentary democracy began to emerge. This early move towards democracy was brought to a sudden end when, in 1960, King Mahendra imposed direct royal rule. Direct royal rule continued until a series of strikes and protests in 1989 forced King Birendra to agree to a new constitution promulgated in 1990. The 1990s witnessed a political impasse between the monarchy, the new political parties and the rise of a powerful Maoist party that declared a 'People's War' in 1996.

The civil war claimed, at least, 10,000 lives between 1996 and 2006. It destabilised Nepal's government and institutions. Since the end of the civil war and the abolition of the monarchy, Nepal has lurched from political crisis to political crisis as political parties fail to agree the terms of a new constitution. The political turmoil of Nepal sets the context in which the UNCRC was introduced into Nepal after its ratification in 1990. Nepal was as with many other states an early 'adopter' of the UNCRC. In 1993 Nepal introduced the *Children's Act* that incorporated aspects of the UNCRC into national legislation

### *Adoption and Intercountry Adoption*

Adoption in Nepal is covered by Chapter 15 of the *Muluki Ain* (General Code). Chapter 15 was amended by the Gender Equality Maintaining Some Nepal Acts Amendment Act 2006<sup>22</sup> to enable women, as well as men to adopt. Chapter 15 states that no adult may adopt a child if he or she already has a child of the same sex.<sup>23</sup> Following amendments to Chapter 15 in 1976, the Nepal Children's Organisation established in 1964 by the royal family, became the only organisation authorised to conduct adoptions in Nepal. It is unclear how many domestic

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<sup>22</sup> For ease of reference the Gregorian calendar year is given. The Nepali calendar year is 2063.

<sup>23</sup> Chapter 15, Clause 1, *The Muluki Ain* (General Code), at 256. Available at: <http://www.lawcommission.gov.np>.

adoptions were overseen by the Nepal Children's Organisation (NCO) between 1976 and 1996. Figures from the Central Child Welfare Board suggest that between 1996 and 2000 327 children were adopted through the NCO.

In 1976 Chapter 15 of the *Muluki Ain* was amended to allow foreign nationals to adopt. Clause 12 A states that:

if any foreign national wishes to adopt any citizen of Nepal, who may be adopted as a son or daughter in accordance with the law, the Government of Nepal may, after considering the character and economic condition of such a foreign national and on recommendation of the concerned foreign government or embassy, permit adoption of son or daughter on such terms and conditions as the Government of Nepal may consider appropriate.<sup>24</sup>

In 2000 the *Terms and Conditions* were issued by the Government of Nepal and opened up intercountry adoption to other child centres. Almost immediately there was a marked increase in the numbers of children adopted after 2000. By 2007 there were 47 child centres, mainly in Kathmandu, permitted to conduct adoptions. As a result figures for adopted children rose sharply with 2,161 children adopted between 2000 and 2007. A report on *The State of the Rights of the Child* published in 2004 noted that there was an official intention to authorise the adoption of 510 children annually.<sup>25</sup> A recent study found that only four out of every hundred adoptions were domestic.<sup>26</sup> There are a number of factors why domestic adoption in Nepal is low reflecting social/cultural norms and economic considerations. However, the official figures may not capture the local level, unregulated, adoptions that we know take place.<sup>27</sup> People create and recreate their families through a range of techniques that are meaningful to them whilst lacking the formality of state approval. We will return to consider these factors in the discussion at the end of the chapter.

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<sup>24</sup> Clause 12A *The Muluki Ain*, at 258 - 259.

<sup>25</sup> Child Workers In Nepal (CWIN) *State of the Rights of the Child in Nepal*. (Kathmandu: CWIN, 2004).

<sup>26</sup> Terres des hommes and UNICEF, *Adopting the Rights of the Child: A study of intercountry adoption and its influence on child protection in Nepal*. (Kathmandu: Terres des hommes and UNICEF, 2008, pp. 27 – 29.

<sup>27</sup> During fieldwork in Nepal, the author encountered several children who had been adopted for a range of reasons in to local families without any formal process. Whilst this reflected the marginalised state of the families, the lack of official recognition of the child as a member of their new family potentially could affect their rights to state support and recognition of their rights to state citizenship.

