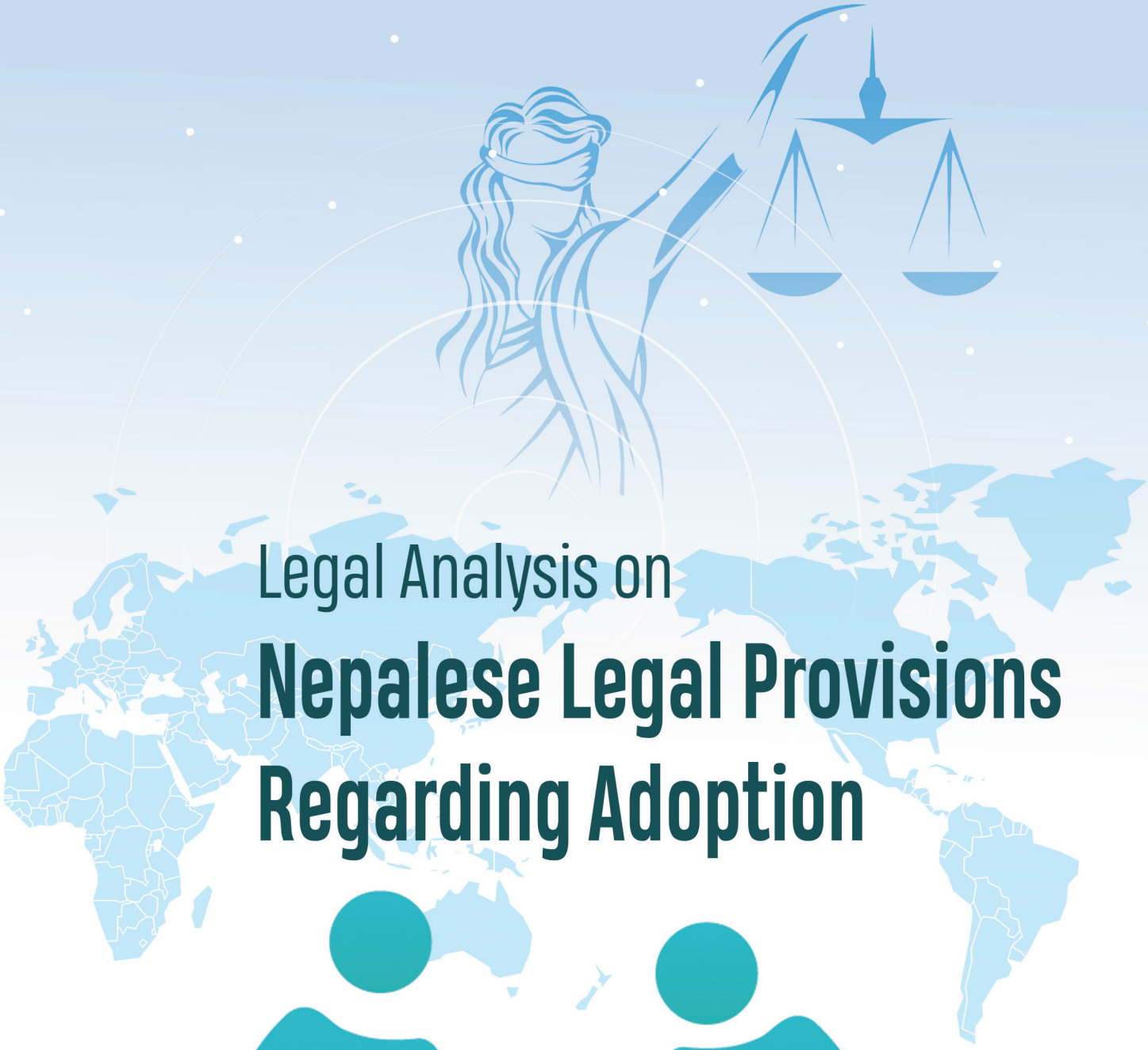

Legal Analysis on
Nepalese Legal Provisions Regarding Adoption

FORUM FOR WOMEN, LAW AND DEVELOPMENT
1995
FWLD

Working for Non-discrimination and Equality

This study is conducted with the support of UNICEF Nepal.

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BACKGROUND

Adoption is the act of one who takes another's child into his/her own family, treating him/her as own and giving all the rights and duties of his/her own child.[1] It is a legally accepted act of creating civil paternity between two person by transferring a parent's legal rights and duties to another person. Adoption is therefore the act of choosing someone's child for oneself legally into his/her family to raise as one's one child.

Adoption is a legally accepted process of handling of a child where a family takes on the duty of raising a child. The adoptive parents after adoption receive a range of legal parental rights and responsibilities. It becomes responsibility of adoptive parents to ensure that all of the emotional, social and legal rights of child are secured. The adoption process takes place according to the national laws of the country. The law of the countries where the parent and the child reside requires both parties to follow due process.

