Concept Note on Legislation to address issue related to Civil Aspects of International Child Removal

Background:

The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral treaty on custodial issues of children, which came into existence on 1st December, 1983. The Convention seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to ensure their prompt return. It is intended to enhance the international recognition of rights of custody and access arising in place of habitual residence, and to ensure prompt return of the child who is wrongfully removed or retained from the place of habitual residence. It seeks the return of children abducted or retained overseas, to their country of habitual residence, for the courts of that country to decide on matters of residence and contact. The objects of the Convention are:

- To secure prompt return of children wrongfully removed to or retained in any Contracting State; and
- To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

A copy of Convention on the Civil Aspect of International Child Abduction 1980 is attached at **Annexure-I**.

1. In the year 2009, Law Commission of India, headed by former Supreme Court Judge, Justice (Dr.) A.R. Lakshmanan, had submitted a report recommending the government to ratify the Hague Convention. (Law Commission of India, **Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980),** Report No. 218 (Mar. 2009). It recommended that "the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their home in India". Accordingly, the issue was examined in the

Ministry, and a draft bill (The International Child Removal and Retention Bill, 2016) was prepared. The draft bill was uploaded on the website of the Ministry of Women and Child Development in June 2016 for public comments.

2. In the meantime, the Hon'ble High Court of Punjab and Haryana in the matter of Seema Kapoor & Anr. Vs. Deepak Kapoor & Ors. Civil Revision No. 6449/2006 decided on 24th February, 2016, referred the matter to Law Commission of India to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on Child Abduction. The order of the High Court is attached as **Annexure –II.**

3. In pursuance of above orders, the Law Commission of India prepared Report No. 263. The Commission observed that "On perusal of the said Bill(draft bill , The International Child Removal and Retention Bill, 2016 prepared by the ministry) , the Law Commission is of the opinion that it requires revision, keeping in view the legislative precedents and practices followed in the drafting of Bills and to suitably harmonize its provision with the Hague Convention 1980 ". The Law Commission also recommended revision of certain clauses of the draft bill prepared by the ministry, and the same is a part of the 263rd report of the Law Commission. A copy of the Report is attached as **Annexure-III**.

4. Besides, in response of the Bill uploaded on the website of the Ministry, comments were received both against and in favour. While some individuals/ organizations supported the Bill, certain others had reservations about it on account of being in conflict with the interest of the Indian children and the women who often return to the country after marital break-up for different reasons.

5. In view of these developments, the Ministry of Women and Child Development held a National Consultation under the chairmanship of Hon'ble Minister of Women and Child Development on 3rd February 2017. After detailed deliberation it was decided to constitute a Multi member Committee to be chaired by the Head of Chandigarh Judicial

Academy, Chandigarh and to draft a suitable legislation, and to give advice whether India should be a signatory to the Hague Convention or not .

Economic liberalisation in India has ushered in the era of globalization, where the world has come to be called a global village, and India has become a part of this global village. Cross border movement of people comes easy with the global job opportunities. The instances of an Indian citizen marrying an NRI or a person of Indian origin having citizenship of a foreign nation, popularly referred to as '**trans-national marriages**' are frequent and in abundance.

However, many a times , it so happens that the spouses fall apart and the marriage breaks down irretrievably. In many such cases, the spouses return to the net of their families/ extended families in India, seeking mental comfort for themselves and their children. However, such instances often land such estranged spouse situation of being perceived as abductors of their children in light of The Hague convention provisions .

In another situation where both the spouses may be Indians, residing in India, one of the spouses may move out of India along with the child born out of such wedlock after breakdown of marriage. In such situation, the issue of getting the child back from the foreign land assumes importance, in the process of redressing the grievance of the left behind spouse. In such cases, the signatory countries of the Hague convention can avail access to the Central authorities of the other contracting states to resolve such issues. Another factor that deserves consideration, is that many a times, on account of the broken marriages, often the complaint of child abduction is alleged against each other by the estranged spouse, to settle their personal scores.

Since the matter is of immense importance and is likely to have large scale ramifications, it is desirable and in the fitness of things to put the same in public domain and invite suggestions from various quarters. The Committee may even hold meetings with different stake-holders.

Suggestions, if any, may be sent by e-mail to the Member Secretary, namely, Ms. Meenaxee Raj of the Committee at

meenaxeeraj@gmail.com upto 31.7.2017. If any information or clarification is required, the same can be sought from the Member Secretary.

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ANNEXURE –I

The Hague Convention on the Civil Aspects of International Child Abduction

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are -

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where-

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attaint the age of 16 years.

Article 5

For the purposes of this Convention -

a) `rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) `rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II - CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep other each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III - RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorites shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal of retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER VI - RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of such rights may be subject. The central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or

administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units --

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting State, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provision of this Convention which may imply such a restriction.

CHAPTER VI - FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservations shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdraw shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years form the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -

1- the signatures and ratifications, acceptances and approvals referred to in Article 37;

2- the accession referred to in Article 38;

3- the date on which the Convention enters into force in accordance with Article 43;

4- the extensions referred to in Article 39;

5- the declarations referred to in Articles 38 and 40;

6- the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawls referred to in Article 42;

7- the denunciation referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

C.M. No. 14931-CII of 2015

Seema Kapoor v. Deepak Kapoor

2016 SCC OnLine P&H 1225

In the High Court of Punjab and Haryana

(BEFORE RAJIVE BHALLA, J.)

Seema Kapoor and another

v.

Deepak Kapoor & Ors.

Mr. Anil Malhotra, Advocate, Amicus Curiae.

Mr. Prateek Gupta, Advocate, for the Union of India.

Mr. P.S. Bajwa, Addl. A.G., Punjab.

Mr. S.S. Sandhu, Spl. Prosecutor, CBI.

C.M. No. 14931-CII of 2015 in CR-6449 of 2006

Decided on February 24, 2016

RAJIVE BHALLA, J.:— A minor child, removed from the dejure custody of this Court, by misusing an interim order, dated 23.12.2006 and the failure of all attempts to restore custody of the minor to this Court, compels me to forward a reference to the Law Commission of India and the Ministry of Women and Child Development, pointing out the ease with which a child can be removed from India for want of any law on "Child removal". Despite the laudable efforts by the Amicus Curiae and the Central Bureau of Investigation, the minor is untraceable.

2. Seema Kpoor and another, filed a revision challenging an order directing them to hand over custody of the minor to the respondents. An interim order, dated 23.12.2006, was passed in favour of the petitioners, allowing them to retain custody of the minor but when Seema Kapoor was directed to produce the minor it transpired that she had fled the country and illegally taken the child to the UK. Mr. Anil Malhotra, Advocate, was appointed as Amicus Curiae to assist the Court, in 2008, and the police was directed to investigate the matter. Thereafter, the investigation was transferred to the Central Bureau of Investigation by this Court. From the replies, filed by the police and the Central Bureau of Investigation, it became apparent that the minor had been spirited away to the United Kingdom on fake passports. The stay order was eventually vacated. An FIR No. 86, dated 12.08.2008 was registered under Sections 363, 193, 209 & 120-B of the Indian Penal Code, at Polcie Station Dasuya for illegal removal of the minor child and FIR No. 119, dated 30.11.2008 was registered under Sections 420, 467, 468, 120-B and Section 12 of the Passports Act, 1967, also at Police Station Dasuya against Rajesh Kapoor and others for obtaining passports on forged documents. Both FIR's were entrusted to the CBI for investigation by this Court.

3. Further directions were issued on 06.11.2008 and the passports of Seema Kapoor and the minor child were impounded. A Special Leave Petition No. 725 of 2009, filed against order dated 14.07.2008 and 06.11.2008, was dismissed on 01.05.2009 by the Supreme Court, but the minor child was not produced. Eventually after various orders were passed by the High Court at London, the minor child was recovered. The witness statement recorded by British Police Constable, Varinder SOOCH 673XB, at

Southall Police Station, UK dated 03.12.2008 records that Seema Kapoor, the minor child and Rajesh Kapoor were apprehended on 03.12.2008, when they were trying to escape. Seema Kapoor and Rajesh Kapoor were held in custody by the British Police till 05.12.2008. The minor child was, however, placed in foster care.

4. By an affidavit dated 11.12.2008, filed before the Family Court of Justice, Family Division, London, Rajesh Kapoor asked the High Court at London not to return the minor to India. A report dated 17.03.2009, reads as follows:-

> *"76. Rajesh has indicated he will continue to support his sister in caring for Aishley. He supports Seema's account of the past and shares her thoughts on the care of Aishley. However, I am concerned that he has prioritised this over his own wife and son who remain in India, and I am not clear as to his motivation. Nor am I clear about his relationship with the father (his brother) to whom he seemed willing to gift his own child in return for Aishley."*

5. Mr. Anil Malhotra, Advocate, Amicus Curiae, had placed on record a report dated 21.03.2009, furnished to the Family Court of Justice, Family Division, London requesting that the minor and Seema Kapoor be returned to India.

6. A detailed judgment dated 21.04.2009, passed by the High Court of Justice, Family Division, London, between Deepak Kapoor and Jyoti Kapoor and the defendants i.e. Seema Kapoor, Rajesh Kapoor and Aishley Kapoor, concludes as under:-

> *"23. In conclusion, on the facts before me, I cannot order a return of Aishley to Seema's custody. This would not be in Aishley's best interests. I shall order the summary return of Aishley to India. My order will include arrangements for the return of Aishley to India and a preamble of requests by me to the Punjab and Haryana High Court.*
>
> *24. This order is to be attached to this judgment and emailed to the Amicus Curiae with a view to him moving the Punjab and Haryana High Court and placing the order on the record before Aishley is taken out of this jurisdiction. The papers in this case will be sent to the Indian Court."*

7. An appeal against the above judgment of 21.04.2009 was lodged with the Court of Appeal at London, which was decided on 23.04.2009.

8. However, on 24.04.2009, at around 9.30am, Aishley Kapoor left the school from a play ground in the company of an unidentified Asian male. Thereafter, efforts by the British police and various agencies to trace her have met with abject failure.

9. The investigation of the FIRs, which were entrusted to the Central Bureau of Investigation, Chandigarh, has confirmed that Rajesh Kapoor has fraudulently obtained a second passport without disclosing the fact that he already held passport No. A-0544912 on 08.04.1996. The Central Bureau of Investigation has verified that fraudulent passports were prepared with respect to Aishley Kapoor from the Passport Office, Jalandhar, on the basis of a fake parentage and birth certificate and that she was spirited away to London, on 22.12.2007.

10. The learned Amicus Curiae and the Central Bureau of Investigation despite their stellar efforts have been thwarted at every step on the way primarily for the reason that India is not a signatory to the Hague Convention on The Civil Aspects of International Child Abduction, 1980. This apart, India does not recognise inter-country child removal as a wrong or an offence, nor is it defined under any specific or particular law. The removal or retention of a child in breach of custody rights is a wrong under the Hague Convention but for want the Union of India acceding to the Hague Convention and or enacting a domestic law, children will continue to be spirited away from and to India, with courts and authorities standing by in despair.

11. The reference is, therefore, forwarded to the Law Commission of India, 14th Floor, Hindustan Times House, Kasturba Gandhi Marg, New Delhi-110001 and the

Ministry of Women and Child Development, Shastri Bhawan, A Wing, Dr. Rajendra Prasad Road, New Delhi-110001, to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law and for signing the Hague Convention on child abduction.

