
THE DILEMMA ON INTER PARENTAL CHILD ABDUCTION WITH SPECIAL REFERENCE TO INDIA

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ABSTRACT

“Inter-Parental child abduction is a serious problem considering that it induces life- long psychological damage to the tender mind of abducted child”

Of the 1.1 billion Indians, about 30 million are Non Resident Indians (NRI) constituting the largest dispersion living in 130 Nation across the World. The high number and volume statistics show an immense potential for free cross border movement of NRIs. This contrarily has given rise to new dimensions of Inter-country family oriented disputes. Inter parental child abduction is one of such emerging problem which defies legislative solution in India.¹

India's law commission has stated that "a large number of NRIs have arisen in each jurisdiction over the years. It has been recorded that in most instances, NRIs choose to marry in India because of cultural similarities and traditional values, even after gaining citizenship in other jurisdictions."²

If there is conflict and serious differences between wife and husband, they are welcome to part with each other gracefully in a dignified way. Whereas, the child being the common property of both the parents, it is unfair, unjust and unreasonable, that one of the parents remove them and deprive the care, company and comfort of the left behind parent of the children. None of the parents has a right to do so, unless there are proven misuse and abuse of child as complained and reported to the law enforcing authorities where they live. Ugly and unpleasant fact is, the children are being used as toys to take revenge against each other due to problems of adjustment in marital relationship. The removal of the child by one parent, depriving the child, the company of the other parent, does not ensure the welfare of the child and healthy brought up. If at all, the warring parents are sincerely interested in the welfare and holistic development of their child, they should set aside their differences and live together for the sake of bright future of their children, thereby serving as good role models to their children.

¹Editorial, “India to reconsider its stand on parental child abduction treaty” Hindustan times, Jan 4, 2017.

²GOVERNMENT OF INDIA LAW COMMISSION OF INDIA Need for Family Law Legislations for Non-resident Indians Report No. 219.

CHAPTER 1 – INTRODUCTION

1.1. What does Inter-Parent Child Abduction mean

Nevertheless, it applies to the unlawful transfer of children from his home by a family member to another country. International abduction of children takes place whenever one person unlawfully takes a minor child in a country other than that in which the child has his or her normal residence.³

Infringement of custodial right' generally involves unlawful dismissal, which causes a jurisdictional clash of laws where various entities and territories may enter and disputes with geographically limited enforcement of custodial decisions.⁴

It often greatly impacts the exposure and relation of a child to his or her relatives and can cause the loss of his or her previous language, history, identity and nationality; this violates the rights of numerous children and can cause severe psychological and emotional harm to the left child and family.⁵

There is a common myth that children are not in difficulty, because the abductor is not really an intruder in these circumstances. Child abduction is defined as a form of child abuse and parental separation. The present day convenience of international travel and also the rise in international marriages contributes to a substantial increase in the number of international abductions of children. As more and more Indians go to research or look for better job opportunities abroad. This migration has also created a surge in the abduction of children by children are forced back by one of their guardians, trapped in the chaos of feuding homes.⁶

1.2. Impact on child

Kidnapped children suffer from their kidnapped parents both emotionally and physically. Many are told they have passed away or left the other parent. Uprooted from their entire lives, home, family and friends, abducted kids are often given new personalities by their abductors and are forced to hide their real names or where they stay. It is outside their ability to understand that a parent who genuinely cares and cherishes them can't find their whereabouts. Youth can't be

³ *Ibid.*

⁴ Inter country Parental Child Removal and the law available at: <https://heinonline.org/> accessed on 25-10-2019 at 11:00am.

⁵ *Ibid.*

⁶ Editorial, "Government likely to junk inter-parental child abduction bill" The Tribune, Nov.6, 2006.

recovered. Abduction removes a kid feeling of history, closeness, qualities and ethics, mindfulness, chance of knowing one's beginnings and the adoration and contact to their relative.

According to Delhi Police's Special Police Unit for Women and Children⁷, Indian women are becoming increasingly self-assured and secure, thus removing the need for them to depend on their husbands for help. This is primarily why they are often able to stand up and demand freedom from mental or physical violence.

Parthav Banerjee, a Delhi-based relationship counselor says that Indian women's increasing psychological and financial freedom and late marriages are given as common reasons for marriage break-ups. "Very often, the couples seek separation within months or weeks of their marriage. After returning from their honeymoon, some couples head straight to their lawyers.

1.3. Statistics related to child abduction

- India is one of the ten major nations to which the abducting mother sends children abducted from the UK.
- The 2013 study found that the number of incidents of parental youngster's abduction in the UK had increased in the region between 2003 and 2013.
- India is number two on the list of nations to which children are secretly kidnapped from the US
- More than 80 instances of parental abduction have been recorded from the US to India, as stated by the US government.
- Parents who try to run away with their children feel that India is their safe haven.
- For 70 percent of cases, it is the woman that takes the child away.

1.4. Is abducting one's own child an offence in India?

In India, there is no legislation against the abduction of parents if one spouse chooses to take away the child and there is no rule against them.

⁷ India's International Child Abduction Dilemma available at: <https://tribunecontentagency.com> last modified on, 9 Jan 2017 accessed on 29-11-2019 at 11:10 am.

Definition of Abduction

'Abduction' is defined under section 362 of the Indian Penal Code, 1860 as an act that compels or deprives an individual by means of deceitful means to force him to quit any position.⁸ Abduction, all things considered, is not just a crime, it is an example of help that is not in itself guilty, but when accompanied by a goal of sending another crime, it ends up becoming clearly guilty as an offence. These so-called abductors are the overwhelming because of parental abduction. A parent takes the child to some other location because of the fear of losing his / her treatment, i.e. such an abduction as mentioned previously, is out of overpowering adoration and love and not to harm the child or to achieve some other ulterior motive. Although many jurisdictions do not have a penal code named "parental abduction," most of them have arranged their general abduction laws to fit a particular offence⁹.

