

DILEMMAS IN CROSS NATIONAL CHILD CUSTODY DISPUTES: NEED REVISITATION

Dr. Anisa Shaikh, Assistant Professor, New Law College, Bharati Vidyapeeth (deemed to be) University, Pune

Akhil V. Nadar, Student, 2nd Year, LL.B. 3 Year, New Law College, Bharati Vidyapeeth (deemed to be) University, Pune

Dharani Dharan V., Student, 2nd Year, LL.B. 3 Year, New Law College, Bharati Vidyapeeth (deemed to be) University, Pune

Abstract:

The Indian legal system regarding child custody is primarily governed by the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956 and other religion specific Laws. These laws provide a framework for determining who should have custody of a child in case of separation or divorce. In India, the best interests of the child are considered the primary consideration when determining custody. The court may award custody to either the father or the mother, depending on various factors such as the financial stability of each parent, the age of the child, and the capability to provide a stable and loving environment for the child by each parent. Western countries, such as the United States, follow the principle of determining custody by considering the best interests of the child. In the US, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides a framework for determining jurisdiction and enforcing custody orders across states. The law aims to ensure that custody decisions made in one state are recognized and enforced in other states. The US legal system recognizes joint custody, where both parents have equal legal and physical custody of the child. Many foreign courts are hesitant to grant Right to access of Child to Parents living in India as they are fearful that, the child may be retained and since India is not a signatory to the convention, return of the child to the habitual residence will be difficult, such reservations will come to an end if India becomes a signatory.

Key words: Child, Custody, Guardianship, Minor, visitation, access, abduction, jurisdiction, inter parental

Introduction:

With the rise of globalization, it is becoming more common for families to live in different countries. In situations where a dispute breaks out between the parents, it has been a common observation that a parent may

relocate internationally with their children without the assent of the other parent, as a result of which disputes over custody and access can arise. This creates complex legal challenges that require a coordinated international response. International child custody disputes can be challenging because they often involve conflicting laws and legal systems with different sets of jurisprudence. In order to address these challenges, international child custody laws have been developed to provide a legal framework for resolving disputes that cross international boundaries. These laws typically aim to secure the child's best interest are protected, while also respecting the rights of both parents.

One of the crucial laws for international child custody is the Hague Convention on the Civil Aspects of International Child Abduction. This treaty provides a legal framework for the timely return of allegedly abducted children to their country of habitual residence, so that custody and access issues can be determined by the courts in the child's home country. In addition to the Hague Convention, there are other international agreements and treaties that address various aspects of disputes related to international child custody. For instance, the European Convention on Recognition and Restoration of Custody of Children and Enforcement of Decisions concerning Custody of Children on 1980, provides a legal framework for the recognition and enforcement of custody decisions between European countries.

Indian judiciary took cognizance of this issue in the case of **Seema Kapoor Vs Deepak Kapoor [CR No.6449 of 2006]**, where the petitioners challenged the order dated 03.11.2006 passed by the Additional Civil Judge (Senior Division), directing Seema Kapoor and Surinder Kumar to hand over the interim custody of the child named Aishley Kapoor born on 14.08.1999 to the natural parents; instead they abused the process of the Court by taking the advantage of the interim order and removed the child from the jurisdiction of the Court to the United Kingdom. Such an international relocation rendered the petitioners inaccessible and allowed illegal retention of custody of the child. The revision petition was then rendered infructuous in 2017, as the kid was 18 year old and the case was disposed, with the only option left with the respondent to impose contempt proceedings on the petitioners; but the police authorities or the Central Bureau of Investigation were unable to secure the custody of Seema Kapoor and Surinder Kumar. This made a striking revelation that if a parent relocates internationally with the children, then almost no option is available for the other parent. This complicacy is not specific only to India, rather it is a global phenomenon which has given rise to international child custodial treaties like The Hague Convention of 1980 on child Abduction.

The Hague Convention

The treaty Hague Convention on the Civil Aspects of International Child Abduction which is signed by several countries with the aim of securing children from the noxious effects of abduction and retention by a parent across international boundaries, guardian, or any other person who has been exercising custody rights. The

Convention was signed in 1980 and provides a legal framework for the return of children to their country of 'habitual residence', so that custody and access issues can be determined by the courts in the child's home country. The Hague Convention applies to children under the age of 16 and is designed to ensure that the child's welfare is the paramount consideration in any legal proceedings. The Convention requires signatory countries to recognize and enforce each other's custody decisions, and to assist the timely and quick return of children who have been illegally removed or retained.

