BETWEEN LOCAL REALITIES AND GLOBAL COMMITMENTS: INDIA'S NON-RATIFICATION OF THE HAGUE CONVENTION WITH COMPARATIVE REFERENCE TO NEW ZEALAND

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ABSTRACT

This paper offers a comparative analysis of India and New Zealand's legal approaches to international child abduction, with a focus on the Hague Convention on the Civil Aspects of International Child Abduction (1980). While New Zealand has incorporated the Convention through its Care of Children Act 2004, balancing procedural obligations with limited discretion under the "grave risk" exception and child objections as seen in *McDonald v Sanchez*, India has not ratified the Convention, relying on domestic laws like the Guardians and Wards Act, 1890 and prioritizing the welfare of the child. This study integrates socio-cultural factors, particularly the role of patriarchal beliefs in perpetuating domestic violence against Indian women, which often necessitates cross-border relocations for safety. Drawing on recent research, it highlights the need for culturally-sensitive legal responses to the challenges posed by patriarchal control, socio-economic vulnerabilities, and gender-based violence. The paper advocates for India's potential accession to the Convention with reservations protecting domestic violence survivors and proposes a harmonized framework that aligns procedural efficiency with child-centric and gender-sensitive approaches.

1. INTRODUCTION

The phenomenon of international child abduction where one parent unilaterally removes or retains a child across borders without the consent of the other has become an increasingly complex legal and humanitarian issue in a globalized world marked by transnational families, inter-country marriages, and migration.The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) was designed to protect children from the harmful effects of wrongful cross-border removal or retention by ensuring their prompt return to the state of habitual residence and securing rights of custody and access across borders. Therefore the Convention rested on three interrelated presumptions: that wrongful removal disrupts a child's stable environment; that custody matters should be determined by the courts of the child's habitual residence; and that contracting states operate under broadly comparable legal protections and procedural fairness.

The return mechanism prioritises speed and neutrality, requiring decisions ideally within six weeks [1], and seeks to eliminate jurisdictional advantage through mutual trust. However, implicit in the Convention's operation are several normative assumptions: that all abductions are wrongful, that taking parents act in bad faith, and that procedural efficiency should be prioritised over the lived realities of family violence, economic hardship, or cultural context. These assumptions have been increasingly scrutinised in light of emerging jurisprudence and global data.

Significantly, the 2021 *Global Report showed* that 73% of taking parents were mothers, and in 58% of those cases, the child was taken to the mother's country of nationality [2]. This data challenges the Convention's original framing of the taking parent as a non-custodial father seeking strategic advantage, revealing instead that many removals are by mothers returning home often for reasons of safety, support, or escape from violence.

India's refusal to ratify the Hague Convention must therefore be understood not as a failure of compliance but as a principled stance rooted in welfare-centric jurisprudence. Indian courts resolve international child abduction cases under domestic statutes such as the Guardians and Wards Act 1890, the Hindu Minority and Guardianship Act 1956, and through parens patriae powers under Articles 32 and 226 of the Constitution. The focus is on substantive justice while

[1] Art 11 of Hague Convention on the Civil Aspects of International Child Abduction 1980
[2] HCCH, Prel. Doc. No 19A, September 2023, at 25–26

considering caregiver protection, familial context, and the best interests of the child over procedural conformity.

Interestingly, recent New Zealand case law indicates convergence with India's welfare-centric stance. In the recent decision of *McDonald v Sanchez* [3] reflect an increasing judicial willingness to treat habitual residence as a dynamic concept and to give substantial weight to the reasoned objections of maturing children, even where this conflicts with prior foreign court orders. The Court affirmed that once an exception under Article 13(1)(b) or s 106 of the Care of Children Act 2004 is made out, there is no residual tilt in favour of return, marking a significant shift from earlier formalistic interpretations. Similarly, in *LRR v COL* [4],the Court of Appeal upheld the High Court's decision to refuse return, emphasising that risks to the mother, such as violence leading to mental health relapse, can render the situation unbearable for both child and primary caregiver. These developments mark a shift from rigid treaty compliance to a child-sensitive, trauma-informed approach.

This trajectory aligns closely with the HCCH Guide to Good Practice on Article 13(1)(b)[5]. The Guide mandates that *grave risk* includes not only direct physical harm to the child but also serious psychological harm to the caregiver and realistic insufficiency of protective measures.[6] It warns against mechanical case processing in summary proceedings and requires that the child's views and evolving capacities must be respected.[7]

Given these evolutions in the interpretation of the Hague Convention, India's non-ratification appears increasingly justified rather than anomalous. India's refusal to adopt a one-size-fits-all model underscores the importance of preserving judicial discretion, protecting caregivers from domestic violence, and ensuring welfare-led outcomes in alarming socio-economic contexts.

This paper engages with that argument through eight sections. First, it outlines the legal frameworks in India and New Zealand. Next, it analyses return delays, habitual residence, and forum shopping. It then explores the grave risk exception, with emphasis on domestic violence . Subsequent sections examine divergent interpretations of child welfare, the socio-economic

[3] *McDonald v Sanchez* [2024]3 NZLR 702
[4] *LRR v COL*[2020] NZCA 209, [2024] NZCA 674 (HC ERA 29–33)
[5] Hague Conference on Private International Law. Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part VI, Article 13(1)(b) published in 2020 225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf
[6] paras 33–34
[7] Para 88

realities of nations affecting the escaping parents, and possible intermediaries such as mirror orders and tailored accession with reservations. Finally, the paper concludes that India's non-ratification acts as principled dissent, embodying hard-won insights now emerging in global jurisprudence.

2. Legal Landscape and Jurisdictional Frameworks in India and New Zealand

2.1. India: Pluralistic Statutes and Welfare-Centric Jurisprudence

India's response to international parental child abduction is grounded in a doctrinal framework that treats such incidents as custody disputes rather than criminal abduction. This approach diverges significantly from the Hague Convention's framework, where the wrongful removal or retention of a child by one parent is presumptively treated as a civil wrong triggering an obligation of return. In India, by contrast, courts do not consider a parent to be an 'abductor' merely by virtue of removing a child from a foreign jurisdiction. This is because both parents are presumed to possess equal custodial rights unless a competent court has ruled otherwise.

As a result, Indian courts adjudicate international child abduction cases through guardianship and custody laws, focusing on the welfare of the child rather than on the wrongful conduct of the parent. There is no specific penal consequence for cross-border parental removal unless a breach of a custody order is established. Consequently, proceedings are framed as civil custody matters under domestic law, most notably through writ petitions under Articles 32 and 226 of the Constitution or through applications under statutes such as the Guardians and Wards Act, 1890.

This civil framing allows Indian courts to adopt a child-centric lens and conduct de novo evaluations of welfare, adaptation, and the best interests of the child without being bound by presumptive mandates of summary return. As affirmed in various decisions, including the landmark case of *Nithya Anand Raghavan v State of NCT* [8] , the courts retain discretion to disregard foreign custody orders if returning the child would not serve the best interest of child.

2.1.1. Religious Personal Laws and Secular Statutes

India lacks a unified statutory mechanism specifically tailored to international child abduction.

[8] *Nithya Anand Raghavan v State of NCT of Delhi and Another* AIR 2017 SC 3137

Custody matters are governed under a combination of religious personal laws and secular statutes. For Hindus, including Buddhists, Jains, and Sikhs, the Hindu Minority and Guardianship Act, 1956 (HMGA), and the Hindu Marriage Act, 1955, provide the primary framework. Muslims follow Shariat principles as interpreted by Indian courts, while Christians and Parsis are governed by the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936, respectively. However, whenever the personal laws are in conflict with the Guardians and Wards Act, 1890 (GWA), the latter prevails. In practice, Indian courts have consistently held that when provisions of personal law conflict with the Guardians and Wards Act, the secular statute prevails. This principle was firmly established in Rafiq v Smt. Bashiran ,[9]the Court held that the Guardians and Wards Act would override conflicting provisions of personal law.The Court emphasised that the primary consideration is the welfare of the child, and the Guardians and Wards Act is intended as a universal code to govern guardianship and custody irrespective of religious affiliations. This precedent underscores the primacy of statutory law in custody matters and reinforces the best interests of the child as the overriding principle.

Although these personal laws vary in the identification of natural guardians and custodial priorities, Indian courts uniformly prioritize the welfare of the child.

2.1.2. Constitutional Jurisdiction and Habeas Corpus

One of the most distinctive aspects of India's approach is the invocation of its constitutional jurisdiction to adjudicate transnational custody disputes. The Supreme Court and High Courts exercise powers under Articles 32 and 226 of the Constitution to issue writs of habeas corpus in child custody matters.

The writ of habeas corpus, when applied to child custody matters, is grounded not in statute but in the court's inherent equitable jurisdiction. It is well established that in such cases, the court acts as *parens patriae*, prioritizing the best interests of the child. As held in *Tejaswini Gaud v Shekhar Jagdish prasad Tiwari* [10], habeas corpus is not concerned with the legality of custody but enables courts to assess the child's welfare. The writ is maintainable where it is shown that the custody of the child is illegal or without authority of law. It is an extraordinary

[9] Rafiq v Smt. Bashiran and Anr. AIR 1963 Raj 239
[10] *Tejaswini Gaud & Ors. Vs. Shekhar Jagdish prasad Tiwari & Ors.:* 2019 (7) SCC 42 at 18,19

remedy invoked only where ordinary legal recourse is unavailable or ineffective.

