



Family Law Symposium – New Delhi

Tuesday 13th September 2016

SYMPOSIUM PAPERS



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PROGRAMME

TIME	SESSION	SPEAKER(S)
9.00am - 9.20am	Opening speech from Justice Sen	Justice Sen
9.20am - 9.30am	Lecture on women's rights in India	Judge Bhanumathi
9.30am - 9.50am	Lecture by Geeta Luthra on domestic violence	Geeta Luthra
9.50am - 10.30am	Panel discussion 1 (adoption)	Ruth Cabeza (chair) Ruwani Dantanarayana Anil Malhotra
10.30am - 11.15am	Coffee	
11.15am - 12.45pm	Panel discussion 2 (surrogacy)	Anne-Marie Hutchinson (chair) Margaret Swain Rahima Nato-Kalfane Narghis Bundhun Ranjit Malhotra
12.45pm - 2.00pm	Lunch	
2.00pm - 3.15pm	Panel discussion 3 (abduction)	Marilyn Freeman (chair) Véronique Chauveau Anil Malhotra Mikoko Otani Professor Anselmo Reyes
3.15pm - 3.45pm	Tea	
3.45pm - 5.00pm	Roundtable (financial provision)	Pinky Anand to introduce & chair
5.00pm	Closing address	William Longrigg, IAFL President

Geeta Luthra is a graduate of Lady Sri Ram College of Commerce, Delhi with an outstanding academic career. During her school years, being an outstanding student she then proceeded to become the first alumni President of Presentation Convent School, New Delhi. She is also the first alumni President of her college, Lady Sri Ram College of Arts, from where she graduated in Political Science being ranked second in her college. Due to her interest in sports and other extracurricular activities, including, debating, quiz, sports, etc. She was the President of the Political Science Association and of Sports Committee of her College. Ms. Luthra has played Hockey for the State of Delhi on several occasions and was a scholarship holder during her second and third year of graduation based on her academic excellence. She did her Bachelors in Law from the Faculty of Law, Delhi University where she stood second in Delhi University.

She was awarded InLaks Scholarship and went to Clare College, Cambridge, U.K. where she completed her Masters in Law in the academic year 1981-82. She then pursued her M.Phil in International Relations and wrote a Thesis on Rann of Kutch boundary disputes between India and Pakistan. She specializes in myriad faces of law including International and Commercial Arbitration, Constitutional Law, Conflict Law/Private International. She has a professional experience of over 35 years and was designated as a Senior Advocate in May, 2009. Ms. Luthra has been a Senior Special Counsel for the Union of India/Central Government in the Supreme Court as well as in

the High Court. She has defended the Union of India in many arbitration disputes under the Requisition and Acquisition of Immovable Property Act. She is an Arbitrator in several commercial and contractual disputes. She has several leading judgments to her credit, including in the field of Right to Employment of Transgenders in Para Military Forces in India as well as in the Rights of Tribal Women to property in view of Article 15 of the Indian Constitution. She is the Vice President of Governing Body of the Indian Council of Arbitration and is a Trustee at *Manushi* which is a trust for the welfare for women and children; she is the Trustee of the Indian Chapter of the Inlaks Foundation as well. She has been an erstwhile Member of Governing Bodies of several colleges and has delivered lectures at the Delhi Judicial Academy as well as Refreshers Course of Women Rights in Jamia Islamia University. Recently she has been awarded an Honorary Professorship by the Amity University in the year 2015.

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**PROTECTION OF WOMEN FROM
DOMESTIC VIOLENCE ACT
2005 : AN OVERVIEW**

INTRODUCTION

- Example of a “budding step” in the field of Women emancipation
- Enacted for the effective protection of the rights of the women guaranteed under the Constitution
- This act was passed by the Parliament in August 2005, and came into force from October 26, 2006
- The act provides for the first time in Indian law a definition of “domestic violence”, which includes not only physical violence but also emotional, sexual and economic abuse.

PREVIOUS LEGISLATIONS

Till 1938

- No specific legal provisions pertaining to violence within home
- Men could only be convicted under the general provisions of murder, abetment to suicide, causing hurt wrongful confinement
- S. 304B of IPC – Dowry Death
- S. 313-316 – Female infanticide, forcing the wife to terminate her pregnancy
- Other sections such as S. 305, 306, 321, 349 have also been used to convict husband for domestic violence

1983

- Matrimonial cruelty was introduced as an offence in IPC under S.498
- Cruelty was defined as *"any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman"*.

1987

- The Commission of Sati Prevention Act 1987
- The Act declares the observance, support, justification or propagation of Sati as criminal activity.

1990

- National Commission for Women Act 1990
- It was enacted in order to review the Constitutional and legal safeguards for women
- The commission also processes the complaint oral, written or suo moto

INCEPTION OF THE ACT

- Act has been enacted keeping in view the various guidelines given by International Conventions and declarations
- The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action 1995 have acknowledged this.
- The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No.XII (1989) has also recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

PRE- PWDVA SCENARIO

The only legal remedies available to women against violence at the hands of her husband/partner/in-laws before PWDV Act came into existence were:

- a) Section 498A IPC – Conditions to satisfy a crime under this section includes acts which would likely, or drove a woman to commit suicide or cause grave danger to her life and limb or health.
- b) Section 304B, IPC – Which could only be used post-mortem to punish violence against a woman when the cause of her death has been shown to be dowry related.

Therefore, significant gaps existed. Lawyers Collective and other women's rights group therefore recognizing this problem, after years of hard work, came up with the draft legislation of PWDVA.

REMEDIES PROVIDED BY PWDVA

- The reliefs provided in the Act are meant to provide immediate relief in emergency situations. The Act did not make any changes in the existing personal law regime on family matters. The reliefs under the Act are in addition to existing laws and have been recognized with the objective of empowering a woman to tide over an emergency situation. Having obtained relief under the law, a woman can still go for relief under other laws later.
- Ex-parte, interim and permanent orders including, protection orders, residence orders, monetary relief.
- The Act includes provisions for making Domestic Incident Reports which will serve as important records at the stage of evidence taking. The manner in which the applications for orders under the Act have also been mentioned in the Act. Finally, the Act provides that the breach of an order obtained is a criminal offence.
- Women can now obtain an order in a pending suit or criminal case, such as divorce case or a criminal case of cruelty (Section 36)
- Impose necessary conditions on respondent (Section 12)
- Any authorized person, NGO or a protection officer can move a petition on behalf of the aggrieved person (Section 12)
- This Act is not restricted to the marital context only, it also recognizes live-in relationships, relations of consanguinity, adoption etc. (Section 2(f))

TYPES OF ORDERS

Protection Order (Section 18) i. Protection from attempt or commission of Domestic violence	Residence Order (Section 19) i. The aggrieved person cannot be removed from the house ii. Order for shared household
Monetary Relief (Section 20) i. Order for maintenance ii. Compensation for domestic violence	Temporary Child Custody (Section 21) i. Visitation rights

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE IN "RELATIONSHIPS AKIN TO MARRIAGE"

Indra Sarma vs V.K.V. Sarma on 26 November, 2013; 2013 STPL(Web) 944 SC, and *D. Velusamy v. D. Patchaiammal* (2010) 10 SCC 469.

Prior to its enactment there was no statutory protection providing protection to women in the matrimonial home the act is a single window act to empower women who may be in terms of physical, verbal, sexual or economic abuse. The enactment also protects women who are living in a relationship even though they are not married, to their live in partner. This concept has been explained and the protection has been given to women who are living in a relationship akin to marriage as distinguished from a concubine.

Recognition of and protection from violence in marriage-like relationships:

The Supreme Court in *D Veluswamy versus D Patchaiammal* has explained the definition of Live-In Relationships with reference to Domestic Violence Act. As :-

the expression 'domestic relationship' includes not only the relationship of marriage but also a relationship in the nature of marriage.

Parliament by the aforesaid Act has drawn a distinction between the relationship of marriage and a relationship in the nature of marriage, and has provided that in either case the person who enters into either relationship is entitled to the benefit of the Act.

IMPORTANT DEFINITIONS: "AGGRIEVED PERSON", "DOMESTIC RELATIONSHIP" AND "SHARED HOUSEHOLD"

• Section 2(a) of the Act states :

2(a) :-aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

• Section 2(f) states :

2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family



IMPORTANT DEFINITIONS UNDER THE PWDVA

• Section 2(s) of the Act states:

"shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;"



MISINTERPRETATION OF LOOSELY DEFINED TERMS LIKE "MATRIMONIAL HOME"

The definition of matrimonial home was too loosely defined in the Protection of Women from Domestic Violence Act in Sec 17 of Domestic Violence Act where even a temporary residence/visit could have been interpreted to include matrimonial home. The concept has been narrowed down and Delhi High Court in three land mark judgments namely

- *Shumita Didi Sandhu versus Sanjay Singh Sandhu* (2007) 96 DRJ 697,
- *Evenet V. Kavita Choudhary* (2012) 130 DRJ 83 (Del) and
- *Barun Nahar Vs. Parul Nahar* 2013 (2) AD (Delhi) 517.



PWDVA : POSITIVE CHANGES

1. The Act widened the definition of "respondent", which included husband and any adult male partner (*Manoj Wankhade v. Manoj Bhimrao Wankhade and Others* (2011) 3 SCC 650)
2. Right to maintenance unaffected even when physically challenged husband (*Om Prakash v. State of Rajasthan*)
3. Wife can remove errant husband from his own residence (*Ishpal Singh Kahai v. Ramanjeet Kahai*)



MISUSE – EASY TOOL FOR TORTURE

- A married woman is subjected to cruelty under Indian Penal Code, 1860 by her husband or his relatives (498A IPC) or by same husband and his relatives in demands of dowry preceding unnatural death within seven years of marriage (304B) or causing woman's death (302 IPC) amounting to murder. In both sections 498A IPC and 304B IPC cruelty extends toward death.
- A person charged under section 304B IPC can be convicted under 498A IPC without any charge under that section.
- According to Malimath Committee Report once a complaint or FIR is lodged under section 498A IPC or 406 of Indian Penal Code, it becomes an easy tool in the hands of the police to arrest or threaten to arrest the husband and other relatives named in the Complaint/FIR without even considering the intrinsic worth of allegations and making a preliminary investigation. (237th law commission report)



Criticism of misuse of DV Act and 498A IPC : Preeti Gupta & Anr. versus State Of Jharkhand & Anr.

Instances of incorrect complaints and misuse of the Act are rampant and the same has been criticized in numerous judgments. In the judgment of Preeti Gupta, Hon'ble Bench of the Supreme Court has held that:

"...The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. Before parting with this case, we would like to observe that a serious relook of the entire provision is warranted by the legislation. It is also a matter of common knowledge that exaggerated versions of the incident are reflected in a large number of complaints. The tendency of over implication is also reflected in a very large number of cases..."

CONTINUED:

Therefore, as long as **specific and defined allegations with date, time and proper description** are not provided in the complaint against the family members of the husband and more importantly where the said accused members have not lived in the same matrimonial home or in a domestic relationship with the complainant under the same roof with access to the complainant, the charges against the said members are being quashed and otherwise it is becoming easier for them to get bail.

Protection order can be attained against only those individuals who have a "domestic relationship" with the complainant in a "shared household".

PROCEEDINGS UNDER THE DV ACT AFTER DIVORCE

When the Decree of Divorce is granted by a foreign court:

The law as it exists is that the jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married while passing of a decree of divorce.

In the case of **Pritam Ashok Sadaphule versus Hima Chugh**, wherein the jurisdiction of proceedings under the PWDVA were questioned on the ground of the Complainant and accused husband being already divorced under the UK Law was raised, the Hon'ble Delhi High Court held that the decree of divorce passed by the UK Court was on a ground not recognized by the Indian Matrimonial Law i.e. irretrievable breakdown of marriage and relied on the judgment of the Apex Court in *Y. Narsimha Rao and Ors V Y. Venkata Laxmi*, 1991 SCR (2) 821.

APPLICATION OF SECTION 13 OF CIVIL PROCEDURE CODE, 1908

Wherein the Hon'ble Supreme Court of India, declined to give its imprimatur to foreign decree which did not take into consideration the provisions of Hindu Marriage Act under which the parties were married. Similarly, the Delhi High Court in this case, refused to consider a decree nisi for divorce granted by Ld. Ilford County Court in UK on 9th May, 2011 stating that the same was granted on the ground of "irretrievable breakdown of marriage" i.e. which is not a ground for dissolution of marriage under the Hindu Marriage Act, as such stating that the said decree cannot be recognized in India.



EXCEPTIONS TO THESE RULES

- Where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on the grounds of available matrimonial law under which the parties are married
- Where the respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim which is based on grounds of available matrimonial law under which the parties are married.
- Where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial home.



MISUSE OF PROTECTION OF DOMESTIC VIOLENCE ACT

- *Adil & ors. Versus State & Anr.* 2010 SCC OnLine Del 3272:- it stated that property of mother in law cannot be termed as a shared household
- Court had clarified the legal position in respect of domestic relationship in *Vijay Verma Vs. State NCT of Delhi & Anr.*, Cri. M.C. No.3878/2009 observed as under:
- Filing of a petition under Protection of Women from Domestic Violence Act by the petitioner taking shelter of domestic relationship and domestic violence needs to be considered so that this Act is not misused to settle property disputes. Domestic relationship is defined under the Act in Section 2(f) as under:
- Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."



MAINTENANCE

- Under Indian law, the term 'maintenance' includes an entitlement to food, clothing and shelter, being typically available to the wife, children and parents.
- The concept of 'maintenance' in India is covered both under Section 125 of the Code of Criminal Procedure, 1973 (Section 125) and the personal laws. This concept further stems from Article 15(3) reinforced by Article 39 of the Constitution of India, 1950
- The Hindu Adoptions and Maintenance Act 1956:-
- A Hindu wife is entitled to be provided for by her husband throughout the duration of her lifetime. The only way the wife can null her maintenance is if she renounces being a Hindu and converts to a different religion, or if she commits adultery.



CONTINUED:

- The wife is allowed to live separately from her husband and still be provided for by him.
 - If the wife is widowed by her late husband, then it is the duty of the father-in-law to provide for her.
- The power of the court to grant alimony is not limited to cases where the decree is obtained by the wife. Courts have powers to grant alimony to the wife even where the husband is granted a decree.
- The factors that the court takes into consideration for permanent alimony/maintenance for the wife as follows:
- A) The status and position of the husband, his income, his assets and his lifestyle
 - B) The reasonable wants of the wife
 - C) The wife's own income or earnings



ESSENTIAL CONDITIONS FOR GRANTING MAINTENANCE AND GROUNDS ON WHICH THE WIFE CAN BE REFUSED MAINTENANCE

- Sufficient means to maintain:
According to Section 125(1) of the Code of Criminal Procedure, the person from whom maintenance is claimed must have sufficient means to maintain the person or persons claiming maintenance.
- Neglect or refusal to maintain:
As per Section 125(1) of the Code of Criminal Procedure, the person from whom maintenance is claimed must have neglected or refused to maintain the person or persons entitled to claim maintenance.
- Wife claiming maintenance must be unable to maintain herself:
As the object of Section 125 of the Code is mainly to prevent vagrancy, the requirement to pay maintenance should be only in respect of persons who are unable to maintain themselves.
The maintenance has to be determined in the light of the standard of living of the person concerned which she enjoyed at the place of her husband i.e. while she was living with him.



Grounds on which the wife can be refused maintenance:

- i) The wife must not be living in adultery:
As per Section 125(4) of the Code of Criminal Procedure, no wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under Section 125 if she is living in adultery.
- (ii) Wife must not refuse without sufficient reasons to live with her husband:
 - According to Section 125(4) of the Code of Criminal Procedure, no wife shall be entitled to receive an allowance for the maintenance from her husband, if she refuses to live with her husband, or if they are living separately by mutual consent.
 - As per explanation to Section 125(3) of the Code, if a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be a just ground for his wife's refusal to live with him.
 - As per explanation to Section 125(3) of the Code, if a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be a just ground for his wife's refusal to live with him.



CONCLUSION

The Act presently is heavily in favor of women. Although, the chances of it being misused and abused though enormous are being constructively and considerably reduced through progressive and definitive judicial review by the Indian Courts.

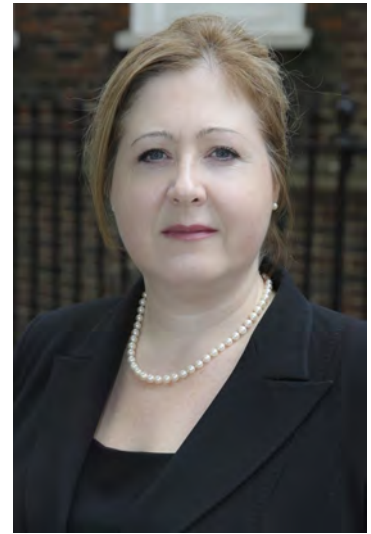
This Act should have ideally included stringent penal provisions for curtailing the instances of abuse and mishandling. Also, this Act does not contain any provisions for creating awareness or for strengthening and preserving family as an institution or even providing chances for reconciliation or even scope for improvement to "the husband".

