

Humanitarian Crisis for Indian children and their families in confiscatory child care proceedings abroad

A case for intervention under human rights laws for the repatriation of Indian children facing foreign confiscatory care proceedings to their relatives in India, instead of being consigned to foreign state institutions or foster care, or being given away in forced adoption abroad.

Summary

Petition to the National Human Rights Commission to:

- recommend that the Government of India institutes a formal and transparent mechanism for the return to India of Indian children caught in confiscatory child care proceedings abroad
- commission a legal and statistical study on the functioning of confiscatory child protection or child welfare laws abroad
- spread awareness of the humanitarian concerns raised in this petition

12 October 2012

To,

National Human Rights Commission
Faridkot House, Copernicus Marg
New Delhi – 110 001

Re: Petition to the National Human Rights Commission under Sub-Sections (d), (e), (g), (h), (i) and (j) of Section 12 and Section 20 of the Protection of Human Rights Act, 1993 read with Regulation 12(b) of the National Human Rights Commission (Procedure) Regulations, 1994 as amended by the National Human Rights Commission (Procedure) Amendment Regulations, 1997.

Dear Sir/Madam,

We are writing to you in relation to the issues highlighted by recent cases reported in the media of the Bhattacharya family in Norway and the Saha family in the United States of America of Indian children being confiscated from their families by public authorities functioning under so-called child protection laws.

Humanitarian Crisis

We have compiled for your consideration a range of materials, including news reports, public commentary; studies by academics, lawyers, medical practitioners and activists; and speeches and reports by elected members of legislative bodies that indicate serious and systemic violations of the human rights of parents and children in the investigation, prosecution and adjudication of child care proceedings in countries of the developed world, including Norway, Sweden, the United Kingdom, and the United States of America.

We draw your attention in particular to the enclosed case study of the Norwegian care proceedings in the Bhattacharya case, which reveals a shocking absence of any justification for the grave and life-altering step of permanent confiscation of the children from their parents and the violation of basic human rights of both the parents and the children in that case.

The treatment meted out to the Bhattacharya family appears to be commonplace in child care proceedings in the developed world. Case after case has been reported of:

- the low threshold for confiscation of children from parents
- the absence of a fair and independent hearing to parents
- cultural bias in evaluating parenting practices and a lack of understanding of the culture of the children being confiscated
- findings of parental abuse or neglect on woefully inadequate evidence, including hearsay, conjectures and speculations, that would not be admissible in other types of legal proceedings
- disempowering members of the extended family from stepping in as guardians where parents are deemed unfit
- children being confiscated for months under interim orders

- children being confiscated without any prior notice or court process, even where there is no emergency situation
- confiscation being ordered by lay tribunals having no legal expertise and whose members include employees of the agency recommending confiscation
- failure to provide an interpreter to parents or children who do not know the local language and the denial of the right to be explained court or investigative proceedings in a language that they understand
- rubber-stamping by courts and lay tribunals of the findings of care workers who function for all practical purposes as adversaries of the parents in care proceedings
- monetary and other incentives for care agencies to place children in foster care or give them up for forced adoption
- termination of parental rights and placing children for adoption after a certain period has been spent by a child in state care, even while the parents are contesting the confiscation of the children in the first place
- a systemic preference for removing children from families rather than enabling families to provide better for their children
- administrative heavy-handedness on the part of care agencies empowered to confiscate children from their parents
- parents being blamed for developmental and other disorders in their children, even though there is no scientific rationale for doing so
- the misinterpretation of medical evidence or the application of medical theories that are vigorously contested within the medical community in findings of abuse, neglect or the like against parents
- mothers not being allowed to continue breast-feeding their babies upon confiscation – not even under supervision and not even where the baby has been exclusively breast-fed and thus not accustomed to bottle feeds
- no attention being given to helping infants and young children adjust to their new environment in state care by allowing parents to spend time with them and care for them under supervision

The cases reported are also revealing of the distorted understanding of the child and family that underlies intervention by permanent separation of children from families perceived to be dysfunctional. There is a pervasive disavowal in these systems of the role of filial love in the assessment of parental performance and the well-being of children.

Children caught in care proceedings abroad face spending their entire childhoods in state institutions or foster homes.

Parents are given minimal visitation rights: as low as two hours a year, thus virtually eliminating the possibility of such children ever knowing them. Once parents who are foreigners lose their right to stay on in such countries, their children who are in state care lose even this minimum access to them.

In some jurisdictions, parents are made to sign an agreement before being allowed visitations saying that they will show no physical affection to their children or offer any explanation to their bewildered children of why they are no longer together.

The Norwegian care proceedings in the Bhattacharya case reveal that siblings under state care are also vulnerable to being separated, including on grounds that if one of them has special needs it will be too burdensome for the foster carer to take care of all siblings together.