It is important to distinguish between the nature of proceedings under the Guardians and Wards Act and those initiated through a writ petition. The former contemplates a detailed evidentiary inquiry, including oral evidence and documentary proof. In contrast, habeas corpus proceedings are summary in nature. Courts exercising writ jurisdiction are cautious about making determinations on complex factual disputes. Therefore, in situations where a detailed factual analysis is necessary to resolve questions of custody, writ courts may decline to exercise jurisdiction and instead direct the parties to approach the appropriate civil court. Only in exceptional circumstances such as where the illegality of detention is clear, or where the best interests of the child are immediately at stake will the writ courts decide custody issues through habeas corpus.

Also in *Nithya Anand Raghavan case* [11], the Supreme Court emphasized that habeas corpus is not confined to physical legality but is grounded in a child's best interests. The Court explicitly rejected doctrines such as "comity of courts" and "first strike" in favor of a welfare-based approach. Foreign custody orders, though relevant, are not binding and must be assessed alongside other contextual and developmental factors .

2.1.3. Mirror Orders and Coordinated Relief

Indian courts have developed the innovative doctrine of "mirror orders" to ensure international enforceability and procedural harmony in transnational custody disputes. This approach entails mutual recognition of parallel orders by courts in different jurisdictions, ensuring that the rights and safety of the returning parent and child are secured.

In *Jasmeet Kaur v Navtej Singh* ,[12]The Supreme Court coordinated with a U.S. court to obtain reciprocal undertakings and conditions before ordering return. These mirror orders allowed Indian courts to impose protections, such as barring criminal prosecution and ensuring financial support, before facilitating the child's return. This model has evolved as a stop-gap substitute in the absence of India's accession to the Hague Convention.

[11] *Nithya Anand Raghavan v State of NCT ,above n 8* at 30,31
[12] *Jasmeet Kaur v Navtej Singh* 2018 SCC Online SC 174

2.1.4. Evolution of Indian Jurisprudence on Hague-Style Abduction Cases

India's jurisprudence on international child abduction has evolved through three discernible phases:[13]

1. ***Early Phase: Emphasis on Comity, First Strike, and Summary Return***

In the 1980s, the Indian Supreme Court exhibited deference to foreign custody orders and international judicial comity. This phase was marked by reliance on the *first strike principle*, which gives priority to the jurisdiction where the custody litigation was first initiated—typically the child's habitual residence. It also invoked the *comity of courts*, whereby Indian courts respected decisions of foreign jurisdictions to foster reciprocal respect. In *Surinder Kaur Sandhu v Harbax Singh Sandhu* [14], the Court held that the child's wrongful removal from the UK warranted return, stating that custody should be decided by the jurisdiction of habitual residence. Similarly, in *Elizabeth Dinshaw v Arvand M. Dinshaw* [15] the Court directed the child's summary return to the United States, underscoring the importance of discouraging unilateral removals.

2. ***Transitional Phase: Balancing Comity, Closest Concern, and Welfare***

During this phase, courts began to balance earlier deference to foreign orders with a growing emphasis on the welfare of the child. The *doctrine of closest concern* emerged, advocating that jurisdiction be determined by the forum most closely connected to the child's life and development.

By the late 1990s and early 2000s, Indian courts began moving away from automatic returns and instead balanced the principle of comity with the child's welfare. In *Dhanwanti Joshi v Madhav Unde* [16], the Supreme Court acknowledged the importance of comity but reiterated that Indian courts were duty-bound to conduct an independent assessment of the child's welfare. Similarly, in *Sarita Sharma v Sushil Sharma* [17], the Court declined to return the children to the U.S., reasoning that the mother had not violated any binding custody order and

[13] Malhotra, Anil and Malhotra, Ankit *International Child Relocation Issues: An Indian Perspective* (Paper presented at the 15 Years of the HCCH Washington Declaration, Embassy of Canada, Washington DC, 3 April 2025)
[14] 1984 AIR 1224, 1984 SCR (3) 422
[15] *Elizabeth Dinshaw v Arvand Dinshaw* AIR 1987 SC 3
[16] *Dhanwanti Joshi v Madhav Unde* 1998(1) SCC 112
[17] *Sarita Sharma v Sushil Sharma* 2000(3) SCC 14

that the children were well settled in India. In *Shilpa Aggarwal v Aviral Mittal* [18], the Court again emphasized that while the jurisdiction of the child's habitual residence should be respected, it must not override the child's best interests.

3. *Recent Phase: Rejection of Formal Doctrines and Primacy of Welfare*

In recent jurisprudence, Indian courts have firmly rejected automatic return and formalistic deference to foreign courts. The priority now lies squarely with the child's best interests, evaluated through case-specific and holistic inquiries.

From 2017 onward, the jurisprudence reflects a decisive shift towards welfare-centric adjudication, firmly rejecting the notion of automatic or summary return. In *Nithya Anand case* [19], the Court underscored that welfare is the determining factor and that foreign custody orders are only one element among many. Likewise, in *Prateek Gupta v Shilpi Gupta*[20], the Supreme Court reiterated that the doctrine of comity cannot displace a full evaluation of the child's circumstances. Courts are now required to assess each case on its individual merits, including the child's adaptation, psychological development, and socio-cultural environment.

This evolution demonstrates that Indian courts have moved from a formalistic adherence to comity toward a child-focused, substantive justice approach in international abduction cases. The discretionary space exercised in recent rulings reflects a firm judicial philosophy that prioritises constitutional morality and child welfare over rigid international comity norms.

2.2. New Zealand: Hague-Compliant and Procedurally Rigid[21]

New Zealand's legal system offers a structured response through its incorporation of the Hague Convention on the Civil Aspects of International Child Abduction, integrated into domestic law via the Care of Children Act 2004 (CoCA). In addition to providing clear procedures for contracting states, New Zealand's legal system demonstrates adaptability in cases involving non-contracting states and flexibility in exceptional circumstances through remedies such as habeas corpus.

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[18] *Shilpa Aggarwal v Aviral Mittal* 2010 (1) SCC 591.
[19] n 8
[20] *Prateek Gupta v Shilpi Gupta and Others 2017 SCC Online SC 1421.*
[21] Mark Henaghan et al., eds. *Family Law in New Zealand*. 21st edition. Wellington, New Zealand: LexisNexis NZ Limited, 2023.

2.2.1. Legal Framework for Contracting States

New Zealand is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, which is implemented through Part 2, Subpart 4 of CoCA. Section 4(4) stipulates that the general welfare principle, though paramount in domestic family law, does not override the procedural mandates of the Convention in return applications. This ensures that the courts prioritise the prompt return of a child wrongfully removed or retained in New Zealand, subject to narrowly defined exceptions.

Section 100 CoCA designates the Secretary for Justice as the Central Authority for international abduction cases .Sections 102–103 empower the Central Authority to initiate return proceedings, while s 105 requires the Family Court to order the return of the child where the criteria for wrongful removal or retention are satisfied.Section 106 outlines limited defences, including grave risk of harm, the child's objection, consent or acquiescence by the left-behind parent, settlement in the new environment, and potential breaches of fundamental rights.

Judicial interpretation has reinforced the narrow application of these defences. In Secretary for Justice (NZ Central Authority) v HJ[22], the Supreme Court confirmed that even the adequacy of the requesting state's legal system does not preclude a grave risk assessment, though the threshold for invoking the exception remains high [23].In Wolfe v Wolfe [24], the High Court emphasised that "grave risk" requires clear and substantial evidence of harm beyond the normal stresses of relocation (NFL1, 284).

CoCA provides for emergency remedies to prevent child removal. Section 77 authorises the court to issue warrants to prevent removal, seize passports, and place the child with a suitable person pending resolution ·Sections 117–119 CoCA provide for additional safeguards and enforcement measures, while s 92 facilitates reciprocal enforcement of foreign custody orders.

2.2.2. Legal Framework for Non-Contracting States

When a child is abducted to or from a non-contracting state, such as India, the Hague Convention's mechanisms do not apply. In these cases, the courts rely solely on domestic principles under CoCA. Section 4 mandates that the child's welfare and best interests are

[22] *HJ v Secretary for Justice (habitual residence)* (2006) 26 FRNZ 168 ; [2006] NZFLR 1005
[23] (FL, 321).
[24] Wolfe v Wolfe [2000] NZFLR 187

paramount.A key illustration is Malakar v Gupta [25], involving a child removed from India to New Zealand. The Family Court conducted a comprehensive welfare assessment, considering cultural ties, relationships, stability, and potential psychological harm. It ultimately refused to return the child to India, concluding that it was in the child's best interests to remain in New Zealan.This welfare-based approach mirrors that in other non-Convention cases, such as Olsson v Culpan [26], where the High Court applied CoCA's welfare principle to order the children's return to Abu Dhabi, which highlighted the continued influence of Convention principles even when inapplicable.

Courts remain alert to potential forum shopping, where a party may seek custody in New Zealand to circumvent foreign legal decisions. In such cases, judges assess whether the child's welfare is genuinely advanced or whether jurisdiction is being exploited.

2.2.3. Exceptional Remedies: Habeas Corpus

In exceptional cases, New Zealand courts utilise habeas corpus to secure the return or release of children wrongfully abducted or detained. The writ of habeas corpus, now codified under the Habeas Corpus Act 2001, offers a rapid and effective mechanism to challenge unlawful detention or custody, particularly when the custodian is present in New Zealand.