It is eventually, the neo collectivist and neo socialist approach which is needed in the society that can essentially free both men and women from shackles of brutality and ultimately put them on an equal pedestal in all respects. Only in a more gender-equal society, women who have suffered violence could get rid of shame/self-blame and such happenings could be de-stigmatized. Family, school, peer groups, and media are all agencies of socialization, which all together should join the cultural revolution and mental revolution to construct India a more female-friendly society.



RUTH CABEZA

Ruth Cabeza is an English Barrister, called to the Bar of Middle Temple in 1998 and practicing out of Field Court Chambers, Gray's Inn, London. She has always specialised in family law, and, since 2010 her practice has becoming increasingly focused on the international movement of children. She has led the way in developing English law in relation to the international adoption of children under the 1993 Convention. She has also been involved in several of the leading cases concerning the establishment of parenthood for intended parents whose children have been born as the result of an overseas commercial surrogacy agreement. She also has experience of international child abduction and relocation cases. Ruth was delighted to be accepted as a fellow of IAFL in summer 2016. Her chambers profile is available on <http://fieldcourt.co.uk/barrister/ruth-cabeza/>



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**PRACTIAL GUIDE TO ADOPTIONS UNDER
THE 1993 HAUGE CONVENTION ON
INTERCOUNTRY ADOPTION**

RUTH CABEZA
BARRISTER
FIELD COURT CHAMBERS
LONDON

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33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

- Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.
- Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.
- Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.
- Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.
- Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20 November 1989, and the *United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (General Assembly Resolution 41/85, of 3 December 1986).

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Article 1
The objects of the present Convention are -

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

- (1) The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.
- (2) The Convention covers only adoptions which create a permanent parent-child relationship.

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Habitual Residence

- Habitual Residence was chosen as the mechanism to establish jurisdiction in preference to: nationality, citizenship, and domicile.
- No definition in the Convention, it is a matter for national law to determine
- The advantage of habitual residence is that:
 - the state in which the child lives is both responsible for, and in a position to assess at a hands on practical level, the child's circumstances.
 - The state in which the adopters live is best placed to assess the adopters, investigate historic involvement with children's services and or criminal justice system and understand the support that can be provided locally following adoption.

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Receiving state and state of origin work in partnership with clearly defined responsibilities in the adoption process

- The receiving state must assess the adopter – Articles 5 and 15
- The state of origin must assess the child – Article 4 and 16
- Both states must agree the adoption is in the best interest of the child Article 17 (c)
- The receiving state must confirm that following the adoption the child will be allowed to reside permanently in that state – Articles 5(c) and 17(d)
- Once a child has been transferred to the receiving state, that state assumes primary responsibility for the child – Article 21

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Automatic Recognition of Adoption

Article 23

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised **by operation of law** in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.

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HCCH

- Invaluable resources – updated status tables/ text of convention and explanatory note
- Country profiles
- Responses to questionnaires
- www.hcch.net

33. CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION¹

(Concluded 29 May 1993)

The States signatory to the present Convention,
Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,
Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,
Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,
Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,
Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),
Have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

- (1) The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.
- (2) The Convention covers only adoptions which create a permanent parent-child relationship.

¹ This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Intercountry Adoption Section". For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Seventeenth Session (1993)*, Tome II, *Adoption – co-operation* (ISBN 90 399 0782 X, 659 pp.).

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph c, have not been given before the child attains the age of eighteen years.

CHAPTER II – REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- a) have established that the child is adoptable;
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c) have ensured that
 - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
 - (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
 - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
 - (4) the consent of the mother, where required, has been given only after the birth of the child; and
- d) have ensured, having regard to the age and degree of maturity of the child, that
 - (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
 - (2) consideration has been given to the child's wishes and opinions,
 - (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
 - (4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –

- a) have determined that the prospective adoptive parents are eligible and suited to adopt;
- b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c) have determined that the child is or will be authorised to enter and reside permanently in that State.

CHAPTER III – CENTRAL AUTHORITIES AND ACCREDITED BODIES

Article 6

- (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
- (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

- (1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.
- (2) They shall take directly all appropriate measures to –
 - a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
 - b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

- a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c) promote the development of adoption counselling and post-adoption services in their States;
- d) provide each other with general evaluation reports about experience with intercountry adoption;
- e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall –

- a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

- (1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.
- (2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

- (1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall –
 - a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
 - b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
 - c) ensure that consents have been obtained in accordance with Article 4; and
 - d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.
- (2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

- a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c) the Central Authorities of both States have agreed that the adoption may proceed; and
- d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

Article 19

- (1) The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.
- (2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

- (3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

- (1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular –
 - a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
 - b) in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;
 - c) as a last resort, to arrange the return of the child, if his or her interests so require.
- (2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

- (1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.
- (2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –
 - a) meet the requirements of integrity, professional competence, experience and accountability of that State; and
 - b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.
- (3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.
- (4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.
- (5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

CHAPTER V – RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23

- (1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.

- (2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

- (1) The recognition of an adoption includes recognition of
- a)* the legal parent-child relationship between the child and his or her adoptive parents;
 - b)* parental responsibility of the adoptive parents for the child;
 - c)* the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
- (2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State.
- (3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.

Article 27

- (1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognises the adoption under the Convention, be converted into an adoption having such an effect –
- a)* if the law of the receiving State so permits; and
 - b)* if the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of such an adoption.
- (2) Article 23 applies to the decision converting the adoption.

CHAPTER VI – GENERAL PROVISIONS

Article 28

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a)* to *c)*, and Article 5, sub-paragraph *a)*, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30

- (1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.
- (2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

- (1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
- (2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
- (3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption 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 that State shall be construed as referring to the law in force in the relevant territorial unit;
- c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorised to act in the relevant territorial unit;
- d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption 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 38

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

Article 39

- (1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
- (2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

Article 40

No reservation to the Convention shall be permitted.

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 43

- (1) 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 Seventeenth Session and by the other States which participated in that Session.
- (2) 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, depositary of the Convention.

Article 44

- (1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.
- (2) The instrument of accession shall be deposited with the depositary.
- (3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months

after the receipt of the notification referred to in sub-paragraph *b*) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 45

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the 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.
- (2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- (3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

- (1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.
- (2) Thereafter the Convention shall enter into force –
 - a*) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b*) for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 47

- (1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.
- (2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following –

- a*) the signatures, ratifications, acceptances and approvals referred to in Article 43;
- b*) the accessions and objections raised to accessions referred to in Article 44;
- c*) the date on which the Convention enters into force in accordance with Article 46;
- d*) the declarations and designations referred to in Articles 22, 23, 25 and 45;
- e*) the agreements referred to in Article 39;
- f*) the denunciations referred to in Article 47.

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

Done at The Hague, on the 29th day of May 1993, 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 Seventeenth Session and to each of the other States which participated in that Session.

ADOPTION SECTION



The *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Adoption Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. This Convention, which operates through a system of national Central Authorities, reinforces the UN Convention on the Rights of the Child (Art. 21) and seeks to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights. It also seeks to prevent the abduction, the sale of, or traffic in children. For further information, see the Outline of the

Convention or the more detailed "Information Brochure" on the Convention.

Please note that the Permanent Bureau of the Hague Conference has no mandate to assist in individual adoption cases. If you have a question relating to intercountry adoption and your country is a Party to the 1993 Adoption Convention, please contact the Central Authority designated by your country.

<p>Text of the Convention Translations Central and other Authorities</p>	<p>Contracting States (status table) States which participated in the XVIIth Session (see Art. 43(1))</p>
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<p>Explanatory documents</p>	<ul style="list-style-type: none"> • Explanatory Report • Information Brochure • Preparatory work (history of the Convention) • Hague Recommendation on Refugee Children (adopted on 21 October 1994)
<p>Information for new Contracting States</p>	<ul style="list-style-type: none"> • Checklist of notifications and declarations to be made by States Parties • Checklist of questions for new Contracting States

Recommended Model Forms	<ul style="list-style-type: none"> • Statement of consent to the adoption • Certificate of conformity of intercountry adoption • Medical Report on the Child • Supplementary Medical Report Form - very young children
Guides to Good Practice	<ul style="list-style-type: none"> • The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice No 1 • Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice No 2
Country profiles	<ul style="list-style-type: none"> • Country Profiles for receiving States and States of origin <ul style="list-style-type: none"> ◦ State responses
Special Commissions	<ul style="list-style-type: none"> • All Special Commission meetings
Questionnaires and responses	<ul style="list-style-type: none"> • All Adoption Questionnaires and responses
Expert Group on the Financial Aspects of Intercountry Adoption	<ul style="list-style-type: none"> • Note on the financial aspects of intercountry adoption • Summary list of good practices on the financial aspects of intercountry adoption • Table on costs associated with Intercountry Adoption <ul style="list-style-type: none"> ◦ State responses • Model Survey • Other work
Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases	<ul style="list-style-type: none"> • Preparatory document for the meeting of the WG on Illicit Practices (Oct 2016) • Documents
The Intercountry Adoption Technical Assistance Programme (ICATAP)	<ul style="list-style-type: none"> • Report of Hague Conference Mission to Kazakhstan (May 2011) • Report of Hague Conference Mission to Nepal (November 2009) • Information document (November 2009) • Report of a fact-finding mission to Guatemala (February – March 2007)
Seminars	<ul style="list-style-type: none"> • Preparatory Training (June 2015) • All Adoption Seminars
Annual adoption statistics	

Related documents and links	
Bibliography	

RUWANI DANTANARAYANA

Ruwani Dantanarayana is an Associate at John Wilson Partners, Colombo, Sri Lanka. She has been working at John Wilson Partners for three years. In her position as an Associate with John Wilson Partners, she works in the firm's private client department and carries out legal research for client legal advice needs and preparation of legal opinions, both for foreign and local clients primarily in the areas of Family Law, Citizenship, Immigration and Employment Law and Foreign Investment Law and Regulation.

Ruwani studied for her Bachelor of Laws degree at the University of London and read for her Masters in Law at the Louisiana State University Paul Hebert Law Center, Louisiana, U.S.A. She was admitted to the Sri Lankan Bar in December 2012 and joined John Wilson Partners soon after.

Ruwani's Family Law practice at the firm includes advising on divorce matters, (cross border and domestic), maintenance applications, child custody matters, international and domestic adoption cases, matters relating to the Hague Convention on International Child Abduction, succession matters and trust matters.

She has authored various articles for international publications and speaks at different international conferences on a variety of topics.

Ruwani has recently been appointed as the Website Officer of the Family Law Committee of the International Bar Association.

She considers one of the greatest achievements in her legal career as having been awarded in 2013 an International Bar Association scholarship to attend the IBA Annual Conference in Boston. She was awarded the scholarship through the Intellectual Property, Communication and Technology Section for a paper she had authored and submitted for the purposes of the scholarship. Ruwani's paper examined the balancing of the right of celebrity children to privacy against the right of freedom of expression of the media.





Intercountry Adoptions in Sri Lanka


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Symposium of the International Academy of Family Lawyers
New Delhi, India.

September 13th, 2016



“Adoption is not about getting a child for a family that needs it, but about getting a family for a child that really needs one”



Legislation in Sri Lanka Governing Adoptions


- Adoption of Children Ordinance no. 24 of 1941
- Kandyan Law no. 39 of 1938
- Thesawalami Law
- Muslim Law – adoption not recognized



Introduction of International Adoption in Sri Lanka

- Baby trade was at its peak in the 1980s – an average of 1500 children were given annually to foreign nationals for adoption
- Incidents of baby-farming in the late 1980s were reported – DPCCS tries to take control of the situation
- Total ban on international adoptions imposed by Government during this time

love knows no borders



Introduction of Adoption (Amendment) Act 1992 - new provisions were introduced to the Adoption of Children Ordinance to provide better legislation on international adoption

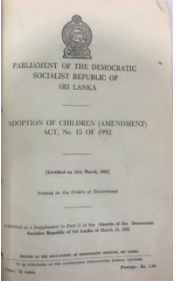
International adoption reopened but decrease in the number of international adoptions seen in Sri Lanka

Regular investigations are carried out by the Police and the National Child Protection Authority to ensure baby-farming does not happen.

The 1992 Adoption of Children (Amendment) Act – Key Points

Subsequent to Sri Lanka ratifying the Convention on the Rights of Children in 1990, the Sri Lankan Government amended the existing Adoption of Children Ordinance to give legal effect to the provisions of the Convention in local law to stop the abuses that were taking place in the system.

- Under the amended law –
 1. Suitable children for foreign applicants have to be selected by the Commissioner of the DPCCS from State Receiving Homes and Voluntary Homes registered with the Department for a period of not less than 5 years.
 2. Priority was given to local applicants – foreign applicants are considered only if there is no local applicant.
 3. The maximum number of adoption orders that can be made by all Courts in any calendar year in favor of foreign applicants is required to be prescribed by regulation.



CONTINUED...

4. A prohibition was introduced against keeping expectant mothers or children with or without the mothers in custody for adoption purposes in any place other than a State Receiving Home or Registered Voluntary Home.
5. Giving or receiving a payment or a reward in consideration of adoption of children was made an offence in terms of the Amendment Act.
6. Punishments for violations of the provisions of the Ordinance were enhanced.
7. The requirement for progress reports to be submitted by the adoptive parents was introduced to allow monitoring of children until the child reaches 10 years of age.

The Hague Convention and Sri Lanka

- The Convention was ratified on May 24, 1994
- Date of entry into force was May 01, 1995
- The Central Authority for Sri Lanka/Sri Lanka Adoption Authority is: the Department of Probation and Child Care Services



International Adoption Statistics in Sri Lanka pre and post 1992 Amendment and 1993 Convention

Year	Local Adoption	Foreign Adoptions	Total Adoptions
1991	407	789	1196
2008	1215	69	1284
2010	1,812	72	1884
2015	Not available	08	Not available
2016	Not available	04	Not available

Quite apart from the strengthening of laws in 1992, the DPCCS states that the low numbers seen in the latter years is due to a dearth of children being available.

Practical Aspects of International Adoption in Sri Lanka

- Who can be adopted?
- Who can adopt?
- Procedures to be followed?
- After the Adoption?

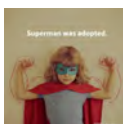


(i) Who can Adopt

- Applicants should be 25 years of age or older and at least 21 years or older than the adoptee – there are exceptions.
- Under Sri Lankan law, single individuals cannot adopt; married couples must jointly apply for adoption. Although existing laws in Sri Lanka do not expressly prohibit same-sex couples from adopting, in practice, same-sex couples are not eligible to adopt a child from Sri Lanka.
- Foreign citizens **residing in Sri Lanka** are **not** permitted to adopt Sri Lankan children.
- Applicants with up to two children may apply but preference is given to Sri Lankan couples with no children.
- Private adoptions are not permitted. Applications must come through accredited adoption agency.

(ii) Who can be Adopted?

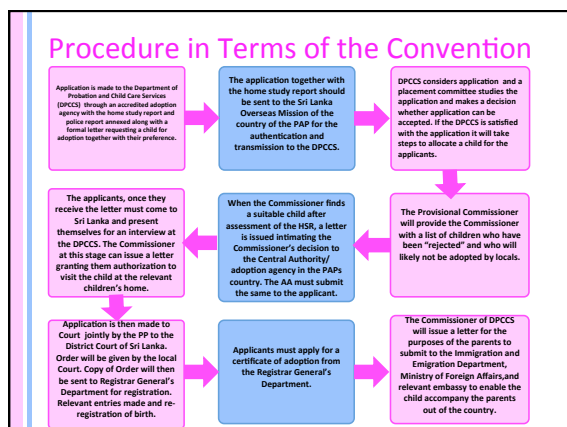
- Following the provisions of the Convention, in Sri Lanka the adoption may take place only if the competent authorities of Sri Lanka have determined that placement of the child within Sri Lanka was given due consideration, and that an inter-country adoption is in the child's best interests.
- Foreigners may only adopt Sri Lankan children between 3 months and 14 years of age.
- An adoption order cannot be made in respect of a child who is over the age of 10 years except with the consent of the child.



(i) Who can be Adopted

- In terms of section 3 (5A)(b)(i) - the number of adoption orders that may be made by all courts in any calendar year, in favor of applicants who are not or were not at any time citizens of Sri Lanka and who are not resident and domiciled in Sri Lanka, shall be prescribed by regulation.
- For the year 2016 this number is 100.