281
children were adopted during the time span of five years (**241** children from July, 2009 to July, 2013 and **40** were from July, 2013 to April, 2014)

7
inter-country adoption was made from July, 2012 to July, 2013 with **2** male and **5** female children

Source: Inter-country Adoption Management Development Board (ICAB)

In Nepal, the right of adoption of child, both domestic and inter-country adoption is legally guaranteed by law. As per the data provided by the Inter-country Adoption Management Development Board (ICAB), 62 children were adopted by couples within the country where only three children were adopted by foreigners in the fiscal year 2014/15.[2] Likewise, 241 children within Nepal have been adopted from July, 2009 to July, 2013 and from July, 2013 to April, 2014

1. Black Law Dictionary, Chambers' Estate, 183 N.Y.S. 526, 528, 112 Misc. 551
2. Inter-country Adoption Management Development Board

the number of adopted children were 40 i.e., a total of 281 children were adopted during the time span of five years.[3] The total of 7 inter-country adoption was made from July, 2012 to July, 2013 with 2 male and 5 female children.[4]

NEPALESE LEGAL PROVISION ON ADOPTION

1. Constitution of Nepal

The Constitution in its Article 39 has mentioned the Right of Child as a fundamental right.[5] The Sub-article 2,3 and 7 of the Constitution focus on development of a child and their right thereof. Sub-article 2 mentions the right of a child to overall personality development from the families and the State, the interpretation of which not just talks about the responsibility of the family for the development of a child but also the responsibility of the State which ultimately can be referred to the parenting and custody/adoption related rules and policies. Similarly, Sub-article 3 speaks about the right to elementary child development which can be hindered in cases where the parenting and custody of the child is not in proper hands and under proper supervision.

2. National (Muluki) Civil Code, 2017

National (Muluki) Civil Code, 2074 is an inclusive codification of private law concerning property, family and obligations along with the code of procedures of Nepal. The Code was implemented from 17 August, 2018 replacing the older laws. There are several chapters under Part 3 under family law which also includes the provisions regarding adoption and inter-country adoption in Nepal in its Chapter 8 and 9.

Domestic Adoption

The Chapter 8 of Family Law of National Civil Code, 2017 deals with the provisions relating to the adoption which mentions that if a person accepts other people's children as own children, they are deemed to be the adopted son or daughter.[6] The adoption of a child shall be carried out to protect the child's best interest. However, people having either son or daughter cannot adopt the child of the same gender.[7] However, if a man and a woman live separately and their child does not live with them, such man or woman can adopt a child.[8] However, any person who has children but files a petition at the concerned District Court to adopt a child and proves that his financial capability to arrange for the overall maintenance of the child, the Court can grab permit upon inquiry of the capability.[9]

3. Ibid.
4. Ibid.
5. Constitution of Nepal, Article 39 Rights of Child
6. National (Muluki) Civil Code, 2017 Section 169
7. Ibid, Section 171 (1)
8. Ibid, Section 171 (2)
9. Ibid, Section 171 (3)

Those couples who do not have children after ten years of marriage and a man or a woman who have not been married until 45 years of age, or are a widow/widower, or have been divorced or judicially separated without children can adopt a child.[10] On the other hand, there are some criteria for those who cannot conclude an adoption including those who are of unsound mind, were convicted in criminal offence involving moral turpitude and are financially unsound to carry and adoption.[11] Besides this, importance is given to the consent of either husband or wife, living together, of the person who is looking for adoption.[12]

There are some conditions where the children cannot be adopted. Children who have crossed fourteen years of age, who are the only child, one who has already been adopted and such adoption is not annulled, is adoptee is in a higher degree that the adopter, and if the adoptee is not a Nepali citizen, except in case of a non-resident Nepali citizen holding a foreign citizenship cannot be adopted.[13] Likewise, unless the adopter and the adoptee belong to the third generation of the same family, there should be 25 years of age gap between the two.[14]

While adopting a child a written consent of both the parents, in case both are alive and consent of either one of surviving parents is requited. However, if a child living with either parent after their separation is to be adopted then the consent of the respective parent with whom the child is living shall be taken into account. Also, if a child who is to be adopted is living with people other than the parents or with any organization for reason, the consent shall be obtained from such person or organization. If a child to be adopted has attained the age of ten years, a written consent of the child shall also be obtained in the presence of either parent, or guardian or curator exercising maternal or paternal authority. Before obtaining the consent, the person who is putting their children for adoption, or the guardian or curator and the child should be informed about the meaning, legal status and the consequences of being an adopted child. Likewise, the code restricts any sort of financial influence in terms of obtaining consent.[15] If the adoption was carried out by either husband of wife during the time of judicial separation, the then child is deemed to be adopted by both after they start living together.[16]

In order to adopt a child, one should file a petition as per the legal requirement in the concerned District Court along with the deed of adoption. The inquiry of this deed by the Court will lead to either permission or obstruction for the petitioner to adopt a child.[17]

The right of an adopted child is equal to that of a biological child, regardless of whether the child was adopted before or after the birth of the biological child. The adopted child has been provided with the liberty to use the surname of either of the adoptive parents or of the biological parents as well.[18] However, if the adoption is annulled then the surname shall be that

Those couples who do not have children after ten years of marriage and a man or a woman who have not been married until 45 years of age, or are a widow/widower, or have been divorced or judicially separated without children can adopt a child.

