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# CROSS-BORDER CUSTODY BATTLES: INDIAN JUDICIAL PERSPECTIVE ON INTERNATIONAL PARENTAL CHILD ABDUCTION

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## INTRODUCTION

The phenomenon of International Parental Child Abduction (IPCA) presents unique and complex challenges in private international law. India, being a non-signatory to the Hague Convention on the Civil Aspects of International Child Abduction, 1980, addresses IPCA cases under the domestic framework of constitutional and personal laws. Typically, the parent left behind in another jurisdiction seeks the return of the child through a writ of *habeas corpus* under Articles 32 and 226 of the Indian Constitution<sup>1</sup>. In such cases, Indian courts do not follow a singular statutory regime but rely upon principles from the Guardians and Wards Act, 1890 (hereinafter "GW Act"), the Hindu Minority and Guardianship Act, 1956 (hereinafter "HMG Act"), and well-established judicial precedents to assess the child's custody.

This article undertakes a judicial analysis of Indian courts' approach in IPCA matters, emphasizing the principles of Child's best interest, Child Welfare, Comity of Courts, Citizenship and Nationality, and the Doctrine of Closest Concern. Analysing the key judgments, the article illustrates how Indian courts have weighed the best interest of the child in determining whether to repatriate children abducted into India.

## CONSTITUTIONAL AND STATUTORY FRAMEWORK

India's legal system provides a constitutional remedy in the form of a *habeas corpus writ petition* under Article 32 and 226 before the Supreme Court and the High Courts, respectively, seeking the release of a child allegedly abducted or wrongfully retained by one parent. These petitions are adjudicated with reference to personal laws, particularly the GW Act and HMG Act. While Section 13 of the GW Act, 1890<sup>2</sup> mandates that the welfare of the minor be the

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<sup>1</sup> The Constitution of India, 1950

<sup>2</sup> The Guardians and Wards Act, 1890

paramount consideration, Section 6 of the HMG Act <sup>3</sup>deals with natural guardianship. However, these provisions are interpreted flexibly as per the case, especially in the context of international custody disputes.

The Protection of Children from Sexual Offenses (POCSO) Act, 2012, and the Juvenile Justice (Care and Protection of Children) Act, 2015, prioritize the welfare of children, including those affected by abduction. These acts aim to provide a robust legal framework for preventing, investigating, and prosecuting child abductions. Additionally, the Supreme Court of India has issued landmark judgments emphasizing the rights and protection of the child.

## **WELFARE OF THE CHILD AS PARAMOUNT CONSIDERATION**

The consistent thread running through Indian judicial decisions is the paramount importance of the child's welfare. Courts are not inclined to order a mechanical repatriation merely based on the principle of comity of courts or parental claims. Instead, the welfare of the child—both physical and psychological—is the guiding test.

The Supreme Court and various High Courts have laid emphasis on individualized assessments of the child's wellbeing, the environment and circumstances in the foreign country, the financial and emotional capabilities of the parent abroad, and the impact of separation from the present caregiver. The guiding principle was aptly summed up in *Yashita Sahu v. State of Rajasthan*<sup>4</sup>, where the Supreme Court repatriated a girl child under the age of three to the United States after evaluating her emotional needs, future opportunities, language adaptation capacity, and parental bonding. Also, the Hon'ble Supreme court in the case of *Rohit Thammanna v. State of Karnataka*<sup>5</sup>, drew a clear distinction between a *child's wish or desire* and the child's best interest in custody matters. The Court emphasized that while the views of the child can be ascertained through personal interaction and may reflect their immediate comfort, these do not by themselves determine what is in the child's best interest. In this case, although the minor child expressed a desire to stay with his mother in Bengaluru, the Court held that his best interest lay in returning to the United States, where he was born, held citizenship, and had lived and studied for nearly a decade. The Court noted that short-term comfort or preference cannot outweigh the long-term welfare considerations such as cultural familiarity, future prospects,

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<sup>3</sup> The Hindu Minority and Guardianship Act, 1956

<sup>4</sup> *Yashita Sahu v. State of Rajasthan*, AIR 2020 SC 4494

<sup>5</sup> *Rohit Thammanna v. State of Karnataka*, (2022) SCC OnLine Kar 1773

and legal status. Hence, the judgment reinforces that the paramount consideration in custody matters is the holistic welfare of the child, not merely their expressed preferences.

