

THE NEED FOR RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS IN INDIA IN THE CONTEXT OF INTERNATIONAL PARENTAL CHILD ABDUCTION

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ABSTRACT

This article discusses the inherent problem concerning foreign custody jurisprudence. It highlights that despite enormous development at the international level, Indian laws remain unclear and uncertain with respect to the recognition and enforcement of foreign custody judgements. The article argues that the problem could be easily reconciled by the creation and implementation of rule-based norms informed by the considerations in the best interest of the child. Unfortunately, in the absence of constitutional and legislative guidelines, the judges have determined the cases using different methodologies resulting in contradictory conclusions. In addition, the 'best interest of the child' criterion is too broad to result in a rule-based determinant in child abduction cases. Conversely, it has instead limited the powers of the courts when utilised. International parental child abduction is a serious concern, and this article looks at the Indian and international laws that apply to the cases. In the background of such debates, this article attempts to shed light on the current impasse in foreign custody jurisprudence and suggests viable alternatives to the situation.

Keywords: Child Custody, International Child Abduction, Recognition and Enforcement of Foreign Judgement, Child Rights, Hague Child Abduction Convention.

INTRODUCTION

Indian law concerning the recognition and enforcement of foreign custody decrees remains unsettled and ineffective.⁴¹⁸ An appropriate and effective remedy to the problem would simply

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⁴¹⁸ Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021); Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014); VC Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).

be the drafting and application of the rule-based norms within the best interests of the child's concerns.⁴¹⁹ Unfortunately, courts are not constitutionally obligated to apply such norms.⁴²⁰ Furthermore, even when it has been applied, the principle of 'best interests of the child' has not helped prevent the disorders inherent in child abduction cases, but has only embarrassed the courts in their efforts to deal with the problem.⁴²¹ This article discusses the prevailing Indian and international law governing the issue of international parental child abduction. It makes an effort to shed light on the shortcomings of the existing system (which has a tendency to favour transnational child abduction by failing to recognise and implement foreign custody decisions) and offers an alternative to the way things are currently handled in the legal system.

INTER-COUNTRY PARENTAL CHILD ABDUCTION

'Child Abduction' is neither recognised nor defined under any of the statutes in India.⁴²² It is also not a punishable offence within the criminal code of India.⁴²³ Child abduction occurs when a parent breaches a custody decree by removing the child from their habitual residence and taking them to another jurisdiction or keeping the child in a second jurisdiction beyond an authorised visitation period.⁴²⁴ Children abducted and brought into this country are difficult to locate because there is no mandatory registration requirement for children entering the Indian territory from a foreign country. Even if the child is located, there is no assurance that the child will be returned to the custodial parents.⁴²⁵

⁴¹⁹ George J Roman, *Recognition and Enforcement of Foreign Judgments in Various Foreign Countries* (Law Library, Library of Congress 1984).

⁴²⁰ Joseph Landisman, 'Custody of Children: Best Interests of Child vs. Rights of Parents' (1945) 33(2) California Law Review 306.

⁴²¹ Julie E Artis, 'Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine' (2004) 38 Law and Society Review <www.jstor.org/stable/1555090> accessed 17 August 2022; GH Miller, 'The Psychological Best Interest of the Child is Not the Legal Best Interest' (2002) 30 Journal of the American Academy of Psychiatry and Law 196; Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (T MC Asser Press 2017).

⁴²² Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.

⁴²³ Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 Journal of Private International Law 114.

⁴²⁴ Anne-Marie Hutchinson, Henry Setright and Rachel Roberts, *International Parental Child Abduction* (Jordan Publishing Limited 1998).

⁴²⁵ Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.

Parental child abduction disturbs the child's need for security and stability and seriously disrupts his personal relationships, often causing emotional problems.⁴²⁶ Courts have contributed to this problem by taking jurisdiction in custody disputes on tenuous grounds and re-litigating modifiable custody decrees.⁴²⁷ Non-custodial parents are thus encouraged to take away the child and move to a more favourable forum, often 'disappearing' in the process.⁴²⁸

INDIAN RESPONSES

There is no legislation or domestic law in India that specifically provides for the rights of parents in the event of international child abduction.⁴²⁹ The legislation that governs this region is one that is founded on precedent.⁴³⁰ In India, the substantive law that governs the interactions between parents and children is controlled by the general (secular) laws of the country as well as the personal laws of the parents involved.⁴³¹

THE GUARDIANS AND WARDS ACT, 1890

The Guardians and Wards Act of 1890 (*hereinafter*, 'GWA') is a general statute that regulates the legal status of children's upbringing. It is a secular law applicable to all individuals, regardless of their religious beliefs. A 'guardian' is responsible for raising a minor child/ward under this Act.

According to the Indian Majority Act of 1875, a 'minor' is someone who has not turned eighteen, the legal age of majority, as defined by the Guardians and Wards Act of 1890.⁴³² The term 'guardian' refers to a person who is responsible for a juvenile or the juvenile's property, or both.⁴³³ Parents, whether married or single, are often the child's natural guardians. In the event of a disagreement between the parents, one parent may file an application for

⁴²⁶ Anne-Marie Hutchinson, Henry Setright and Rachel Roberts, *International Parental Child Abduction* (Jordan Publishing Limited 1998).