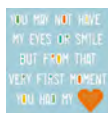
- ### Documents Required to be Submitted
- General information on the applicants – there is no standard format
 - Home Study Report – a report on the mental health of the applicants, their social, religious and financial background and suitability to adopt
 - Police report – a report on the conduct and activities of the applicant
 - Certified copies of the birth certificates of both prospective parents
 - Certified copies of the marriage certificate
 - Certified copies of health certificates of both prospective parents
 - Certified copies of employment records of both prospective parents
 - Copies of the passport of the applicants
 - All documents must be submitted in English and should be authenticated by the Sri Lankan High Commission in the country of the applicants

The Preamble of the Hague Convention states –

Intercountry adoption may offer the advantage of a permanent home to a child for whom a suitable family cannot be found in his or her state of origin

Interestingly some of the reasons why a suitable family cannot be found by a child in Sri Lanka (or why they are rejected) are as follows –

- Mental and physical health defects of the child or children with special needs
- Family (birth family – if known) background of the child
- Issues in the birth horoscope of the child
- Complexion of the child



The Court Procedure to Obtain an Adoption Order

- A Petition containing the details of the applicants (residence, civil status, occupation, monthly income etc), details of the child, whether the age requirement is satisfied, and proof of the fact that consent was obtained from the birth parents must be submitted to Court. The consent forms must be annexed thereto (unless consent is dispensed by Court).
- Notice regarding the date and time for hearing will be issued on all parties concerned – the child or his guardian, parent(s) or guardian who has actual custody of the child; if the applicant is a single applicant, to his or her spouse.
- The Court may direct that the applicant and any respondent shall be heard and examined separately, provided that no such direction shall be given unless the Court is satisfied that the giving of the direction is desirable.
- The Court requests a report from the Commissioner to determine whether the adoption is in the best interests of the child. The Commissioner has from 14 to 28 days to submit the report. The home study must be included in the Commissioner's report. If everything is in accordance with the applicable laws and regulations, the Court then issues an order of adoption. The adoption order may be made in the Form stipulated in terms of the Rules issued under the Adoption of Children Ordinance.
- Upon the making of an adoption order, the Registrar of the Court must within 7 days from the day of the order send a duplicate or certified copy of the order to the Registrar-General and shall issue a duplicate or certified copy to the applicant.
- Personal presence of the prospective parents is essential.

After the Adoption Order

- **Birth Registry –**
 - Where a Court makes an adoption order authorizing two spouses jointly to adopt a child then such spouses may notwithstanding the fact that the birth of that child has been previously registered under the Births and Deaths Registration Act, make a written declaration to the Registrar-General for the re-registration of the birth of that child by the insertion of the names of such spouses as the natural parents of that child.
 - The Registrar-General, on satisfying himself in regard to the declaration and that an adoption order has been made, can cause the birth to be re-registered.

- **Follow ups**
 - In the case of every adoption by foreign persons, it is the duty of every such adopter to furnish to the Commissioner of Probation and Child Care Services, progress reports –
 - quarter-yearly, in respect of the child until the adoption of such child is legally confirmed in that country;
 - half-yearly, in respect of such child along with the child's photographs for the first three years from the date on which the adoption is legally confirmed in that country;
 - yearly, in respect of such child until such child reaches the age of 10 years, prepared by an institution recognized by the country of such adopter and authenticated by the accredited representative for the Republic of Sri Lanka in that country.

- **Time frames**
 - Allocation of a child
 - 3 to 4 years at minimum
 - Obtaining the adoption order
 - Six weeks



Inter-family Inter-country Adoptions in Sri Lanka

- The same procedure referred to previously is followed in inter-family cross-border adoptions.
- The only difference is that the child to be adopted is known and therefore no "allocation" is required by the DPCCS.



Conclusions – Questions?



ANIL MALHOTRA, ADVOCATE*

*Anil Malhotra is a practising Advocate in India since September 1983. He attained Bachelor of Science (1980) and Bachelor of Laws (Professional) (1983) degrees from Panjab University, Chandigarh & an LLM degree from the University of London, London in 1985. He studied Comparative Family Law at London School of Economics besides Law & Society at School of Oriental & African Studies.

Well conversant with independently conducting civil, service, company, matrimonial and allied litigation at High Courts over India and Supreme Court. From 1986 to 1992, he taught civil procedural laws and matrimonial remedies for six years as a part-time lecturer at the Faculty of Laws, Panjab University, Chandigarh. Worked at High Court as Additional Central Government Standing Counsel from 1997 to 2000.

Have represented substantial number of private clients for the past three decades by filing and defending independent petitions at the High Court and other Forums in matters relating to constitutional, civil, company, criminal, consumer and family disputes litigation. Has rendered substantial assistance as Amicus curiae with reported judgments on various issues of public law importance. Representing Government of Punjab pro bono, as counsel in defending vires of Punjab Travel Professionals Regulation Act, 2012, at the High Court since 2013.

For over 30 years, he continues to act as an Indian expert to render reports in foreign courts on appointment by the Bench in overseas jurisdictions. Conducts matters in Indian Courts pertaining to interpretation and application of foreign Court Orders regarding divorce decrees, child abduction, custody, maintenance, adoption, surrogacy and family related issues of Non-resident Indians (NRIs).

He has co-authored book titled “Acting for Non-resident Indian Clients” (Jordans 2005), India, NRIs and the Law (Universal 2009), Indians, NRIs and the Law (Universal 2011), Surrogacy in India : A law in the Making (Universal 2013) and International Indians and the Law, (Universal 2014), Surrogacy in India – A law in the Making : Revisited (LexisNexis 2015). He has significant published work and has both international and domestic conference participations. Has over 300 newspaper columns to his credit besides significant published work in journals.

As Chairperson, Task Force, Policy Procedures, Resolution and Grievances of NRIs, he has authored five reports for the Government of Punjab and has assisted in the enactment of The Punjab Compulsory Registration of Marriages Act, 2012 and Punjab Travel Professionals Regulation Act, 2012. He is an Advisor on NRI issues to the Government of Punjab & is a member of Nodal Cell for NRI Affairs in UT, Chandigarh. On January 29, 2007, he was elected to the International Academy of Family Lawyers. He is the Indian Representative of the Family Law Committee of International Law Association and has lectured at National Judicial Academy, Bhopal on 10 programmes and spoken at Chandigarh Judicial Academy. He has authored four publications on NRIs issues for the Government of Punjab.

Has conducted number of litigations on inter country parental child removal matters and has persistently proposed, debated and discussed need for India to sign the Hague Convention on Inter parental child abduction, 1980. As amicus curiae, his report on inter country parental child removal, forms part a Punjab and Haryana High Court judgment making a reference to the Law Commission of India, to recommend that India needs to consider signing the Convention. Handled litigation & campaigns for India to enact a law on surrogacy arrangements in India. Intends to persuasively pursue enactment of Indian legislation on these subjects.



UPSHOT OF NEW CARA GUIDELINES AND FUNDAMENTAL DEPARTURES WITH REGARD TO INTER-COUNTRY ADOPTIONS IN THE INDIAN CONTEXT

**A Presentation by
Anil Malhotra & Ranjit Malhotra, Advocates
Malhotra & Malhotra Associates,
International Lawyers, India**

AT THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS
CONFERENCE, 14 - 18 SEPTEMBER 2016, AT NEW DELHI.

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HIGHLIGHTS OF THE OF INTER-COUNTRY ADOPTIONS FROM INDIA UNDER THE NEWLY INTRODUCED GUIDELINES GOVERNING ADOPTION OF CHILDREN, 2015

- The Guidelines Governing Adoption of Children, 2015, were notified on 17 July, 2015 by Ministry of Women and Child Development, Central Government of India. These Guidelines have been issued by the Central Adoption Resource Authority (hereinafter CARA) to provide for the regulation of adoption of orphan, abandoned or surrendered children from the date of notification and have replaced the earlier Guidelines Governing the Adoption of Children, 2011. The said new Guidelines have also brought within their ambit domestic adoptions, effected under the provisions of the juvenile justice legislation.
- The New 2015 Cara Guidelines principally draw support from:
 - (a) The Juvenile Justice (Care and Protection of Children) Act, 2000 and Rules framed there under. The said enactment now stands replaced by the re-enacted provisions of The Juvenile Justice (Care and Protection of Children) Act, 2015, w.e.f. from 15 January 2016. The earlier JJ Act, 2000, now expressly stands repealed by Section 111 of the JJ Act, 2015.
 - (b) Judgment dated: 08.02.2013 of the Hon'ble Supreme Court in the case of Stephanie Joan Becker vs. State & Anr. All India Reporter 2013 Supreme Court 3495.

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- The new 2015 CARA Guidelines have to be read, interpreted, analysed and complied in the best interest of the child in conjunction with the provisions of the newly re-enacted JJ Act, 2015. Also, a certain category of domestic adoptions as effected under the provisions of the JJ Act, 2015 have now been brought within the ambit of the new 2015 CARA Guidelines. The previous 2011 CARA Guidelines dealt only with inter country adoptions.
- Although, it is implied that both the 2011 and 2015 CARA Guidelines deal with adoption of Indian children only, but it is not stated so in both sets of the old and the new CARA Guidelines, even though inter country adoptions are expressly defined in para 2 (34) of the JJ Act, 2015. Of course, the paramount consideration of inter country adoptions, is the best interest of the child, which also finds mention in para 2(9) of the JJ Act, 2015.

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- The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) allows a Court to give a child in adoption irrespective of marital status of the adopting person. The JJ Act also authorises State Governments to recognise one or more of its institutions or voluntary organisations as specialised adoption agencies for placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified by CARA. The latest guidelines governing Adoption of Children notified on 17 July 2015, drastically streamline inter-country adoption procedures thereby, permitting single parent adoptions with the exception of barring single male persons from adopting a girl child.
- The 2015 statutory guidelines framed by the Ministry of Women and Child Development, of the Government of India permits any prospective adoptive single foreign parent, irrespective of his marital status, to adopt a child from India. The benefit of Article 21 of the Constitution of India available to all persons, including foreign nationals in India, guarantees the right to life to all persons thereby giving freedom to adopt to foreigners.

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- Also, relative adoptions within the parameters of the JJ Act are defined under Section 2(52) of the JJ Act, 2015. The definition is somewhat restrictive including only maternal/paternal aunts/uncles and /or grandparents but excluding cousins. The definition clause and both the provisions of the CARA Guidelines, 2015 and JJ Act, 2015 are conspicuously silent as to, situations where the parties are known to each other. Such an anomalous situation was meaningfully and positively resolved by the Hon'ble Supreme Court of India, in the case of Anokha v. State of Rajasthan reported as (2004) 1 Supreme Court Cases (SCC) 382. Provisions for allowing inter country adoption within the family are reported to be under process.
- Another noteworthy feature of the JJ Act, 2015 is the principle of right to privacy and confidentiality explicitly carved out in Section 3(xi) of the JJ Act, 2015. In light of this specific provision, it can now be forcefully argued, that foreign missions as part of the visa application and interviewing process cannot insist on the presence, particulars and contact details of the biological parents, much to the detriment of the minor children, sought to be adopted by prospective adoptive parents, resident and domiciled overseas.

RECENT PROGRESSIVE PATH BREAKING DECISIONS OF THE HON'BLE SUPREME COURT OF INDIA

- The verdict of the Supreme Court on 6 July 2015 in ABCVS The State, JT 2015 (6) SC 103, holding that a single unwed mother has a right to maintain a petition to claim sole and exclusive guardianship of a child born outside of wedlock, is a path breaking view shattering the shackles of traditional and conventional societal setups in a realm of statutory personal laws where a Uniform Civil Code still remains a Constitutional aspiration. This is in line with some earlier path-breaking verdicts of the Hon'ble Supreme Court of India.
- The verdict of the Supreme Court in National Legal Services Authority v. Union of India, 2014 (5) SCALE 1 recognising transgender as the third gender have held "that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution." Clearly, transgender persons having been granted a legal recognition as third gender may be entitled to rights of adoption, succession, inheritance and other privileges under law. The new enunciation is a path of rights.

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- Likewise, in *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1, the apex court upholding the recognition of the right to adopt and to be adopted as a fundamental right, has held that every person, including Muslims, irrespective of the religion they profess, is entitled to adopt a child. This enunciation of rights is a new view.
- The Supreme Court in *Stephanie Joan Becker*, (2013) 12 SCC 786, permitted a single 53 year old lady to adopt a female orphan child aged 10 years by relaxing the rigour of the guidelines of CARA on the totality of the facts of the case that the proposed adoption would be beneficial to the child as the Court was of the view that the adoption process would end in successful blending of the child in the US, irrespective of the age bar disallowing such adoptions.

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UPSHOT OF NEW CARA GUIDELINES AND FUNDAMENTAL DEPARTURES : WITH REGARD TO INTER-COUNTRY ADOPTIONS

- The adoption process has been made online with the advent of new CARA Guidelines notified on 17 July 2015.
- Previously, under the 2011 CARA guidelines, the process of finding a home was mostly dependent on the 411 accredited specialist adoption agencies, whilst CARA had the role of a facilitator in the process of inter-country adoptions.
- Both the domestic and inter-country adoption process after the initial online CARA screening, is now rigidly court mandated, court supervised and court approved, which of course lends a greater degree of credibility in so far relating to the authenticity and the genuineness of the adoption process, eliminating and minimising to a large extent the chance of cartel run frauds and sham adoptions, with cross border ramifications. And, the larger issue is that "court approved adoption orders," with CARA approval of course should find far more greater acceptability with foreign missions/embassies/consulates in India.
- Court scrutiny coupled with CARA online vetting and approval should in turn result in minimal refusal of adoption applications considerably, minimise the visa refusals if not eliminate the same in genuine cases, the long drawn cumbersome appeal process instituted and adjudicated overseas, in the event of refusals, especially for Non Resident Indians, Overseas Citizens of India & Persons of Indian Origin.

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- The new CARA Guidelines resonate transparency, to enable the prospective adoptive parents "to make informed choices," and not to be at the mercy of SAAs.
- The Specialised Adoption Agencies (hereafter SAAs) as defined in Section 2 (57) of the JJ Act, 2015, in contrast to a crucial role in the decision making process under the previous regime, are now primarily left with the task of caretakers, whilst the child is awaiting adoption and also for handling of legal formalities preceding the process of adoption. The SAAs now play no substantial role in the decision making process.
- It is sincerely hoped that the new online CARA guidelines and combined with the eventual court mandated seal of approval, will potentially and substantially give positive meaningful interpretation to benefits arising out of India signing the Hague Convention on Adoptions on 6 June 1993, especially in terms of Consular processing. This gap can presumably be plugged in the absence of enabling domestic legislation, that should have been enacted after the signing of the Hague Convention on adoptions, by India, which unfortunately did not happen at that moment in time. Two decades down the line, this legal anomaly stands rectified.

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- The preamble to the JJ Act 2015, fortifies generous references and support to international instruments and conventions, including the Hague Convention of Protection of Children and co-operation in respect of inter-country Adoption (1993). Furthermore, Section 68 of the JJ Act, 2015, outlines the functions of CARA, and it is specifically stated in Section 68(d) of the said enactment that CARA will carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of inter-country Adoption, 1993.
- Section 64 of the JJ Act, 2015, mandatorily provides for reporting of adoptions, not withstanding anything contained in any other law for the time being in force. This is with regard to information regarding all adoption orders issued by the concerned courts, to CARA on a monthly basis, so as to enable authority to maintain the data on adoption.

FUNDAMENTAL PRINCIPLES, ELIGIBILITY CRITERIA FOR ADOPTIVE CHILDREN AND PROSPECTIVE ADOPTIVE PARENTS

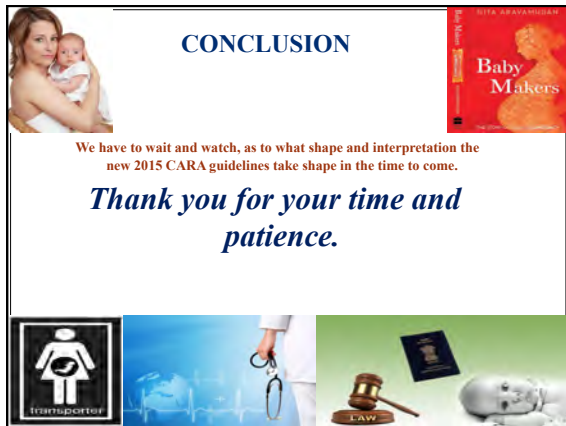
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- Para 3 of Guidelines mandate Fundamental principles governing adoption. -The following fundamental principles shall govern adoptions of children from India, namely, -
 - (a) the child's best interests shall be of paramount consideration, while processing any adoption placement;
 - (b) preference shall be given to place the child in adoption with Indian citizens, with due regard to the principle of placement of the child in his own socio-cultural environment, as far as possible.
- Para 4 of Guidelines qualify children eligible for adoption. - Any orphan or abandoned or surrendered child, declared legally free for adoption by the Child Welfare Committee is eligible for adoption.
- Para 5 of Guidelines stipulate Eligibility criteria for prospective adoptive parents. -

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- (a) the prospective adoptive parents should be physically, mentally and emotionally stable; financially capable; motivated to adopt a child; and should not have any life threatening medical condition;
- (b) any prospective adoptive parent, irrespective of his marital status and whether or not he has his own biological son or daughter, can adopt a child;
- (c) single female is eligible to adopt a child of any gender;
- (d) single male person shall not be eligible to adopt a girl child;
- (e) in case of a couple, the consent of both spouses shall be required;
- (f) no child shall be given in adoption to a couple unless they have at least two years of stable marital relationship;
- (g) the age of prospective adoptive parents as on the date of registration shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups
- (h) the minimum age difference between the child and either of the prospective adoptive parents should not be less than twenty five years;
- (i) the age for eligibility will be as on the date of registration of the prospective adoptive parents;
- (j) couples with more than four children shall not be considered for adoption;

CONCLUSION



We have to wait and watch, as to what shape and interpretation the new 2015 CARA guidelines take shape in the time to come.