Ingredients of parental child abduction:

Whether or not parental abduction involves taking of a child by a parent is governed by three key variables, including;

- The guilty parent's legal standing,
- Availability of any court orders requiring treatment, and
- The guilty parent's aim.

For the latter, the only option left is to go to trial and fight a legal war that could last even ten decades. The other parent can do nothing apart from going through the boring and lengthy court case. It's also possible that the latter won't be allowed to interact with their child, too. Families live in India, and the abductive parent decides to take the kids to another world. Again in this situation, as the Indian legal system does not recognize the abduction of parents as a criminal offence, there really isn't much the other parent can do. With the advent of such situations where one parent abducts the other, regulations should be in effect demanding that it be both a criminal offense and an act of child abuse. Parental kidnapping and parental abduction of children in India should be treated as a criminal offence and should be recognized as child abuse. Although many jurisdictions do not have a penal code named "parental abduction," most of them have arranged their general abduction laws to fit a particular offence.

⁸ Section 362 of IPC.

⁹ Julia A. Todd, "The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention & Goals Being Achieved? Volume 26 Indiana Journal of Global Legal Studies Page no. 26 (2019).

CHAPTER 2 – CONVENTION ON PARENT CHILD ABDUCTION

2.1. The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention is a multilateral treaty aimed primarily at providing a remedy for abductions and at protecting and protecting children from their negative impacts. The main purpose of the Convention is

- to secure a prompt return of children who have been wrongfully removed or retained in any contracting state, and
- Ensure that the rights of custody and access under the law of one contracting state are effectively respected in other countries.¹⁰

The Convention, which has 90 Member States, protects children under the age of 16 from a parent's "wrong removal or retention" and ensures "their prompt return to the state of their habitual residence."¹¹

The Hague Convention on the Civil Aspects of International Child Abduction or Hague Abduction Convention is a International cooperation Convention Framework by the Hague Conference on Private International Law establishing an suitable mechanism for returning a child abducted by a parent from one member country to another. A petition could be made for the recovery of an infant who had been wrongly abducted or imprisoned for as long as the applicant retained custody rights, unless it was claimed that those rights were "successfully enforced" at the time of the abduction.¹²

The Convention is designed immediately to recover the objective condition that occurred before the expulsion or detention of a child. It does not attempt to settle disputes over the jurisdiction of legal custody, nor does it rely on the availability of court orders as a prerequisite for the release of children.¹³

The Convention was marked 25-10-1980 and came into on 1 December 1983 between the countries who are party to the convention. The Convention has its main objective to ensure the

¹⁰ *Supra note 2.*

¹¹ Julia a Todd, "The Hague Convention on the Civil Aspects of the international child abduction volume 26 *Indian Law Journal Legal Studies* page no 26.

¹² *Ibid.*

¹³ International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India available at <https://www.researchgate.net/> accessed on 2-10- 2020 at 3:15pm.

prompt return of child who were seized from their nation of or unlawfully held in a contracting state and not their nation of routine living arrangement.

The essential aim of the Convention is to ensure child guardianship course of action existed preceding a supposed unfair evacuation or maintenance accordingly preventing a parent from intersection worldwide limits looking for an increasingly thoughtful court. The Convention applies just to child who is younger than 16.

The convention provides a mechanism for countries to work altogether in a specific ways to resolve international abduction cases.

2.2. Important features of the convention

- All countries which have ratified or acceded to this Convention shall have a central authority. In abduction cases involving parents and other officials, the central authority is the main point of contact.
- The central authority is usually responsible for helping to trace abducted children, helping to find suitable alternatives to instances of parental abduction and helping to return the child to their normal course of life.
- All documents sent to the central authority as part of the application shall be considered valid in the courts of the partner countries without the formalities often imposed by the courts to accept foreign documentation.
- Generally, a parent need not to apply for a custody order to show that his or her right to be with their children was encroached, when the child was taken from his or her country; the Conference provides evidence of the child's normal presence, often by proof of raising children or relationship.
- Whether the child may return to his or her home or whether access / visitation rights exist does not depend on the immigration status or identity of the child or of the mother.

2.3. Which types of cases come under the Hague conventions on abduction?

Filing a lawsuit under the convention does not guarantee the recovery of a child The child was habitually residing in one convention nation, was mistakenly transferred to another convention country or held there.

- The relocation or preservation of a child shall be deemed to be unconstitutional if it breached the custodial privilege and the individual enforcing the right at the moment of removal or retention.
- The Treaty must have been in place between the two nations if the exclusion or preservation was unfair.
- The child must be below the age of 16.

2.4. The Argument for the Return

A case starts with a demand for the recovery of a child State and federal district courts originally had shared jurisdiction to consider Hague Convention lawsuits. Because of this concurrent authority there may be problems of abstention or elimination. An adult or parent appealing for the return of a child will prove by a preponderance of the evidence of that.

- The child must be below the age of 16.
- Child must be wrongfully removed or retained.
- From his or her Habitual residence.
- In contravention to parent's child custody.¹⁴

2.5. Defenses against child return application

Under the agreement, a court could refuse the return of the abducted child if one of the following safeguards taken by other party

- There are chances that the return of the child may subject the child to physical or emotionally injury, or otherwise put the child in a miserable situation.
- The child has reached the age and degree to which the court should take into account child welfare.
- Since the removal or substitution, more than one year has elapsed and the child has settled in a new environment.
- The group requesting restitution has either consented to the expulsion or transfer of the child or has ultimately acquiesced.

¹⁴ *Ibid.*

- The return would be in defiance of the fundamental principles of inalienable rights and fundamental freedom in the area where the child is born.
- In fact, the party seeking return did not exercise custody rights if the child was wrongly removed or retained.¹⁵

¹⁵ International Parental Child Abduction: An Overview available at <https://www.jstor.org/stable> accessed on 5-12-2019 at 9:22 pm.