⁴²⁷ Stellina Jolly, 'International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India' (2017) 31 *International Journal of Law, Policy and the Family* 20.

⁴²⁸ Eve M Brank and Lorey Scott, 'The Historical, Jurisprudential, and Empirical Wisdom of Parental Responsibility Laws' (2012) 6 *Social Issues and Policy Review* 26.

⁴²⁹ Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 *Macquarie Law Journal* 38.

⁴³⁰ Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021); Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).

⁴³¹ Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) *Family Law Quarterly* 441.

⁴³² Guardians and Wards Act 1890, s 4(1); Indian Majority Act 1875, s 9.

⁴³³ Guardians and Wards Act 1890, s 4(2).

guardianship under Section 7 of the GWA.⁴³⁴ This authority is exercised by the courts in consideration of the child's welfare and in conformity with Section 17 of the GWA.

The GWA and other family-related personal laws in India give a legal means for remedial recourse. Section 24 of the GWA outlines the responsibilities of a guardian. It states that a guardian is responsible for the child's care and must provide support for the child's health, education, and other legal requirements.⁴³⁵ Therefore, if the responsibilities outlined in Section 24 are not met, remedies under the Act can be sought by filing a petition in the court.⁴³⁶

Section 43 of the Act permits the court to issue orders restricting the behaviour or actions of guardians, as well as the implementation of such orders.⁴³⁷ The court has the authority to issue an order limiting the behaviour or actions of any guardian appointed or declared by the court, either in response to an application filed by an interested party or on its own initiative.⁴³⁸ If there is more than one guardian for a child and those guardians are unable to reach a decision on an issue that affects the child's welfare, any one of the guardians may petition the court for direction, and the court may issue whatever order it considers to be appropriate.⁴³⁹ The court will transmit notice of the application or intention to the guardian or guardian who did not make the application prior to the making of the order unless it seems that the delay would undermine the purpose of the preceding orders. In this case, the court will not send the notice. This order can be enforced in the same manner as an injunction that was granted in accordance with either Section 492 (now Order 39, rule 1) or Section 493 (now Order 39, rule 2) of the Code of Civil Procedure of 1882. Under this clause, orders can be issued against a court-appointed or proclaimed guardian.⁴⁴⁰

PERSONAL LAWS

The following personal laws apply to the relevant parties in India, but only if they follow one of the recognised religions. In case of an inter-religious marriage, if the marriage has taken

⁴³⁴ Guardians and Wards Act 1890, s 7.

⁴³⁵ Guardians and Wards Act 1890, s 24.

⁴³⁶ Sai Ramani Garimella and Stellina Jolly, *Private International Law South Asian States' Practice* (Springer Nature 2017).

⁴³⁷ Guardians and Wards Act 1890, s 43.

⁴³⁸ R Lakshana, 'Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues' (2018) 5(2) *Indian Journal of Law & Public Policy* 11.

⁴³⁹ Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) *Family Law Quarterly* 441.

⁴⁴⁰ Code of Civil Procedure 1908.

place in accordance with the secular law, then only the secular law will apply.⁴⁴¹ Otherwise, the law according to which the marriage took place shall be the governing law of the parties to the dispute.⁴⁴²

WHEN BOTH PARENTS ARE HINDU BY VIRTUE OF THE DEFINITION OF ‘HINDU’ UNDER INDIAN LAW

The definition of ‘Hindu’ within Indian law is quite vast and includes the religion of Buddhism, Jainism, Sikhism and any other practice or belief not corresponding to Islam, Zoroastrianism or Christianity.⁴⁴³ Both the Hindu Minority and Guardianship Act of 1956 and the Hindu Adoptions and Maintenance Act of 1956 address the care and welfare of minors.⁴⁴⁴ The courts are required to examine these two acts in conjunction with the Guardian and Wards Act since their provisions are complementary.⁴⁴⁵ When considering the custody and guardianship of a minor child, the child's best interests must take precedence.⁴⁴⁶ The idea of well-being must be carefully considered and interpreted broadly.⁴⁴⁷ Therefore, the court must evaluate the child's moral and physical health as well as their emotional and loving attachments.

Concerning very young children, it is well-established through a series of Supreme Court decisions that the mother should have custody, as the father is unable to provide maternal tenderness (considered essential for the child's proper growth and psychological development).⁴⁴⁸ The Hindu Minority and Guardianship Act stipulates that the mother shall be granted custody if a child is under five years of age.⁴⁴⁹ Other religious laws do not include such specific restrictions.

⁴⁴¹ V C Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).

⁴⁴² *ibid.*

⁴⁴³ Constitution of India 1950, art 25(2)(b).

⁴⁴⁴ Hindu Minority and Guardianship Act 1956; Hindu Adoptions and Maintenance Act 1956.

