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Volume 10, May 2020 ISSN 2581-5504

"Child Abduction under Private International Law"

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ABSTRACT:

The arena of child abduction under private international law is severely under explored and inadequately represented. The phenomenon of the abduction of children, especially bearing a transnational identity, is what has been plaguing the world with several ancillary issues. The problem is not only restricted to the jurisdiction of the courts to try such matters, but it also pervades to the obstruction and the negligence of the consent of the children, which form an important part of the vulnerable and disadvantaged groups and demand critical attention, especially when it comes to according their rights. Not only unethical, the sheer ignorance of the issue and the nonchalant dispute amongst countries regarding the custody of children in such matters is nothing but another step to violate their human rights and render them vulnerable to other forms of exploitation and thereby, ruining an entire generation and the mentality thereof. The paper herein seeks to delve into the noble efforts to conserve the arena of the child abduction amongst various jurisdictions and how successful the international community, including India has been in the conservation of the rights of child.

Keywords: child, abduction, child snatching, private international law

INTRODUCTION:

The problem of child abduction, which is known by several names, is an important bone of contention under the branch of Private International Law. Initially governed the rules of Public International Law and such regulations which were universal for all members of the international community, this issue were not dealt with efficiently. It was only in the 20th century one observes, the recognition which was accorded to this problem and the codification and protocol for the same, that deals with this on-going and unethical issue.

The problem of child abduction that has now escalated on a globally, is a by-product of several causes. The increase of instances in international and inter-community marriages, the fall of gender stereotypes, the rise of active participation of women and men alike in labour force and the increasing statistics of divorce. The abduction or what is also known as the "international parental kidnapping" or "child stealing" or "child snatching" is nothing but an outcome of a new lifestyle pattern that is gaining momentum. Therefore, an important aspect of the family law, is also recognised, codified and enforced under the rules and principles of private international law.

The problem of child abduction roughly described through this illustration: a couple, possibly of two different nationalities, solemnize the marriage. The couple bear a child, which is considered as a minor under the laws of the land where the couple is domiciled. The issue arises when one of the partners or members of the family of either of the spouses, removes

the child from its habitual residence and surroundings and introduces the child to a foreign territory, often by begging, coaxing or forcing the child. Since the child is usually with a person known to a guardian or is a guardian itself, and the fact that the laws of land differs the minute they set foot in a foreign territory, is what makes the matter worse. The possibility that child maybe held ransom, maybe forced to disappear or is just kept in forceful custody, without any direct proof of any formal or illegal kidnapping, is what eluded the jurisdiction of the local laws to try the case in the first place.

EFFORTS ON THE PART OF THE UNITED NATIONS

The unreasonable incidences of such and related crimes led to the United Nations to deliberate and ultimately form an important convention that addressed the issue directly. The Hague Convention on the Civil Aspects of Child Abduction, which was adopted on the 25th October, 1980 was a stepping stone towards the solution to this global menace.[1] Consisting of 42 Articles, the Convention, in its essence, sought to regularise the jurisdiction of courts with respect to cases of international abduction by parents and aimed to give the interests and rights of child a higher footing. The Convention on the Rights of Child, 1989, also sought to bring into consideration, the often ignored rights and interests of the child, to the fore font.

The Preamble of the Convention states that *"...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…"*[2] The intention of the document can be clearly ascertained. The main idea was to put a stop to the illegal and unethical removal of children from natural habitat and ensuring a safe and a just environment for their healthy upbringing, and not one that is tumultuous.

The instrument, basically, mandates the state to not enquire into the merits of the case of child abduction, but to report it to the appropriate forum or a competent court of "habitual residence" of the child, so as to take a step towards justice. Being well aware that every country has different law and has a subjective judgment of the criminality of the same offense, it sought to recognize and provide uniformity for the forum or the court whose system of law would be most suitable to legal relationship that is founded on the factual situation.

Among several provisions that are mentioned in the convention, one of the most important and misused provision, that maybe responsible for the continued perpetration of the said offense, is Article 13. It expressly states that *"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 -*

[1] *Convention of 25th October 1980 on the Civil Aspects of International Child Abduction,* HCCH, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=24, last seen on 9/3/2020
[2] Ibid.

