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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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 Adoption\(^3\) 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 20\(^{th}\) 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

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

Under the Hague Convention, sending states are responsible for ensuring required and proper consents are obtained for sending a child for intercountry adoption. The sending country must determine whether consents to the adoption have been appropriately obtained. A child may be required to give additional consent to the adoption if of a suitable age. The consent of the biological parent, if required, must be obtained, 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. The birth mother’s consent may only be obtained following the child’s birth, 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. There is a great deal of emphasis on the provision and protection of children’s rights through international and regional legal conventions. Most international rights instruments, however, lack their own enforcement mechanisms and thus become reliant upon member states’ domestic enforcement arrangements. The ratification of an instrument is no guarantee of compliance with the obligations therein.

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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).
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.
in terms of domestic enforcement is critical to whether the aims of the instrument are actually achieved.\textsuperscript{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.\textsuperscript{20} The guide was subsequently finalised in 2008.\textsuperscript{21} It comments on important elements to ensure proper parental consent is obtained:

\(\ldots\) 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.\textsuperscript{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’.\textsuperscript{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.’\textsuperscript{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’.\textsuperscript{25} Inappropriate parental consent can occur when intercountry adoption is a façade to give a mask of legitimacy to child trafficking.\textsuperscript{26} Concern about preventing child trafficking in the guise of adoption is highlighted by the agenda of the


\textsuperscript{20} Guide to Good Practice, p.18, para.8. See fn.15.

\textsuperscript{21} Guide to Good Practice. See fn.15.

\textsuperscript{22} Guide to Good Practice, p.34, para.78 (emphasis added). See fn.15.

\textsuperscript{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.

\textsuperscript{24} Guide to Good Practice Section 2.2.3.1, p.36, para.84. See fn.15.


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.’

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.’ 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.

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 factors and compiles a percentile score for states based on this measure:

27 ‘Permanent Bureau Questionnaire’, See fn.25.
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.\textsuperscript{32}

Based on the World Bank’s data (2006), table A below provides information on rule-of-law rankings for India, Guatemala\textsuperscript{33} and South Africa. It also includes their rankings relative to their region.\textsuperscript{34}

\textit{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 Bank}\textsuperscript{35}

<table>
<thead>
<tr>
<th>Country</th>
<th>Rule of Law Rankings</th>
<th>Regional Ranking</th>
<th>Country Ranking</th>
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<td>South Africa</td>
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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,\textsuperscript{36} this has not emerged as a concern in South Africa.\textsuperscript{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


\textsuperscript{33} ‘Governance Matters VI’. See fn.30.

\textsuperscript{34} ‘Frequently Asked Questions’. See fn.30.


\textsuperscript{36} ‘Governance Matters VI’. See fn.30.

\textsuperscript{37} ‘Governance Matters VI’. See fn.30.

\textsuperscript{38} See discussion on section on India.

\textsuperscript{39} 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. Although the war ended in 1996, a large sector of the population remains marginalised and fearful of the government. During the war, the indigenous population, the Mayans, were targeted by Guatemalan government forces that were aided by the United States. Guatemala has high rates of poverty across the population, but the Mayan population experiences higher rates of poverty than the general population.

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. The lawsuit resulted in a finding that the President indeed lacked such powers under the Guatemalan Constitution, and as a result, the legal status of the Convention remained unresolved. A recent report on the Hague Convention in Guatemala confirms the lack of clarity

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46 Blair, ‘Safeguarding the Interests of Children’, p.369. See fn.45.
around the status of the Convention and there is no consensus in the international community as to whether the Convention is in force.

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. 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.

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. 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, with new laws going into effect 31 December 2007, requiring a judicial proceeding for intercountry adoptions. Despite the previous lack of clarity on its status within Guatemala, the Hague Convention became effective – perhaps again – on that date as well.

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 2000 revealed that both Canada and the United States of America required DNA tests to prove that the person giving consent to the adoption was in fact the biological mother of the child. The United States began to require a second DNA test in August 2007 to

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.
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’.
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.\textsuperscript{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 adoption\textsuperscript{61} or who may even be deliberately mislead into providing consent,\textsuperscript{62} and the solicitation for adoption of unborn children.\textsuperscript{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.\textsuperscript{64}

The ILPEC report on intercountry adoption in Guatemala suggests that meaningful access to the legal system is severely lacking.\textsuperscript{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.\textsuperscript{66} The Mayan population is marginalised from mainstream Guatemalan society,\textsuperscript{67} a reminder of their victimisation during the thirty-six year long war.\textsuperscript{68} Mayans are afraid to speak out and to participate in the Guatemalan governance structures.\textsuperscript{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.\textsuperscript{70}

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

\begin{itemize}
\item \textsuperscript{61} ILPEC, pp.52-53. See fn.52.
\item \textsuperscript{62} Goicoechea, ‘Report’, p.41. See fn.45.
\item \textsuperscript{63} ILPEC, pp.49-50. See fn.52.
\item \textsuperscript{64} ILPEC, p.51. See fn.52.
\item \textsuperscript{66} ILPEC, pp.19-20. See fn.52.
\item \textsuperscript{67} Sabin et al., ‘The Mental Health Status’, p.164. See fn.41; San Pedro, ‘Guatemala’, pp.2-5. See fn.33.
\item \textsuperscript{68} Sabin et al., ‘The Mental Health Status’, p.164. See fn.41; San Pedro, ‘Guatemala’, pp.2-5. See fn.33.
\item \textsuperscript{69} San Pedro, ‘Guatemala’, pp.3-5, 7-8. See fn.33; Goicoechea, ‘Report’, p.41. See fn.45.
\item \textsuperscript{70} Sieder, ‘The Judiciary’, pp.231, 240. See fn.38.
\end{itemize}
(...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.\textsuperscript{71}