The sharp rise in intercountry adoption occurred at the height of Nepal's civil war. This may reflect families in the most affected areas sending their children to the capital for safety. This was also the period that saw the expansion of the internet in Nepal and the rise of adoption tourism. In 2007, shortly after the civil war ended a report on intercountry adoption practices in Nepal drew attention to a range of serious concerns.<sup>28</sup> In his review of intercountry adoption practice in Nepal, SP Paudel concluded that as the number of intercountry adoptions rose sharply there was a significant increase in irregularities. Three key issues were identified. The first was that child centres were falsely declaring children to be abandoned. The second key concern identified was the purchasing of children from their biological parents for adoption. Finally, the child centres were charging excessive amounts of money from prospective adoptive parents.

The latest investigation by UNICEF found that 85% of children in the orphanages they visited had at least one living parent.<sup>29</sup> These orphanages often lack proper regulations and regulations on who can operate a residential care institution for children are non-existent. They have become a lucrative business in Nepal with profit to be made from both the families – who are deceived as to what will happen to their children – and from well-intentioned foreign tourists who donate funds in the belief they are supporting genuine orphans. Children are being trafficked into these orphanages internally from other parts of Nepal to meet the demands of volunteers and other donors who are prepared to pay to supposedly 'help' Nepal's orphans.

Article 3, Clause 5 of the Optional Protocol states that, 'State parties shall take all appropriate legal and administrative measure to ensure that all persons involved in the adoption of the child act in conformity with applicable international legal instruments.' Nepal ratified the Optional Protocol in 2006. It signed the Hague Intercountry Adoption Convention on 28 April 2009. After signing the Hague Intercountry Adoption Convention, the Ministry of Women, Children and Social Welfare formed an Intercountry Adoption Management Committee on 14 May 2010 to regulate adoption effectively.

In May 2010 the UK Borders Agency issued a notice restricting adoptions from Nepal. Four specific concerns were set out in the notice: failure to adhere to the key principles of the

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<sup>28</sup> S.P. Paudel, *Inter-country Adoption process in Nepal*, Paper presented at the International Conference on Intercountry Adoption, 11-13 March 2007, Kathmandu, Nepal.

<sup>29</sup> Terres des hommes and UNICEF, *Adopting the Rights of the Child*, p. 19.



UNCRC and in particular, ‘the complete absence of the principle of the best interests of the child’; the absence of an adequate legal framework despite recent legislation; poor procedures finally the ongoing falsification of documents and lack of transparency and accountability for money brought in to Nepal for intercountry adoptions.<sup>30</sup> The restriction remains in force in the UK. In August 2010, the U.S. Department of State and the U.S. Immigration and Customs Enforcement agency suspended the processing of new adoption cases from Nepal which involved children who are claimed to have been found abandoned. Evidence showed that the likelihood that the children had actually been abandoned was very slim. As with the UK, the restriction remains in force.<sup>31</sup>

In 2011, the Nepali government announced that it received no applications for intercountry adoptions. The Ministry of Women, Children and Social Welfare (MWCSW) invited applications through concerned embassies, diplomatic missions and international adoption agencies ending the suspension introduced in 2009. Officials advised that prospective adoptive parents should apply online for the permission of the Nepali government. They should also submit permission from their respective governments for adoption and apply through registered adoption agencies. In 2011, 29 child centres had their licenses renewed for intercountry adoption and seven new child centres were being licensed.<sup>32</sup> The U.S. Department of State continues to strongly recommend that prospective adoptive parents refrain from adopting children from Nepal due to grave concerns about the reliability of Nepal’s adoption system and credible reports that children have been stolen from birth parents, who did not intend to irrevocably relinquish parental rights.

### *India: National Assets and Scandals*

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<sup>30</sup> International Adoption Guide, <http://www.internationaladoptionguide.co.uk/from-which-countries-is-it-possible-to-adopt-from/nepal-adoption-criteria.html> Accessed 25 February 2015.

