CROSS-STATUTORY CONUNDRUMS IN ADOPTION OF CHILDREN IN INDIA

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Abstract—The Supreme Court of India recently, in Kripal Amrik Singh v. State of Maharashtra, took cognizance of the question whether adoption under personal law falls outside the ambit of the guidelines of the Court expressed in Laxmi Kant Pandey v. Union of India. In this backdrop, the author undertakes an analytical enquiry into the present state of the law on adoption of children across the personal law and secular frameworks under the Juvenile Justice (Care and Protection of Children) Act. Discussing conceptual and pragmatic dilemmas tied with the said question, the author discovers lethal gaps in the regulatory mechanism vis-a-vis non-institutional adoptions and argues for reframing the existing frameworks in order to bring greater clarity and consistency towards securing the welfare of children under juvenile justice laws.

Keywords: Child Adoption, Juvenile Justice, Child Rights, Personal Laws, In-Country Adoption, Inter-Country Adoption.

I. INTRODUCTION

The problem humbly deliberated on by this author in the next few pages draws its inspiration from the notice issued by the Supreme Court

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of India in *Kripal Amrik Singh* v. *State of Maharashtra*[1] last year. The Court had taken cognisance of the question whether an adoption under a personal law is outside the ambit of the guidelines previously issued in a series of verdicts, commonly referred to as *Lakshmi Kant Pandey* v. *Union of India*,[2] that led to the evolution of the present legal framework on adoption of children under the Juvenile Justice (Care and Protection of Children) Act, 2015.[3] The question was raised originally before the Bombay High Court, against whose decision[4] the Supreme Court was hearing an appeal, by the petitioner in a bid to reverse the order of a Child Welfare Committee to send the child concerned to a Specialised Adoption Agency. Incidentally, in light of the specific circumstances involved, the Bombay High Court considered the said child to be a "child in need of care and protection" as defined under JJA[5] and thereby justified the interference of the concerned Child Welfare Committee in what was argued as a direct adoption arrangement between a surrendering mother and prospective adoptive parents.[6] On hearing the appeal, the Supreme Court did not find fault with the holdings of the High Court.[7]

The Apex Court curiously did not enter any elaboration whatsoever on the issue it had framed previously at the time of disposal of the appeal. The question, however, begs a wider analytical scrutiny, and offers the author an opportunity to shed light on the doctrinal contradictions in the interplay between the multiple legal regimes of adoption in this country. The endeavour towards an answer, like most doctrinal questions, may lead to several other issues without resolving which the endeavour may not be a successful one. Recognising this, the author must proceed to define the problem at hand by untangling the several aspects of this query.

First, the author takes the liberty of reframing the above stated question. Formally speaking, as of now, there are two distinct statutory models of adoption. One is under the Hindu Adoptions and Maintenance Act, 1956,[8] and the other under JJA. HAMA is specific to the Hindu community as defined by Indian law,[9] where all parties concerned in the adoption process are required

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1 SLP (Crl) No. 4095/2021, order dated 18.06.2021, (https://main.sci.gov.in/supremecourt/2021/12955/12955_2021_44_1_28073_Order_18-Jun-2021.pdf (Accessed on 12 October 2022).

2 For the purposes of the current discussion, the author shall be referring to (1984) 2 SCC 244. Hereinafter *Laxmi Kant Pandey*.

3 Act 2 of 2015 (hereinafter "JJA").

4 *Kripal Amrik Singh* v. *State of Maharashtra*, 2021 SCC OnLine Bom 406 : (2021) 2 HLR 27.

5 JJA § 2(14)(*v*).

6 *See supra* notes 4, 21-24.

7 SLP (Crl) No. 4095/2021, order dated 27.10.2021, https://main.sci.gov.in/supremecourt/2021/12955/12955_2021_3_22_30930_Order_27-Oct-2021.pdf (Accessed on 12 October 2022).

8 Act 78 of 1956 (hereinafter "HAMA"). HAMA remains the only community-specific statute providing for adoption of children.

9 HAMA § 3.

to be Hindus,[10] except when an adoption is given by a guardian (who may or may not be a Hindu), where the biological parents of the child are either dead or otherwise not available or qualified to look after the interests of the child.[11] On the other hand, after the *Shabnam Hashmi* v. *Union of India*[12] verdict of the Supreme Court, it is understood that the adoption framework under JJA is available for all, irrespective of religious affiliation.