In Re Jayamohan [27], the High Court issued a habeas corpus writ to compel a mother to produce her children, whom she had left with relatives in Sri Lanka. The court asserted jurisdiction over the mother, who was physically present in New Zealand, highlighting the extraterritorial reach of the writ in child abduction cases [28]Similarly, in Olsson v Culpan [29], the High Court granted habeas corpus under s 14(1) of the Habeas Corpus Act 2001, ordering the return of children detained in New Zealand to Abu Dhabi, underscoring the remedy's flexibility and complementarity with CoCA's provisions. [30]

2.2.4. Evolution of New Zealand Jurisprudence

New Zealand's jurisprudential trajectory under the Hague Convention has undergone

[25] Malakar v Gupta [1996] NZFLR 759
[26] Olsson v Culpan [2017] NZHC 217
[27] Jayamohan (infants), Re (1995) 13 FRNZ 711; (1995) 2 HRNZ 210; [1996] 1 NZLR 172; [1995] NZFLR 913
[28] (NFL, 370).
[29] Above n 26
[30] (NFL, 370).

significant development across three distinct phases:

Phase I: Rigid Compliance (1991–2010)

Initially, New Zealand courts adopted an approach strictly adhering to procedural rules and international comity principles. Early cases, including Clarke v Carson[31] , reinforced prompt returns and minimized judicial discretion in applying exceptions, thus reflecting strong treaty compliance and deterrent intent against child abductions.

Phase II: Emerging Flexibility (2011–2019)

Subsequent jurisprudence gradually acknowledged complexities in abduction scenarios. Decisions like Secretary for Justice (NZ Central Authority) v HJ[32] and Butler v Craig [33]signaled a cautious willingness to balance procedural mandates with child-specific welfare considerations, particularly in interpreting exceptions under section 106. The judiciary began showing greater openness to welfare-informed discretionary rulings, albeit within a narrowly defined scope.

Phase III: Child-Centric and Welfare-Responsive (2020–Present)

Recent decisions notably shifted toward prioritizing child welfare alongside procedural adherence. McDonald case exemplifies this progressive jurisprudence, demonstrating significant judicial emphasis on children's settled integration and their explicit objections to return. This phase reflects deeper judicial recognition of children's rights, psychological impacts, and socio-cultural integration factors, aligning with evolving global best practices in international child abduction law.

This phased evolution represents New Zealand's shift from stringent procedural compliance towards a balanced, welfare-oriented adjudication model, integrating rigorous procedural adherence with nuanced child welfare considerations.

[31] Clarke v Carson [1995] NZFLR 155,
[32] Above n 22
[33] [2008] NZCA 198

2.3. Comparative Analysis: New Zealand and India

Aspect	**New Zealand**	**India**
Hague Convention	Signatory (CoCA)	Not a signatory
Central Authority	Secretary for Justice (s 100 CoCA)	No formal central authority
Primary Statute	Care of Children Act 2004	Guardians and Wards Act 1890
Emergency Powers	ss 77, 117–119 CoCA	General injunctive powers
Foreign Orders	Reciprocal enforcement (s 92 CoCA)	Fresh custody applications
Welfare Principle	Paramount (s 4 CoCA)	Paramount consideration
Habeas Corpus	Available (Jayamohan, Olsson)	Constitutional provisions (Article 32 and 226)

India and New Zealand illustrate two divergent paradigms in handling international parental child abduction. New Zealand's formal, treaty-bound model prioritizes uniformity, speed, and cross-border legal cooperation. India, by contrast, operates within a pluralistic and constitutionally discretionary framework, where the welfare of the child is paramount and procedural doctrines yield to context-specific analysis.

India's development of remedies like habeas corpus and mirror orders illustrates a capacity for adaptive legal innovation in the absence of formal treaty obligations. While this allows for holistic and culturally sensitive adjudication, it also results in uncertainty and inconsistent enforcement. As international mobility increases, the comparative experience of these jurisdictions underscores the need for both procedural predictability and a strong commitment to child welfare in transnational custody disputes.

3. Prompt Return and Delays in Practice

One of the fundamental objectives of the Hague Convention is to ensure the prompt return of children wrongfully removed or retained across international borders. The idea is to deter international child abduction by removing jurisdictional incentives and restoring the status quo.

In India, however, where the Convention has not been ratified, this goal is often undermined by procedural delays, discretionary proceedings, and the absence of time-bound frameworks.

The lack of any treaty-based mechanism in India means that left-behind parents must rely on general custody or guardianship litigation, or file a habeas corpus petition. These proceedings, particularly under the Guardians and Wards Act, 1890, tend to be time-consuming and adversarial. As such, they do not ensure expeditious resolution, even when the case clearly involves wrongful retention or unilateral removal of the child.[34]

Although habeas corpus is technically available as a speedy remedy, its efficacy is often diluted by judicial reluctance to order summary returns. Courts may conduct full-scale inquiries to determine the welfare of the child before issuing any return order. For example, in *Nithya Anand Raghavan*[35], the Supreme Court emphasized that the return of the child must not be ordered as a matter of course, particularly when such return could harm the child's best interests. The outcome was not a summary return but a full judicial inquiry,which is inconsistent with the swift return mechanism envisioned under the Hague Convention.

Furthermore, procedural technicalities often lead to delays. In *Ruchi Majoo v Sanjeev Majoo*,[36] the determination of the child's "ordinary residence" under Section 9 of the GWA became a jurisdictional obstacle, prolonging proceedings that should have ideally been resolved promptly.

3.1. Inconsistency and Lack of Uniformity in Judicial Outcomes

Beyond procedural delays, India's return decisions show a striking lack of jurisprudential uniformity. Indian courts decide international abduction cases on a fact-intensive, case-by-case basis without adhering to any presumptive model or guiding framework. As a result, outcomes are inconsistent, even when similar facts are presented.

In *Smriti Kansagara v. Perry Kansagara* ,[37] the child had lived in India for almost eight years after being removed from Kenya by the mother. Despite the prolonged stay, the Court

[34] Apoorva Tomar, "An Analysis of the Indian Supreme Court's Approach Towards Protection of the Best Interest of the Child in International Parental Child Abduction Cases" (2025) 2(5) *Indian Journal of Integrated Research in Law* ISSN 2583-0538.
[35] Supra n 8
[36] *Ruchi Majoo v Sanjeev Majoo* (AIR 2011 SC 1952),
[37] *Smriti Kansagara v. Perry Kansagara* [37](Civil Appeal No. 3559 of 2020)

eventually ordered the return of the child to the father in Kenya, citing factors like the child's Kenyan nationality, inheritance opportunities, and language exposure. This case marked a departure from earlier judgments where similar durations in India had led to refusal of return. Here, the Court also explicitly acknowledged the child's right to be heard—one of the few instances where this principle was honoured.

Similarly, in *Yashita Sahu v. State of Rajasthan* , [38]the mother had wrongfully removed the child from the U.S. after initiating legal proceedings there. The Court ordered the child's return, emphasizing that both parents' involvement was necessary for welfare. However, in *Arathi Bandi v. Jagadrakshaka Rao* , [39]*Lahari Sakhamuri v. Sobhan Kodali* [40], and *Nilanjan Bhattacharya v. State of Karnataka*[41] ,the Court's approach to comity and foreign orders varied widely, further illustrating the lack of uniform standards.

Notably, in *Jasmeet Kaur v. State*, [42]the Court upheld a return order in favour of the U.S. based father, relying on the fact that all parties were American citizens and that Indian courts had no jurisdiction to adjudicate custody. However, such clarity is rare; most judgments oscillate between summary and detailed inquiries, with little predictability.

The empirical analysis conducted in Apoorva Tomar [43] ,confirms this inconsistency. Of the nine Supreme Court judgments reviewed from 2017 to 2020, only five resulted in return orders. Three were denied outright, and one was remanded to the family court. In only one case i.e the *Smriti Kansagara* decision, was the child's right to be heard clearly recognized. This lack of procedural uniformity, combined with no binding precedent or summary return mechanism, makes India's return jurisprudence opaque and inconsistent.

The report underscores that without uniform standards for assessing wrongful removal and mandated time limits for adjudication, India lacks any assurance of prompt return, even in cases where such return may be appropriate.[44]

[38] *Yashita Sahu v. State of Rajasthan* [(2020) 3 SCC 67],
[39] *Arathi Bandi v. Jagadrakshaka Rao* (AIR 2014 SC 918)
[40] *Lahari Sakhamuri v. Sobhan Kodali* (AIR 2019 SC 2881)
[41] *Nilanjan Bhattacharya v. State of Karnataka* (Civil Appeal No. 3284 of 2020)
[42] *Jasmeet Kaur v. State (NCT of Delhi)* [(2019) 17 SCALE 672]
[43] N 34 pp 6-10
[44] N 34

3.2. Judicial Response to Delay: Balancing Return and Welfare

In contrast, signatory states like New Zealand have mechanisms in place to process such requests quickly under the Care of Children Act 2004, which implements the Hague Convention. Although procedural complexities , unavoidable delays and discretionary challenges persist, the structure at least ensures a legal expectation of urgency.

