
INDIA AND THE HAGUE CONVENTION

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ABSTRACT

The International Convention on the Civil Aspects of International Child Abduction, adopted in 1980, aims to safeguard children from being taken or kept in another country without permission from their rightful guardians. This is done by insisting that the children be returned to their home country, where they usually live, to settle any disagreements about custody. However, India, despite facing the challenges of cross-border abduction, has not signed this crucial international agreement. The Hague Convention emphasizes the child's habitual residence as the primary authority in custody disputes and acts as a deterrent against unilateral actions by parents. India's stance on the convention reveals a debate between officials who argue it may disadvantage Indian women and advocates who stress the importance of preventing child abuse. In the absence of specific national laws, India relies on existing legislation like the Guardians and Wards Act, 1890, to address parental child abductions. The legal battle in India is often protracted, lacking the efficiency seen in countries following the Convention. The Law Commission of India recommended signing the Hague Convention, recognizing the need for a local law. However, the absence of a governing law in India raises concerns about the well-being of children entangled in custody battles. The international community's perspective on India's non-signatory status underscores the potential impact on foreign judges' decisions, emphasizing the need for India to join the Hague Convention for the swift return of abducted children to their homes.

I. INTRODUCTION

The surge in divorce cases and custody disputes has been attributed to the rise of globalization and technological advancements, fostering a hectic lifestyle and demanding work culture. This phenomenon has given rise to international parental child abduction, a situation where one parent relocates a child from one country to another without the other parent's consent, thereby infringing upon parental rights and contact privileges. This has posed a significant challenge in legal arenas, particularly concerning jurisdictional aspects.

In response to the escalating crisis, the international community took action by adopting the International Convention on the Civil Aspects of International Child Abduction on October 25, 1980. This convention, in force since December 1, 1983, aims to shield children from the detrimental consequences of cross-border abduction and retention. Its primary objectives include facilitating the swift repatriation of wrongfully removed or retained children in any Contracting State and ensuring the effective recognition of custody and access rights under the laws of one Contracting State in others. Currently, 101 states have become signatories to this convention, with some, such as Australia, amending their family law legislations to implement the Hague Convention domestically. However, it is noteworthy that India has not yet signed this pivotal international agreement.

II. THE HAGUE CONVENTION

Despite its title emphasizing abduction, the Hague Convention extends its application beyond mere abduction scenarios, encompassing instances where children are taken to another country in violation of custody rights or wrongfully retained in contravention of such rights. The convention operates on the foundational principle that the child's habitual residence country should be the primary decision-making authority in any custody dispute. Recognizing that the state of habitual residence holds the most significant interest in resolving such disputes, it is typically better equipped to assess the merits of custody controversies.

Furthermore, the convention serves as a deterrent against unilateral actions by parents in relocating or removing children from their habitual residence. Countries subscribing to the convention commit to returning children and having all custody matters adjudicated in the jurisdiction where the child was habitually resident. A notable example is the *Tournai v Mechoulam*¹ case, where the Israeli Supreme Court ordered the return of a child to France.

¹Supreme Court of Israel (April 15,1992)

In this case, the French divorce decree mandated joint custody, but the mother had moved to Israel with the child without her husband's consent. This emphasizes the convention's role in upholding international legal standards and ensuring that custody disputes are resolved in the jurisdiction of the child's habitual residence.

III. INDIA'S STAND ON THE CONVENTION: TWO FACED VIEWS

The decision by the Indian government not to sign the Hague Convention on the Civil Aspects of International Child Abduction has sparked a debate, with officials defending their stance on the grounds that signing would disadvantage Indian women. They argue that more Indian women escape troubled marriages abroad, returning to the safety of their homes in India, than non-Indian women leaving with their children. The officials claim that the majority of cases involve women fleeing, not men. Further it is argued that, our courts have the ultimate responsibility for children under *parens patriae* jurisdiction, meaning they act as the ultimate guardians within their jurisdiction. When a father claims a child was taken against a court order granting him custody, the court must decide if sending the child back to a foreign country is in their best interest. In India, foreign judgments aren't automatically recognized, but signing the Hague Convention would require us to acknowledge foreign judgments, even if they might not align with Indian custody laws or were delivered without the father's presence.