CHAPTER 3 – POSITION OF INDIA

3.1. Indian legislation

India does not follow the Hague Convention on International Child Abduction Civil Aspects, so it is equally important to establish specific domestic law with clear, legitimate and essential principles of child custody before India becomes a member of the Convention.

Not too much in Indian legislation addresses the definition of child custody.

To name a few¹⁶

Section 26 of the Hindu Marriage Act, 1955¹⁷

Section 4(a) of the Hindu Minority and Guardianship Act, 1956¹⁸

*Gita Hariharan v. Reserve Bank of India*¹⁹

By way of the Habeas Corpus, the High Court can order the custody of a minor at the request of an individual appealing for the same, with overriding focus on the child's welfare. Habeas Corpus is a reasonable redress on one parent's part to reclaim a child from the other parent, either before or after the parents become legally separated or divorced. Since the child's welfare is the primary consideration in determining a custody award, such a decision may be rendered in a Habeas Corpus proceeding.

3.2. What is a Writ of Habeas Corpus?

A writ of habeas corpus that literally means "making the body" is a court order for an individual or entity keeping someone in detention to carry the arrested person to the court issuing the order and to justify a valid reason for that person's custody. Usually, a Habeas corpus petition is filed for illegal detention. The court can order the taking before him of a convict, who is in wrongful detention of another citizen. Habeas corpus was used to guarantee the rehabilitation

¹⁶ Hindu marriage act, Hindu minority and guardianship act , guardians and wards act

¹⁷ Section 26 of Hindu marriage act, 1955 states that a court can pass orders and make such provisions in the in any proceedings under the Act with respect to the custody, maintenance and education of minor children upon an application for that purpose as expeditiously as possible.

¹⁸ Section 4(a) of the Hindu Minority and Guardianship Act, 1956 defines "minor" to mean "a person who has not reached the age 18 years". 18 And, under the Act, the custody of a child is given to any person, be it the child's natural parents or guardian appointed by the court with the prime importance given to the welfare of the child.

¹⁹ (1999)2SCC288.

of people illegally imprisoned or even in cases where parents petition the court in cases of child custody. Because India isn't a Contracting State to the Hague Convention, issues encompassing the consideration of wrongly isolated or held youngsters happening in various cases are treated by the Indian Courts based on each issue, subsequently keeping up the estimations of the court gathering and the kid's prosperity.

The proceedings show the following pertinent points in relation to the legal principles.

3.2.1. Jurisdiction

Courts utilized the guideline of 'close contact' to settle upon the ward. The theory is that the individual correspondence organizes is best set to evaluate the enthusiastic, social and prosperity needs of the child. While the decisions don't plainly endorse the conditions and criteria for deciding close contact, the decisions demonstrate that the youngster's constant habitation might be significant thought. Choices likewise recommend that the relational correspondence study was led on practical terms, and center was applied to the circumstance law that secures life partners and youngsters' prosperity. This methodology likewise stands out from the Hague Convention's act of concentrating its favored ward on the acclimated home of the youngster which it regards to have the most grounded and most close to home relationship to the proof and the gatherings to the contest.

3.2.2. Welfare of the child

Notwithstanding the distinction in the individual laws of the gatherings and the predominant job of the parent under the statutory laws, the possibility of 'home wellbeing' guided Indian courts. Court orders depend on guardianship decisions mulling over every single significant factor that help the welfare of the youngster. The choices unmistakably express that the welfare of the youngster beats the protected guidelines identified with the guardianship. In the structure of between national youngster abduction, an intensive survey of the kid's welfare is required in every individual case, and the examination draws out the entire system that includes both the child and trial.²⁰

3.2.3 Comity

²⁰ International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India available at <https://www.researchgate.net/> accessed on 4 Jan. 2020 at 3:15pm.

Courts have decided that 'preliminary convention' doesn't require compulsory similarity with outside guidelines or due thought dependent on the realities and states of individual cases. The choices don't request that the Indian courts decide if they will not follow a remote request. In singular cases they leave the issue to show it truly. Such a thought makes vulnerability all through the whole procedure. An oppressed gathering may not be agreeable to get such a decision in India, regardless of whether it is in his/her support outfitted with a legitimate remote guardianship request. Choices speak to the power appended to a global interlocutory request when contradicted to a last request. Moreover, the Hague Convention doesn't recognize the full and interlocutory headings in confinement.

3.2.4 Habitual residence

In *Ruchi Majoo v Sanjeev Majoo*,²¹ and *Surya Vadhan v Union of India*²² courts deciphered Ordinary residency on the grounds of the gatherings' reason under the Hindu Minority and Guardianship Act. The courts looked for a two-factor arrangement of deciding factum and ill will from the progenitor's perspective before assessing habitation, and hostility was given inclination. Habitation got hard to decide in singular cases and the multifaceted nature of Indian courts is related with the general absence of comprehension of the idea of constant living arrangement.

3.2.5 Custody

India's Law Commission has noticed that Indian courts have not followed a uniform practice in the goals of cases including minor kids and have offered care to either parent in many cases. Joint care has not been considered, on the grounds that Indian law doesn't require it.

3.3. Why India is not party to the convention?

India is one of countries which have chosen not to be party to said convention even though India has been under pressure from western countries to become party to said convention.

Those who urge India to sign the convention often put forward arguments that India should be party to the said convention are mostly Indians marrying and staying abroad and giving birth to children in abroad.

²¹ (2011)6SCC479.

²² (2015)5SCC450.

Those who urge to sign the convention should understand the basic concept that India should not join the convention for the security, welfare and protection of the children. Mostly children are brought to back to India because sometimes they are not safe in the nation state.²³

To protect family system and family ties child are being brought back to their country of origin as more and more are now exposed to the western culture so they have lost their family values and family ties.