Under Section 100(1) CoCA, the Secretary for Justice,as the designated Central Authority,must take action to secure the prompt return of a child removed from or to New Zealand. Section 102 specifies the process for applying for return when a child is removed from New Zealand to a contracting state, and Section 103 mandates that the Secretary "take action under the Convention to secure the prompt return of the child to the applicant". This clear statutory mandate is further supported by the Convention's objective to prioritize prompt return over substantive custody considerations.

However, in practice, delays often arise. These can result from defended proceedings, appeals, or practical obstacles in coordinating returns across jurisdictions. In Butler v Craig [45], for example, the Court noted that the delay in enforcing a return order did not in itself provide grounds to discharge the order. The child's return had been delayed for approximately five years since the original order, yet the Court emphasized that neither the Convention nor the CoCA expressly permits the discharge of return orders on the basis of delay. However, in exceptional cases, a Family Court may refuse enforcement if a return has become impracticable or contrary to the child's welfare.

The case of Simpson v Hamilton [46]highlights the court's balancing act between prompt return and changed circumstances. The child in this case had spent a third of her life in New Zealand, and the family had moved frequently to avoid deportation. Despite no Section 106 CoCA defenses being met, the Court exercised its discretion to refuse return, citing the significant change of circumstances and the child's best interests.

The Supreme Court in Secretary for Justice v HJ [47],addressed delays arising from protracted litigation. Although the children in question had been in New Zealand for over a year, the Court

[45] Butler v Craig [2008] NZCA 198
[46] Simpson v Hamilton [2019] NZCA 579
[47] Secretary for Justice v HJ [2006] NZSC 97

highlighted that the general rule of prompt return should prevail unless a ground for refusal is clearly established. Chief Justice Elias emphasized that while prompt return is generally in the best interests of children, each case must be considered on its merits, and the child's welfare remains paramount.

In practice, delays may result from legal complexities or resistance by abducting parents, sometimes causing a child to become settled in New Zealand and potentially shifting the balance against return. However, Section 106 CoCA sets a high threshold for refusing return based on settlement or grave risk, requiring clear and compelling evidence.

Notably, Article 12 of the Convention contemplates a limited delay exception: if proceedings commence more than one year after the wrongful removal and the child is settled in their new environment, return may be refused. However, New Zealand courts have stressed that even where this threshold is met, discretion remains, and prompt return is usually favored unless there is compelling evidence that return would harm the child.

A further example arises in Kanda v Kanda[48], where the Court refused to suspend a return order, even though the mother argued that attending a funeral in Germany (a Hague Convention country) during the COVID-19 pandemic posed risks. The Court held that the potential for pandemic-related delays did not outweigh the child's interests and the principle of prompt return.

In summary, while New Zealand's legal framework under CoCA supports the prompt return of abducted children, delays in practice can arise from legal resistance, logistical issues, or appeals. However, New Zealand courts consistently emphasize that prompt return remains the default expectation, with delays and changed circumstances only justifying refusal of return in exceptional cases where the child's welfare is clearly compromised.

The Hague Convention prescribes that abducted children should ideally be returned within six weeks. In practice, however, delays are common[49]. In New Zealand, cases such as Clarke v Carson[50] demonstrate that courts retain discretion even after an exception under s 106 is proven . Additionally, ex parte McLaughlin illustrates how New Zealand courts have considered

[48] Kanda v Kanda [2021] NZFC 7903
[49] n 21
[50] Clarke v Carson [1995] NZFLR 926

factors such as imprisoned parents, failed abduction conspiracies, and mental health risks to justify delayed or denied returns [51]

Similarly, in the High Court case Red v Red[52], the mother had abducted the children to New Zealand, citing serious abuse by the father, including assault with a taser and a child's broken arm. Despite this, return was ordered due to the lack of concrete evidence and the presumption that Australian legal mechanisms were adequate for child protection .This example underscores how even severe allegations of domestic violence may not disrupt the preference for return if procedural criteria are unmet.

In India, courts adopt a similar fact-intensive approach. In Nithya Anand Raghavan[53], the Supreme Court emphasized that a child's psychological and emotional well-being could outweigh the principle of immediate return. The Court held that summary jurisdiction to return a child is to be exercised only in the interests of welfare, not as a routine measure.Therefore, delays in both jurisdictions are not solely procedural but often reflect genuine concern for the child's circumstances.

3.3. Delay as Justification vs Delay as Obstacle

The Good Practice Guide identifies procedural delays as one of the most persistent problems undermining the effectiveness of the Hague Convention. in practice, many cases are prolonged due to overburdened courts, insufficient legal aid, translation requirements, and cross-border coordination issues. The Guide emphasizes that such delays can frustrate the objective of restoring the status quo ante and often compromise the child's welfare, particularly when the child becomes settled in the new environment.

Delays are especially detrimental in cases involving allegations of domestic violence. Victims may face prolonged legal uncertainty, and the child may experience extended instability, undermining their psychological well-being. The Guide recommends systemic reforms, including the appointment of specialized judges, implementation of fast-track procedures, and better coordination among Central Authorities to ensure time-sensitive handling of applications.

[51] (FL, p. 322).
[52] Red v Red [2016] NZHC 340
[53] n 8

While both India and New Zealand recognize the welfare of the child as a paramount consideration, they diverge sharply in how this principle interacts with procedural timelines. In India, the welfare principle is frequently invoked to justify delay; in New Zealand, delay is acknowledged but managed within a legal framework that consistently promotes prompt return.

India's lack of statutory guidance or international obligations enables abducting parents to exploit the system by initiating custody proceedings or securing interim orders that delay adjudication. These delays, in turn, become the very reason courts later cite to deny return. In contrast, New Zealand's courts, despite procedural delays, generally resist treating the mere passage of time as grounds for refusal unless statutory defenses under Section 106 CoCA are clearly met.

Moreover, New Zealand's statutory language imposes obligations on the Central Authority and the judiciary to act swiftly, whereas in India, discretion and decentralization dominate. The absence of a uniform process in India leads to unpredictable outcomes and significantly increases litigation timelines.

Both India and New Zealand face the challenge of balancing the need for prompt decisions with the obligation to ensure a child's safety and well-being. While New Zealand has adopted legislative mechanisms to enforce the Convention's timeline, Indian courts exercise discretion based on holistic welfare evaluations, which sometimes lead to prolonged hearings. Thus, delay becomes a shared challenge, reinforcing the need for a procedural framework that supports timely yet thorough adjudication.While India's judicial flexibility accounts for socio-cultural and economic complexities, it lacks uniform benchmarks, leading to inconsistent outcomes. New Zealand, conversely, applies high evidentiary thresholds that may ignore nuanced family vulnerabilities.

Therefore ,a middle path is essential one that incorporates context-sensitive understandings of caregiving, cultural displacement, and trauma, while providing legal certainty. Treaty adaptations and legislative reform should ensure protective, culturally attuned justice in cross-border custody disputes. As both India and New Zealand grapple with these challenges, prioritizing the lived experiences of survivors and children over procedural orthodoxy becomes paramount.

3.4. Comparison chart for Delays

Factor	**India**	**New Zealand**
Judicial Approach to Return	Full judicial inquiry; comity of foreign courts not binding; welfare is paramount.	Summary proceedings favored; prompt return is the presumption; welfare considered only in limited exceptions (s 106).
Role of Delay	Delay often used as a strategic tool by abducting parents; courts may validate return refusal based on "settlement" due to time lapse	Delay does not automatically defeat return; courts resist discharging orders solely due to delay (*Butler v Craig*); however, if child is settled after 1 year, courts may refuse return.
Consistency of Return Decisions	Highly inconsistent. Courts apply different standards case-by-case. No presumptive return rule	Highly inconsistent. Courts apply different standards case-by-case. No presumptive return rule
Use of Summary Procedure	Rare. Habeas corpus often leads to full custody trial. Summary return is discouraged unless welfare is clearly met.	Common. Summary return encouraged unless grave risk, consent, or child's objection is proven.
Time Limits	None. Cases may take months or years (*Smriti Kansagara* took nearly a decade).	Convention suggests 6-week resolution; courts aim for expedition, though delays sometimes occur.

4. Habitual Residence and Forum Disparity

The concept of habitual residence serves as the foundational jurisdictional anchor under the Hague Convention on the Civil Aspects of International Child Abduction (1980). It determines the child's rightful forum for custody litigation and aims to prevent forum shopping by parents who might abduct children to jurisdictions perceived as more favourable. The Convention provides that the child's habitual residence prior to wrongful removal or retention must be the starting point for assessing jurisdiction, ensuring that disputes are resolved in the child's

familiar social and familial context.

However, habitual residence is not explicitly defined in the Convention. Jurisprudence across Hague signatory states interprets it as the centre of the child's life, reflecting a factual, not merely legal, inquiry into where the child has developed a degree of integration, permanence, and routine. This approach ensures that courts consider the child's lived reality rather than parental preferences or unilateral relocations.

In international child abduction cases, determining the child's habitual residence is a critical yet complex question, particularly in jurisdictions like India that are not parties to the Hague Convention. Habitual residence is central to deciding jurisdiction, enforcing foreign custody orders, and evaluating return requests. However, Indian courts do not follow a uniform doctrine on habitual residence, often leading to forum disparity and judicial inconsistency.

