

1 INTRODUCTION

David M. Smolin

PART 1: OUT OF THE FOG: RESPONSES AND REMEDIES FOR THE ILLEGAL SEPARATION OF CHILDREN FROM THEIR FAMILIES IN THE CONTEXT OF INTERCOUNTRY ADOPTION

The Fog and Confusion Surrounding Discussions of Illegal Adoption

Adoptee literature speaks of the process of coming out of the fog, which can be described as moving from a naive and entirely positive view of adoption to a more realistic perspective that acknowledges the inherent loss and pain in adoption, including separation from the first family.¹ I am using the phrase in a related but different way.

First, the fog about adoption envelops not only adoptees but also adoptive parents, sometimes even first families, and also the general society. The fog has enveloped us all within the romanticized mythology of adoption as a saving, selfless act of rescue, making it difficult for us to live with and legislate about real adoption with all of its multilayered complexities.

Second, even for those who acknowledge the inherent emotions and complexities of adoption and have thus moved out of what is commonly termed the adoption fog, there is often scant or no awareness of the prevalence of illegal adoption. We are enveloped within the fog of presuming that adoption systems, including intercountry adoption systems, have generally operated in accordance with legal and ethical standards. Given the necessary governmental approvals in two countries, the involvement of 'adoption professionals', applicable international treaties and specialized international bodies, and various bureaucratic processes and seemingly endless paperwork, many presume that seriously illegal or unethical practices are kept to a minimum. This is an additional level of ignorance and confusion, I would argue, that has made it very difficult to discuss, enact and implement remedies and responses to illegal and unethical adoptions.

¹ See, e.g., L. MacFarquhar, 'Living in Adoption's Emotional Aftermath', *New Yorker*, 3 April 2023, <https://www.newyorker.com/magazine/2023/04/10/living-in-adoptions-emotional-aftermath>; S.F. Branco, J. Kim, G. Newton, S. Kripa Cooper-Lewter and P. O'Loughlin, 'Out of the Fog and into Consciousness: A Model of Adoptee Awareness', *ICAV*, 2022, <https://intercountryadopteevoices.com/wp-content/uploads/2022/06/adoptee-consciousness-model.pdf>.

Dispelling the fog concerning illegal adoptions is not about taking a negative stance towards intercountry adoption as a political or ideological matter, but rather about realizing the degree to which systemic violations of legal and ethical standards have occurred in intercountry adoption systems over the entire modern history of intercountry adoption. Dispelling the fog is about using that awareness and accompanying clarity as a foundation for action and narratives concerning remedies and responses.

I have spent nearly a quarter-century personally and professionally responding to illegal intercountry adoption.² This chapter is a reflection on identifying and overcoming the severe obstacles to the provision of remedies for illegal intercountry adoption, based on a clear and realistic assessment of those barriers and obstacles.

Out of the Fog: Reconceptualizing Illegal Adoption as Usually Involving the Illegal Separation of Children from their Families

A foundational step in moving out of the fog is reconceptualizing illegal adoption as usually involving the illegal separation of children from their families.³ While not all illegal adoptions involve this wrong, the most important – and in many instances the most widespread – forms of illegal adoption commonly do involve the illegal and wrongful separation of a child from the child's family. Illegally separating children from families is a wrong easily understandable to the general public. Parents normally have an intrinsic fear of losing their children. Modern societies have created organized response systems that treat a missing or stolen child as an emergency requiring an immediate response. The fact that not all missing or stolen children receive the same publicity and effort – often based on race, ethnicity or socioeconomic status – is broadly understood as a wrong to be rectified, not a difference to be embraced.⁴ In order to dispel the fog, in addressing illegal adoptions we should constantly speak of the illegal and indeed cruel separation of children from their families.

Second, once the focus is on illegal separation of children from their families, the opportunity arises to explain how adoption systems incentivize, facilitate and hide such wrongs. Adoption systems have unfortunately caused the needless separation of

2 Many of my writings on intercountry adoption are available for free download here: https://works.bepress.com/david_smolin/.