10. Ibid, Section 172 (1)
11. Ibid, Section 172 (2)
12. Ibid, Section 172 (3)
13. National (Muluki) Civil Code, 2017 Section 173 (1)
14. Ibid, Section 174
15. Ibid, Section 175
16. Ibid, Section 176
17. National (Muluki) Civil Code, 2017 Section 177
18. Ibid, Section 178

of the biological parents.[19] In the case of partition claim, the adopted child has no claim over the property of his/her biological parents, except in case where the adoption has been annulled. If an adopted son or daughter has already obtained his or her partition share at the time of effecting adoption, he or she may receive such property as well.[20]

The adoptive parents shall take care of overall maintenance of the adopted child as their own child as per their capacity and also protects their best interest and exercise the parental authority. In case where the adoptive parents cannot fulfill these requirements, the adopted child can remain separately by obtaining their partition share.[21] Likewise, the adopted children shall also have the obligations similar to a biological child where the child is required to take care of the adoptive parent's overall maintenance, management of their property and protection of their best interest. The right of an adopted child to meet and communicate with their biological parents is also protected.[22]

The adoption is considered to be void if a person having his own son adopts a son or having his own daughter adopts a daughter, if the person is of unsound mind and was convicted for criminal offence of moral turpitude respectively, if the adoption cannot not be affected, or if any act relating to difference in age or the consent for adoption has been conducted.[23] Also, if the adoptive parents fail to fulfill their obligation, then the adopted child can have the adoption annulled. However, if they had already received their partition share then they might not be entitled to have the adoption annulled. The adoptive person can have the adoption annulled if the adopted child does not fulfill their duty, or expels them from the home and causes them mental and physical harm, if they misuse their property, and if they live separately for 3 years, unless in case they are married.[24]

In case where the adoption is annulled, the adoptive relationship between the adoptive parents and the adopted children will be terminated. After such termination, the adopted child will not be entitled to any rights or obligation vested on him as an adopted child. However, this does not affect the right, obligations and entitlements exercised during the period of adoption.[25]

The Paragraph 9 of Family Law of National Civil Code, 2017 deals with the provisions relating to the inter-country adoption which mentions that if any foreigner accepts a minor of a Nepalese citizen or of a foreigner domiciled in Nepal as an adopted son or daughter then it shall be considered to be accepted as an inter-country adoption.[26] However, the adopter should attain a permission from the Government of Nepal. Such permission shall be granted only to the citizens or married couple of those countries which are opened by the Government of Nepal for inter-country adoption through a notification in the Nepal Gazette.[27] The best interests of the child is considered before granting the permission for such adoption by the Government of Nepal.[28]

19. Ibid, Section 179
20. Ibid, Section 180
21. Ibid, Section 181
22. Ibid, Section 182
23. National (Muluki) Civil Code, 2017 Section 184
24. Ibid, Section 185
25. Ibid, Section 186
26. Ibid, Section 188
27. Ibid, Section 189
28. Ibid, Section 190

Inter-Country Adoption

In regard to the inter-country adoption, there are some eligibilities of child to be given for adoption. First, the child must be an orphan child who is not under the protection of anyone after the death of his/her father and mother, and second the child should be voluntarily abandoned. However, the adoptee should have stayed in a children home for at least six months.[29] Similarly, the act has also provisioned the eligibility criteria for foreigners adopting the child. The foreign couple having no child born even up to ten years of their marriage, an unmarried woman/man, widow, divorcee woman/man or a judicially separated woman/man who has completed forty-five but not exceeding fifty-five years of age having no children of their own are granted permission for the adoption of any child of Nepali citizen or of a foreigner domiciled in Nepal. But if the law of a foreign country provided that a citizen of that country can adopt more than one child, he/she can adopt a child despite that he/she has a child. The foreigner of unsound mind or convicted of a criminal offense involving moral turpitude by the court of Nepal or the concerned country will not be granted permission for the adoption.[30]

The inter-country adoption related matters are regulated by the Inter-country Adoption Management Development Board (ICAB) under the Ministry of Women, Children and Social Welfare Government of Nepal. The board is designated as the central authority to deal with inter-country adoption. A qualified foreigner or couple should apply to the board for adoption of Nepali minor or a minor of a foreigner domiciled through the embassy of his/her country in Nepal with the documents translated either in English or Nepali language mentioned as provisioned. Keeping the applicant's information confidential, the board will then forward the details relating thereto to the selection committee if the application fulfills all the requirements.[31]

The Government of Nepal shall form a selection committee notifying in the Nepal Gazette, for the purpose of making recommendations to the Board as to which of minors may be appropriate for adoption by any foreigner or foreign couple, after selecting the person or couple desirous of making adoption and the minor.[32] Based on the minor's details provided by applicant

29. Ibid, Section 191
30. Ibid, Section 192
31. National (Muluki) Civil Code, 2017 Section 194
32. National (Muluki) Civil Code, 2017 Section 195

and the relevant matters received, the board ascertain what type of minor is appropriate for being adopted by which applicant and recommend the name of applicant and the minor.[33] Upon the recommendation received from the selection committee, if it is appropriate, the board considers to grant a minor for adoption by foreigner and makes recommendation to Government of Nepal. The government will grant permission for the adoption of such minor by the foreigner if it thinks reasonable to do so being based on the recommendation submitted by the board. The government have to give information to the central agency responsible for inter-country adoption situated in the country of adoptive person and to the embassy of concerned country designated for Nepal after the permission is granted for the adoption. The couple or the foreigner making such adoption can make an appeal to the concerned High Court if not satisfied with the decision made by Government of Nepal.[34]