While, Advocates for signing the Convention argue that the focus should not be narrowly on "Indian women being abused." They emphasize that child abduction is a form of child abuse with lasting traumatic effects. Reasons for abduction, as per experts, range from frustration with custody arrangements to concerns for safety.

IV. THE BEST INTEREST PRINCIPLE

In the context of international parental child abductions in India, where no specific national law exists, the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956, serve as guiding legislation for child custody and guardianship matters. Despite India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, significant strides have been taken through legislative measures and case laws to address parental child abductions. To expedite the return of an internationally abducted child in India, one recourse is filing a writ petition of Habeas Corpus under Article 32 before the Supreme Court or under Article 226 of the High Court, depending on the jurisdiction where the child is suspected to be. This legal avenue, initiated by the left-behind parent, offers a swift

method for processing the child's return. India's legal framework also includes acts such as the Protection of Children from Sexual Offenses (POCSO) Act, 2012, and the Juvenile Justice (Care and Protection of Children) Act, 2015, prioritizing the welfare of children affected by abduction. Landmark judgments by the Supreme Court underline the rights and protection of the child. In the early case of *Surinder Kaur v Harbax Singh Sandhu*² (1984), the judiciary addressed international parental child abduction, emphasizing the child's welfare and challenging jurisdictional claims. Recent case laws, like *Ravi Chandran v. Union of India*³ (2010) and *Ruchi Majoo vs. Sanjeev Majoo*⁴ (2011), have influenced the legal landscape. The former affirmed Indian courts' jurisdiction over custody matters of Indian children taken abroad, urging international cooperation, while the latter prioritized the child's happiness and well-being in custody disputes.

Additionally, in the case of *Paul Mohinder Gahun v. State of NCT of Delhi*⁵, the Delhi High Court declined to award custody of the child to the father. The court emphasized that considerations of conflict of laws and jurisdictions should be secondary to what serves the best interests of the minor.

V. THE LONG LEGAL BATTLE

In India, when a child is taken without specific laws in place, it's treated as a custody battle. In countries following the Convention, the child's home country orders them to return, and the country they're taken to issues a similar order. This is not a custody decision; it just means sending the child back to their home country, where both parents can then seek custody.

In India, taking a child by a parent is not considered a crime. So, the only legal option for the left-behind parent is to start legal proceedings in the country where the child usually lives. With that court's order, they can then come to India and file a Habeas Corpus case, turning the matter into a custody battle. This legal process in India is known for being slow, and there are very few lawyers who know how to handle such cases, making it expensive for the left-behind parent. Time is crucial for children and this long process might also cause ill effects to them as well.

²1984, 3 SCR 422

³2010, 1 SCC 174

⁴2011, 6 SCC 479

⁵2005, 1 HLR 428

VI. LAW COMMISSION'S REPORT

The Law Commission of India had discussed about this issue giving certain recommendation in its report in 2009, highlighting a crucial point that the term "abduction" is not suitable when a parent is involved, as a parent can't 'abduct' their own child. The Commission suggested creating a local law and endorsing the Convention. The Law Commission of India also suggested that India should sign the Hague Convention. Yet, it is surprising because the report also recognises that it's mostly women who are compelled to return to a foreign country to face custody battles on their own, without support. In 2016, the Ministry of Women and Child Development proposed a bill to prevent parental child abduction, as countries joining the Convention need their own laws on child removal. However, this bill hasn't become a law yet.

VII. CONCLUSION

The Indian judiciary is increasingly acknowledging foreign court jurisdiction through summary return inquiries, although occasional deviations do occur. However, the inconsistency in Indian Courts' decisions regarding minor children reflects a lack of a uniform approach and progressive development in this realm. Some cases prioritize the child's welfare, while others focus on legal technicalities and jurisdictional complexities. This absence of a governing law can adversely impact the physical and emotional well-being of children entangled in fractured relationships.

This situation underscores the need for an international perspective. The absence of India as a signatory to the Hague Convention on the Civil Aspects of International Child Abduction could adversely influence foreign judges deciding on child custody. Without the Convention's assurance of swift return to the country of origin, foreign judges may hesitate to permit the child's travel to India. Therefore, becoming a signatory to the Hague Convention would enhance the prospects of securing the return of children to their homes in India.

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