The comprehensive scheme of regulating child adoption in India under JJA read with the Adoption Regulations of 2017[13] has grown out of several interventions to curb corruption which has resulted in *mala fide* placements, contributing to trafficking and abuse of children who in the name of adoption were displaced to undesirable environments. The jurisprudential genesis of this framework, as observed above, lies in the *Laxmi Kant Pandey* guidelines issued by the Supreme Court between 1984 and 1991. While these guidelines were issued in the context of intercountry adoptions, the mechanism suggested therein addressing issues such as (a) evaluation of the fitness of prospective adoptive parents[14] to adopt a child from India, (b) counselling of biological parents relinquishing their children for adoption, (c) recording the social and medical background of children placed for adoption, (d) eligibility of institutions to act as placement agencies, and (e) role of State authorities in regulating adoption,[15] has inspired procedural regulation of both in-country and inter-country adoption in India. Therefore, for practical purposes, the question framed by the Supreme Court in *Kripal Amrik Singh* must be translated thus: are adoptions contemplated under a personal law subject to the procedural framework prescribed under JJA?

It must be remarked here that this secular framework under JJA is way more onerous than what has been contemplated under the HAMA provisions. For example, any PAP(s) desirous of adopting a child under the JJA scheme must register themselves in the Child Adoption Resource Information System.[16] They have to get themselves screened by a Specialised Adoption Agency[17] (in case of in-country adoption)[18] or an Authorised Foreign Adoption Agency[19] (in

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10 *Id.* §§ 7-11.
11 *Id.* § 9(4).
12 (2014) 4 SCC 1.
13 Hereinafter 2017 Regulations. Issued by the Central Adoption Resource Authority (hereafter "CARA").
14 Hereinafter "PAPs."
15 *Laxmi Kant Pandey*, 267-276.
16 Hereinafter "Carings."
17 Hereinafter "SAA."
18 JJA § 58(2), read with 2017 Regulations, Reg. 9(8).
19 Hereinafter "AFAA." *See* 2017 Regulations, Reg. 15(3): In the absence of an AFAA in the receiving country, the same function can be exercised by a Central Authority or a Government department overseeing matters of inter-country adoption there or the Indian diplomatic mission in that country. The acronym AFAA in this article shall stand in for the appropriate institution in this category.

case of inter-country adoption),[20] which must prepare a home study report for evaluating the fitness of the PAP(s) to adopt a child. On the other hand, for any child to be placed for adoption, the competent Child Welfare Committee[21] must be satisfied that there is adequate documentation to account for the series of steps in which the child has come to be placed for adoption.[22] For an orphaned or abandoned child, such documentation must contain the reports of the appropriate District Child Protection Unit[23] and the police station pursuant to enquiries in seeking out the biological family of the child.[24] In case of a surrendered child, a deed of surrender executed by the surrendering biological parent(s) must be followed by counselling efforts and a mandatory reconsideration period of sixty days before the surrender can become final.[25] Further, all proposed adoptions under JJA are subject to the approval of the competent court,[26] which must review the process in each case and either grant or reject the respective adoption petition.[27]

In contrast, there is generally no institutional interference in cases of adoptions executed within the scope of HAMA, which may be completed solely by means of a bona fide, informal arrangement between the person giving adoption and the person taking adoption.[28] The sole exception remains in cases where an adoption is given by a guardian, requiring the approval of the competent court, which must be satisfied that the adoption will be "for the welfare of the child."[29] While any monetary consideration between the parties involved in an adoption arrangement is prohibited,[30] there are no *ex ante* checks on the same by any judicial or other authority, save for the exceptional context noted earlier.

The above comparison adds a critical dimension to the principal enquiry. Should the author arrive at a conclusion that adoptions under a personal law are indeed immune to the procedural regulation under JJA, either entirely or partially, it is unavoidable to consider the desirability of such an exemption. In view of the twin objectives unfolding from the initial problem, the author proceeds in the following parts to examine the state of the law governing

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[20] JJA § 59(4), read with 2017 Regulations, Reg. 15(3).

[21] Hereinafter "CWC."