12. A report prepared by Mr. Anil Malhotra, Advocate, Amicus Curiae, appointed by this Court, setting out the law needs to be lauded and forwarded with this reference. I place on record and acknowledge the tireless efforts put in by Mr. Anil Malhotra, Advocate.

13. A copy of this order be handed over to Mr. Anil Malhotra, Advocate, Amicus Curiae and counsel for the Union of India, for communication.

14. Adjourned to 30.03.2016.

ANNEXURE-A

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
IN C.R. No. 6449 OF 2006

Seema Kapoor and Another .....Petitioners

v.

Deepak Kapoor and Another .....Respondents

REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURAIE

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THE LAW IN RELATION TO THE CUSTODY OF CHILDREN AND CHILD REMOVAL IN INDIA

DATED: 20 January 2016 (ANIL MALHOTRA) ADVOCATE & AMICUS CURAIE

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
IN C.R. No. 6449 OF 2006

Seema Kapoor and Another .....Petitioners

v.

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REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURAIE

RESPECTFULLY SHOWETH:

THE LAW IN RELATION TO THE CUSTODY OF CHILDREN AND CHILD REMOVAL IN INDIA;

a. INTRODUCTION

15. Intercontinental abduction of children by parents is now a contemporary legal issue which baffles and mesmerizes different legal systems of nations whose inter-se conflicting positions prevents the return of children to the country of their habitual residence. Solace can be found inter-se between countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction, 1980. But what happens to those aggrieved parents whose countries are not a part of this global conglomerate of like-minded nations which honor each other's laws. No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimized by legal systems.

16. The world is a far smaller place now than it was a decade ago. Inter country and inter continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos, all have positive traits but are fraught with a new set of risks for the children caught up in such cross border situations. Caught in a cross fire of broken relationships, with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over 1.2 billion Indians, about 30 million are non-resident Indians living across 180 countries, who, by migrating to different jurisdictions, have generated a new crop of spouse related inter parental child removal and international family disputes.

b. DEFINITION OF CHILD REMOVAL

17. Families with connections to more than one country, face unique problems if their relationships break down. The human reaction in this already difficult time is often to return to one's family and country of origin, with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another, may, whether inadvertently or not, be committing child removal or inter parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of a person, with whom the child normally lives.

18. A broader definition encompasses the removal of a child from his/her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction, signed at the Hague on October 25, 1980 with over 90 contracting countries today as parties from all regions of the globe, however, defines removal or detention wrongful in the following words:

> *"Article 3*
>
> *The removal or the retention of a child is to be considered wrongful where:*
>
> *(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or*

retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

19. Child removal does not find any specific definition in any Indian codified law and since India is not a signatory to The Hague Convention, there is no parallel Indian legislation enacted to give the force of law to The Hague Convention. Hence, in India, all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and/or foreign origin.

c. GLOBAL SOLUTIONS AND REMEDIES

20. The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and now has about 93 contracting nations to it. The objectives of the Convention are:

- To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. It operates as an effective deterrent, providing real and practical means to restore the status quo prior to the abduction, it also prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both the parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of The Hague Conference on Private International Law, at The Hague, Netherlands, renders a superb service by monitoring and assisting the development of services to support effective implementation and consistent operation of The Hague Conventions and review their operations. Since there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post convention services. In terms of The Hague Convention on Civil Aspects of international Child Abduction, the Secretariat has published in three parts, guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which are all approved by contracting States. The Secretariat thus helps to create an international medium of Consenting States who contract with each other to return children who are wrongfully removed.

d. WHY SHOULD INDIA BE INTERESTED IN JOINING THE 1980 CONVENTION.

21. The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on the Child protection policies in much of the world. In a civilised society where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems at the family law front are largely unresolved. Times have changed, but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a workup. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

22. *Firstly,* India is no longer impervious to international inter parental child removal. In the absence of the Convention principles, the Indian Courts determine the Child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of

the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The over powering parent wins to establish his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

23. *Secondly,* such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of The Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's habitual residence and so would be the Court of that country. In India, determination of rights, as per Indian law, of a foreign child removed to India by an offending parent may often be bitterly contested and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

24. *Thirdly,* the fact that India is not a party to The Hague Convention may have a negative influence on a foreign judge, who is deciding whether a child living with his/her parent in a foreign country, should be permitted to spend time in India to enjoy contact with his/her Indian parent and extended family. Without the guarantee afforded by The Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle; membership of The Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 93 States that are parties to the Convention.

25. *Fourthly*, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

26. It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above. However, till date, India has not signed the Hague Convention on Civil Aspects of International Child Abduction, 1980.

e. RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

27. As far as the forum for securing the return of the children is concerned, it is important to reiterate that India is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Article 226 of the Constitution of India, a parent whose child has been abducted can approach the State High Court to issue a writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a Habeas Corpus Petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Article 32 of the Constitution of India.

28. In so far relating to the relevant legislation, the aggrieved parent (if Hindus by religion) could well seek recourse to the provisions of the Hindu Minority and Guardianship Act, 1956 (hereafter 'HMGA 1956'), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act,

1890 (GWA). The HMGA 1956, like the Hindu Marriage Act 1955 (HMA), has an extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir.

29. In so far the law relating to guardianship and custody is concerned, the Guardians and Wards Act, 1890 (GWA) is an Act pertaining to the appointment of guardians and wards, as also for seeking custody of children. It is available to all persons, free of religion or personal laws and can also be invoked by foreigners. The provisions of GWA are independent of personal law and prescribe the procedure, criteria and other details of appointment of guardians as also factors to determine custody issues of children. A guardianship and custody petition under the GWA is also an alternative remedy sought by aggrieved parents in cases of both intra and inter-country parental child removal. This is because there is no other statutory remedy prescribed under the Indian law for seeking sole custody of a child by an aggrieved parent seeking exclusion of the other parent's parental rights. Often, the Supreme Court or the High Court concerned remands the matters to a Guardian Judge or a Family Court or a Trial Court when disputed questions of facts are involved requiring evidence to be led, which is not possible in a writ jurisdiction under Articles 32 or 226 of the Indian Constitution before the Supreme Court or a High Court. Hence, inter-parent, inter-country child custody matters may land up before a Guardian Judge in a Family Court or Trial Court, if the High Court or the Supreme Court in writ jurisdiction is unable to determine the factual aspects requiring evidence to be led by the parties. Therefore, the inter-parental child custody dispute may be remanded to the Guardian Judge in a Family Court or a Trial Court in such a situation, even in cases of inter-country child removal where, despite a foreign court order, summary removal is not directed by the High Court or the Supreme Court.

30. However, precedents of Courts in India indicate that the controlling consideration governing the custody of the children is their welfare and not the rights of the parents litigating before the Indian Court in child custody cases.

f. INDIA AND THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980

31. As of now, India is not a party to The Hague Convention on Civil Aspects of International Child Abduction 1980. Other than the statutory provisions of law quoted above, in which matters of child custody are agitated in different courts in different proceedings, the principles of The Hague Convention cannot be enforced on Indian Courts. Different recent decisions indicate a trend that Indian Courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign Court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign Court orders of child custody are no longer mechanically enforced and normally the Courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign Court custody order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

32. India, not being a signatory to The Hague Convention of 1980 on the Civil Aspects of International Child Abduction, questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

g. THE POSITION OF INDIAN LAW ON CHILD ABDUCTION

33. India is a vast territorial jurisdiction comprising of 29 States and 7 Union Territories spread over 3.28 million sq. kilometers. Every State in India has an individual High Court which governs the internal District Courts in the particular

territory of that State. The High Court is free to frame its procedural rules regarding practices and rules to be followed within its jurisdiction. Depending on the location of a Family Court or Trial Court i.e. Guardian Judge, the practices in deciding child custody disputes may vary. Hence, the time frame of deciding an inter-parental inter-country child removal may vary as per local rules, practices and procedures.

34. Even though India has enacted a Family Courts Act, 1984, at the discretion of every Individual State to constitute a Family Court in its Districts in the State, most States in India do not have Family Courts. Hence, majority of the jurisdictions in States in India do not have Family Courts or Specialist Judges trained to handle only Family Court matters. Therefore, a normal Civil Judge in the Trial Court may, in addition to his other duties and judicial functions, also be a Guardian Judge under the Guardian and Wards Act, 1890, upon being so notified and designated by the High Court. Consequently, when a matter is before an ordinary Civil Judge in the Trial Court in his role as a Guardian Judge, the time frame within which he will be able to decide a child custody dispute is impossible to predict since his pre-occupation with other nature of disputes on his board may vary. Therefore, by no stretch of imagination, any time frame can be predicted. Even when the Judge presiding heads a Family Court, a lot may depend on the pre-occupation of the Court with other matters before the Family Court and the workload of the Family Court which again makes it impossible to predict a time frame.

35. The High Courts and the Supreme Court of India entertain petitions for issuance of a writ of Habeas Corpus for securing the custody of the minor at the behest of the parent who lands on Indian soil alleging violation of a foreign Court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective speedy solution as a redressal for violation of fundamental rights.

36. Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent, seeking to enforce a foreign Court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past over three decades.

37. That if the matter is taken up in a Habeas Corpus writ petition in the High Court or the Supreme Court, it is the pure discretion of that) Court to hold a summary enquiry or a detailed investigation in that particular case. India follows a procedure of detailed bulky written pleadings followed by hearing arguments at length. Depending on the pre-occupation of a Bench with other matters and the workload of the Court, it may be next to impossible to define a time frame for deciding a child custody dispute. Even at the High Court or the Supreme Court, there are no dedicated Family Judges or any Family Division. Therefore, depending on the entire roster of the Court and its pre-occupation with other matters, every individual Bench will take up an inter-parental child custody dispute depending on other important matters before the Court. This again makes the whole situation unpredictable in point of identifying a time frame.

38. That the issue of effectiveness of the procedure is again a very open ended answer. If the petition before the Guardian Judge is favorably decided in a positive decision favoring a foreign aggrieved parent, the matter may not rest there. For enforcing the foreign court order directing return of a child, the aggrieved foreign parent may still have to invoke the writ jurisdiction of the High Court or the Supreme Court seeking a direction for the return of the child. Meanwhile, if the decision of the Guardian Judge is appealed against by the abducting parent, the matter may be further delayed. Ultimately as and when a decision comes by the High Court, the matter may be appealed against in the Supreme Court. This process may take time

and thus the effectiveness of the procedure is open ended till the last appeal is exhausted in the Supreme Court.

h. CONCLUSION OF CASE LAW ANALYSIS

39. An analysis of the Indian case law reveals that until 1997, Indian Courts whenever approached by an aggrieved parent, invariably exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights. However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court shall be only one consideration while determining the matters on merits in which the welfare of the child will be of paramount importance. Thereafter, child removal and custody matters now get decided on merits in India and every individual decision is based on the facts of the case and there is no set pattern of decisions consistently being followed.

40. However, a different trend set by some of the recent decisions above indicates that aggrieved parents who invoke the jurisdiction of the High Court in a writ of Habeas Corpus are not non-suited simply for the reason that the determination of the best interest of the child can be done only by an adjudicatory process in the Family Court or before the Guardian Judge. The Habeas Corpus remedy to enforce the child custody order of a foreign court is proving to be effective and result oriented. These recent decisions also indicate a trend in respecting foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of such foreign court decisions.

41. Generally, the position varies on the facts and circumstances of each case and no assurance or guarantee can be given that the children will be returned back from India on the strength of a foreign court Order since every matter is determined and decided on its independent merits. This is regardless of the fact that recent Supreme Court decisions have handed down general principles to be observed in inter-parental child removal matters of foreign jurisdictions.