3.4. Why should India join the 1980 convention?

- The Hague Convention is a landmark agreement that has had major consequences in much of the world on child protection measures. India is emerging as a major destination in the developing world, in a civilized society where globalization and free interaction are part of a rapidly changing setup. Non-resident Indians in all walks of life have attained rewards. But the issues, back home, on the. As time is changing but laws are still same. Throughout India the rules of marriage, divorce, inheritance, maintenance and adoption need a work. Child abduction is often viewed as a custody dispute between parents for protesting and prosecuting spouses ' rights while suddenly removing the child's rights.
- India is no doubt resistant to excluding interparental children from the international community. In the absence of the rules of the Convention, the Indian Courts shall determine the best interest of the child by which any child separation shall be treated with as any conflict regarding custody. In this system, the case is a battle for the superior interests of the parties and the real question of the child's welfare is secondary and inferior. The question of jurisdiction is decided by the conflict between parental desires and partners ' privileges. The over controlling parent succeeds to claim his rights, and the subsequent assertion of the child's best interests is a misleading term and confusion. Such a settlement is not really in the best interests of the child being taken away.
- The benefit of The Hague Convention solution is that it immediately returns the status to what it had been before the unjust dismissal or preservation took place and maintains the Court's proper role in the country of usual residence of the child. The right law to apply to the child would be from the country of origin of the child and so would be that country's court. In India, determining the rights of a foreign child removed from India

²³ INTERNATIONAL CHILD ABDUCTION available at <http://www.worldlibrary.in/> accessed on 10-10-2019 at 3:00pm.

by an offending parent in accordance with Indian law can often be clouded and may not be in the best interests of the child and should be determined by the law and the origin court of the child.

- The reality that India is not a party to the Hague Convention may have a detrimental effect on a foreign judge who determines whether a child living abroad with his / her parent should be allowed to spend time in India maintaining interaction with his / her Indian parent and entire family. Without the Hague Convention guarantees that the child can return to the country of origin easily, the international judge may be reluctant to allow the child to migrate to India.²⁴
- The Convention allows for a framework for addressing custody and communication conflicts that may occur when parents are split and live in different countries. The Convention shall prevent the issues which may occur in courts in different countries equally competent to determine these matters. The Convention's guidelines on identification and compliance remove the need to re-litigate custody and communication questions, and guarantee that decisions are taken by the courts of the nation where the child was habitually residing previous to departure.

3.5. What consequence India will have if it leaves the Hague Convention without amending its own laws?

1. The Hague Convention rule states that if a child is abducted from one country and brought to another country's territory, the country from which the child is abducted may order that the child be returned immediately to the Central Authority of the Contracting Group to which the child was abducted. The Contracting Party or nation to which such an application is made is recognized as the Requesting State and Contracting Party which makes such a request.

Therefore, if India were to join the Hague Convention and then accept applications from some other Contracting Country for the return of an abducted child the Indian judiciary would be required to comply with those applications, despite the fact that, in compliance with current Indian law, a child in the care of either parent is a child in guardianship and that the child is not identified as an abduction. Signing the Hague Convention will ultimately require kneeling to international pressure and following an international view of the law that violates India's

²⁴ 263rd Law Commission Report on The Protection of Children (Inter-Country Removal and Retention) Bill, 2016 available at <https://blog.sconline.com/> accessed on 10-10-2019 at 6:00 pm.

constitution. That would also be an infringement on India as an independent democratic nation and its sovereignty.

2. In so far as international decrees / orders are involved in cases of child kidnapping from parties involved, it would even invalidate Section 13 of the Civil Procedure Code.²⁵

Unless India were to join the Hague Convention, it would never have been advantageous to the rights of individuals and children of Indian origin or Indian residents, because there are very few cases of Indian children being taken from India to a foreign country by either parent of the family, a child in the care of either parent of the child is not identified as an 'abducted' child as per laws in India as well as traditions, customs, and values. Those who favour this have failed to release that this will ultimately affect the other crucial issues.

3. Those who urge that India should be party to the convention without considering the ground reality and amending its laws with respect to western ideas, culture and values. Convention is neither practical nor beneficial to any Indian citizen, or helpful to anyone of Indian origin, even people of Indian origin aspire to maintain and stay connected with their roots in India, both for themselves and also for their children.

As far as personal life is concerned, the young generation is traveling abroad and living a modern lifestyle they remain deeply entrenched in Indian values and traditions regarding child-rearing, family life. The mother is the main and sometimes the only child caregiver even in Indian families living abroad.

If such a woman experiences marital problems with her husband abroad, which in many cases takes the form of psychological abuse and sexual assault, and decides to return to the security and stability of her own family and extended family in India, it is only normal that she should

²⁵ section 13 of Code of Civil Procedure 1908 "When foreign judgment not conclusive" A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

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

carry her children with her. The Indian rules will definitely not be finding her capable of abducting her own children in such a situation.

4. If such a spouse living abroad could easily obtain child custody by using the rules of the Hague Convention, he will simply leave the spouse in India as well as the children totally disturbed. If India were to join the Hague Convention, it would have a devastating effect on oppressed wives staying with their husbands abroad who would not attempt to save themselves and their children by returning to India for fear of being labeled as offenders, accused of abduction of children. Those abused wives will live in fear, continuously.

In cases of child protection, warrants issued by judges in foreign countries using the umbrella of the Hague Convention provisions eventually breach the fundamental principle of the primary importance of child welfare.

5. As India is a democratic country if any changes to be made in Indian laws it will not be accepted or appreciated by public as a whole, Indian public will never accept the view on which one parent is considered as abductor. Without considering ground reality it will only lead to violation of rules and public unrest.

