

Consequences of India Signing the Hague Convention, 1980

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Abstract

In this era of growing cultural barriers there is a significant growth of revolt amongst the youths against these cultural norms. Boundaries divide the nations but families unite them. The family matters involving child abduction across international boundaries are not of a local concern. It has a global character. Thus, there arises a need for resolving the disputing laws of nations and giving effect to creation of private international laws on this matter. It in turn presses on the need to create a treaty at the international level. The Hague Convention of 1980 is an initiative for that purpose. The Hague Convention on the Civil Aspects of International Child Abduction was signed on 25th October, 1980 and came into force on 1st December, 1983. Ninety three countries are party to this convention as of February, 2015. Although, India is not a signatory, the jurists and the advocates have reiterated the need for India to sign the Convention.

This paper aims to answer the question as to whether India should become a signatory to the convention or not. Current provisions relating to the matter of child abduction have been studied. The Hague Convention of 1980 has been studied in detail.

Consequences of India Signing the Hague Convention, 1980

1. Child Abduction under the International Law

A multilateral treaty developed by the Hague Conference on Private International Law (HCCH) whose objective is to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States². This convention secures the restoration of the status quo by returning wrongfully removed children expeditiously³.

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² Article 1, Chapter 1 of Hague Convention on the Civil Aspects of International Child Abduction, 1980

³ Elisa Perez- Vera, *Explanatory report*, 426

Child abduction here means children who have been wrongfully taken or kept away from their “Habitual residence”. The most archetypal situation that will turn on the operation of convention is when one parent moves to other country and cross the international border without the consent of left-behind parent or without taking the permission of the concerned court for reallocation. Proceedings under the convention are not criminal. It is less of a child custody case and more of provisional remedy i.e to determine whether the child was wrongfully removed from his habitual residence. This Convention is only applicable to child below the age of 16 years.⁴

2. Hague Convention, 1980

The Hague Convention of 25th October, 1980 on the Civil Aspects of International Child Abduction is a multilateral treaty signed by 93 countries⁵ is concerned with matter related to retention or removal of child from their habitual resident. The purpose of this convention is to define the “right of custody” and “right of access”.⁶

2.1 Structure of Hague Convention, 1980

Article 1, 2, 3 and 5 is related to objective, scope and also establishes criteria if a criteria is wrongful.⁷

Article 4 deals with the personal application of the convention whereas 35 refer to temporal application.⁸

Articles 7 and 8 deal with the Central Authorities and the duty for the contracting states to designate a Central Authority.⁹

Applications of Central Authorities are dealt in articles 8, 27 and 28.¹⁰

⁴ Article 4, Chapter 1 of Hague Convention on the Civil Aspects of International Child Abduction, 1980

⁵ Status Table: Convention of 25th October, 1980 on the Civil Aspects of International Child Abduction; See also : http://www.hcch.net/index_en.php?act=conventions.status&cid=24

⁶ Fordham International Law Journal, Volume 21, Issue 1, available at ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1553&context=ilj

⁷ Sarah Hillebrand, Leonie Mass, Chian Sonmez, *Structure*, Hague Convention on the Civil Aspects of International Child Abduction, 1980, available at http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20BUCHAREST%20DOCUMENT/Written_paper_Germany_2.pdf

⁸ Sarah Hillebrand, Leonie Mass, Chian Sonmez, *Structure*, Hague Convention on the Civil Aspects of International Child Abduction, 1980, available at http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20BUCHAREST%20DOCUMENT/Written_paper_Germany_2.pdf

⁹ Elisa Perez- Vera, *Explanatory report*, 440-441.

Articles 9 to 12, and 14 to 19 are devoted to the return of children, while article 13 and 20 promote exceptions from the general rule for the return of the child.¹¹

Specific duties in relation with regard to access rights are mentioned under article 21.¹²

Chapter V (Articles 22 to 26 and 30) refers to costs and proceedings.¹³

Articles 31 to 34 apply to states with more than one legal system and relations with other conventions¹⁴.

2.2 Key Features of Hague Convention, 1980

A) Expeditious handling:

The concerned judicial or administrative body of contracting states must act expeditiously in proceedings for return of the children from wrongfully retained in or removed to any Contracting State.¹⁵

The judicial or administrative authority concerned has to reach a decision within 6 weeks of the commencement of proceedings¹⁶. In *Daunis v/s Daunis*¹⁷, it was held that the courts should act expeditiously in handling the process for return of children. The convention presses the Contracting States to provide “the most expeditious procedures available”¹⁸.