42. Since, inter-country inter-parental child removal is not defined by any statute and is not considered an offence under any existing codified law operating in India, the tendency to go into the merits of the case even on jurisdictional issues, tends to cause delay, prejudice the rights of an aggrieved parent and prevent summary return of a child to its home in a foreign jurisdiction.

43. Since, there is no statute in India defining, recognising or identifying inter-parental child removal, especially in the international context, the Indian Courts over a passage of time have been adjudicating matters on the basis of individual facts and circumstances to decide as to what relief should be granted to the parties. Hence, there is a variation of decisions and there is no consistent view point. The welfare of the child principle being the paramount consideration, there is a tendency among Indian Courts to digress from a consistent approach and accordingly, precedents may be distinguished or differed depending on the factual matrix and circumstances, which may differ from case to case. Thus, the jurisprudence in child abduction law varies.

i. POSITION OF FOREIGN COURT ORDERS IN INDIA

44. The principles governing the validity of foreign court orders are laid down in section 13 of the Indian Code of Civil Procedure, 1908 (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in Section 13, CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

45. It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the

children being of paramount importance.

46. Section 14 of the CPC talks presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

j. NO PROVISION FOR MIRROR ORDERS IN INDIA

47. In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known to the English law, but not to the Indian legal system. Hence, it is not possible to approach a Court in India for issuing a mirror order on the strength of a foreign Court Order whereby a mechanical return of children can be sought back to the overseas jurisdiction if the foreign court order is violated in India. Accordingly, an independent judicial remedy will have to be invoked in a Court of competent jurisdiction in India for a fresh adjudication and determination on the basis of the principle of the welfare of the child and the best interest rule. The foreign court order granting custody or visitation will form only one consideration before the Indian Court to determine rights of parties. The independent opinion of the children concerned too will be heard in such a process. However, simply seeking return of children on the strength of a foreign court order is not possible. There is no provision in Indian law for mirror orders to be passed.

48. k. A POSSIBLE SOLUTION

49. With the increasing number of non-resident Indians abroad and multiple problems arising, leading to family conflicts, inter parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to The Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law, some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Till such time, India becomes a part of the Hague Convention on Inter-parental Child Removal and enacts an internal legislation to give effect to the Hague Convention by creating a Central Authority or other coordinating body, the inconsistency in judicial decisions will remain. The Indian Courts decide individual matters on the facts and circumstances of every case and are not guided by any statutory or enabling provisions, which interpreted may provide uniformity and consistency. Consequently, issues of custody, removal, inter-parental conflicts and related aspects cannot find any uniform path of judicial interpretation.

l. GENERAL CONCLUSION

50. With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter parental child removal to and from India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions.

It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Let us not delay the path to resolution of these disputes. Removed children cannot be allowed to live on a no man's island.

51. In the light of the above detailed position of law on inter-parental child removal issues in India, the following two conclusions can be said to emerge. They are identified and stipulated as follows:

1. Firstly, India not being a signatory to the Hague Convention on Civil Aspects of International Child Abduction, Courts in India do not take judicial notice of the definition of "Child Removal" which finds mention in the Hague Convention. Inter -Parental Child Removal is not defined as an offence under any Civil or Criminal law in India. Hence, to establish it as a wrong within the meaning of The Hague Convention is extremely difficult. Consequently, deprivation of parental rights on the strength of a foreign court order from a convention country will not find an easy interpretation. Such parental rights will have to be established and proved afresh to step on the threshold of violations resulting thereupon. Again, these may depend on an independent assessment of the Indian Courts on the best interest and the welfare of the child principle on the basis of evidence before the Court.
2. Secondly, the practical difficulties in seeking implementation of a foreign court order if the children are not returned from India, may vary in different jurisdictions in India. To start with, the choice of the petition (Habeas Corpus under the Constitution of India or a Guardianship petition under the Guardian and Wards Act), the time frame for its decision, delays in hearing of the matter, time to be consumed in establishing evidence, and ultimately remedies of further appeals besides executing the Indian Court order, are all time consuming factors. It may be impossible to lay down any straight jacket formula of prescribing a defined time frame for an expeditious decision in seeking the return of the child from India. Further, if the matter is appealed to a Court of superior jurisdiction in India, it may again set off a final conclusion in the matter. Also, seeking implementation of visitation rights may require frequent visits to India since it will be practically impossible to seek temporary return to the foreign jurisdiction from India as long as the matter remains pending final decision before an Indian Court. The legal battles in India may thus be cumbersome, time consuming and requiring procedural formalities.

52. Hence, in the totality of the aforesaid situation, the need for India to have a codified and statutory law on the subject of inter-country, inter-parental child removal is the dire need of the hour. Despite the recommendation of the Law Commission of India in Report no. 218 of March 2009, that India should become a signatory to the Hague Convention to resolve the problem of inter-country child removal, the same has not happened and no domestic law defines or governs this problem till date. The deadlock continues and children suffer in silence in inter-country parental conflicts.

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GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

Report No.263

The Protection of Children (Inter-Country Removal and Retention) Bill, 2016

October 2016

डा० न्यायमूर्ति बलबीर सिंह चौहान
पूर्व न्यायधीश सर्वोच्च न्यायालय
अध्यक्ष
भारत का विधि आयोग
भारत सरकार
हिन्दुस्तान टाइम्स हाउस
कस्तूरबा गान्धी मार्ग, नई दिल्ली–110 001
दूरभाष : 23736758, फैक्स : 23355741

सत्यमेव जयते

Dr. Justice B.S. Chauhan
Former Judge Supreme Court of India
Chairman
Law Commission of India
Government of India
Hindustan Times House
K.G. Marg, New Delhi-110 001
Telephone : 23736758, Fax : 23355741

D.O.No.6(3)292/2016-LC(LS)

17th October, 2016

Shri Ravi Shankar Prasad Ji,

The protection of children is, nowadays, recognized as a critical issue of national importance. The principle of 'best interest of the child' can be found in the provisions of the Convention on the Rights of the Child, 1989 which came into force on 2nd September, 1990 and the Preamble and object of the Hague Convention, 1980. In brief, the desire to protect children must be based upon the true interpretation of their best interests.

The High Court of Punjab and Haryana, in **Seema Kapoor & Anr. v. Deepak Kapoor & Ors.** CR No.6449/2006 vide order dated 24.02.2016, referred the matter to the Law Commission of India *"to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on child abduction."*

The Law Commission of India examined the issues involved and found that the Commission had already examined the said issues and submitted the 218th Report titled **"Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)"** on 30th March 2009, advising the Government of India to sign the Hague Convention on the Civil Aspects of International Child Abduction, 1980, which came into force on 1st December, 1983. While examining these issues, the Law Commission found that the Government of India has already prepared a draft of the **"Civil Aspects of International Child Abduction Bill, 2016"**, which attempted to bring the Bill in consonance with the Hague Convention, 1980 and has been put on the website of the Ministry of Women and Child Development.

Appreciating the importance of the matter and the concerns raised from time to time, the Law Commission decided to examine the matter meticulously and examined the various provisions of the said Bill thoroughly. On perusal of the said Bill, the Law Commission is of the opinion that it requires revision keeping in view the Legislative precedents

and practices followed in the drafting of Bills and to suitably harmonize its provisions with the Hague Convention 1980.

The Law Commission of India has prepared a comparative statement showing the provisions of the said Bill, placed on the website of the Ministry of Women and Child Development, and the revised Bill recommended by the Law Commission indicating the changes/modifications made by the Commission. The text of "THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016" as recommended by the Law Commission is attached as Annexure-II. I believe this 263rd Report of the Law Commission addresses the concerns relating to children and their parents and makes an attempt to set the stage for India to sign the Hague Convention, 1980.

I am enclosing a copy of the Report number 263rd for consideration by the Government.

The Commission acknowledges the contribution made by Ms. Aditi Sawant, Consultant to the Commission in preparation of the Report.

With warmest regards.

Yours sincerely,

(Dr. Justice B.S. Chauhan)

Shri Ravi Shankar Prasad
Hon'ble Minister for Law & Justice
Shastri Bhawan,
New Delhi.

Report No. 263

The Protection of Children (Inter-Country Removal and Retention) Bill, 2016

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1. BACKGROUND

1.1 The High Court of Punjab and Haryana, in **Seema Kapoor & Anr. v. Deepak Kapoor & Ors.**, CR No.6449/2006 *vide* order dated 24.02.2016, referred the matter to the Law Commission of India "*to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on child abduction.*"

1.2 After receiving this reference, the Law Commission examined the issues involved and found that the Law Commission had already examined the said issues and submitted the 218th Report titled "**Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)**" on 30 March 2009, advising the Government of India to sign the Hague Convention on the Civil Aspects of International Child Abduction, 1980, which came into force on 1st December, 1983 (hereinafter referred to as Hague Convention, 1980).

1.3 During the examination of the issues, the Commission also found that the Government of India has already prepared a draft of the **"Civil Aspects of International Child Abduction Bill, 2016"** (hereinafter referred to as the Bill), which is broadly in consonance and conformity with the Hague Convention, 1980. The said Bill has been put on the website of Ministry of Women and Child Development so that stakeholders may file their comments or make suggestions for improving the same.

2. INTRODUCTION

2.1 The world has become a global village. There is an increased movement of people from all cultures and backgrounds, due to the globalized job market. Thus, people from different countries and cultural backgrounds have optimistically created family units. More than three crores of Indians live in the foreign countries, having cross border matrimonial relationships. When such a kind of diverse family unit breaks down, children (sometimes babies) suffer, as they are dragged into international legal battle between their parents. Inter-spousal child removal can be termed as most unfortunate as the children are abducted by their own parents to India or to other foreign jurisdiction in violation of the interim/final orders of the *competent* courts or in violation of parental rights of the aggrieved parent. In such an eventuality, the child is taken to a State with a different legal system, culture and language. The child loses contact with the other parent and is transplanted in an entirely different society having different traditions and norms of life.

2.2 The preamble and object of the Hague Convention, 1980 and the International Child Abduction Bill, invokes the principle of 'best interests of the child'. In other words, the object of the aforementioned laws in obtaining the return of the child must be subordinate when considered against the child's interest. The desire to protect children must be based upon a true interpretation of their best interests.

2.3 The principle of 'best interests of the child' can also be found in the provisions of the Convention on the Rights of the Child, 1989, which came into force on 2nd September 1990. India ratified the Convention on 11th December, 1992. The Juvenile Justice (Care and Protection of Children) Act, 2000, (as re-enacted by Act 2 of 2016) defines the term 'best interests of the child' in clause (9) of section 2 as under:

> ' *"best interest of child" means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and*

needs, identity, social well-being and physical, emotional and intellectual development.'.

3. SOME JUDGEMENTS OF THE SUPREME COURT OF INDIA

3.1 In **re: McGrath (Infants),** [1893] 1 Ch 143 Lindley LJ said:

> *"The dominant matter for the consideration or the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."*

3.2 These words are relevant even a century later, and have found place in various Indian judicial pronouncements. The Courts referred to the Convention on the Rights of the Child, 1989 and emphasized the importance of the principle of best interests of the child in **Laxmi Kant Pandey v. Union of India**, *AIR 1984 SC 469*; **Gaurav Jain V. Union of India**, *AIR 1997 SC 2021*; and **Nil Ratan Kundu v. Abhijit Kundu**, *(2008) 9 SCC 413*.