<sup>31</sup> US Department of State – Bureau of Consular Affairs *Notice: U.S. Department of State Continues to Recommend Against Adopting from Nepal*. 31 December 2013. <http://travel.state.gov/content/adoptionsabroad/en/country-information/alerts-and-notifications/nepal-5.html>. See a critical online report on the US State Department’s actions by American families affected by the restriction submitted to the US Congress, K.T. Dempsey, *Both Ends Burning Paper Chains*, no date, no place of publication. Available at <https://bothendsburning.org/wp-content/Paper-Chains-Ful-Report.pdf>.

<sup>32</sup> A. Poudel ‘Government opens applications for intercountry adoptions’ 29 November 2014. Online news article accessible at [www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=38929](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=38929). Last accessed 6 October 2015.

Since gaining independence in 1947, India has emerged as the most populous country in South Asia. India is the federal union of twenty nine states and seven territories. In recent years, after a failed policy of sterilisation introduced in the early 1970s, India's population exceeds one billion. According to a recent report, nearly one in five children in the world live in India.<sup>33</sup> At approximately 472 million, children make up almost forty per cent of the Indian population. Whilst recent economic developments have boosted India's economy the benefits are limited. Indian children continue to face significant deprivation, malnutrition and vulnerability (for example, the ongoing high rate of female infanticide).

India acceded to the UNCRC on 11 December 1992. In 2003, India ratified the Hague Inter-country Adoption Convention. This was followed in 2005 with the ratification of the Optional Protocol to the UNCRC on the sale of children, etc. These international treaties are set against an existing legislative framework based on colonial and postcolonial laws, notably the Guardian and Wards Act 1890, and the 1956 Adoption and Maintenance Act. More recently, there have been a series of child-focused Acts passed, notably the Juvenile Justice (Care and Protection of Children) Act 2000 and its 2006 Amendment, the Commission for the Protection of Child Rights Act 2005 and the Protection of Children from Sexual Offences Act 2012. This brief summary of federal legislation demonstrates a significant difference in effective legal regulation between India and her neighbour, Nepal. However, whilst Nepal lacks a strong legal and regulatory framework, as we shall see there remain practical challenges to implementation in a federal state as large as India.

### *Adoption and Intercountry adoption*

Adoption rights were until 2014 restricted in India. Prior to a Supreme Court decision in February 2014, adoption was restricted to Hindus, Buddhists and Jains.<sup>34</sup> The decision by the Supreme Court was a landmark judgement. The judgement held that any person, irrespective of religion, could adopt a child under the Juvenile Justice (Care and Protection) Act 2000. Indeed, recognising the separate personal laws for Muslims the Supreme Court held that this right to adopt prevailed even if 'the personal laws of the particular religion do not permit it'.<sup>35</sup>

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<sup>33</sup> Committee on the Rights of the Child, *Concluding observations on the consolidated third and fourth periodic report of India*, 13 June 2014, CRC/C/IND/CO/3-4.

<sup>34</sup> *Shabnam Hashmi v Union of India & Others*, 19 February 2014. Available at: [supremecourtindia.nic.in/outtoday/wp4702005](http://supremecourtindia.nic.in/outtoday/wp4702005). Last accessed 15 July 2015.

<sup>35</sup> *Shabnam Hashmi v Union of India and Ors* at 34.

The petitioner, Shabnam Hashmi, had been advised in 2005 that she would only have ‘guardianship rights’ for the one year old girl that she adopted. In an interview after the Supreme Court issued its decision, Mrs Hashmi noted that ‘We wanted to treat her like a naturally born child and wanted her to feel that way. But law and government officials stood in the way. The Supreme Court has passed a landmark verdict and now people of all religions can adopt’.<sup>36</sup>

Following the death of an Indian child travelling to the US to be adopted, in 1981, a petition was submitted by an advocate to the Supreme Court complaining of the ‘malpractices indulged in by the social organisation and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents’.<sup>37</sup> The petitioner accused the organisations and agencies of exposing such children to ‘want of proper care’.<sup>38</sup> The *Laxmi Kant Pandey* case is a landmark. Justice Bhagwati noted that The Supreme Court directed child welfare organisations to develop domestic adoption programmes in India, whilst placing a quota on foreign adoptions (only 50% of adoptions could be by foreigners). In addition, the decision expanded the mandate of child placement organisations to include a range of services for children. Drawing on the preamble to the National Policy for the Welfare of Children which states that ‘children are a ‘supremely important national asset’’<sup>39</sup>, Justice Bhagwati expressed concern for the impact of the loss to the nation arising from intercountry adoptions and the potential problems of assimilation by the children. From Justice Bhagwati, intercountry adoption should not be an ‘independent activity in itself’ because it could ‘degenerate into trading’ and promote abandonment.

