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# **CROSS-BORDER CHILD ABDUCTION DISPUTES AND LEGAL FRAMEWORK IN INDIA: A COMPREHENSIVE ANALYSIS**

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## **Research Objective**

This study aims to provide a detailed examination of the causes that have hindered India's ratification of the Hague Convention on the Civil Aspects of International Child Abduction, which serves as the global benchmark for handling child custody matters involving foreign jurisdictions. The study's goal is to examine India's stance and the benefits and drawbacks of joining the Convention. This research also hopes to provide information on how the Convention might alter the present legal procedure for resolving foreign custody concerns in India.

## **Research Question**

1. How does India's current approach to cross-border custody disputes, governed by domestic laws, compare to the principles outlined in the Hague Convention?
2. How could India's participation in the Hague Convention impact its standing in the global legal landscape, and what potential legal advantages might it offer?

## **Introduction**

Contemporary concerns in family law sometimes transcend national borders, testing the mettle of legal systems across the world<sup>1</sup>. Cross-border custody disputes, in which parents or guardians from different countries fight over who will have physical custody of a child, present a significant obstacle that must be overcome. In circumstances of this nature, there is often a clash between the primary interests of the child and the concepts of justice.

It is of interest and controversy whether or not India would ratify the Hague Convention on the Civil Aspects of International Child Abduction, which provides a framework for handling such

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<sup>1</sup> Law Commission of India, The Protection of Children (Inter-Country Removal and Retention) Bill, 2016, Report No. 263, 2016, para. 2.1.

conflicts. As of the present, India hasn't signed the Hague Convention, raising questions about its current approach to navigating cross-border custody disputes and the potential benefits that ratifying the Convention could offer in the future.

Review of literature

John Eekelaar - The Emergence of Child's Rights (1988)<sup>2</sup> *“The application of the welfare of the child principle in Indian courts, particularly under the Guardians and Wards Act of 1890, can lead to coercive paternalism, potentially disregarding children's autonomy and preferences”*.

Anil Malhotra and Ranjit Malhotra - India, Inter-Country Parental Child Removal and The Law<sup>3</sup>, *“The Indian courts, guided by the universal principle that places the welfare of the child as of paramount consideration in cases of child removal and custody, exercise their authority through parens patriae jurisdiction.”*

### **Understanding Child Removal**

Dr Justice A.R. Lakshmanan, Judge, Supreme Court rightly opines, *“Statistics show that divorce and custody cases are on the rise. The practice of international child abduction has its roots in these inter-parental custody battles”*<sup>4</sup>. Child removal in the context of international custody disputes pertains to the act of one parent unilaterally relocating a child from their customary country of residence to another country, without obtaining the approval of the other parent or without following the proper legal procedures. This act of removal can disrupt existing custody arrangements and often raises serious legal and jurisdictional issues<sup>5</sup>.

### **Let's consider an example involving an international custody dispute:**

Suppose Sarah and John are a married couple originally from the United States. They have a young daughter named Emily. Due to marital issues, Sarah decides to relocate to India with Emily without John's consent or the approval of any court. This unilateral decision to move Emily to another country without John's knowledge or agreement constitutes child removal.

In this scenario, child removal has taken place because Sarah has taken Emily away from her habitual residence (the United States) to a foreign country (India) without John's permission.

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<sup>2</sup> Eekelaar, John, The Emergence of Children's Rights, 6 Oxford J. Legal Stud. 161 (1986).

<sup>3</sup> Anil Malhotra & Ranjit Malhotra, International Indians & The Law (3rd ed., Universal Law Publishing Co. Pvt. Ltd. 2015).

<sup>4</sup> Charu Singh, Cross-border marriage disputes: Child suffers most, say jurists, The Tribune News Service (New Delhi, May 6 (2006)

<sup>5</sup> Aditi, Private International Law and Inter-Parental Custody Disputes in India, NUJS, August 2014

This action can have significant legal and emotional consequences. It may lead to custody battles, jurisdictional conflicts, and difficulties in enforcing custody orders across international borders.

International child abduction laws and conventions, such as the *Hague Convention- Article 3- on the Civil Aspects of International Child Abduction*<sup>6</sup>, intend to address and prevent such situations. They establish a framework for the prompt return of abducted children to their country of habitual residency, ensuring that custody issues are settled legally and in the best interests of the child.

