

Identifying Domestic Mechanisms for Rights Protection in an Intercountry Adoption Setting: A comparison of India, Guatemala and South Africa

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Abstract

This article examines access to justice issues in three countries to identify with particular attention to safeguards to the provision of parental consent. A comparison of these three countries demonstrates that while rule-of-law and access to justice issues play a role in ensuring proper consent is obtained, that more account needs to be taken of local circumstances that influence the understanding of parents when consenting to the adoption of their child.

1. Introduction

When a parent consents to the intercountry adoption of a child, how much consideration is given to safeguarding whether they fully understand the implications of what they have agreed to? If faced with difficulty in providing for a child, has the parent been presented with alternatives other than intercountry adoption? Perhaps of more concern, does the parent realise that they have consented to adoption at all, rather than believing they have consented to something else altogether, such as medical treatment for the child? Such are the questions that should surround the examination of parental consent for intercountry adoption of their child. But to what degree do sending countries provide the necessary safeguards to ensure that parental consent to intercountry adoption is valid and fully informed?

There are indisputable problems that must be acknowledged, confronted and solved to ensure that parental consent to adoption is valid and fully informed. Research, however, suggests that there is resistance to acknowledge that these misunderstandings and misperceptions exist.¹ Resistance may lie in the fact that recognition of these problems disturbs the idealised images of intercountry adoption often presented as part of the demand-driven business of intercountry adoption.²

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¹ J. Roby, 'Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding legal and cultural pitfalls', (2004) *Journal of Law and Family Studies* 6, pp.303-304.

² See generally S. King, 'Challenging Monohumanism: An argument for changing the way we think about intercountry adoption', (2008) *Michigan Journal of International Law* 30, p.413; L. Cartwright, 'Photographs of "Waiting Children": The transnational adoption market', (2003) *Social Text* 21(1), p.83.

This reinforces the necessity of relying upon the domestic mechanisms of sending countries to ensure that parental consent is valid and informed, as sending countries are tasked under the Hague Convention on Intercountry Adoption³ to ensure that the consent, if given, is appropriate.

The practical circumstances of intercountry adoption are such that there is even more pressure on the systems of adoption to produce scarce children to satisfy market forces of demand. First, there are a decreasing number of children being sent for intercountry adoption, which raises competition for children between adoption providers in receiving states. This could give rise to unscrupulous practices in obtaining children for intercountry adoption, including fraudulent consents or consents obtained in inappropriate circumstances. Second, sending states cannot rely on receiving states routinely scrutinising parental consent validity. Under the Hague Convention, this duty is assigned to sending states. Only very extreme circumstances are likely to prompt receiving state action to ensure valid and informed consent, as illustrated by the situation discussed in Guatemala. It is thus incumbent upon the domestic state mechanisms to ‘get it right’ when approving parental consents. Yet this is no easy task, as shown in this article through a discussion of three sending states.

This article compares India, South Africa and Guatemala in their role as sending countries in intercountry adoptions, with the purpose of revealing the broader features that affect the ability of a country to provide meaningful and effective domestic mechanisms for rights assurance and access to justice. What domestic factors are important to ensure that parental consent is valid and fully informed? This paper looks at rule-of-law rankings, access-to-justice barriers and local cultural and economic conditions. While the rule-of-law and access-to-justice environments play a role in obtaining proper parental consent, they are not the overriding factors. The article concludes that more account needs to be taken of local circumstances that influence the meaning of expressing consent.

2. International Treaties and International Adoption

While intercountry adoption has grown rapidly over in the latter part of the 20th century,⁴ it had in fact been ongoing since the early years of that century, albeit with more limited numbers.⁵ Modern intercountry adoption is said to have started with the adoption of children from South Korea to the United States in the aftermath of the Korean War.⁶ In the late 1980s and 1990s there

³ Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, hereinafter ‘Hague Convention on Intercountry Adoption’ or simply ‘Hague Convention’.

⁴ D. Blair, ‘Safeguarding the Interests of Children in Intercountry Adoption: Assessing the gatekeepers’, (2005) *Capital University Law Review* 34, pp.349-351; P. Selman, ‘Trends in Intercountry Adoption: Analysis of data from 20 receiving countries, 1998-2004’, (2006) *Journal of Population Research* 23(2), p.183; P. Selman, ‘Intercountry Adoption in the New Millennium: The “quiet migration” revisited’, (2002) *Population Research and Policy Review* 21, p.205.

⁵ Selman, ‘Intercountry Adoption in the New Millennium’, p.209. See fn.4; Selman ‘Trends in Intercountry Adoption’, p.186. See fn.4; T. Hubinette, ‘The Adopted Koreans of Sweden and the Korean Adoption Issue’ (2003), *The Review of Korean Studies* 6(1), p.251; see also T. Hubinette, ‘Contested Adoption Narratives in a Swedish Setting’, 2nd International Conference on Adoption Research, University of East Anglia, Norwich, 17 July 2006, available at <http://www.uea.ac.uk/swk/icar2/pdf/s/Tobias%20Hubinette.pdf>. Last access 28 October 2010.

⁶ C. Choy, ‘Institutionalizing International Adoption: The historical origins of Korean adoption in the United States’ in K. Bergqvist, M. E. Vonk, D. S. Kim, and M. D. Feit (ed.), *International Korean Adoption* (Oxfordshire: The Haworth Press, 2007), p.25.

was a push for an international convention that would set out specific criteria and standards for intercountry adoption.⁷ The result was the Hague Convention on Intercountry Adoption.⁸

Under the Hague Convention, sending states are responsible for ensuring required and proper consents are obtained for sending a child for intercountry adoption.⁹ The sending country must determine whether consents to the adoption have been appropriately obtained.¹⁰ A child may be required to give additional consent to the adoption if of a suitable age.¹¹ The consent of the biological parent, if required, must be obtained,¹² or alternately a judicial process might remove the parent's legal rights, in which case the parent does not need to consent to the adoption.¹³ The birth mother's consent may only be obtained following the child's birth,¹⁴ although there is no time frame set out that requires any passage of time between the birth and the giving of the birth mother's consent to the adoption.¹⁵ There is a great deal of emphasis on the provision and protection of children's rights through international and regional legal conventions.¹⁶ Most international rights instruments, however, lack their own enforcement mechanisms and thus become reliant upon member states' domestic enforcement arrangements.¹⁷ The ratification of an instrument is no guarantee of compliance with the obligations therein.¹⁸ What each state provides

⁷ G. Parra-Aranguren, Explanatory Report on the Convention of Protection of Children and Co-operation in Respect of Intercountry Adoption (1994), The World Organisation for Cross-Border Co-operation in Civil and Commercial Matters, 'Introduction', para.A1-A29. Available at <http://hcch.e-vision.nl/upload/expl33e.pdf>. Last access 28 October 2010.

⁸ Parra-Aranguren, 'Introduction', para.A1-A29. See fn.7.

⁹ The Hague Convention on Intercountry Adoption, Chapter II, Article 4; Chapter IV, Article 16. It is important to recognise that not all intercountry adoptions occur under the auspices of the Hague Convention. This article focuses on the requirements of the Hague Convention.

¹⁰ The Hague Convention on Intercountry Adoption, Article 16(1)(c).

¹¹ The Hague Convention on Intercountry Adoption, Chapter II, Article 4 (d)(i) and (iii).

¹² The Hague Convention on Intercountry Adoption, Chapter II, Article 4 (c)(i) and (iv). See also D. Smolin, 'The Two Faces of the Intercountry Adoption: The significance of the Indian adoption scandals', (2005) *Seton Hall Law Review* 35, p.403.

¹³ C. Fonseca, 'Transnational Influences in the Social Production of Adoptable Children: The case of Brazil', (2006) *International Journal of Sociology and Social Policy* 26(3), p.154.

¹⁴ The Hague Convention on Intercountry Adoption, Chapter II, Article 4 (c)(iv). See also Smolin, 'The Two Faces', above, fn.12.

¹⁵ The Hague Convention on Intercountry Adoption, Chapter II, Article 4 (c)(iv). See also Smolin, 'The Two Faces', above, fn.12. The Guide to Good Practice indicates that the sending state of Colombia requires the passage of one month after the birth of the child before parental consent to intercountry adoption can be given. As discussed in this paper, the laws of India and South Africa allow a window of time after consent is given for it to be withdrawn. See Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to good practice* (Bristol: Jordan Publishing, 2008), footnote 41, p.34 (hereinafter *Guide to Good Practice*). Available at http://www.hcch.net/upload/adoguide_e.pdf. Last access 28 October 2010. This Guide was developed as part of the efforts around the Special Commission that was held in 2005.