In order for a child to be returned under the Hague Convention, the following conditions must be satisfied:

- 1) The child, immediately before the illegal removal or retention must have been "habitually residing" in a Signatory State;
- 2) The rights of custody entitled to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident must be in breach by reason of the wrongful removal or retention;
- 3) the removal or retention must not have been consented to by the person or institution having such rights.

The Hague Convention has been successful in promoting cooperation between signatory countries in international child abduction cases for the west, and has helped to reunite many children with their parents. However, it is important to note that the Convention has its limitations, and some cases can still be complex and time-consuming to resolve because of, involvement of several justice systems. The difference in the legal Jurisprudence of two legal systems, often come in conflict when multiple cultures are involved.

In **Dhanwanti Joshi v. Madhav Unde(1998)** , the Supreme Court referred to the Hague Convention on the Civil Aspects of International Child Abduction and observed that, there is an absence of uniformity and progressive development while adjudicating cases pertaining to minor children. Whereas, some cases prioritize the welfare of the child, some cases pass verdict on the basis of technical aspects of legal principles and jurisdictional concerns. The Supreme court observed that, this could be the result of the absence of any law governing this concern and as a consequence of this children are subjected to physical and emotional hardships caused by the broken relationship's turmoil.

Vital Parameters Considered In Child Custody Disputes

In determining child custody, the most important consideration is the best interests of the child. In **(Prateek Gupta vs. Shilpi Gupta) 2017**, the Supreme Court reasoned that the child was in India for almost two and a half years after being taken by his father from the United States (U.S.) and that returning to the United States would not be aligned to the welfare of the child as the child was in his developmental years and had conform and adjusted to the environment. In this case, a court in the United States had made a ruling directing the mother

to receive custody of the kid and also its return. But, the Supreme Court ruled that for the greater good, i.e., the well-being of the child being of utmost importance, such foreign orders and principles of comity and close contact can be disregarded. Also the Supreme Court ruled in **(Nithya Anand Raghavan v. State (NCT of Delhi) &Anr. (2017))** that India, a non-convention country, must decide the return issue on the merits. In this instance, the father had obtained an ex-parte order to return the child to UK after the mom fled with the child to India. As directed by the Supreme court of India, in such anomalies either the court in India should conduct a quick inquiry for sending the child back or conduct an extensive enquiry on the merits of the case. The courts must conduct in-depth investigations when necessary to protect the best interests of the kid because they are not required to strictly adhere by foreign court orders of repatriation. In determining the custody case's best interest of the kid, the SC took into consideration child's gender, prior foreign court rulings against the abducting mother, the child's health status, the nationality and citizenship of the child's parents, the amount of time the child spent in each country, and the decision regarding the child's best interests in the custody dispute. The SC further noted that the child lives in a nuclear family in the UK but a joint family in India, and that the mother's account of the father's domestic abuse was also taken into consideration.

Thus it is clear from both of these decisions from 2017 that the SC took into account the elements that favour keeping the child away from their former location of habitual residence. The fact that, the response of the parent who was left behind in a foreign court was quick and fast, is not sufficient for the court to pass a return order. In a nutshell, there are several factors that courts and other decision-makers typically consider when making a custody determination, including but not limited to:

The child's relationship with each parent: This includes the child's attachment to each parent, the level of comfort and security the child feels with each parent, and the child's ability to communicate and express feelings with each parent.

The child's age, health, and developmental needs: The court will consider the child's age, health, and developmental needs, including any special needs or disabilities. This includes an assessment of the child's educational, medical, and psychological needs, as well as the child's need for stability, structure, and routine.

The parents' ability to meet the child's needs: This includes an assessment of the parents' financial resources, stability, and ability to provide a stable home environment for the child. The capability of the parents' to provide for the child's emotional and physical needs, as well as the parents' ability to support and encourage the child's relationship with the other parent is also considered.

The child's preference: In some cases, the court may consider the child's preference for which parent they would like to live with. This is usually done in older children who are able to articulate their views.