The Norwegian proceedings also reveal that enabling a child to grow up in the culture of its birth is given only passing consideration. It has been reported that in some jurisdictions there is a push to accelerate the rate of children in state care being made available for adoption by doing away with the preference for adoptive parents to be of the same ethnicity as the child.

The permanent separation of children from their families has severe consequences for both parents and children. Parents are inconsolable in the life-long deprivation of their children; a terrible loss that is no less painful or more capable of remedy than the death of a child. As for the children, their extraction from their families and re-location as subjects of public care in institutions or foster homes; or being put up for adoption, constitutes a radical and complete re-writing of their childhood and of their identity into adulthood by the State.

However, despite the power and severity of this form of State intervention, parents and children have less recourse against confiscatory decisions by child welfare services than that available even to prisoners on death row in many of these jurisdictions. In these child welfare systems, there is no pardon and no second chance; not even where the allegation is a passing phase of depression in a parent or too few toys in the home. In some countries, even murderers and rapists have greater protection of their civil liberties than parents and children caught in confiscatory care proceedings.

The actions of social services bureaucrats and the decisions of courts operating in these child welfare regimes are largely hidden from public view by strict confidentiality laws. This is said to protect the privacy of the child, but in fact has the effect of rendering care workers and the associated justice system immune from scrutiny and accountability.

The Bhattacharya and Saha cases reveal that even parents and children living in a foreign country who have retained their Indian citizenship and are staying there only for the short or medium term are subject to the jurisdiction of confiscatory child welfare laws.

Child's Right of Return under International Covenants

Children confiscated under foreign care proceedings are left with no possibility of returning to their own countries. They are consigned to growing up deprived of family life, separated even from their siblings in state institutions, shelters and foster homes, or being placed for adoption in families having no links to the culture into which they were born.

However, Indian children abroad have a right to return to India under Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR). This Article provides that no one shall be arbitrarily deprived of the right to enter their own country.

Ordinarily, an Indian child's right of return to India is exercised through its Indian guardians. However, this is not possible when a child is removed from the control of its usual Indian guardians as happens in foreign care proceedings. Such a child is deprived of its right of return to India unless the Indian Government intervenes on being petitioned by its family to facilitate its return to India.

Intervention by the Government to facilitate the return to India of children facing foreign care proceedings is the only chance such children have of retaining their heritage and preserving their family ties in cases where such children have family members in India willing to take over their care.

It is useful to refer to General Comment No. 27 (GC/27) of the United Nations Human Rights Committee (UNHCR) in understanding the scope of the right of return under Article 12(4) of the ICCPR. In paragraph 19 of GC/27 the UNHCR has stated that the right to enter one's own country "includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality)."

The overriding importance of the right of return is emphasised by the UNHCR in paragraph 21 of GC/27 in these words: "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."

In paragraphs 19 and 20 of GC/27, the UNHCR explains that being born in a country or having formal citizenship of that country is not a necessary condition for the right of return to vest in a person. It is stated in paragraph 19 that the "right of a person to enter his or her own country recognizes the special relationship of a person to that country." In paragraph 20 of GC/27 it is stated that "the wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien."

The right of return to India of children confiscated in care proceedings abroad is buttressed by their rights under international covenants to family life and to be raised in their culture of birth.

Intervention to facilitate the right of return of such children is enjoined upon the Government of India under its duty as stated in Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to give the "widest possible protection and assistance to the family".

The family has been recognised in Article 10 of the ICESCR and in Article 23(1) of the ICCPR as the "the natural and fundamental group unit of society". Recognition of the family as the natural and fundamental group unit of society under these conventions confers on all children the right to the preservation of their family ties, to be raised in the families of their birth and to be united with their families, wherever this is possible.

In paragraph 5 of its General Comment No. 19 to Article 23 of the ICCPR, the UNHRC has stated that the right to found a family implies the "possibility to....live together" and that further, the "possibility to live together implies the adoption of appropriate measures, both at the internal level **and as the case may be, in cooperation with other States, to ensure the unity or re-unification of families...**[emphasis added]." "Family" in this context, is not restricted to the members of the nuclear family and may include the members of the extended family. In paragraph 2 of its General Comment No. 19 (GC-19) to Article 23 of the ICCPR, the UNHRC has recognised that the concept of family may differ in different States and may include members of the extended family depending on how the concept and scope of the family is constructed or defined in the society or legal system of the relevant State.