¹⁶ Examples of child specific international and regional instruments include, besides the Hague Convention on Intercountry Adoption, the United Nations Convention on the Rights of a Child and the African Charter on the Rights and Welfare of the Child.

¹⁷ O. Hathaway, 'Why Do Countries Commit to Human Rights Treaties', (2007) *Journal of Conflict Resolution* 51(4), p.588; O. Hathaway, 'Between Power and Principle: An integrated theory of international law', (2005) *University of Chicago Law Review* 72, p.469; Smolin, 'The Two Faces', p.407. See fn.12.

¹⁸ See Hathaway, 'Why Do Countries Commit', pp.593-594, 612, where research is done to identify the motivations for a state to ratify and implement a human rights treaty. See fn.17. See also Hathaway, 'Between Power and Principle', pp.497-499. See fn.17.

in terms of domestic enforcement is critical to whether the aims of the instrument are actually achieved.¹⁹

The development of a ‘Guide to Good Practice’ was part of the agenda of the second Special Commission of the Hague Conference on intercountry adoption.²⁰ The guide was subsequently finalised in 2008.²¹ It comments on important elements to ensure proper parental consent is obtained:

(...) it is important that States have reliable and ethical personnel to oversee the consent procedure. States should take steps to monitor the operations of foreign accredited bodies or persons to ensure that no undue pressure is exerted by them, or on their behalf, by intermediaries, to obtain consents to adoption. This is of particular importance in countries where adoption leading to the termination of the original familial ties is not culturally known. In such contexts, *the implications of an intercountry adoption have to be carefully studied, and, if necessary be reflected in the legislation.*²²

The Guide thus stresses the importance of law on intercountry adoption, with particular regard to proper parental consents, being cognizant of the social milieu in which the consent to the adoption is being given. This is critical to ensuring that proper consent is given, as discussed later in this article. Simply including it in the legislation of the sending state is not sufficient. More is needed to ensure that the social contexts and local constructions are adequately included in the sending state legislation.

The Guide recommends other steps to be taken to ensure that parental consent is proper. It also has a ‘Recommended Model Form Statement of Consent to the Adoption’.²³ Further, the Guide suggests that steps to ensure proper consent is given include ‘both counselling and independent interviewing of persons whose consent is required.’²⁴

In preparation for the Special Commission to be held in 2010, a questionnaire has been prepared that asks states to detail the steps that states take to prevent the ‘abduction, sale and traffic in children in the context of adoption.’²⁵ Inappropriate parental consent can occur when intercountry adoption is a façade to give a mask of legitimacy to child trafficking.²⁶ Concern about preventing child trafficking in the guise of adoption is highlighted by the agenda of the

¹⁹ Hathaway ‘Why Do Countries Commit’, pp.593 and 612, and Hathaway, ‘Between Power and Principle’, pp.497-499. See fn.17.

²⁰ *Guide to Good Practice*, p.18, para.8. See fn.15.

²¹ *Guide to Good Practice*. See fn.15.

²² *Guide to Good Practice*, p.34, para.78 (emphasis added). See fn.15.

²³ *Guide to Good Practice*, Annex 7-2. The form was first approved for use by the 1994 Special Commission, see *Guide to Good Practice*, p.36, para.81. See fn.15.

²⁴ *Guide to Good Practice* Section 2.2.3.1, p.36, para.84. See fn.15.

²⁵ Permanent Bureau, Hague Conference on Private International Law, Questionnaire on the Abduction, Sale of, or Traffic in Children and Some Aspects of the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Preliminary Document No 4 (The Hague, April 2010), for the attention of the Special Commission of June 2010 (hereinafter ‘Permanent Bureau Questionnaire’). Available at http://hcch.e-vision.nl/upload/wop/adop2010_pd04e.doc. Last access 28 October 2010.

²⁶ See generally D. Smolin, ‘Child Laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping and stealing children’, (2006) *Wayne Law Review* 52, p.113.

2010 Special Commission, where ‘the first day (...) will be devoted to examining issues of abduction, sale and traffic in children in the context of adoption.’²⁷

Understanding the factors that might impede the provision of proper consent, and more importantly, identifying the factors that encourage provision of proper consent is critical. It is not sufficient simply to put a law on the books that requires valid, voluntary and fully informed consent. The cultural factors that might impinge upon this in each sending state must be accounted for within the processes and means for obtaining consent. Roby highlights the importance of understanding ‘the reasons behind a foreign country’s laws and standards, which have their foundations in a nation’s deeply rooted cultural values. Understanding these variations in culture, tradition and perceptions can aid in building a mutually respectful and effective practice, and to avoid legal and cultural pitfalls.’²⁸ The discussion on this is set out in more detail in the concluding sections of the article, following a discussion of the situation in three sending states.

3. Rule of Law and Validity of Intercountry Adoption: Parental Consent

Is there a correlation between the strength of a country’s rule of law and the validity of parental consent to intercountry adoption? Hathaway predicts that a state with strong domestic enforcement options—which she equates to strength in a state’s rule of law—are more likely to comply with the obligations enshrined in international treaties:

The internalization of international legal requirements and compliance with them depends on the extent to which those outside the government can be expected to enforce the state’s international legal commitments against the government. This in turn depends upon on what kind of *domestic enforcement mechanisms* the state possesses. Does it have a strong and independent judiciary to adjudicate fairly the claims of litigants who believe that the state has failed to meet its international obligations? Are there sufficient protections for civil rights such that individuals and groups can bring enforcement actions against the government without fear of reprisals? If a state does have such rule of law institutions in place, it can be expected to engage in domestic legal enforcement, even if little or no transnational legal enforcement occurs.²⁹

Through an application of Hathaway’s proposition to intercountry adoption and parental consent, one would expect to find that a state’s rule-of-law ranking would correlate with provision of proper parental consent in intercountry adoption. Hathaway, however, does not offer a precise definition of rule of law. The World Bank offers a definition of the rule of law based on several evaluation factors³⁰ and compiles a percentile score for states based on this measure:³¹

²⁷ ‘Permanent Bureau Questionnaire’, See fn.25.

²⁸ J. Roby, ‘Understanding a Sending Country’s Traditions and Policies in Intercountry Adoption: Avoiding cultural and legal pitfalls’, (2004) 6 *Journal of Law and Family Studies*, pp.303, 305.

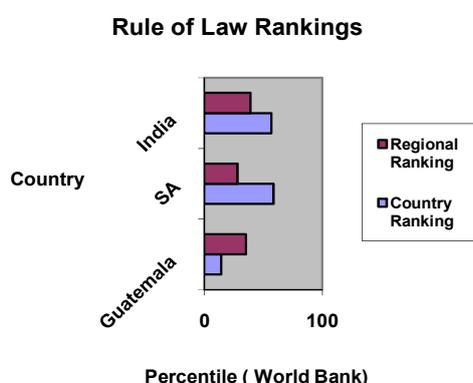
²⁹ Hathaway, ‘Between Power and Principle’, p.497-498 (emphasis added). See above, fn.17.

³⁰ D. Kaufmann, A. Kraay, and M. Mastruzzi, *Governance Matters III: Governance Indicators for 1996-2002*, World Bank Policy Research Working Paper No. 3106 (30 June 2003) (hereinafter ‘Governance Matters III’). Available at <http://ssrn.com/abstract=405841>. Last access 28 October 2010. The rule of law in its turn is one of several factors evaluated to determine an overall governance score. See Kaufmann, Daniel, Kraay, Aart and Mastruzzi, Massimo, *Governance Matters VI: Governance Indicators for 1996-2006* (July 2007). World Bank Policy Research Working

Rule of law measures the extent to which agents have confidence in and abide by the rules of society, in particular of contract enforcement, the police and the courts, as well as the likelihood of crime and violence.³²

Based on the World Bank’s data (2006), table A below provides information on rule-of-law rankings for India, Guatemala³³ and South Africa. It also includes their rankings relative to their region.³⁴

Table A — Data Based on World Bank Rule of Law Ranking for India, Guatemala and South Africa, and as compared to an overall regional average for the state’s region as identified by World Bank³⁵



This table reveals some interesting comparative information on the rule-of-law rankings of each country. South Africa and India have very similar rule-of-law rankings, and each has a higher rule-of-law ranking relative to its regional average. Guatemala, on the other hand, has a very low rule-of-law ranking, both relative to its regional average and compared to South Africa and India.