3.3 The Supreme Court in **Dr. V. Ravi Chandran v. Union of India**, *(2010) 1 SCC 174*; and **Arathi Bandi v. Bandi Jagadrakshaka Rao**, *AIR 2014 SC 918*, directed to return the respective children to the country of their 'habitual residence' on the principle of *'comity of courts'* principle for the determination of their best interests and welfare which is the prime consideration.

3.4 In **Roxann Sharma v. Arun Sharma**, *AIR 2015 SC 2232,* the Apex Court deprecated the practice of 'forum shopping' requiring the entitlement of custody rights of the other spouse to be judicially determined. The Court observed that:

"...the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration".

3.5 In such cases, the Court exercises its *parens patriae* jurisdiction to decide the best interests and welfare of the child. In view thereof, the issue of conflicting interests of the contesting parents remain insignificant. The Court exercise this extraordinary jurisdiction *de hors* the statutory right of the parties.

3.6 In **Ruchi Majoo v. Sanjeev Majoo**, *AIR 2011 SC 1952*, the Supreme Court emphasised that in case the child is not 'ordinarily resident' in the territorial limits of the Court, the Court must examine the matter independently.

3.7 Recently, the Supreme Court succinctly reiterated all principles, the Courts have applied over the course of years to judge cases of international parental abduction, in the case of **Surya Vadanan v. State of Tamil Nadu,** *AIR 2015 SC 2243*. The Court stated that:

- principle of 'comity of courts and nations' must be respected and the principle of 'best interest and welfare of the child' should apply;
- rule of 'comity of courts' should not be jettisoned except for compelling special reasons to be recorded in writing by a domestic court;
- interlocutory orders of foreign courts of competent jurisdiction regarding child custody must be respected by domestic courts; and
- an elaborate or summary enquiry by local courts when there is a pre-existing order of a competent foreign court must be based on reasons and should not be ordered as routine when a local court is seized of a child custody litigation.

3.8 To state it simply, the welfare of the child must have primary importance and secondly, the 'principle of comity of courts' – a principle of 'self –restraint', must be considered.

3.9 In cases, where the jurisdiction of the foreign court in not in doubt, the "first strike" principle could be applicable, namely, whichever court seized the matter first, ought to have prerogative of jurisdiction in adjudicating the welfare of the child. Further, whenever the matter is pending in a foreign court and interim order has been passed by the said court, the Indian court should not proceed with the matter.

3.10 It has repeatedly been held by the Courts that repatriation of the child to the foreign land should not (a) cause any moral, physical, social, cultural or psychological harm to the child; (b) cause any legal harm to the parent with whom the child is in India; (c) violate the fundamental principles of human rights and freedoms of the receiving country, i.e., where the child is being held and; (d) considering the child welfare principle, due importance must be given to the primary care-giver of the child.

3.11 More so, in such matters, it is of primary importance to decide whether the foreign court has jurisdiction over the child in question if the child is 'ordinarily resident' in the foreign court's territorial jurisdiction, and, then the order of the foreign court must be given due weight and respect. No litigant can be permitted to defy and decline compliance to an interim or final order of a court merely, because one of the parents is of the opinion that the order is incorrect. (*vide* **Surya Vandanan v. State of Tamil Nadu**)

4. JUDGEMENTS OF SUPREME COURTS OF CANADA, UNITED KINGDOM AND UNITED STATES OF AMERICA

4.1 In **Thomson v. Thomson,** *(1994) 3 SCR 551*, the Supreme Court of Canada while dealing with the issue as what should be the magnitude of physical, moral or cultural harm, which may justify refusal of the order of return of the child to his or her 'habitual residence', explained that harm must be "to a degree that also amounts to intolerable situation". It must be a "weighty" risk of "substantial" psychological harm. "Something greater than that would normally be expected on taking a child away from one parent and passing him to another."

4.2 **In the matter of S (a Child)**, *(2012) UKSC 10,* the UK Supreme Court referred to its own judgment in **Re E (Children) (Abduction: Custody Appeal)**,*(2011) UKSC 27*, and observed that a defence under Article 13 (b) of the Hague Convention, 1980 could be founded upon the anxieties of a parent about a return with the child to the state of 'habitual residence', which were not based upon objective risk to her, but nevertheless of such intensity as to be likely to destabilise the parenting of that child to the point at which the child's situation would become intolerable.

4.3 The United States Supreme Court in **Lozano v. Montoya Alvarez,** *34 S.Ct. 1224 (2014)*, a Hague Convention, 1980, case in US, relating to domestic violence, recognized the impact of domestic violence on the child, observing:

> "*the return of the child may be refused if doing so would contravene fundamental principles …… relating to the protection of human rights and fundamental freedom.*"

5. DOMESTIC VIOLENCE IMPACTING CHILDREN

5.1 In case, a woman suffers from domestic violence and runs away along with the child from the place of 'habitual residence', though violence may not be against the child, it may have very serious impact and repercussions on the child. Thus, in such a case, the Court has to consider whether repatriation of the child would cause any moral, physical, social, cultural or psychological harm to the child or any other legal harm to the mother, with whom the child is in India or violates fundamental rights or human rights, as provided in the Hague Convention, 1980, itself.

5.2 Unfortunately, women involved in cross-jurisdictional divorces, 'holiday marriages' or 'limping marriages' have to face additional challenges in the custody battle, which also relate to jurisdiction, access to judicial recourse and resources. This may be viewed as a bias against the interests of women. The woman must not be put in a situation where she has to make the impossible choice between her children and putting up with abusive relationship in a foreign country. This kind of discord between the husband and wife also creates apprehension as to risk to the lives of the wife and her family members at the hands of the husband or others, and many a times, the party seeks police protection and the help of civil society/social workers.

5.3 Interestingly, the statistics, of particular import to the developing countries, where the conditions of women battling for divorce is deplorable, shows that globally, 68 per cent of the taking parents were mothers; 85 per cent of these respondent mothers were the primary caregivers of their children and 54 per cent had gone home to a country in which they held citizenship-even if that was not their 'habitual residence'.

6. SALIENT FEATURES OF THE HAGUE CONVENTION, 1980

6.1 Essentially, the Hague Convention, 1980 seeks to achieve two objectives namely—to protect a child from the harmful effect of such removal; and to secure prompt return and re-integration of the child in an environment of his or her 'habitual residence'; and both these objectives correspond to the specific idea as to what constitutes the 'best interest of the child'.

6.2 Salient features of the Hague Convention, 1980 are:

- It ensures rapid procedure for the return of the child wrongly removed to or retained in contracting party to its country of 'habitual residence';
- It ensures that rights of custody and of access under the law of one of the Contracting States are effectively respected in another Contracting State;
- It re-establishes *status quo ante* by returning the child to the country of 'habitual residence';
- A return order is not a final determination of the issue of custody, rather, it provides for return of the child to the jurisdiction which is most appropriate to determine the issues of custody and access; and
- Each country that has signed the Convention must have established a Central Authority, which processes such applications. The Convention lays down certain roles and functions of the Central Authority. This Authority must, *inter alia,* help locate children; encourage amicable solutions and; help process requests for return of children.

7. INITIATIVES OF THE GOVERNMENT OF INDIA

7.1 The recently drafted Indian Bill on International Parental Abduction is broadly in conformity with the Hague Convention, 1980 and mirrors its provisions. India is currently not a signatory to the Hague Convention, 1980. The Bill is an attempt to set the stage for India to sign the Convention.

- The Bill provides for the constitution of a Central Authority.
- A decision under the Hague Convention, 1980 concerning the return of the child is not a final determination on merits of the issue of custody.
- It outlines the role of the Central authorities with regard to a child, who is removed *to India, and from India to another Contracting State* of the Hague Convention, 1980.
- It lays down procedure for securing the return of a child and provides for the Central Authority to apply to the High Court for restoring custody of the child.
- It empowers the Court to deny custody on certain grounds. It allows the Courts in India to recognise decisions of State of the 'habitual residence' of the child. It also states that the Indian Court that wants to disregard the interim/final order of the foreign court must record reasons for the same.

7.2 The Bill empowers Indian Courts to seek a decision from Central Authorities of the Contracting State from which the child was removed.

7.3 So far as the Indian law as reflected in the provision of the Guardians and Wards Act, 1890 (8 of 1890) are concerned, the issue of custody of a child, remains always open and does not attain finality as it is always being considered to be temporary order made in existing circumstances. With the changed conditions and circumstances,

including the passage of time, the Court may vary such an order, if, it is so necessary in the interests and welfare of the child. The doctrines of '*estoppel'* and *'res judicata'* have no application in such a case (vide **Rosy Jacob v. Jacob A. Chakramakkal**, *AIR 1973 SC 2090*; and **Dr. Ashish Ranjan v. Dr. Anupama Tandon**, *(2010) 14 SCC 274*;)

8. CHILD ABDUCTION DISTINGUISHED FROM INTER-COUNTRY REMOVAL OF CHILDREN

8.1 Child abduction is dealt with stringently by most countries; but 'abduction' of the child across borders by his or her own parent is governed by a rather arcane corpus of laws. The heterogeneity of rules applicable to cases traditionally qualified as "child abduction cases" at both the national and the supranational level, add to the complexity of the legal treatment of "parental child abductions".

8.2 'Abduction' is explained under section 362 of the Indian Penal Code, 1860 as an act compelling or taking away a person by deceitful means inducing him to go from any place. Abduction as such, is not simply an offence rather is an auxiliary act not punishable in itself, but when it is accompanied by an intention to commit another offence, it *per se* becomes punishable as an offence. In the case of 'parental abduction', these so-called 'abductors', are most of the times, loving parents. The child is taken away by a parent to any other place because of the fear of losing his/her custody i.e. such an abduction, as stated earlier, is out of overwhelming love and affection and not to harm the child or achieve any other ulterior purpose. Therefore, the Hague Convention, 1980, although uses the word 'abduction', it is not intended as in an ordinary case of abduction under criminal jurisprudence. As such, the word 'abduction' within the Hague Convention, 1980, is to be considered as short hand for a more appropriate terminology, "wrongful removal or retention" which appears throughout in the text of the Hague Convention, 1980. Hence, at the outset, the Law Commission is of the Opinion that the word 'abduction' in the current Bill, be dispensed with.

8.3 Be that as it may, wrongful removal and retention not only causes serious prejudice to the other parent, but may have a serious impact on the over-all development of the child. More so, such wrongful removal and retention may be in utter disregard or in violation of the

order of the competent court regarding custody of the child. In this backdrop, many countries have made such wrongful removal and retention a punishable offence. In United Kingdom, the **Child Abduction Act, 1984** has very stringent provisions making such wrongful removal and retention, as an offence punishable with the imprisonment up to seven years.

9. RECOMMENDATIONS

9.1 As the Law Commission of India has already submitted the Report and the Ministry of Women and Child Development has also drafted the Bill, we are of the considered opinion that submission of detailed report would not serve any purpose. However, on perusal of the draft Bill, the Law Commission is of the opinion that it requires revision keeping in view the foregoing discussions, the legislative precedents and practices followed in the drafting of Bills, and to suitably harmonise its provisions with the Hague Convention, 1980. A Comparative Statement showing the provisions of the draft Bill placed on the website of the Ministry of Women and Child Development and the Revised Bill recommended by the Law Commission of India indicating the changes/modifications made by the Law Commission is attached as **Annexure-I**. The text of the Protection of Children (Inter-Country Removal and Retention) Bill, 2016 as recommended by the Law Commission of India, is attached as **Annexure-II**.