The absence of the Hague Convention's applicability in India for cross-border custody disputes could result in intricate legal complexities. Despite judicial activism, which offers temporary relief, the lack of a standardized international framework might lead to inconsistent rulings and legal uncertainties. While judges' efforts in interpreting domestic laws address immediate concerns, the absence of a comprehensive international mechanism poses challenges in ensuring consistent outcomes and streamlined processes for resolving such disputes. Inconsistencies, practical challenges in enforcing custody orders across borders, and potential forum shopping underline the need for a universally recognized legal framework to provide a permanent and predictable resolution for cross-border custody disputes in India.

## **Analysis**

### **India's position**

In the Indian context, remedies for cross-border custody disputes are typically sought through domestic legal avenues. Parents often resort to provisions such as the writ of Habeas Corpus under Article 226 and Article 32 of the Constitution to address instances of alleged child abduction to India by a spouse. Because of the time constraints involved, parents may seek for decisions from foreign courts. But India's response to these wars has been all over the map. This emphasizes the need of India developing a comprehensive private international law framework. To improve predictability and equitable settlements in cross-border custody disputes, it would be helpful to address the current fragmented environment and provide a uniform set of standards and principles.

### **Judicial Pronouncements**

1. The Indian court acknowledged and accepted the Ontario Superior Court of Justice's

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<sup>6</sup> Article 3, Hague Convention of 1980 on the Civil Aspects of International Child Abduction

decision in the matter of *Kulwinder Dhaliwal v. State of Punjab*<sup>7</sup>. The court issued an order enabling the petitioner to relocate to Canada with his young children. The Indian court's decision to accept and implement the foreign verdict in this instance is symptomatic of a growing trend toward doing so in situations involving transnational custody. This method highlights the importance of recognizing the necessity for international collaboration and respecting foreign legal rulings in cross-jurisdictional child custody disputes.

2. The Supreme Court of India showcased a noteworthy legal position pertaining to child custody problems in the case of *Vikram Vir Vohra v. Shalini Bhalla*<sup>8</sup>. The court highlighted the fundamental principle of prioritizing the welfare of the child, even in cases when it necessitates the alteration of child custody arrangements. The court's determination stipulated that child custody orders possess an interlocutory character, so allowing for their modification in accordance with the child's best interests. In the present instance, the Supreme Court granted permission for the mother to accompany her underage son, approximately ten years of age to Australia. This ruling was consistent with the child's stated preference to remain in the custody of the mother. The judgement of the court emphasized the utmost significance of the child's well-being, so illustrating the commitment of Indian courts to protect the child's interests and happiness amidst international custody issues. These evaluations further highlight the need for India to establish a comprehensive framework for private international law, one that places child welfare first when addressing the complexities of cross-border custody disputes.
3. An American father and a British mother residing in Ireland got into a custody fight over their 8-year-old daughter, *Mandy Jane Collins*<sup>9</sup>, after she was allegedly being held by the father in Goa, India. Despite the urgency of the situation, the court declined to issue a writ of habeas corpus and instead ordered the mother to pursue the matter via regular channels of justice in Goa, where her appeal was finally rejected. The ruling put more weight on legal considerations than on the child's urgent needs, prioritizing procedural features of the child's care. As a result, the infant child was abandoned in Goa by her mother. As an example of the challenges inherent in cross-border custody

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<sup>7</sup> CWP No.8691 of 2008 (O&M)

<sup>8</sup> (1973) 1 SCC 840

<sup>9</sup> 2006 SCC OnLine Bom 1556

battles, this case underlines the need for a balanced approach that gives equal weight to procedural fairness and the best interests of the kid. In order to successfully handle such issues, it stresses the need of building a complete framework of private international law in India.

4. The Malaysian petitioner in *Ranbir Singh v. Satinder Kaur Mann*<sup>10</sup> filed a Habeas Corpus case in India in an effort to win custody of his children. The petitioner has the backing of a direction from the Malaysian High Court in their case. Unfortunately, the Indian High Court rendered a decision to dismiss the petition, asserting that the issue of custody could perhaps be revisited in the appropriate legal venue, contingent upon the facts produced by the involved parties. This disposition, although maintaining compliance with legal protocols, has the potential to negatively impact the child's welfare as a result of the prolonged procedural conflicts that are likely to occur in typical civil cases. This particular case highlights the inherent difficulties associated with international custody disputes, wherein legal processes may unintentionally extend the resolution of custody matters and have a negative impact on the welfare of the kid in question.
5. The judicial decisions rendered by the Supreme Court in the cases of *Smriti Kansagara and Aman Lohia*<sup>11</sup> offer divergent perspectives on issues pertaining to foreign child custody. In the case of *Smriti Kansagara*<sup>12</sup>, the Court deliberated over several criteria including nationality, education, development, inheritance, and cultural features in relation to the kid who was transported from Kenya to India by the mother. The child was ultimately repatriated to Kenya, with the mother being granted access rights, thereby exemplifying a comprehensive strategy that places paramount importance on the child's welfare.