3. Act relating to Children, 2018

The rights pertaining to children in Nepal are defined under the Act relating to the Children, 2018 which in regards to adoption states that nobody is allowed to treat their biological or adoptive son or daughter differently and make any kind of discrimination.[35] Similar provision of non-discrimination between biological or adoptive son or daughter has been mentioned in provincial law of Nepal.[36]

4. National ID and Civil Registration Act, 2019 and National ID and Civil Registration Regulation, 2020

This Act was implemented in order to maintain records and maintain personal and biological details of citizen. Regarding adoption, the Act states that a person who adopts a children must notify and register the adoption before the concerned local registrar.[37] Such registration should be made using the format as mentioned in the Schedule-27 of National ID and Civil Registration Regulation, 2020.[38] During the registration of adoption, both the adoptee husband and wife should be present.[39] The local registrar maintains a record and will issue a certificate of adoption as per the Schedule-29 of National ID and Civil Registration Regulation, 2020 after examining the documents submitted by the adoptee.[40]

5. Domestic Violence (Offence and Punishment) Act, 2009

Various forms of domestic violence, including physical, mental, sexual, and economic violence, that adopted children may experience are covered by this Act. It has been defined "Domestic Relationship" as a relationship between two or more people who are living in the same household and are related to one another by descent (consanguinity), marriage, adoption, or are family members living together as a joint family; or a domestic helper who is living with the family.[41]

33. National (Muluki) Civil Code, 2017 Section 196
34. National (Muluki) Civil Code, 2017 Section 197
35. Section 5(3), Act relating to Children, 2018
36. Section 5(3), Provincial Act relating to the Children, 2020 Sudurpaschim Province, Gandaki Province
37. Section 29(1), National ID and Civil Registration Act, 2019
38. Rule 25(1), National ID and Civil Registration Regulation, 2020
39. Rule 25(2), National ID and Civil Registration Regulation, 2020
40. Rule 25(3), National ID and Civil Registration Regulation, 2020
41. Section 2(b), Domestic Violence (Offence and Punishment) Act, 2009

INTERNATIONAL LEGAL INSTRUMENTS ON ADOPTION

1. Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child (CRC) is the first legally binding international instrument which incorporate the full range of human right including civil, cultural, economic, political and social rights. It was adopted and opened for signature on 20th November, 1989 and came into force since in 2nd September, 1990. Nepal ratified the CRC on 14th September 1990. The Convention has defined a child as a human being under the age of eighteen unless the age of majority is attained earlier under a State's own domestic legislation.

In regard to the adoption of child, the convention recognizes and permit the system of adoption which considers the best interests of the child. It ensures the adoption authorized by the competent authorities as per the applicable law and procedure. It also recognizes the inter-county adoption as an alternative means of child's care ensuring the safeguard and standard as per the existing provisions of national adoption.[42]

2. CRC Committee on the Rights of Child CRC Concluding Observations (Concluding observations on the combined third to fifth periodic reports of Nepal)

The concluding observations of the Committee on the Rights of the Child is the compiled document which indicates the progress achieved by the reviewed State, the Committee's main areas of concern and recommendations to the State to improve the implementation of the Convention on the Rights of the Child and/or its Optional Protocols.[43] Since Nepal has ratified the CRC and its optional protocols, the committee has observed the status of Nepal's progress and recommended on the area of improvement. Regarding adoption of the children from the concluding observation on the combined third to fifth periodic of Nepal,[44] the committee has recommended the following;

- Develop and implement strict criteria for the adoption of Nepalese children, ensuring in particular that reasonable time is given for an effective tracing of the parents or close relatives of children separated from them as a result of the 2015 earthquake, and abolish the provision stating that the poverty of the parents of a child can be a legal ground for adoption
- Ensure that exhaustion of all means of preventing termination of parental responsibility and/or separation of the child is set as a clear criterion in all case involving adoptions
- Regulate and monitor the practice of placing children with close relatives or others to ensure that all their rights, including the right to education and to health care, are fully respected

42. CRC Article 21
43. https://crcreporting.childrightsconnect.org/convention-on-the-rights-of-the-child-concluding-observations/#:~:text=What%20are%20the%20concluding%20observations,for%20every%20State%20under%20review.
44. https://icj2.wpenginepowered.com/wp-content/uploads/2017/12/Concluding-Observations-CRC-Nepal-2016-eng.pdf

- Review the current mechanisms and procedures for domestic and intercountry adoption, particularly the role and responsibilities of national and district-level decision-making bodies, with a view to ensuring that professionals responsible for adoption cases are fully equipped with the expertise needed to review and process of adoption cases
- Consider ratifying the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry adoption, in order to, inter alia, prevent trafficking and smuggling of children.

3. The Hague Convention, 1993

The UN Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption is a multilateral treaty that deals with international adoption in an effort to regulate the adoption procedure and protect those involved from the corruption, abuses and exploitation in regard to adoption. It creates an international standard of practices for intercountry adoptions.