[Justice Dr. B.S. Chauhan]
Chairman

[Justice Ravi R. Tripathi]
Member

[Prof. (Dr.) S. Sivakumar]
Member

[Dr. Sanjay Singh]
Member-Secretary

[Dr. Suresh Chandra]
Ex-officio Member

[Dr. G. Narayana Raju]
Ex-officio Member

Annexure-I

Comparative Statement showing the provisions of the draft Bill placed on the website of Ministry of Women and Child Development (WCD) and the Revised Bill recommended by the Law Commission of India

Bill prepared by WCD	Revised Bill
THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016	**THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016**
A BILL	A Bill
to secure the prompt return of children wrongfully removed to or retained in any Contracting State, to ensure that the rights of custody and access under the law of one Contracting State are respected in other Contracting States, and to establish a Central Authority and for matters connected therewith or incidental thereto.	to **ensure** the prompt return of children wrongfully removed to, or retained in any Contracting State, to ensure that the rights of custody and access under the law of one of the Contracting **States** are **effectively** respected in **another** Contracting States, and to establish a Central Authority, **inter alia, for the purposes of providing assistance to help locate such children, encourage amicable solutions and help process of requests for return of children** and for matters connected therewith or incidental thereto.
WHEREAS the interests of children are of paramount importance in matters relating to their custody;	*WHEREAS* the **best** interests of children are of paramount importance in matters relating to their custody **in view of the Convention on the Rights of the Child, 1989** which came into force on 2nd September, 1990;
AND WHEREAS India is a party to the Hague Convention on the Civil Aspects of International Child Abduction;	
AND WHEREAS the said Convention entered into force on the 1st December, 1983;	*AND WHEREAS* the Hague Convention on the Civil Aspects of International Child Abduction, 1980, **came into force on the 1st December, 1983;**
And WHEREAS the said Convention has for its main objective, to secure the prompt return of children wrongfully removed or retained in any contracting state, to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states;	*AND WHEREAS* **it would be necessary to implement the said Convention in so far as they relate to an expeditious return of a child who has been wrongfully removed or retained in contracting party to its country of his or her habitual residence in violation of the custody rights or access rights;**
AND WHEREAS it is considered necessary to provide for the prompt return of children wrongfully removed or retained in a contracting	

state, and to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states, and thereby to give effect to the provisions of the said Convention; Be it enacted by Parliament in the sixty-fifth year of the Republic of India as follows:-	Be it enacted by Parliament in the (_____) year of the Republic of India as follows:-
Chapter I **Preliminary**	**CHAPTER I** **Preliminary**
1. (1) This Bill may be called the Civil Aspects of International Child Abduction Bill, 2016 (2) It extends to the whole of India (except Jammu and Kashmir) (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: Provided that different dates may be appointed for different provisions of this Act and any reference in such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.	**1. Short title, extent, application and commencement.** (1) This **Act** may be called **the Protection of Children (Inter-Country Removal and Retention) Act, 2016**. (2) It extends to the whole of India except **the State of** Jammu and Kashmir. **(3) The provisions of this Act shall apply to every child who has not completed sixteenth year of age and has either wrongfully removed to, or retained in India, irrespective of his or her nationality, religion, or status in India.** (4) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: *Provided* that different dates may be appointed for different provisions of this Act and any reference in **any** such provision to the commencement of this Act shall be construed as a reference to the **commencement** of that provision.
2. In this Act, unless the context otherwise requires,- (a) "Applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention; (b) "Central Authority" means the Central Authority established under Section 4; (c) "Contracting State" means a state signatory to the Hague Convention on the Civil Aspects of International Child Abduction;	**2. Definitions** In this Act, unless the context otherwise requires,— (a) "applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other **State** party to the Convention for the return of a child alleged to have been wrongfully removed or retained, or for arrangements for organising or securing the effective exercise of rights of access pursuant to the **said** Convention; (b) "Central Authority" means the Central Authority **constituted under section 4**; (c) "Contracting State" means a State signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on 25th October, 1980, as set out in the First Schedule; (e) "Chairperson" means the Chairperson of the Central Authority; (f) "Habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred. (g) "Member" means a member of the Central Authority and includes the Chairperson, if any; (h) "prescribed" means prescribed by rules made under this Act; (i) "Right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence; (j) "Right of custody" in relation to a child includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.	(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on **the** 25th October, 1980, as set out in the Schedule; (e) "Chairperson" means the Chairperson of the Central Authority; (f) "habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one **of the** parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, **whichever occurred last**. (g) "member" means a member of the Central Authority and includes the Chairperson; (h) "prescribed" means prescribed by rules made under this Act; (i) "right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence; (j) "right of custody" in relation to a child includes the **right to take care of the person of the child, to make long-term decisions about child's development and well-being and**, in particular, to determine the child's place of residence.
3. (1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered wrongful where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or would have been so exercised, but for the removal or retention. (2) The rights of custody mentioned in Sub-section (1)above, may arise in particular:	**3. Wrongful removal or retention** (1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered **a** wrongful act where – (a) **such an act** is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or **shall** have been so exercised, but for the removal or retention. (2) The rights of custody **specified** in the **Act,** may arise in particular—

(a) by operation of law; (b) by reason of judicial or administrative decision; or (c) by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.	(a)by operation of law; **or** (b)by reason of judicial or administrative decision; or (c)by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.
Chapter II **Constitution, Powers and Functions of the Central Authority**	**CHAPTER II** **Constitution, Powers and Functions of Central Authority**
4. (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be appointed by the Central Government for the purposes of this Act, an officer of the Central Government not below the rank of Joint Secretary to the Government of India, to be called as the Central Authority.	**4. Constitution of Central Authority.** **(1) The Central Government may, by notification in the Official Gazette, constitute an Authority to be called as the Central Authority to exercise the powers conferred on, and perform the functions assigned to it, under this Act.**
(2) Such Central Authority shall, unless removed from office under Section xx, hold office for a period not exceeding three years or until he attains the age of sixty years, whichever is earlier.	**(2) The Central Authority shall consist of ,-** **(a) a Chairperson, who is an officer not below the rank of Joint Secretary to the Government of India, and** **(b) two members out of which at least one shall be an advocate with ten years of practicing experience and another member having such qualification, experience and expertise in matters related to inter-country removal or retention of child and child welfare as may be prescribed,** **to be appointed by the Central Government.**
(3) If a casual vacancy occurs in the office of the Central Authority, whether by reason of his death, termination or otherwise, such vacancy shall be filled within a period of ninety days by making afresh appointment in accordance with the provisions of sub-section (1) and the person so appointed shall hold office for the remainder of the term of office for which the Central Authority in whose place he is so appointed would have held that office.	**(3) The tenure of the Chairperson or any member of the Central Authority shall be three years from the date on which he assumes office as such or till the age of his superannuation, whichever is earlier.** **(4) If a casual vacancy occurs in the office of the Chairperson or a member in the Central Authority, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled within a period of ninety days by making a fresh appointment in accordance with the provisions of sub-section (2)** and the person so appointed shall hold the office for the remainder of the term

	of office of the person in whose place he is appointed. **(5) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed.**
(5 - No such section proposed by WCD)	**5. Appointment of officers and other staff of Central Authority:-** **(1) The Central Government may provide to the Central Authority, such officers and other staff as it considers necessary, for its efficient discharge of functions under this Act.** **(2) The salary and allowances payable to and other terms and conditions of service of the officers and other staff of the Central Authority shall be such as may be prescribed.**
5. The Central Authority or any other authority on its behalf shall take all appropriate measures to perform all or any of the following functions, namely:- (a) To discover the whereabouts of a child who has been wrongly removed to, or retained in, India, and where the child's place of residence in India is unknown, the Central Authority may obtain the assistance of the police to locate the child; (b) To prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such provisional measures as may be necessary; (c) To secure the voluntary return of any such child to the country in which such child had his or her habitual residence or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the Contracting State in which such child has his or her habitual residence; (d) To exchange, where desirable, information relating to any such child, with the appropriate authorities of a Contracting State; (e) To provide, on request, information of a general character, as	**6. Functions of Central Authority.** The Central Authority **or any other officer authorized by the Central Authority in this** behalf, shall take all appropriate measures **while** performing all or any of the following functions, namely— (a) to discover the whereabouts of a child who has been wrong**fully** removed to, or retained in, India, **or outside India**, and **in case** where the child's place of residence in India is **not** known, the Central Authority may obtain the assistance of the police to locate the child; (b) to prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such measures as may be **considered** necessary; (c) to secure the voluntary return of any such child to the country in which **the** child had his or her habitual residence, or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the contracting State in which **the** child has his or her habitual residence; (d) to exchange, where desirable, information relating to any such child, with the appropriate authorities of a contracting State.

to the law of India in connection with the implementation of the Convention in any Contracting State; (f) To institute judicial proceedings with a view to obtaining the return of any such child to the Contracting State in which that child has his or her habitual residence, and in appropriate cases, to make arrangements for organising or securing or to institute judicial proceedings for securing the effective exercise of rights of access to a child who is in India; (g) Where circumstances so require, to facilitate the provision of legal aid or advice; (h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the Contracting State in which the child has his or her habitual residence; (i) Such other functions as may be necessary to ensure the discharge of India's obligations under the Convention. 6. The Central Authority shall, while inquiring into any matter referred to in Section 5, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular, in respect of the following matters, namely: (1) summoning and enforcing the attendance of any person and examining him on oath; (2) discovery and production of any document; (3) receiving evidence on affidavit; (4) requisitioning any public record or copy thereof from any court or office; (5) issuing commissions for the examination of witnesses or documents.	(e) to provide, on request, information of a general character, as to the law of India in connection with the implementation of the Convention in any contracting State; (f) to institute judicial proceedings with a view to **secure** the return of any such child to the contracting State in which that child has his or her habitual residence, and in appropriate cases, **to** make arrangements for instituting judicial proceedings for securing the effective exercise of rights of access to a child who is in India; (g) where circumstances so require, **to** facilitate **providing** legal aid or advice; (h) to **make** such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the contracting State in which the child has his or her habitual residence; (i) such other functions as may be necessary to ensure the discharge of India's obligations under the Convention. **7. Powers of Central Authority.** The Central Authority shall, **have for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court** under the Code of Civil Procedure, 1908 **(5 of 1908)** while trying a suit, in respect of the following matters, namely:- (1) summoning and enforcing the attendance of any person and examining him on oath; (2) **requiring the** discovery and production of documents; (3) receiving evidence on affidavits; (4) **subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872),** requisitioning any public record or **document or a copy of such record or document,** from any office; (5) issuing commissions for the examination of witnesses or documents.