Thank you for your time and patience.

ANNE-MARIE HUTCHINSON OBE QC (HON)

Partner

“One of the leading matrimonial lawyers of our time” Legal 500.

Anne-Marie specialises in international family law

Anne-Marie is a specialist in surrogacy with an international element and co-parenting agreements. She advises in respect of complex international adoption applications and legal issues arising from the creation and implementation of surrogacy arrangements under The Human Fertilisation and Embryology Act 2008.

Anne-Marie is Co-Chair of the IAFL Surrogacy and ARTS Committee.

Awarded the inaugural UNICEF Child Rights Lawyer award in 1999. She received an OBE for her services to international child abduction and adoption in the 2002 Queen’s New Year’s Honours List. Awarded an “Albert” by the Albert Kennedy Trust in recognition of her work in defending the human rights of young LGBT people. In 2012 she was named International Family Lawyer of the Year. In 2016 Anne-Marie was appointed Queen’s Counsel Honoris Causa.

Anne-Marie is a Founding Fellow of the International Surrogacy Forum.

In February 2016 Anne-Marie was an Observer at the meeting of the Experts’ Group on the Parentage/Surrogacy Project run by the Hague Conference.

She is a regular speaker and lecturer both within the United Kingdom and abroad.

Consistently named as one of the leading family lawyers in London in both Chambers and The Legal 500, she is singled out by Chambers as the sole “star individual” for cross-border disputes.



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Current trends in UK surrogacy law and the case for reform

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Key legislation

- Surrogacy Arrangements Act 1985
- Human Fertilisation and Embryology Act 1990 section 30
- Human Fertilisation and Embryology Act 2008 section 54



Surrogacy Arrangements Act 1985

- Enacted in 1985 as “knee jerk” reaction to Baby Cotton;
- The Act as enacted in 1985 remains largely in force today;
- Surrogacy “contracts” are unenforceable
- Range of criminal offences:
 - Prohibition on third party brokers
 - Prohibition on advertising



“Parental Orders”

- Introduced by the HFEA 1990 (s.30)
- Introduced into the Bill at a relatively late stage and the clause in the Bill received little scrutiny during Parliamentary debates
- HFEA 2008 (s.54) widened the scope of the Applicants to include unmarried couples (either heterosexual or same-sex) and couples in a civil partnership
- Single parents remain excluded
- The ACA 2002 s.1 checklist applies



Trends in the case law

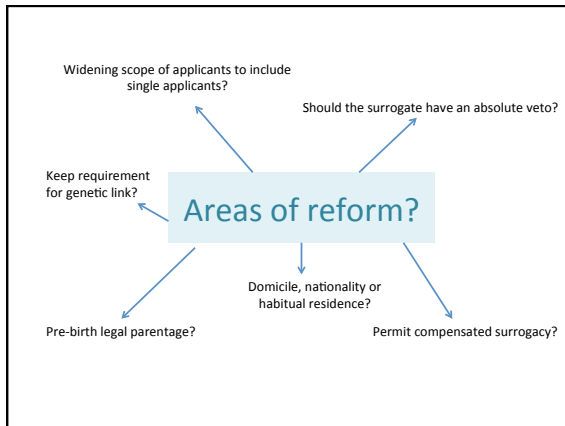
- The case law relating to s.54 has evolved in unusual ways. In particular, there have been two landmark decisions of the President:
 - Re X (Surrogacy Time Limits) [2014] EWHC 3135 (Fam) - permitted application for a parental order outside six month time limit
 - Re Z (A Child) No 2) [2016] EWHC 1191 (Fam) – declaration of incompatibility



Impact of Re Z

- Notwithstanding the declaration of incompatibility, the prohibition on single applicants remains until such time as Parliament changes the law;
- On 7 June 2016 Lord Prior confirmed that the Government have asked the Law Commission to consider including a project on surrogacy





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Margaret Swain is an attorney in private practice in Baltimore, Maryland. A former surgical, delivery room and IVF clinical nurse, she focuses her legal on Assisted Reproductive Technology Law, Adoption and Guardianship. Ms. Swain is a fellow of the American Academy of Adoption Attorneys, where she chaired the ARTs Committee, and served four years on the Academy's Board of Trustees. She is a long-standing member of the American Society for Reproductive Medicine, co-chaired the formation of its Legal Professional Group, of which she is a Past-Chair, and has been faculty on several Post-Graduate courses taught at the annual conferences. Ms. Swain served for three years on the Executive Council of ASRM's affiliate, The Society for Assisted Reproductive Technology. A member of the ABA and its Family Law Section on ART, Ms. Swain is also a charter fellow of the American Academy of Assisted Reproductive Technology Attorneys, served for three years as its Deputy Director and as Chair of its CLE and Legislative committees and is the current Director of the organization. Ms. Swain has authored a number of textbook chapters, is a frequent lecturer, and has taught as adjunct faculty at the University of Baltimore School of Law.

In 2008, she was recognized for her legal advocacy in adoption by the national Congressional Coalition on Adoption Institute, and honored as an "Angel in Adoption".



THE EMBRYO

CREATION, CONFLICT and
CONTROVERSY

Margaret E. Swain
The Law Office of
Margaret E. Swain
Baltimore, Maryland
USA
AAARTA Director

Nidhi Desai
Desai and Miller
Family Building Law Firm
Chicago, Illinois
USA
AAARTA Deputy Director

United States Overview

Basic Principles

- Embryos, while deserving of special respect for their potential to become a person, are generally not viewed as persons
- Embryos belong to the persons who created them or if donor gametes(s) are used, to those to whom the gametes were donated
- There should be a written plan for disposition

Supranumary Embryos

- Fertility Center generally enters into storage or shipment agreement (sometimes within the informed consent document) with patients. IPs direct disposition of the embryos in writing.
- Choices may be revised at any time, by giving new written directives

Disputes Between IPs

- Matters are heard by state courts.
- Disputes have been decided on a case-by-case basis.
- Over the years, a trend in court decisions developed.

Trends

- No forced procreation over objection
- Follow directives in storage agreement
- But, under some special circumstances, the court might order a different outcome-these cases are the outliers

Finley v. Lee

- Written agreement with fertility center, directing thaw and destroy
- Wife had fertility-ending cancer treatment
- Divorce
- Wife wanted to use embryos for procreation
- CA highest appeals court ruled that embryos should be destroyed, consistent with written agreement (2015)

Gadbury v. McQueen

- Decision pending from lower appeals court in disputed embryo disposition matter in Missouri

Testamentary Provisions For Embryos

- Follow storage agreement with fertility center
- Statement granting authority to make decisions for embryos
 - Thaw and destroy?
 - Donate to research?
 - Donate to another for reproduction-unclear as to whether a Will can convey this power& state law may not allow
 - Store indefinitely with instructions to pay fees

ART & Divorce Legal Issues

- Establish existence of IC & its exact terms
- Notify clinic/storage facility of pending divorce
- Discuss “changed circumstances”
- Ascertain client’s position, advise on likelihood of prevailing
- Amenable to mediation?
- If clients is hoping for procreative use over objection of partner, are there other, reasonably acceptable, similar options for family building?

Embryo Disputes: Preventable?

- Visit with ART MHP before signing IC
- Should IPs have an agreement with each other, outside of IC?
 - Would any IP actually agree to take this step?
 - Would courts view it any differently than the IC document?
- Can party who wishes to procreate really excuse other party from support obligations?
 - Could other party be considered a donor?
 - Is this fair to resultant child?
- Should gold standard be unilateral consent consistent with written directives at time of storage ?

International Overview

Canada

Australia

Nepal

Botswana/South Africa

THANK YOU!

Bonus Information

- The following cases track the various courts' decisions in contested embryo disposition cases in the United States

York v. Jones

- Couple "owns" embryos
- They do not belong to clinic where they are stored, and clinic has to hand them over when couple requests
 - 1989

Davis v. Davis

- Mary Sue & Junior Davis, married couple, began IVF treatments in 1985
- Unsuccessful after 5 cycles, 7 embryos remained frozen
- Junior filed for divorce in 1989
- Only disputed item in divorce was cryopreserved embryos
- No written dispositional agreement

- Junior wanted embryos to be discarded
- Mary Sue wanted to use them to procreate
- Court considered whether pre-embryos are persons or property
- “pre-embryos are not...either ‘persons’ or ‘property’, but occupy an interim category that entitles them to special respect because of their potential for human life”.

- Court went on to say that any written agreements should be enforced
- Three prong test devised:
 - Progenitors’ preferences
 - Prior agreements
 - Procreation avoidance-no forced parentage

A.Z. v. B.Z.

- Informed consent signed on 7 occasions
- So ambiguous cannot be used to determine fate of embryos
- IC only may be relied upon to determine relationship between couple and clinic
- Will not force parenthood
 - 2000

J.B. v. M.B.

- Consider changed circumstances and competing interests of parties
- Wish to not reproduce more compelling than hope to procreate
– 2001

Litowitz v. Litowitz

- Cryopreservation agreement with clinic is controlling
- Strict contract analysis, neither party given embryos: clinic allowed to thaw, which was option chosen in original agreement
– 2002

Roman v. Roman

- Found “meeting of minds” in validating consent to allow embryos to be destroyed in event of divorce
- Follows trend of not forcing procreation
– 2006

In re Marriage of Witten

- When couple divorced, could not agree on what should happen to embryos
- Court analyzed under two paradigms: contractual & contemporaneous mutual consent
- Remanded for decision based on these models
- Noted with favor the enforceability of storage agreements as to parties and fertility center

Special Circumstances

- In three recent cases, the courts have not followed the concept of avoiding potential nonconsensual forced parenthood

Reber v. Reiss

- 2004: Wife has breast cancer/chemo, but undergoes IVF first, w/ husband, and they freeze embryos .
- 2007: Husband seeks divorce. Wife wants embryos for reproduction, husband wants them destroyed.
- At trial, embryos awarded to husband, wife appeals

- Court acknowledged that, normally, party wishing to avoid reproduction would prevail.
- Here, the embryos present Andrea’s only chance to have bio child.
- Court applied balancing test, and found wife’s interests outweighed husband’s.
- Decision not against public policy of State.
 - *Reber v. Reiss*, 42 A.3d 1131 (December 27, 2012)

Mbah v. Anong

- Couple had nine cryo’d embryos when they divorced
- Informed consent said wife would get embryos in case of divorce-Husband’s argument that his signature was forged not persuasive
- Court applied strict contract analysis of IC
- Viewed embryos as marital property
- Embryos awarded to Wife

Issues as Defined by the Court

- Are the embryos marital property?
- Do they have value?
- How should the value be divided?

Szafranski v. Dunston

- No agreement signed between unmarried couple when embryos crated for fertility preservation before cancer treatment
- At trial, embryos awarded to woman
- Appealed
- Final appeals court decision upheld lower appeals court
– *Illinois, 2015*

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42 years, married and two kids



BIOGRAPHY

Member of the Quebec (Canada) Bar since March 31th, 2003 and of the Paris (France) Bar since July 21th, 2007.

French and Canadian.

Bilingual English and French.

Almost 14 years of experience in Family Law, my exclusive and only area of practice, with a strong dominant international.

Writing articles on the issues of private international family law in the quarterly edition of the Journal of Family Law, Gazette du Palais.

ORGANIZATIONS

Member of the International Association of Family Lawyers (IAFL)

Member of the International Bar Association (IBA)

Member of the Union Internationale des Avocats (UIA)

Member of the Association des Avocats du Québec en France

Member of the Franco-British Lawyers Society (FBLs)

Member of the French-American Bar Association (FABA)

Member of the Barreau de Paris « Commission en Droit de la Famille »

Member of the Institut du Droit de la Famille et du Patrimoine (IDFP)

Member of the « Association des Avocats du Québec en France » (AAQF)

Referenced as a Lawyer in International Family Law at the Canadian Embassy in Paris, France

CONFERENCES IN INTERNATIONAL FAMILY LAW

Speaker at the Commission of family law at the International Bar Association (IBA)

Speaker at the Academy of European Law (ERA)

BWGA ASSOCIÉS
— CABINET D'AVOCATS —

NARGHIS BUNDHUN

Education:

- Licence and Maîtrise en Droit, Université de la Réunion, France;
- Diploma in International Commercial Arbitration, Chartered Institute of Arbitrators, UK;
- Accredited Commercial Mediator, Chartered Institute of Arbitrators, UK;
- Accredited Commercial Mediator, CMAP, France/MCCI Mauritius
- Diplôme Universitaire en droit civil mauricien, Institute for Judicial and Legal studies Mauritius/ Université de la Réunion, France



Profession: Barrister (1989 to date)

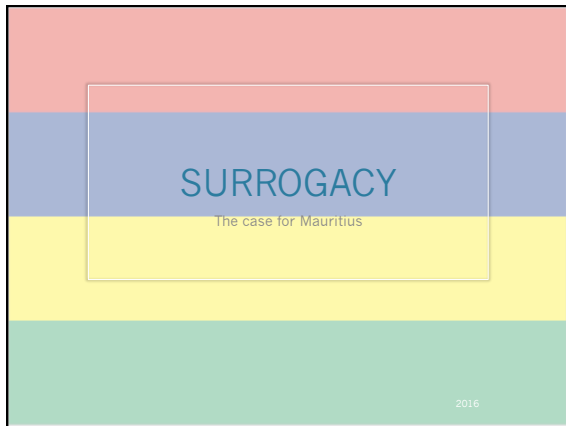
Membership:

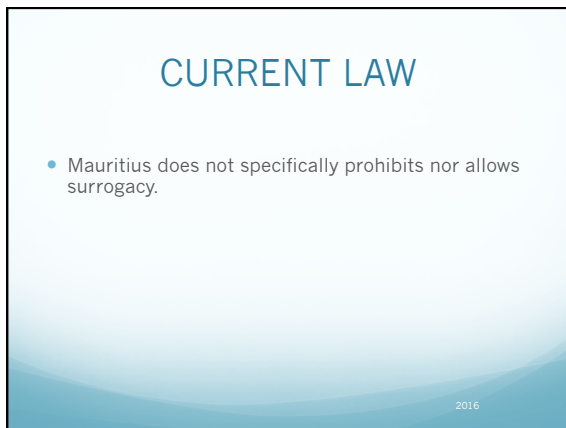
- Mauritius Bar Association
- Fellow International Academy of Family Lawyers
- Fellow Chartered Institute of Arbitrators, UK;

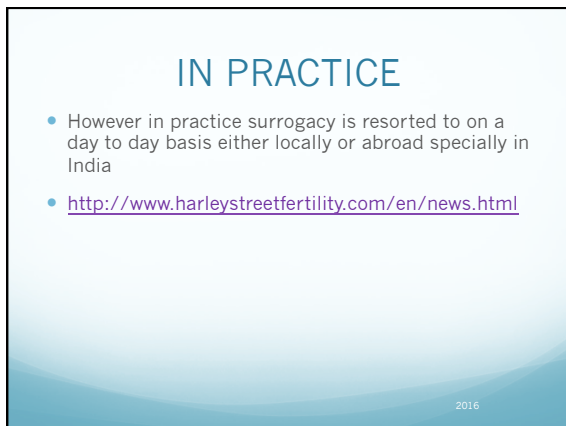
Landmarks:

- Teaching of Family Law at the Council of Legal Education Mauritius from 1994 to date;
- Teaching of Laws of Succession and Matrimonial Regimes at the University of Mauritius from 2005 to 2014;
- First woman to Chair the Mauritius Bar Association in 2000;
- Treasurer of the Mauritius Bar Association on a number of occasions including in 2015 and 2016;
- Member Electoral Supervisory Commission (2001 to date) supervising National, Regional and Local elections in Mauritius and observer for elections in Zimbabwe, India and Madagascar;
- Member of the Electoral Boundaries Commission;
- Chair of NGO SAFIRE (an NGO working towards the rehabilitation of children on the street (2006 to date);
- Fellow of the Chartered Institute of Arbitrators (arbitration);
- Fellow of the International Academy of Family lawyers;
- IVLP alumni

Practice: 75% of my practice is in Family law including divorce, alimony and maintenance, custody and relocation issues, international child abduction appearing before the Family Division of the Supreme Court of Mauritius, The Court of Civil Appeal and the Judicial Committee of the Privy Council







MOVES TO CHANGE THE LAW

- Yes and No

1. A bill was prepared many years ago (2007/2008) but never went to Parliament;
2. Review paper produced by the Law Reforms Commission in July 2013

2016

Controversies

- Not really, as given the history and the practice it is an accepted fact

2016

My personal experience

- *Facts*

Husband has dual citizenship English and French

Wife also has dual citizenship French and Mauritian (born outside of Mauritius)

Couple settled in Mauritius

Recourse to surrogacy in India

2016

• *Issue:* How does the child travel with the parents to Mauritius?