4.1. India's Approach: "Ordinary Place of Residence"

India does not apply the concept of habitual residence. Instead, Indian courts rely on the term "ordinary residence" under Section 9 of the *Guardians and Wards Act, 1890* (GWA), which governs jurisdiction in custody matters. While conceptually similar, "ordinary residence" is interpreted narrowly and formally, focusing on the physical presence of the child in a given location and the intention to remain there. This legal technicality has often been a source of delay and jurisdictional disputes.

In *Ruchi Majoo v. Sanjeev Majoo* ,[54]the Supreme Court of India addressed the meaning of "ordinary residence" and held that mere physical presence of the child in a location is not sufficient. The child must reside in that place with an element of permanence or settled purpose. In this case, even though the child had only recently come to India, the mother argued that he was now ordinarily resident in Delhi. The father, who lived in the United States, challenged the jurisdiction of the Indian courts. The prolonged jurisdictional debate delayed resolution and overshadowed the merits of the abduction claim. Such technical disputes around residence often become threshold issues, stalling litigation and enabling abducting parents to secure interim custody orders in India.

[54] N 36

Similarly, in *Kanika Goel v. State (NCT of Delhi)*[55] , the abducting mother initiated proceedings in India after removing the child from the United States. The Court accepted jurisdiction based on the child's stay in India, without rigorous assessment of the child's life and routine abroad. The absence of a well-developed framework for habitual residence allows Indian courts to consider even brief stays as ordinary residence, leading to jurisdictional overlaps and forum manipulation.

This forum disparity is further compounded by conflicting interpretations of foreign custody orders. While early cases such as *Surinder Kaur Sandhu* and *Elizabeth Dinshaw* gave primacy to the place of original jurisdiction usually tied to habitual residence—later decisions have rejected this view. This creates a tension: while foreign courts, particularly those applying Hague standards, may determine habitual residence based on the child's integration into a social and familial environment abroad, Indian courts prioritize whether the child is well-settled in India and whether returning would disrupt their welfare. As a result, the child's habitual residence is often recharacterized by Indian courts through a domestic lens, leading to discrepancies between international and Indian forums.

In sum, India's ambiguous approach to habitual residence and its divergence from Hague standards contribute to forum disparity in international child abduction disputes. Indian courts' reliance on domestic statutory interpretations and welfare-centric analysis may protect children's interests in certain contexts, but it also undermines predictability and global legal cooperation in cross-border family disputes.

4.2. New Zealand's Approach: Functional and Factual Assessment of Habitual Residence

In contrast, New Zealand applies the habitual residence test as a factual and child-centred inquiry. The courts interpret it flexibly, looking at the totality of the circumstances, including the length, regularity, conditions, and reasons for the child's stay in a country. Parental intention may be relevant but is not conclusive; the emphasis is placed on the child's actual integration into the environment.

In *Secretary for Justice v HJ*[56], the New Zealand Supreme Court confirmed that habitual

[55] *Kanika Goel v. State (NCT of Delhi)* [(2019) 3 SCC 336
[56] 22

residence is a question of fact, not legal status. The Court emphasized that even where a child had been in New Zealand for over a year, the presumption of return under the Hague Convention continued to apply unless one of the Section 106 defenses (such as settlement or grave risk) was clearly met. The case underscored that habitual residence does not automatically shift with physical relocation, especially when the relocation is wrongful.

Likewise, in *Simpson v Hamilton*, the Court assessed whether the child's repeated relocation between jurisdictions had created a new habitual residence in New Zealand. Despite no Section 106 defense being met, the Court ultimately refused return due to change of circumstances and best interests. This shows that while habitual residence remains the legal foundation, courts can exercise discretion in rare, fact-intensive cases—but only after giving due regard to the Convention's presumption of return.

The interpretation of "habitual residence" varies significantly between jurisdictions. In New Zealand, courts oscillate between parental intent and factual integration. In Olsson v. Culpan[57], the High Court issued a writ of habeas corpus ordering return of children to Abu Dhabi, treating habitual residence as fixed by contract and reinforced by the child's welfare under s 4 of the Care of Children Act 2004.

In New Zealand, the concept of habitual residence is central to determining jurisdiction and the applicability of the Hague Convention on the Civil Aspects of International Child Abduction. The Care of Children Act 2004 (CoCA) defines habitual residence broadly, leaving it to the courts to interpret based on the specific facts of each case. Section 105(1)(d) CoCA specifies that an application for return under the Hague Convention must prove that the child was habitually resident in a contracting state immediately before the wrongful removal or retention.

Courts have clarified that habitual residence is a factual inquiry, dependent on parental intent, the child's circumstances, and the objective evidence of residence and integration. In Punter v Secretary for Justice[58], the Court of Appeal held that even a short-term move for a defined period does not necessarily prevent a change in habitual residence if there is evidence of a settled intention. Similarly, Rush v Mercer[59] illustrates that parental intent, duration of stay,

[57] n 26
[58] *Punter v Secretary for Justice* [2004] 2 NZLR 28
[59] [2021] NZFC 1592

and steps taken to establish residence such as obtaining visas or integrating into the community can shift habitual residence, even if the original move was intended to be temporary.

However, the concept is not without complexity. The House of Lords in In Re J , [60]noted the absence of a precise definition of habitual residence under the Hague Convention. Instead, the term is interpreted with its ordinary and natural meaning, considering the facts of each case. For example, a child can cease to be habitually resident in country A immediately upon departure with the settled intention not to return, but may not be habitually resident in country B until a period of integration has occurred.

A critical issue arises when both parents disagree about the habitual residence of the child. In Basingstoke v Groot[61], the Court of Appeal resolved conflicting evidence by examining intent, the length of stay, and the level of integration into the new environment, ultimately deciding that the child's habitual residence had changed to the Netherlands. This approach highlights the nuanced, fact-intensive analysis required in New Zealand cases.

However,a landmark clarification came in *McDonald v Sanchez*[62] ,where the Court of Appeal reaffirmed that habitual residence is a broad factual inquiry that cannot be determined solely by parental intent or formal court orders. The Court held that "a formal agreement between parents as to habitual residence is only one factor" and does not conclusively determine the child's habitual residence . Despite the parents' original agreement for the children to return to Spain, the Court found that the children had become habitually resident in New Zealand due to their meaningful integration into family, schooling, and community life. Their physical presence for over a year, coupled with their settled daily routine, led the Court to conclude that New Zealand had become their habitual residence.

This case aligns with global jurisprudence like *Re J (A Minor)* and *Re R (Children)*[63], which reject rigid rules and endorse fact-based evaluations. The New Zealand courts emphasized that even planned short-term stays can evolve into habitual residence, especially as children age and form independent attachments and opinions.

[60] House of Lords in In Re J [1990] 3 WLR 492 (HL)
[61] [2007] NZFLR 363
[62] n 3
[63] *Re R (Children)* [2015] UKSC 35

4.3. Forum Disparity and Jurisdictional Challenges

Forum disparity, or forum shopping, refers to situations where one parent seeks to litigate custody disputes in a forum perceived to be more favourable. In the New Zealand context, the Hague Convention aims to prevent forum shopping by ensuring that custody disputes are determined in the child's habitual residence. However, in cases involving non-contracting states or complex circumstances, forum disparity can emerge.

The Family Court in Malakar v Gupta [64],a case involving a child removed from India demonstrated the challenges of forum disparity. Since India does not implement the Hague Convention, the New Zealand court applied Section 4 CoCA, focusing on the welfare of the child. The absence of a binding international framework allowed the parent to seek a more favourable outcome in New Zealand, highlighting potential for forum shopping in non-Convention cases.

Similarly, the case of Lehartel v Lehartel [65] involved considerations of whether to resolve custody in New Zealand or return the child to Tahiti, where they were habitually resident and the courts were already seized of the matter. The High Court's decision to return the child to Tahiti underscored the importance of avoiding inconsistent orders and parallel jurisdictional claims, thereby respecting the principle of comity and the child's integration into their habitual residence.

India faces significant jurisdictional challenges due to the absence of a uniform legal regime and lack of adherence to the Hague Convention. One major concern is forum disparity is the inconsistencies and jurisdictional conflicts that arise when courts in different countries assert authority over the same custody dispute.

Indian courts focus on the child's immediate welfare and level of settlement, rather than technical determinations of habitual residence. The phrase "minor ordinarily resides" under the GWA has been interpreted to mean the place from which the child was removed, not the place of temporary residence [66]. This divergence illustrates the potential for forum shopping, as parents may seek custody in the jurisdiction perceived to be more favorable to their claim. As

[64] Malakar v Gupta [1996] NZFLR 759
[65] Lehartel v Lehartel [1993] 1 NZLR 578
[66] n 36 at [10]

seen in cases like Nithya Anand and Lahari Sakhamuri[67] , the Court emphasized cultural continuity, language, and support systems as important facets of habitual residence determination.

Indian courts often base jurisdiction on the child's "ordinary residence" under Section 9 of the Guardians and Wards Act, 1890. However, this may conflict with a foreign court's determination of habitual residence, especially in cases where proceedings were first initiated abroad. While the Hague Convention offers clarity by deferring jurisdiction to the state of the child's habitual residence, Indian courts retain discretion to assert jurisdiction if the child is found to be ordinarily residing within India at the time of filing.

This creates jurisdictional overlap and prolongs litigation. In *Ruchi Majoo v Sanjeev Majoo* [68], the Supreme Court allowed proceedings in India despite the existence of an American custody order, holding that the child's ordinary residence had shifted to Delhi . Similarly, in *Nithya Anand Raghavan* [69], the Court held that return orders from foreign jurisdictions are not binding in India, particularly when they may compromise the child's welfare .