Chapter III **Procedure for Applications to Central Authority**	
7. (1) The appropriate authority of a Contracting State, or a person, institution or other body claiming that a child has been wrongfully removed to or retained in India in breach of rights of custody, may apply to the Central Authority for assistance in securing the return of such child. (2) Every application made under Sub-section (1) shall substantially be in the form prescribed in the rules to this Act. (3) The application under Sub-section (1) may be accompanied by - (a) A duly authenticated copy of any relevant decision or agreement giving rise to the rights of custody claimed to have been breached; (b) A certificate or affidavit from a Central Authority or other competent authority of the Contracting State in which that child has his or her habitual residence or from a qualified person setting out the law of that Contracting State relating to the rights of custody alleged to have been breached; (c) Any other relevant document.	**Chapter III** **Procedure for Application to Central Authority**
8. Where, on receipt of an application under Section 6, the Central Authority has reason to believe that the child in respect of whom the application is made is in another Contracting State, it shall forthwith transmit the application to the appropriate authority of that Contracting State, and shall accordingly inform the appropriate authority or the applicant, as the case may be.	**8. Procedure for making application to Central Authority.** (1) The appropriate authority of a contracting State, or a person, institution or **any** other body claiming that a child has been wrongfully removed to, or retained in India in breach of **the** rights of custody, may apply to the Central Authority for assistance in securing the return of **the** child. (2) Every application made under sub-section (1) **shall be in such form as may be** prescribed. (3) The application under sub-section (1) **shall** be accompanied by— (a) a duly authenticated copy of relevant decision or agreement giving rise to the rights of custody claimed to have been breached; (b) a certificate or affidavit from a Central Authority or **any** other competent authority of the contracting State in which that child has his or her habitual residence or from **an attorney or** a qualified person setting out the law of that contracting State relating to the rights of custody alleged to have been breached; (c) any other relevant document.
9. Where the Central Authority is requested to provide information relating to a child under Section 5 (d), it may request a police officer to make a report to it in writing with respect to any matter relating to the child that appears to it to be relevant.	**9. Transfer of applications to contracting State.** Where, on receipt of an application under **section 8**, the Central Authority has reason to believe that the child in respect of whom the application **has been** made is in another contracting State, it shall forthwith transmit the application to the appropriate authority of that contracting State, and shall accordingly inform the appropriate authority or **as the case may be, the applicant referred to in sub-section(1) of section 8**. **10. Calling Report from Police.**

Chapter IV **Refusal by Central Authority to accept Applications**	Where the Central Authority is requested to provide information relating to a child **under clauses (a) and (d) of section 6,** it may call for a report from the police in writing with respect to any matter relating to the child that appears to **the Central Authority** to be relevant.
10. The Central Authority may refuse to accept an application made to it under Section 7 if it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded. On its refusal to accept an application, the Central Authority shall forthwith inform the appropriate authority or person, institution, or other body making the application, the reasons for such refusal.	**CHAPTER IV** **Refusal by Central Authority to accept Applications**
11. The Central Authority should not reject an application solely on the basis that additional documents or information are needed. Where there is a need for such additional information or documents, the requested Central Authority may ask the applicant to provide these additional documents or information. If the applicant does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.	**11. Refusal by Central Authority to accept Applications.** (1) The Central Authority may refuse to accept an application made to it under section 8, if it is manifest that the requirements of the Convention are not fulfilled or that the application is **otherwise not complete**. (2) The Central Authority **on its refusal to accept an application**, shall forthwith inform the appropriate authority or person, institution, or **any** other body making the application, the reasons for such refusal.
12. Any party aggrieved by the refusal of the Central Authority to accept an application made under Section 7 may appeal against such refusal to the Secretary, Ministry of Women and Child Development, Government of India. Such appeal shall be made within 14 days from the date of receipt of the decision of the Central Authority.	**12. Additional Information.** (1) The Central Authority **shall** not reject an application solely on the **ground** that additional documents or information are needed. (2) The Central Authority may, **where there is a need for such additional information or documents**, ask the applicant to provide these additional documents or information, **and** if the applicant does not do so within a reasonable period specified by the Central Authority, **it may decide not to** process the application.
	13. Appeal to Central Government. (1) Any party aggrieved by the refusal of the Central Authority to accept an application made under section **8**, may appeal against such refusal **to the Central Government in such manner as may be prescribed**. **(2)** Such an appeal shall be made within **a period of** fourteen days from the date of receipt of the decision of the Central Authority; **and the appeal shall be disposed off as early as possible but not later than six weeks from the date of receiving of the appeal.**
Chapter V **Procedure for Application to High Court**	**CHAPTER V**
13. Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under Section 6, the Central Authority may apply to the High Court within whose	

territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the Contracting State in which the child has his or her habitual residence. 14. Where an application is made to a High Court under Section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned, or of securing the child's residence pending the proceedings, or to prevent the child's return for being obstructed, or of otherwise preventing any change in the circumstances relevant to the determination of the application. 15. Where the High Court is satisfied, upon an application made to it under Section 10, that:- (a) The child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of Section 3; and, (b) A period of one year has not yet elapsed between the date of the alleged removal or retention and the date of such application; It shall forthwith order the return of such child to the Contracting State in which the child had his or her habitual residence; Provided that the High Court may order the return of a child to the Contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, unless it is satisfied that the child is settled in his or her new environment. 16. (1) Notwithstanding the provisions of Section 15, the High Court is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;	**Procedure for Application to High Courts** **14. Power of Central Authority to apply to the High Court.** Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under **section 8**, the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the contracting State in which the child has his or her habitual residence. **15. Interim Order by High Courts.** Where an application is made to **the** High Court under section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for purpose of securing the welfare of the child concerned, **or for making such provisions for the child**, pending the proceedings, or to prevent the child's **return, or for otherwise** preventing any change in the circumstances relevant to the determination of the application. **16. Power of High Courts to return child to contracting State.** Where the High Court is satisfied, upon an application made to it under **section 14**, that— (a) the child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of section 3; and, (b) a period of one year has not elapsed between the date of the alleged removal or retention and the date of such application; it may order the return of such child to the contracting State in which the child has his or her habitual residence: *Provided* that the High Court may order the return of a child to the contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, **if the High Court** is satisfied that the child is not settled in his or her new environment. **17. Possible exceptions to the return of the child**

or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. (2) The High Court may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. (3) The return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. (4) In exercising its powers under this Section, the High Court shall have regard to any information relating to the social background of the child provided by the appropriate authority of the Contracting State in which that child has his or her habitual residence. (5) The High Court shall not refuse to make an order under this Section for the return of a child to the Contracting State in which that child has his or her habitual residence, on the grounds only that there is in force, a decision of a court in India or a decision entitled to be recognised by a court in India relating to the custody of such a child, but the High Court shall, in making an order under Section 10, take into account the reasons for such decision. 17. (1) The appropriate authority, or a person, institution or other body of a Contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person specified in the application to a child who is in India. (2) An application made under Sub-section (1) shall be in such form in such manner as may be prescribed.	(1) Notwithstanding **anything contained in** section 16, the High Court may not pass the order of return of the child if the person, institution or **any** other body, **opposing the return**, establishes that- (a) the person, institution or **any** other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that **the** return **of the child** would expose the child to physical or psychological harm or otherwise place the child in a **non-conducive** situation. **(c) the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of 'domestic violence' as defined in section 3 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).** (2) The High Court may refuse to order the return of the child if - (a) **the court** finds that the child objects to being returned and has attained an age **and level** of maturity at which it is appropriate to take **into** account **of his or her** views; (b) the return is not permitted **under** the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms; (c) **the High Court, while** exercising powers under this section**, considers** any information relating to the social background of the child provided by the appropriate authority of the contracting State in which that child has his or her habitual residence, **as inappropriate**; (3) The High Court may not refuse to make an order under this section for the return of a child to the contracting State in which that child has his or her habitual residence, on the grounds only- (i) that there is in force, a decision of a court in India or, (ii) a decision entitled to be recognised by a court in India relating to the custody of such child: **Provided that** the High Court shall record reasons while passing such orders relating to the return of a child. **18. Rights of access of person, institution or any other body to a child in India.**

18. (1) Without prejudice to any other means for securing the exercise of rights of access of any person to a child in India, the Central Authority may apply to the High Court for an order of the Court for securing the effective exercise of those rights. (2) Where the High Court is satisfied, on an application made to it under Sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, it may make such order as may be necessary to secure the effective exercise of those rights of access, and any conditions to which they are subject.	(1) The appropriate authority, or a person, institution or **any** other body of a contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person, specified in the application, to a child, who is in India. (2) An application made under sub-section (1) shall be in such form and in such manner as may be prescribed.
19. (1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Section 3, the High Court may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable. (2) The High Court may, before making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, request the central Authority to obtain from the relevant authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful under Section 3.	**19. Application to the High Court for exercise of rights of access of any person to a child in India.** (1) Without prejudice to any other means for securing the exercise of rights of access of any person, institution or **any other** body of the contracting State to a child in India, the Central Authority may apply to the High Court, for an order of the Court, for securing the effective exercise of those rights. (2) Where the High Court is satisfied, on an application made to it under sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, **the court may, subject to such conditions as may be considered necessary, make an order to secure the effective exercise of those rights of access**.
20. Upon making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the High Court may order the person who removed that child to India, or who retained that child in India, to pay the expenses incurred by the Central Authority. These expenses may include costs incurred in locating the child, costs of legal representation of the Central Authority, and costs incurred in returning the child to the Contracting State in which that child has his or her habitual residence.	**20. Relaxation of requirements of proof of foreign law.** (1) **The High Court, while** ascertaining whether there has been a wrongful removal or retention within the meaning of section 3, **may take notice of the law of**, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable. (2) The High Court may, before making an order under **section 15** for the return of a child to the Contracting State in which that child has his or her habitual residence; **direct the Central Authority**, to obtain from the **concerned** authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful **within the meaning of** section 3. **21. Costs.**

21. An order made by the High Court under Section 13 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom an order relates.	**(1) The High Court may, while making an order under section 15 for the return of a child to the contracting State in which that child has his or her habitual residence, order the person who removed that child to India, or who retained the child in India, to pay the expenses incurred by the Central Authority.** **(2) The expenses referred to in sub-section (1), may include costs incurred in locating the child, costs of legal proceedings incurred by the Central Authority, and costs incurred in returning the child to the contracting State in which that child has his or her habitual residence.**
22. Where an order is made under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements as are necessary to be made in accordance with the order for the return of such child to such Contracting State.	**22. Adjudication not to cover determination of custody rights of parent.** An order made by the High Court under **section 16** shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom **the** order relates.
Chapter VI **Application in respect of child removed from India**	
23. (1) A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of custody of such person, institution or other body, may apply to the Central Authority for assistance in securing the return of that child to India. (2) On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in securing the return of that child to India. (3) The rights of custody mentioned in Sub-section (1)above, include rights of custody accruing to any person, institution or other body by operation of law; (a) by reason of judicial or administrative decision; or (b) by reason of an agreement having legal effect under the law of India.	**23. Arrangements to return a child to Contracting State.** Where an order is made under **section 16** for the return of a child to the contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements, as are necessary, to be made in accordance with the order for the return of **the** child to such contracting State **within a period of sixty days from the date of such order**.
	CHAPTER VI **Application in respect of child removed from India**
24. The High Court may, on application made by or on behalf of the appropriate authority of the Contracting State, declare that the removal of a child to that Contracting State or the retention of that	**24. Application to Central Authority for return of child to India.** (1) A person, institution or **any** other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of rights of custody of such person, institution or **any** other body, may apply to the Central Authority for assistance in securing the return of that child to India. **(2) Every application made under sub-section (1) shall be made in such form as may be prescribed.** (3) On receipt of an application under sub-section (1), the Central Authority shall **forthwith** apply to the appropriate authority, **in the manner, if any, specified** in the contracting State to which **the** child is alleged to have been removed or retained, for assistance in securing the return of that child to India.