B) Central Authority:

All the parties to the convention shall create a Central Authority to discharge the duties which are imposed by the convention upon such authorities¹⁹. The purpose of it is to secure the prompt return of children and achieve the objectives of this convention. Some of the key functions which they can perform directly or through intermediaries as mentioned in Article 7 of this convention are as follows:

¹⁰ ibid

¹¹ ibid

¹² Available at <http://lawcommissionofindia.nic.in/reports/report218.pdf>

¹³ Sarah Hillebrand, Leonie Mass, ChianSonmez, *Structure*, Hague Convention on the Civil Aspects of International Child Abduction, 1980, available at http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20BUCHAREST%20DOCUMENT/Written_paper_Germany_2.pdf

¹⁴ Elisa Perez- Vera, *Explanatory report*, 440-441.

¹⁵ Available at [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf)

¹⁶ Article 11, Chapter III of Hague Convention on the Civil Aspects of International Child Abduction, 1980

¹⁷ 222 Fed.Appx. 32, 2007 WL 786331 (2d Cir. 2007)

¹⁸ See *Holder v/s Holder* (Holder II), 392 F.3d 1009, 1002 (9th Cir. 2004)

¹⁹ Article 6, Chapter II of Hague Convention the Civil Aspects of International Child Abduction, 1980

- i) To discover whereabouts of the child who has been wrongfully removed or retained.
- ii) To prevent further harm to child.
- iii) To secure voluntary return of the child.
- iv) To initiate or facilitate the institution of judicial or administrative proceedings. They will also help in completing application forms and sending them to Central Authorities of different Countries.
- v) To keep each other informed with respect to the operation of this convention and , as far as possible, to eliminate any obstacles to its application.

C) Administrative Return:

A formal request to the Central Authority can be made by the parent who is seeking the return of child of either the country of child's habitual residence or the Central Authority where the child is located.²⁰ The Central Authority doesn't have the power to compel the return of the child and they can only negotiate for voluntary return.²¹ However, in case of failure of such negotiation, legal proceedings can be initiated regarding the same.²²

1. Some Elements of the Case For Return:

These are the following criteria which should be fulfilled to seek the return of child.

- a) The child has been wrongfully removed or retained (Article 1)
- b) From his or her habitual residence
- c) In violation of the custody rights of the left-behind parent.
- d) The child must be below the age of 16 years (Article 4)

A child will said to be wrongfully removed or retained if it is violating the custody rights of left-behind parent according to the law of that country where the child habitually resides. Law of the child's habitual residence will determine the custody rights. The Hague Convention, 1980 under article 3 has laid down three ways of determining right to custody:

- i) By operation of law

²⁰ Available at [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf)

²¹ *ibid*

²² *ibid*

- ii) By judicial or administrative decision
- iii) By an agreement of the parties

In *Bromley V/S Bromley*²³ the court held that a person may not maintain an action for return of child when that person is entitled to exercise only access or visitation rights.

The term habitual residence is not clearly explained in the convention. It can be said that it means a place where a child is more comfortable and living there for a considerable period of time. This concept is different from that of domicile as it includes elements of future intent, citizenship and nationality. In *Holder v/s Holder* (Holder II)²⁴ it was stated that the question of whether a particular place is a child's habitual residence is a fact-driven issue.

In *McClary v/s McClary*²⁵ court considered number of factors including language issues. Factors like schooling²⁶, social life²⁷, medical care extended, family, friends and age.

In *Bates*²⁸ it was held that, "There must be settled purpose. The purpose may be one or there may be several. It may be specific or general....Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others."

2. Defenses to Return

The convention also lays down certain provisions which can be used as a defense to return. They are:

- If the petition filed is after one year and it is demonstrated that the child is now settled in its environment.(Article 12)
- Consent or acquiescence to removal or retention of the child. { Article 13(a) }
- Failure to exercise custody rights.
- If the return would cause physical or Psychological harm or grave risk. { Article 13(b) }
- If the return would lead to violation of human rights. (Article 20)

²³ 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998)

²⁴ 392 F. 3d 1009, 1016 (9th Cir. 2004) (opining that case involving military families do not "generate a typical fact pattern and, in all convention cases, emphasis is on the details of the case at hand").

²⁵ See *McClary v/s McClary*, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. 2007) (unreported disposition)

²⁶ See *Ruiz v/s Tenario*, 392 F.3d 1247, 1255 (11th Cir. 2004); *Silverman v/s Silverman* (Silverman II), 338 F.3d 886, 898-99 (8th Cir. 2003)

²⁷ See *Holder II* 392 F.3d at 1020

²⁸ (1989) EWHC (Fam) CA 122/89 (Eng.).