The contrast between India and New Zealand results in significant forum disparity. In India, abducting parents frequently benefit from delay and procedural ambiguity. Courts often treat temporary presence as "ordinary residence," thereby asserting jurisdiction and denying return. This was evident in *Prateek Gupta v. Shilpi Gupta*, where the Court refused to return a child taken from the U.S., citing the time already spent in India.

This fragmented approach results in forum shopping, delays in enforcement, and inconsistency in protecting children's rights. The courts' discretion, though grounded in welfare principles, creates legal uncertainty for parents seeking cross-border remedies. Without clear legislative guidance or treaty-based commitments, jurisdictional authority is determined largely by where the child resides at the time of filing, and by courts' independent welfare assessments, rather than by internationally harmonized standards.

Apoorva's report[70] underscores the urgency for reform to reduce jurisdictional ambiguity and enhance legal cooperation in such cases. Until such reforms are made, forum disparity and

[67] AIR 2019 SC 2881, p. 9
[68] n 36
[69] n 8
[70] n 34

jurisdictional confusion will likely continue to impede prompt, coordinated resolution of international child abduction disputes.

By comparison, New Zealand courts discourage forum shopping. In *McDonald v Sanchez*, the Court explicitly noted that the original plan for temporary residence does not override the child's actual experience and adjustment, and emphasized that "circumstances and plans change, and children grow up to form views and plans of their own"[71]

Importantly, the Court declined to give decisive weight to Spanish court orders, noting that family law orders are never "final" and must reflect evolving realities, especially when children attain maturity .This pragmatic approach respects international comity while placing the child's present welfare at the centre ,something India also claims to prioritize, but without institutional safeguards for consistency

5. Grave Risk, Domestic Violence, and Gendered Concerns

Domestic violence is a pervasive issue that significantly complicates the application of international custody laws such as the Hague Convention .According to the HCCH 2021 Global Report[72], of the total taking parents identified across cases, 73% were mothers, and domestic violence was raised in approximately 30% of all return applications (pp. 23–24). The report reflects a growing pattern where mothers flee abusive relationships and are subsequently labeled as abductors under international law. Furthermore, the report notes that the large majority 94% of taking persons were mothers who were the "primary carer" or "joint primary carer" of the child.[73]

The Guide to Good Practice under the 1980 Convention[74],acknowledges domestic violence as a valid basis for invoking the grave risk exception but simultaneously a study by Weiner[75] shows that only 25% of such claims are successful. Undertakings measures that courts rely on to ensure the safe return of the child are often unenforceable. Whereas, approximately 67% of

[71] N 3 at para 9
[72] Hague Conference on Private International Law (HCCH). (2021). *Global Report on International Child Abduction 2021*. Hague Conference on Private International Law assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf
[73] Idib para 15
[74] Hague Conference on Private International Law (HCCH). (2020). *Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part VI – Article 13(1)(b)*. Hague Conference on Private International Law.
[75] Weiner, M. H. (2025). *Convention on Safety for Survivors of Family Violence Involved in International Custody Disputes*. *46 Cardozo Law Review.*

these undertakings are not implemented[76]. This places both the child and the taking parent, typically the mother, in serious danger upon return to the country of habitual residence.

5.1. India's Gender-Sensitive Interpretation of Grave Risk

India has consistently refrained from ratifying the Hague Convention, citing that it inadequately addresses the intersection of domestic violence and child custody. The Ministry of Women and Child Development, the Law Commission of India, and the Justice Rajesh Bindal Committee Report (2018) have all opposed accession on the grounds that it disproportionately impacts Indian women returning from abusive relationships abroad.

In Nithya Anand Raghavan case [77]The Supreme Court of India refused to enforce a foreign return order, citing past abuse faced by the mother and emphasising the child's best interests. In Prateek Gupta v. Shilpi Gupta [78]The court held that comity of courts cannot override the welfare of the child, especially when credible claims of abuse are raised. In K.G. v. State of Delhi[79] & Anr. , the Delhi High Court acknowledged the grave risk in forcing a mother to return to a jurisdiction where she had previously suffered abuse.

Indian courts have developed a trauma-informed framework where the concept of "grave risk" is not restricted to direct harm to the child but includes the psychological harm arising from a caregiver's distress. The case of "Leela," where an Indian mother was criminally prosecuted abroad after returning to India with her child to escape an abusive relationship, exemplifies the perils of a rigid return mechanism.[80]

5.2. New Zealand's Jurisprudential Approach to Grave Risk

New Zealand applies a high threshold for invoking the Article 13(1)(b) exception. Courts require the risk to be "severe and substantial," as seen in Damiano v. Damiano[81], and often rely on the adequacy of protective measures in the requesting state. In S v M[82] The court denied a

[76] Idid at p.1171
[77] N 8
[78] N 20
[79] K.G. v. State of Delhi & Anr. [2020 SCC OnLine Del 655
[80] Hague Convention on Child Abduction has a domestic violence problem Hague Convention on Child Abduction has a domestic violence problem
[81] *Damiano v Damiano* [1993] NZFLR 548
[82] *S v M* [1993] NZFLR 584

grave risk claim despite the father's drug-related offences.

In Red v Red[83], psychological harm was supported by expert evidence, yet return was ordered based on undertakings, which are often not enforced. These cases demonstrate New Zealand's tendency to prioritize procedural consistency over individual safety.

However, a significant departure is observed in LRR v COL[84] , The New Zealand Court of Appeal held that the return of the child to Australia would expose the mother to ongoing domestic abuse and economic insecurity, thereby indirectly creating an intolerable situation for the child. The court rejected the sufficiency of proposed undertakings and emphasized the need to consider the cumulative harm to both mother and child.

Further,in RB v HJ[85] ,the court held that a serious risk of harm to both mother and child was established due to long-standing abuse and insufficient protective assurances.Similarly in Secretary for Justice v Abrahams [86], the court emphasized that undertakings must be both specific and enforceable, failing which the return may be refused.In H v H [87] ,held that the child's exposure to an unsafe caregiver was deemed sufficient to trigger the Article 13(1)(b) exception.These cases reflect an increasing recognition within New Zealand jurisprudence of the complex realities associated with domestic violence in cross-border custody cases.

However, *Roberts v Cresswell*[88] demonstrates a problematic shift in New Zealand's approach to evaluating grave risk. Despite acknowledging that the mother's PTSD-related risks could not be confidently discounted, the Court chose to downplay their likelihood based on countervailing probabilities and did not proceed to consider protective measures. This departure from the established *Re E* and *LRR* framework left courts "falling between two stools," failing to apply either a precautionary or protective analysis. This undermined the child-protection rationale of the Convention and poses significant dangers in summary proceedings[89].

[83] N 52
[84] LRR v COL [2020] NZCA 209 para 131-150
[85] RB v HJ [2017] NZCA 525
[86] Secretary for Justice v Abrahams [2004] 2 NZLR 606
[87] H v H [2007] NZFLR 245,
[88] *Roberts v Cresswell* [2023] NZCA 36
[89] *Falling between two stools? The risk in New Zealand's approach to the assessment of grave risk in Hague Convention cases* (2024) 11 NZFLJ 91

These decisions reveal a slow but emerging trend in New Zealand jurisprudence acknowledging that the welfare of the primary caregiver, particularly in domestic violence situations, is inextricably linked to the child's welfare. However, inconsistency in applying a precautionary evidentiary approach remains a concern.

5.3. Academic Critique and HCCH Good Practice Guide

Legal academic Merle H. Weiner has been at the forefront of reform advocacy. In her article *Convention on Safety for Survivors of Family Violence Involved in International Custody Disputes* [90], Weiner critiques the Hague Convention's failure to accommodate the complex realities of domestic violence in cross-border custody cases.

Weiner emphasizes that often-overlooked reality is that many removals are protective responses by primary caregivers. despite this prevalence, the grave risk exception remains narrowly interpreted. Courts often require specific and compelling evidence of immediate physical or psychological harm to the child, disregarding indirect trauma or the broader impact of a violent environment. The second prong of the exception "intolerable situation"—is infrequently applied or improperly conflated with the harm criterion, thereby eroding its protective purpose.

Furthermore, Weiner critiques witnessing domestic violence, a factor well-documented in the judicial tendency to dismiss the psychological impact of trauma and developmental research. The structural limitations of the Convention thus fail to accommodate modern understandings of harm, risk, and caregiving dynamics.

Weiner outlines four major deficiencies: (1) the burden of proof on taking parents is disproportionately high; (2) protective undertakings are often ineffective; (3) the Convention fails to define domestic violence comprehensively; and (4) it ignores social, legal, and cultural barriers survivors face in their home countries.

To address these shortcomings, Weiner proposes a complementary treaty that would explicitly define domestic violence, require assessment of risk to both the child and parent, and offer mechanisms such as expedited asylum, legal aid, and enforceable protective measures.

[90] N 75

The HCCH Good Practice Guide[91] under Article 13(1)(b) outlines the need for a "forward-looking" evaluation of risk and explicitly includes domestic violence against the parent as a legitimate basis for invoking the grave risk exception . It emphasizes that any return order should only be made if effective and enforceable protection measures are in place [92].