[22] 2017 Regulations, Regs. 6 and 7.

[23] Hereinafter DCPU. *See id.* Reg. 6(6): In its absence in any district, the District Magistrate shall perform such function.

[24] *Id.* Regs. 6(6)-(11).

[25] *Id.* Reg. 7.

[26] But see Juvenile Justice (Care and Protection of Children) Bill, 2021, Cls. 18 and 19: As on 28th August 2021, both Houses of the Parliament have passed the Bill, which proposes to substitute the District Magistrate in the relevant jurisdiction for the court as the final authority for approving any purported adoption.

[27] JJA §§ 58(3) and 59(7), read with 2017 Regulations, Regs. 12, 17, 51, 52 and 53.

[28] HAMA § 11(*vi*).

[29] *Id.* § 9(4).

[30] *Id.* § 17.

adoption of children in India in the light of relevant statutory provisions and judicial determinations, and argues that the doctrinal positions explaining the existing state of the law creates an untenable distinction between, on one hand, adoptions directly given by biological parents to adoptive parents,[31] and, on the other, those where the child is placed in adoption by other persons.[32] Following this, the author forwards his recommendations for reconciling these contradictions through appropriate changes in the existing framework.

II. ANOKHA V. STATE OF RAJASTHAN[33] AND AMIT SINGH V. STATE OF MAHARASTRA[34] ON THE BLIND SIDE OF LAXMI KANT PANDEY

The petitioners in *Kripal Amrik Singh* have contended that the *Laxmi Kant Pandey* guidelines have no application over an adoption under a personal law, drawing principal support from the Supreme Court ratio in *Anokha* v. *State of Rajasthan*.[35] In that case, the bench comprised of Ruma Pal and P. Venkatarama Reddi, JJ., distinguished a matter of inter-country adoption as exempted from the rigours of institutional scrutiny as prescribed under the *Laxmi Kant Pandey* guidelines. The learned judges had classified children placed for adoption into the following categories:[36]

a) orphaned or destitute children or children whose biological parents cannot be traced,

b) children who have been surrendered by biological parents for adoption, and

c) children who are living with biological parents.

The Court had observed that the third category of children were not in contemplation of the *Laxmi Kant Pandey* guidelines, which would therefore not govern cases where the biological parent(s) sought to give a child directly in adoption to PAPs, even in case of inter-country adoption.[37] The verdict in *Anokha* thus approved of a less stringent process of inter-country adoption where an application of the foreign PAPs for guardianship of the adoptive child would suffice to exhaust the procedural requirements in this country.

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[31] For the purpose of the following discussion, the author shall refer to this category of adoptions as "parent-to-parent adoptions."

[32] *See* JJA § 2(21). For the purpose of the following discussion, the author shall refer to this category of adoptions as "third-party adoptions."

[33] Anokha v. State of Rajasthan, (2004) 1 SCC 382.

[34] Amit Singh v. Union of India, (2019) SCC Online All 5800.

[35] *See supra* note 1.

[36] Anokha, 387.

[37] *Id.*

Even on the support of this precedent, there is a little gap between the context in which *Anokha* was decided and the generalisation contended in *Kripal Singh*. *Anokha* is a decision based on the application of a community-neutral statute in the Guardians and Wards Act, 1890,[38] and thus strictly speaking cannot be automatically regarded as a precedent on matters of adoption under personal law. But one may see the appeal in the inspired contention of the petitioners in *Kripal Amrik Singh* on the basis of the context in *Anokh*a. The recorded facts in the latter show that the foreign PAPs were previously acquainted with the biological mother of the child in question. She had expressed her willingness to relinquish the child to the guardianship of the PAPs, subject to the approval by a competent court of the guardianship application submitted by the latter under GAWA.[39] Reading the situation in the light of the reasoning in *Anokha*, the author understands that the principle underlying the contention in *Kripal Amrik Singh* is that wherever the adoption in question is in the nature of direct personal transaction between the biological and adoptive parents, there should be no regulatory intervention.