Settlement of child in environment is a valid defense which can be claimed. The Text and Legal Analysis opines that, “To this end nothing less than substantial evidence of the child’s significant connections to the new country is intended to suffice to meet the respondent’s burden of proof”. There are several factors which the court needs to determine including²⁹.

1. Age of the child
2. Language fluency
3. Durability and stability of residence in new environment
4. Concealment of child’s whereabouts
5. Consistence attendance at school or day care
6. Attendance at church
7. Friends and relatives in new environment
8. Participation in school, extracirrcular activities, community, sports, clubs
9. Financial stability and employment of parent
10. Academic progress
11. Immigration status³⁰

In *Re C.*,³¹ case a mother abducted her daughter to Ireland. The father of the child filed a petition under Hague Convention for a return order and soon after that mother voluntarily returned to California. One month later she again re-abducted her child to England, chanded her and her daughter’s name so that tracing get difficult. She also changed the date of birth of his child with the deceased child. After four years she was found. The British High Court ruled:

- a) After the period of one year has passed from the time of child’s abduction and the child had become settled, the court has no discretion to order the child’s return under this convention.
- b) Article 18 doesn’t confer residual jurisdiction to order the child returned, since it applies only to the domestic law of a country to order return.
- c) Deliberate concealment will not stop the one-year limit from running, but it is relevant to the issue whether a child is settled

²⁹See *In re B.* Del C.S.B, 559 F.3d 999,1099 (9th Cir. 2009)

³⁰ See, *B. Del C.S.B*, 559 F.3d at1099 (We will also consider the immigration status of the child and the respondent . In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation”)

³¹ *Re C.* (Abduction : Settlement), [2004] EWHC (Ch) 1245 (Eng)

Article 13 (a) says that a court is not bound to order a child returned if the person, institution or other body having care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. In *Baxter v/s Baxter*³² the term consent and acquiesce was explained. Consent refers to permission given before the child is removed whereas acquiescence refers to conduct after the removal. Consent can be established by statements or conduct hinting that a parent has consented to the removal and retention of child, for either permanently or for an indefinite period of time³³.

In *Nicolson v/s Pappalardo*³⁴, the parties experienced marital difference before the birth of their daughter. Three months after the child was born, mother with her child left Australia and went to U.S.A. Father of the child unwillingly gave consent to this travel with a hope that it will relut in reconciliation. After one month, mother decided to stay back in U.S.A and subsequently filed and received a temporary domestic violence protection order which was later modified with the consent of father's attorney to provide mother was to have temporary custody of the child. The 1st Circuit held that father neither consented nor acquiesced in the permanent removal of the child to the United States. Although the stipulated order of temporary custody was a strong indication of father's acquiescence, the district court found no intent on father's part to consent to permanent removal. The First Circuit deferred to that finding, nothing that courts (such as *Baxter*, supra)³⁵ treat issue of acquiescence as on involving pure subjective intent.

Article 13 (a) deals with the custody rights as an affirmative defense. It must be established by preponderance of evidence. It is not necessary that the parent have constant physical custody of the child, he/she can handover the child to another party such as grandparents. This in, and of itself may constitute the exercise of custody rights.³⁶

Grave risk and intolerable situation doesn't include lifestyle, economic conditions, educational conditions or disparate quality of parenting styles³⁷. It will include child sending back to war zone, famine or disease. It would also include cases of serious abuse or neglect,

³² 423 f.3d 363, 371 (3d Cir. 2005)

³³ See *Gonzalez-Caballero v/s Mena*, 251 F.3d 789, 793-94 (9th Cir. 2001)

³⁴ *Nicolson v/s Pappalardo*, 605F.3d 100 (1st Cir. 2010)

³⁵ *Baxter*, 423 F.3d at 371-72

³⁶ *Sampson v/s Sampson* 975 P.2d 1211, 267 kan. 175 (1999) (finding the exercise of custody rights where father placed children with his parents, supported children, and visited them on weekends)

³⁷ See, e.g, *Cuellar v/s Joyce*, 596 F.3d 505, 509 (9th Circuit, 2010)

or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection³⁸.

Age of maturity defense or child objection to return can also be used as defense. Violation of human rights and fundamental freedoms (Article 20) of the convention clearly states that, “the return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

3. Consequences of India not being A Signatory

3.1 Introduction

In March 2009, the Law Commission released the 218th report analysing the need that persists in India to accede to the Hague Convention on the Civil Aspects of International Child Abduction of 1980. It opens with a note of reduction of significance of the national boundaries and the world becoming one. More the availability of opportunities to one, the greater are the aspirations and desires. The desire of one helps him move forward but comes at the expense of familial relations. Globalization and technological advancement brings with it individual independence and ego inflations, which paves way for familial problems.³⁹ All these result into increase in number of divorces. There are three aspects of divorce that should be accessed to analyse its effect on a child, namely, domain, tactics and attitudinal.⁴⁰ Domain is concerned with the area of disagreement between the couples. Tactics refer to the efforts taken up by the spouses to resolve the dispute or disagreements. These efforts are usually informal in character. Attitudinal dimension is the amount of negativity the spouse holds for another after divorce.