3 UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/2022-09-29/JointstatementICA_HR_28September2022.pdf, para. 3.

4 G. Barton, 'What Happens When a Child Disappears in America', CNN, 26 August 2022, <https://www.usatoday.com/in-depth/news/investigations/2022/08/26/racial-disparities-abound-efforts-find-missing-children/10331706002/>.

children from their families.⁵ Adoption systems have unfortunately exacerbated rather than remedied separations of children from their families that otherwise could have been remedied.⁶ Intercountry adoption further exacerbates separations through the geographical, linguistic and cultural distances it creates between children and their original families.⁷ Such an understanding counters the common view of adoption as an inherent good and sets the premise for limiting, reforming and regulating adoption.

Third, a focus on the illegal separation of children from their families clarifies the question of remedies. Where illegal adoptions include an illegal separation of children from their families, the remedy should normally involve a restoration of that relationship.⁸ Yet, depending on the facts of the case, remedies for illegal adoptions should also take into account the time and events between the separation and the reunion, including the relationships the child has formed due to the adoption. Remedies commonly should be 'additive' rather than 'subtractive', or 'both/and' remedies, meaning that remedies should acknowledge the importance of the child's relationships with both the original family and the adoptive family, as well as the child's complex cultural, racial and national identities. In practice, remedying illegal adoptions turns out to be an exceedingly complex process over time.⁹

Fourth, a clear focus on how intercountry adoption systems have incentivized, facilitated, exacerbated and hidden the illegal and unethical separation of children from families, in combination with the grave difficulties in supplying even partially effective remedies, strengthens the case for ending the modern era of intercountry adoption. On a systemic level, the harm to benefit ratio of intercountry adoption is

5 See, e.g., Committee Investigating Intercountry Adoption, *Consideration, Analysis, Conclusions, Recommendations, and Summary*, February 2021, <https://www.government.nl/documents/reports/2021/02/08/summary-consideration-analysis-conclusions-recommendations>; see Chapters 2, 3, 4, 5, 6, 7, 8, 9; E.C. Loibl, *The Transnational Illegal Adoption Market: A Criminological Study of the German and Dutch Intercountry Adoption Systems*, The Hague, Eleven International, 2019; D.M. Smolin, 'Child Laundering: How the Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children', *Wayne Law Review*, Vol. 52, No. 1, 2006, pp. 113-200.

6 See, e.g., S.A. Jafri, 'Missing Girl Among Children Rescued in Tandur', *Rediff*, 1 May 2001, <https://m.rediff.com/news/2001/may/01ap1.htm>; D.M. Smolin, 'The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals', *Seton Hall Law Review*, Vol. 35, 2004, pp. 403-493; Smolin, 2006, pp. 121-122.

7 Compare United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, Art. 20(3): "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

8 See Art. 8(2) UNCRC; UN Human Rights Treaty Bodies, 29 September 2022, paras. 15-18.

9 On the complexities of reunions, in general, and the complexity of kinship post reunion and long term, see G. Clapton, 'Close Relations? The Long-Term Outcomes of Adoption Reunions', *Genealogy*, Vol. 2, No. 4, 2018, p. 41; L. Long, 'ICAV Perspective Paper: The Experiences and Views of Intercountry & Transracial Adoptees', July 2016, <https://intercountryadopteevoices.com/wp-content/uploads/2016/07/search-and-reunion-icav-perspectives-july-2016-v12.pdf>.

much worse than has been recognized. Most interventions with such a poor record as to systemic abuses over such a long period of time would have been discontinued long ago. The difficulties involved in even partial remedies underscore this need to end the modern era of intercountry adoption.¹⁰

Fifth, reviewing the accuracy of past predictions about intercountry adoption systems, I will make new predictions on how recent efforts to remedy illegal intercountry adoptions will likely proceed. While, of course, no one can predict the future, it is often possible to make reasonable hypotheses about the future based on the past and on the nature of the systems involved. These predictions can serve as an important reality check.