The parents' ability to co-parent: The court will consider the parents' ability to communicate and make joint decisions regarding the child's upbringing, including decisions related to education, health care, and other important issues. In many judgements the court ensures that the child receives the love and affection of both the parents.

The parents' past conduct: The court may consider any history of abuse, neglect, or other harmful behavior by either parent.

The child's cultural and religious background: The court may consider the child's cultural and religious background, as well as any special needs or considerations related to that background.

It is important to note that the weight given to each of these factors will vary depending on the individual circumstances of the case and the jurisdiction in which the case is being heard. Ultimately, the goal is to make a decision that is in the best interests of the child and that takes into account the child's well-being and best interests in the long term

Indian Custodial Jurisprudence juxta posed against Western Frameworks

The Indian legal system regarding child custody is primarily governed by the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956 and other religion specific Laws. These laws provide a framework for determining who should have custody of a child in case of separation or divorce. In India, the best interests of the child are considered the primary consideration when determining custody. The court may award custody to either the father or the mother, depending on various factors such as the financial stability of each parent, the age of the child, and the capability to provide a stable and loving environment for the child by each parent.

Western countries, such as the United States, follow the principle of determining custody by considering the best interests of the child. In the US, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides a framework for determining jurisdiction and enforcing custody orders across states. The law aims to ensure that custody decisions made in one state are recognized and enforced in other states. Additionally, the US legal system recognizes joint custody, where both parents have equal legal and physical custody of the child.

In India, Religion of the parties play a major role in determining the custody of the child, whereas in the western framework, religion is not a very crucial parameter, also the phraseology used in the convention as 'abduction of the child ' may sound absurd in Indian context, as parents are considered as the natural custodians of the children and the term abduction may not be acceptable in the Indian society. Another fundamental fault line between both the jurisprudence is that, the 'question of custody' is a consequence of the violation of custody

rights of the parents; Whereas in India, the question of custody is the consequence of determining what is best for the welfare of the child; that is not to say that the western framework has no regard for the child's welfare, but there is a subtle difference in the position as to 'why the question of custody is being raised?' , the foreign position usually reduces it down to a question of the rights of parents to have custody of the child versus the welfare of the child, whereas Indian jurisprudence keeps the welfare of the child paramount, with only little regard to the rights of the parents. The joint custody; The right to access and right to have physical custody are principles that are in comity of US and Indian courts.

Criticism of The Convention from Indian Point of View

The treaty, Hague Convention on the Civil Aspects of International Child Abduction provides a legal schema for the quick and secured return of children across international borders, who have been unlawfully removed or retained. India is not a signatory to the Convention, and as a result, Indian courts do not follow the provisions of the Convention in child custody cases. Indian courts prefer to maintain their discretion in whether or not to return the child to its habitual residence and rightfully so.

Critics of the Hague Convention in India argue that the Convention places too much emphasis on the prompt return of children and does not adequately consider the best interests of the child.

The Convention does not take into account the cultural and societal differences between the countries involved and may not properly consider the child's right to stability, security, and a healthy upbringing; for instance, In India children are necessary for performing important religious ceremonies, which need not be the case in foreign countries and might not even understand the Indian perspective, readily.

The convention does not provide adequate support for the parent who was left behind in the country of origin. In a country like India, where travelling abroad is a luxury that only few can afford; It would be to the prejudice of the party to make them travel abroad and fight for custody in that country.

The Convention does not provide sufficient mechanisms for ensuring that the left-behind parent has access to their child or that their rights as a parent are protected. The goal of the convention is more or less deciding as to in which country the suit for custody be tried. Now, the fundamental problem is, foreign courts are not at all accessible to many in India and not to mention the level of legal literacy of the mass ,with all these limitations in place, becoming a signatory might open floodgates of loopholes that might be used by the wealthy to exploit the weaker sections of the society.

The Convention does not provide an effective system for resolving disputes between countries that might arise because of variation in culture and jurisprudence, and that the process for returning a child can be slow and cumbersome.

The term 'Habitual Residence' is another point for criticism as it is not well defined and the question as to what will be the 'Habitual Residence' of a new born baby, is also disputed.