International parental abduction refers to the removal of child by one parent from the custody of one parent from one country to another without the approval of the other parent.⁴¹ It encompasses an interference with parental rights or right to contact with the removed child. This raises jurisdictional questions before the International Courts. As discussed above, The Hague Convention of 1980 is an attempt to lubricate the friction created in foreign countries for this.

³⁸ Friedrich v/s Friedrich (Friedrich II), 78 F.3d 1060, 1069 (6th Cir. 1996) (indicating that the sexual abuse of a child by his parent will also amount to intolerable situation).

³⁹Dr. Justice A.R Lakshmanan, International Child Abduction- Parental Removal(2008) 48 IJIL 427

⁴⁰ Available at <http://lawcommissionofindia.nic.in/reports/report218.pdf>

⁴¹ ibid

On one hand are countries signing this convention(as many as 89⁴²) and some even changing their own laws to meet the norms of the Convention, for instance like Australia. On the other, there are countries, like India, which haven't yet signed it. With the increasing internal disturbances and rising intolerance, this is not even on the cards anytime soon.

3.2 India's Stand on Child Abduction

The question is not whether India holds a sympathetic view for the child whose parents have separated. In India, marriage is an eternal bond and separation is not easy, as evident from the stringent divorce laws. The empathetic view of the Supreme Court towards the kids of separated parents is expressed in the case of SumedhaNagpal vs. State of Delhi⁴³.

India has come across a plethora of cases where by its judgements have changed from summary⁴⁴ to a full-fledged sensitive pronouncements. Earlier, the Court was of the opinion that the child should be simply moved to the country of his parents, but later, took the opinion of looking for the welfare and best interest of the child.⁴⁵

In a case, the Supreme Court emphasised the fact that a growing girl needs more of her mother and should therefore be in her custody.⁴⁶ In yet another case, they declined to give a mother the custody of her kids but at the same time gave the directions to let her visit them.⁴⁷ Going almost to the extent of pushing behind the question of jurisdiction and conflicting laws, the Delhi High Court has put upfront the argument that the interest of the minor shall be of paramount importance.⁴⁸

The Indian Laws governing this aspect of child abduction are not many and ambiguous, rather are complimentary to each other. Section 26 of the Hindu Marriage Act, 1955 makes it the duty of the Court to decide the matter of custody, education and maintenance of the minor child expeditiously. Aiding this provision, Section 4(a) of the Hindu Minority and Guardianship Act, 1956 defines 'minor' as a child under the age of eighteen years. Also, the

⁴²Available at <http://www.thehindu.com/news/national/jurists-want-india-to-sign-hague-convention-on-international-child-abduction/article4712421.ece>

⁴³ JT 2000(7) SC 450

⁴⁴ Smt. SurinderKaurSandhu vs. HarbaxSingh Sandhu, AIR 1984 SC 1224; Mrs. Elizabeth Dinshaw vs. Arvand N. Dinshaw, AIR 1987 SC 3

⁴⁵Dhanwanti Joshi vs. MadhavUnde, (1998)1 SCC 112; Sarita Sharma vs. Shushil Sharma, JT 2000 (2) SC 258

⁴⁶ Kumar V. Jahagirdar vs. ChethanaRamatheertha, 2004(1) HLR 468.

⁴⁷Sahiba Ali vs. State of Maharashtra, 2004(1) HLR 212. In the case of Mandy Jane Collins vs. James Michael Collins, (2006) 2 HLR 446, the High Court of Bombay, rejected the writ of Habeas Corpus filed by the mother, residing in Ireland, of the child for custody and upheld the custody of the child with the father in Goa.

⁴⁸ Paul MohinderGahun vs. State of NCT of Delhi, 2005(1) HLR 428

Act specifies that custody of such a minor has to be decided over the fact that it is for the welfare of the child.⁴⁹

These cases bring to light the non-uniformity of perspectives the judiciary has put forth over the issue of child abduction. Some of these judgements can also be termed as judicial overreach of the Supreme Court on occasion of the dearth of clear provisions of law over the matter. The judgements are ambivalent in nature owing to the fact that some are decided on the basis of welfare of the child, while some are decided based on the technicalities of various provisions of law and jurisdictional tiffs.⁵⁰ This double standard nature of the Courts only adds to the dilemma of the child who has been caught up in the emotional turmoil at a very tender age.

