

Legal issues and response child custody law family essay

[Law](#)



**ASSIGN
BUSTER**

LAKSHAY SONI (AUTHOR)SYMBIOSIS LAW SCHOOL,

NOIDAadakh_friendlguy@yahoo. com+917503650858ANUBHUTI SETH (CO-AUTHOR)SYMBIOSIS LAW SCHOOL, NOIDAanubhuti. seth@yahoo. co.

in+918860685993" Marriage is really tough because you have to deal with feelings..... and lawyers" Richard PryorThis quote exemplifies the bitter truth behind many broken marriages and the evil they fight in; herein we would be extensively dealing with issues relating to marriage and children with the ambit of foreign or rather NRI marriages. Child custody and guardianship are the legal terms which are used to describe the legal and practical relationship between a parent and child, such as the right of the parent to make decision for the child, and parent's duty to care for the child. Law wants that at least one parent, if not both, always be legally responsible for the child. Child abduction is the unlawfully taking of child from guardianship of its natural or legal parents. The issue fetches major concern in India this issue basically arises in the condition of divorced parents fighting over the custody of their child. Besides, the parental abduction, affects the child's mental as well as physical health as he will be made to go through emotional traumas and might be even coerced by one of the parent in order to win the custody of their child. In order to be in a stronger position with clear cut dimensions of concrete law, a legislation named ' Indian Civil Aspect of International Child Abduction Bill, 2007' was proposed to secure the prompt return of children wrongfully retained or abduction to India. The proposed paper in IV part would list out the silent futures of the proposed legislation and would point out the exiting loopholes in it. Part I of the paper would give an introduction to the whole issue of IPCA, citing factors causing such

abduction. Part II further would conceptualize the nature of the act constituting ' child abduction' with the help of universal accepted definitions available. Part III of the paper would discuss the various remedies available under the Indian legal system and will give few suggestions and amendments. (Part IV as mentioned in third paragraph). Part V gives the conclusion, along with the silent features of the said bill. The paper makes some further recommendations so as to ensure secure upbringing of every child.

INTRODUCTION

We Indians have a kind of fascination and hopes attached to the words like ' foreign', ' NRIs' etc. but little did everyone know about the trouble and issues such as sacred relation would bring into the lives of many. In India we are trying the curb the trouble related to NRI marriages and the evil they bring into them. When these marriages breakdown it brings many aspects to be dealt with like child custody and maintenance. Many girls married from India find it difficult to get maintenance mainly because of the unawareness of their rights. The question arising in the child custody appears to a baggage in the spilt b/w the couple rather than true fight for their own blood. On the other hand we can have a different perspective of child custody through the recent Norway case, where both the parents jointly had a fight for the custody of their children. Eventually the custody was given to the grandparents; this case brought in light how the foreign land governs situation in a different perspective than that of India, and how Indian couple have fallen prey for the same." Adoption is not about finding children for families, it's about finding families for the children"- Joyce Maguire Pavao

<https://assignbuster.com/legal-issues-and-response-child-custody-law-family-essay/>

above mentioned quote is true because by mean of adoption it is the children who get new family, parents to take care of them. Adoption is a way to give new life to the children. The uniform child custody jurisdiction and enforcement Act (UCCICE) is concerned with determining which stet will have the original jurisdiction regarding child custody. On this father's day, it has been brought to notice that the law relating to child custody are biased against men, because all the law and the Hindu law grant the custody of a minor kid to the mother basing on the rule that " children of tender age need mother's care". The uproar against this law is majorly because the mother who have got the custody of the children are not allowing the father of the child to meet the father of the child to meet them, despite the court orders, even if in case the children meet the father they aren't talking because of the orders given to them by their mother. So the father demanded that there has to be an initiative to make rules that the custody is a joint custody or a shared parenting because isolation of either of the parent affects the children.

CHILD ABDUCTION

There in fix universal definition of child abduction. Such act which results in sexual, physical or emotional abuse or neglect of children are often dealt with by the law of countries as abuses. Child abduction is a devastating social issue. However, tragic the count of deaths and serious injuries provide limited insight into the pervasive long-term social, behavioural, and cognitive consequences of child abduction and neglect. Reports of child neglect also reveal little about the interaction among individual, family, and societies cannot be marked by reported incidences. The guilty person may be a