As discussed above in relation to Nepal, children who are adopted transnationally generate immediate resources in the form of donations to the children’s home.<sup>40</sup> Yngvesson suggests that as a result staff may therefore privilege or prefer intercountry adoptions and accept apparently abandoned children or whose mother wants to relinquish her or him, rather than

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<sup>36</sup> H.V. Nair ‘Supreme Courts Gives Adoption Rights to Muslims,’ *India Today*, 20 February 2014. Accessible at: [Indiatoday.intoday.in/story/supreme-court-gives-adoption-rights-to-muslims/1/344463](http://indiatoday.intoday.in/story/supreme-court-gives-adoption-rights-to-muslims/1/344463)

<sup>37</sup> *Laxmi Kant Pandey vs Union Of India & Anr* on 27 September, 1985, at 1. Accessible at <http://indiankanoon.org/doc/1402035>. Last accessed 6 October 2015.

<sup>38</sup> *Laxmi Kant Pandey v The Union of India*, at 1.

<sup>39</sup> *Laxmi Kant Pandey v The Union of India*, at 16.

No date is given for the National Policy for the Welfare of Children.

<sup>40</sup> B. Yngvesson, *Belonging in an Adopted World*, chapter 3.

seeking to trace birth kin.<sup>41</sup> However, Justice Bhagwati recognised barriers to domestic adoption. He states, ‘it has been the experience ...of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption’.<sup>42</sup> Expanding on this observation, Justice Bhagwati noted that ‘even if [Indian parents] decide to take such a [stranger] child in adoption they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents’.<sup>43</sup>

The case did prompt a more aggressive policy of domestic adoption with an active campaign in 1990s. The campaign challenged existing ideas about ‘the family’ that inhibited adoption and fostering by presenting adopted and foster children as family forms like any other. By late 1990s directors of Indian child welfare societies reported waiting lists of Indian adoptive parents and a gradual shift in the bias against girls. Despite the apparent success of the campaign, there remain social and cultural barriers, for example, a preference for light skinned children and for healthy, non-disabled children. Finally, there remains a reluctance to acknowledge adoptive status outside of the immediate family.

As required by in the Hague Intercountry Adoption Convention the Indian authorities established the Central Adoption Resource Agency. In 2003, 39% of children adopted were for intercountry adoptions (1,398). The main receiving country was the United States. In the same year, 60% of adopted children were aged under five (the percentage for intercountry adoptions is unclear).<sup>44</sup> On the face of it, it appears that India has implemented important legislation to improve and strengthen the administrative and regulatory framework to promote the ‘best interests’ of children. However, deep concerns remain about the efficacy and the political commitment to independent functioning of these statutory entities.<sup>45</sup>

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<sup>41</sup> Id.

<sup>42</sup> *Laxmi Kant Pandey v The Union of India*, at 30.

<sup>43</sup> Id.

<sup>44</sup> A.S.Shenoy *Child Adoption Policy in India – Review*. Paper presented at 1<sup>st</sup> International Conference on Intercountry Adoption, Kathmandu, Nepal, March 2007. Available at <http://unstats.un.org/unsd/vitalstatkb/Attachment482.aspx>.

<sup>45</sup> S. Raha and A. Mehendale, ‘Children’s Commission: A Case of State Apathy’, *Economic and Political Weekly*, 18 January 2014, 17.