4. Conclusion

The need for India signing the Convention can be analysed from the fact that if a foreign judge has to decide the case of child abduction and without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission to let the child travel to India.⁵¹

At a symposium organised in New Delhi in May, 2013 by the British High Commission, the participants, including former Attorney General of India, Soli Sorabjee, urged India to sign the Convention.⁵² According to Mr. Anil Malhotra, “when an NRI marriage breaks, child custody fight occurs across the seas. We have no laws relating to cases of such conflict over child custody.”⁵³

On several occasions India has faced issues relating to parental kidnapping especially the place like U.S.A, where Parental abduction is a criminal offence. For example, Dr. Fazal Rahman married to a woman in India and moved with her to Massachusetts. They bore two kids. Apparently, they develop some issues and Dr. Fazal moved to his hometown in India. He also refused to return the kids. His aggrieved wife moved the Massachusetts Court and obtained an emergency custody order. Meanwhile, he himself got an order for the

⁴⁹Githa Hariharan vs. Reserve Bank of India, (1999) 2 SCC 228

⁵⁰The 218th Law Commission Report, 2009, Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction of 1980

⁵¹ ibid

⁵² Available at <http://www.thehindu.com/news/national/jurists-want-india-to-sign-hague-convention-on-international-child-abduction/article4712421.ece>

⁵³ ibid

custody from the Nagpur Family Court. The mother came to India to take with her the children but he filed a criminal charge against her. As a result of this, she had to flee to the U.S.A. Consequently, Dr.Fazal was charged with international parental kidnapping.⁵⁴ He was then sentenced to imprisonment by the United States when he was returning to the U.S.A. He was also asked to handover the kids to the mother but he filed a false petition in the Nagpur High Court. On this pretext, he was further sentenced to imprisonment and the Nagpur High Court gave the custody of the children to Dr.Fazal's mother. However, the wife of Dr.Fazal was not given any contact with the kids except for sporadic visits.

On many occasions parents of Indian origin have taken a child to India and have immediately sought favorable custody orders from the Indian courts.⁵⁵ Usually such efforts will not be recognized in the United States and they may well be counterproductive.⁵⁶ A U.S. court will not permit parents to evade U.S. jurisdiction by the subterfuge of a parent taking the child to another jurisdiction.⁵⁷

In re Marriage of Sareen, 153 Cal.App.4th 371, 62 Cal.Rptr.3d 687(Cal. App. Dist.3 06/21/2007) a case in California happened to be on the above grounds. In this case, the couple was residing in New York and bore a child there, though they were married in New Delhi. They went on a vacation to Switzerland but later the husband insisted on going to India. The husband soon filed for divorce and custody in India, deserted the wife and kid, fleeing with their passports. However, the wife managed to go back to U.S.A. The California Court heard the matter and said that it had full and sole jurisdiction over the matter and not India, because the husband had taken the child to India by means of subterfuge.

By the above cases discussed, it becomes imperative to become self-introspective and analyse as to why India is a safe haven for child abductors. The answer can be drawn easily and is also stated in the above discussion viz., India not being a signatory of the Hague Convention of 1980 and also the dearth of proper legislation on this issue in India. To add to it all, there is Section 13 of the CPC but with the exception of a child's welfare and also there is the non-recognition of "mirror orders"⁵⁸ in India⁵⁹.

⁵⁴ United States vs. Fazal-Ul-Raheman-Fazal, 355 F. 3d 40 (1st Cir. 2004)

⁵⁵ Available at <http://www.international-divorce.com/parental-child-abduction-india.htm>

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ Mirror order is the one that is issued by another court which contains the same terms as those that are contained in the order that is being mirrored. Available at www.international-divorce.com/mirror_Orders_to_help_Prevent_International_Child_Abduction

It is an ironical fact that in India, not only the judicial outreach exists but also, the judiciary is very slow in giving its decisions. This fact also contributes to the reason as to why people abduct children and flee to India. The delay in judicial pronouncements gives ample time to the children to settle in Indian culture and in turn becomes a ground for the parents to retain the custody from any Indian Court.

The above discussion makes it clear that not many alternatives lie before India. With the passage of time and almost no Parliamentary sessions taking place, expecting an Indian legislation over the issue of child abduction would be all futile. It is better to first accede to the Convention and then making the necessary changes in the municipal law of the country.

⁵⁹Majoo vs. Majo, [2011] INSC 515