Child not entitled to Mauritian passport

Surrogacy is prohibited in France, but child is entitled to a French travel document

However, the daughter cannot have the French travel document as she is not travelling back to France

Backlog of at least 6 months in issuing English passport

2016

RANJIT MALHOTRA

Ranjit Malhotra was the first Indian lawyer to be awarded the prestigious Felix Scholarship to read for the LLM Degree at the School of Oriental and African Studies, University of London. He obtained his Degree with merit in 1993, specialising in South Asian family laws and immigration laws. He is an India-based lawyer handling substantial international work. He is a member of the International Bar Association, for which he is also the newsletter editor of the Family Law Committee for a fourth term since January 2011, International Correspondent of the International Family Law journal published by Jordan Publishing, The United Kingdom and former co-chair of the Family Law and Family Law Rights Section of Lawasia. He is also a nominated life member of the Indian Society of International Law, the Immigration Law Practitioners Association, the American Immigration Lawyers Association, the Reunite Child Abduction Agency, the Indian Council of Arbitration, Lawasia, and is an elected fellow of the International Academy of Matrimonial Lawyers, Commonwealth Lawyers Association and International Law Association. He is also enrolled with the International Association of Youth and Family Judges and Magistrates.



He also extensively advises foreign lawyers in the area of private international law, while acting on behalf of the non-resident Indian community, besides rendering expert testimony in foreign litigation, involving Indian laws.

For the past several years, he has also been successfully nominated as one of the leading immigration lawyers in the Who's Who Legal: Corporate Immigration worldwide directory published annually from London.

He frequently travels abroad to attend international legal conferences. He has made presentations at five global immigration summits organised by the International Bar Association. He has co authored four books and has to his credit substantial internationally published work.

He was invited to participate in two exclusive Wilton Park conferences on migration matters in 2007 and 2009 and also to attend the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions held in Windsor, UK in 2009. He was awarded the Berger Memorial Scholarship for the AILA conference in San Diego, USA in 2011. Mr Malhotra was also invited as the only Indian speaker at the Annual Immigration Conference organised by the Law Council of Australia in March 2012. He was invited to lecture at the Harvard Law School on cross border child abduction issues on 15 April 2014.

He was the only Indian speaker at the stand alone ART conference organised American Bar Association Section of Family Law from 6-9 May 2015, at Carlsbad, California, USA, at the surrogacy symposium organised by the International Academy of Matrimonial Lawyers held in London from 17-19 May 2015 and at the surrogacy session of the International Bar Association annual conference held in Vienna, Austria, from 4-9 October 2015. Much more recently he analysed the new 2015 CARA Guidelines and mechanics of inter country adoptions from India at the American Immigration Lawyers Association Bangkok District Chapter Conference held in

Vietnam from 2-4 March 2016. Most recently, he had made a presentation on the need for India to sign the Hague Convention on child abduction at the Culture, Dispute Resolution and the Modernised Family conference organised by the IFLPP at the King's College, London from 6-8 July 2016.

Mr. Ranjit Malhotra, specialising in areas of private international law is a managing partner in his firm Malhotra & Malhotra Associates. The Firm has a broad-based practice with a reputation for offering a full range of quality personalised legal services. The firm has also been handling legal work for several Fortune 500 companies.

Mr. Ranjit Malhotra has also been extensively handling inbound and outbound corporate immigration work for software companies, banks, consulting companies, multinationals etc. including lodging business and settlement applications at Embassies and Consulates throughout India. He has rich experience of consular representation.

His firm Malhotra & Malhotra Associates is on the panel of lawyers for eleven major embassies in New Delhi, including the British High Commission, Australian High Commission, Canadian High Commission, New Zealand High Commission, American Embassy, German Embassy, Austrian Embassy, French Embassy, Spanish Embassy, Embassy of Luxembourg and Swedish Embassy at New Delhi.

He can be contacted at ranjitmalhotra1966@gmail.com

Place : Chandigarh, India

Ranjit Malhotra

Date : 30 July 2016

**VITAL SUGGESTIVE CROSS BORDER
PERSPECTIVES AND SAFEGUARDS,
EMERGING FROM CONTEMPORARY
TRENDS AND PRACTICES : FOR PROPOSED
SURROGACY LAW IN INDIA**

**A Presentation by
Ranjit Malhotra & Anil Malhotra, Advocates**



**at the IAFL Annual Conference, at New Delhi, India
from 14-18 September 2016**

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- o **LARGER AWARENESS, AS ALSO VIGOROUS CONTINUED DEBATE AND DISCUSSION OF PRIVATE INTERNATIONAL LAW ISSUES IS URGENTLY REQUIRED, IT IS THE NEED OF THE DAY.**
- o **CREATION OF EXCLUSIVE SPECIALIST FORUMS**
There are already serious issues of determining parentage, nationality, issuance of passports, grant of visas and problems of disputed parentage. Corresponding amendments will have to be made in The Births and Deaths Registration Act, 1969 and The Citizenship Act, 1955 as the same contains no provisions for children born out of surrogacy arrangements. **There is no Forum defined, designated or created which will look into these problems or determine how they have to decided or dealt with.**



- o **PROPOSED LEGISLATION SHOULD PROVIDE FOR STATELESS CHILDREN**
Clearly, the proposed legislation has to provide **"for stateless children,"** in the absence of court intervention. A child cannot be left stateless. This is a very serious issue.

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- o **POWERFUL DUE DILIGENCE MECHANISM SHOULD BE IN PLACE**
There are no mechanisms at all in place to **check credentials** of commissioning parents. Clearly, there should be an accredited agency in a foreign country to check and verify backgrounds credentials of commissioning parents. **Home study reports mandated under CARA guidelines in inter-country adoptions, could well possibly be applicable in cross border surrogacy arrangements.**
- o **MULTIPLE FORUM SHOPPING BY COMMISSIONING PARENTS SHOULD BE BARRED**

The proposed legislation should **prohibit simultaneous multiple forum shopping in different jurisdictions,** expressly also prohibiting use of two surrogate mothers, whether in India or abroad leading to two surrogate children born at the same time.
- o **CREATION OF REGULATORY ENVIRONMENT**
The level of commercialization seriously warrants a regulatory environment. The ICMR and the MCI should contemplate some sort of surrogacy regulators.

3

•MEDIATION, ARBITRATION AND SURROGACY OMBUDSMAN

The proposed law should also provide for mediation and arbitration, in the event of disputes. If we can have a banking ombudsman, we could well have a surrogacy ombudsman.


• SUFFICIENT ATTENTION TO INTERNATIONAL SURROGACY AGREEMENTS / ARRANGEMENTS

With the law surrogacy in India in danger?



Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy arrangements, the provisions of the Indian Contract Act, 1872 would apply. Alternatively, the commissioning parents can also move an application under the Guardian and Wards Act, 1890, for seeking an order of appointment to be declared as the guardian of the surrogate child. In comparison, surrogacy contracts are unenforceable in the UK also in terms of reported decision *Re TT (surrogacy)* [2011] EWHC 33 (Fam). The point to be canvassed is that there should be a separate exhaustive chapter in the proposed legislation exclusively dedicated to international surrogacy arrangements, so as to attempt to create at least a minimum harmonisation process fraught without difficulties.

o MANDATORY INSURANCE COVER FOR SURROGATE MOTHERS WITH US DOLLAR BENCHMARKS BY OVERSEAS COMMISSIONING PARENTS, AS A PREREQUISITE TO THE ISSUANCE OF MEDICAL VISAS.




o The proposed law and the rules framed there under should provide that the potential overseas commissioning parents, should mandatorily take an approved insurance cover [with US dollar benchmarks] for the surrogate mother for the gestation period and till the time of the birth of the surrogate child, from approved/accredited Government and private insurance companies in India. Such insurance cover, should be mandatorily appended with the medical visa application lodged on behalf of intending commissioning parents, at the Indian Embassy/Mission overseas. Details of the Insurance cover should be recorded in the surrogacy agreement as well, including the bank account and Aadhar card details of the surrogate mother, so as to attempt to ensure proper realization in the event of any mishap, contingency, default or death of the surrogate mother.

• SURROGACY COST AND COMPENSATION : PREVAILING INTERNATIONAL BENCHMARKS SHOULD BE THE GUIDING FACTORS

Surrogacy: Cost and compensation

Category	Item	Cost
Possible surrogacy expenses	Surrogate's expenses (travel, lodging, food, etc.)	\$10,000 - \$20,000
	Medical expenses (pregnancy, delivery, etc.)	\$10,000 - \$20,000
	Legal fees (contract, etc.)	\$5,000 - \$10,000
	Agency fees	\$10,000 - \$20,000
	Insurance (life, health, etc.)	\$5,000 - \$10,000
	Travel expenses (to India, etc.)	\$5,000 - \$10,000
	Lost wages (if any)	\$5,000 - \$10,000
	Medical monitoring (during pregnancy)	\$5,000 - \$10,000
	Travel expenses (to India, etc.)	\$5,000 - \$10,000
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	Medical monitoring (during pregnancy)	\$5,000 - \$10,000
	Travel expenses (to India, etc.)	\$5,000 - \$10,000
Other possible expenses		
Agency fees	\$10,000 - \$20,000	
Legal fees	\$5,000 - \$10,000	
Insurance	\$5,000 - \$10,000	
Travel	\$5,000 - \$10,000	
Medical	\$5,000 - \$10,000	
Lost wages	\$5,000 - \$10,000	
Other	\$5,000 - \$10,000	
Total estimated cost for intended parents	\$60,000 - \$80,000	




Source: [Reproductive Possibilities LLC](http://www.reproductivepossibilities.com/pares_exp.cfm)
http://www.reproductivepossibilities.com/pares_exp.cfm
 1 October 2014

- **COMPREHENSIVE CONSOLIDATED SURROGACY LEGISLATION, WITH EXTRA TERRITORIAL APPLICATION LIKE THE PROVISIONS OF THE HINDU MARRIAGE ACT, 1955.**
Given the fast changing socio economic conditions, technological advancements, an attempt should be made for one stop shop consolidated piece of surrogacy legislation, covering both domestic and international surrogacy arrangements, rather than creating an environment of cherry picking i.e. selective reliance on scattered pieces of legislation.



- **LEGAL RIGHTS QUA USE OF GENETIC MATERIAL UPON TERMINATION OF MARRIAGE OF OVERSEAS COMMISSIONING PARENTS.**
The proposed legislation has to address the position of legal rights to use genetic material upon termination of marriage and in the event of the surrogate child not being claimed on account of divorce of foreign commissioning parents, stringent financial penalties with dollar benchmarks should be imposed on such separated parents.

- **ILLEGAL TRADING IN GAMETES /EMBRYOS SHOULD BE PUNISHABLE.**
Illegal trading in gametes /embryos should be punishable under the Indian Penal Code, 1860 or under a separately carved out offence of human smuggling.




- The said legislation should also address the issue of baby breeding rings /cartels, which are part of illegal cross border migration networks.
- The sperm market is international. The issue is whether importing of gametes as cargo, would be legally permissible within the scope of the legislation? To the contrary, it can be argued that it amounts to human smuggling.
- These kind of cases raise profound psychological implications. Simultaneously, we need a law on embryo donation

- Creation and storage of genetic materials are most cutting edge issues. In practical terms, these are profoundly sad processes. people do not even want to talk about the whole range of issues in this regard
- The sperm/embryos ownership, control, transfer and bailment are important issues to be addressed in the proposed legislation.
- Whether genetic engineering would be permissible.
- To address the issue of collaborative reproduction, especially in the case of multiple parent families.

- **MOTHER RETRACTING HER CONSENT ? CHANGE OF HEART.**
What happens if the surrogate mother, changes her mind during the gestation period? What law would be applicable in such a situation? Specific provisions with regard to choice of law and conflict of law will have to be incorporated in the proposed legislation. The mother could well argue, that parting with the child would be violative of Article 21 of the Constitution of India.

- Whether the mother should be given the window period to retain the child. The power of veto with the surrogate mother is a thorny issue, as genetic material potentially may be coming from two mothers.

AGGRIEVED SURROGATE MOTHER/ IMMEDIATE FAMILY MEMBERS SHOULD BE EMPOWERED TO INVOKE THE JURISDICTION OF THE NATIONAL COMMISSION FOR WOMEN, NEW DELHI OR APPROPRIATE STATE LEVEL FORUMS.



There should be a mandatory provision in the proposed legislation for an aggrieved surrogate mother and in the event of her inability, disability or restricted movement, in the alternative her immediate family members should be empowered to invoke the jurisdiction of the NCW, New Delhi, or appropriate State level forums during the gestation period and, "for a reasonable amount of time," after the birth has taken place. This is in the event of any mishap, contingency or disability of any sorts accruing to the surrogate mother, or in the event of the unfortunate death of the surrogate mother.

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o PROVISION FOR MANDATORY COORDINATION OF NCW, NEW DELHI OR APPROPRIATE STATE LEVEL FORUM WITH FOREIGN MISSIONS, IN CASE OF DEFAULT BY ERRING FOREIGN NATIONALS/ COMMISSING PARENTS

In such a situation, the NCW, New Delhi or the State level forum should be duty bound to enforce their findings, and the relief awarded by the NCW, New Delhi or the State level forum should be enforceable qua the commissioning parents, and in the case of foreign nationals, the concerned consular department of the foreign mission/embassy/consulate should be clothed /directed with the responsibility of enforcing attendance of such erring foreign nationals /commissioning parents.



Also, in the event of any default, lapse, wilful error or cheating on part of the intending overseas parents during the currency of the surrogate agreement, and even after the birth of the child having taken place, the NCW, New Delhi or the appropriate State level forum, as a central nodal agency or the State level forum, as the case may be, should be statutorily vested for pursuing the cause /case of the affected surrogate mother.

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Legal considerations

The relationship between contract and informed consent, should be clearly spelt out in the legislation, so much so, casting a duty on the medical doctor, to explain in sufficient detail to the surrogate mother, as sometimes given the dubious role of middlemen, agents and brokers, there is a strong web of deceit, treachery and trickery, especially where the surrogate mother and her family are uneducated, so much so, they are not even aware that they are signing.


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OTHER VITAL ISSUES OF “SIGNIFICANT CONCERN”

- o Whether looking for surrogate mothers is permissible to be advertised on the internet, and print and other electronic media.
- o Provision for mandatory testamentary conveyance of stored embryos.
- o For the world of donor created children, to take into consideration issue of access for donor conceived offspring to donor’s non identifying medical information, when the surrogate child attains the age of majority.
- o Whether transgenders would be allowed to opt for surrogacy arrangements, especially in light of the recent transgenders Bill.
- o Issue of Reproductive autonomy needs to be considered.
- o From the cradle to the grave, at the end of the day, posthumous reproduction, will crop up.

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o PLEA OF DATA PROTECTION LEGISLATION BY FOREIGN MISSIONS IN INDIA SHOULD NOT BE USED TO OBSTRUCT, THWART OR STALL THE ENQUIRY PROCESS.



That on an institutional basis, the NCW, New Delhi or the appropriate State level forum should also be empowered and authorised to correspond, liaise and coordinate with the overseas commissioning parents, as also foreign missions both in India and abroad, both in normal circumstances or in the event of any default. And, such an enabling clause should be mandatorily recorded in the surrogacy agreement /contract, also explicitly providing consent of the foreign commission parents to the effect that the plea of foreign data protection legislation of the country of their habitual residence will not be allowed with a view to negate the fact finding process carried out by the NCW, New Delhi or the State level forum, or to thwart /stall any such enquiry process so initiated.