One of the reasons for more federal level regulation arose from a series of adoption scandals. On three separate occasions in 1995, 1999 and 2000 in the state of Andhra Pradesh, allegations were made about the systematic buying of babies, in particular from the nomadic Lambadas.<sup>46</sup> Investigations of the orphanages at the centre of the allegations revealed other illicit practices.<sup>47</sup>

More recently, the Committee on the Rights of the Child made a number of recommendations in respect of the 'best interests of the child'. The Committee expressed concern at the lack of detailed information on measures taken to ensure that, in practice, the right of children to have their best interests taken as a primary consideration is consistently applied by professionals working for and with children in all areas affecting them. With reference to General Comment No 14, the Committee recommended India to:

- (a) Develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child in every area and for giving those interests due weight as a primary consideration; as well as ensure that such procedures and criteria are disseminated to courts of law, administrative authorities and legislative bodies, public and private social welfare institutions, as well as traditional and religious leaders and the public at large;
- (b) Establish effective monitoring and evaluation procedures in that regard.<sup>48</sup>

Although, as outlined above India has enacted a range of child focussed legislation and the importance of the judicial decision in *Laxmi Kant Pandey* it is clear that in a federal union the size of India that challenges remain at the local level to the effective implementation of Art.3.

## **D Conclusion: States, Rights and Implementation**

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<sup>46</sup> D. M. Smolin, 'The Two Faces of Intercountry Adoptions: The Significance of the Indian Adoption Scandals' (2005) 35 *Seton Hall Law Review* 403, at 450.

<sup>47</sup> D.M. Smolin, 'The Two Faces of Intercountry Adoptions', at 493.

<sup>48</sup> *Concluding observations on the combined third and fourth periodic reports of India*, 13 June 2014, para. 36. Accessible at: <http://www.refworld.org/publisher,CRC,CONCOBSERVATIONS,IND,541bee3e4,0.html>. Last accessed 6 October 2015.

Bartholet argues that ‘adoption abuses exist...But there is no persuasive evidence that adoption abuses are extensive’.<sup>49</sup> A vocal advocate for intercountry adoption, Bartholet is explicit in her opposition to increased restrictions of intercountry adoption. However, as discussed in the preceding section there is abuse and it is not taking place on ‘an occasional basis’.<sup>50</sup> She criticises the UNCRC and the Hague Intercountry Adoption Convention subsidiarity provisions and strongly argues against the importance for a child of her or his ‘heritage rights’. Whilst it is clear that Bartholet’s stance is based on strong convictions in the right of all children to be raised in ‘a nurturing family’ the lack of detail in her article overlooks the evidence not only of abuse of the adoption system, but the longer term issues experienced by children who are adopted through intercountry adoption. She does comment on the impact of long term institutionalisation on children but in relation to babies and children under one. The evidence from Nepal and India demonstrates that it is often older children who have been put forward for intercountry adoption. Bartholet in focussing on certain rights and playing down other rights illustrates the complexity of rights.

This chapter has focussed on the state parties and their obligations under Art.3 of the UNCRC. From focussing on two South Asian states we can gain important insights into the barriers to effective implementation. In recent years, anthropological and socio-legal research on human rights has highlighted the complexity of the rights claims and rights implementation. For example, research on the hybrid construction of women’s rights in Iran through a blend of Shari’a law and international human rights illustrates that despite the global proliferation of rights talk, often anchored by reference to international conventions (e.g. CEDAW or UNCRC), it has not produced normative uniformity.<sup>51</sup> Others argue that there is a multiplication of rights constructions as international, national and local norms collide, merge and produce new hybrid meanings in different contexts. The production of new, hybrid, meanings have given rise to ‘normative pluralism’.<sup>52</sup> However, whilst we can trace a flow of

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<sup>49</sup> E. Bartholet, ‘International Adoption: The Human Rights Position’, <http://nrs.harvard.edu/urn-3:HUL.Inst.Repos:3228398>, at 24. This is a pre-peer review version of the article ‘International Adoption: The Human Rights Position’ at Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 *Global Policy* (2010).

<sup>50</sup> E. Bartholet, ‘International Adoption’, at 32.

<sup>51</sup> A. Osanloo, *The Politics of Women’s Rights in Iran* (Princeton: Princeton University Press, 2009), p207.