CHAPTER 4 - LAW COMMISSION

4.1 . Law Commission's Suggestions

India's committee investigated the topic and the council first discussed the question in its 218 report titled "*NEED TO ACCEDE TO THE HAGUE CONVENTION ON THE CHILD ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980*" advising the Government of India to sign the Hague Convention on the civil aspects of International Child Abduction, 1980 which came into force on 1 December, 1983 while examining these issue, the law commission found the government of India has already prepared a draft of the "*CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016*" which attempted to bring the bill in consonance with the Hague convention 1980, and has been put on the website of the Ministry of Women and Child Development.

The law commission, appreciating the relevance of the issue and the concerns raised from time to time, agreed to review the subject carefully and thoroughly examined the various clauses of the said legislation. On the basis of that legislation, the Committee in Legal Affairs and Citizens Rights finds it appropriate to study the legal precedents and procedures observed in the drafting of the law and to suitable harmonizes its provision with the Hague convention 1980.

India's Law Commission has prepared a comparative statement showing the requirements of that law, listed on the Ministry of Women and Development website, and the amended version proposed by the Law Commission suggesting the Commission's amendments or modifications.

The text of "*THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL 2016* as recommended by the Law Commission. 263rd report of the law commission addresses the concerns relating to children and their parents and makes an attempt to set the stage for India to sign the Hague convention, 1980.

The 21st Law Commission in its first report (LCI report no.-263), recommended a series of changes in the draft Civil Aspects of International Child Abduction Bill-2016 which includes:

- Introduction of the word ' abduction ' from the Bill in order to put it into compliance with the Hague Convention, which, in its view, uses the word as a substitute for a more appropriate term, ' false introduction or preservation '.

- Extends its scope to children under the age of 16, identified as an appropriate age with a maturity degree.
- One year probation period for the holding or expulsion of a child from parent custody.
- Demand for reimbursement by the Central Authority of expenses incurred by the individual.
- The victims may include a parent or a family member, friends and others.
- Three-month penalty for willful misrepresentation or concealment of truth, thereby avoiding the child's safe return.
- It mandates keeping records of applications and cases brought to the Central Authority.

According to the 21st Law commission, these proposed revisions are must for harmonies of its provisions with the Hague Convention.²⁶

4.2. The Civil Aspects International Child Abduction Bill, 2016

The Union Ministry of Women and Child Development (WCD) amended the Civil Aspects of the International Child Abduction Act, 2016, which, if authorized, would encourage the immediate return of any child under the age of 16 who has been "wrongly abducted or held in another State that is not his / her habitual residence."

The proposal envisaged "the timely return of children unlawfully abducted or held in a Contracting State and ensuring that custody and access rights are respected in other Contracting States under the rule of one Contracting State." It also introduced a central authority to locate a child to avoid more damage to any such child and to guarantee the child's voluntary return to the signatory nation.

4.2.1. Various Objectives and provisions

- Proposed legislation for the creation of a central authority to be managed by a joint secretary-level officer. The authority would have the authority to decide all the events.

²⁶ GOVERNMENT OF INDIA LAW COMMISSION OF INDIA Report No.263 The Protection of Children (Inter-Country Removal and Retention) Bill, 2016.

- Any such child's voluntary return to the country where that child had his accustomed residence.
- To exchange information with the relevant authorities of a Contracting State concerning any such child.
- To provide, on request, details of a general nature as to the law of India related to the enforcement of the Convention in any Contracting Country.
- To initiate judicial proceedings with a view to securing the return of any adult in whose habitual residence the child is. It also encourages legal aid or counseling.
- This makes management related procedures.²⁷

As far as Indian law is concerned, as expressed in the clause of the Guardians and Wards Act, 1890, the question of a child's custody is still accessible and does not achieve finality, as it is always perceived to be a temporary order rendered under current circumstances. The Court can adjust such an order with the changing conditions and circumstances, including the passage of time, if it is so appropriate in the child's interests and welfare.

4.2.2. Significance

- Replaces the unusable Law of 1890 on Guardians and Wards act. A new law incorporating international Hague Convention measures.
- According to BOKH (Bringing Our Children Home), India is one of the top five countries for international parent-child abductions, making it a prudent step for GOI to take.
- By invoking “First Strike” principle it will help in deciding which court has jurisdiction regarding final decision.
- This provision would secure the future of the infant in the absence of any domestic law.
- It will ensure better communication as follows from delaying tactics with foreign countries.²⁸

²⁷ *ibid*

- The law of the authority of the different courts would speed up the decision and add continuity in the judgment.
- Will help the child psychologically as trauma he has to go through.

While the bill does not provide any punitive protection against the individual found to have abducted the child and not valid in J&K, it is still a very good move by the Indian government to secure the future of this nation's building blocks.

4.2.3. What is the requirement of the Bill?

- This Bill is all about the rights of children, who are abducted cross-country by their own family member, including their guardians.
- When any foreign nationals residing in India go back and take a child with him / her without partner's consent, this situation arises.
- Indian live abroad are moving back to India and bring back child along with him/her without the permission of partner.
- Situation gets worse, when parents are migrating to different countries and child is taken along by one parent, without the permission of other.
- It is unfortunate that an aggrieved parent with a foreign court order requiring return of the child finds no slot in the Indian legal system.²⁹

The Indian legal system, though, offers redress by using formal habeas corpus. Therefore, the only solution left to the parent is to collect traditional facts to be identified coming under the outdated Guardians and Wards Act of 1890.

4.2.4. Salient features the Civil Aspects of International Child Abduction Bill, 2016

- The Act allows for the creation of a Central Authority.
- A resolution under the 1980 Hague Convention on the return of a child does not represent a final determination on the grounds of the custody issue, because India is not

²⁹ *Supra note 2*

a signatory.

- This defines the position of the Central Authorities in relation to a child transferred to India and from India to another Hague Convention Contracting Country, 1980.
- It sets out the procedure for securing the child's return and provides for the Central Authority to apply to the High Court for the restoration of child custody.
- It empowers the Court on certain grounds to deny custody. This requires the Indian courts to accept State rulings on the child's' habitual residence.
- It also states that the Indian Court which wishes to disregard the foreign court's interim / final judgment must record the same reasons.