⁴⁴⁵ Asha Bajpai, ‘Custody and Guardianship of Children in India’ (2005) 39(2) Family Law Quarterly 441.

⁴⁴⁶ Stellina Jolly, ‘International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India’ (2017) 31 International Journal of Law, Policy and the Family 20.

⁴⁴⁷ Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021); Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).

⁴⁴⁸ R Lakshana, ‘Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues’ (2018) 5(2) Indian Journal of Law & Public Policy 11.

⁴⁴⁹ Hindu Minority and Guardianship Act 1956, s 6(a).

WHEN THE MUSLIM LAW IS APPLIED TO THE PARTIES

The Muslim Personal Law as per the (*Shariat*) Application Act of 1937 governs Muslims within India (except in the State of Goa).⁴⁵⁰ In Islam, the custody of a minor child is referred to as '*hizanat*', which literally translates to 'care of the new-born'.⁴⁵¹ According to Sharia law, the father is the natural guardian of his children regardless of their gender. However, the mother can have custody of her boy until the age of seven and her daughter until she reaches puberty. Therefore, according to Muslim law, a male attains adulthood/majority at the age of seven, while a girl does so upon reaching puberty.⁴⁵² As noted previously, the Guardianship and Ward Act permits the application of the minor's personal law.⁴⁵³ Additionally, GWA provides that a guardian shall be appointed in line with the personal law applicable to the parties.⁴⁵⁴

In *Akhtar Begum v. Jamshed Munir*,⁴⁵⁵ the High Court of Delhi declared that 'the personal law of the parties must be considered when evaluating an application for custody under Section 6 of the Act.' If a court fails to do so, it would be operating improperly and with substantial irregularity.

While analysing the concept of custody of a minor child and guardianship in *Athar Hussain v. Syed Siraj Ahmed*,⁴⁵⁶ the court ruled that guardianship and custody are different, depending on the situation. The father might be the natural guardian, but custody can be given to someone else. The court cannot appoint another guardian unless the father is unfit to be one, per Section 19 of the GWA. In this case, the Family Court and the High Court deemed the father unfit. The court ruled that although the father is the child's natural guardian, the child's well-being may imply that another friend or family should have legal custody.

CHRISTIAN LAW AS APPLIED IN INDIA

In biblical law, guardianship might be separate from custody. Christian law follows the 1869 Indian Divorce Act regarding custody (*hereinafter*, 'IDA').⁴⁵⁷ The Act does not discriminate on the basis of religion. Section 41 of the act addresses child custody rulings following a

⁴⁵⁰ Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (19th edn, 1990).

⁴⁵¹ Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Armdt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (T MC Asser Press 2017).

⁴⁵² Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (19th edn, NM Tripathi 1990).

⁴⁵³ Guardianship and Wards Act 1890, s 6.

⁴⁵⁴ Guardianship and Wards Act 1890, s 17.

⁴⁵⁵ *Akhtar Begum v Jamshed Munir* AIR 1979 Delhi 67.

⁴⁵⁶ *Athar Hussain v Syed Siraj Ahmed* (2010) 2 SCC 654.

⁴⁵⁷ Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford University Press 2014).

divorce.⁴⁵⁸ In any action to obtain a judicial separation, the court may, from time to time, prior to rendering its decree, make such interim orders and decree provisions as it deems appropriate with respect to the custody, maintenance, and education of the minor children whose parents' marriage is the subject of the action, and may, if it deems it appropriate, direct proceedings to be taken for placing such children under the protection of the court.⁴⁵⁹

IN CASE OF PARSI LAW

The Parsi Marriage and Divorce Act of 1936 governs the legal status of children in Parsi households. In any action brought under this Act, the court may issue interim orders and include such provisions in the final decree regarding the custody, support, and education of children under the age of 18 whose parents' marriage is the subject of the action.⁴⁶⁰ In such instances, the court may make, cancel, suspend, or modify any orders and provisions regarding the custody, support, and education of the children that could have been made by the final decree or interim orders if the action to acquire the decree were still continuing.⁴⁶¹

There is a significant distinction between custody and guardianship in India. Guardianship is a more valuable and complete right than custody.⁴⁶² As a result, guardianship and trusteeship are quite similar concepts. In addition, a guardian's duties are somewhat more onerous than those of a normal custodian. For instance, custody could only be granted for a short period of time and should serve a specific purpose.⁴⁶³ When parents are married and are living together, they share joint custody and are jointly responsible for the child's upbringing. In the event of separated/divorced parents, legal responsibility for the kid rests with the parent who has been designated 'guardian' by the court and given legal custody.

Typically, the mother is granted legal custody of the children in India. However, even in situations where the mother is given legal custody, the father is legally obligated to provide financial assistance for the child's upbringing, and the courts will issue an order to this effect when declaring guardianship and awarding custody. Since there is no legal distinction between

⁴⁵⁸ Indian Divorce Act 1869.

⁴⁵⁹ Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford University Press 2014).