The return to India of Indian children facing foreign care proceedings is also enjoined upon the Government of India under its duty to recognise and preserve the rights of children to take part in cultural life as recognised under Article 15 of the ICESCR. In General Comment No. 21 (GC-21), interpreting this provision, the United Nations Committee on Economic, Social and Cultural Rights (UNESCR) has stated in paragraph 26 that the right to take part in cultural life includes the rights of children “to learn and understand cultural values and practices of the communities to which they belong”. In these comments the UNESCR has also affirmed that children “play a fundamental role as the bearers and transmitters of cultural values from generation to generation.”

In paragraph 54 of GC-21, the UNESCR has stated that Article 15 of the ICESCR enjoins upon States the duty to provide “all that is necessary for the fulfilment of the right to take part in cultural life when individuals....are unable, for reasons outside their control, to realise this right for themselves with the means at their disposal.” This inability to participate in cultural life exactly describes the predicament of children confiscated in foreign countries from their Indian families and in such situations, States are called upon in paragraph 54(a) of the General Comments to take such steps as “the enactment of appropriate legislation and the establishment of effective mechanisms allowing persons ...to claim protection of their right to take part in cultural life..”.

The establishment of international co-operation in the form of agreements or other mechanisms by the Government of India with foreign countries that enable the return of children in foreign state care to their extended families in India would also be in keeping with the duties of the Government of India under Article 15 of the ICESCR as interpreted in paragraph 56 of GC-21 which states that “State parties should recognise and promote **the essential role of international co-operation** in the achievement of the rights recognised in the [ICESCR], including the right of everyone to take part in cultural life and should fulfil their commitment to take **joint and separate action to that effect** [emphasis added].” Paragraph 57 of General Comment No. 21 also enjoins upon the Government of India the duty to ensure “thorough international agreements where appropriate” that “the realisation of the right of everyone to take part in cultural life receives due attention.”

Rights of family members under Article 14 and Article 21 of the Constitution of India

Relatives in India of children confiscated abroad are entitled to be united with these children under their rights to the preservation of their family and of the widest possible protection and assistance of the Government of India in achieving this under Article 23(1) of the ICCPR and Article 10(1) of the ICESCR. The rights of such relatives to family life and to transmit their culture and religion through their descendants, including the children of their family confiscated in foreign care proceedings, are also guaranteed in the right to life under Article 21 of the Constitution of India and the right to cultural life in Article 15 of the ICESCR as interpreted in GC-21, cited above.

We appreciate the humanitarian intervention of the Government of India through the Ministry of External Affairs in the case of the Bhattacharya family of facilitating negotiation with foreign authorities for the release of confiscated children to their family in India.

However, the absence of a formal and transparent mechanism for the Government’s response to such cases offends against the rule embedded in Article 14 of the Constitution of India that all actions of the State, including those in exercise of executive powers, should not be arbitrary or discriminatory. Article 14 enjoins upon the State that all its actions, including executive actions, should be exercised in a manner that is fair, open, reasonable, i.e., based on relevant factors, respects the rules of natural justice and is applied consistently among all those who are similarly placed with respect to the subject

matter of the relevant executive action. Families from socially or economically backward backgrounds may not be able to gain the attention of the Government or the public for the plight of their children caught in confiscatory child care proceedings abroad. It is, therefore, critical not to rely on *ad hoc* intervention but for the Government to establish a systemic mechanism for dealing with these cases.

The lack of a formal and transparent mechanism for intervention by the Government in such cases thus offends against the fundamental right to equality under Article 14 of relatives in India of children confiscated abroad.¹

Powers of the NHRC

Therefore, whereas the National Commission Human Rights Commission is empowered to take the following steps under the Protection of Human Rights Act, 1993:

- Under section 12(d), to review the safeguards provided by or under any law for the time being in force for the protection of human rights and recommend measures for their effective implementation
- Under section 12(e), to review factors that inhibit the enjoyment of human rights and recommend appropriate remedial measures
- Under section 12(g), to undertake and promote research in the field of human rights
- Under section 12(h), to spread human rights literacy among various sections of society (including the Government) and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means
- Under section 12(i) to encourage the efforts of non-governmental organisations and institutions working in the field of human rights
- Under section 20(1), to place an annual report and to submit special reports to the Central Government, which is required under Section 20(2) to place such reports before both Houses of Parliament, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any
- Under section 12(j), to perform such other functions as it may consider necessary for the protection of human rights

And whereas under Regulation 12(b) of the National Human Rights Commission (Procedure) Regulations, 1994 as amended by the National Human Rights Commission (Procedure) Amendment Regulations, 1997, a petition or communication that is not a complaint falling under Section 12(a) of the Protection of Human Rights Act, 1993 **but relates to any other clause in Section 12**, the same shall be placed forthwith before the Registrar, who shall cause it to be transmitted under

¹ It is also relevant to note on the subject of protection against arbitrary executive action, that the UNHCR has stated in paragraph 21 of GC/27 in relation to the right of return under Article 12 of the ICCPR that “the reference to the concept of arbitrariness [in Article 12(4) of the ICCPR] is intended to emphasise that it applies to all State action, legislative, administrative and judicial...”.

acknowledgement to the Secretary General, who shall place it with a brief note before the full Commission as early as possible.