While India is noted as having potential systemic problems with parental consent to adoption,³⁶ this has not emerged as a concern in South Africa.³⁷ The similarity of the World Bank rule-of-law rankings between South Africa and India suggests that it is difficult to draw correlates between the World Bank measure of rule of law and integrity of parental consent. This in turn

Paper No. 4280. Available at <http://ssrn.com/abstract=999979> (hereinafter ‘Governance Matters VI’). Last access 28 October 2010), See also ‘Frequently Asked Questions’, at <http://info.worldbank.org/governance/wgi/faq.htm>. Last access 28 October 2010.

³¹ ‘Governance Matters VI’. See fn.30.

³² ‘Frequently Asked Questions’. See fn.30.

³³ See also P. San Pedro, ‘Guatemala: Empowerment as ongoing process’, Development in Perspective Case Studies 6 (Madrid: Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE), 2007), p.7, discussing Guatemala’s ranking by the World Bank on rule of law and governance indicators. Available at <http://www.fride.org/publication/205/guatemala:-empowerment-as-ongoing-process>. Last access 28 October 2010.

³⁴ ‘Governance Matters VI’. See fn.30.

³⁵ ‘Governance Matters VI’. See fn.30.

³⁶ See discussion on section on India.

³⁷ See discussion on section in South Africa.

suggests that integrity of parental consent does not only depend on the likelihood of strong domestic enforcement of The Hague Convention requirements.

4. Examining Three Intercountry Adoption Countries of Origin

4.1. Guatemala

Guatemala was plagued by a long-running civil war for 36 years.³⁸ Although the war ended in 1996,³⁹ a large sector of the population remains marginalised and fearful of the government.⁴⁰ During the war, the indigenous population, the Mayans, were targeted by Guatemalan government forces⁴¹ that were aided by the United States.⁴² Guatemala has high rates of poverty across the population,⁴³ but the Mayan population experiences higher rates of poverty than the general population.⁴⁴

4.1.1. Questions of International Treaty Ratification

Guatemala has faced an international quagmire over its intercountry adoption operations and its attempts to implement the Convention have been a minefield of controversy.

A lawsuit challenging the constitutional ability of Guatemala's President to sign the Hague Convention into law was brought by a group of attorneys involved in intercountry adoption.⁴⁵ The lawsuit resulted in a finding that the President indeed lacked such powers under the Guatemalan Constitution,⁴⁶ and as a result, the legal status of the Convention remained unresolved.⁴⁷ A recent report on the Hague Convention in Guatemala confirms the lack of clarity

³⁸ K. Gresham, L. Nackerud and E. Risler, 'Intercountry Adoption from Guatemala and the United States: A comparative policy analysis', (2003) *Journal of Immigrant and Refugee Services* 1 (3/4), p.5; R. Sieder, 'The Judiciary and Indigenous Rights in Guatemala', (2007) *International Journal of Constitutional Law* 5(2), pp. 211, 217.

³⁹ Gresham et al., 'Intercountry Adoption', p.5; Sieder, 'The Judiciary', p.21. See fn.38.

⁴⁰ San Pedro, 'Guatemala', pp.3, 7-8. See fn.33.

⁴¹ M. Sabin, K. Sabin, H. Y. Kim, M. Vergara, L. Varese, 'The Mental Health Status of Mayan Refugees after Repatriation to Guatemala', (2006) *Pan American Journal of Public Health* 19(3), pp.163, 164; San Pedro, 'Guatemala', p.5. See fn.33.

⁴² E. Noonan, 'Adoption and the Guatemalan Journey to American Parenthood' (2007) *Childhood* 14 p.301, 302.

⁴³ San Pedro, 'Guatemala', p.4. See fn.33.

⁴⁴ San Pedro, 'Guatemala', p.5. See fn.33.

⁴⁵ D. Blair, 'Safeguarding the Interests of Children in Intercountry Adoption: Assessing the gatekeepers', (2005) *Capital University Law Review* 34, pp.349, 369. I. Goicoechea reports on current opposition to the Convention by the adoption attorneys, who believed that 'the Hague Convention discouraged international adoptions, while its implementation in Latin America had produced harmful effects.' See I. Goicoechea, Report of a Fact-Finding Mission to Guatemala in Relation to Intercountry Adoption 26 February-9 March 2007 (May 2007), Permanent Bureau, Hague Conference on Private International Law, available at http://www.hcch.net/upload/wop/mission_gt33e.pdf, p.44.

⁴⁶ Blair, 'Safeguarding the Interests of Children', p.369. See fn.45.

⁴⁷ Goicoechea, 'Report', p.15. See fn.45.

around the status of the Convention⁴⁸ and there is no consensus in the international community as to whether the Convention is in force.⁴⁹

Additionally, five states refused to acknowledge a Hague Convention treaty relationship with Guatemala, exercising an option available to Convention member states upon the ratification of the Convention by a new state.⁵⁰ The Netherlands' objection commented that Guatemala did not have the infrastructure needed to ensure the appropriateness of parental consent to adoption, including assuring that the consent was a fully informed one.⁵¹

4.1.2. Parental Consent to Intercountry Adoption in Guatemala

Prior to 2007, the intercountry adoption system in Guatemala was such that no requirement of any judicial proceeding existed.⁵² Far from an access-to-justice issue within an established legal process, there was simply no legal process at all.

However, there were sweeping reforms made of this system,⁵³ with new laws going into effect 31 December 2007, requiring a judicial proceeding for intercountry adoptions.⁵⁴ Despite the previous lack of clarity on its status within Guatemala, the Hague Convention became effective – perhaps again – on that date as well.⁵⁵

Ensuring appropriate parental consent to adoptions has been a particular concern in Guatemalan intercountry adoptions. An extensive study on the Guatemalan intercountry adoption process undertaken in 2000⁵⁶ revealed that both Canada⁵⁷ and the United States of America⁵⁸ required DNA tests to prove that the person giving consent to the adoption was in fact the biological mother of the child.⁵⁹ The United States began to require a second DNA test in August 2007 to

⁴⁸ Goicoechea, 'Report', p.15. See fn.45.

⁴⁹ Goicoechea, 'Report', p.15. See fn.45.

⁵⁰ Status Table, Hague Convention on Intercountry Adoption, available at http://www.hcch.net/index_en.php?act=status.comment&csid=767&disp=type. The five states that lodged objections are Canada, Germany, the Netherlands, Spain and the United Kingdom. See also Blair, 'Safeguarding the Interests of Children', p.369, above, fn.45.

⁵¹ Status Table, Hague Convention on Intercountry Adoption. See fn.50. See also Blair, 'Safeguarding the Interests of Children', p.369. See fn.45.

⁵² Goicoechea, 'Report', pp.16-17, 22-23. See fn.45. See ILPEC Guatemala for UNICEF, 'Adoption and the Rights of the Child in Guatemala', (2000), p.6, commenting on the use of an alternative process that makes use of a notary comments that this manner of doing intercountry adoption is unique to Guatemala.

⁵³ Goicoechea, 'Report', p.16-17, 22-23. See fn.45.

⁵⁴ U.S. Department of State, 'Guatemalan Congress Passes Adoption Legislation', Press release, 25 January 2008, available at http://www.uscis.gov/files/pressrelease/Guatemala_Adoption_Law_Update_01.25.08.pdf. Last access 28 October 2010. Some exceptions were made for adoptions that were pending prior to 31 December 2007, so that they could be completed under the former process using a notary—see U.S. Department of State, 'Guatemala: Registering in-process cases with the National Adoption Council'.

⁵⁵ Goicoechea, 'Report', p.17. See fn.45.

⁵⁶ ILPEC, see fn.52.

⁵⁷ ILPEC, pp.42-44. See fn.52.

⁵⁸ ILPEC, pp.44-46. See fn.52.