⁴⁶⁰ Phiroz K Irani, 'The Personal Law of the Paris of India' JND Anderson (ed), *Family Law in Asia and Africa* (Routledge 2021).

⁴⁶¹ *ibid.*

⁴⁶² Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.

⁴⁶³ Sonali Abhang, 'Guardianship and Custody Laws in India- Suggested Reforms from Global Angle' (2015) 20(7) IOSR Journal of Humanities And Social Sciences 39.

legitimate and illegitimate children in Hindu law, the father will be required to offer financial support for the child's upbringing, even if the mother is the 'natural' guardian.⁴⁶⁴ There is no legal distinction between a father who is included on the child's birth certificate and a father who is not. According to this philosophy based on established law, there is no distinction between the legal rights of legitimate and illegitimate offspring.

RESPONSE OF THE COURTS IN CHILD ABDUCTION CASES

Consequently, it is evident from the debate that there is no legislation or domestic law that specifies parental rights in cases of international child abduction. This domain is governed by precedent-based law.

India is not a signatory to the 1980 HCCH Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) or any other treaty or convention in this area. Therefore, India is not required to repatriate a kid to the nation from where it was illegally abducted.

However, the Supreme Court of India recently ruled that the principle of comity of nations applies when children are wrongfully removed from the jurisdiction of foreign countries to which they belong and that the parties should be returned to the jurisdiction of the court with the closest relationship to the child. The custody question should be decided definitively by the courts in that nation.

The law that the Supreme Court of India has established has evolved through time. The following decisions provide insight into the principles utilised by Indian courts while deciding international child abduction cases:

In *Surinder Kaur Sandhu v. Harbax Singh Sandhu*,⁴⁶⁵ the Supreme Court has ruled that the doctrine of conflict of laws favours the jurisdiction of the state having the closest connection to the case's concerns. The court said that allowing another state to assume jurisdiction in such situations would promote forum-shopping.

In *Elizabeth Dinshaw v. Arvand M. Dinshaw*,⁴⁶⁶ the Supreme Court of India adopted a child-centric approach. It stated that if a custody dispute involving a child comes before a court, the

⁴⁶⁴ Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.

⁴⁶⁵ *Surinder Kaur Sandhu v Harbax Singh Sandhu* AIR 1984 SC 1224.

⁴⁶⁶ *Elizabeth Dinshaw v Arvand M Dinshaw* (1987) 1 SCC 42.

matter must be settled without regard to the legal rights of the parents, but exclusively and predominantly on what is in the best interest of the child.

*Dr. V Ravi Chandran v. Union of India*⁴⁶⁷ is an important case towards recognition and enforcement of foreign custody orders. In this case, the mother fled to India with her child and was subsequently untraceable. The Supreme Court ordered the Central Bureau of Investigation (CBI) to locate the child. The child was seized by the CBI in Chennai and returned to US court jurisdiction.

Similarly, in *Shilpa Aggarwal v. Aviral Mittal*,⁴⁶⁸ the Supreme Court of India ruled that child custody disputes should be decided by the courts having the closest connection to the problem at hand. In this instance, both parties, permanent citizens of the United Kingdom, travelled to India with their three-year-old daughter. The father filed a petition for custody of his daughter when the mother refused to return the child to England. The Supreme Court ruled that the English courts, where both parents lived continuously, should decide the child's custody based on the comity of courts and the child's best interests.

However, in *Ruchi Majoo v. Sanjeev Majoo*,⁴⁶⁹ the Supreme Court decided that the courts in India have *parens patriae* jurisdiction over children, which is an onerous responsibility. As the child's welfare is an essential issue, the Supreme Court declared that even if a foreign court has a definite opinion on the minor's welfare, Indian courts cannot forego an independent examination with objectivity. However, the Court added that this does not mean that foreign court orders should still be regarded and the welfare of the child shall remain the pivotal principle over all other considerations.

However, this case was overruled in *Arathi Bandi v. Bandi Jagadrakshaka Rao*.⁴⁷⁰ The Supreme Court adopted its reasoning in the *Dr. V Ravi Chandran case*.⁴⁷¹ It held that when a parent removes the child from the foreign nation to India in contravention of the domestic court's decision, they cannot avail any remedy. The Supreme Court expressly endorsed the current idea of Conflict of Laws, which favours the recognition of the jurisdiction of the state having the closest connection to the dispute.

⁴⁶⁷ *Dr V Ravi Chandran v Union of India* (2010) 1 SCC 174.

⁴⁶⁸ *Shilpa Aggarwal v Aviral Mittal* (2010) 1 SCC 591.

⁴⁶⁹ *Ruchi Majoo v Sanjeev Majoo* (2011) 6 SCC 479.

⁴⁷⁰ *Arathi Bandi v Bandi Jagadrakshaka Rao* 2013 (15) SCC 790.

⁴⁷¹ *Dr V Ravi Chandran v Union of India* (2010) 1 SCC 174.