The best interests of the child should be the paramount consideration in adoption as per the convention. It has mentioned that the adoption can be done only if the competent authorities of the State of origin have established that the child is adoptable and determine that an intercountry adoption is in the child's best interest. Likewise, the competent authorities of the state should ensure that the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin. Such consent should be free and in writing. The convention also focuses on principle of subsidiarity,[45] providing counseling and information regarding the effects of adoption as per necessity.[46]

In order to make an inter-country adoption, the convention has listed some requirements which states that the competent authorities of the receiving State must have determined that the prospective adoptive parents are eligible and suited to adopt, have ensured that the prospective adoptive parents have been counselled as may be necessary and have determined that the child is or will be authorized to enter and reside permanently in that State.[47] The Convention provisions a system of Central Authorities in all Contracting Parties and enforces general obligations on them which includes cooperating with one another through the exchange of general information concerning intercountry adoption; eliminating obstacles to the application of the Convention; and deterring all practices contrary to the purpose of the Convention.[48] The Convention foresees a system where the contracting parties work together to ensure the protection of children. Cooperation between contracting parties is crucial to safeguard the efficiency of any safeguards put in place.[49]

The Chapter four of the convention deals with the procedural requirements needed to fulfill inter-country adoption. Person residing in the contracting state opting to adopt a child habitually residing in another state should apply for the central authority in the state of their habitual residence.[50] Once the central authority is satisfied with the application, it prepares a report including information about the identity, eligibility, suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an inter-country

45. "Subsidiarity" means that Parties recognize that a child should be raised by their birth family or extended family whenever possible.
46. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Article 4
47. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Article 5
48. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Article 16
49. Ibid. Article 7
50. Ibid. Article 14

adoption of the applicants along with the characteristics of the children for whom they would be qualified to care and pass on the report to the central authority of the state of origin.[51]

The central authority of the state of origin will prepare a report including information about child's identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child if it is satisfied with the report, they receive considering the child's upbringing and to the child's ethnic, religious and cultural background. The authority will determine whether the predicted placement is in the best interests of the child on the basis of the reports after insurance that consent have been obtained. The central authority will then submit the report to the central authority of receiving state. The confidentiality of identity of mother and father should be maintained if such identity may not be disclosed in the State of origin.[52] The central authorities of both the states shall keep each other informed about the adoption process and the measures taken to complete it along with the progress of the placement if a probationary period is required.[53]

LAWS RELATED TO ADOPTION OF SELECTED FOREIGN COUNTRIES

India

In India, the adoption related matters are regulated by The Hindu Adoptions and Maintenance Act, 1956 and The Juvenile Justice (Care and Protection of Children) Act, 2015.

As per the Hindu adoption law, any male and female Hindu who is of sound mind and is not a minor has the capacity to take on or a daughter in adoption. If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.[54] In case of female Hindu, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.[55]

In order to make a valid adoption, both the person adopting and the person giving in adoption should have the capacity and right to take in adoption.[56] Only the father or mother or the guardian of a child shall have the capacity to give the child in adoption. If the father or mother are dead or have completely renounced the world, have abandoned the child or have been declared by a court to be of unsound mind, the guardian of the

51. Ibid. Article 15
52. Ibid. Article 16
53. Ibid. Article 20
54. The Hindu Adoptions and Maintenance Act, 1956 Section 7
55. Ibid. Section 8
56. Ibid. Section 6

child may give the child in adoption with the permission of the court.[57] The right of adoptive parents to dispose of their properties have also been secured by the act stating that an adoption does not deprive the adoptive father or mother of the power to dispose of his/her property by will or by transfer.

The Juvenile Justice (Care and Protection of Children) Act, 2015 is another law that regulates adoption in India. As per this act the prospective adoptive parents must be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to the child. The consent of both the spouses is required for the adoption in the case of couple. Likewise, a single or divorced person can also adopt as per the regulation framed by the adoption authority of India. A single male is not eligible to adopt a girl child.[58]

An Indian prospective adoptive parent living in India need to apply to a Specialized Adoption Agency if they are interested to adopt an orphan or abandoned or surrendered child. The agency will prepare the home study report of the parents and will refer a child declared legally free for adoption with the child study report and medical report of the child if they are eligible. Once the agreement is signed by the adoptive parents, the agency gives the child in pre-adoption foster care and file an application before the District Magistrate for obtaining the adoption order. The district magistrate then passes the order of adoption and hence the parent can adopt the child. The progress and wellbeing of the child in the adoptive family will be followed up and determined in the manner as provided in the adoption regulations framed.[59] The act also provisions about inter-adoption adoption of an orphan, abandoned and surrendered child. A child with physical and mental disability, siblings and the children who are above five years of age are given preference over other children for the inter-country adoption as per the regulations.[60]

In India, any relative who are living in abroad aiming to adopt a child from his relative have to obtain an order from the District Magistrate and should apply for an no objection certificate from the authority as per the adoption regulations. Upon such receipt of application from either biological or from the adoptive parents, the authority issues the no objection certificate under intimation to the immigration of India and of the receiving country of the child. After receiving the letter, the adopter can receive the child from the biological parents and have to facilitate the contact of the adopted child with his siblings and biological parents.[61]

South Africa

The adoption related laws in South Africa are regulated by the Child Care Act, 1983. The Chapter 4 of the act deals with the adoption related legal provisions. In South Africa, any person younger than 18 years of age with certain circumstances may be adopted. Such circumstances include orphan and absence of legal guardian or caregivers willing to adopt, if parents or legal guardians of the child cannot be established, if the child is abandoned, neglected or abused by the parents, legal guardians or caregivers or if the child needs a permanent home. Any spouses, partners in a life partnership including same sex partners or other person sharing and forming a permanent home, a widower, widow,