⁵⁹ ILPEC, pp.42-46. See fn.52.

verify that, at the end of the adoption process, the child and the mother were the same individuals whose information was presented at the beginning of the process.⁶⁰

Nevertheless, guaranteeing that the consenting person is the birth mother of the child does not impede the occurrence of other problems with birth mother consent to adoption. These include the granting of consent by a mother who does not understand the effects of her consent to an adoption⁶¹ or who may even be deliberately misled into providing consent,⁶² and the solicitation for adoption of unborn children.⁶³

A report commissioned by UNICEF and carried out by ILPEC Guatemala illustrates the stark reality of the uninformed consent by Guatemalan mothers:

The social workers of the family courts admitted that the majority of mothers have little or no knowledge about the institution of adoption and its consequences. Although they therefore try to inform the mothers in this respect, it remains obvious that in most cases no adequate counsel (either psychological or legal) exists for these mothers. Indeed, in many cases there isn't even the possibility for the social workers to provide this most basic information to either of the parents since the mothers simply visit the law offices and deliver their children without anyone fully explaining to them the consequences of their decision.⁶⁴

The ILPEC report on intercountry adoption in Guatemala suggests that meaningful access to the legal system is severely lacking.⁶⁵ Whether new domestic legislation will alter such situation remains to be seen and it is likely that more than a change in law is needed to promote meaningful access to justice. Available information suggests that the majority of children sent in intercountry adoption are of indigenous Mayan heritage.⁶⁶ The Mayan population is marginalised from mainstream Guatemalan society,⁶⁷ a reminder of their victimisation during the thirty-six year long war.⁶⁸ Mayans are afraid to speak out and to participate in the Guatemalan governance structures.⁶⁹

Issues in intercountry adoption reflect larger issues of judicial access of indigenous rights in Guatemala. Courts are generally not receptive to having a role in the provision of rights to the indigenous population.⁷⁰

The prospects of access to justice for the indigenous Mayan population are bleak, due to numerous structural barriers in the Guatemalan system:

⁶⁰ See 'Guatemala halts foreign adoptions', *BBC News*, 6 May 2008. Available at <http://news.bbc.co.uk/1/hi/7385122.stm>. Last access 10 November 2010.

⁶¹ ILPEC, pp.52-53. See fn.52.

⁶² Goicoechea, 'Report', p.41. See fn.45.

⁶³ ILPEC, pp.49-50. See fn.52.

⁶⁴ ILPEC, p.51. See fn.52.

⁶⁵ Goicoechea, 'Report', p.41. See fn.45. See also S. Sargent, 'Indigenous Children's Rights: International Law, self-determination and intercountry adoption in Guatemala', (2010) *Contemporary Issues in Law* 10(1), p.1.

⁶⁶ ILPEC, pp.19-20. See fn.52.

⁶⁷ Sabin et al., 'The Mental Health Status', p.164. See fn.41; San Pedro, 'Guatemala', pp.2-5. See fn.33.

⁶⁸ Sabin et al., 'The Mental Health Status', p.164. See fn.41; San Pedro, 'Guatemala', pp.2-5. See fn.33.

⁶⁹ San Pedro, 'Guatemala', pp.3-5, 7-8. See fn.33; Goicoechea, 'Report', p.41. See fn.45.

⁷⁰ Sieder, 'The Judiciary', pp.231, 240. See fn.38.

(...) the quality of ordinary justice remained extremely poor and highly likely to exclude indigenous people. The majority continue to lack access to the official justice system in their own languages. Very few judges or lawyers are Mayan or speak indigenous languages. Litigation is not permitted in indigenous languages, and the number of interpreters employed in the justice system is nowhere near sufficient to meet demand.⁷¹

Reluctance and an inability to use the legal system is not however limited to the Mayan population.⁷² There is a general disinclination to use the legal system.⁷³

Whilst the intercountry adoption moratorium remains in place as of the time that this article went to press,⁷⁴ there were significant developments that point towards the direction in which Guatemalan intercountry adoption reform is headed. The Guatemalan government has announced a pilot project for sending children for intercountry adoption and has invited sending states to send applications to participate in this project. Guatemala seeks to approve a ‘maximum of four receiving countries and one adoption service provider in each country.’⁷⁵ It is anticipated, however, that the resumed sending of children in intercountry adoption will not be the same as before. The United States Department of State website cautions that ‘the profile of children who would be placed under this pilot program contrasts sharply with the profile of most children previously adopted internationally from Guatemala.’⁷⁶

In summary, the Guatemalan situation is at a crossroads. On the one hand, it is undergoing radical changes in its intercountry adoption system, by making judicial involvement mandatory. On the other hand, Guatemala has had significant internal opposition to any changes in its intercountry adoption operation and resistance to the implementation of the Hague Convention. In such a situation, it is at best uncertain whether the intercountry adoption reforms now under way will take hold.⁷⁷

⁷¹ Sieder, ‘The Judiciary’, p.227. See fn.38.

⁷² Goicoechea comments that ‘Vulnerable people are not used to reporting to the authorities (they do not trust the justice system and it is also extremely difficult for them to accede to it). Access to justice is a serious problem that should be duly considered.’ Goicoechea, ‘Report’, p.41. See fn.45.

⁷³ Goicoechea, ‘Report’, p.41. See fn.45.

⁷⁴ Given the likelihood of rapid changes in the system after the time this article goes to press, need some caution here to the reader to update the situation.

⁷⁵ United States Department of State, Bureau of Consular Affairs, Office of Children’s Issues, ‘Guatemala: Adoption Alert’, available at <http://adoption.state.gov/news/guatemala.html>. Last access 10 May 2010.

⁷⁶ ‘Guatemala: Adoption Alert’. See fn.75.

⁷⁷ For further discussion on what is necessary to ensure sustained successful intercountry adoption law reform in Guatemala, see Sargent, ‘Indigenous Children’s Rights’, fn.65. It is worth a comment that despite a moratorium being placed on intercountry adoption by Guatemala, it has not prevented the processing of adoption applications that were under way prior to the moratorium. In United States fiscal federal year 2009, which dates from 1 October 2008 to 30 September 2009, 756 children from Guatemala were adopted to the United States, with Guatemala ranking as the fifth highest state for the sending of children to the United States for adoption. See Intercountry Adoption, Office of Children’s Issues, United States Department of State, ‘Total Adoptions to the United States’, available at http://adoption.state.gov/news/total_chart.html, last access 11 May 2010. In recent developments, the United States withdrew interest on a pilot programme of adoptions from Guatemala in October 2010, citing concerns that the plans for the programme did not meet minimal safeguards for children as required by the Hague Convention. See United States Department of State, Bureau of Consular Affairs, Office of Children’s Issues, ‘Guatemala: Adoption Alert: Guatemala Pilot Program’. Available at <http://adoption.state.gov/news/guatemala.html>. Last access 10 November 2010.

4.2. South Africa

Following the end of the apartheid system in the mid 1990s,⁷⁸ South Africa created new structures of national governance, including a new constitution,⁷⁹ that have been widely praised as important factors in the relatively smooth transition.⁸⁰ However, despite such praise, South Africa faces numerous challenges.⁸¹ These include guaranteeing legal access to its diverse population,⁸² as South Africa is a country with a widely variant population⁸³ and numerous languages,⁸⁴ and providing for children left vulnerable due to the widespread HIV/AIDS epidemic.⁸⁵ Women also face the likelihood of gender-based poverty and vulnerability in post-apartheid South Africa,⁸⁶ as well as high rates of domestic violence.⁸⁷

4.2.1. Distinctive Approach to Legal System

South Africa has a distinctive approach in the design of its legal system. It operates with a plural legal system that puts customary law on an equal footing with statutory law.⁸⁸ The Constitution set a vision for the new nation to be ‘united in its diversity’.⁸⁹ It also incorporates the principle of the best interests of the child.⁹⁰ South Africa’s Constitution receives praise for the role that it has

⁷⁸ C. Murray and R. Simeon, ‘Recognition without Empowerment: Minorities in democratic South Africa’, (2007) *International Journal of Constitutional Law* 5(4) (Advance Access Copy), p.1; J. Sloth-Neilson, ‘Children’s Rights in South African Courts: An overview since the ratification of the UN Convention on the Rights of the Child’, (2002) *The International Journal of Children’s Rights* 10(2), p.137.

⁷⁹ Murray and Simeon, ‘Recognition’, p.2. See fn.78.

⁸⁰ Murray and Simeon, ‘Recognition’, pp.2-3, 4, 16-17, 24-26, 28, 30-31. See fn.78; M. Anderson, ‘Access to Justice and Legal Process: Making legal institutions responsive to poor people in LDCs’ (February 2003), Institute of Development Studies (IDS), Working Paper 178, p.21. Available at <http://www.ids.ac.uk/ids/bookshop/wp/wp178.pdf>.