The Supreme Court gave due consideration to the child's choice while deciding the case in *Jitender Arora v. Sukriti Arora*.⁴⁷² The Supreme Court of India has ruled in favour of a 15-year-old girl who was taken from the UK to India by her father. Her mother filed a habeas corpus petition asking that she be returned to the UK. But the teenager said she did not wish to travel to the United Kingdom to be with her dad, and the Supreme Court upheld the child's right to choose to be equivalent to the best interest of the child, when they are able and willing to take a rational decision regarding their custody.

In *State of N.C.T. v. Nithya Anand Raghavan*,⁴⁷³ the Supreme Court reaffirmed its ruling in *Dr. V Ravi Chandran* case⁴⁷⁴ that India's Courts could not be divested of their authority to refuse the return of a child to their home country. However, the Court remarked that such situations must be evaluated on a case-by-case basis, regardless of whether a summary or in-depth investigation is conducted.

In *Prateek Gupta v. Shilpi Gupta*,⁴⁷⁵ the Supreme Court extensively discussed the principles of 'intimate contact' and 'closest connection'. The court held that the concept of comity of courts and principles of 'intimate contact' and 'closest connection' must be evaluated based on the facts of each case. In situations of child abduction, a court may adopt either a summary inquiry or order the child's prompt return to its home country. The court has been of the opinion that these cases should not be rule-based. Instead, the facts of each case and the opinion of the judge based on common law principles and the welfare of the child should be the guiding force in such cases.

The latest and the most controversial case of international parental child abduction to date is the case of *Kanika Goel v. The State of Delhi*.⁴⁷⁶ The question cannot be resolved primarily on the rights of the parties vying for custody of the minor, the three-judge bench in this case declared, and the emphasis must instead be on whether the child's return to the country of origin is in their best interests. Most importantly, the court held that the fact that the minor child's prospects will improve with repatriation might be important in substantive proceedings for custody of the minor but it will not be crucial when examining threshold concerns in a habeas corpus petition. Thereby restating that the Court is under a responsibility to objectively

⁴⁷² *Jitender Arora v Sukriti Arora* 2017 (3) SCC 726.

⁴⁷³ *State of NCT v Nithya Anand Raghavan* (2017) 8 SCC 454.

⁴⁷⁴ *Dr V Ravi Chandran v Union of India* (2010) 1 SCC 174.

⁴⁷⁵ *Prateek Gupta v Shilpi Gupta* (2018) 2 SCC 309.

⁴⁷⁶ *Kanika Goel v The State of Delhi* (2018) 9 SCC 578.

determine over the admission of the writ petition for the return of the child. The result in this case was that the child was taken away from the US embassy in Nepal to the father in Chicago, and the US government upheld the action by the father since the father already had the decision in his favour.⁴⁷⁷

INTERNATIONAL RESPONSES - THE HAGUE CONVENTION

Unlike the proposed draft, the Hague Convention does not formulate recognition and enforcement standards; rather, it requires the prompt restoration of the custody that existed before the abduction.⁴⁷⁸ The Hague Convention is intended to deter child abductions by putting potential abductors 'on notice' that the removal of a child to, or retention in, a country other than the child's habitual residence will result in the prompt return of the child.⁴⁷⁹ The Hague Convention has two specific objectives. First, it discourages child abduction across international borders by securing the expeditious return of the wrongfully removed or retained child in any contracting state. By returning the situation to the way it was before the abduction, the Convention removes the benefit sought by the abducting parent. The child's speedy return and the restoration of the pre-abduction custody status deprive the abductor of any legal or practical benefits of acting outside the law.⁴⁸⁰ Subsequent litigation on the rights of custody is not prohibited once the child's return is accomplished.⁴⁸¹

The second objective of the Hague Convention is to ensure that the law of custody and access rights in one state is effectively respected in the other. The protection of the non-custodial parent's right of access is provided for in Article 21.⁴⁸² In essence, the Hague Convention is structured to secure the prompt return of a child under sixteen who is wrongfully removed or retained after an award of custody has been made.⁴⁸³

Thus, to order the immediate return of the child, the court, under the Convention, must find that (1) the child was wrongfully removed from his habitual residence and (2) proceedings

⁴⁷⁷ Ned Price, 'Department Press Briefing- May 5, 2022' (*US Department of State*, 05 May 2022) <www.state.gov/briefings/departments-press-briefing-may-5-2022/> accessed 30 September 2022.

⁴⁷⁸ Rhona Schruz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *International and Comparative Law Quarterly* 771.

⁴⁷⁹ *ibid.*

⁴⁸⁰ Stellina Jolly, 'International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India' (2017) 31 *International Journal of Law, Policy and the Family* 20.

⁴⁸¹ Rhona Schruz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *International and Comparative Law Quarterly* 771.

⁴⁸² Convention on the Civil Aspects of International Child Abduction 1980, art 21.