A more recent decision of the Allahabad High Court in *Amit Singh* v. *Union of India* adds colour to this issue. The facts involved an order of the Child Welfare Committee at Varanasi granting adoption of a child who was under the care of a child care institution, following which custody was allowed to prospective adoptive parents. The adoption was being processed under Section 9(4) of HAMA, which required permission of the competent court before the adoption could become final. The Court held that the Juvenile Justice Act[40] and the guidelines thereunder framed by the State concerned and CARA would apply to such adoptions:

> "… [T]he Juvenile Act is in aid to the procedure laid down for adoption under the Adoption Act. It is not in conflict and in no way overrides the provisions of the Adoption Act rather runs parallel to it. It in substance puts an additional obligation in the matter of adoption as a child."[41]

In other words, the Allahabad High Court suggested that adoption of a child given by a guardian under HAMA has to fulfill the procedural requirements prescribed by the framework under the Juvenile Justice Act. Now if *Amit*

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38 Act 8 of 1890 (hereinafter "GAWA").

39 The law on inter-country adoption at that time did not provide for any option for final grant of adoption. Any foreign PAP(s) desirous of taking an Indian child in adoption needed to, as a final procedural step in India, submit an application for guardianship to a competent court under GAWA. After such an application would be granted, the PAP(s) would be free to complete the adoption process in accordance of the law governing adoptions in the country of his citizenship. See *Laxmi Kant Pandey*, 263, 264.

40 The matter originally arose when the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act 56 of 2000) was still in effect. The ratio would, however, substantially apply to the Act of 2015 as well.

41 *Amit Singh*, 17.

Singh is broadly read to indicate that the procedural requirements under the scheme of juvenile justice laws would *in toto* apply to adoptions under Hindu law, such a reading would conflict with the precedent in *Anokha* to the extent parent-to-parent adoptions[42] are concerned. Therefore, the significance of *Amit Singh* must be restricted to third-party adoptions[43] under Hindu law, institutional or otherwise.

III. TRACING THE BOUNDARIES OF LEGAL REGULATION

The real question then is, whether the true position of the law of adoptions directly given by biological parents to adoptive parents is reflected today by the ruling in *Anokha*. The answer to this has to be sought in view of the changes made to the secular framework on adoption by JJA and the 2017 Regulations. Section 56(2) of JJA added for the first time within this scheme a provision covering 'adoption of a child from a relative[44] by another relative'. Building on this, the 2017 Regulations provided for a detailed procedure for processing adoptions in the following three categories: (a) in-country relative adoptions,[45] (b) adoptions by step-parents,[46] and (c) inter-country relative adoptions[47].

A clarification regarding the scope of relative adoptions contemplated under the 2017 Regulations is in order here. It is interesting to note that relative adoptions are not strictly meant to be parent-to-parent adoptions in all cases. Regulation 51(2) read with Schedule XXII makes it amply evident that adoption of a child can be given to a relative even by a guardian "where biological parents are not alive" or "are not able to give consent." On the other hand, a stepparent adoption is a more close-ended process where consent can be expressed by biological parent(s) of the concerned child only.

It is observed that in all these classes of relative/stepparent adoptions, it is mandatory for the PAPs (a) to register in CARINGS and (b) to submit an application to the court of competent jurisdiction for any such adoption to become final.[48] This is despite the lack of involvement of any child care institution in the chain of custody between the biological parents and the adoptive parents. Of course, in comparison to non-relative adoptions, the extent of scrutiny is understandably less, with varying degrees. However, there is an unmistakable intent in the current framework to exercise due diligence over relative

42 *See supra* note 31.
43 *See supra* note 32.
44 JJA § 2(52): "relative" is defined as "in relation to a child for the purpose of adoption under this Act, ... a paternal uncle or aunt, or a maternal uncle or aunt, or paternal grandparent or maternal grandparent."
45 2017 Regulations, Regs. 51 and 55.
46 *Id.* Regs. 52 and 55.
47 *Id.* Regs. 53-57.
48 2017 Regulations, Regs. 51(5), 52(4) and 55.

adoptions by means of execution of appropriate documentation and judicial verification of the same.[49]

Appreciating these developments, it can no longer be soundly argued that the exemption afforded to private adoptions in *Anokha* is an absolute one. The current state of the law governing adoptions is a chequered one, broadly represented in the following propositions:

i. Third-party adoptions must adhere to the procedural standards prescribed under the Juvenile Justice Act and the Adoption Regulations. If the Allahabad High Court's reasoning in *Amit Singh* is accepted, the procedural standards would apply to institutional adoptions processed under Hindu law.

ii. Parent-to-parent adoptions may be processed under the norms of three different statutes in applicable cases:

   a) First, adoption of a Hindu child given by a Hindu biological parent to a Hindu adoptive parent, who may or may not be relatives, can be processed by means of a *bona fide* deed of adoption under HAMA.