⁸¹ Murray and Simeon, ‘Recognition’, pp.2-3, 4, 30-31. See fn.78.

⁸² See, generally, S. Mills, ‘Mothers in the Corridors of the South African Legal System: An assessment of the Johannesburg Family Court Pilot Project’, (2003) *Jenda: A journal of culture and African women studies* 4, pp.1, 3-4. Available at <http://www.jendajournal.com/issue4/mills.html>. Last access 28 October 2010.

⁸³ Murray and Simeon, ‘Recognition’, pp.5-6. See fn.78; S. Burman, ‘The Best Interests of the South African Child’, (2003) *International Journal of Law, Policy and the Family* 17(1), pp.28, 30.

⁸⁴ Murray and Simeon, ‘Recognition’, pp.6-7. See fn.78; Burman, ‘The Best Interests’, p.30. See fn.83.

⁸⁵ L. Townsend and A. Dawes, ‘Intentions to Care for Children Orphaned by HIV/AIDs’, (2007) *Journal of Applied Social Psychology* 37(4), pp.822-823; S. Madhavan, ‘Fosterage Patterns in the Age of AIDS: Continuity and change’, (2004) *Social Science and Medicine* 58, p.1443.

⁸⁶ Mills, ‘Mothers’, pp.3-4. See fn.82, above.

⁸⁷ Mills, ‘Mothers’, p.4. See fn.82.

⁸⁸ Burman, ‘The Best Interests’, p.31. See fn.83; C. Himonga, ‘Implementing the Rights of the Child in African Legal Systems: The Mthembu journey in search of justice’, (2001) *The International Journal of Children’s Rights* 9(89), pp.94-97. There is, however, no uniform agreement that the existence of this type of system is effective in preventing racial discrimination; see M. Pieterse, ‘It’s a “Black Thing”: Upholding culture and customary law in a society founded on non-racialism’, (2001) *South African Journal on Human Rights* 17, p.364.

⁸⁹ Murray and Simeon, ‘Recognition’, p.1. See fn.78.

⁹⁰ Burman, ‘The Best Interests’, p.28. See fn.83. The best interest standard is found within Section 28, of the Constitution of the Republic of South Africa. Section 28(2) states that ‘a child’s best interests are of paramount importance in every matter concerning the child.’

played in the post-apartheid governance of South Africa.⁹¹ While the transition into post-apartheid governance has not been without its problems, the Constitution and the governance structure that it sets up are credited with at least keeping conflict to levels below what had been expected.⁹²

4.2.2. Parental Consent to Intercountry Adoption in South Africa

South Africa has only recently implemented the Hague Convention⁹³ and it already indicates that it does not have the infrastructure fully in place to meet Convention requirements.⁹⁴ Intercountry adoption is a new phenomenon in South Africa, only permitted by the Constitution following a decision by the Constitutional Court.⁹⁵

South Africa's current process for a child leaving the country through intercountry adoption requires legal approval.⁹⁶ The Constitutional Court must be satisfied with the appropriateness of the consent to adoption.⁹⁷ The biological parents are given 60 days following the provision of consent in which to reconsider their decision.⁹⁸

The South African domestic laws thus provide some safeguards for ensuring that parental consent has been appropriately given. Whether these in fact are effective in doing so is largely dependent within any legal setting on the ease or difficulty of accessing rights and safeguard provisions provided for within the law. As discussed in the next section, there are practical difficulties to accessing justice within South Africa's system that could lessen the effectiveness of the legal provisions for providing appropriate parental consent.

4.2.3. Access-to-Justice Issues in South Africa

Anderson points out the unique success that South Africa's legal system has had through the change from apartheid governance to its present government structure:

South Africa, which is an interesting example of a state which had a strong ideological adherence to the rule of law during the apartheid era, but the rule of law was not enough since the laws which were applied were explicitly discriminatory. During this period, courts paid a distinct but limited role in controlling the excesses of the executive. With

⁹¹ Murray and Simeon, 'Recognition', pp.2, 4, 16-17, 24-26, 28, 30-31. See fn.78.

⁹² Murray and Simeon, 'Recognition', pp.28-31. See fn.78; Anderson, 'Access to Justice', p.21. See fn.80.

⁹³ It became a party to the Convention on 21 August 2003. See N. Spurr, 'South Africa: Intercountry adoption, a last resort or best hope?', *Inter-Press Service*, 14 October 2005, available at <http://www.aegis.com/news/ips/2005/IP051005.html>. Last access 28 October 2010. See Hague Convention Status Table, showing entry into force on 1 December 2003. See fn.50.

⁹⁴ Responses to Questions 6 and 17, Hague Conference on Private International Law, 'Questionnaire on Intercountry Adoptions—South Africa', for 2005 Hague Convention Special Session, available at http://www.hcch.net/upload/adop2005_za.pdf. Hereinafter 'South Africa Responses'.

⁹⁵ Sloth-Neilson, 'Children's Rights', pp.141-142. See fn.78.

⁹⁶ South Africa Responses, Question 4(c). See fn.94.

⁹⁷ South Africa Responses, Question 4(c). See fn.94.

⁹⁸ South Africa Responses, Question 4(c). See fn.94.

democratisation and the end of apartheid policies, the existing formal rule of law has been grafted onto a genuine commitment to racial equality and new constitutional rights. New judges were appointed, including a new Constitutional Court with a strong commitment to racial equality, human rights and pro-poor policies. Although levels of criminal violence remain very high, there is strong evidence suggesting that police violence has declined, and the decisions of the courts are distinctly more responsive to criticism of state authority and the needs of the poor.⁹⁹

There remain practical problems of access to the legal system, despite the praise that the South African Constitution has garnered. A study of the Family Court Pilot Project in Johannesburg revealed a two-tiered system of justice.¹⁰⁰ Black women had a difficult time accessing the court system, even within the auspices of this pilot project.¹⁰¹ They had difficulty in understanding the process and getting resolutions they needed.¹⁰² Barriers to getting needed services included problems with literacy, language and simply the time it took to attend court, fill out and submit the necessary forms.¹⁰³ Another comment on the difficulties of accessing justice in Africa indicates that ‘the prevalence of poverty, ignorance of the law, the social and economic disadvantage of most people, especially women and children, and the adversarial nature of the system of justice in Africa are some of the most obvious barriers to the accessibility of justice.’¹⁰⁴

South Africa has only recently begun to participate in intercountry adoption. It is still completing its infrastructure, but has passed domestic legislation that provides specific steps that are meant to safeguard the provision of parental consent. These safeguards, if utilised as written, provide a framework for ensuring that parental consent is appropriate. Yet, a review of the South African court system indicated that there are significant barriers to accessing justice. Until or unless those barriers are adequately addressed, there remains a risk of obtaining improper consents to intercountry adoption.

4.3. *India*

India’s modern governance structure is shaped by its 1950 Constitution.¹⁰⁵ It was written in the aftermath of widespread violence following events in 1947 that resulted in the creation of Pakistan.¹⁰⁶

The Hague Convention entered into force in India on 6 June 2003.¹⁰⁷ India’s participation in intercountry adoption dates from at least the early 1960s.¹⁰⁸

⁹⁹ Anderson, ‘Access to Justice’, p.21. See fn.80.

¹⁰⁰ Mills, ‘Mothers’. See fn.82.

¹⁰¹ Mills, ‘Mothers’, pp.17-27. See fn.82.

¹⁰² Mills, ‘Mothers’, pp.17-27. See fn.82.

¹⁰³ Mills, ‘Mothers’, pp.17-27. See fn.82.

¹⁰⁴ Himonga, ‘Implementing the Rights of the Child’, p.115. See fn.88.

¹⁰⁵ P. B. Mehta, ‘India’s Unlikely Democracy: The rise of judicial sovereignty’, (2007) *Journal of Democracy* 18(2), p.70.

¹⁰⁶ P. Datta, ‘Historic Trauma and the Politics of the Present in India’, (2005) *Interventions* 7(3), p.316.

¹⁰⁷ Hague Convention Status Table, see fn.50.