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

Whilst the intercountry adoption moratorium remains in place as of the time that this article went to press,\textsuperscript{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.’\textsuperscript{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.’\textsuperscript{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.\textsuperscript{77}

\textsuperscript{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.
\textsuperscript{73} Goicoechea, ‘Report’, p.41. See fn.45.
\textsuperscript{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.
\textsuperscript{76} ‘Guatemala: Adoption Alert’. See fn.75.
\textsuperscript{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, South Africa created new structures of national governance, including a new constitution, that have been widely praised as important factors in the relatively smooth transition. However, despite such praise, South Africa faces numerous challenges. These include guaranteeing legal access to its diverse population, as South Africa is a country with a widely variant population and numerous languages, and providing for children left vulnerable due to the widespread HIV/AIDS epidemic. Women also face the likelihood of gender-based poverty and vulnerability in post-apartheid South Africa, as well as high rates of domestic violence.

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. The Constitution set a vision for the new nation to be ‘united in its diversity’. It also incorporates the principle of the best interests of the child. South Africa’s Constitution receives praise for the role that it has

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79 Murray and Simeon, ‘Recognition’, p.2. See fn.78.
86 Mills, ‘Mothers’, pp.3-4. See fn.82, above.
87 Mills, ‘Mothers’, p.4. See fn.82.
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.\footnote{Murray and Simeon, ‘Recognition’, pp.2, 4, 16-17, 24-26, 28, 30-31. See fn.78.} 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.\footnote{Murray and Simeon, ‘Recognition’, pp.28-31. See fn.78; Anderson, ‘Access to Justice’, p.21. See fn.80.}

\section*{4.2.2. Parental Consent to Intercountry Adoption in South Africa}

} Intercountry adoption is a new phenomenon in South Africa, only permitted by the Constitution following a decision by the Constitutional Court.\footnote{Sloth-Neilson, ‘Children’s Rights’, pp.141-142. See fn.78.}

South Africa’s current process for a child leaving the country through intercountry adoption requires legal approval.\footnote{South Africa Responses, Question 4(c). See fn.94.} The Constitutional Court must be satisfied with the appropriateness of the consent to adoption.\footnote{South Africa Responses, Question 4(c). See fn.94.} The biological parents are given 60 days following the provision of consent in which to reconsider their decision.\footnote{South Africa Responses, Question 4(c). See fn.94.}

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.

\section*{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:

\begin{quotation}
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
\end{quotation}
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.\(^108\)

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\(^100\) 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.
\(^107\) 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.\(^\text{109}\) Steps are taken to ensure that parents are aware of the effect of the relinquishment.\(^\text{110}\) Parents also provide statements that their relinquishment was not obtained based on monetary considerations.\(^\text{111}\) 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.\(^\text{112}\) This is done through the resources of the agency to which the child was relinquished.\(^\text{113}\) If no family has been located within 45 days, a centralised resource list of potential adoptive families is consulted.\(^\text{114}\) If, after additional 30 days have elapsed, no adoptive home within India has been located, the intercountry adoption process may be started.\(^\text{115}\)

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.\(^\text{116}\) It also seems that a system so crafted would guard against other abuses in intercountry adoption practice.\(^\text{117}\) 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.\(^\text{118}\) Each different layer of operation presents an opportunity for inappropriate exchanges of money as a child progresses through the system.\(^\text{119}\) 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.’\(^\text{120}\)

India has had several highly problematic situations regarding intercountry adoption practices.\(^\text{121}\) As in Guatemala, the practices of soliciting unborn babies for adoption\(^\text{122}\) and soliciting poverty-stricken parents to surrender infants for adoption in exchange of a small amount of money have

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\(^{110}\) 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.


\(^{120}\) Smolin, ‘The Two Faces’, p.488. See fn.12.


been common. 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.' Many of these occurred prior to the Hague Convention’s entry into force, 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. These, however, did not prevent intercountry adoption abuses.

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.

4.3.2. Access to Justice Issues

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

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136 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.
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 court and making use of traditional forms of dispute resolution. This all takes place with a backdrop of controversy over the role and powers of the Indian Supreme Court in Constitutional interpretation. 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.

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?

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 factors identified as being particularly important for determining levels of access to justice in developing countries: reluctance to use the law, access to legal

information and legal literacy, inadequate legal representation and delays in judicial process and decisions. 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. 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.

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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.'\textsuperscript{151} This is likewise recognised by the Guide to Good Practice for the Convention,\textsuperscript{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.'\textsuperscript{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

\textsuperscript{152} Guide to Good Practice. See fn.15.
\textsuperscript{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, including the position of women as mothers within a particular society or community. Second, economic considerations and other environmental factors such as disease that are present in a given community or population at a particular time may have bearing on parental consent in intercountry adoption.

Social and cultural norms may exert considerable influence on the parental consent process. The nature of the parental consent itself must be considered in this context. Is it expressing the will of the consenting individual? 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. 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. The consent that is given may be expression of their desires and not of hers. 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? 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, or other conditions that arguably outstrip intercountry adoption in both numbers and urgency for attention and urgent commitment of resources. 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. Another example is that of South Africa, and the HIV/AIDS epidemic, where large numbers of children are

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

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.

This article argues that an approach must be taken that promotes a dialogue and exchange whereby new meanings can be negotiated, constructed and implemented. In the case of parental consent, it would facilitate exchanges between sending and receiving countries to create an understanding of parental consent. 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 (…).
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 infanticide\(^{178}\) 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.


\(^{177}\) 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.


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.’ 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.

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