CHAPTER 5 – CASE LAWS

India is not a signatory to the Hague Convention. The Supreme Court has observed in the case of *Sumedha Nagpal v. State of Delhi*³⁰ as under;

“No court choice can recreate the broken home or give a youngster both obedient guardians care, support, love and assurance. Neither one of the courts acknowledges or finds a sense of contentment in administering on these issues. Considering that, it would be a choice, and it would be a not a good choice for ordinary family and marriage ideas. The fundamental component of society is the family, and that association sets up the most significant relationship in presence that influences individuals' ethics and culture than some other organization. Child always needs a sense of security, warmth, care and affection from their parents.”

In *Surinder Kaur v. Harbax Singh Sandhu*³¹ it was held that the provisions of the Hindu Minority and Guardianship Act, 1956 the supreme concern can't be resolved as promoting the welfare of a child while exercising overview power in returning the minor children to the foreign country of their origin & in *Elizabeth Dinshaw v. Arvind M. Dinshaw*³², the Supreme Court exercising its summary jurisdiction, the removed minor children were returned to their foreign country of origin on the basis of custody orders from foreign courts.

In *Dhanwanti Joshi v. Madhav Unde*³³ the Supreme Court noted that the international court's order is only one of the details to be taken into account when coping with child custody issues and that India is a non-signatory nation to the Hague Convention, the rule is that the Court from which authority the child is withdrawn finds the topic of fairness pertaining to child welfare as of paramount importance. It is in this case that the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning removed children to their parent country by observing that the welfare and best interest of the child should be of paramount consideration & in *Sarita Sharma v. Sushil Sharma*³⁴, The Courts preferred the protection of child welfare and best interests over all other considerations. Foreign court rulings then became just one factor of child custody cases that were to be resolved on the facts of each case without any summary return. It was the Supreme Court in this case that changed the previous view and did

³⁰ AIR 1984 SC 46.

³¹ AIR 1984 SC 1224.

³² AIR 1987 SC 3.

³³ JT 1997(8) SC 720.

³⁴ JT 2000 (2) SC 258.

not exercise summary jurisdiction in returning children to its parent and observed that the welfare and best interest of the child or children should be of paramount consideration.

The Supreme Court in the case of *Sahiba Ali v. State of Maharashtra*³⁵ do not provide custody to the mother of her child, but at the same time gave orders for visitation rights in the care and health of the minor children. In another case of *Kumar V. Jahgirdar v. Chethana Ramatheerth*,³⁶ the Supreme Court came to the conclusion that a female child of that age wants more of her mother than her father and her mother's remarriage is not a disqualification to safeguard the child's interest. Further, in case of *Paul Mohinder Gahun v. State of NCT of Delhi*³⁷ the Delhi High Court refused to grant the parent custody of the child and concluded that the problem of violation in laws and territories would take a note that what will be in the best minor's interest.

*Ruchi Majoo v. Sanjeev Majoo*³⁸, Sanjeev Majoo accused Ruchi Majoo of abducting her son to India while the child's custody was being tried in a US court. While a Delhi district court held that the court had the right to hear the case, the Delhi High Court set it aside and ruled that the case did not fall within the jurisdiction of an Indian court.

*Karan Singh Bajwa v. Jasbir Singh Sandhu and others*³⁹

There was a disagreement between the NRI pair over the custody of two minor children (age 6 and 11 years old), Couple came to India, and Wife began living with father along with the Habeas Corpus petition writing children and husband papers. The Honorable Judge found that this was not a high-conflict case, but there was misunderstanding between the couple they settled their counseling and advice dispute Hon'ble Judge and agreed to live together. They agreed to withdraw litigation against each other further Joint custody of children given to couple without going into legal issues. Sanjeev Majoo accused Ruchi Majoo of abducting her son to India while the child & custody was being tried in a US court. While a Delhi district court held that the court had the right to hear the case, the Delhi High Court set it aside and ruled that the case did not fall within the jurisdiction of an Indian court.

³⁵ JT 2003(6) SC 79.

³⁶ (2010) 1 SCC 174.

³⁷ 2005(1) Hindu Law Reporter 428.

³⁸ (2011) 6 SCC 479.

³⁹ 2013(1) R.C.R.(Civil) 809.

*Surya Vadanam v. State of Tamil Nadu*⁴⁰ The Court stated that:

- The theory of the comity of courts and nations should be upheld and the concept of the best interests and well-being of the child ' implemented
- Comity of courts rule should not be revoked except for compelling special reasons to be recorded in writing by the public court
- Domestic courts shall comply with interlocutory directives from foreign courts with appropriate jurisdiction involving child custody; and
- An extensive or brief investigation by local courts where a pre-existing decision has been given by a qualified foreign court must be focused on facts and should not be required as a regular matter when a local court is seized in child custody proceedings.

Shanmughan case

Shanmughan of Texas is a U.S. citizen, an inventor in Richardson (Texas) who runs a software company, and a survivor of Foreign Parental Child Abduction. His U.S. citizen daughters (Malia and Purul) were kidnapped and taken to Bangalore (India) without his knowledge on 21 July 2005 by his wife Shanti (a U.S. resident for about 8 years). This was in direct violation of the order of a Court which restricted his wife from removing the children from Texas. On Oct 2nd, 2006, the same Court granted father sole custody of his children as a US citizen. It's been over 2 years and the wife hasn't let him see or even talk to his daughters, whom he cared for since the day they were born. There is no day he didn't cry out for his family. His father in law served as an accomplice in the abduction from Texas of Shanmughan girls. His wife filed a petition for divorce after fleeing to India and then sold his house without his permission in Bangalore. She also obtained an ex parte order from the local court in Bangalore giving her custody of the kidnapped children despite being a permanent resident of the United States and a regular Texas resident. Shanmughan is very worried for his daughter well-being, as his wife has hypothyroidism that often contributes to a depressive state. She requires, and is reliant on, several drugs. His younger daughter, Purul, has a health condition that requires constant medical care. As a father he wants her to receive the best possible medical attention in the USA. Shanmughan wants to see his kids grow up in a safe and nurturing environment. He is largely