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; 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 authorities 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."[3]

This provision, though is mentioned and guaranteed with a noble intention, is actual capable of doing more harm that there already is. The factor of "grave risk" and "physical or psychological harm" is easily capable of creating a bias in the minds of the adjudicating authority. Because the matter concerns children, the population and the needs of the same are deemed as sensitive. There cannot be any lapse or dearth of any kind. Any misstep by any authority is not only capable of violation of human rights, but also may lead to bad publicity and international accountability. If the court or any adjudicating authority feels that there is a certain risk of the child or children are deposited back into their natural habitat, the authority has the power to withhold the return of child. This may be possible even if the child insists. An example of the narrow interpretation of this provision is elucidated in the case of Friedrich v. Friedrich, whereby the United States Supreme Court held that a grave risk can only exist when the return puts the child in imminent danger prior to the resolution of a custody dispute, e.g. return of the child to a war zone or famine area; or, in cases where there is serious abuse or neglect or extraordinary emotional dependence and the court in the place of habitual residence is unable or unwilling to give the child adequate protection.[4] The exact opposite was held in a case in Canada whereby the Supreme Court held that that the risk of harm need not come from a cause related to the return of the child to the other parent, it may also arise from the removal of the child from his present caregiver: from the child centered perspective, harm is harm. If the harm is serious enough, it is irrelevant where it arises from. However, it would only be in the rarest cases that the removal of the child from the abductor and its new environment would constitute the level of harm contemplated by the Convention.[5]

THE INDIAN PERSPECTIVE

With respect to Indian approach, India is not a signatory to the Hague Convention and neither has it executed any kind of bilateral treaty with any country with respect to the problem of

[3] Ibid
[4] Friedrich v Friedrich , 78 F.3d 1060, (1996 United States Court of Appeals) (6th Cir.)
[5] Thomson v. Thomson,4th Canada, 119, 253 (1994, Supreme Court of Canada)

international abduction. Yet, India is beginning to collaborate with the United States of America, to find practical solutions so as to encounter the issue of child abduction under international law.[6]

The cases of child abduction are often dealt with as cases of unresolved child custody and are subjected to the adjudication of family courts, thereby characterized as personal laws. A 2016 report stated that there were 99 unresolved custody return applications in India, including 24 such applications which were made in 2015.[7] In India, every major community has its own personal laws, to deal with issues like marriage, adoption, guardianship, divorce and maintenance. The family courts, under various statues like the Guardian and Wards Act, the Hindu Marriage Act, etc. have decided cases on the custody of children, keeping in mind, the paramount interests of children. In the case of In Ruchi Majoo v Sanjeev Majoo[8], the Supreme Court heard a petition from the mother against the father wherein she challenged the High Court's interim order that quashed the guardianship order given in her favour under the Guardian and Wards Act, 1890, by the District Court. In this case, the appellant made the application when legal proceedings had already been initiated in a foreign court. The High Court quashed the guardianship order and also held that the issue of the child's custody ought to be decided by the foreign court because it had already passed the protective custody warrant order, and also because the child and his parents were US citizens who were ordinarily resident in the US. Hearing the appeal, the Supreme Court framed three questions for decision:

1. Was the child 'ordinarily resident' in India for the District Court to exercise its jurisdiction?
2. Was the High Court right in declining to exercise extraordinary jurisdiction under the *Code of Civil Procedure 1908* (India) s 151, citing 'principle of comity of courts'?
3. Did the order granting custody to the mother need modification to include visitation rights to the father?