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o COLLECTIVE RESPONSIBILITY OF GOVERNMENT STAKEHOLDERS

Also in so far relating to private international law issues, the rules framed under the proposed surrogacy legislation should provide for setting up a nodal agency comprising of representatives from various Indian Ministries i.e. the Law Ministry, Legal and Treaties Division, Ministry of Women and Child Development and of course National Commission for Women, National Commission for Protection of Child Rights, New Delhi for active meaningful dialogue and **collaboration with the Hague Conference on Private International Law.**



o PROVISION FOR MUTUAL INTERNATIONAL COOPERATION

Internationally, there is already ongoing cross border collaborative Hague monitored dialogue going on of having a Hague Convention on Surrogacy.

The Hague Conference on Private International Law has commissioned a study and released a report titled, “Parentage / Surrogacy Project” by the Permanent Bureau at the Hague in March 2014.

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○ Subsequently, See: **Latest Hague Report by Experts Group:**
<https://assets.hcch.net/docs/f92e95b5-4364-4461-bb04-2382e3e0d50d.pdf>

○ Introduction to the most recent February 2016 Hague Report reads as follows:

1. From 15 to 18 February 2016, the Experts' Group on Parentage / Surrogacy ("the Group") met in The Hague. The meeting was attended by 21 experts, 3 observers and members of the Permanent Bureau. The experts represented 21 States from all regions, including some States of origin as well as some receiving States in relation to international surrogacy arrangements ("ISAs").
2. The mandate of the Group is to explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from ISAs. The Group was asked to first consider the private international law rules regarding the legal status of children in cross-border situations, including those born of ISAs.
3. The meeting took place against the background of existing regional and international treaties and obligations, such as, for example, the United Nations Convention on the Rights of the Child.

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○ **"We are at crossroads of family law, migration law and refugee law," Philippe Lortie, First Secretary, The Permanent Bureau, The Hague Conference on Private International Law, speaking on, "The Application of the 1966 Convention to Unaccompanied and Separated Children," quoting Baroness Hale of the Supreme Court of The United Kingdom at the concluding plenary session of the Conference organised by the "International Centre for Family Law, Policy and Practice," on Culture, Dispute Resolution and the Modernised Family Law, held from 6-8 July, 2016 at King's College, London, Waterloo Campus.**

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○ **IMMIGRATION PERSPECTIVE : ARTICLE 8 OF THE ECHR, IS THE INVISIBLE ELEPHANT IN THE ROOM**

Some of the foreign jurisdictions allowing surrogacy have now framed immigration rules for children born out of surrogacy arrangements. Generally, all surrogacy applications are being lodged within the ambit of immigration rules, with lot of emphasis on comprehensive documentation, mandatory DNA testing.

Quite understandably checks, balances and concerns in processing surrogacy application voice concern of the member states, that flood gates should not be opened.

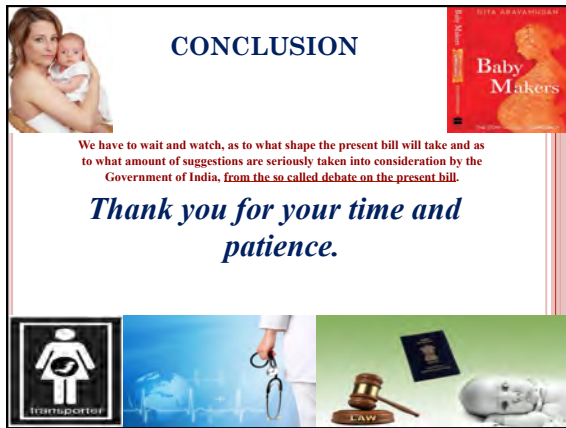


European member states worried at potential interpretation of Article 8 of the European Convention of Human Rights, which talks of the right to family life, which has been given a very sweeping interpretation. What if at a later point of time, the surrogate mother claims her right to be united with the surrogate child as a parent of such a child. Presumably, this proposition has not been tested in the British Courts or any foreign court at this moment in time.

Different countries have conflicting legislation governing surrogacy there are no international agreements covering surrogacy immigration applications.

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CONCLUSION

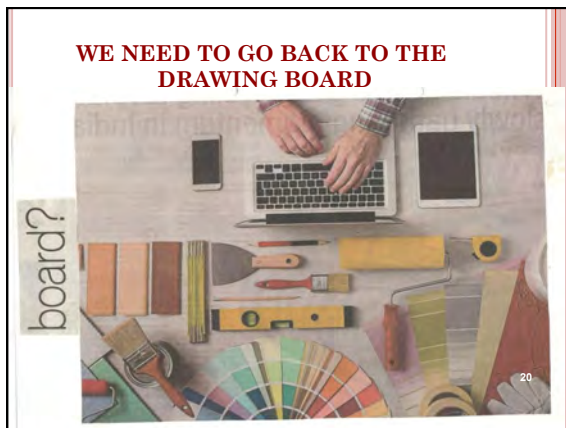


We have to wait and watch, as to what shape the present bill will take and as to what amount of suggestions are seriously taken into consideration by the Government of India, from the so called debate on the present bill.

Thank you for your time and patience.

transporter

WE NEED TO GO BACK TO THE DRAWING BOARD



board?

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

KEEP CALM AND APPLY THE ECHR

PROFESSOR MARILYN FREEMAN

B.A.(Hons)LL.M,Ph.D,Barrister(non-practising).

Marilyn Freeman was called to the English Bar (Middle Temple) in 1986 after completing an LL.M at Kings College, London. She then spent some time teaching Law, raising a family, and in practice at the Bar. She joined London Metropolitan University (previously City of London Polytechnic and London Guildhall University) in 1992 as Senior Family Law Lecturer, after which she was appointed firstly as Reader in Child and Family Law, and subsequently as Professor of Family Law. During this time, Marilyn concentrated her research efforts and practical work in the areas of international child abduction, forced marriage, and relocation, gaining her doctorate in international child abduction, and is widely acknowledged as a leading expert in these areas in which she remains actively involved. For many years she was Head of the reunite Research Unit, and she has undertaken several ground-breaking research projects, some supported by government departments (Foreign and Commonwealth Office, Ministry of Justice), including research into the effects of both international child abduction and relocation. She has recently published a report into higher and further education responses to forced marriage, as well as her research into the long-term effects of abduction, an area in which there is almost no research evidence available, notwithstanding the importance of this issue both for those who have been through an abduction, as well as for those who have to administer the legal machinery designed to deal with these events. Her work has been cited approvingly by courts all over the world, and was acknowledged in the United Kingdom Supreme Court by Baroness Hale, who referred to it as “important research” (In the Matter of A (Children) (AP) [2013] UKSC 60, at para 57) and In the matter of J (a child) [2015] EWCA Civ 329, at para 43 where Baroness Hale stated: “Research by Professor Marilyn Freeman ... has made it clear that contact with the left-behind parent is of crucial importance in preserving the relationship between the child and that parent, as well as in ending the abduction itself in some cases”.



For several years, she was co-director of the Centre for Family Law and Practice established in 2009 at London Metropolitan University to address the interface between academe and practice in Family Law. The Centre’s many activities attracted widespread global support and recognition, in particular the two international Family Law conferences which were held in 2010 and 2013, and which have been referred to as “the best in the world”. She has now moved on to establish as co-director the International Centre for Family Law, Policy, and Practice (ICFLPP) in order to develop the specialist international aspects of this work. The ICFLPP is affiliated to the Westminster Law School where Marilyn holds an appointment as Principal Research Fellow. The ICFLPP held its highly successful conference on “Culture, Dispute Resolution and the Modernised Family” in association with King’s College, London, from 6-8 July 2016.

Although much of her work concerns international matters, Marilyn is also actively involved in domestic Family Law issues, including those relating to divorce, parentage, parental responsibility, residence and contact. This long-term involvement with Family Law matters and their outcomes has resulted in Marilyn’s enduring interest in those who are affected by them, both in relation to the relevant law and practice which governs the disputes which arise in their cases, and the most helpful ways for resolving these complicated and testing family situations. It


is this commitment which has led to Marilyn qualifying as a Family Mediator trained to undertake direct consultation with children, and cases involving international child abduction, and other international family disputes.

Marilyn publishes widely, and is regularly invited to address both national and international conferences on her work and her areas of expertise, and to participate as an expert in working groups and other initiatives relating to international and domestic family matters. In addition, she holds a door tenancy at 4 Paper Buildings with whom she works closely on matters of mutual specialist interest.

Parental Child Abduction: The Long-Term Effects

Professor Marilyn Freeman, PhD*
Presented at
International Academy of Family Lawyers Annual Meeting 2016
Pre-Meeting Symposium for IAFL Fellows and Local Lawyers
Tuesday 13 September 2016
India International Centre, New Delhi, India

*Co-Director, The International Centre for Family Law, Policy and Practice
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1

Freeman, M. (2014)
Parental Child Abduction: The Long-Term Effects Research *

*ICFLPP (December 2014) <http://www.familylawandpractice.com/researchers/longtermeffects.pdf>. See also Freeman, M. (2015) Parental Child Abduction: The Long-Term Effects: A Research Summary, *International Family Law*, 1.

Sincere gratitude is expressed to TAKE ROOT, a US organisation devoted to previously abducted children, for its assistance with obtaining the US component of this research sample, and whose help with this project has been of such great value.

Appreciation is also expressed to the Faculty of Law, Governance and International Relations at London Metropolitan University for its initial financial support for this project.

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Context for current project

INTERNATIONAL CHILD ABDUCTION – THE EFFECTS (2006) *

Considered several categories of effects including on the left-behind parent; the abducting parent; the wider family; the child.

Effects on the child considered from

(i) the perspective of the interviewed parents AND
(ii) the perspective of child concerned

*Undertaken for reunite. Available on www.reunite.org

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Effects on child from perspective of parents

High percentage of interviewed parents thought that there had been effects on the children from the abduction. These included:

- *physical symptoms of stress;
- *non physical symptoms like lack of faith in legal system and adults;
- *learning of coping strategies like "blinking out";
- *the acceptance of conflict as normal;
- *a general lack of trust;
- *difficulties with schooling due to time missed;
- *bad behaviour and regression;
- *tensions in familial relationships when living with non-abducted siblings and new family members on return;
- *Friendships – "no-one wants to be in the middle of all this fighting".

4

Effects on child from perspective of parents continued

Psychological barrier created between abducted child and left-behind parent because both know that they survived this period of separation and life without each other, and both have now lost faith in their reciprocal need.

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Effects on child from perspective of parents continued

"The kids are back. That's the end of it".

Lack of post-return support impacting the children identified by both left behind and abducting parents

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Effects from perspective of children

- Children yearned for an end to the ongoing proceedings.
- Children resented being caught up in the adult conflict
- Children did not want to hear negative things about either parent or to feel that they had to defend the other parent.
- Children did not feel they were taken seriously or that their views carried much weight.
- **The return of the child can be as upsetting and stressful as the original abduction**
- **All children adversely affected in different ways notwithstanding age and stage of development.** Even those children who did not see themselves as having been abducted felt angry and confused by the court battle and the insecurity of their living arrangements. Their trust in one of their parents, and sometimes both, was compromised.

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Effects: Adults abducted as Children

- Described effects as "lasting".
- Problems at school
- Problems with violence and drinking – was a "functioning, miserable, non-diagnosed depressive for many years".
- Extreme confusion and guilt felt towards abducting parent.
- Feelings of shame and self-hate emanating from the abduction, and from being torn and having to make decisions which destroy the lives of those you love.
- Problems of loneliness and self-harm, insecurity, "**entirely attributable to the abduction.. which destroys your life**".
- Importance of research – "**someone wants to know what happened**".

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Freeman, M. (2014) Parental Child Abduction: The Long-Term Effects Research *

- This was a small-scale (34) qualitative study to find out about the lived experiences of those who had been through an abduction many years earlier, and to learn whether, and how, the participants felt that the abduction had affected their lives, and if those effects had continued long-term.
- Long-term effects required a sample where the abductions had taken place a considerable amount of time earlier. Abductions in this sample occurred between 10 years and 50+ years ago. **N.B. many of the abductions occurred before the implementation of the 1980 Hague Child Abduction Convention and it is possible that this may have affected the outcomes for these children,** and also that the outcomes may have been different at earlier points in time.
- The periods of time away before reunification, if it occurred, were substantial. For the majority (68.76%) of those reunified, this did not occur until more than 5 years after the abduction, and more than one third of the reunifications (34.37%) occurred after 10 years.

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Sample

- 34 adults participated in the study – 33 had been previously abducted as children, and one was the non-abducted sibling of an abducted child participating in the research.
- The sample of 34 interviews related to 30 separate incidents of abduction.
- Each participant was interviewed by me as Principal Investigator (PI) during the period 2011–2012 with an opportunity provided to each participant to update the PI by email in July 2014.
- The sample was recruited primarily in the USA and UK although initial discussions with potential participants who did not eventually participate took place in other countries including South Africa and Spain.
- The sample was acquired through personal and professional contacts working in the field, word of mouth, media publicity, and via the assistance of Take Root, an organisation for previously abducted children, funded by the U.S. Department of Justice and located in Washington State

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Some Research Snapshots

- Male, 46 years old, abducted by father at 7 years of age. **Has found it very hard to let people in.**
- Female, 37 years old, abducted by mother at 8 years of age. **Not good at intimate relationships. Constant sense of insecurity.** "It was so dramatic, the idea of not seeing one parent again". **Blocks things out.** Self-harmed. Drugs. **Worries may be like her mother. Does not want children, in case it is true.**
- Female, 42 years old, abducted by father at 4 years of age. **Numb for much of childhood, "just surviving".** **Years to find security and peace.** Affects everything, parenting, relationships, career. **Everything can so easily be taken away.** Relationships completely coloured by fear. **Eating disorder, mental health problems. Suicidally depressed.**

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Research Snapshots Continued

- Female, 30 years old, abducted by father at 4 years of age. Has **trust** and rejection issues. **Has no significant relationships with men as always "pulling back".** **Never feels secure because "anything CAN happen".**
- Male, 30 years old, abducted by father at 4 years of age. Does not like to talk about past as makes him feel vulnerable. **Cannot open up. Worries that is similar to father and capable of doing similar things.** Finds relationships with older men extremely difficult.
- Female, 23 years old, abducted by father when 5 years old. **Feels that everything in her life is chaos.** She lacks confidence. Has never been able to talk about things so leaves things and hopes they will just go away. **Never feels safe or secure.** Difficult to make friends. Self-harmed. Problems at school as had to re-learn the language.

