

## A legal analysis of the proposed legislation on the civil aspects of the international child abduction bill, 2016 in India

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### Abstract

The right of the Child is of immense value as they are the future of the country. When we talk about human rights it is most important to emphasize on the child rights. In the field of child abduction law some new legislation is being done. This paper analyses the issues relating to international child abduction and the civil aspects of the International Child Abduction Bill 2016. This happens when one parent takes the child back to their native country without the consent or agreement of the other parent. The Legislature in India has taken initiative to solve the problem by drafting the Civil Aspects of International Child Abduction Bill, 2016. This paper discusses various important expressions which have been defined under this draft Bill. It also examines the wrongful removal or retention of child in India including the Legality of Right of Custody in India and the constitution, powers and functions of the central authority. The very important role of the central authority and the High Court has been discussed.

**Keywords:** child abduction, hague convention, contracting state, natural parents, right of access

### Introduction

It is true that India is a party to the Hague convention on the civil aspects of international child abduction. The main object of this convention has made it clear that the children who are unlawfully retained in any contracting state should be returned to the state of origin immediately. As per this convention the contracting state shall respect the rights of custody and of access under the applicable law of other contracting state. There was a regular problem in the United States and many other countries regarding securing of legal representation for Hague applicants. Since, India is party to this Hague convention, therefore, India will have to respect the basic provision will have to set a law on the civil aspect of international child abduction. Accordingly, in the year 2016 the union Parliament has prepared a draft legislation on the civil aspect of international child abduction known as 'Child Abduction Law'. The preamble <sup>[1]</sup> of this draft bill mentions that in order to return immediately the child abducted and wrongfully detained in one contracting state the draft legislation will be of immense help. Moreover, the draft legislation requires one contracting state to respect the law of another contracting state with respect to immediately return of the wrongfully detained child and also support for the implementation of the rights of custody and access as determined under the law of the other Contracting State, where the child originally belongs to. The Draft Bill, in order to implement its provisions efficiently, proposes for the establishment of Central Authority for proper regulation of the provisions of the Child Abduction Law. The viability of this

<sup>1</sup>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-preamble-the civil aspects of child abduction bill, 2016.

law can be examined while discussing the important provisions from the Draft Bill of 2016.

### Important Definitions

The Child Abduction Law, in order to make the provisions simple and non-critical, has defined various expressions. The expression 'Contracting State' has been defined under this draft bill on Child Abduction Law, which means a nation which is a party to the Hague Convention as a signatory on Civil Aspects of International Child Abduction <sup>[2]</sup>. The Child Abduction Law defines the term 'Convention' and mentions that it is only the Hague Convention on the civil aspects of child abduction as assigned on October 25, 1980 at The Hague <sup>[3]</sup>. The expression 'habitual residence' has been defined under this law, which means a child who resides with the natural parents or it may be possible because of separation agreement or by court order deciding with one parent only or residing with a person, other than the parents (because of the demise of the parents) on a permanent basis for a significant period of time <sup>[4]</sup>. However, what should be the significant period of time has not been defined appropriately in this Draft Bill. The term 'right of access' has been explained under this child abduction law, which means child resides in a place other than

<sup>2</sup> Sec-2(c) "Contracting State" means a state signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

<sup>3</sup> Sec-2(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on 25th October, 1980.

<sup>4</sup> Sec-2(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.

habitual residence for a limited period of time <sup>[5]</sup>. The term 'right of custody' is defined under this law which means in relation to a child, it is necessary to determine a place for residence and also the care of the child <sup>[6]</sup>.

### **Wrongful removal or retention of child in India**

The retention or removal in India would only be wrongful or illegal, when the child has been removed or retained in India under force and if the person responsible for right of custody of that child causes breach of that right under the law of the Contracting State where the child was habitually residing and also if such right is exercised only for the removal or retention <sup>[7]</sup>.

### **Legality of right of custody in India**

Custody of the child will be lawful if that has been done either by operation of any existing law or by the judicial or administrative decision or on the basis of an agreement made between the Contracting States <sup>[8]</sup>.