57. Ibid. Section 9
58. The Juvenile Justice (Care and Protection of Children) Act, 2015 Section 57
59. Ibid. Section 58
60. Ibid. Section 59
61. Ibid. Section 60

unmarried or divorced person, step parent or the father of child born out of wedlock who are older than 18 years of age can adopt a child in South Africa.[62] The adopter must be fit and proper to be entrusted with full parental rights and responsibilities, willing and able to exercise and maintain the parental rights and responsibilities and should be properly assessed by an adoption social worker. Each parent of the child and every legal guardian must give his/her consent should give consent for the adoption.[63] However, if the parents or legal guardians has a mental illness, abandoned the child and cannot be traced, abused or neglect the child, failed to fulfill the parental rights and responsibilities towards the child, failed to respond to the notice of the proposed adoption within 30 days of receiving it the consent is not required.[64]

In order to adopt a child in South Africa, consent to adoption is must from each parent of the child and every legal guardian. A social worker will then investigate and will compile a report on whether the child can be adopted, if the adoption is in the best interest of child, medical information in relation to the child and the eligibility of the prospective parents. The report is submitted to the Children's Court. The Children's Court will grant an adoption order upon fulfillment of all the requirements. Such order of the court should be taken to Home Affairs office along with the birth certificate of the child for record of adoption.[65] An adopted child is regarded as the biological child of the adoptive parents and all parental rights and responsibilities of the child's biological parents or previous legal guardians will be terminated. The adoptive child takes the surname of the adoptive parents.[66]

Australia

Australia practices open adoption for both domestic and international adoption where children who are adopted grow up with an understanding that they have been adopted and if possible are supported to have a relationship with or knowledge of their family of origin. In regard to the domestic adoption, adoption and child welfare legislation is made at the state government level and each jurisdiction has their own department. Likewise, a number of non-government organizations (NGOs) are also commissioned to provide out-of-home care and adoption services in Australia. Each jurisdiction, department and NGO has their own process for adoption which include setting up of the criteria for prospective adoptive parents and carrying out the training and assessment process. The procedure includes contacting the relevant state department or accredited agency, attending an information session, undertaking assessment and training, waiting for matching, placement and post adoptive support.[67]

The aspects such as effects of adoption and on parenting order, international adoption about adoption and agreements are provisioned in the Family Law Act, 1975 in Australia. The inter-country adoption in Australia is governed by the Attorney-General's Department however they are administered by the state departments. The intercountry adoptions eligibility requirements and process used in each state and territory is similar but are not identical. A regulation i.e., Family Law (Hague Convention on Inter-country Adoption) Regulation, 1998 has also been passed in order to regulate the inter-country adoption in Australia.

62. Child Care Act, 1983 Section 17
63. Ibid. Section 18
64. Ibid. Section 19
65. Ibid. Section 18
66. Ibid. Section 20
67. https://www.adoptchange.org.au/permanency-adoption-info/?gclid=EAIaIQobChMIstnp08eb_AIVFB4rCh0etA-moEAAYAyAAEgKJEPD_BwE#

ANALYSIS OF NEPALESE ADOPTION LAWS WITH SELECTED FOREIGN COUNTRIES ADOPTION LAWS

The comparative analysis of Nepalese adoption laws with the selected foreign countries can be seen as;

Adoption Rights-Adopters

1. Nepal

Fundamental Principles for Adoption	Who can adopt?	Who cannot adopt? (Restrictions)	Analysis
» Has to be to protect the best interests of the child » Needs to have consent of all parties (written consent if father and mother of child still alive, or of any surviving parent) » Consent required of home or orphanage responsible for child if no parents to sign for consent » Written consent of child required if they are above 10 years of age » Age difference of 25 years minimum between adopter and adoptee (doesn't apply within 3 generations of same family)	» Couples with one child (but only opposite gender, unless their children live separately- i.e., aged out) » Any person who has children who files a petition with the District Court and demonstrates financial capacity to care for the child » Couples who have been married for 10 years without children » Couples who married after 45 years of age without children » Widows/ widowers or divorcees without children	» Those of unsound mind » Those without relevant financial capacity » Convicted of offences involving 'moral turpitude' (immoral crimes v illegal crimes)	» Nepal's adoption laws provide for the input of children into the adoption process (requirement of written consent)- this promotes the goals of CRC well » Places specific restrictions on who can adopt, including financial capacity (unique to Nepal) and specific relationship requirements » Places limits on how many children can be adopted (unique to Nepal) » Places a large age gap requirement between adopter and adoptee (larger than Australia and with no mechanism to exempt it)

2. India

Fundamental Principles for Adoption	Who can adopt?	Who cannot adopt? (Restrictions)	Analysis
» If someone has more than wife, consent of all wives necessary for adoption » Adoptive parents must be physically fit, financially sound, mentally alert and highly motivated to provide a good upbringing to the child » Specialized agency needs to perform a home study report of prospective parents » Adoptive parents need to facilitate contact between child and bio siblings and parents (where possible)	» Any male or female Hindu of sound mind and is not a minor, with relevant capacity to care for the child » Single or divorced person can adopt as per the relevant regulation	» A single man cannot adopt a daughter » Those deemed not to have capacity to care for the child	» India has less restrictions on who can adopt, reserved only for the protection of young girls » Provides mechanisms for facilitating contact with biological family » Specifies mechanism for assessing suitability of prospective parents (home study) » Provides assessment criteria for suitability of parents- including motivation to provide a good life to the child