<https://assignbuster.com/legal-issues-and-response-child-custody-law-family-essay/>

parent, the innocence could be protected not only through the subsidies in the eyes of the law but there is urgent need of individual and social responsibilities as the abuse makes a child handicapped. Inter parental child abduction become an increasing problem in India. Communication and advancement in infrastructure has made the world more accessible. This has also lead to easier connectivity b/w individuals of varied nationalities, living in different parts of the world. This has also brought up problems-exposure to cross border risks, children caught up b/w broken relations of their parents due to mixing of many culture and different religions accopnied by rules and various taboos. For long, it has been believed that if a parent does something to a child then that is all right. The concept of child as chattel is still with us. Gradually, over the years, child abuse has been separated and neglected out from permissible parental action. The debate over this issue have led us to an universally accepted conclusion that it is necessary to charge a parent with the crime against the child like maltreatment, serious neglect, physical and sexual abuse of children. In addition to this, Intercontinental Abduction of children by parents is now a contemporary legal issue which mesmerizes different legal systems of nations whose inverse conflict positions prevents return of children to country of their habitual residence. The increasing number of inter-country relationship, the overall increase in family breakdown, advancements in family breakdown, advancements in telecommunications and information technology, and the speed and convenience of international travel, all contribute to this global problem. Recent data from a study indicates that child abduction by a parent is up to six times more frequently than previous estimate had suggested.

Sadly, India is also becoming a safe haven for child abductor. With the increasing no. of NRI and multiple problems arising leading to family conflicts, inter parental child removal to India is no more as a local problem and needs to be resolved on an international platform. Some steps have to be taken by joining hands globally to resolve these conflicts through the medium of courts interacting with each other. In India the main problem is that there is no defined legislation for inter parental child abduction. India is not a signatory of Hague Convention on civil aspects of international child abduction (1980). Thus many cases are basically decided on the principle of the well-being of the abducted child. In order to be in a stronger position with clear cut dimensions of concrete law, legislation named ' Indian Civil Aspect of International Child Abduction bill, 2007' was proposed to secure the prompt return of children wrongfully retained or abducted to India.

NATURE OF THE ACT CONSTITUTING ' CHILD ABDUCTION'

Child abduction or Child theft is the unauthorized removal of a minor (a child under the age of legal adulthood) from the custody of the child's natural parents or legally appointed guardians. The term child abduction confounds two legal and social categories which differ by their perpetrating contexts: abduction by members of the child's family or abduction by strangers: Parental child abduction: a family relative's (usually parent's) unauthorized custody of a child without parental agreement and contrary to family law ruling, which largely removes the child from care, access and contact of the other parent and family side. Occurring around parental separation or divorce, such parental or familial child abduction may include parental

alienation, a form of child abuse seeking to disconnect a child from targeted parent and denigrated side of family. Abduction or kidnapping by strangers (from outside the family, natural or legal guardians) who steal a child for criminal purposes which may include: extortion, to elicit a ransom from the guardians for the child's return illegal adoption, a stranger steals a child with the intent to rear the child as their own or to sell to a prospective adoptive parent human trafficking, a stranger steals a child with the intent to exploit the child themselves or by trade in a list of possible abuses including slavery, forced labor, sexual abuse, or even illegal organ trading murder By far the most common kind of child abduction is parental child abduction (200, 000 in 2010 alone) [1] and often occurs when the parents separate or begin divorce proceedings. A parent may remove or retain the child from the other seeking to gain an advantage in expected or pending child-custody proceedings or because that parent fears losing the child in those expected or pending child-custody proceedings; a parent may refuse to return a child at the end of an access visit or may flee with the child to prevent an access visit or fear of domestic violence and abuse. There is a considerable overlap between criminal law and civil law. Sometimes a person who has abducted a child is guaranteed a ' safe harbour' free from prosecution when that parent returns to the original jurisdiction. However an increasing number of arrests and prosecutions are taking place on return, sometimes directly encouraged by the parent whose child has been abducted. The police and prosecution services will not be bound by any civil agreement reached before the civil courts in another country. Police statistics show an increasing number of prosecutions for parental abductions. Actual or potential abductors must be

warned that there is a real risk of criminal proceedings. It should be investigated before the parent returns, if necessary by raising it with the court ordering the return. In some cases, the likelihood of prosecution of the primary carer, ordered to return has resulted in the child returning without the parent who has then had to make the relocation application from abroad. This is a highly unsatisfactory state of affairs and the consequence of the overlap of civil and criminal law. The Hague Convention is the Convention on the Civil Aspects of International Child Abduction, signed at The Hague on 25 October 1980. It has at present been ratified by approximately 80 countries. Each signatory country agrees in respect of a child abduction to its country that it will not enter into a full investigation of custody, contact or other parenting arrangements etc in respect of the child, which instead will be left to the court in the country where the child was last habitually resident, and instead merely secure the child's early and safe return. It is designed to encourage prompt return through administrative and judicial procedures so parents do not resort to self-help and secondary abduction. This is not departing from the principle that the welfare of the child is paramount but applying it, including the belief that it is not in the best interests of a child to be abducted but instead the decisions about the child should be left to the country where the child is or was habitually resident.