Legal Premise: Children Normally Have the Right to be Raised by Their Original Family

As a matter of children's rights, the child has a right to "know and be cared for by his or her parents" (Art. 7(1) UNCRC). The child also has rights to 'a name' and a 'nationality' and to "preserve his or her identity, including nationality, name and family relations..." (Art. 8(1) UNCRC). Hence, many separations of a child from parents violate the rights of the child and require remedies; indeed, the United Nations Convention on the Rights of the Child (UNCRC) states: "Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity" (Art. 8(2)). As will be discussed later, Article 9 requires further actions from the state where the separation results from "any action initiated by a State Party...", and Article 10 requires states to accommodate international travel for purposes of 'family unification'.

As a technical matter, the right of the child to "know and be cared for by his or her parents" is limited by two contingencies: "as far as possible" (Art. 7(1) UNCRC) and the "best interests of the child" (Art. 3(1) and Art. 20-21 UNCRC). These are explained in what follows.

'As far as possible'

Under the UNCRC, where it is not 'possible' for the child to be raised by their original family, the child's rights have not been deprived when the child is not raised by the

¹⁰ I make the case at greater length for ending the modern era of intercountry adoption in D.M. Smolin, 'The Legal Mandate for Ending the Modern Era of Intercountry Adoption', in N. Lowe and C. Fenton-Glynn (eds.), *Research Handbook on Adoption Law*, Cheltenham, Edward Elgar, 2023, pp. 384-407, draft version available at https://works.bepress.com/david_smolin/24/.

original family. The African Charter on the Rights and Welfare of the Child (hereinafter ACRWC) has a similar provision, stating that “[e]very child … shall, whenever possible, have the right to reside with his or her parents” (Art. 19(1)). These provisions make it important to distinguish between a tragic loss and the deprivation of a right.

Practically speaking, there are some tragic circumstances that cannot be avoided by either the state or society, and thus since no one has committed a deprivation of a right, there is no deprivation of a right. For example, if the parents die from an illness, despite receiving appropriate medical care, and thus neither state nor society nor any individual is liable, then there is great loss but technically no rights deprivation. Psychologically, of course, loss occurs regardless of whether there is a rights deprivation or not.

The distinction is foundational to the legality of adoption. Where it was not possible for the child to remain and be raised by their family, and it is not possible to remedy that separation, a subsequent adoption may be legal. On the other hand, an adoption built on top of an illegal separation that could have been avoided or remedied is an illegal adoption, which constitutes the deprivation of the rights of the child. An adoption built on an illegal separation is an illegal adoption no matter how many legal procedures were followed at later stages of the adoption process, and even if the adoptive family was unaware of the illegal separation – although the adoptive family would not be legally or ethically responsible for such illegality if the adoptive family neither created nor knew of the illegal separation. An adoption built on an illegal adoption exacerbates the deprivation of the child’s rights in relationship to the original family, because the adoption makes it more difficult to remedy the illegal separation.

‘Best interests of the child’

The principle of the best interests of the child is often misunderstood. As Nigel Cantwell has pointed out, the term ‘best interests of the child’ can be and has been misapplied to justify deprivations of the rights of the child, and, indeed, of the *human rights* of the child.¹¹ To the contrary, the term best interests of the child should be understood as a shorthand for respecting all of the rights of the child.¹² Beyond that, a best interests of the child determination is an important procedure for making what are often fact-intensive and complex decisions about the child.¹³

11 N. Cantwell, *The Best Interests of the Child in Intercountry Adoption*, UNICEF, 2014, <https://www.unicef-irc.org/publications/712-the-best-interests-of-the-child-in-intercountry-adoption.html>.

12 Cantwell, 2014, pp. 54, 60, 81; United Nations Committee on the Rights of the Child, ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)’, 29 May 2013, CRC/C/GC/14, para. 4.

13 Cantwell, 2014, pp. 54-60; United Nations Committee on the Rights of the Child, ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)’, 29 May 2013, CRC/C/GC/14, pp. 12-20.