6. Welfare of the Child and Judicial Discretion

The principle that the child's welfare is paramount is embedded in both Indian and New Zealand law. However, the scope and application of this principle vary. In New Zealand, welfare is circumscribed in Convention matters, and even in domestic relocation cases, courts often allow discretion to override strict welfare assessments. For instance, S v M[93] upheld return despite allegations of past harm, noting that harm must be "grave" to qualify . In practice, this narrows judicial discretion until a defence under s 106 is conclusively established.

6.1. New Zealand's Convention-Limited Welfare Doctrine

While the welfare of the child is a foundational principle in both Indian and New Zealand legal systems, its application diverges significantly in international custody disputes. In New Zealand, courts are bound by the constraints of the Hague Convention, which emphasizes procedural objectives such as prompt return over substantive welfare evaluation. As seen in *S v M*, [94]return was ordered despite allegations of harm, with the court reasoning that harm must rise to the level of being "grave" under s 106 to be considered.

New Zealand jurisprudence tends to limit judicial discretion unless a defence under Article 13(1)(b) or its equivalent under the Care of Children Act 2004 is established. The presumption of return remains strong, and undertakings or assurances are often considered adequate, despite being inconsistently enforced. Even in relocation disputes not governed by the Convention, New Zealand courts focus heavily on preserving contact with both parents, sometimes at the expense of the primary caregiver's well-being.

Significantly, in *LRR v COL* [95], the New Zealand Court of Appeal emphasized that the best interest of the child must include an evaluation of the cumulative impact on the child if the

[91] N 74 pp.27,37
[92] Ibid p.34
[93] n 82
[94] *S v M* (NZFLR 323, 2014)
[95] N 84

mother, who had experienced serious and ongoing abuse, were to return. The Court explicitly found that requiring the mother and child to return to an environment of coercive control and financial dependency would expose the child to psychological harm and an intolerable situation .Although in many cases the return was ordered but the tension between procedural return mandates and a substantive welfare-based assessment always remains.

However,the decisions reveal a slow but emerging trend in New Zealand jurisprudence acknowledging that the welfare of the primary caregiver, particularly in domestic violence situations, is inextricably linked to the child's welfare.

6.2. India's Expansive and Child-Centric Welfare Approach

Central to India's adjudication of international child abduction cases is the unwavering application of the "welfare of the child" principle. Unlike the Hague Convention, which focuses primarily on the procedural objective of prompt return, Indian courts emphasise a substantive evaluation of what arrangement best serves the child's physical, emotional, educational, and psychological well-being. This welfare-based doctrine provides wide judicial discretion, enabling judges to assess the unique facts of each case rather than apply a uniform rule.

Indian courts have long held that the welfare of the child outweighs technical legal claims, including foreign custody orders. In *Tejaswini Gaud v Shekhar Jagdish Prasad Tewari*[96] , the Supreme Court underscored that custody matters are not solely about legal entitlement but about the well-being of the child. The Court reiterated that even in habeas corpus petitions, where proceedings are usually summary, detailed inquiry into welfare is warranted in exceptional situations. Likewise, in *Smriti Madan Kansagra v Perry Kansagra*[97] , the Court highlighted that the child's best interests include considerations of education, mental health, cultural identity, and emotional attachment.

This broad discretion is particularly evident in *Nithya Anand Raghavan*[98], where the Court refused to issue a summary return order in deference to a foreign court's decision, emphasizing that courts must engage in a fact-specific analysis of what return would mean for the child. The Supreme Court stressed that mere illegality of the removal cannot justify return if the

[96] *Tejaswini Gaud v Shekhar Jagdish Prasad Tewari* (2019 7 SCC 42)
[97] *Smriti Madan Kansagra v Perry Kansagra* (2020 SCC OnLine SC 887),
[98] N 8

environment in the requesting country does not support the child's best interests .

In *Ruchi Majoo case*[99], the Court held that the place of "ordinary residence" must be assessed with respect to the child's adjustment and stability, not solely based on legal domicile. This judgment clarified that even if the child was brought to India unilaterally, the child's comfort, education, and integration in Indian society could form a basis for retaining jurisdiction in India .Indian courts have also expanded the interpretation of welfare to include considerations of the parent's mental health and socio-economic security. The court took into account the mother's lack of financial support and isolation in a foreign country as factors adversely affecting both her and the child's well-being.

Unlike the Hague model, where the child's voice is heard in limited circumstances, Indian courts guided by Section 17 of the Guardians and Wards Act,may consider the child's preference if the child is of sufficient maturity. This discretionary space reflects India's approach of balancing legal rights with equitable outcomes, reinforcing the idea that every child's circumstance is unique.

However, this welfare-centric model, while principled, has also drawn criticism for its unpredictability. Without statutory benchmarks or treaty obligations, the decision-making process can vary significantly between courts. Yet, this very flexibility is also cited as a strength in situations where rigid rules could fail to account for complex emotional, developmental, or safety needs of children in transnational disputes.

Ultimately, Indian judicial discretion anchored in the paramountcy of the child's welfare allows courts to resist mechanical enforcement of foreign custody orders and tailor relief to the realities faced by the child and their primary caregiver. While it may complicate international cooperation, it affirms the commitment of Indian courts to holistic, compassionate, and context-sensitive justice in cross-border family conflicts

Indian courts employ a holistic assessment encompassing emotional, psychological, and social aspects of a child's welfare. The Supreme Court in Tejaswini Gaud v. Shekhar Tewari[100] reaffirmed that material prosperity alone is insufficient to determine welfare and that emotional and cultural continuity are equally critical. Section 2(9) of the Juvenile Justice Act, 2015

[99] N 36
[100] N 10 at p.38

defines the "best interest of the child" to include identity, social well-being, and physical, emotional, and intellectual development , further reinforcing this approach.

Moreover, judgments like Yashita Sahu v State of Rajasthan ,[101]underscore that joint parenting and maintaining ties with both parents are central to the child's welfare. However, courts have clarified that the violation of foreign custody orders is not dispositive and must be assessed through the lens of the child's best interest.

6.3. Balancing Judicial Discretion and Legal Certainty

While a flexible, welfare-oriented approach to international child custody is essential to protect vulnerable children and caregivers, excessive judicial discretion can create unpredictability and undermine consistent legal standards. According to me,the lack of codified benchmarks or treaty obligations in India, for example, means that different judges may reach divergent conclusions on similar facts, leading to uncertainty for litigants and difficulty in ensuring international cooperation.

Conversely, rigid application of the Convention, without room for nuanced judicial assessment, risks exposing children to harmful environments, especially in cases involving domestic violence. The ideal balance lies in a structured yet context-sensitive model: one that anchors judicial discretion in statutory guidelines and child-centred principles, ensuring both protection and predictability. Thus, absolute discretion is neither desirable nor sufficient—it must be exercised within a principled, rights-based, and trauma-informed legal framework.

7. Socio-economic and Psychological Realities in India and New Zealand

7.1. India's Context: Patriarchy, Vulnerability, and Judicial Response

In many Indian cases, mothers return from abroad due to domestic abuse, legal helplessness, or lack of social support, often accompanied by their children. Indian courts acknowledge the impact of these socio-economic vulnerabilities, treating them as critical factors in custody decisions. The Justice Rajesh Bindal Committee recognized domestic violence as a major issue in inter-country abduction cases and proposed exceptions for return under its draft Protection

[101] Yashita Sahu v State of Rajasthan (2020) 3 SCC 67

of Children (Inter-Country Removal and Retention) Bill, 2018[102] .

India's approach to international child abduction cases is deeply influenced by the socio-economic and psychological realities prevalent within the country. The intersection of poverty, mental health challenges, and gender disparities creates a complex backdrop that necessitates a nuanced understanding of each case. Indian women are among the most prone to domestic violence globally, with patriarchal beliefs deeply entrenching gender inequalities that shape these experiences [103] . According to a comprehensive study involving 825 Indian women across 31 countries, 72.5% had experienced at least one form of abuse, while over a third faced controlling behaviors from their partners. The study underscores that patriarchal ideologies not only produce but also perpetuate domestic violence through expectations of women's subservience to men within familial structures.

The socio-economic factors compound the vulnerability of Indian women to domestic violence. Satyen highlights that women in low-income households, particularly those from rural areas or with limited education, report higher rates of domestic violence and control, reinforcing the intersection between gender, poverty, and violence. Cultural norms further restrict their agency and exacerbate psychological distress. As noted in the research, a significant portion of these women internalise societal expectations, thereby normalising abuse and preventing help-seeking behaviours. Such conditions pose unique challenges in international child abduction cases, where mothers fleeing abuse may find themselves in legal systems that fail to fully grasp the psychological and social complexities of their situations[104].Gender disparities exacerbate these challenges, particularly for women from marginalized communities who face heightened risks due to societal expectations, domestic responsibilities, and limited access to education and employment. Research[105] indicate that Indian women from marginalized communities face higher psychological distress and lack of mental health support due to stigma . This intersection of poverty, gender, and mental health underlies many cases where mothers flee foreign jurisdictions with their children, seeking safety in India.