4.3.1. Parental Consent to Intercountry Adoption

India, like South Africa, has a sixty-day window of time in which a parent can retract relinquishment of parental rights once given.¹⁰⁹ Steps are taken to ensure that parents are aware of the effect of the relinquishment.¹¹⁰ Parents also provide statements that their relinquishment was not obtained based on monetary considerations.¹¹¹ Indeed, several steps must be completed even before a child is eligible for placement through intercountry adoption. First, steps must be taken to locate a family in India.¹¹² This is done through the resources of the agency to which the child was relinquished.¹¹³ If no family has been located within 45 days, a centralised resource list of potential adoptive families is consulted.¹¹⁴ If, after additional 30 days have elapsed, no adoptive home within India has been located, the intercountry adoption process may be started.¹¹⁵

Given this carefully constructed multi-step process for relinquishing a child to intercountry adoption, it seems that India may have created a model system for protecting the child's rights by minimising chances for inappropriately given parental consent.¹¹⁶ It also seems that a system so crafted would guard against other abuses in intercountry adoption practice.¹¹⁷ However, in the context of India's social make up, the system instead operates to invite the very abuses it seeks to provide a bulwark against.¹¹⁸ Each different layer of operation presents an opportunity for inappropriate exchanges of money as a child progresses through the system.¹¹⁹ Just as in Guatemala, children that are likely to become involved in intercountry adoption are from marginalised social groups: '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.'¹²⁰

India has had several highly problematic situations regarding intercountry adoption practices.¹²¹ As in Guatemala, the practices of soliciting unborn babies for adoption¹²² and soliciting poverty-stricken parents to surrender infants for adoption in exchange of a small amount of money have

¹⁰⁸ V. Groza, D. Chenot, K. Holtedalh and the Team from Children of the World Norway, 'The Adoption of Indian Children by Norwegian Parents', September 2004, p.12. Available at http://verdensbarn.no/verdensbarn/media/pdf/8C4CF44E8A0337AB65B8BC35D3D0498Aup20a3f1.Norwegian_Adoptions_final_report.pdf. Last access 28 October 2010.

¹⁰⁹ Response to Question 4.c, 'Reply to the Questionnaire on the Practical Operation of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption', India, 2005, Hague Convention Special Session, available at http://www.hcch.net/upload/adop2005_in.pdf, (cited as 'India Reply').

¹¹⁰ India Reply, response to Question 4 d. See fn.109.

¹¹¹ India Reply, response to Question 4 d. See fn.109.

¹¹² India Reply, response to Question 4 d. See fn.109.

¹¹³ India Reply, response to Question 4 d. See fn.109.

¹¹⁴ India Reply, response to Question 4 d. See fn.109.

¹¹⁵ India Reply, response to Question 4 d. See fn.109.

¹¹⁶ Smolin, 'The Two Faces', pp.446-448. See fn.12.

¹¹⁷ Smolin, 'The Two Faces', pp.446-448. See fn.12.

¹¹⁸ Smolin, 'The Two Faces', pp.446-448. See fn.12.

¹¹⁹ Smolin, 'The Two Faces', pp.446-448. See fn.12.

¹²⁰ Smolin, 'The Two Faces', p.488. See fn.12.

¹²¹ Smolin, 'The Two Faces', pp.456-473. See fn.12.

¹²² S. C. Singh, 'Adoption Law in India: Need for a fresh look', (2002) *Central India Law Quarterly* 15, p.152.

been common.¹²³ Concerns have also been expressed that adoption activity may in fact conceal inappropriate practices including ‘moral or sexual abuse or forced labour or experimentation for medical or other research.’¹²⁴ Many of these occurred prior to the Hague Convention’s entry into force,¹²⁵ but it is suggested that, even then, India had a well-crafted set of domestic laws and practice provisions to provide a sound process for the conduct of intercountry adoptions.¹²⁶ These, however, did not prevent intercountry adoption abuses.¹²⁷

Despite these problems and concerns over the fate of a child who ultimately ends up in intercountry adoption, the judiciary in India views legitimate intercountry adoption as a positive option for providing a family to a child.¹²⁸

4.3.2. Access to Justice Issues

India, like South Africa, has a constitution that is the foundation of its judicial system,¹²⁹ crafted in and for a newly independent nation, with an eye towards being responsive to a diverse population.¹³⁰ Despite the aspirations of the Indian Constitution, delivery of access to justice has in reality been plagued with difficulty.¹³¹ The legal system is overburdened,¹³² which causes delays in the resolution of matters taken to courts.¹³³ It is not, as one might expect, an excessive use of the courts that has created this situation,¹³⁴ but rather sparse judicial resources,¹³⁵ including the insufficient number of courts¹³⁶ and judges.¹³⁷ This has resulted in a general reticence to make use of the legal system.¹³⁸

¹²³ Singh, ‘Adoption Law in India’, p.152. See fn.122.

¹²⁴ P. C. Pati, ‘Inter-Country Adoption of Children: Judicial consideration in India’, (2003) *Central India Law Quarterly* 16, pp.1-2.

¹²⁵ Smolin, ‘The Two Faces’, pp. 456-474. See fn.12. Smolin outlines adoption issues in Andhra Pradesh, starting with problems 1995-1996. See, specifically, Smolin, ‘The Two Faces’, pp. 456. See also Singh, ‘Adoption Law in India’, pp.152-156. See fn.122.

¹²⁶ Smolin, ‘The Two Faces’, p.426 and pp. 426-445 for a description of the system in India. See fn.12. See also Singh, ‘Adoption Law in India’, pp.152-155. See fn.122; Pati, ‘Inter-Country Adoption of Children’, p.1. See fn.124.

¹²⁷ Smolin, ‘The Two Faces’, p.426. See fn.12.

¹²⁸ Pati, ‘Inter-Country Adoption of Children’, p.7. See fn.124; Singh, ‘Adoption Law in India’, p.159. See fn.122.

¹²⁹ M. Galanter and J. Krishnan, ‘Bread for the Poor: Access to justice and the rights of the needy in India’, (2004) *Hastings Law Journal* 55, p.789; Mehta, ‘India’s Unlikely Democracy’, pp.72-73. See fn.105.

¹³⁰ G. Jacobsohn, ‘An Unconstitutional Constitution? A Comparative Perspective’, (2006) *International Journal of Constitutional Law* 4(3), pp.460, 471. P. Datta notes that the Constitution was created after the Indian partition, where there were ‘up to 2 million dead (...) and 12 million homeless.’ See P. Datta, ‘Historic Trauma and the Politics of the Present in Indian’, (2005) *Interventions* 7(3), p.316.

¹³¹ Galanter and J. Krishnan, ‘Bread for the Poor’, pp.789-790. See fn.129 above.

¹³² Galanter and J. Krishnan, ‘Bread for the Poor’, pp.789-790. See fn.129.

¹³³ Galanter and J. Krishnan, ‘Bread for the Poor’, pp.789-790. See fn.129.

¹³⁴ Galanter and J. Krishnan, ‘Bread for the Poor’, p.789. See fn.129.

¹³⁵ Galanter and J. Krishnan, ‘Bread for the Poor’, p.790, footnote 2. See fn.129.

¹³⁶ Galanter and J. Krishnan, ‘Bread for the Poor’, p.790, footnote 2. See fn.129.

¹³⁷ Galanter and J. Krishnan, ‘Bread for the Poor’, p.790, footnote 2 and Appendix A (‘Number of Judges, Common Law and Civil Countries’), p.834, showing India with a very low rate of judges in proportion to India’s population as compared to both civil and common law jurisdictions. See fn.129.

¹³⁸ Galanter and J. Krishnan, ‘Bread for the Poor’, p.789. See fn.129.

There have been innovative projects that aim to provide better access to the Indian courts. These involve minimising usual legal rules on who may bring an action to court¹³⁹ and making use of traditional forms of dispute resolution.¹⁴⁰ This all takes place with a backdrop of controversy over the role and powers of the Indian Supreme Court in Constitutional interpretation.¹⁴¹ The Court has determined that it is within its powers to declare an amendment to the Indian Constitution as unconstitutional – thus there can be judicial override of legislatively crafted Constitutional change.¹⁴²

There are, however, significant complicating factors beyond the infrastructure of India's judiciary when it comes to access to justice, particularly regarding intercountry adoption parental consent. Smolin comments that

(...) 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 her as bound to follow the dictates of her husband and mother-in-law?¹⁴³

Thus, the question of assuring appropriate parental consent in India is presented with a number of challenges – similar to those seen in Guatemala or South Africa. There is a large population that has trouble accessing the court system and there has been a persistent history of inappropriate adoption practices.