⁴⁰ (2015) 5 SCC 450.

responsible for the health of his family, and can provide the basis for the love and support they deserve. His wife and family are stealing the dignity of his children to fulfill their vanity and other reasons⁴¹

Deshmukh's case

Deshmukh of Bamberg, Germany, says his wife and her father took his son hostage. For the past 15 years, he has paid Rs 18000 per month as child care, but his wife has continuously denied him access to his child because she fears that once the son meets his father on a regular basis, he will leave his mother and she will lose her source of income. All German and Indian courts gave him the right to see the boy; the lower Indian court and even the German court offered him child custody but his wife openly refuses to follow court orders. The wife of Deshmukh denied the child contact with her father by e-mail, telephone and even regular paper mail. When she was punished with incarceration by the Indian courts she took the child to the house of her counsel but had humiliated the child so much that he was afraid to speak. Deshmukh from pursuing his wife's custody case lodged against him a completely groundless 406 lawsuit. She had also attempted to use false accusations in Germany but the German courts told her that God gave two parents to the child and that he should have access to both. Deshmukh's sister actually resides in the same Indian city as his aunt. Deshmukh has fought this argument for the last 15 years but is not going anywhere in India. He lost his home and his mother was forced to sell her house in order to battle this lawsuit.

Niren case

Niren was a highly skilled specialist who served in the US financial services industry. During the last 16 years (last 14 years in the US) he has been married to his high school sweetheart Wife and has two lovely minor children. Family went to India for a 4-week vacation, where Wife is absolutely normal with Niren, and the household also goes to Agra for a 4-day trip to see Tajmahal. Two days before returning on the excuse of celebrating Rakshabandhan, she takes the kids to the place of her parent and avoids engaging with the father and locks herself and kids up in the house of her parent. She withdraws almost Dollars 20,000 from electronic joint account. Niren extends stay in India and attempts to make useless communication with Wife and children; he returns to the United States. She is seeking a divorce. Niren confronts American courts who give Wife many opportunities to come back and return the children, but

⁴¹Child Abduction-Indian and International Laws against Child Abduction available at <http://www.legalserviceindia.com/> accessed on 11-11-2019 at 7:40 pm.

she declines. US courts award father sole legal and physical custody, send a request to Habeas Corpus for the development of children injunction against Wife for child custody outside the US, contempt of court summons, and finally a state arrest warrant against mother. Wife keeps on denying. Niren moves Delhi HC, and eventually Supreme Court, refers case to mediation. The US Embassy in Delhi helps in trying to persuade the woman to bear in mind the child's best interests to move to the US but no outcome. 498A filed allegations of cruelty trumped up by 16-year-olds on dowry claims and misappropriation of jewels. Niren provides multiple conflict resolution initiatives (all of which are extremely fair and advantageous for the wife but ask her to return with children to the US), all of which are ignored. Kids show strong symptoms of Rein, were seriously brainwashed and mentally abused, were trained to utter words denigrating father and US by rote. Wife and her parents are deliberately trying to prevent father contact with people by internet, do not enable any Skype sessions, and refuse to allow paternal grandparents to visit people in restaurant / mall, even though everyone lives in Delhi. When Niren later learns, such acts were pre-planned by Wife, with strong encouragement from her husband, and her father, Wife's credit card transactions reveal that she and her family celebrated their imminent behavior by spending 2 weeks before kidnapping children in Delhi on expensive suits and sarees.⁴²

Rana case

Rana is a citizen of the United States who works for a reputed financial firm. His 6-year-old US citizen daughter Nalanda was abducted from the US on November 26th, 2006, and brought to India by his ex-wife Nandini. In 1996 Rana married Nandini. They were blessed with a daughter who we called Nalanda in August 2000. Rana used to take care of daughter Nalanda as his wife followed her work as Nandini was a professional dancer with a burgeoning career and a fledgling dance school. He left for work every morning around 4 a.m. to meet her routine so that he could be back on time at 5:00 p.m. when the students of his wife will arrive. Nandini married the husband of her best friend with whom she had had an extramarital affair during her marriage to Rana after his divorce came through in June 2006. Rana's ex-wife deliberately started cutting down on the time after the marriage, Rana was allowed with his daughter who was very upset by this new arrangement and the new husband of her mother. In these circumstances; Rana was calling for formal access and custody amendments. His ex-wife took his daughter on obtaining this notification, and fled in revenge to India. Rana's daughter's world was once again ripped apart as a result of her mother's chaotic and greedy transfer to India. In

⁴² *ibid*

her age, she was a gifted and talented student and participated in gymnastics, where she was recognized as a potential candidate for the 2012 Olympics. Nalanda still suffers from asthma and was taken away to India under surgical supervision. She was not enrolled in a school in India and stayed home for 6 weeks before she started to go back to school. While, Rana followed a legitimate course of action and, in February 2007, the Court ordered his ex-wife to return his daughter for visitation. The ex-wife of Rana disobeyed the order and violated all the other commands that followed and kept the little girl from talking to her father. Rana was awarded sole custody on 19 Dec and Nandini was given 30 days to return Nalanda to the United States. Rana loves his daughter a lot and needs her back in his life so he can give her a life that she enjoys, emotionally and financially secure. He wants to protect her from the chaos that her mother's greedy actions have put her in again and again.

*Seema Kapoor and another v. Deepak Kapoor and others*⁴³

The High Court of Punjab and Haryana, referred the matter to the Law Commission of India “to examine multiple issues relating to inter-country, inter-parental child abduction by families and, accordingly, determine that proposals should be provided for the implementation of appropriate legislation to join the Hague Convention on child abduction.