[49] The degree of scrutiny varies across the different classes of relative adoptions. For example, the various steps involved in in-country relative adoptions may be summarily represented as follows:

(1) The PAPs must register in CARINGS.

(2) If the adoption concerned is a parent-to-parent adoption, consent of the biological parents must be recorded in the format prescribed in Sch. XIX of the 2017 Regulations. Besides identifying information of the biological parents and the expression of their consent, the format also provides, in case either of the biological parents is deceased, for the requirement of death certificate of the deceased parent. The consent document must also be countersigned by the PAPs and contain declaration by two witnesses.

(3) If the adoption concerned is a third-party adoption, consent of the guardian must be recorded in the format prescribed in Sch. XXII of the 2017 Regulations. The information required is similar to that in Sch. XIX, with the addition of a certification from the CWC having jurisdiction in the place of residence of the child being adopted.

(4) The PAPs must then file an application before the competent court for granting the adoption along with an affidavit in support of their financial and social status in the format provided in Sch. XXIV of the 2017 Regulations and the consent letter. *See* 2017 Regulations, Reg. 51.

On the other hand, in case of inter-country relative adoptions, the procedure mirrors a good measure of the sequence followed for non-relative inter-country adoptions. The AFAA concerned for the PAPs' country of residence must prepare a home study report for the PAPs. This must be uploaded in CARINGS at the time of registering the PAPs along with relevant documents prescribed in Sch. VI of the 2017 Regulations, besides information regarding personal identification, such as the family tree showing the PAPs' relationship with the child to be adopted. On the domestic front, the concerned DCPU is tasked with the preparation of a background report on the biological family of the child to be adopted, and the same must be forwarded to the concerned AFAA through CARA, which shall then issue a No-Objection Certificate. Following this, the AFAA must forward a certificate recording permission of the receiving country as per the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (hereinafter "Hague Convention") to CARA, on the reception of which CARA shall issue a Conformity Certificate for the proposed adoption. Only after this elaborate process can an adoption application can be submitted before the appropriate court for final approval. *See* 2017 Regulations, Regs. 53-57.

b) Second, relative adoptions and step-parent adoptions can be processed in accordance with the juvenile justice laws. Again, if the rationale in *Amit Singh* is applied, relative or step-parent adoptions where all parties concerned are Hindus, must also satisfy the conditions laid down by the secular framework.

c) Third, a penumbral application of the precedent in *Anokha* would mean that inter-country adoptions given by biological parents to foreign adoptive parents who are not qualified as relatives can still be processed by means of a guardianship application before a competent court under GAWA without any reference to the juvenile justice laws.

IV. DOCTRINAL CONTRADICTIONS

The above propositions lead to several issues pertaining to the principles underlying them. First, the Supreme Court's interpretation of the *Laxmi Kant Pandey* guidelines in *Anokha* betrays a presumption of good faith attaching to parent-to-parent adoptions given by biological parents, which could not be afforded to institutional placements in the background of corrupt practices that necessitated these guidelines in the first place. In support of such a presumption, it may be argued that parent-to-parent adoptions allow biological parents an agency in choosing and evaluating prospective adoptive parents as to their fitness for ensuring the best interests of the adopted child.

However, the inclusion of relative and step-parent adoptions, especially in the inter-country context, indicate that while the agency of biological parents have been recognized, it has not resulted in an irrebuttable presumption that any proposed relative adoption necessarily reflects the best interests of the child.[50] Now, considering the propositions on non-relative adoptions under HAMA and the penumbral application of the exemption in *Anokha*, if relative adoptions cannot be exempted on absolute presumption of good faith, it cannot be legitimately contended that non-relative adoptions – where the opportunity of exercising agency on the part of biological parents can vary from case to case based on the level of acquaintance they have with the PAPs before the proposed adoption – should be entirely exempted from regulatory due diligence.