The Court in the case of *Aman Lohia* placed significant emphasis on prioritizing the wellbeing of the child over parental conflicts in matters pertaining to custody. The premise of emphasizing the well-being of the child was repeated, and the concept of collaborative shared parenting was proposed. These instances exemplify the dynamic nature of cross-border custody jurisprudence. *Smriti Kansagara* demonstrates a thorough assessment of factors that exert influence, whereas *Aman Lohia* emphasizes

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<sup>10</sup> 2006 SCC OnLine P&H 747

<sup>11</sup> 2021 SCC Online SC 224

<sup>12</sup> 2020 SCC Online SC 887

the paramount importance of prioritizing the well-being of the kid. These rulings exemplify the judiciary's dedication to managing intricate international custody issues and prioritizing the well-being of children in an ever more interconnected global society.

The establishment of a comprehensive private international law system in India holds significance, especially with relation to custody issues that transcend national borders. The presence of conflicting decisions in the observed circumstances highlights the pressing necessity for a uniform and predictable approach to effectively address these intricate issues. The presence of these inconsistencies not only extends the duration of legal conflicts but also has the potential to jeopardize the welfare of the kid entangled in these disagreements.

Within this particular setting, the Hague Convention on the Civil Aspects of International Child Abduction arises as a prospective solution to effectively tackle these aforementioned concerns. The Convention serves the purpose of establishing a universally acknowledged structure, so guaranteeing uniform and efficient resolution of custody issues that transcend national boundaries. The primary focus is on safeguarding the welfare of the child and placing significant importance on the expeditious repatriation of children who have been unlawfully taken<sup>13</sup>, with the aim of minimizing any adverse effects on their established living arrangements. If India were to adopt the principles of the Convention, it may potentially facilitate the alignment of decision-making processes, enhance procedural efficiency, and safeguard the rights of both children and parents. In conclusion, the adoption of the Hague Convention presents the potential for a systematic and fair method, thereby reducing the negative consequences of uneven rulings and building a more dependable and child-centric framework for addressing international custody conflicts in India.

## **Recent Developments**

### **The 2016 International Child Abduction Bill**

The Union Government passed the measure. The law concerns international child removal or retention. If this bill passes, India will likely ratify the Hague Convention. The legislative proposal attempts to criminalize intentionally and unlawfully keeping a minor abroad. Additionally, this law expedites the return of children to their home country. This policy protects children wrongfully held abroad from psychological suffering and helps them return

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<sup>13</sup> HCCH 1980 Child Abduction Convention, art. 4.

home. The Act also creates a centralised authority to manage and regulate these events.

### **263<sup>rd</sup> Law Commission Report**

*Seema Kapoor v. Deepak Kapoor*<sup>14</sup> from the High Court of Punjab and Haryana was examined by the Law Commission of India. Therefore, in its 263rd report, the Law Commission reviewed the legal concerns surrounding international child abduction and retention. The 263rd Report suggests a civil cross-border child abduction act and endorses the 218th Law Commission Report's suggestion that India ratify the Hague Convention. Prior to implementation, the commissions suggested revising the legislation. For inappropriately keeping a child from a guardian, the committee recommended a year in jail. A three-month punishment was imposed for misrepresentation and concealment. The two changes should make the proposed legislation law. The Commission also concluded that domestic abuse should not be tolerated because it hurts children mentally.

### **Critical Analysis**

#### **Should India Sign Hague Convention?**

The Hague Convention on Child Abduction has achieved the active involvement of more than 100 nations, indicating its considerable worldwide importance. The primary focus of this agreement is to tackle the significant problem of parental child abduction across international borders. Its objective is to reinstate the original legal and physical circumstances by expediting the prompt repatriation of the child to their customary place of residence. The fundamental objective is to ensure the well-being of the child and prohibit sudden parental activities that disturb their daily routine.

The imperative for India to formally adopt The Hague Convention on the Civil Aspects of International Child Abduction becomes apparent when analyzing the existing legal framework pertaining to inter-parental custody entitlements. Despite commendable endeavors undertaken by the judiciary in India, the country currently lacks a comprehensive international treaty that specifically addresses the complex network of cases involving the abduction of children across national borders.