REMEDIES AVAILABLE FOR ABDUCTED CHILD

On April 29, 1988, the same day the United States became a signatory to the Hague Convention, Congress enacted the International Child Abduction Remedies Act (ICARA).[2]ICARA empowers state and federal courts to hear cases under the Convention and allows the Central Authority access to

<https://assignbuster.com/legal-issues-and-response-child-custody-law-family-essay/>

information in certain American records regarding the location of a child and abducting parent. In the United States, the Office of Children's Issues (OCI) in the Department of State serves as the Central Authority in instances where children are wrongly removed from the United States. A parent seeking the return of a child who the parent claims has been wrongly abducted may apply to the " Central Authority" of the child's habitual residence or of any other signatory nation to the Hague Convention.[3]Unfortunately, the Hague Convention and ICARA cannot function as remedies in a situation that involves a nonsignatory nation of the Hague Convention, and U. S. courts have dismissed complaints made under ICARA for failure to state a claim because of the involvement of a nonsignatory nation.[4]

SALIENT FEATURES OF INTERNATIONAL CHILD ABDUCTION BILL, 2007

A Central Authority for performance of duties under the Hague Convention for securing the return of removed children by instituting judicial proceedings in the High Court. The appropriate authority or a person of a contracting country may apply to the Central Authority for return of a removed child to the country of habitual residence. The High Court may order return of a removed child to the country of habitual residence but may refuse to make such an order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to refusal for return of a child by the court. The HC may refuse to return a child if the child objects to being returned upon it being satisfied that the child has attained an age and maturity to take into account his views. Based on the experience from other countries that have ratified the Hague

Convention, it is critical that all loopholes that will prevent the implementation of this be plugged. This (the exploitation of loopholes) is likely to be a serious problem in India and the political/bureaucratic/legal system will continue to provide a safe haven for the NRI/PIO/OCI/foreign citizen kidnapper, especially if the kidnapper is the mother. One example of a loophole is that abducting parent starts custody proceedings in India under the 30 year old laws before/in parallel with proceedings started by the left behind parent under the Hague Convention. Before India signs the Hague convention, appropriate laws will have to be enacted to prevent the exploitation of loopholes. In this way, children removed to and from India will be reunited with their aggrieved parent and India will no longer be a safe haven and sought after destination for parking removed NRI/PIO/OCI/foreign citizen children from foreign jurisdictions.[5] Furthermore, India should take steps to prevent child abductions within India, stop children being taken away from the gender that is denied custody rights, and penalize kidnappers and custodial mothers/fathers who deny visitation to the other parent. Mostly Indian women bargain child custody as blackmailing tool to get easy Divorce and huge sum of Alimony. Even Father is a natural guardian, but hardly 2% of Fathers get Child custody. Custody should be Equal to both gender and child should be raised with both Parents love and Affection. 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. [6] 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 fulfilment of any conditions to which the exercise of those 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.

CONCLUSION

The weight of the evidence suggests overwhelmingly that the source of child abduction starts at home. Only when society begins to ask itself the painful question of why this abuse and abduction is so prevalent in NRI marriages and why families, that ought to be safe havens for children, are so indifferent to the needs and effects of their disintegration causes on their children. As lawyers who are well acquainted with the family law can assess the risk of abduction and can take measures that will be effective in preventing the risk from becoming a reality. It is time we and those who train us realize that many children can be spared the trauma and harm of being abducted by parent and how we can lead the way in the battle by ensuring that we are well informed and well trained in all aspects of parental abduction prevention.

In today's emerging scenario, it is now generally seen that in the absence of any Indian legislation on the subject, there is no uniform pattern of decisions to resolve issues of custody and contact which arise when parents are separated and live in different countries. Few recent decisions of various cases of IPCA, show that a time has now come for some international

perspective in this regard. There are certain situations when parents move the court and seek Habeas Corpus relief and the parent with the child abroad, moves the court there and gets a restraint order. Both the parents get equipped with the judicial orders and the dual-continental custody battle takes place in two jurisdictions. For the greater interest of the children at risk, the conflict of jurisdiction of the courts should not be given so much importance. It is therefore, the gravest need of the hour that the Indian legislature may consider enacting some legislation to protect the rights of the abducted child and to resolve the clash between the rule of domicile and the nationality rule. Maybe, till this is done, the Supreme Court of India could well lay down some uniform guidelines to be consistently followed in IPCA from foreign jurisdictions. Maureen, Dabbagh (2012). Parental Kidnapping in America. US: McFarland. p. 1. ISBN 978-0-7864-6533-0. 42 U. S. C. § 11601(a). Hague Convention, art. 6, at 1501. Mezo v. Elmergawi, 855 F. Supp. 59 (E. D. N. Y. 1994) (discussing now ICARA and Hague remedies do not apply to non-signatories). Stop child abduction to India, give equal rights to father Posted by 498a_crusader on February 28, 2008 Art. 21 Hague Convention on the Civil Aspects of International Child Abduction, 2007