[102]Protection of Children (Inter-Country Removal and Retention) Bill, 2018 available at 2022081679.pdf
[103] Satyen, L., Bourke-Ibbs, M., & Rowland, B. (2024). *A global study into Indian women's experiences of domestic violence and control: The role of patriarchal beliefs*. *Frontiers in Psychology, 15*, Article 1273401. https://doi.org/10.3389/fpsyg.2024.1273401
[104] ibid
[105] Bhuyan, R., & Senturia, K. (2005). Understanding domestic violence resource utilization and survivor solutions among immigrant and refugee women. *Journal of Interpersonal Violence, 20*(8), 895–901

Despite educational qualifications, language barriers in host countries severely restrict Indian women's ability to access legal help or employment abroad. This linguistic isolation, coupled with lack of financial independence and awareness of local legal systems, leads many to return to India with their children in hopes of familial and judicial support. Although exact data on international custody disputes is limited, the 2024–2025 National Legal Services Authority (NALSA) [106]statistics reflect the broader scope of legal vulnerability faced by women: over 316,000 women received legal aid in India within a year.

This entrenched reality of patriarchal control and high rates of domestic violence among Indian women calls for a culturally sensitive and intersectional approach to international child abduction cases. Courts in India, as reflected in cases like Tejaswini Gaud v. Shekhar Tewari[107], have increasingly recognized these dynamics, prioritizing the welfare of children and caregivers.

7.2. New Zealand's Approach: Evidentiary Burden and Institutional Gaps

New Zealand's legal framework under the Care of Children Act 2004 acknowledges grave risk exceptions (Article 13b), it often demands high evidentiary thresholds, as seen in cases like DD v LK[108] and M v H[109], potentially failing to account for the lived realities of mothers from patriarchal cultures. To address these gaps, both countries need to integrate a nuanced understanding of the socio-economic and psychological burdens faced by Indian women, emphasizing the role of patriarchal ideologies in perpetuating domestic violence and shaping child welfare outcomes.

Whereas,International child abduction cases in New Zealand are profoundly shaped by the intersecting effects of socio-economic and psychological factors, both of which have significant implications for the welfare of the children involved. When a child is abducted by a parent across international borders, the trauma associated with abrupt separation, dislocation from familiar surroundings, and the collapse of parental relationships can result in deep psychological scars. Studies, including those by the International Centre for Family Law, Policy and Practice (ICFLPP), have documented how such experiences can trigger profound

[106] National Legal Services Authority Beneficiary Report (2024-2025) Twenty-First Law Commission | Law Commission of India | India
[107] n 10
[108] *DD v LK* [2007] NZFC 92; [2007] BCL 630; BC200769209
[109] *M v H (guardianship)* [2007] NZFLR 292

distress, including attachment disorders, adjustment difficulties, and post-traumatic stress symptoms. The child's reintegration into their habitual residence, if ordered, is often complicated by these psychological scars, especially when compounded by the length of the separation and conflicting parental narratives.

In New Zealand, the statutory framework under the Care of Children Act 2004 (CoCA) reflects the gravity of these concerns. While the Hague Convention prioritizes the child's prompt return to their habitual residence, it also recognises exceptions under Article 13, which in New Zealand are codified in section 106 CoCA. A key exception is the "grave risk" ground under s 106(1)(c), which allows the court to refuse return if it is satisfied that returning the child would expose them to a grave risk of physical or psychological harm, or otherwise place them in an intolerable situation.

Judicial interpretation of this exception has been cautious. The Supreme Court in Secretary for Justice v HJ[110], clarified that the adequacy of the foreign country's legal system is not, in itself, sufficient to preclude the grave risk defense. The words "grave risk" and "intolerable situation" must be given their ordinary, strong meaning, reflecting a threshold higher than mere inconvenience or emotional upset. The Court stressed that the assessment must be forward-looking and based on a clear evidentiary basis.

This high threshold was exemplified in DD v LK[111], where the Family Court found that the father's history of prolonged violence, combined with his ongoing psychological instability, created a sufficiently grave risk to the children's safety to deny the return order. The evidence showed that the father, who sought the children's return from New Zealand to Australia, had consistently exposed them to a physically and emotionally abusive environment. Despite undertakings offered, the Court concluded that these were inadequate to mitigate the risk to the children, particularly given the father's failure to comply with prior protection orders in Australia.

In contrast, the Family Court in M v H[112], took a narrower view of the grave risk exception. Even though there was a videotaped disclosure by the child, naming the father as the perpetrator of sexual abuse, and despite corroborating evidence from the therapist who opined that the

[110] N 22
[111] N 114
[112] N 115

child was in danger if returned, the Court held that these did not meet the grave risk threshold. The Court reasoned that protective orders from Australian authorities would be sufficient to manage the risk and that the delay in returning the child for therapy did not fundamentally alter this assessment. This stark contrast between DD v LK[113] and M v H[114] underscores the heavy evidentiary burden that must be met for the grave risk exception to apply.

Other cases, such as **S v S**[115], further highlight how the New Zealand courts balance parental mental health against the grave risk standard. In this case, the mother suffered from post-traumatic stress disorder and Battered Woman's Syndrome due to sustained abuse by the father. The Court found that if the children were returned to Australia, the mother's inability to participate in custody proceedings and the risk of the father obtaining custody posed a grave risk to the children's welfare. Consequently, the Court refused the return order on the basis that the risk to the children's physical and psychological health was intolerable.

The socio-economic realities that intersect with these legal and psychological considerations are particularly acute in New Zealand's indigenous and marginalised communities. Māori and Pasifika families often face systemic barriers in accessing legal and psychological support services, which compounds the risk of adverse outcomes in child abduction cases. Socio-economic disadvantage can hinder a left-behind parent's ability to navigate complex cross-border litigation or to access the resources necessary to enforce return orders. These factors contribute to delays and inconsistent outcomes, as observed in cases like Simpson v Hamilton[116], where the Court's decision not to return the child to Germany, despite no statutory defenses being established, reflected an acknowledgment of the practical realities facing the child and family.

Moreover, systemic inequities are evident in the way New Zealand's institutions respond to these cases. Reports from government inquiries, including the Royal Commission of Inquiry into Abuse in Care[117], highlight how Māori children, in particular, are disproportionately represented in child protection interventions. This mistrust of state institutions, combined with

[113] N 114
[114] 115
[115] *S v S* [1999] NZFLR 625
[116] n 46
[117] Human Rights Commission. (2024). *Whānaketia – Through pain and trauma, from darkness to light: Final report of the Royal Commission of Inquiry into historical abuse in state care and in the care of faith-based institutions in Aotearoa New Zealand*. Wellington, NZ: Royal Commission of Inquiry into Abuse in Care.

the lack of culturally sensitive legal representation, can exacerbate the challenges faced by parents in abduction disputes.

Both countries underscore the need for treaty adaptations and culturally sensitive approaches. While India's welfare-based framework offers flexibility but inconsistency, New Zealand's rigid threshold may under-serve vulnerable families. A balanced approach is crucial to protect children's rights while accounting for socio-economic and psychological challenges in cross-border disputes.

8. Recommendations for Procedural Safeguards and Equitable Access to Justice

One of the key criticisms of India's potential ratification of the Hague Convention is that it risks placing already vulnerable women, facing domestic violence, financial hardship, and cultural alienation, under additional strain. Hague Convention proceedings are often expensive, time-bound, and procedurally complex. In some jurisdictions, such as the United States and parts of Europe, the act of removing a child across borders without consent has even been criminalised, compounding the stress for already traumatised mothers.

According to me,to mitigate the disproportionate burden that Hague Convention proceedings place on already vulnerable parents, particularly mothers fleeing domestic violence, there is a pressing need for the following procedural reforms that centre on equity and accessibility:

1. States should legislate the mandatory provision of free legal aid in all Hague return proceedings where the taking parent alleges domestic violence or demonstrates financial incapacity. This mirrors protections already provided in domestic abuse cases under many national laws and ensures that survivors are not penalised for seeking safety across borders.

2. A right to qualified translation and interpretation services must be recognised in all Hague-related court hearings. Mothers from India and other non-English-speaking countries often face significant language barriers abroad, which can prevent them from understanding proceedings, asserting their rights, or even seeking help.

3. Governments should explore creating specialised legal aid panels trained in international family law and trauma-informed practice. These professionals would be better equipped to assist litigants in Hague Convention cases where domestic violence, coercive control, or socio-cultural marginalisation are at issue.

4. States should adopt protocols for trauma-informed adjudication, particularly when domestic abuse is alleged. Judicial officers must be trained to recognise patterns of coercive control, understand the socio-economic impacts of violence, and avoid re-victimising survivors through overly rigid procedures.

In my humble opinion, these safeguards might be able to help ensure that the rights of survivors and children are meaningfully protected in cross-border custody disputes.

CONCLUSION

India's current stance on the Hague Convention reflects a deeply rooted legal philosophy that values substantive welfare over procedural compliance. As the analysis of New Zealand cases shows, ratification alone does not resolve interpretive ambiguities, eliminate judicial discretion or secure justice for survivors of domestic violence. India's domestic legal framework provides adequate means to protect children while accommodating gendered vulnerabilities and socio-cultural realities.

However, the emergence of mirror order jurisprudence demonstrates a pragmatic interim solution for cross-border disputes. Until legislative reforms are enacted, Indian courts will continue to rely on ad hoc, welfare-centric determinations under their parens patriae jurisdiction. According to me, any future accession to the Hague Convention should be accompanied by reservations safeguarding domestic violence victims and interpretive declarations aligning with India's child-centric ethos. This balanced approach would harmonise procedural efficiency with a compassionate commitment to children's lived experiences and the realities of international parenting.