## COMITY OF COURTS AND PRIVATE INTERNATIONAL LAW PRINCIPLES

Although not bound by the Hague Convention, Indian courts often recognize the need to respect foreign judgments and custody orders based on the principle of comity of courts. However, this respect is not absolute and must align with the child's best interests.

In *Rajeshwari Chandrasekhar Ganesh v. State of Tamil Nadu*<sup>6</sup>, the Supreme Court reaffirmed its earlier directions allowing the mother to take her two minor children back to the United States after the father chose not to return. The Court directed the father to promptly hand over the children's passports and PIO/OCI cards, warning that any obstruction would be treated as contempt. It emphasized that the mother's right to take the children to the U.S. must not be hindered and reiterated that all parties must strictly comply with the earlier judgment, while also permitting the father to stay in India if he so chooses. The Supreme Court's consistent emphasis, that the doctrine of comity does not override domestic legal obligations towards the welfare of a child, was held paramount.

## NATURAL ENVIRONMENT AND DOCTRINE OF INTIMATE AND CLOSEST CONCERN

Courts have invoked the '*doctrine of intimate and closest concern*' to determine which parent and location is best suited to ensure the child's development. This doctrine supplements the best interest principle by locating the natural, emotional, linguistic, and social environment that is most conducive to the child's growth.

In *Abhay v. Neha Joshi*<sup>7</sup>, the male child was repatriated to USA, the court considered not only the educational facilities and living standards in the USA but also the presence of extended family and cultural environment in India. The Court emphasized that while foreign residence and education are factors, the intimate concern and primary caregiving by one parent cannot be overlooked.

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<sup>6</sup> Rajeswari Chandrasekar Ganesh vs The State Of Tamil Nadu, [2021] SCC Online SC 3322

<sup>7</sup> Abhay v. Neha Joshi, 2019 SCC OnLine Bom 237

## REBUTTABLE PRESUMPTION UNDER HMG ACT: MATERNAL GUARDIANSHIP

The **Hindu Minority and Guardianship Act, 1956**, enacted as part of the Hindu Code, governs matters relating to guardianship of minors who are Hindus, including Buddhists, Jains, and Sikhs, unless it is proved that they are not governed by Hindu law. As per **Section 1(2)** of the Act, it “*extends to the whole of India except the State of Jammu and Kashmir*” (though this exclusion is now redundant post the abrogation of Article 370) and “*applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.*” This means that the Act is applicable not only to Hindus residing within the territory of India but also to those who are domiciled in India but residing abroad. The phrase “*Hindus domiciled in the territories to which this Act extends*” refers to individuals who fall under the definition of Hindu as provided in **Section 3 of the HMG Act**, and who have their legal **domicile** in India—that is, they consider India as their permanent home and intend to return or remain in India indefinitely, even if they are temporarily or permanently staying outside India. The expression “*outside the said territories*” refers to physical presence outside the geographical boundaries of India. The inclusion of this provision ensures that the provisions of the Act regarding guardianship of minors are applicable to Indian-domiciled Hindus even in cases of **international residence or cross-border disputes**, thereby affirming the applicability of Indian personal laws in such scenarios, especially in matters of custody and guardianship.

The HMG Act under Section 6(a) presumes the father as the natural guardian of a minor son, with the mother taking that role only after the father. However, this is a rebuttable presumption. The Indian judiciary has progressively interpreted this provision in line with welfare-oriented jurisprudence.