3. South Africa

Fundamental Principles for Adoption	Who can adopt?	Who cannot adopt? (Restrictions)	Analysis
» Adopters must be older than 18 » Must be fit and proper person, as assessed by a social worker	» Any spouses, partners in a life partnership (incl. same sex) and de factors - Widowers, widows, unmarried, divorced people	» A person who is unsuitable to work with children	» Provides comprehensive definitions of who can be adopted

Fundamental Principles for Adoption	Who can adopt?	Who cannot adopt? (Restrictions)	Analysis
» Need consent of parents (if possible) and all relevant legal guardians, otherwise consent not required » Must be in best interest of child	» Step-parents or father of a child outside of wedlock » Foster parent » No restrictions placed on lack of financial means for adoption	» People unfit as assessed by a social worker	» Does not include financial stability as a consideration for excluding adopters- in fact allows them to seek social security » Also provides mechanism for assessing suitability of parents (social worker)

4. Australia

Fundamental Principles for Adoption	Who can adopt?	Who cannot adopt? (Restrictions)	Analysis
» Open adoption for both domestic and international adoption » Best interest of the child » Children should grow up with understanding that they are adopted and have a relationship (or knowledge of) their bio family » Organized on a state level through government-based organizations with their own processes and child welfare legislation	**Using NSW as proxy** » Fit and proper person to fulfil the responsibilities of a parent » At least 21 years of age and 18 years older (min.) than adoptee (can be overlooked by the court in certain circumstances) » Couples who have lived together for more than 2 years » A relative with whom the child has a relationship of longer than 2 years duration (only if best possible action for interests of the child)	» People deemed unfit or improper persons to adopt	» Has the widest provisions on who can be adopted - Provides exemptions for adoption by siblings or other family members who are under 21 years of age in extenuating circumstances - Mentions specifically the need to provide children with an understanding of their adoption and facilitate contact with bio family

Fundamental Principles for Adoption	Who can adopt?	Who cannot adopt? (Restrictions)	Analysis
» Inter-country adoption regulated by Hague Convention» Inter-country adoption regulated by Hague Convention	» Step-parent, only if: 1) Child is at least 5 years old 2) Step-parent has lived with the child and birth/ adoptive parent for min. 2 years prior to making application 3) Most preferable action in the best interests of the child		

Adoption Rights

1. Nepal

Who can be adopted?	Who can be adopted (inter-country)?	Who cannot be adopted?	Analysis
» Any child that does not fall into an exempt category	» Fully orphaned children or voluntarily abandoned (need to be in a children's home for minimum 6 months) » More than one child can be adopted if adopters home country permits more than one child to be adopted	» Children older than 14 years (doesn't apply if within three generations of same family or a son or daughter born to ex-husband of a wife) » Children who have already been adopted (not annulled) » Only children » "One who is in a higher degree of relationship" than the adopter » Non-Nepali citizens (doesn't apply to non-resident Nepali citizens with foreign citizenship)	» Nepal is the only country of the 4 that places restrictions on who cannot be adopted- most other countries provide mechanisms for any child to be adopted in the right circumstances (including those over the age of 18)

2. India

Who can be adopted?	Who can be adopted (inter-country)?	Who cannot be adopted?	Analysis
» Child who has been abandoned, voluntarily surrendered, or whose parents have been deemed unfit by the Courts	» Children with disabilities, siblings, and children older than 5 are given priority for adoption (for inter-country adoptions)	» N/A	» India has a priority system for inter-country adoptions to ensure that children who would ordinarily be neglected in consideration for adoption are given better odds

3. South Africa

Who can be adopted?	Who can be adopted (inter-country)?	Who cannot be adopted?	Analysis
» Anyone under 18 years of age (within certain circumstances) » Orphaned » Absence of legal guardian or caregivers willing to adopt » Parents or legal guardians cannot be established » Abandoned, abused, or neglected » In need of permanent housing	» N/A	» N/A	» South Africa has some limitations about who can be adopted- but are still fairly expansive. Typically framed exclusively in child welfare terms rather than anything else.

4. Australia

Who can be adopted?	Who can be adopted (inter-country)?	Who cannot be adopted?	Analysis
» Was under 18 years of age when petition was made » Was 18 or older at the time of application, but cared for by the applicant prior to 18 years of old	» N/A	» N/A	» Australia has the broadest provisions on who is eligible for adoption- including allowing for adoption of adult children by step-parents