child in that Contracting State is wrongful within the meaning of Section 3.	
Chapter VII **Rights of Access**	
25. A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of access of such person, institution or other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of rights of access.	(Provision relating to Declaratory Powers of High Court not necessary in view of clause 16)
26. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of Contracting States in the same way as an application for the return of a child.	. **CHAPTER VII** **Rights of Access** **25. Rights of access of person, institution or body in India.** A person, institution or **any** other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of **the** rights of access of such person, institution or **any** other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of **the** rights of access**, in such form as may be prescribed**. **26. Application to Central Authority of Contracting State to exercise rights of access of any person, institution or body in India.** An application to make arrangements for organising or securing the effective exercise of rights of access **under section 25 shall be** presented forthwith to the Central Authority of the Contracting State in the same **manner** as an application for the return of a child **under section 24**.
27. On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in making arrangements to organise or secure the effective exercise of rights of access.	**27. Coordination between Central Authorities to secure rights of access.** On receipt of an application under **section 26**, the Central Authority shall **forthwith** apply to the appropriate authority, **in the manner if any, specified**, in the Contracting State to which **the** child is alleged to have been **wrongfully** removed, or retained, for assistance in making arrangements to **secure, or** organise the effective exercise of rights of access.
(28. No such provision made by WCD)	**CHAPTER VIII**

(29. No such provision made by WCD)	**Offences and Penalties** **28. Punishment for wrongful removal or retention.** Whoever wrongfully removes or retains a child either himself or through other person from the custody of a parent in terms of sub-section (2) of section 3 of this Act, is said to commit the offence of wrongful removal or retention, and shall, be punishable with imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both. **29. Punishment for willful misrepresentation or concealment of fact.** Whoever, by willful misrepresentation, or by concealment of a material fact, which he is bound to disclose, related to the location or information of the child under clause (a) of section 6, voluntarily causes to prevent the safe return of the child in pursuance to an order made under section 15 or section 16 of this Act shall be guilty of an offence punishable with imprisonment for a term which may extend to three months or with fine which may extend to five thousand rupees or with both.
Chapter VIII **Miscellaneous**	**CHAPTER IX** **Miscellaneous**
28. (1) The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. (2) If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.	**30. Expeditious process.** (1) The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children. (2) If the judicial or administrative authority concerned has not reached a decision within **a period of** six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own **motion** or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for delay.
29. The Central Authority shall submit an annual report to the Central Government through the Ministry of Women and Child Development in such form as may be prescribed.	(3) If **any information or** reply is received by the Central Authority of the requested State, that Authority shall transmit the **same** to the Central Authority of the requesting State, or to the applicant, as the case may be.
(clauses 29 & 33 made by WCD – has been merged in clause 31 prepared by the Commission)	**31. Reports and returns** (1) The Central Authority shall submit an annual report giving full account of its activities under this Act to the Central Government **in such** form as may be

	prescribed. (2) **The Central Authority shall in addition to the report under sub-section (1) furnish such returns or other relevant information with respect to its activities as the Central Government may from time to time require.** (3) **The report submitted under sub-section (1) shall contain a full account of -** **(a) a brief record of applications for the return of children submitted by applicants to the Central Authority.** **(b) detailed information on applications for the return of children that remain pending for more than one year after the date of filing and information on the current status of such children and specific actions taken by the Central Authority to resolve such cases.** **(c) A list of countries to which the children mentioned in clause (b) have been wrongfully removed to or retained in, countries which have failed to comply with their obligations set out in the Convention with respect to, return of children, access to children by applicants in India.**
(32. No such provision made by WCD)	
30. No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member thereof or any person acting under the direction of the Central Authority, in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.	(4) **The Central Authority shall inform to the parent, who has requested assistance regarding a wrongfully removed or retained child, once in every six months, except where the case has been closed by the Central Authority and the reason for the same has been conveyed to the person, institution or body seeking such assistance.** **32. Maintenance of Records.** **The Central Authority shall maintain detailed and updated records concerning the applications, and, or cases brought to its notice under this Act in such manner as may be prescribed.**
31. Every member of the Central Authority and every officer appointed in the Central Authority to exercise functions under this Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.	**33. Protection of action taken in good faith.** No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member **or officer thereof or any officer acting under the authorization of the Central Authority** in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.
32. (1) In the discharge of its functions under this Act, the Central	

Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government. (2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national purposes, the decision of the Central Government thereon shall be final. 33. The Central Authority shall furnish to the Central Government, such returns or other information with respect to its activities as the Central Government may from time to time require. 34. (1) The Central Government may, by notification, make rules to carry out the provisions of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:- (a) Form of application to Central Authority for assistance in securing the return of a child that has been wrongfully removed to or retained in India (b) Form of application to Central Authority for assistance in securing the return of a child that has been wrongfully removed to or retained outside India (c) Procedure for appointment of Chairman and Members of Central Authority/recruitment of staff of Central Authority (d) Procedure in case of refusal to accept an application by Central Authority under Section 7	**34. Members and officers of Central Authority to be public servants** **Every** member and officer of the Central Authority **and the officer authorized by the Authority to perform functions under this Act** shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, **1860** (45 of 1860). **35. Power to give directions.** (1) In the discharge of its functions under this Act, the Central Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government. (2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national interests, the decision of the Central Government thereon shall be final. **36. Power of Central Government to make rules.** (1) The Central Government may, by notification **in the official Gazette**, make rules to carry out the **purposes** of this Act. (2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:- **(a) qualifications and experience for appointment of Members of Central Authority under clause (b) of sub-section (2) of section 4 ;** **(b) the salary and allowances and terms and conditions of service of Chairperson and Members under sub-section (5) of section 4;** **(c) the salary and allowances and terms and conditions of service of officers and staff of the Central Authority under sub-section (2) of section 5;** **(d) form of application to Central Authority for assistance in securing return of child wrongfully removed or retained in India, under sub-section (2) of section 8;** **(e) procedure for making appeal to the Central Government in case of refusal to accept the application by the Central Authority under sub-**

	section (1) of section 13; **(f) form of application to Central Authority for assistance in securing exercise of rights of access to a child in India, under sub-section (2) of section 18;** **(g) form of application to Central Authority for assistance in securing return of child wrongfully removed to or retained in the Contracting State under sub-section (2) of section 24;** **(h) the form of application for assistance in organizing or securing the rights of access to a child wrongfully removed to or retained in a Contracting State under section 25; and** (i) **the form in which annual report shall be prepared under sub-section(1) of section 31;**
(3) Every rule made under this Act (Sub-section (*1*))shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.	(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.
35. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty: Provided that no order shall be made under this Section after the expiry of a period of two years from the commencement of this Act.	**37. Power to remove difficulties.** (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty. *Provided* that no **such order** shall be made under this section after the expiry of a period of two years from the commencement of this Act.
(2) Every order made under this Section shall be laid, as soon as may be after it is made, before each House of Parliament.	(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

ANNEXURE-II

THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016

A
Bill

to ensure the prompt return of children wrongfully removed to, or retained in any Contracting State, to ensure that the rights of custody and access under the law of one of the Contracting States are effectively respected in another Contracting States, and to establish a Central Authority, inter alia, for the purposes of providing assistance to help locate such children, encourage amicable solutions and help process of requests for return of children and for matters connected therewith or incidental thereto.

WHEREAS the best interests of children are of paramount importance in matters relating to their custody in view of the Convention on the Rights of the Child, 1989 which came into force on 2nd September, 1990;

AND WHEREAS the Hague Convention on the Civil Aspects of International Child Abduction, 1980, came into force on the 1st December, 1983;

AND WHEREAS it would be necessary to implement the said Convention in so far as they relate to an expeditious return of a child who has been wrongfully removed or retained in contracting party to its country of his or her habitual residence in violation of the custody rights or access rights;

Be it enacted by Parliament in the (_____) year of the Republic of India as follows:-

CHAPTER I
Preliminary

2. Short title, extent, application and commencement.

(1) This Act may be called the Protection of Children (Inter-Country Removal and Retention) Act, 2016.
(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) The provisions of this Act shall apply to every child who has not completed sixteenth year of age and has either wrongfully removed to, or retained in India, irrespective of his or her nationality, religion, or status in India.
(4) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

2. Definitions

In this Act, unless the context otherwise requires,—

(a) "applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other State party to the Convention for the return of a child alleged to have been wrongfully removed or retained, or for arrangements for organising or securing the effective exercise of rights of access pursuant to the said Convention;
(b) "Central Authority" means the Central Authority constituted under section 4;
(c) "Contracting State" means a State signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on the 25th October, 1980, as set out in the Schedule;
(e) "Chairperson" means the Chairperson of the Central Authority;
(f) "habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one of the parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever occurred last.
(g) "member" means a member of the Central Authority and includes the Chairperson;
(h) "prescribed" means prescribed by rules made under this Act;
(i) "right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;
(j) "right of custody" in relation to a child includes the right to take care of the person of the child, to make long-term decisions about child's development and well-being and, in particular, to determine the child's place of residence.

3. Wrongful removal or retention

(1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered a wrongful act where –
(a) such an act is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or shall have been so exercised, but for the removal or retention.

(2) The rights of custody specified in the Act, may arise in particular—

(a) by operation of law; or
(b) by reason of judicial or administrative decision; or
(c) by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.

CHAPTER II
Constitution, Powers and Functions of Central Authority

4. Constitution of Central Authority.

(1) The Central Government may, by notification in the Official Gazette, constitute an Authority to be called as the Central Authority to exercise the powers conferred on, and perform the functions assigned to it, under this Act.

(2) The Central Authority shall consist of ,-
(a) a Chairperson, who is an officer not below the rank of Joint Secretary to the Government of India, and
(b) two members out of which at least one shall be an advocate with ten years of practicing experience and another member having such qualification, experience and expertise in matters related to inter-country removal or retention of child and child welfare as may be prescribed,
to be appointed by the Central Government.

(3) The tenure of the Chairperson or any member of the Central Authority shall be three years from the date on which he assumes office as such or till the age of his superannuation, whichever is earlier.

(4) If a casual vacancy occurs in the office of the Chairperson or a member in the Central Authority, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled within a period of ninety days by making a fresh appointment in accordance with the provisions of sub-section (2) and the person so appointed shall hold the office for the remainder of the term of office of the person in whose place he is appointed.

(5) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed.

5. Appointment of officers and other staff of Central Authority.

(1) The Central Government may provide to the Central Authority, such officers and other staff as it considers necessary, for its efficient discharge of functions under this Act.
(2) The salary and allowances payable to and other terms and conditions of service of the officers and other staff of the Central Authority shall be such as may be prescribed.

6. Functions of Central Authority.

The Central Authority or any other officer authorized by the Central Authority in this behalf, shall take all appropriate measures while performing all or any of the following functions, namely—

(a) to discover the whereabouts of a child who has been wrongfully removed to, or retained in, India, or outside India, and in case where the child's place of residence in India is not known, the Central Authority may obtain the assistance of the police to locate the child;

(b) to prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such measures as may be considered necessary;

(c) to secure the voluntary return of any such child to the country in which the child had his or her habitual residence, or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the contracting State in which the child has his or her habitual residence;

(d) to exchange, where desirable, information relating to any such child, with the appropriate authorities of a contracting State.

(e) to provide, on request, information of a general character, as to the law of India in connection with the implementation of the Convention in any contracting State;

(f) to institute judicial proceedings with a view to secure the return of any such child to the contracting State in which that child has his or her habitual residence, and in appropriate cases, to make arrangements for instituting judicial proceedings for securing the effective exercise of rights of access to a child who is in India;

(g) where circumstances so require, to facilitate providing legal aid or advice;

(h) to make such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the contracting State in which the child has his or her habitual residence;

(i) such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.