⁴⁸³ Convention on the Civil Aspects of International Child Abduction 1980, art 4.

were instituted within the Convention's one-year statute of limitations. If one year or more has passed, the authority is required to order the return of the child unless the child is now settled in his new environment.⁴⁸⁴

Article 13 provides two of the three limited exceptions to Article 12's return requirement. Under Article 13, the judicial authority may refuse to return the child if the person who opposes the child's return establishes that the child's custodian was not exercising his custody rights at the time of removal or retention, that the custodian has consented to or subsequently acquiesced in the removal or retention; or that a grave risk of physical or psychological harm or otherwise intolerable situation would await the child upon return.⁴⁸⁵ The 'harm to the child' exception does not include economic or educational disadvantage.⁴⁸⁶ The Hague Convention is a step in the right direction to decrease the number of child abductions. Nevertheless, it has its own shortcomings, which acceding nations must minimise to most effectively implement the Convention.⁴⁸⁷

Perhaps the Convention's most apparent weakness is that the non-convention countries may become haven states for abducting parents.⁴⁸⁸ Ultimately, the effectiveness of the Convention may depend more upon its adoption by a large number of states than on its precise terms.⁴⁸⁹ Ideally, public pressure will encourage governments to ratify the Convention, thus significantly reducing the haven state problem.⁴⁹⁰

Another weakness is that judicial discretion is still permitted under the aforementioned exceptions to immediate return. If the Courts construe these exceptions too broadly, the purpose of the Convention will be significantly hampered. Thus, the requested Court should exercise its discretion and assert jurisdiction to protect the child only in an actual emergency.⁴⁹¹ The third weakness of the Convention is that it may only be invoked if the removal or retention is deemed wrongful. Article 3 of the Convention states that removal or retention is deemed

⁴⁸⁴ Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021).

⁴⁸⁵ Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 *Journal of Private International Law* 114.

⁴⁸⁶ *ibid.*

⁴⁸⁷ Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 *Macquarie Law Journal* 38.

⁴⁸⁸ *ibid.*

⁴⁸⁹ Sai Ramani Garimella and Stellina Jolly, *Private International Law South Asian States' Practice* (Springer Nature 2017).

⁴⁹⁰ Sarah Viger, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing 2011).

⁴⁹¹ Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 *Journal of Private International Law* 114.

wrongful: (1) if it breaches the custody rights of the applicant under the law of the child's state of habitual residence; and, (2) when at the time of the removal or retention those rights were actually being exercised "but for" the abductor's actions.⁴⁹² An abducting parent who removes the child before a custody decree is granted does not breach any existing custody right; hence, his act is not wrongful under the Convention.⁴⁹³

Another area for concern is the limitation period of one-year post-abduction/retention for invoking the Convention.⁴⁹⁴ This statutory limitation is especially problematic for those parents who do not know where their children have been taken.⁴⁹⁵ Thus, a parent who successfully takes away the child and remains undetected for over a year may ultimately benefit.⁴⁹⁶

Finally, there is the question of how the courts will apply the Convention. A court that is petitioned by the custodial parent essentially pass it over at times.⁴⁹⁷ In such cases, the court hearing the petition essentially states, "*The jurisdictional courts of the country issuing the order are responsible for that, not us,*" by refusing to recognise and enforce the other country's decree.⁴⁹⁸ Therefore, the court simply sends the parties back to the country that issued the decision.⁴⁹⁹ On the other hand, if India recognises and enforces the foreign custody decision, it may benefit India's foreign policy.⁵⁰⁰

By taking the initiative in recognising and enforcing the foreign decree, India will be sending a message to the foreign nation that India will not interfere with the court decisions of that country, even at the expense of Indian citizens.⁵⁰¹ Hopefully, this will lead to reciprocal

⁴⁹² Anne-Marie Hutchinson, Henry Setright and Rachel Roberts, *International Parental Child Abduction* (Jordan Publishing Limited 1998).

⁴⁹³ Rhona Schruz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *International and Comparative Law Quarterly* 771.

⁴⁹⁴ Convention on the Civil Aspects of International Child Abduction 1983, art 12.

⁴⁹⁵ Sarah Viger, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing 2011).

⁴⁹⁶ V C Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).

⁴⁹⁷ Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 *Macquarie Law Journal* 38.

⁴⁹⁸ George J Roman, *Recognition and Enforcement of Foreign Judgments in Various Foreign Countries* (Law Library, Library of Congress 1984).

⁴⁹⁹ Amanda Michelle Waide, 'To Comply or Not to Comply? Brazil's Relationship with the Hague Convention on the Civil Aspects of International Child Abduction' (2010) 39 *Georgian Journal of International and Comparative Law* 271.

⁵⁰⁰ VC Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).