<sup>52</sup> M. Goodale, ‘The Power of Rights: Tracking Empires of Law and New Forms of Social Resistance’ in M. Goodale and S.E. Merry (eds), *The Practice of Human Rights* (New York, N.Y: Cambridge University Press, 2007), 130, p. 135.

rights there are challenges between international rights and national or local norms. A range of scholars have illustrated how the ‘very lightness of rights reconstructions’ can lead to the limitation or denial of ‘rights transformative powers’.<sup>53</sup> Specifically for this chapter are concerns over the failure of rights to deliver – notably the challenges at the national and local level - the effective and meaningful implementation of Art.3. As Massoud demonstrates in his ethnographic research in Sudan, rights claims have little effect where the state lacks the institutional capacity.<sup>54</sup> Massoud notes that “in a state embroiled in civil war”, like Nepal, “the law is not an unqualified human good”.<sup>55</sup> There remains in Nepal a lack of institutional capacity ranging from inadequate monitoring of child centres and an ineffective legal system to regulate and oversee intercountry adoptions from the perspective of the ‘best interests’ of the child.

Of course, it is important to recognise that states differ significantly in their acceptance of human rights depending on their political system and the actions of civil society.<sup>56</sup> Ratifying a convention, such as the UNCRC, can increase the resonance of human rights for its population. However, as Merry notes ‘this raises a dilemma’.<sup>57</sup> Rights are more likely to be effective where they are resonant, where there are institutions that will respond to rights claims and where complainants can mobilize resources and allies to promote their claims. This is reflected to an extent in India, notably in the petition that initiated the case of Lakshmi Kant Pandey. Yet, rights framework are less successful in situations where, as in the case of child centres in Nepal, there is no single perpetrator but where certain groups are vulnerable, often children from remote mountainous communities, due to an unequal economic and political system.

By examining Article 3 in the context of domestic and intercountry adoption in South Asia this chapter highlights the challenges to implementation of the UNCRC. The chapter’s contribution is to remind us that the majority of children live in states that have weak state institutions, regimes that may be undemocratic and in which the ‘voice of the child’ remains unheard, if

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<sup>53</sup> M. McCann, ‘The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era’, (2014) 48 *Law and Society Review* 245, at 263.

<sup>54</sup> M.F. Massoud, *Law’s Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan* (New York, N.Y: Cambridge University Press, 2013), in particular Chapter 7, pp211 - 230

<sup>55</sup> M.F. Massoud, *Law’s Fragile State*, p228.

<sup>56</sup> See B.A. Simmons, ‘Reflections on Mobilizing For Human Rights’ (2012) 44 *International Law and Politics* 729.

<sup>57</sup> S.E. Merry, ‘Inequality and Rights: Commentary on Michael McCann’s “The Unbearable Lightness of Rights”’ (2014) 48(2) *Law and Society Review* 285, at 292.

not, actually silent. From an anthropological perspective paying attention at the local level reveals a great deal. At the international level the state is the vehicle for the implementation of the UNCRC. This assumes that a state will be viewed as benevolent and on the side of its citizens. Yet as illustrated by a range of anthropological studies, we know that the state is not viewed as the neutral or the benevolent source of protection. Many ordinary people view the state with mistrust and do not comply with state norms. This raises significant concerns for children and young people separated from or abandoned by their parents or birth family, or without kin. As illustrated by the irregularities surrounding intercountry adoption these children are separated, without their consent or the ability to consent from their cultural and social roots. The sense of 'belonging' in two different worlds, the world of the birth parents and that of the adopted parents and yet not belonging fully in either is captured by Yngvesson. In her nuanced ethnographic study of intercountry adopted children in the USA and Sweden Yngvesson's informants, adult adoptees, reflect on their 'two different identities'.<sup>58</sup> The importance of identity and the impact on growing children should not be underestimated. Underlying the concerns over intercountry adoption, indeed why UNICEF and the Hague Intercountry Adoption Convention favour domestic adoption over intercountry adoption is a recognition of the potential psychological impact on the adoptee. For states to fully effect Art.3 and in particular to ensure that state authorities do take the 'best interests' of the child into account the underlying, often complex, cultural and social values of the state and its representatives have to be addressed.

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<sup>58</sup> B. Yngvesson, *Belonging in an Adopted World*, at 154 – 164.