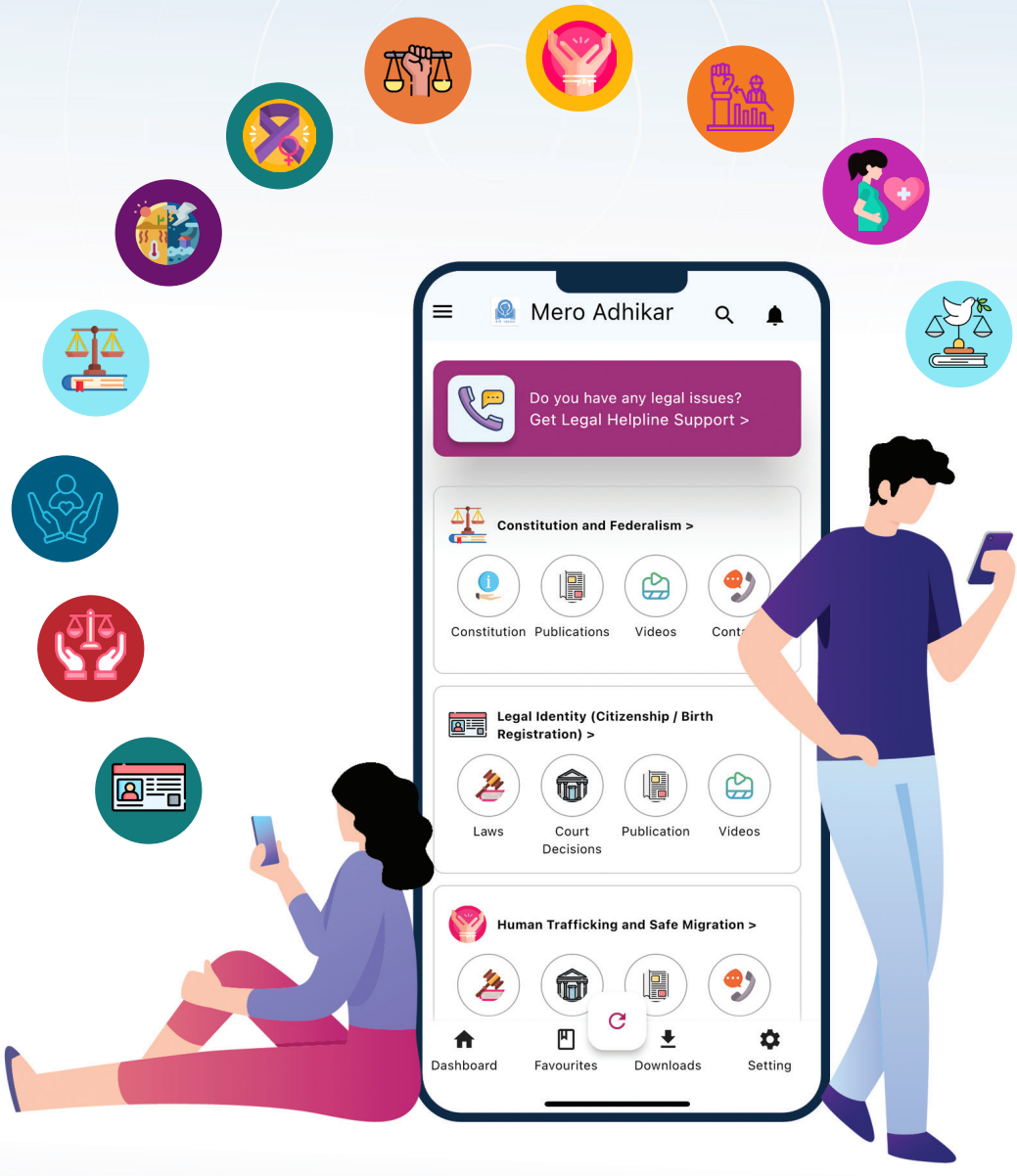
RECOMMENDATIONS

- Create and put into place a strong adoption standard for Nepalese children, making sure, in particular, that adequate time is given for an effective locating of parents or other close family members of children who have been separated from them.
- Terminate the rule allowing for adoption on the basis of a child's parents financial inability to care for them.
- The Muluki Civil Code, 2017 in its Chapter 9 Adoption and Inter-country Adoption states that a son or daughter of another person who is accepted as his or her son or daughter is considered to be an adopted son or daughter. The term "children" should be used in place of "son or daughter" in this context because it is gender neutral and includes intersex children as well.
- An unmarried person who has reached the age of forty-five who is a widow, a divorcee, or a woman who has been judicially separated from her spouse may perform an adoption under Section 172(b) of Muluki Civil Code, 2017. This provision of requirement of 45 years of age has to be examined and lowered.
- No financial enticement of any kind should be used in order to obtain consent for adoption, according to Section 175(7) of Muluki Civil Code, 2017, and such consent must be given voluntarily. However, there is no legal provision that would punish an unconsented adoption. Therefore, appropriate punishment provisions should be made in this circumstance likewise.
- There is no provision of a monitoring mechanism in regard to in-country adoption. The close relatives and Local Child Welfare Officer should be made responsible to monitor the practice of placing children with them to guarantee that all of a child's rights, including the right to education and health care are upheld.
- To secure the safety of adopted children and to stop the abduction, sale, and trafficking of children, there should be a system of agreement and collaboration among the countries involved in inter-country adoption. Similar to this, the Human Trafficking and Transportation (Control) Act of 2007 ought to define trafficking keeping in mind the possibility of trafficking of children while inter-country adoption and adhere to the Hague Convention's standards.
- While adopting children, intercountry adoption should only be taken into consideration once the child's options within the State of origin have been exhausted.
- Review the current mechanisms and procedures for domestic and international adoption, paying particular attention to the roles and responsibilities of national and district-level decision making bodies, in order to make sure that those in charge of adoption cases have all the knowledge necessary to review and process adoption cases.
- Ratify the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption to combat child smuggling and trafficking.

मेरो अधिकार
Know Your Rights

MERO ADHIKAR

Know Your Rights



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