⁵⁰¹ Adeline Chong, 'Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia' (2020) 16 *Journal of Private International Law* 31.

treatment by foreign countries of the recognition and enforcement of Indian court decrees.⁵⁰² All countries have a strong interest in protecting their own citizens. However, that interest must give way, if countries hope to gain the return of their abducted children.⁵⁰³ If a country refuses to enforce a custody decree of another country and return the child to that other country, how can it ever expect to get anything but like treatment? When a parent kidnaps their child in violation of an already-issued custody decree, he should not be allowed to benefit by hiding behind the interest that his homeland has in him as one of its citizens.⁵⁰⁴ Reciprocity would clearly further any country's foreign, as well as public policy.⁵⁰⁵ By recognising and enforcing the custody decrees of other nations, any nation could hope to receive equal treatment. This would strengthen ties between the reciprocating nations.⁵⁰⁶ Furthermore, public policy would be furthered in that aggrieved parents will ultimately benefit from the recognition and enforcement of the foreign decree when their children are returned.

THE ALTERNATIVE: RECOGNITION AND ENFORCEMENT

Although the Hague Convention is a significant effort at alleviating the problems of parental child abduction in the international arena, a recognition and enforcement statute would make it much more likely that a custodial parent from a foreign country could better enforce a custody order against an abducting non-custodial parent.⁵⁰⁷

While no clear consensus exists on the underlying motivation for recognition and enforcement of any foreign judgment, several rationales have been put forward in favour of such action. They include: (1) the avoidance of duplicating judicial efforts; (2) the protection of the successful foreign litigant from harassing or evasive manoeuvres; (3) the promotion of a stable and uniform international order; (4) the belief that in certain instances, the rendering forum is more appropriate than the recognising jurisdiction; and (5) recognition and enforcement of foreign custody decrees furthers Indian foreign policy.

⁵⁰² Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 *Macquarie Law Journal* 38.

⁵⁰³ Adeline Chong, 'Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia' (2020) 16 *Journal of Private International Law* 31.

⁵⁰⁴ R Lakshana, 'Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues' (2018) 5(2) *Indian Journal of Law & Public Policy* 11.

⁵⁰⁵ Shruti Sahni, Samanvi Narang and Sunidhi Setia, 'Custody of Children in India- An Inter-Country Dispute' [2021] *Design Engineering* <<https://pure.jgu.edu.in/id/eprint/1201/>> accessed 22 August 2022.

⁵⁰⁶ Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).

⁵⁰⁷ Sarah Viger, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing 2011).

An analysis of the previous sections brings to the fore the sense of frustration the ‘victimised’ parent must experience when seeking relief through the courts in these matters.⁵⁰⁸ Indian ideals expect that each nation, when awarding custody to a parent or guardian, should base its judgment on the investigations and advice of a support system of social workers and psychologists so superior and knowledgeable that their recommendation for custody is flawless.⁵⁰⁹ In practice, however, this ideal has been unattainable, and the only other solution is to uphold and respect the decree set down by the issuing nation, whether flawless or not, as a definite enforceable standard must be set in this sensitive dilemma.⁵¹⁰ Nations finding themselves the harbourers of parental child abduction would then be required to enforce the decree of the foreign nation and return the child to the custodial parent. If nations want rule-based order for regulating parental abduction cases, they must honour, rather than scrutinize and then modify, the decrees of other nations and send back the children of those nations. To put it plainly, the current legal framework has to be upgraded.⁵¹¹

Claims of child abuse as the reason for having fled with a child should be the only exception, and these, of course, should be carefully investigated by the petitioning nation.⁵¹² If the abducting parent can prove that the child would be subject to danger if the original decree were enforced, there should be an exception to the absolute recognition and enforcement standard proposed. The burden of proof, of course, should be on the abducting parent to prove that the danger exists to the child in question.

IMPLEMENTATION OF A RECOGNITION AND ENFORCEMENT STANDARD

Although not the focus of this article, a few brief words on implementing a recognition and enforcement standard should be mentioned. The Central Government may assume power over the proposed Indian recognition and enforcement law in either one of three principal ways: the exercise of the treaty-making power, a protocol to the existing treaty, or the enactment of a

⁵⁰⁸ Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021).

⁵⁰⁹ George J Roman, *Recognition and Enforcement of Foreign Judgments in Various Foreign Countries* (Law Library, Library of Congress 1984).

⁵¹⁰ Adeline Chong, ‘Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia’ (2020) 16 *Journal of Private International Law* 31.

⁵¹¹ Stellina Jolly and Aditya Vikram Sharma, ‘Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration’ (2021) 17 *Journal of Private International Law* 114.

⁵¹² *ibid.*

central statute. The crystallisation of law through multilateral treaties would be the preferred method for two reasons.⁵¹³ First, distrust between diverse political and economic systems remains a fact of life. A mutually negotiated and satisfactory treaty would do much to alleviate these problems, particularly concerning troublesome countries like the USA and Norway.⁵¹⁴ Furthermore, a greater likelihood exists that respective concerns will be addressed and resolved in a treaty, thus leading to reciprocal recognition agreements. Second, exercising the treaty power as the vehicle for recognising foreign decrees would enable the federal branches of government to weigh foreign policy considerations.

The second alternative for implementation would be a protocol to the existing treaty. Although a protocol to an existing treaty requires the same implementation process (and this carries with it the same advantages) as that of a multilateral treaty, this alternative would not be as effective. Problems may arise in attempting to alter the convention in its current state from an intentionally vague and deliberately simple treaty to a specific recognition and enforcement treaty. A discussion of these problems, however, is outside the purview of this article.