Arguing for such an exemption also requires a presumption that biological parents engaged in a private adoption transaction are immune to coercion, undue influence and corrupt considerations. There is always a possibility that corrupt institutional actors or individuals may act as informal intermediaries in such transactions without acting in any official capacity recognized under the

[50] *See id.* and text accompanying.

law.[51] In the absence of standards of scrutiny, the unregulated field of non-relative adoption lies open for child traffickers and other unscrupulous opportunists for exploiting vulnerable children.

Further, arguing for an absolute exemption for certain classes of adoptions leaves children so placed outside the scope of follow-up measures prescribed under the juvenile justice laws. The SAA, in case of in-country adoptions, or the AFAA, in case of inter-country adoptions, is required to prepare post-adoption follow-up reports at prescribed intervals.[52] If it is found that the adopted child is facing adjustment issues with the adoptive family, appropriate arrangements for counselling must be arranged by the concerned SAA or AFAA, as the case may be.[53] In case of inter-country adoption, if the AFAA is of the opinion that the child "is unable to adjust in the adoptive family or that the continuance of the child in the adoptive family is not in the interest of the child," Regulation 19(3) mandates the AFAA to "withdraw the child and provide necessary counseling and ... arrange for suitable alternate adoption or foster placement of the child in that country" in consultation with the Indian diplomatic mission in the concerned country and CARA. Exempting certain adoptions from the scope of regulation thus means undue discrimination against the children so placed. In the absence of any follow-up process, there is a clear abdication of responsibility of the State towards ensuring the welfare of the adopted child.

V. RECOMMENDATIONS

As remarked by the author in the Introduction section, the relatively simple query regarding the relationship of personal laws on adoption with the regulatory framework under the juvenile justice laws has manifested into a complex discovery of the true state of the law and its gaps. Having regard to the issues laid out above, the author humbly proposes several recommendations towards reconciling the said gaps in the following paragraphs.

First, all parent-to-parent adoptions must be unambiguously brought within the ambit of the procedural safeguards under the juvenile justice laws.

Second, it is ideal to have a single legal framework governing adoption of children. But, in case the personal laws on adoption such as HAMA and customary laws in certain Muslim communities[54] continue in their application,

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[51] *Laxmi Kant Pandey*, 274.

[52] 2017 Regulations, Regs. 13(1) and 19(1).

[53] *Id.* Regs. 13(4) and 19(2).

[54] *See* The Muslim Personal Law (Shariat) Application Act, 1937 (Act 26 of 1937) § 3(1). *See also* ASAF A.A. Fyzee, *Outlines of Muhammadan Law* 44 (Tahir Mahmood 5th Edn. 2008) (1949).

the procedural safeguards under the juvenile justice laws must be uniformly extended to these contexts.

Third, considering that the penumbral scope of the ratio in *Anokha* may still be applied to non-relative inter-country private adoptions to avoid the regulatory scrutiny of the juvenile justice laws, it must be clarified whether such adoptions are permitted under the present law. If yes, the same must be subject to appropriate regulatory safeguards. A similar clarification must also be incorporated regarding non-relative private adoptions under Hindu law.

Fourth, the author is compelled to make a cautionary observation in respect of third-party relative adoptions. It was clarified earlier that Regulation 51(2) allows relative adoptions given by guardians where biological parents are either deceased or are unable to express consent. The expression 'guardian' may refer to natural persons as well as juristic entities, such as child care institutions.[55] A natural person can be a guardian of a child in several capacities, such as, (a) a parent in the capacity of natural guardian, (b) a testamentary guardian, and (c) a guardian appointed by a competent court. On the other hand, a child under the guardianship of a child care institution is invariably regarded as a child in need of care and protection[56] under JJA, and the procedure prescribed under the 2017 Regulations must be followed before the child can be declared as legally free for adoption by the competent CWC.[57]

The anomaly that appears here relates to the requirement for background checks on PAPs. In the context of inter-country relative adoption, the concerned AFAA is required to prepare a home study report of PAPs. It must be pointed out that an alternative method of background check on PAPs is available in in-country adoptions too where they must submit an affidavit in support of their financial and social status along with the adoption application before the court.[58] However, there is a difference in the nature of scrutiny as the home study in respect of non-relative adoptions and inter-country relative adoptions are conducted by 'social workers', who are required to be trained and experienced in the sphere of child development and protection.[59] This distinction may be explained by the following observations:

1) In-country relative adoptions do not involve the facilitation of SAAs. In case of inter-country relative adoption, PAPs must register through an AFAA in the country of their residence.[60]

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[55] JJA § 2(31): "'[G]uardian' in relation to a child, means his natural guardian or any other person having, in the opinion of the (Child Welfare) Committee or, as the case may be, the (Juvenile Justice) Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceedings."