*Nithya Anand Raghavan v. State of NCT of Delhi and another*⁴⁴

In the instant case husband and wife both of Indian origin, They married in India and shifted to U.K., Wife came to India and gave birth to female child and returned to U.K. Child also acquired U.K. citizenship. Wife returned to India due to matrimonial disputes with husband and brought the child along with her. On a letter from husband U.K. Judge issued an ex-parte warrant in the U.K Court to compel the wife to deliver the child. Foreign court order isn't binding on Indian courts. Court refuse the child's relief of return to the country from which he / she has been excluded, regardless of the child's pre-existing return order by a foreign court. Court granted child custody to mother - Held by court that

- (1) An Indian court not to be set by foreign court rulings.
- (2) The child's wellbeing should be in the judgment of the international court's child custody case order to the child's welfare.

⁴³ 2016 SCC Online P&H 1225.

⁴⁴ 2017 (8) SCC45.

(3) The Court has the discretion not to transfer a child to a foreign country from which he / she has been withdrawn whether he / she is sure that the going back of child would gain him / her grace or danger of harm, the pre-existing foreign court order can only be one of the factors in deciding child custody proceedings.

(4) India was not yet a signatory to the Hague Convention and therefore, if they applied their minds individually, Indian courts would not violate any international obligations.

(5) No primacy can be granted to the concept of comity of courts when determining disputes for custody.

(6) The Indian court was free to decline the child's compensation for return if it was confident that the child was happy in its new environment.

*Prateek Gupta v. Shilpi Gupta*⁴⁵

Issuance of Writ Habeas Corpus for child custody thus granting habeas corpus should be of paramount importance for child welfare. According to the Guardian and Wards Act, 1890 Baby expelled from his native country and continuing childhood in a world to which he was transferred certainly dangerous as he judged the overall perspective, interpretation and practicality on the touchstone. It should not be dislodged from the atmosphere and context it had been adapted to for its well-being. Doctrine of intimate contact and nearest consideration regarded only when children were uprooted from their native country and experienced unfamiliar climate, language, tradition, etc., with the portent of mutilative effect on their overall growth and grooming process. Child barely 2-1/2 years when he came to India and lived half of his life in India and appellant was biological father of baby, custody not to be interpreted as improperly or unfairly drawing invocation of jurisdiction of question written in the form of habeas corpus, Child till receiving majority would stay in father's custody if passed by court of competent jurisdiction.

⁴⁵2018(1) R.C.R.(Civil) 210.

CHAPTER 6 - SUGGESTION

The generation of today is more inspired with western culture and travel to foreign countries. So they're adopting Western ideas, customs and style of life. To deal with this situation, certain regulations need to be changed without changing the earlier Indian rules. When India decides to become a party to the agreement, it will mean that India must kneel down to Western rules and modify its own practices, so there should be an arrangement or conference that can settle the issue of parent child kidnapping without becoming a party to the Hague Convention.

According to Indian rules, parent abduction in India is not an offence, but in some instances spouses abduct their infant for the sake of their ego. It has significant emotional and psychological impact on the child.

As a bill was introduced in 2016 with objectives of prompt return of children to their habitual residence, but latter no action was taken on it. So government of India should take necessary measures to control parent child abduction. Without kneeling down to the foreign pressure there should be some treaties to control inter parent child abduction, Government of India should set up a special committee with a special objective to be achieved with the best interest of children.

As laws are made in India but not further implemented or bring in action so as related to rules related to parent child abduction earlier bill was passed but no action was taken on it. With emergence of brain drain it has become necessary to make new laws related to divorce, adoption and even parent child abduction.

India without signing Hague convention should sign some treaty with foreign countries in consultation with public at large so that in case of such an issue rules that should be followed and procedures that should be enacted.

CONCLUSION

The convenience of international travel nowadays and also the rise in international marriages contribute to a substantial increase in the number of international child abductions. As more and more Indians go to research or look abroad for better employment opportunities. Abduction destroys a child's sense of history, closeness, values and behavior, knowledge, and a chance to learn his or her origins, customs, culture, ideas and values.

India is one of the countries that decided not to sign the convention despite the fact that India was persuaded by many Western countries to join the convention. In India, assessing the interests of a foreign infant expelled from India by an accused parent in keeping with Indian law can often be clouded and may not be in the child's best interest, and should be decided by laws of child origin.

Given the reality of the Indian ground and the essence of Indian family traditions and family values, it is not in India's interest to join the Hague Convention. Keeping in mind that the child's welfare of India should not only become a signatory to the Hague Convention, but also that India should not enter into any treaties or protocol under western pressure. It is eminently correct, right, right and fair that every dispute involving child custody and guardianship should be determined on a case-by-case basis by Indian courts as protested before Indian courts, without any interference from any one. Judiciary should also play its role to protect the interest of the child. Judges should also considering the matter and fact and circumstances of the decide its matter without and influence from the western ideas.

As India is democratic country if any changes to be made in Indian laws it will not be accepted or appreciated by public as a whole, Indian public will never accept the view on which one parent is considered as abductor. Without considering ground reality it will only lead to violation of rules and public unrest.

Indian courts have also been very respectful of the interests of the non-custodial partner as regards their rights to access their children and thus no discrimination would be faced even by spouses living overseas in the custody of Indian courts as regards the exercising of their right to access to their children. This is in direct contrast to foreign court decisions in which the inclination has been to protect the agitating parent's needs and privileges and their ' equity ' in the infant for the child's supreme benefit, to the significant disadvantage of the child's welfare in many circumstances.

There is no need, no excuse, no purpose and no incentive for any foreign entity to enforce alien ideas and values on Indians, for the Indian government to bow to anybody's pressure on this issue involving the welfare of Indian origin / citizenship children. The Government of India should therefore take the necessary steps and safeguards to ensure that India stays opposed to undue pressure from western government.