In *Vasudha Sethi v. Kiran V. Bhaskar*<sup>8</sup>, the Supreme Court held that although the father is the natural guardian under the statute, this presumption can be rebutted where the mother is better suited to provide care. Here, the court ordered the repatriation of a minor son to the United States where the mother was the primary caregiver and the child was a US citizen.

### When the Muslim Law is applied to the Parties:

The **Muslim Personal Law (Shariat) Application Act, 1937** governs Muslims across India,

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<sup>8</sup> *Vasudha Sethi v. Kiran Bhaskar*, AIR 2022 SC 1241

with the exception of the State of Goa<sup>9</sup>. Under Islamic law, the concept of custody of a minor child is referred to as *hizanat*, which signifies the act of caring for a newborn. According to Sharia, while the father is recognized as the natural guardian of his children irrespective of gender, custody rights may rest with the mother under specific conditions. The mother is entitled to the custody of a male child until the age of seven and a female child until she attains puberty. Consequently, under Muslim law, a boy is considered to attain majority at seven years of age, whereas a girl reaches majority upon puberty.

As per the Guardians and Wards Act, 1890 (GWA), courts are permitted to apply the personal law applicable to the minor, and any guardian appointed under the Act must be consistent with the relevant personal law of the parties involved.<sup>10</sup> In the case of *Akhtar Begum v. Jamshed Munir*<sup>11</sup>, the Delhi High Court held that the personal law of the parties must be duly taken into account when deciding custody matters under Section 6 of the Act, and a failure to do so would amount to a material procedural irregularity.

Further, in *Athar Hussain v. Syed Siraj Ahmed*<sup>12</sup>, the court drew a clear distinction between guardianship and custody, holding that the two are separate legal concepts contingent on the circumstances. Although the father may be the natural guardian, the custody of the child may be entrusted to another individual if warranted by the welfare of the child. According to Section 19 of the GWA, the court cannot appoint a guardian during the lifetime of the natural guardian unless he is found to be unfit. In this case, both the Family Court and the High Court found the father unfit, and therefore, the court granted legal custody to another family member, emphasizing that the welfare of the child takes precedence over guardianship rights.

## ROLE OF CITIZENSHIP AND NATIONALITY

While Indian courts are primarily guided by the welfare of the child, the nationality and citizenship status of the child also form an important consideration. In *Rohit Thammanan v. State of Karnataka*, the Supreme Court held that the child's US citizenship and his settled status in the United States justified his repatriation. The court considered the continuity of education, healthcare facilities, and linguistic familiarity as part of the welfare assessment.

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<sup>9</sup> The Muslim Personal Law (Shariat) Application Act, 1937

<sup>10</sup> The Guardians and Wards Act, 1890, Section 6 and 17.

<sup>11</sup> Akhtar Begum v Jamshed Munir AIR 1979 Delhi 67

<sup>12</sup> Athar Hussain v Syed Siraj Ahmed (2010) 2 SCC 654

## THE INDIAN JUDICIAL APPROACH: INTER – COUNTRY PARENTAL CHILD ABDUCTION AND RETENTION

Over the years, Indian courts have developed certain identifiable trends in dealing with cases of inter-country parental child removal and retention. An analysis of case law, beginning with the first notable judgment delivered by the Kerala High Court in the case of Marggarate Maria Pulparampil v Dr. Chacko Pulparampil & Ors. in late 1960s<sup>13</sup>, reveals that Indian courts have consistently treated the “best interest and welfare of the child” as the guiding principle in custody disputes of this nature. However, despite the repeated invocation of this standard alongside the principle of comity of courts, there has been a lack of uniformity and consistency in how these principles have been interpreted and applied in individual cases.

Custody rulings have varied significantly even though the same guiding principles were cited, demonstrating an absence of clear and consistent judicial parameters. Courts have alternately awarded custody to fathers, mothers, grandparents, or other relatives without any established set of guidelines following the removal of the child from the custody of the lawful guardian. Furthermore, judicial attitudes towards foreign custody orders have shifted over time, showing different phases in legal reasoning.