### **Constitution, powers and functions of the central authority**

The Central Authority shall be constituted by the Government of India with a person not below the rank of Joint Secretary. The Central Authority shall hold the office for three years or till the age of superannuation, whichever is earlier <sup>[9]</sup>.

There are many powers and functions prescribed under section 5 <sup>[10]</sup> of the child abduction law. Some of the important powers

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<sup>5</sup> Sec-2(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;

<sup>6</sup> Sec-2"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.

<sup>7</sup> Sec-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..

<sup>8</sup> Sec-3(2) The rights of custody mentioned in Sub-section (1)above, 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.

<sup>9</sup> Sec-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. (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.

<sup>10</sup> Sec-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

and functions have been described here. For example, the Central Authority can discover the whereabouts of the child who has been illegally removed or retained in India and the child's habitual residence is not in India. The Central Authority can prevent further danger to any such child under wrongful detention. This authority by an amicable solution shall be able to return the child to his/her country where the child has habitual residence. The Central Authority can even exchange the information of child wrongfully detained or abducted. This authority can request the other contracting party to provide information of child was found in India under wrongful detention. The Central Authority can institute judicial proceedings with regard to return of any children of the Contracting States. It can also facilitate the services of legal aid to the abducted child. It can make administrative agreements if necessary for the safe return of the child to the Contracting State where the child has the habitual residence. This Central authority will function so as to fulfil the India's obligation as per the requirement of the Hague convention on the civil aspects of child abduction.

### **Procedure for applications to central authority**

A person or institution of a Contracting State can make an application before the Central Authority in India for taking back the child who is wrongfully removed or retained in India <sup>[11]</sup>. However, the application must provide supporting documents, such as, authenticated copy of the relevant decision of the agreement on rights of custody, a certified copy with regard to habitual residence of the child, etc <sup>[12]</sup>. The Central Authority may refuse to accept any application for returning the child wrongfully retained in India on the ground that the requirements of the Hague convention are not fulfilled <sup>[13]</sup>.

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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 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.

<sup>11</sup> Sec- 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.

<sup>12</sup>Sec-7 (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.

<sup>13</sup> Sec- 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.

### **Application to High Court in India**

Whenever it appears to the Central Authority that without the orders of the High Court the child cannot be returned to the contracting party, the Central Authority shall make an application to that High Court under whose jurisdiction the child is found or last seen <sup>[14]</sup>. With the help of the orders of the High Court, it would be feasible for the Central Authority to return the child who is wrongfully retained in India.

### **Application in respect of child removed from India**

The Central Authority in India established under this child abduction law can also entertain an application made by a person or institution believing the fact that a child from India has been wrongfully removed and unlawfully detained in Contracting State, the Central Authority will assist the concerned person or the institution to return the child from such wrongful retention from the Contracting State <sup>[15]</sup>.

### **Right of Access**

When it is believed by a person or institution that the child has been wrongfully retained in a Contracting State and such person or institution has been denied to right of access to such child in the Contracting State, then the Central Authority in India based on the application made by such person or institution can help to provide right of access to the child wrongfully retained in the Contracting State <sup>[16]</sup>.

### **Conclusion**

Thus, it is clear from the above study, that the civil aspects of International Child Abduction Bill, 2016 have been efficiently drafted for the purpose of lawfully returning the child who is wrongfully retained in the Contracting States. The child abduction law not only defined the various complicated terms to make the legislation simple but also has given ample opportunity for the purpose of establishment of Central Authority and also explained, very well, the concept of right of access and the right of custody. Since, it is still in the form of a bill, therefore, the effectiveness of its application cannot be judged now. It is a matter of time when the law takes effect and is implemented successfully. Yet, the legal researchers will have opportunity to make an anatomy of such implementations, whether effective or not.

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<sup>14</sup> Sec-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.

<sup>15</sup> Sec- 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.

<sup>16</sup> Sec 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.