Despite these criticisms, proponents of the Hague Convention argue that the Convention provides a much-needed framework for protecting the rights of children and parents in international child custody cases, and that it helps to ensure the prompt return of children who have been unlawfully and wrongfully removed from their habitually resident country

Advantages of signing the Hague Convention

218th report of Law Commission of India released on March 2009 stressed on need to accede to the Hague Convention on the Civil Aspects of International Child Abduction. It recommended that a foreign judge determining on a child's custody may be influenced negatively by India's non-signatory status to the Hague Convention on the Civil Aspects of International Child Abduction. The foreign judge could be hesitant to provide authorization for the child to go to India without the assurance provided by the Hague Convention to the effect that the child will be speedily returned to the country of origin. As a logical conclusion, India should ratify the Hague Convention, which will open up the possibility of securing the return of children who were born there.

Some of the advantages of signing and ratifying the Hague Convention on the Civil Aspects of International Child Abduction include:

Prompt Return of Children: The Hague Convention provides a legal skeleton for the timely and safe return of children who have been illegally removed or retained across international borders. This helps to ensure that children are returned to their country of habitual residence as quickly as possible, reducing the potential harm to the child and helping to preserve the child's relationships with both parents.

Increased Cooperation: The Hague Convention promotes cooperation between signatory countries in resolving child custody disputes. This helps to ensure that international child custody cases are handled in a consistent and effective manner, reducing the risk of conflicting decisions and minimizing the potential harm to the child.

Improved Legal Protection: The Hague Convention provides signatory countries with a comprehensive legal framework for protecting the rights of children and parents in international child custody cases. This helps to ensure that children's best interests are taken into account and that parents' rights are protected, even in cases where the child has been wrongfully removed to another country.

Improved Access to Justice: The Hague Convention provides an effective mechanism for resolving international child custody disputes, helping to ensure that parents have access to an impartial and efficient resolution process.

Increased Predictability: By providing a consistent and predictable legal framework, the Hague Convention helps to reduce the uncertainty and confusion associated with international child custody cases. This helps to ensure that children are protected and that parents are able to make informed decisions about their children's future.

Overall, the Hague Convention provides signatory countries with a comprehensive framework for protecting the rights of children and parents in international child custody cases, and helps to ensure that children are returned to their country of habitual residence as quickly as possible.

Disadvantages of Signing The Convention

While the Hague Convention on the Civil Aspects of International Child Abduction provides a number of benefits, there are also some disadvantages to signing and ratifying the Convention. Some of the key disadvantages include:

Limited Application: The Hague Convention only applies to cases where the child has been wrongfully removed or retained across international borders. This means that it is not applicable to cases where both parents are in agreement, or where the child has been moved within the same country.

Lack of Cultural Sensitivity: Critics argue that the Hague Convention does not take into account the cultural and societal differences between the countries involved and may not properly consider the child's right to stability, security, and a healthy upbringing.

Slow and Cumbersome Process:The process for returning a child under the Hague Convention can be slow and cumbersome, and that it can result in long delays and additional stress for both the child and the parents involved.

Limited Enforcement Mechanisms: The Hague Convention relies on the cooperation of signatory countries to enforce its provisions. If a country is not willing to comply with the provisions of the Convention, it can be difficult to enforce the return of a child. For instance, India is not a signatory to this convention.

Overall, while the Hague Convention provides a number of benefits, it is not without its limitations and criticisms. As with any international treaty, it is important to carefully consider the advantages and disadvantages before deciding whether to sign and ratify the Convention

The Civil Aspects of International Child Abduction Bill, 2016

The Civil Aspects of International Child Abduction Bill, 2016 was introduced in India to address the issue of international child abduction. The bill seeks to implement the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, which is a treaty that provides a legal framework for the secured and quick return of displaced children to their country of habitual residence.

The key provisions of the bill include:

Defining the term ‘Habitual Residence’ : The bill in Sec 2 (f) defines the term Habitual Residence as

The place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred

Such a definition makes it clear that no regard is given to any other aspect like the place of birth, circumstances of birth, cultural considerations etc. This also calls for investigation into situations where couple temporarily move to a foreign country for work purpose with their child and the custody dispute arises in the foreign country leading to the abduction of the child; So, according to the definition the child’s habitual residence will be the foreign country as both the parents and child resided together before the abduction in the foreign country. This could lead to an absurd situations and conclusions.