The court answered the first and the second question in affirmative, while answering the third in negative. It summarily held that the High Court had been erroneous in denying jurisdiction to the matter at hand. The term "ordinarily resident" must be held as a question of fact and should be subjected to a complete inspection and scrutiny with respect to the circumstances inclusive of the place of birth, duration of residence, etc. For the second question, the Court made an explanatory note, expounding the role of Indian judiciary with respect to the disputes concerning the custody of a transnational child. It held:

[6] *India Beginning to work with US to resolve child abduction cases : Official,* Economic Times, available at https://economictimes.indiatimes.com/news/politics-and-nation/india-beginning-to-work-with-us-to-resolve-child-abduction-cases-official/articleshow/63728962.cms, last seen on 10/03/2020

[7] *Annual Report on International Parental Child Abduction (IPCA),* Bureau of Consular Affairs, US Department of State, 2016, available at https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20(July%2011).pdf, last seen on 10/03/2020

[8] Ruchi Majoo vs. Sanjeex Majoo, Civil Appeal No. 4435 of 2011, (Supreme Court of India 13/05/2011)

"The duty of a court exercising its Parens Patraie [sic] jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration, the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision."[9]

The concept of shared custody/residence orders is of a recent occurrence in India. In the Eugenia Archetti Abdullah v State of Kerala[10] the court, pending custody proceedings in a foreign court, ordered the custody of the children to the mother with the directive of shared custody or visitation rights until the mother left India. In Leeladhar Kachroo v Umang Bhat Kachroo,[11] the court held that it has the right to entrust the custody of a child to a parent who currently resides outside its jurisdiction, if it proves to be conducive to the welfare of the child. Owing to an absence of a statutory provision regarding shared residence orders within Indian law and judiciary, the courts necessarily interpret foreign courts' shared residence orders in light of the best interests of the child.

EFFORTS ON THE PART OF THE INTERNATIONAL COMMUNITY

Apart from this, there have been various attempts on the regional front, so as to single out and handle the situation of child abduction. One of the best examples would be of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, which was adopted by the Council of Europe on 20 May 1980 in Luxembourg. The aim of this Convention is to simplify the cross-border enforcement of custody orders. The second source of law is the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children adopted on 19 October 1996 within the framework of the Hague Conference of Private International Law. It entered into force on 1 January 2002. It contains rules on jurisdiction, applicable law, recognition and enforcement of measures on parental responsibility and protection of children.

The several instruments, though varying in technicality, aim to promote a single objective: to protect and deliver the rights of children. Considered as one of the most vulnerable and disadvantaged groups, children are that part of the population that need care and affection, apart from dissemination of knowledge and provision of basic facilities. The impact of several events on the nascent mindset of children, have the ability to produce serious

[9] Ibid
[10] Eugenia Archetti Abdullah vs. State of Kerala, 2004 (3) KLT 1025 (Kerala High Court, 07/04/2004)
[11] Leeladhar Kachroo vs. Umang Bhat Kachroo, 121 (2005) DLT 218, II (2005) DMC 193, 2005 (82) DRJ 609 (Delhi High Court, 2005)

repercussions on the mental health of the progeny. The protection of mental health is an equally important aspect when it comes to protecting the rights of child. Often, due to political or civil unrests, children or families are uprooted and are forced to relocate, often resulting in children being left behind in the pandemonium. Such disturbing experiences often leave children vulnerable to not only parental abduction, but all sorts of evil that the society and mankind is a host to. Due to lack of understanding and the inability to judge a person, children are victims in several instances. Also, the purpose is not only to secure children and their various rights, but also to act in consonance with the rights of parents or the rightful and legal guardianship of the child. The separation of child from the its parent or parents is a cruelty that is meted out on both, and not just the child or the children in question.

The parent or parents too have the rightful claim and guardianship over their lawful progeny and even though it is illegal, it is simply immoral to separate the two. The hindrance of the rights of the rightful guardian or guardians is a serious human rights violation in itself.

CONCLUSION:

The area of child abduction under private international, although still in its developmental and nascent stage, is a huge milestone to curb the unethical abductions and to address the issues of the contemporary issues of nations under private international law. The nascent nature of the field is proving to be a boon and bane respectively. It is a boon as contemporary issues can be recognized and thus categorically addressed, thus being up to date with new criminal and civil trends. On the other hand, it is a bane as it is currently yet not very effective so as to prevent such crimes, let alone impart justice to the parties involved.

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