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Research Snapshots Continued

- Female , 45 years old, abducted by father when 22 months old. **Several serious suicide attempts during youth. Depressed . Never felt accepted. Always felt that something was missing as a child. Doesn't trust anybody.**
- Male, 63 years old, abducted by mother when two and a half years old. **Always felt "not connected" to anyone. Felt separate, not part of anything, totally isolated. Painfully shy. Still has some sort of attachment problems. Abduction undermines your ability to attach.**
- Female, 44 years old, abducted by mother when 4 years old. **Not good at relationships. Big issues with security because "something was taken away so abruptly". "I was a big puzzle to myself and others". Now has lots of trust issues.**

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Research Snapshots Continued

- Female, 45 years old, abducted first by father at 18 months, and then by mother at 3 years, and again by father at 5 years. **Identity changed by father. Everyone is close and tight, but then they leave. Abduction is misunderstood and seen as a non-issue. Has a ball of rage in the pit of stomach.**
- Female, 53 years old, abducted by father at 8 years of age. **Identity changed. Abduction took her childhood as well as her identity. Lived as a ghost. Did not make friends, lived under the radar. It's unforgivable because they were supposed to protect me, and they have not. Abduction is a crime, and has long term implications.**
- Male, 45 years of age, abducted by mother at 11 years of age. **Mother turned him against father. Is haunted by treachery of choosing mother over father in court proceedings. Full of rage as child and as adult. Is defined by the abduction, not simply affected by it. It has shaped everything. Only a skeleton is left. Parents thinking of abducting their children need to know all of this.**

14

Research Snapshots Continued

- Female, aged 38 years of age, abducted by mother at 5 years of age. **Mother turned her against her father. Husband now doubling up as father she never knew. Is in "a personal holocaust. Missing the building blocks. Waiting to be rescued even though with a parent. This information should not be hidden. The legal system does not deal with it.**
- Female, 45 years of age, abducted by mother at 4 years of age as "misguided protection". **Big issues with security and feeling loved. The most important people in your life could just go. There is a hole there, and when you grow up, you can't fill it. Support mechanisms stop as soon as child is found, but it never stops for the child. You are violated in way that is not sexual.. there is this way, too.**
- Female, 35 years of age, abducted by father at 9 years of age. **Abduction made me feel like I was not good enough to anyone. Even though father took her, feels that mother abandoned her because she was told that mother had left her, and the subject has never really been dealt with since between them. Abduction is not a victimless crime. Its so much worse because someone who loves and protects you does this to you. How can you recover from that? Abduction needs to be taken more seriously.**

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Research Snapshots - Reunification

- Female, 38 years old, abducted by father at three and a half years of age. **Returned by court to mother at 8 years of age. Describes this event as "the kidnapping". Did not know her mother any more. Did not recognise her.** Took about 3 months to realise this was permanent and was not going to be with "her family" again. Mother thought she was getting her young child back again. All the rules were different. **At 14 she returned to live with father.**
- Female, 57 years old, abducted by father at 5 years of age with 2 siblings. Returned with one sibling by father to mother at 12 years of age. **Did not recognise mother.** People were in your life, then out of your life. **You just did your best to get through it. You just lived in the moment.** Things would happen to me. I had to survive it. **You had no control over anything. Became weirder and weirder in my head.** As an adult, **scared – always scared. No trust of people, or of myself.** No adult has validated feelings, so cannot trust herself. **Reunification? Who are you being reunified with? People do not understand the situation**

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Research Snapshots – Reunification Continued

- Female, 46 years old, abducted by father at 6 years of age. **Initially exciting** but started to miss mother. **Father told her that mother did not love her, and didn't care about her otherwise she would find her. This became her reality.** Bond between mother and child erased. Six years later, mother found her. Serious psychological problems in adulthood. **"I need to become whole". One of the hardest things is to be acclimatised with the left behind family. The child in the adult still wants to know where that parent was, and why she was not protecting her. This is a lifelong thing. You play it out as an adult. The story never ends.**
- Female, 36 years of age, abducted by mother at 4 years of age without her siblings. **Identity changed.** Returned to father at 12 years of age. Within 18 hours had a completely different life. **Had to kill the new identity off in order to be her original self.** People didn't understand me. I was a freak. Non-abducted siblings felt abandoned by mother. As an adult, she struggles with reality. Cuts things out of her life if she has no control over them. **Does not trust anybody.** Fear and insecurity have never left her. **Identity crisis. Serious psychological issues as adult. Abduction is not just a domestic dispute.**

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Research Snapshots – Reunification Continued

- Female, 34 years of age, abducted by mother at 8 months of age. Found at 10 years of age and returned to father. Banners on father's home welcoming home. **"You know they need you to be happy too", but she was not happy on inside. Didn't know what was wrong with her.** When a child is found, someone needs to mentor her. Need to know it is OK to love your new family. **Need empathy. Nobody asks the kids.**
- Female, 37 years of age, abducted by father at 4 years of age. Returned to mother by father 9 years later. **"In another room full of strangers". Went back to father after some time. "Nobody can understand the pain".** Want to be normal. Was not raised normal, and doesn't know what that is. Has to fight not to isolate. **Does not feel worthy. Feels that neither parent thought she was worthy enough to stay with her. Never feels secure. Feels that the abduction makes her "too much" for most people. Cannot let her guard down. There needs to be more awareness of abduction, and why it matters, and why it is not OK.**

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Observations

Repeated references to problems with:

- Numbness, and blocking out
- Self worth
- Personal identity
- Mental health issues
- Depression
- Suicidal tendencies
- Personal relationships
- Letting people in
- Intimacy
- Believing anything can last
- Insecurity
- Trust
- Fear of being like the person blamed for causing these effects

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Analysis

For analytical purposes, the following classification system was used:

- (a) **“Very significant effects”** are those where the interviewee reported:
 - (i) Attempting to see, seeing, or having seen a counsellor, therapist, psychologist, psychiatrist or similar; or
 - (ii) being diagnosed with a condition like post-traumatic stress; or
 - (iii) having suffered a psychotic episode or breakdown; or
 - (iv) having been admitted to a hospital or other institution with mental health issues; or
 - (v) having suffered depression or attempted suicide.
- (b) **“Effects”** are those which do not fall into the above classification, but where the interviewee reported other discernible effects such as having problems with:
 - (i) trust in relationships; or
 - (ii) lack of self-worth; or
 - (iii) fear of abandonment; or
 - (iii) panic attacks.
- (c) **“No real effects”** are where the interviewee reported having had:
 - (i) minimal; or
 - (ii) no effects from the abduction.

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Findings: A note of Caution

- It is emphasised that caution must be exercised in the use of the report’s qualitative findings as they result from the interviewees’ personal perspectives both as to the cause of the effects described, and the degree of impact of those effects on their lives, as well as the author’s system of data classification. Additionally, the sample numbers are relatively small, and there was no opportunity for a control group in the project. It is not suggested that these qualitative findings are generalisable. The focus of the research is to understand the effects of abduction on this sample of people as reported by themselves.
- Abductions in this sample occurred between 10 years and 50+ years ago. Outcomes/effects may be different if surveyed at earlier points in time.
- Reunification for the majority (68.76%) was more than 5 years after the abduction, with more than one third of the reunifications (34.37%) occurring after 10 years. Outcomes/effects may be different where reunification following an abduction occurred sooner.

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Very significant effects

Some examples of the very significant effects described by the interviewees:

•One female interviewee who was abducted at 6 years of age and reunified after another 6–7 years, reported having a **psychotic breakdown** in her mid 20's. She was **admitted to a hospital** for 4 months. She explained that she felt that she needed "to become whole". She has been in **therapy** for the last 18 months. She says that this is "a lifelong thing".

•One female interviewee who was under 3 years old at the time of the abduction, and was reunified after 6 years, had "**a total breakdown**" for which she was **hospitalised**. She then had further **therapy** afterwards.

•One female interviewee who was 4 years old at the time of the abduction, during which time her identity was changed, was reunified after 8 years. She suffered an **identity crisis** which led to a **breakdown** lasting between 12–18 months

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Effects

Some examples of the effects described by the interviewees:

- not being able to fill the hole in their lives left by the abduction;
- feelings of isolation and lack of self-worth;
- problems with attachment, security and mistrust;
- difficulties with personal relationships including lack of emotion;
- guilt towards the left-behind parent; and
- rejection by the left-behind parent on return because of the anger felt towards the child for not finding a way back.

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No real effects

Circumstances of no real effects – very low percentage

In one case, the child was three years old at the time of abduction by the primary carer mother, and recalled being on her mother's side and feeling then, as now, that her mother did the right thing in taking her.

In another case, the abduction was for a very short period of time (a matter of days).

NB another interviewee comment:

"it takes time to know what it has done to you, and how you are feeling".

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Key Findings

1. **Very significant effects were reported by 25 interviewees (73.53%).**
 - Apparently high level of mental health problems in this abduction research sample.
 - Note figures from Public Health England for Community Mental Health Profiles 2013: one in 4 people in the UK will suffer a mental health problem in the course of a year <http://www.nepho.org.uk/cmhp/>
 - No direct comparison. Did these problems in the research sample occur within same time period? Useful for context?

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Key Findings continued

2. **Primary Carer Abductions**
 Sixteen interviewees reported abductions by either sole or joint primary carers (10 mother sole primary carers + 6 joint primary carers)
Thirteen of the sixteen interviewees who reported abductions by either sole primary carers or joint primary carers also reported suffering very significant effects from the abduction (7 sole primary carers + 6 joint primary carers)
 2 sole primary carer abduction interviewees reported effects
 1 sole primary carer abduction interviewee reported no real effects

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Key Findings continued

3. **Protective abductions**
Do primary or joint primary carer abductions undertaken for protective reasons produce different outcomes in terms of the effects on the child?
 •In the three interviews where the interviewee described the abduction by the primary carer or joint primary carer parent (two were mothers, and one was a father) as being, or perhaps being, for protective reasons towards the child one of the interviewees described having effects from the abduction, and the other two interviewees described having very significant effects.
 •In each of the three "child protection" abductions, the interviewees doubted the reason for the abduction being protective, even if the abductor had thought that this was the case.
 •In the only interview where the interviewee described the abduction by the primary carer mother as being to protect the mother from further abuse the interviewee did not report suffering effects from the abduction. She completely accepted her mother's reason for the abduction and thought her mother had acted correctly.
Where the abducted child knows, or believes, that the abduction is for protective reasons are the effects considerably lessened? No reliable conclusions can be drawn on this matter from this small data set. However, Baroness Hale has identified in her foreword to the report, that this might be an area where more research is required.

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Key Findings continued

4. Support and after-care

The lack of specialist knowledge and support for abduction victims - a recurring theme in the interviews.

- Vast difference in the ways that society views stranger abduction and parental abduction – “parental abduction is unimportant because they are with their parents.”
- “...people think this is a victimless crime” – means no validation for the impact and effects of the abduction suffered by the child.
- “no matter how good the abducting parents think they are it has some long term effects for the child”
- Appropriate counselling at the time might prevent problems later
- “I did not receive therapy or counselling. There was no support system. It was just done. I did not know who I was for a long time. There needs to be something in place once the child is returned. The real work begins once the child is returned”
- Where mental health professionals were involved, often they had not dealt previously with abduction cases. “This makes it worse”. They need to understand the ramifications, consequences and effects of abduction”.

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Key Finding 4: Support and aftercare continued

- Very difficult to get the right help. “Even now, I don’t know what to ask for”.
- “If someone dies there is all this stuff about grief.. But there is nothing for abduction”.
- “Things like this can fracture sibling relationships as well”. Non-abducted siblings need help during the time of abduction and afterwards
- “There is no time limit to the need for aftercare because it takes time to know what it has done to you, and how you are feeling”.
- “The past has not become smaller with time” (Sarah Cecelie, Action Against Abduction (previously PACT) <http://www.actionagainstabduction.org>)

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Conclusions

- A high proportion (73.53%) of the previously abducted children in this sample reported suffering very significant effects from their abduction in terms of their mental health. This percentage increases further (to 91.17%) when taking into account those reporting less significant, but still discernible, effects. Such effects were evident even where the abduction occurred at a very young age where it might be thought that, as the child had not yet had a chance to form a strong and enduring relationship with the left-behind parent, the effects might be expected to be correspondingly less severe.
- A very low percentage (8.82%) in this sample reported no real effects, and these were either related to very short abductions or to abductions where the interviewee supported the abduction or intention to abduct by the primary carer.
- The status of the abductor did not tend to alter the effects experienced by the abducted child.
- Those who reported very significant effects talked about the ongoing nature of those effects in their current adult lives, often very many years after the abduction.

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Conclusions continued

These findings tend, therefore, to support those from earlier studies about the long-lasting negative effects of abduction which are emphasised in this project by the direct reporting of the abducted children, as adults, many years after the event, and build on the Effects report (2006) which had a smaller sample of child interviewees (10), where less time had passed between the abduction and interview (all abductions in 2006 project occurred over 5 years before the interview vs a minimum of 10 years and a maximum of 50 years in current sample) and where the time away before reunification where it occurred was far less (6 weeks to 14 months in 2006 project, few days to 42 years in current sample).

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Recommendations

- Focus of the recommendations
- Need to protect children from the harmful effects of abduction
- Preamble 1980 Hague Child Abduction 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"

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Recommendations – how to achieve the required result?

One way of protecting children from the harmful effects of abduction is to prevent abductions from taking place. Whilst it is accepted that it is not possible (? desirable) to prevent all abductions, it is submitted that preventable abductions must be avoided. Recommendations are made regarding prevention.

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Prevention Recommendations

- Most parents want to do the right thing for their children. Knowledge and awareness about the legal and socio-legal aspects of child abduction may affect the decisions which parents make about abduction. A global awareness-raising campaign should be undertaken - some parents still do not appreciate that you can abduct your own child; some lawyers are still giving incorrect advice.
- Widely publicised establishment of body of abduction-specialist mediators able to provide appropriate information about abduction and its effects in family law cases to be available at reasonable cost if not publicly funded.
- Registers of abduction-specialist mediators to be kept by Central Authorities and should appear on the relevant websites.

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Recommendations continued

Another way of protecting children from the harmful effects of abduction is to provide appropriate support and care for those who have been abducted.

Recommendations are made regarding support and care.

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Support and care recommendations

- Support required for abducted children who are found and returned, for those who are found and not returned, and those who are never found. What happens about contact between non-returned children and the left-behind parent? Especially pertinent where no public funding for contact cases.
- Child must be properly heard in abduction proceedings
- Prompt return of children where appropriate to help ameliorate the harmful effects of long-term abduction
- Prompt welfare determinations after return including leave to remove applications (relocation) so that child is not left in limbo and re-abductions less likely to occur
- Abduction support services to be made available and well publicised, including remote access through internet, making all abducted children the contact-makers – particularly important where children are never found.
- Funding? Should not deter some international co-ordinated effort, even on modest scale.

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Support and care recommendations continued

- Authority effecting return to put in place monitoring system under which feedback is provided to the authority about the returned child for a defined period of time – funding? Some modest form of follow-up would be better than the almost-complete absence currently available.
- Mentor to be provided where children are returned. Mentor to befriend child and family and to assist in the reunification process. Mentor, where possible, to have experienced child abduction personally. Register of mentors to be created and kept in same way as mediators above. Register could be accessed by parties in informal return arrangement as well as when court-ordered. Need for support similar in both cases.
- **Abduction training programmes to be devised and offered to schools, local authorities, police, judiciary, and mental health specialists. Information about effects of abduction to be included.**
- Further collaborative longitudinal funded research to be undertaken

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Where are we now?

- International collaboration formed to take forward the recommendations
- Funding being sought
- Commitment to the issues
- Necessary to progress in “bite-size” sections?
- Interested parties?
- **AFCC (Australia) Melbourne, August 2017 – pre-conference institute addressing post-abduction support concerns with psychologists and others working therapeutically with abducted and previously children and families.**

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Final Word

Perhaps the most pressing issue is for parental child abduction to be understood for what it is, an important matter with potentially extremely serious negative effects for the child (and others including future generations), the impacts of which may continue into adulthood affecting well-being, health, personal relationships, choices, and outcomes. **It is not a benign victimless event which “sometimes happens within families”.**

This is a societal problem, and not simply an individual family issue. These events are doubtless ripples on the oceans between those in different countries, and between people on different continents, but in learning more of the long-term effects of abduction, we see their inherent potential to also ripple through the generations and affect the society we will become. **Families may be small, but their impact is huge.**

We ignore these issues at our peril. We may not be able to do everything for everyone but **we can do something for some, and we should.**

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International Child Abduction: A French Perspective

Véronique CHAUCHEAU, Avocat au Barreau de Paris
Véronique CHAUCHEAU et Associés

IAFL – New Delhi
Tuesday, September 13, 2016; 2pm

1

France is a State Party to the 1980 Hague Convention

- The 1980 Hague Convention is in force in France since 1st Decembre 1983
- The Convention shall extend to the whole of the territory of the French Republic



2

France is a State Party to the 1980 Hague Convention

Central Authority designated under the 1980 Hague Convention:

Ministère de la Justice
 Direction des Affaires Civiles et du Sceau
 Bureau du droit de l'Union, du droit international privé et de l'entraide civile (BDIP)
 13, Place Vendôme
 75042 PARIS Cedex 01
 France
 telephone number: +33 (1) 44 77 61 05
 telefax number: +33 (1) 44 77 61 22
 E-mail : entraide-civile-internationale@justice.gouv.fr
 website : <http://www.justice.gouv.fr/justice-civile-11861/enlèvement-parental-12063/>

French Member of The International Hague Network of Judges :

Judge Isabelle GUYON - RENARD, Deputy Judge of the First Civil Chamber of the Court of Cassation

3

France is a State Party to the 1980 Hague Convention

• **Special Unit for Mediation in International Family Disputes:**

Ministère de la justice
Direction des affaires civiles et du Sceau
Bureau du droit de l'Union, du droit international privé et de l'entraide civile
Cellule de médiation familiale internationale

13, place Vendôme
75042 PARIS Cedex 01
Téléphone : 01 44 77 25 30 Télécopie : 01 44 77 60 54

4

France is a State Party to the 1980 Hague Convention

• **In the Judicial Process, the State Public Prosecutor (*Procureur de la République*) is responsible for taking action to obtain a return order**

The State Public Prosecutor is acting on behalf of the State, not on behalf of the left behind parent

• **Concentration of Jurisdiction**

36 Competent Tribunals :
1 First Instance Tribunal for 1 Court of Appeal

• **Responsibility of the State Public Prosecutor (*Procureur de la République*) for the enforcement of return orders**

5

France is a State Party to the 1980 Hague Convention

SUPPORTING LEGAL INSTRUMENTS

- **International treaties:** 1996 Hague Child Protection Convention
- **Regional Instrument:** Brussels II *a* Regulation
- **National Implementing legislation:** 2004 and 2012 Reforms
- **National Criminal Law:** Art. 227-7 of the Penal Code

6

France is a State Party to the 1980 Hague Convention

Recent Trends (1)

- At Central Authority level : devoted and qualified team but with limited funds
- State Prosecutor : 2 to 3 months to go to Court
- Judicial Process : 1 to 2 months to set a hearing

7

France is a State Party to the 1980 Hague Convention

Recent Trends (2)

- Latest HCCH Statistics 2011 :
 - App. 50-60% of return applications to French CA ended with the return of the child, including:
 - App. 30-40% of voluntary return
 - App. 20% of judicial return
 - App. 15% of judicial refusal
- the European Court of Human Rights condemned France for the violation of Article 8 of the European Convention on Human Rights due to not taking all measures required to implement a return ordered under the 1980 Hague Convention (*CEDH 7 mars 2013, req. n° 10131/11*)

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France is a State Party to the 1980 Hague Convention

Top and Tips

- Having direct/telephone contacts with the Central Authority
- Corresponding with a local lawyer in the State of Refuge
- Making use of Art. 29 of the Convention if the CA or judicial process is slow
- Making use of criminal law and international cooperation (INTERPOL) when available
- Providing affidavits on the law applicable to custody instead of using Art. 15 of the Convention
- Requesting support from the Member of the Hague International Network of Judges when international judicial issues arise

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THANK YOU!