[56] As defined in JJA § 2(14).

[57] *See* 2017 Regulations, Regs. 6 and 7.

[58] Id. Reg. 51(4).

[59] *Id.* Reg. 2(20).

[60] *Id.* Reg. 53(1).

2) The requirements of processing an inter-country relative adoption through an AFAA and of getting a background report on PAPs are borne out of the prescriptions of the Hague Convention. Article 5 of the Convention enjoins on the PAPs' country of residence an obligation to:

   (a) determine that the PAPs are eligible and suited to adopt, and

   (b) ensure that the PAPs have been appropriately counselled.

Further, Article 15 requires the Central Authority of that country to prepare a "report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care" and forward the same to the "State of origin."[61]

The above explanation is corroborated by the requirement of a background report to be prepared by the competent DCPU on the biological family of the child to be adopted by relatives residing outside India. This is clearly inspired by Article 16 of the Hague Convention, prescribing an obligation on the Central Authority of the State of origin to "prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child."

However, this line of reasoning to explain the procedural distinction between in-country and inter-country relative adoption portrays the commitment towards ensuring the welfare of children adopted within the country as half-hearted, by highlighting the omission to incorporate the better standard for evaluating the suitability of PAPs. The gap is more fundamental in the context of third-party relative adoptions involving non-institutional guardians, i.e., where the guardian in question is a natural person not being a biological parent. The presumption of good faith based on the consideration of agency argued in relation to parent-to-parent adoptions earlier cannot be extended to institutional guardians as well as non-institutional guardians, at least when such a guardian is not a person within the kinship group of the child.

In light of the above discussion, it is submitted by the author that the Regulations should be revised to charge SAAs, where the child concerned is under institutional guardianship, with the task of preparing home study reports even for PAPs who fall within the scope of the definition of 'relative' under JJA. In case of a child under the guardianship of a natural person not being a biological parent, the same must be done by any competent person so authorized by the CWC having jurisdiction over the place of residence of the child concerned.

[61] Refers to the country in which the child proposed to be adopted resides.

Further, it must also be noted that while there are follow-up provisions for monitoring the progress of children placed in non-relative adoptions, both in-country and inter-country, and the same would apply to inter-country relative adoptions too, there is a conspicuous lack of any comparable measures in the context of in-country relative adoptions. Appropriate revisions in the line of the suggestions submitted in the last paragraph must be made to the Regulations to address this gap.

Finally, the definition of "child in need of care and protection" must be expanded to include any child being contemplated for being given away in adoption, irrespective of whether they are living with their biological family at the time of the proposed adoption. This would be consistent with the inclusion of relative and step-parent adoption after the enactment of the Act of 2015. The proposed expansion of the definition is also in line with the recognition expressed by the Supreme Court in *Laxmi Kant Pandey* that "the most congenial environment" for any child is "the family of his biological parents."[62] Any displacement from this *status quo* must be understood to add an element of vulnerability to the experience of the child.

The same principle appears to have been adopted in the Hague Convention itself. In the context of inter-country adoption, it does not make any distinction between parent-to-parent adoption and third-party adoption, and requires that biological parents desiring to give their children in adoption must be counselled with the object of maintaining, as far as consistent with the best interests of the child, the *status quo*.[63] Thus, consistent with the suggestion for the expanded definition of "child in need of care and protection," the author recommends a more faithful adaptation of the standards laid out in the Convention by making the counselling of biological parents – so far required only in the context of surrendered children[64] – mandatory even in case of parent-to-parent relative adoptions.

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62 *Laxmi Kant Pandey*, 251.
63 Hague Convention, Art. 4.
64 *See* text accompanying *supra* note 25.