4. Domestic Mechanisms for Ensuring Proper Parental Consent to Intercountry Adoption

Because ensuring the appropriateness of parental consent is an obligation of the sending state, the domestic mechanisms in place in the sending state are extremely relevant.

4.1. Access to Justice

This section considers four factors¹⁴⁴ identified as being particularly important for determining levels of access to justice in developing countries:¹⁴⁵ reluctance to use the law,¹⁴⁶ access to legal

¹³⁹ Mehta, 'India's Unlikely Democracy', pp.71-72. See fn.105; Galanter and J. Krishnan, 'Bread for the Poor', p. 795. See fn.129.

¹⁴⁰ Galanter and J. Krishnan, 'Bread for the Poor', pp.791-794, 799-801. See fn.129.

¹⁴¹ Jacobsohn, 'An Unconstitutional Constitution?', pp.471-476. See fn.130; Mehta, 'India's Unlikely Democracy', pp.74-75. See fn.105.

¹⁴² Jacobsohn, 'An Unconstitutional Constitution?', pp.471-476. See fn.130; Mehta, 'India's Unlikely Democracy', pp.74-75. See fn.105.

¹⁴³ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁴⁴ Anderson, 'Access to Justice', pp.16-20. See fn.80.

¹⁴⁵ Anderson, 'Access to Justice', p.16. See fn.80.

information and legal literacy,¹⁴⁷ inadequate legal representation¹⁴⁸ and delays in judicial process and decisions.¹⁴⁹ Such factors are evaluated in light of parental consent and access to justice situations in India, Guatemala, and South Africa.

4.1.1. Reluctance to Use the Legal System

Widespread reluctance to use the legal system is a problem in Guatemala. The lack of a judicial process for intercountry adoption until recent legislative reforms means that in practice the reluctance to use the legal system would not have had an impact on the integrity of parental consent. Given the problems documented on obtaining appropriate parental consent, with DNA tests implemented by two receiving states, and other receiving states refusing to permit adoptions from Guatemala at all, the reluctance to use the legal system may impede the consent process in the reformed operations.

India has drawn up procedures to ensure appropriate consent, including a period of time in which the consent can be retracted. Despite this, there is also documented reluctance to use the legal system in India, but this is caused by the system being over-burdened.

Does the reluctance to use the court system impact on the integrity of parental consent? Smolin has predicted the multi-faceted process of adoption in India is likely to encourage wrongful practice rather than to impede it.¹⁵⁰ This suggests larger systemic problems in intercountry adoption, and that likely the integrity of parental consent is at risk of being eroded. A reluctance to use the court system only exacerbates this risk, but is apparently only one of many factors that are critical to ensuring appropriate parental consent. Yet India's judiciary has tried to provide alternatives and innovations to encourage access to justice. While these have not perhaps fully achieved their aims, they do represent a commitment to make the legal system available to all.

While South Africa experiences issues of access to justice, it does not display the documented reluctance to the use of its system as do India, and Guatemala has the most pervasive problems of all three countries. This is reflective of its long-standing issues of systemic issues in governance.

4.1.2. Access to Legal Information and Legal Literacy

Legal information and legal literacy are at the heart of ensuring that parents are making an informed choice on consenting or relinquishing their child to intercountry adoption. Where systems do not provide adequate information on the consequences and meaning of consent, consent can by no means be considered truly informed.

¹⁴⁶ Anderson, 'Access to Justice', pp.16-19. See fn.80.

¹⁴⁷ Anderson, 'Access to Justice', p.19. See fn.80.

¹⁴⁸ Anderson, 'Access to Justice', p.19. See fn.80.

¹⁴⁹ Anderson, 'Access to Justice', pp.19-20. See fn.80.

¹⁵⁰ Smolin, 'The Two Faces', pp.446-448. See fn.12.

Again, Guatemala has documented problems with informed consent. South Africa requires that the consent process take place in front of a judge, with careful documentation that the parents did make an informed decision when giving consent. This safeguard is meaningful only if the judge takes time to ensure the comprehension expressed by the parents is genuine. It is too easy for this to become a rote process in an overwhelmed legal system, and this then becomes a real risk in the under-resourced Indian judicial system.

4.1.3. Inadequate Representation

This is an element that goes hand in glove with access to legal information and legal literacy – and thus to the integrity of parental consent in intercountry adoption. A good legal representative can make legal information digestible and comprehensible to a birth parent. They can ensure that consent to intercountry adoption is given in a genuine, appropriate and informed manner, and, should a parent decide to retract consent, that the parent is able to access the legal system in order to do so. Providing independent legal representation for each parent in intercountry adoption consent would be an ideal safeguard and domestic mechanism for the assurance of rights. Yet, as Anderson comments, ‘lawyers are often in short supply.’¹⁵¹ This is likewise recognised by the Guide to Good Practice for the Convention,¹⁵² which recognises that, in reality, ‘states of origin may often lack the resources for this important responsibility of ensuring that proper consents are obtained.’¹⁵³

4.1.4. Delays in the Legal System

It is hard to assess the result that legal system delays may have on birth parent consent. Legal system delays are likely to be symptomatic of other systemic problems that would have a deleterious defect on the integrity of birth parent consent to intercountry adoption. Delays in the legal system also may have an impact on other access-to-justice factors, as in the case of India, where legal system delays result in a reluctance to make use of the legal system.

Nevertheless, these access-to-justice barriers do not in and of themselves account for what is necessary to obtain informed birth-parent consent to adoption. Even if these barriers were all successfully addressed, there are remaining factors that need to be accounted for in the consent process and in the nature of the consent itself. Access to justice is a critical part of ensuring informed consent, but it does not provide all the needed pieces of the puzzle.

5. Ensuring Valid Parental Consent in Intercountry Adoption

Two systemic factors for ensuring appropriate parental consent in intercountry adoption must be considered over and above the rule-of-law environment and access-to-justice barriers in a

¹⁵¹ Anderson, ‘Access to Justice’, p.19. See fn.80.

¹⁵² *Guide to Good Practice*. See fn.15.

¹⁵³ *Guide to Good Practice*, para.2.2.3 and 78, p.34. See fn.15. Emphasis added.

sending country. The first is social and cultural norms,¹⁵⁴ including the position of women as mothers within a particular society or community.¹⁵⁵ Second, economic considerations¹⁵⁶ and other environmental factors such as disease¹⁵⁷ that are present in a given community or population at a particular time may have bearing on parental consent in intercountry adoption.¹⁵⁸

Social and cultural norms¹⁵⁹ may exert considerable influence on the parental consent process. The nature of the parental consent itself must be considered in this context.¹⁶⁰ Is it expressing the will of the consenting individual?¹⁶¹ This may in fact not be an accurate picture of the cultural and societal norms of the mother who is giving the consent or relinquishment.¹⁶² As pointed out by Smolin, the woman may not occupy a position within her culture that allows her to express a viewpoint that differs from that of her husband or other family members.¹⁶³ The consent that is given may be expression of their desires and not of hers.¹⁶⁴ She may not even consider the possibility of an expressed opinion that would differ. Moreover, even if a woman in such position would dare expressing her own opinion, the consequences of this behaviour could be disastrous to her.

In such an environment, can the birth mother truly provide an informed consent to the adoption?¹⁶⁵ An answer to this question would in turn raise the different question of how informed consent would or should be understood within any given environment. Is informed consent a universal standard or is it something that must or should aspire to take account of cultural, regional or national differences, perhaps even within a state?

A second systemic factor is conditions in a given time and space, such as extreme poverty and deprivation,¹⁶⁶ or other conditions that arguably outstrip intercountry adoption in both numbers and urgency for attention and urgent commitment of resources.¹⁶⁷ Smolin offers the example of widespread poverty, nutritional deficiencies, disease and female infanticide in India as rendering the occurrence of intercountry adoption problems as minor in comparison.¹⁶⁸ Another example is that of South Africa, and the HIV/AIDS epidemic, where large numbers of children are

¹⁵⁴ Smolin, 'The Two Faces', pp.485-489. See fn.12; B. Rwezaura, 'The Concept of the Child's Best Interest in the Changing Economic and Social Context of Sub-Saharan Africa', (1994) *International Journal of Law and the Family* 8, pp.82, 83-84, 109.

¹⁵⁵ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁵⁶ Rwezaura, 'The Concept of the Child's Best Interest', pp.84, 109. See fn.154.