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10

ANIL MALHOTRA, ADVOCATE*

*Anil Malhotra is a practising Advocate in India since September 1983. He attained Bachelor of Science (1980) and Bachelor of Laws (Professional) (1983) degrees from Panjab University, Chandigarh & an LLM degree from the University of London, London in 1985. He studied Comparative Family Law at London School of Economics besides Law & Society at School of Oriental & African Studies.

Well conversant with independently conducting civil, service, company, matrimonial and allied litigation at High Courts over India and Supreme Court. From 1986 to 1992, he taught civil procedural laws and matrimonial remedies for six years as a part-time lecturer at the Faculty of Laws, Panjab University, Chandigarh. Worked at High Court as Additional Central Government Standing Counsel from 1997 to 2000.

Have represented substantial number of private clients for the past three decades by filing and defending independent petitions at the High Court and other Forums in matters relating to constitutional, civil, company, criminal, consumer and family disputes litigation. Has rendered substantial assistance as Amicus curiae with reported judgments on various issues of public law importance. Representing Government of Punjab pro bono, as counsel in defending vires of Punjab Travel Professionals Regulation Act, 2012, at the High Court since 2013.

For over 30 years, he continues to act as an Indian expert to render reports in foreign courts on appointment by the Bench in overseas jurisdictions. Conducts matters in Indian Courts pertaining to interpretation and application of foreign Court Orders regarding divorce decrees, child abduction, custody, maintenance, adoption, surrogacy and family related issues of Non-resident Indians (NRIs).

He has co-authored book titled “Acting for Non-resident Indian Clients” (Jordans 2005), India, NRIs and the Law (Universal 2009), Indians, NRIs and the Law (Universal 2011), Surrogacy in India : A law in the Making (Universal 2013) and International Indians and the Law, (Universal 2014), Surrogacy in India – A law in the Making : Revisited (LexisNexis 2015). He has significant published work and has both international and domestic conference participations. Has over 300 newspaper columns to his credit besides significant published work in journals.

As Chairperson, Task Force, Policy Procedures, Resolution and Grievances of NRIs, he has authored five reports for the Government of Punjab and has assisted in the enactment of The Punjab Compulsory Registration of Marriages Act, 2012 and Punjab Travel Professionals Regulation Act, 2012. He is an Advisor on NRI issues to the Government of Punjab & is a member of Nodal Cell for NRI Affairs in UT, Chandigarh. On January 29, 2007, he was elected to the International Academy of Family Lawyers. He is the Indian Representative of the Family Law Committee of International Law Association and has lectured at National Judicial Academy, Bhopal on 10 programmes and spoken at Chandigarh Judicial Academy. He has authored four publications on NRIs issues for the Government of Punjab.

Has conducted number of litigations on inter country parental child removal matters and has persistently proposed, debated and discussed need for India to sign the Hague Convention on Inter parental child abduction, 1980. As amicus curiae, his report on inter country parental child removal, forms part a Punjab and Haryana High Court judgment making a reference to the Law Commission of India, to recommend that India needs to consider signing the Convention. Handled litigation & campaigns for India to enact a law on surrogacy arrangements in India. Intends to persuasively pursue enactment of Indian legislation on these subjects.



“INDIA, INTERCOUNTRY PARENTAL CHILD REMOVAL AND THE LAW”



1.

“MAGNITUDE OF THE PROBLEM”



- Considering , Cross-border unions **between 1.1 Billion Indians** , about **30 million non-resident Indians (NRI's)** living in **180 nations** abroad and;
- Also keeping in mind, the fact that India in itself is spread over **3.28 million sq. kilometers** over **29 States** and **7 Union Territories**
- has created an **immense potential for unresolved inter-parental child custody conflicts** within and outside India.

Concept of Inter-parental Child Removal

Broken cross border marriages, multi jurisdiction matrimonial disputes and enforcement of custody orders of foreign courts

→

Inter-parental Child Removal
Non Resident Indian parents remove their children *to India or to foreign* jurisdictions either in violation of a foreign court custody order or in infringement of the other spouse's parental rights.


4

“The Hague Convention”


The Hague Convention , a multilateral treaty developed by the [Hague Conference on Private International Law](#) ; provides an expeditious method to return a child taken from one member nation to another. Proceedings on the Convention concluded 25 October 1980 and the Convention entered into force on 1 December 1983. It currently has 94 nation members world wide.

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- The Convention was drafted to “insure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained in a contracting state not their country of habitual residence.”



- The Convention seeks 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 the rights of access.”



- The primary intention of the Convention is to preserve whatever status quo child custody arrangement existed immediately before an alleged wrongful removal or retention thereby deterring a parent from crossing international boundaries in search of a more sympathetic court. The Convention applies only to children under the age of 16.



Hague Convention on Civil Aspects of International Child 1980, which States that the removal of a child is considered to be wrongful where:

- a) It is in breach of rights of custody.
- b) At the time of removal or retention those rights were actually exercised.
- c) The rights of custody mentioned 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.

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2.
**“UNDEFINED INTER-PARENTAL
CHILD REMOVAL”**



10

**Lack of Statutory Remedies in
Indian Legislation**

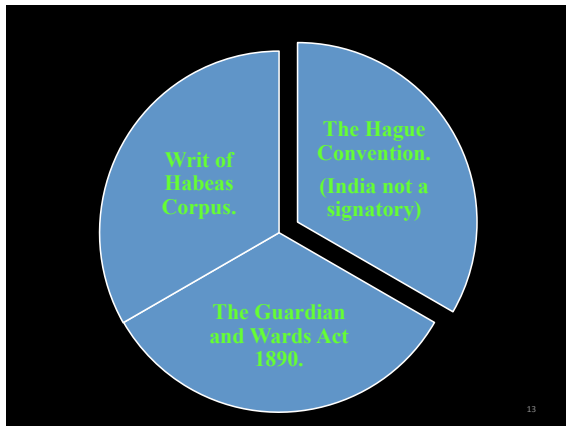
- India not a signatory to the Hague Convention.
- “Inter-parental child abduction” is neither defined nor is it an offence under any statutory law in India.
- Illegal detention- requirement for Habeas Corpus- Difficult to prove the illegality to invoke the remedy.
- Only remedy is by way of becoming a guardian of one’s own child.
- Position of the Constitution by seeking a prerogative writ either from High Courts or the Supreme Court.

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3.
“REMEDIES”



12



4.
“THE POSITION OF INDIAN
 LAW ON CHILD ABDUCTION”

•The Earlier law

In 1984, in Surinder Kaur Vs. Harbax Singh Sandhu & in 1987, in Elizabeth Dinshaw Vs. Arvind M. Dinshaw, the Supreme Court exercising summary jurisdiction returned the removed minor children to the foreign country of their origin on the basis of foreign court custody orders.

•The Changed Verdicts

In 1998, in Dhanwanti Joshi Vs. Madhav Unde & in 2000, in Sarita Sharma Vs. Sushil Sharma, the courts have favored keeping the child’s welfare and best interests in mind over all other aspects. Accordingly, Foreign court orders are only one consideration now in child custody disputes which are decided on the merits of each case.

RECENT SUPREME COURT JUDGMENTS IN CHILD REMOVAL MATTERS

1. **Ruchi Majoo v. Sanjeev Majoo** : Judgments Today 2011 (6) 167 SC

- A Writ Court can conduct an enquiry on the question of custody or deal with the matter summarily and Order the parent to return the custody of the child to the country from where he/she was removed leaving all aspects relating to child welfare to be investigated by Court in his own country in cases arising out of proceedings under the Guardians & Wards Act, the Guardian Judge can hold a summary enquiry provided it is competent to maintain a petition for custody of the minor under Section 9(1) GWA. However, if the Guardian Judge does not have jurisdiction to entertain a petition for custody, it cannot pass any order or issue any direction and the Court has to pass an order of dismissal of the proceedings.

2. **Dr. V. Ravi Chandran v. Union of India**: 2010 (1) Supreme Court Cases 174.

- The Courts which have already passed custody orders or consent orders between the parties and has given the divorce to the parties has the jurisdiction to deal with the custody matters of the child who should be returned to the country from where he/she has been removed. (This judgment has been followed in another decision on July 16, 2013)

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RECENT SUPREME COURT JUDGMENTS IN CHILD REMOVAL MATTERS

3. **Arathi Bandi v. Bandi J. Rao** Judgments Today 2013 (II) SC 48

- Holding the mother singularly responsible for removal of the child from the jurisdiction of the US Courts, exercised summary jurisdiction for return to USA.

4. **Shilpa Aggarwal v. Aviral Mittal**: 2010 (1) Supreme Court Cases 591,

- The Court where the child has spent his initial years and has intimate contact with the child, will have the jurisdiction to decide about custody of the Child on Comity of Courts principle.

6. **Paul Mohinder Guhan v. Selina Guhan**: Delhi High Court Judgment; 130 (2006) DLT 524, paras 11,19,20,24 and 32. (Running pages 128, 129, 131 and 132)

- The purport of expression "ordinarily resides," is not similar to the expression, "where the minor resides at the time of the application." (Para 19) Theory of conflict of law is referred to (Para 20). Removal of child from ordinary residence without knowledge of other parent is not correct (Para 24 & 32).

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JUDGMENTS INTERPRETING PHRASE "ORDINARILY RESIDENT" USED IN GWA

6. **Mukand Swarup v. Manisha Jain** : Delhi High Court Judgment: CRP 55/2009, Decided on 21 April 2009,

- View under the Hague Convention under such cases under Article 3 of the Convention is in favour of the Country where the minor resided before the removal (Para 3 and 4). Temporary shifting or removal of minor child to another place by one of the parents would not give jurisdiction to the Courts of that place to deal with the case (Para 10).

7. **Amrit Pal Singh v. Jasmit Kaur**: Delhi High Court Judgment AIR 2006 Delhi 213;

- The word "ordinarily resides," do not have the same meaning as that of "residents at the time of the application." Inter Parental kidnapping of the child does not ouster the Court's jurisdiction only because place of residence was different at the time of filing of the application (Paras 8 and 9). Inherent jurisdiction is different from the territorial jurisdiction (Para 10).

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ROXANN SHARMA v. ARUN SHARMA

2015 (8) Supreme Court Cases 318

- Frequent visitation does not mean continuous visitation.
- Whether having permanent residence in India or not is not so important a factor.
- The focal point for consideration in such cases is welfare of the child.
- Considering that global relocation is a well known legal concept now, the entitlement as to custody by the left behind spouse has to be jurally investigated.
- Forum Shopping or Court Shopping by parties to litigation must be firmly dealt with.
- Co-ordinate benches of High Courts must respect prior orders.
- The parent who does not have interim custody should be allowed to visit the child without removing him/her from the custody of the other parent. Spending more time than is allowed amounts to temporary transfer of custody which is impermissible.

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SURYA VADANAN Vs. STATE OF TAMILNADU

2015 (5) Supreme Court Cases 450

- ✓ By a watershed verdict, Justices Madan B. Lokur and U.U. Lalit, directing return to UK of two minor children six and ten years of age laid down the following salutary principles.
- ✓ The principle of comity of courts and best interest / welfare of child apply in such cases.
- ✓ Rule of comity of courts should not be jettisoned except for compelling special reasons to be recorded in writing.

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SURYA VADANAN Vs. STATE OF TAMILNADU

- ✓ If the jurisdiction of the foreign court is not in doubt, the first strike principle is applicable.
- ✓ Interlocutory orders of foreign courts of competent jurisdiction must be respected.
- ✓ Elaborate or summary inquiry by domestic-courts when there is a pre-existing order of a competent foreign court must be based on reasons and not ordered as a routine.

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SURYA VADANAN Vs. STATE OF TAMILNADU

- The following considerations be considered.
- Nature and effect of foreign court order.
- Reasons for repatriation / non repatriation.
- Moral, physical, social, cultural or psychological harm to the child.
- Harm to parent in foreign country.
- Alacrity in moving concerned foreign court.

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5. Why should India be interested in joining the 1980 convention?

Firstly

- India is no longer impervious to international inter parental child removal

Secondly

- Plays into the hands of the abducting parent
- Usurps the role of the Court

Thirdly & Forthly

- Negative influence on a foreign judge
- The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues

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6. "LAW IN THE MAKING: AN AFTERMATH"



24


“The salient and salutary features of the Indian Civil Aspects of International Child Abduction Bill, 2016.”

- ✓ Create a Central Authority for performance of duties
- ✓ Applications may be made 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
 - ✓ Refuse to return a child if the child objects or if there is a grave risk of harm or would put the child in an intolerable situation.
 - ✓ Request the Central Authority to obtain a decision or determination on the removal or retention of the child in India .
 - ✓ Direct that the person who has removed the child to India pay the expenses and costs



7. Plugging the holes : suggestions for amendments

- Section 1 or any other introductory section must clarify about the applicability of the Act to every child removed or retained in India.
- Section 4 - for considering the qualification for appointment of the chairperson and members of the Central Authority (appointment by the SC)
- Article 11 of the Convention enjoins a period of six weeks for an expeditious disposal of the proceedings before the judicial or administrative authority of the Contracting State. This time period to be specified in Sections 13 to 22 & 28
- Necessity of making effective implementing procedural rules a must.



- The exclusive use of specialist family or designated judges in every High Court of every State may be necessary.
- U.K has the benefit of an Hon'ble Judge in the Court of Appeal acting as "Head of International Family Law" who assists in liaising with the judges abroad. In India too, such an office will need to be created for an effective working. Even the Chairperson of the Central Authority should ideally be an Hon'ble Judge who can effectively communicate with the High Courts for a smooth resolution of overseas child abduction disputes.
- Provision for providing of interim powers to move the concerned High Court to give interim directions to secure welfare.
- The power to order disclosure of a child's whereabouts.
- "Costs must follow the event." This will deter future child removals and provide actual monetary costs.
- Rules of procedure regarding making of applications before the Central Authority and / or other requirements must be made a part of the new proposed Indian law.
- Bar on parallel proceedings in India under Guardians & Wards Act.



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Dr. Pinky Anand is a designated Senior Advocate at the Supreme Court of India with a distinguished practice in diverse areas. She currently holds the prominent position as the Additional Solicitor General of India. A Doctorate of Law, graduate of Harvard Law School and an Inlaks scholar, Dr Anand is recipient of French National Order of Merit by President of the French Republic. Practicing in the Supreme Court of India, she has championed and fought numerous cases leading to landmark judgments in Indian Matrimonial law. As an expert in matrimonial law, Ms Anand has been at the helm of several landmark cases. Some of the more famous cases led by Ms. Anand are: Constitutional right of freedom and expression for the South Indian Actress Khushboo where the Supreme Court upheld fundamental rights of speech in a path breaking judgment and quashed 21 cases of defamation; V. Ravi Chandran vs. Union of India where she ensured the return of an American child to New York State though India is not a signatory to the Hague convention and Stephanie Joan Becker Vs State where the Supreme Court directed that if adoption is in the best interest of the child, there should not be any hindrance and the child is now growing up in Washington. She is an erudite speaker and writer and is extremely proactive in social welfare issues championing issues relating to women and child development at national and international conferences. She is Chairperson, National Committee Law, ASSOCHAM and has several awards for excellence in law to her credit including Amity University, Women Achievers Award. She is country councillor Law Asia and Vice President of the Bar Association of India. She is member of group of experts for Commonwealth for Drafting Model Law on Cyber Crime and was previously leading the All India Legal Team for BJP, the ruling party. She has authored the Indian chapter on Family Law jurisdictional comparisons published by Sweet and Maxwell and has been instrumental in bringing forth several legislations protecting women from sexual harassment and cyber crime.