Acknowledgement of the term ‘Abduction’: The bill uses and acknowledges the international child abduction as the removal or retention of a child from the child's country of habitual residence in breach of the rights of the person, institution, or other body having the right to determine the child's place of residence, although not very acceptable in the Indian society as it is presumed that a parent cannot abduct their child as they are the lawful and natural custodians of their wards. This cultural insensitivity may create hardships to the parents and to the child as well.

Formation of Central Authority: The bill under section 4, establishes a Central Authority in India to act as a liaison between Indian courts and the Central Authorities of other countries that are also parties to the Hague Convention. The Central Authority will also be responsible for implementing the provisions of the Convention in India as per section 5(i). The formation of such a body is necessitated by the convention.

Process for the return of the child: The bill in sec 7 clause 1, provides that an application may be accepted and a process for the prompt return of an abducted child to their country of habitual residence be initiated. This process involves filing a petition with the Central Authority, which will then work with the Central Authority of the child's country of habitual residence to secure the child's return. The bill also gives power to the High court to decide of certain aspects of the return of the child.

Exception to the return of the child: The bill provides for certain exceptions to the return of the child, as in sec 16(1) (b) that, if the return would place the child in an intolerable situation, if the child objects to being returned, or if the return would violate human rights and fundamental freedoms. Article 13(b) of the convention provides for the exceptions as to when a country may refuse to send the child back to his/her habitual place of residence

Penalty for non-compliance: The bill provides for penalties for non-compliance with the provisions of the Convention, including fines and imprisonment and Sec 20 mandates that the expenses to be borne by the parent responsible for the abduction of the child.

Cooperation between authorities: The bill requires the Central Authority in India to cooperate with the Central Authorities of other countries that are parties to the Hague Convention to ensure the prompt and effective implementation of the provisions of the Convention.

Role of the courts: The bill provides for the jurisdiction of Indian courts to hear cases involving international child abduction and to enforce the provisions of the Convention.

The Way Forward

The way forward is perhaps to refrain from acceding to the convention, notwithstanding the benefits that becoming a signatory to the convention will bring to the table, like prompt return of the abducted child from a foreign country to India, but it may also open floodgates for a new set of problems. Many foreign courts are hesitant to grant Right to access of Child to Parents living in India as they are fearful that, the child may be retained and since India is not a signatory to the convention, return of the child to the habitual residence will be difficult, such reservations will come to an end if India becomes a signatory. Although it seems like there are several benefits, a nuanced study with the culture and circumstances in mind would suggest otherwise. It is often argued that, the focus of the convention is on the Prompt return of the child back to the much debated 'Habitual Residence " rather than the welfare of the child, prompt return may not be the need or in the best interest of the child. The assessment of the habitual residence is yet another factor adding to the hardship, the questions as to what will be the habitual residence of a new born baby, or what will be the habitual residence of a child born when parents are temporarily in a foreign country, makes the assessment absurd, also the term 'Abduction' may not go very well to the Indian sentiments in context to a child ,parents are deemed as the natural custodians of the children in India and when one of them is termed as an abductor , it may hurt the sentiments.

No regards to culture or religion is yet another factor, Indian personal laws are heavily influenced by religion and no regards is given to such a perspective. Furthermore, India reports a considerable number of domestic violence cases also among couples who are settled in foreign countries and more or less, as a consequence of

the culture the wife is heavily financially dependent on the husband. With such a structure in place, if the mother, who is a victim of domestic violence finds refuge in India, the Hague's convention will force the child to be returned back to the foreign country to the father, with the incurring expenses paid by the financially unstable mother and with a further burden to file a case in a foreign country which may not be easily accessible to the left behind mother. Such hardships created by the convention will act to the prejudice of the left behind parent and lead to injustice by allowing the wealthy to exploit the poor parent. Another aspect which adds to the reluctance to sign the convention is the biased perspective of the foreign courts regarding India, if the jurisdiction of the case is transferred to a foreign court as per the convention, the foreign court may entertain the argument that, India being a relatively economically weaker country, it would be in the best interest of the child to stay in the foreign country.

Given the multi-dimensional aspects of this issue, it may seem like a plausible option to become a signatory to the convention but weighing the pros and cons, one can conclude that it might do more harm than benefit to the Indian society.

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