7. Powers of Central Authority.

The Central Authority shall, have for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:-

(1) summoning and enforcing the attendance of any person and examining him on oath;
(2) requiring the discovery and production of documents;
(3) receiving evidence on affidavits;
(4) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document, from any office;
(5) issuing commissions for the examination of witnesses or documents.

Chapter III
Procedure for Application to Central Authority

8. Procedure for making application to Central Authority.

(1) The appropriate authority of a contracting State, or a person, institution or any other body claiming that a child has been wrongfully removed to, or retained in India in breach of the rights of custody, may apply to the Central Authority for assistance in securing the return of the child.

(2) Every application made under sub-section (1) shall be in such form as may be prescribed.

(3) The application under sub-section (1) shall be accompanied by—
(a) a duly authenticated copy of relevant decision or agreement giving rise to the rights of custody claimed to have been breached;
(b) a certificate or affidavit from a Central Authority or any other competent authority of the contracting State in which that child has his or her habitual residence or from an attorney or a qualified person setting out the law of that contracting State relating to the rights of custody alleged to have been breached;
(c) any other relevant document.

9. Transfer of applications to contracting State.

Where, on receipt of an application under section 8, the Central Authority has reason to believe that the child in respect of whom the application has been made is in another contracting State, it shall forthwith transmit the application to the appropriate authority of that contracting State, and shall accordingly inform the appropriate authority or as the case may be, the applicant referred to in sub-section(1) of section 8.

10. Calling Report from Police.

Where the Central Authority is requested to provide information relating to a child under clauses (a) and (d) of section 6, it may call for a report from the police in writing with respect to any matter relating to the child that appears to the Central Authority to be relevant.

CHAPTER IV

Refusal by Central Authority to accept Applications

11. Refusal by Central Authority to accept Applications.

(1) The Central Authority may refuse to accept an application made to it under section 8, if

it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not complete.

(2) The Central Authority on its refusal to accept an application, shall forthwith inform the appropriate authority or person, institution, or any other body making the application, the reasons for such refusal.

12. Additional Information.

(1) The Central Authority shall not reject an application solely on the ground that additional documents or information are needed.

(2) The Central Authority may, where there is a need for such additional information or documents, ask the applicant to provide these additional documents or information, and if the applicant does not do so within a reasonable period specified by the Central Authority, it may decide not to process the application.

13. Appeal to Central Government.

(1) Any party aggrieved by the refusal of the Central Authority to accept an application made under section 8, may appeal against such refusal to the Central Government in such manner as may be prescribed.

(2) Such an appeal shall be made within a period of fourteen days from the date of receipt of the decision of the Central Authority; and the appeal shall be disposed off as early as possible but not later than six weeks from the date of receiving of the appeal.

CHAPTER V

Procedure for Application to High Courts

14. Power of Central Authority to apply to the High Court.

Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under section 8, the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the contracting State in which the child has his or her habitual residence.

15. Interim Order by High Courts.

Where an application is made to the High Court under section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for purpose of securing the welfare of the child concerned, or for making such provisions for the child, pending the proceedings, or to prevent the child's return, or for otherwise preventing any change in the circumstances relevant to the determination of the application.

16. Power of High Courts to return child to contracting State.

Where the High Court is satisfied, upon an application made to it under section 14, that—

(a) the child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of section 3; and,

(b) a period of one year has not elapsed between the date of the alleged removal or retention and the date of such application;

it may order the return of such child to the contracting State in which the child has his or her habitual residence:

Provided that the High Court may order the return of a child to the contracting State in which that child has his or her habitual residence even in a case where more than one

year has elapsed between the date of the alleged removal or retention and the date of such application, if the High Court is satisfied that the child is not settled in his or her new environment.

17. Possible exceptions to the return of the child

(1) Notwithstanding anything contained in section 16, the High Court may not pass the order of return of the child if the person, institution or any other body, opposing the return, establishes that-
   (a) the person, institution or any other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention; or
   (b) there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in a non-conducive situation.
   (c) the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of 'domestic violence' as defined in section 3 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).

(2) The High Court may refuse to order the return of the child if -
   (a) the court finds that the child objects to being returned and has attained an age and level of maturity at which it is appropriate to take into account of his or her views;
   (b) the return is not permitted under the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms;
   (c) the High Court, while exercising powers under this section, considers any information relating to the social background of the child provided by the appropriate authority of the contracting State in which that child has his or her habitual residence, as inappropriate;

(3) The High Court may not refuse to make an order under this section for the return of a child to the contracting State in which that child has his or her habitual residence, on the grounds only-
   (i) that there is in force, a decision of a court in India or,
   (ii) a decision entitled to be recognised by a court in India relating to the custody of such child:
   Provided that the High Court shall record reasons while passing such orders relating to the return of a child.

18. Rights of access of person, institution or any other body to a child in India.

(1) The appropriate authority, or a person, institution or any other body of a contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person, specified in the application, to a child, who is in India.

(2) An application made under sub-section (1) shall be in such form and in such manner as may be prescribed.

19. Application to the High Court for exercise of rights of access of any person to a child in India.

(1) Without prejudice to any other means for securing the exercise of rights of access of any person, institution or any other body of the contracting State to a child in India, the Central Authority may apply to the High Court, for an order of the Court, for securing the effective exercise of those rights.

(2) Where the High Court is satisfied, on an application made to it under sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, the court may, subject to such conditions as may be considered necessary, make an order to secure the effective exercise of those rights of access.

20. Relaxation of requirements of proof of foreign law.

(1) The High Court, while ascertaining whether there has been a wrongful removal or retention within the meaning of section 3, may take notice of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

(2) The High Court may, before making an order under section 15 for the return of a child to the Contracting State in which that child has his or her habitual residence; direct the Central Authority, to obtain from the concerned authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful within the meaning of section 3.

21. Costs.

(1) The High Court may, while making an order under section 15 for the return of a child to the contracting State in which that child has his or her habitual residence, order the person who removed that child to India, or who retained the child in India, to pay the expenses incurred by the Central Authority.
(2) The expenses referred to in sub-section (1), may include costs incurred in locating the child, costs of legal proceedings incurred by the Central Authority, and costs incurred in returning the child to the contracting State in which that child has his or her habitual residence.

22. Adjudication not to cover determination of custody rights of parent.

An order made by the High Court under section 16 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom the order relates.

23. Arrangements to return a child to Contracting State.

Where an order is made under section 16 for the return of a child to the contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements, as are necessary, to be made in accordance with the order for the return of the child to such contracting State within a period of sixty days from the date of such order.

CHAPTER VI

Application in respect of child removed from India

24. Application to Central Authority for return of child to India.

(1) A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of rights of custody of such person, institution or any other body, may apply to the Central Authority for

assistance in securing the return of that child to India.

(2) Every application made under sub-section (1) shall be made in such form as may be prescribed.

(3) On receipt of an application under sub-section (1), the Central Authority shall forthwith apply to the appropriate authority, in the manner, if any, specified in the contracting State to which the child is alleged to have been removed or retained, for assistance in securing the return of that child to India.

CHAPTER VII

Rights of Access

25. Rights of access of person, institution or body in India.

A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of the rights of access of such person, institution or any other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of the rights of access, in such form as may be prescribed.

26. Application to Central Authority of Contracting State to exercise rights of access of any person, institution or body in India.

An application to make arrangements for organising or securing the effective exercise of rights of access under section 25 shall be presented forthwith to the Central Authority of the Contracting State in the same manner as an application for the return of a child under section 24.

27. Coordination between Central Authorities to secure rights of access.

On receipt of an application under section 26, the Central Authority shall forthwith apply to the appropriate authority, in the manner if any, specified, in the Contracting State to which the child is alleged to have been wrongfully removed, or retained, for assistance in making arrangements to secure, or organise the effective exercise of rights of access.

CHAPTER VIII

Offences and Penalties

28. Punishment for wrongful removal or retention.

Whoever wrongfully removes or retains a child either himself or through other person from the custody of a parent in terms of sub-section (2) of section 3 of this Act, is said to commit the offence of wrongful removal or retention, and shall, be punishable with imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both.

29. Punishment for wilful misrepresentation or concealment of fact.

Whoever, by wilful misrepresentation, or by concealment of a material fact, which he is bound to disclose, related to the location or information of the child under clause (a) of section 6, voluntarily causes to prevent the safe return of the child in pursuance to an order made under section 15 or section 16 of this Act shall be guilty of an offence punishable with imprisonment for a term which may extend to three months or with fine which may extend to five thousand rupees or with both.

CHAPTER IX

Miscellaneous

30. Expeditious process.

(1) The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children.

(2) If the judicial or administrative authority concerned has not reached a decision within a period of six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own motion or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for delay.

(3) If any information or reply is received by the Central Authority of the requested State, that Authority shall transmit the same to the Central Authority of the requesting State, or to the applicant, as the case may be.

31. Reports and returns

(1) The Central Authority shall submit an annual report giving full account of its activities under this Act to the Central Government in such form as may be prescribed.

(2) The Central Authority shall in addition to the report under sub-section (1) furnish such returns or other relevant information with respect to its activities as the Central Government may from time to time require.

(3) The report submitted under sub-section (1) shall contain a full account of -
   (a) a brief record of applications for the return of children submitted by applicants to the Central Authority.
   (b) detailed information on applications for the return of children that remain pending for more than one year after the date of filing and information on the current status of such children and specific actions taken by the Central Authority to resolve such cases.
   (c) A list of countries to which the children mentioned in clause (b) have been wrongfully removed to or retained in, countries which have failed to comply with their obligations set out in the Convention with respect to, return of children, access to children by applicants in India.

(4) The Central Authority shall inform to the parent, who has requested assistance regarding a wrongfully removed or retained child, once in every six months, except where the case has been closed by the Central Authority and the reason for the same has been conveyed to the person, institution or body seeking such assistance.

32. Maintenance of Records.

The Central Authority shall maintain detailed and updated records concerning the applications, and, or cases brought to its notice under this Act in such manner as may be prescribed.

33. Protection of action taken in good faith.

No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member or officer thereof or any officer acting under the authorization of the Central Authority in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.

34. Members and officers of Central Authority to be public servants

Every member and officer of the Central Authority and the officer authorized by the Authority to perform functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860 (45 of 1860).

35. Power to give directions.

(1) In the discharge of its functions under this Act, the Central Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government.
(2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national interests, the decision of the Central Government thereon shall be final.

36. Power of Central Government to make rules.

(1) The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.
(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

(a) qualifications and experience for appointment of Members of Central Authority under clause (b) of sub-section (2) of section 4 ;
(b) the salary and allowances and terms and conditions of service of Chairperson and Members under sub-section (5) of section 4;
(c) the salary and allowances and terms and conditions of service of officers and staff of the Central Authority under sub-section (2) of section 5;
(d) form of application to Central Authority for assistance in securing return of child wrongfully removed or retained in India, under sub-section (2) of section 8;
(e) procedure for making appeal to the Central Government in case of refusal to accept the application by the Central Authority under sub-section (1) of section 13;
(f) form of application to Central Authority for assistance in securing exercise of rights of access to a child in India, under sub-section (2) of section 18;
(g) form of application to Central Authority for assistance in securing return of child wrongfully removed to or retained in the Contracting State under sub-section (2) of section 24;
(h) the form of application for assistance in organizing or securing the rights of access to a child wrongfully removed to or retained in a Contracting State under section 25; and
(i) the form in which annual report shall be prepared under sub-section(1) of section 31;

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

37. Power to remove difficulties.

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty.

Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

REFERENCES:

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