In the initial phase, Indian courts prioritized the welfare of the child over all else, often refusing to grant custody to the removing parent, where doing so would jeopardize the child’s health or wellbeing. The second phase witnessed a tilt toward the principle of comity of courts, where Indian courts showed a greater willingness to recognize and enforce foreign custody orders, even when doing so may not have aligned perfectly with the child’s best interest. In the third and more recent phase, Indian courts appear to be attempting a reconciliation between these two principles, striving to balance the child’s welfare with international obligations.

Despite some progress, inconsistencies continue to emerge, even under domestic statutes such as the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956. For instance, in cases involving children aged five years or below, courts have reliably granted custody to the mother, relying on Section 6 of the HMG Act, which presumes that young children require maternal care for their emotional and physical development.

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<sup>13</sup> Marggarate Maria Pulparampil v Dr. Chacko Pulparampil & Ors. (AIR 1970 Ker 1)

However, when it comes to the recognition of foreign custody decisions, a significant gap in legal application remains. Indian courts have rarely invoked Section 13 of the Code of Civil Procedure (CPC)<sup>14</sup>, which lays down clear criteria for recognizing foreign judgments in civil matters, including custody disputes. This provision has remained unused, reflecting a critical lapse in ensuring consistency in the treatment of foreign custody orders. Regular application of Section 13 CPC could have mitigated the inconsistencies that have plagued Indian jurisprudence in this area.

Section 13 of the Code of Civil Procedure, 1908, serves as a significant loophole in cases of international parental child abduction, particularly because India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. While this provision generally provides for the recognition of foreign judgments, it also allows Indian courts to refuse enforcement if the judgment is deemed to be in conflict with Indian law or public policy. In custody disputes, this exception is frequently invoked, enabling abducting parents to resist foreign court orders simply by arguing that such decisions violate Indian legal norms or the child's welfare as interpreted under Indian law. As a result, even when a foreign court has lawfully ordered the return of a child to their country of habitual residence, Indian courts may disregard such orders, asserting jurisdiction solely based on the child's physical presence in India. This legal flexibility not only weakens the principle of comity of courts but also encourages forum shopping and prolongs custody battles, often to the detriment of the child's well-being and stability. Thus, Section 13, in the absence of India's commitment to international child abduction conventions, becomes a tool that can be exploited, creating uncertainty and legal inconsistency in cross-border custody cases.

Despite long-standing acknowledgment of the child's best interest and international comity, the Indian judiciary's handling of international parental child abduction cases remains erratic. The absence of a uniform legal framework or binding guidelines has resulted in unpredictability and a case-by-case application of both domestic and international principles. This underscores

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<sup>14</sup> Code of Civil Procedure, 1908, Section 13 - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except--

(a) where it has not been pronounced by a Court of competent jurisdiction;  
(b) where it has not been given on the merits of the case;  
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of<sup>1</sup> [India] in cases in which such law is applicable;  
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;  
(e) where it has been obtained by fraud;  
(f) where it sustains a claim founded on a breach of any law in force in India].

the urgent need to examine and rectify the gaps in India's current legal and judicial approach to such matters.

## JUDICIAL TRENDS IN REPATRIATION ORDERS

Recent Indian jurisprudence has seen a growing inclination toward ordering the return of children to their habitual residence when it aligns with the child's welfare. This trend is visible in:

- In *Yashita Sahu v. State of Rajasthan*, the Supreme Court directed the return of a girl child under three years to the USA, reaffirming that custody should lie with the parent who can provide stability and natural environment.
- In *Rajeshwari Chandrashekhar Ganesh v. State of Tamil Nadu*, the Madras High Court ordered the repatriation of two minor children to the mother in the USA, emphasizing maternal care and reading Section 17 of the HMG Act alongside Section 13 of the GW Act.
- In *Rohit Thammanna v. State of Karnataka*, the Karnataka High Court facilitated the repatriation of an 11-year-old boy to the USA, stating that the best interest of the child lay in returning to his settled environment abroad.
- In *Elizabeth Dinshaw v. Arvand M. Dinshaw*<sup>15</sup>, the Supreme Court of India adopted a child centric approach. It stated that if a custody dispute involving a child comes before a court, the matter must be settled without regard to the legal rights of the parents, but exclusively and predominantly on what is in the best interest of the child.
- However, in *Ruchi Majoo v. Sanjeev Majoo*<sup>16</sup>, the Supreme Court decided that the courts in India have *parents patriae jurisdiction* over children, which is an onerous responsibility. As the child's welfare is an essential issue, the Supreme Court declared that even if a foreign court has a definite opinion on the minor's welfare, Indian courts cannot forego an independent examination with objectivity. However, the Court added that this does not mean that foreign court orders should still be regarded and the welfare

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<sup>15</sup> Elizabeth Dinshaw v Arvand M Dinshaw (1987) 1 SCC 42

<sup>16</sup> Ruchi Majoo v Sanjeev Majoo (2011) 6 SCC 479

of the child shall remain the pivotal principle over all other considerations.

- However, this case was overruled in *Arathi Bandi v. Bandi Jagadrakshaka Rao*<sup>17</sup>, the Supreme Court adopted its reasoning in the Dr. V Ravi Chandran case. It held that when a parent removes the child from the foreign nation to India in contravention of the domestic court's decision, they cannot avail any remedy. The Supreme Court expressly endorsed the current idea of Conflict of Laws, which favours the recognition of the jurisdiction of the state having the closest connection to the dispute.

These decisions reflect a jurisprudential evolution wherein courts, while acknowledging the lack of a multilateral treaty regime, rely on equitable principles and welfare assessments to issue repatriation orders. Legal reasoning behind the repatriation orders:

Indian courts have used a combination of statutory interpretation and constitutional principles to uphold the rights of the child and the left-behind parent. The key legal reasoning includes:

1. **Constitutional Jurisdiction** – Courts entertain habeas corpus petitions as the remedy against illegal or unlawful retention, invoking Articles 32 and 226.
2. **Interpretation of Guardianship Laws** – Courts read Sections 6, 13, and 17 of the HMG and GW Acts together to determine the fitness of the custodial parent.
3. **Evaluation of Evidence** – Courts rely on affidavits, foreign judgments, school and medical records, and psychological assessments to reach a conclusion.
4. **Best Interest Standard** – The ultimate test remains whether the custody or repatriation order would serve the best interest of the child.
5. **Public Policy Considerations** – Courts occasionally weigh broader considerations like international image, rule of law, and child rights under international conventions, even if not ratified.

## CONCLUSION

India's approach to International Parental Child Abduction is a nuanced interplay between

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<sup>17</sup> Arathi Bandi v Bandi Jagadrakshaka Rao 2013 (15) SCC 790

domestic laws, constitutional remedies, and evolving judicial standards. While the absence of accession to the Hague Convention results in non-uniformity, the judiciary has filled this vacuum by crafting a welfare-centric jurisprudence. The courts have consistently underscored that comity of courts, parental rights, and even statutory presumptions must all yield to the child's best interest.

The recent line of judgments points to a developing trend of repatriation in appropriate cases, especially when the child's citizenship, habitual residence, and the caregiving parent are situated abroad. Yet, the courts remain cautious to ensure that the child's psychological, emotional, and physical welfare is not compromised.

Going forward, the judicial approach could benefit from codification through legislation or India's accession to the Hague Convention to bring in clarity, consistency, and predictability. Until then, the courts continue to perform a delicate balancing act, guided by constitutional values and the welfare of the child as the cornerstone of their decisions.

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