The last avenue of implementation could be through the enactment of a Central government legislation.⁵¹⁵ Central legislation of foreign decree recognition practices would strengthen Indian recognition law.⁵¹⁶ The benefits received from the exercise of centre treaty-making power, namely, reciprocity and the furtherance of Indian foreign policy, would also accrue from a central statute. A crucial distinction, however, is that a treaty would promote greater international stability because it represents a more direct approach to redressing the current problem areas India faces with regard to other countries. India is not a signatory to the HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention) and therefore is not under an obligation to return a child to the country from which they had been wrongfully removed. India is also not a signatory to the:⁵¹⁷

⁵¹³ Sonali Abhang, 'Guardianship and Custody Laws in India- Suggested Reforms from Global Angle' (2015) 20(7) IOSR Journal of Humanities And Social Sciences 39.

⁵¹⁴ Apoorva Mandhani, 'Submissions to the Committee on the Hague Convention on the Civil Aspects of International Child Abduction' (*LiveLaw*, 30 September 2017) <www.livelaw.in/lawyers-collective-urges-centre-not-sign-hague-convention-civil-aspects-international-child-abduction-read-submission/?infinitemscroll=1> accessed 22 August 2022.

⁵¹⁵ Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 *Macquarie Law Journal* 38.

⁵¹⁶ Sai Ramani Garimella and Stellina Jolly, *Private International Law South Asian States' Practice* (Springer Nature 2017).

⁵¹⁷ Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).

- Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation).
- HCCH Convention on the jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children 1996 (Child Protection Convention).

The law relating to international child abduction is precedent-based law and there is no specific statute/convention governing the courts in India.⁵¹⁸ Repatriation of the child is done based on the principles of comity of law (under which states will mutually recognise each other's legislative, executive, and judicial acts).⁵¹⁹ However, precedence is always given to the welfare of the child. In a recent judgment of the Supreme Court, it has been held that the essence of the judicial decision on the issue of repatriation of a child removed from its native country must be clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of 'intimate contact and closest concern'.⁵²⁰ Though the principle of comity of courts and the above doctrines in a foreign court are factors that deserve notice in deciding the issue of custody and repatriation of the child, it is no longer *res integra* (a question that has not been examined or undecided) that the overriding determinant would be the welfare and interest of the child.

CONCLUSION

India is unlikely to sign the Hague Child Abduction Convention, which makes inter-country abduction of children by parents a punishable offence. It has been observed that signing the Convention may go against the interests of women who escape bad marriages. The solution indicated by the current Government was to implement an internal mechanism to redress complaints from women who have run away from violent marriages and returned to India with their children. The Justice Bindal committee/Chandigarh committee submitted a draft of 'The Protection of Children (Inter-Country Removal and Retention) Bill 2018' to the Ministry of

⁵¹⁸ V C Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).

⁵¹⁹ Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021).

⁵²⁰ *Amyra Dwivedi v Abhinav Dwivedi* (2021) 4 SCC 698; *Yashita Saho v State of Rajasthan* (2020) 3 SCC 67; *Varun Verma v State of Rajasthan* 2019 SCC OnLine Raj 5430; *Kanika Goel v State (NCT of Delhi)* (2018) 9 SCC 578; *Lahari Sakhamuri v Sobhan Kodali* (2019) 7 SCC 311.

Women and Child Development (WCD) on 23 April 2018.⁵²¹ The Bill attempts to set the stage for India to sign the Hague Child Abduction Convention.

India is yet to be a signatory to the Convention. The Panel has prepared a draft law to safeguard the interests of children, as well as those of the parents, particularly mothers. Returning a child to the place of habitual residence may result in sending the child to an incompatible set-up. It may overlook the fact that a mother is the primary caregiver of the child. International child abduction is a problem of significant dimensions. The present laws need to be revised in several respects. The broad discretion given to Courts and the general mistrust of foreign judgments by Indian judges severely limits and weakens any positive attributes the initiative taken by the Law Commission and the draft statute by the Ministry of Women and Child Development may have had in the international context.

At best, the Hague Convention will deter child abductions by parents who are either "*located*" by the victimised parent or who attempt to 'legitimise' their wrongdoing within one year of abduction. The Convention's most significant shortcoming, however, is that it is not a recognition and enforcement treaty; thus, courts are still free to exercise discretion and take jurisdiction when it is deemed to be "*in the best interest of the child.*" This, in turn, undermines international stability and certainty in dispute resolution. It is hoped that once India begins to recognise foreign custody decrees, the remedy sought by the injured party can be granted by enforcing the relief provided for in the foreign decree.

⁵²¹ Law Commission of India, *The Protection of Children (Inter-Country Removal and Retention) Bill* (Report No 263, 2016) <<https://lawcommissionofindia.nic.in/reports/Report263.pdf>> accessed 22 August 2022.