However, it's crucial to keep in mind that ratifying The Hague Convention is only the beginning. There is a need to strengthen private international law that cannot be addressed by a single agreement alone. The larger context highlights the need for India to build a more

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<sup>14</sup> 2017 SCC OnLine P&H 2422

thorough framework that recognizes the complexities of international family law within today's increasingly linked globe. By strengthening the present private international law framework, India may create a system that uniformly deals with legal challenges that emerge between nations. Custody disputes, property rights, and claims to inheritance are only few of the many types of problems that fall under this umbrella<sup>15</sup>.

For these reasons, India should join The Hague Convention immediately. In order to close the gap in the current legislative framework, the aforementioned step is essential. Private international law is in need of a complete revision, and this move should serve as a catalyst for that. Effectively addressing the considerable disparities in cross-border family law disputes presents an opportunity for India to improve its legal framework and create a fair global legal system. To do this, it is necessary to safeguard the legal interests of all parties.

The Convention strategically prioritizes the repatriation of the child to their habitual abode, which is the location that holds the most significant ties to the kid. The establishment of clear jurisdictional boundaries not only serves to deter the practice of forum shopping, but also guarantees the maintenance of a uniform legal environment. The criteria for exempting individuals from the requirement to return are carefully delineated, so minimizing the potential for abuse of these rules.

### **Reason for not ratifying**

Nevertheless, India has yet to ratify the Hague Convention, despite its commendable attributes. On January 23, 2017<sup>16</sup>, the Indian government, operating under the purview of the Women and Child Development Ministry, made the decision to refrain from ratifying the Convention. The rationale behind this decision was based on the apprehension that the implementation of the Convention could potentially put Indian women who seek refuge from abusive marriages in foreign countries at a disadvantage. According to governmental records, a significant proportion of cases included Indian women who sought asylum in India accompanied by their children. Conversely, instances of non-Indian women married to Indian men leaving India were comparatively less frequent.

This perspective underscores a limitation of the Convention, as its implementation may not adequately consider the intricacies of specific cultural and social settings. The Convention

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<sup>15</sup> Elisa Perez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention' Acts and Documents of the Fourteenth Session' [1980] 3 Child Abduction 426 (1982).

<sup>16</sup> India: Decision Not to Sign Hague Treaty on Child Abduction (Jan. 23, 2017).

endeavors to safeguard the child's best interests; yet, it is imperative to incorporate contextual flexibility to mitigate inadvertent repercussions.

In summary, the Hague Convention on Child Abduction serves as a prominent example of international cooperation in tackling the urgent matter of child abduction across national borders. The ideas of this approach are in accordance with the objective of safeguarding the well-being of children and upholding the rights pertaining to custody. Nevertheless, the non-ratification of India serves as a poignant reminder of the imperative to take into account the distinct obstacles presented by the social structure of individual countries. The incorporation of global standards while considering the intricate local realities is necessary in order to establish a comprehensive and efficient legal system.

### **Conclusion and recommendation**

The field of Private International Law in India, specifically in relation to cases of inter-parental child abduction, is characterized by a relatively limited level of development. The lack of comprehensive legislative frameworks, both at the international and domestic levels, has resulted in a significant dependence on court action as a means of addressing these matters. The Indian judiciary has exhibited ingenuity in managing such instances; yet, it is apparent that a more sustainable and methodical approach is necessary.

Ratifying the Hague Convention of 1980 is a very important step forward, especially in light of the present situation. The Convention has the potential to create a universally accepted system for dealing with international kidnapping situations. **Concerns among Indian women married to men who mistreat them abroad are one example of a potential obstacle brought on by the Convention.** This effort is being done with the main goal of making sure kids are safe in line with standard standards for child custody arrangements.

However, courageous legislative initiatives are needed to make the Convention more effective. The Convention's principles can only be effectively put into practice and protected if they are reflected in domestic legislation. A more cohesive approach to the complex concerns of international child abduction may be achieved via **the creation of bilateral agreements with countries** that have not signed the appropriate international treaties.

In general, ratifying the Hague Convention is considered as a positive development; nevertheless, this should not be done without first carefully weighing the potential drawbacks. The dynamic nature of Private International Law in India calls for the establishment of an all-encompassing and permanent structure for handling inter-parental child abduction cases. The

Convention lays the groundwork for a framework to be established, subject to domestic law reform and international collaboration.

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