¹⁵⁷ Smolin, 'The Two Faces', p.484. See fn.12; Burman, 'The Best Interests', pp.36- 38. See fn.83; Rwezaura, 'The Concept of the Child's Best Interest', pp. 110- 111. Rwezaura cites such factors as 'harsh conditions such as war, famine, political repression and police brutality.' Rwezaura, 'The Concept of the Child's Best Interest', p.110. See fn.154.

¹⁵⁸ Smolin, 'The Two Faces', pp.484, 488-489. See fn.12.

¹⁵⁹ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶⁰ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶¹ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶² Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶³ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶⁴ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶⁵ Smolin, 'The Two Faces', pp.488-489. See fn.12.

¹⁶⁶ Smolin, 'The Two Faces', p.484. See fn.12.

¹⁶⁷ Smolin, 'The Two Faces', p.484. See fn.12.

¹⁶⁸ Smolin, 'The Two Faces', p.484. See fn.12.

vulnerable due to the loss of one or both parents.¹⁶⁹ South Africa also faces widespread poverty.¹⁷⁰

Addressing these two situations – social and cultural norms and economic considerations – require addressing laws and domestic mechanisms within their contextual landscape. The necessity and difficulty of taking stock of this is described:

A focus on law's relation to community (...) requires that full account be taken of the complex interrelations of different kinds of community life within the territory of state legal systems. People have allegiances, with varying degrees of transience or permanence, at different times and different ways, and often simultaneously, to different group and social relations involving intricate overlapping of the different types of community life (...). Sometimes law, faced with impenetrable complexity (especially, perhaps, in the interplay of values and beliefs), steps aside and regulates in the most limited, neutral, locally pragmatic way possible, or not at all.¹⁷¹

This article argues that an approach must be taken that promotes a dialogue and exchange whereby new meanings can be negotiated, constructed and implemented.¹⁷² In the case of parental consent, it would facilitate exchanges between sending and receiving countries to create an understanding of parental consent.¹⁷³ That common understanding could be used to enable identification of the necessary domestic mechanisms to obtain appropriate parental consent within the environment of the sending country.

Therefore, an approach that takes on board creating dialogue between sending and receiving states has a strong practical value:

The success of the dialogue process can be determined by the pragmatic criteria of whether the problems are eventually resolved to the satisfaction of the interacting groups or not. Instead of simply comparing divergent and perhaps incommensurable cultural traditions with each other, the adequacy of traditions can be tested against the particular problems to be solved. While each of the cultures may have something to contribute to the resolution of the problem, each may also be lacking in certain conceptual and normative resources which would help them to solve it (...).¹⁷⁴

¹⁶⁹ Burman, 'The Best Interests', pp.36-38. See fn.83. S. Madhavan, 'Fosterage Patterns in the Age of AIDS: Continuity and change', (2004) *Social Science and Medicine* 58, pp. 1443, 1447-1448.

¹⁷⁰ Burman, 'The Best Interests', pp.3-38. See fn.83.

¹⁷¹ R. Cotterrell, *Law, Culture and Society: Legal ideas in the mirror of social theory* (Hampshire: Ashgate, 2006), pp.155-156.

¹⁷² Cotterrell, *Law, Culture and Society*, pp.450-454, 455-457. See fn.171. J. Gubrium and J. Holstein, 'Analyzing Interpretive Practice' in D. Denzin and Y. Lincoln (ed.), *Strategies of Qualitative Inquiry*, 2nd edition (Thousand Oaks, CA: Sage, 2003), pp.215,230; K. Charmaz, 'Grounded Theory: Objectivist and constructivist methods' in D. Denzin and Y. Lincoln (ed.), *Strategies of Qualitative Inquiry*, 2nd edition (Thousand Oaks, CA: Sage, 2003), p.269.

¹⁷³ R. Evanoff, 'Universalist, Relativist and Constructivist Approaches to Intercultural Ethics', (2004) *International Journal of Intercultural Relationships* 28, pp.439, 455-457.

¹⁷⁴ R. Evanoff, 'The Concept of "Third Cultures" in Intercultural Ethics', (2000) *Eubios Journal of Asian and International Bioethics* 10, p.126, available at <http://www.eubios.info/EJ104/EJ104H.htm>.

Because a child in intercountry adoption is essentially being exchanged across not only national boundaries but also cultural boundaries, this approach to the thorny question of how to understand parental consent is an appropriate one.¹⁷⁵

This is echoed in the commentary of Brunnee and Toope. They argue that effective legal norms are ones that have ‘congruence with normative inheritance, past and present social practice and contemporary aspirations.’¹⁷⁶

Thus, effective laws on parental consent would be ones that have been crafted with an awareness of the local context. The ways in which consent is obtained, the explanations given about the meaning of consent to adoption, and safeguards on possible abuses would all be cognizant of the local culture, meanings, and relevance to the community.

In this way, the laws and practices of sending countries can ensure that proper consent is obtained. Done in this way, domestic mechanisms can be a bulwark against potential abuses in intercountry adoption.

6. Conclusion

Access to justice may sound like a well-worn aphorism, but it remains one important aspect for securing domestic access to children’s rights. However, a strong rule of law environment and an efficient provision of access to justice are not sufficient to ensure that appropriate consent is, or has been, given to a child’s entry into intercountry adoption. It also falls short of providing all necessary domestic mechanisms to ensure children’s rights in general, beyond a parental consent in intercountry adoption setting.

Intercountry adoption occurs within an environment of other and perhaps seemingly more urgent children’s issues,¹⁷⁷ such as female infanticide¹⁷⁸ or high rates of disease, inadequate nutritional resources and poverty.¹⁷⁹ The domestic elements that determine of whether adequately informed parental consent is provided in intercountry adoption also determine whether other rights of children receive recognition and protection. Economic and social conditions, whether comprising incipient crisis or a chronic part of the environment, all play into whether there are adequate domestic mechanisms to provide assurance of children’s rights.

¹⁷⁵ Evanoff, ‘Universalist’, p.450. See fn.173.

¹⁷⁶ J. Brunnee and S. Toope, ‘International Law and Constructivism: Elements of an interactional theory of International Law’, (2000) *Columbia Journal of Transnational Law* 39, p.74. Available at <http://ssrn.com/abstract=1432539>. Last access 28 October 2010.

¹⁷⁷ Smolin, ‘The Two Faces’, pp. 483-484. See fn.12; Burman, ‘The Best Interests’, pp.36-38. See fn.83. Burman additionally comments that, where developing countries face problems of poverty and disease, ‘(...) the best interests of [the] child frequently cannot be considered at any but the most basic level of survival.’ See Burman, p.38. Rwezaura comments that, ‘For the majority of these children[,] sheer survival is their major goal and, if asked the proverbial question: “What would you like to be when you grow up?” Most of them will answer: “I would like to be alive.”’ See Rwezaura, ‘The Concept of the Child’s Best Interest’, p.111. See fn.154.

¹⁷⁸ Smolin, ‘The Two Faces’, p.484. See fn.12; K. Menon-sen and A.K. Shiva Kumar, *Women in India: How Free? How Equal?*, Report Commissioned by the Office of the United Nations Resident Coordinator in India (2001), pp.27-28.

¹⁷⁹ Smolin, ‘The Two Faces’, p.484. See fn.12; Burman, ‘The Best Interests’, pp.36-38. See fn.83; Rwezaura, ‘The Concept of the Child’s Best Interest’, pp. 110-111. See fn.154.

The study of India, South Africa and Guatemala points out that providing an adequate legal and judicial infrastructure is a necessary first step towards providing domestic mechanisms that assure children's rights. Nevertheless, the development and provision of a judicial infrastructure is not enough. Even if it exists, numerous problems can render it ineffective as a mechanism to ensure children's rights. These may be issues of access to justice. However, even in systems where there is a concerted effort to provide access to justice, other cultural and societal norms may influence how and whether those domestic mechanisms are utilised—and perhaps most critically, *who* may utilise them to what purpose. Cotterrell perhaps best sums up the complex nature of this task: 'the nature of individual autonomy and dignity and who is to define these remain important questions.'¹⁸⁰ These are the challenges in providing effective domestic mechanisms for the assurance of children's rights. The process of answering those questions will be pivotal in whether adequate domestic mechanisms are in place, not only for parental consent in intercountry adoption but also for children's rights more generally.

¹⁸⁰ Cotterrell, *Law, Culture and Society*, p.169. See fn.171.