Prayer

Now therefore the undersigned petition the National Human Rights Commission to do the following:

1. The National Human Rights Commission exercises its powers under Sections 12(d) and (e) of the Protection of Human Rights Act, 1993 to recommend the following measures for the effective implementation of and removal of factors that inhibit the enjoyment of the human rights as discussed above of Indian children and their relatives in India under Article 12(4) of the ICCPR (**right of return**), Article 15 of the ICESCR (**cultural rights**), Articles 23(1) of the ICCPR and 10(1) of the ICESCR (**right to widest possible assistance for preservation and protection of the family**) and Article 14 and Article 21 of the constitution of India (**right to equal treatment in all aspects of State action and the right to life**):
 - (a) The Government of India designates a committee or department with representatives in all embassies, consulates and missions abroad with the duty of responding to the plight of Indian children caught in care proceedings abroad. Such committee or department to have well-defined and transparent procedures for the receipt, investigation and expeditious disposal of petitions from children or the relatives of children who have been placed under state care, foster care or have been institutionalised or given away in adoption in or consequent to child care proceedings abroad; or are under actual or threatened confiscation, whether interim, temporary or permanent, in child care investigations or proceedings abroad;
 - (b) The Government of India empowers such committee or department to use its good offices with the governments of foreign States, particularly States that are signatories to the ICCPR and the ICESCR, to enter into agreements, understandings or other arrangements for the expeditious return of Indian children caught in care proceedings in such States to their families in India;
 - (c) The Government of India issues a travel advisory drawing the attention of Indians planning to travel abroad, even for holidays or medium term stay, to the severe and confiscatory nature of foreign child protection laws;
 - (d) The Government of India sensitises its embassies, consulates and missions abroad of the human rights concerns with the confiscatory powers of child welfare services of the developed world and instruct them to gather information about child welfare care laws and about lawyers, activists, language interpreters and other persons who can be of assistance to Indians facing confiscatory child care proceedings or investigations.
2. The National Human Rights Commission exercises its powers of research and awareness-building under Sections 12(g), (h), (i) and (j) of the Protection of Human Rights Act, 1993 to commission a legal and statistical study on the functioning of confiscatory child protection or child welfare laws abroad.
3. The National Human Rights Commission exercises its powers under Section 20(1) of the Protection of Human Rights Act, 1993 to submit a report to the Government of India in regard to the matters raised in this petition.

4. The National Human Rights Commission exercises its powers of spreading human rights literacy and awareness of safeguards for the protection of human rights; to encourage the efforts of non-governmental organisations and institutions working in the field of human rights; and to perform such other functions as it may consider necessary for the protection of human rights under Sections 12 (h), (i) and (j) of the Protection of Human Rights Act, 1993 by espousing and publicising the humanitarian concerns raised in this petition.

Yours sincerely,

Signatories (for signatures, see overleaf)

Justice (retd.) Mukul Mudgal Former Chief Justice, Punjab & Haryana High Court	Justice (retd.) AP Shah Former Chief Justice, Delhi High Court	Brinda Karat, Former Member of Parliament (Rajya Sabha)
Suranya Aiyar Lawyer	Sudha Sundararaman General Secretary, All India Democratic Women's Association	Jyotsna Chatterji Director, Joint Women's Programme
Padmabhushan Devaki Jain Feminist Economist & Author	Renuka Mishra Educationist, Feminist Activist & Founder, Nirantar	Jaya Srivastava Chairperson, Jagori
Leila Passah National General Secretary, YWCA of India	Dr. Ranjana Kumari Director, Centre for Social Research	Kalyani Menon-Sen Women's Rights Activist
Annie Raja General Secretary, National Federation of Indian Women	Gauri Choudhary Director, Action India	Sehba Farooqui Secretary, All India Democratic Women's Association, Delhi
Indu Agnihotri Director, Centre for Women's Development Studies	Rita Panicker Director, Butterflies, Child Rights Organisation	Dr Vasanthi Raman Convenor, FORCES-CWDS Network
Dr. Shalini Grover Senior Research Fellow in Sociology, Institute of Economic Growth, University of Delhi	Nandita Rao, Lawyer	Shilpa Phadke Sociologist, Tata Institute of Social Sciences
Trideep Pais, Lawyer		

Enclosed: Letter of Support from Dr. Girija Vyas, Member of Parliament (Lok Sabha) and former Chairperson, National Commission for Women

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