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# The 'Status-quo' of Private International Law in India for the protection of children from International Parental Abduction

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PARTH DEWAN<sup>1</sup>

## ABSTRACT

*This Research Article sheds light upon the background, features and execution of one of the landmark multilateral agreements for safeguarding the children from international parental abduction, i.e., the “Hague Convention on the Civil Aspects of International Child Abduction”. Furthermore, through the lens of this multilateral treaty, this Article focuses on examining India’s globally reprobated decision of abstaining from ratifying this landmark treaty and, evaluates the contemporary position of India’s Judicial apparatus in dealing with instances of International Parental Abduction through case analysis, theorization, and evaluation from a holistic standpoint.*

## I. INTRODUCTION

India, being one of the inaugural signatories of the United Nations Child Rights Convention<sup>2</sup>, standing upfront as a nation all for the safeguarding of children’s rights, has of late grossed quite a notoriety and condemnation at the international level for its failure to criminalize ‘parental kidnapping’. India’s abstinence from signing the “Hague Convention on Child Abduction”<sup>3</sup> has resulted in its emergence as a ‘safe-hub’ for parental kidnapers, with it being amongst the top 10 countries to which ‘abducted children’ are taken from UK<sup>4</sup> and having 80 plus active cases of International Parental Child Abduction (hereafter IPCA) from USA<sup>5</sup>. The latter’s Secretary of State Mike Pompeo accused India for ‘non-conformity’ to provisions for prevention of IPCA and claimed that 90% of IPCA’s cases last unsolved for over a year<sup>Ibid</sup>.

The most predominant explanation about the contemporary escalation in instances of IPCA

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<sup>2</sup> “UN General Assembly, Convention on the Rights of the Child, 20 November 1989, Treaty Series, vol. 1577, p.3.”

<sup>3</sup> “Hague Conference on Private International Law, (the “Convention”), 25 October 1980, Hague XXVIII”

<sup>4</sup> “Vicky Mayes (Development & External communications Liaison Officer), Reunite International Child Abduction Centre”

<sup>5</sup> “US accuses India of non-adherence to parental child abduction protocols’, May 17<sup>th</sup>, 2018, The Hindu”

is that there has been an upswing in inter-country matrimonial unions and parallelly, an increase in the separation between couples and the easy accessibility of taking the child to another country, cutting off the communication between the child and the other parent. Furthermore, the cultural, ethnic and religious distinctions between the couple often leads to circumstances of disputes. A Research executed in the year 1994 revealed that 15.9% of the child abductions in the USA happened in marriages where one partner belonged to a different nationality<sup>6</sup>. And since, displacing the child to a totally new country is in stark contrast to the so-called idea of “child’s benefits”, a multilateral treaty was fundamental<sup>7</sup>.

In the instances of parental abduction, it would conventionally come under the realm of Civil Law as, in accordance to the jurisprudence, Criminal Law would not be relevant. However, few countries like the USA, have enacted statutes for criminalizing the act resulting in the obstruction of parental rights; the “International Parental Kidnapping Crime Act”<sup>8</sup> realizes the abduction of a child by his/her parent a federal felony and a serious crime. On a number of occasions, the aforementioned has been executed against Indian nationals; United States V. Fazal-Ur-Rahman-Fazal and U.S. V. Sardana. India’s abstinence from signing the “Hague Convention on Child Abduction” has aggravated the issue of IPCA as, by providing an easy accessibility to abduct a child to India and, making it insuperable for an Indian parent to get justice in the instances of IPCA by other partner to any other foreign nation; Shehzad Hemani Vs. Nadia Rashid<sup>9</sup>. **Therefore, it is the need of the hour that India re-evaluates its stance on the complication of International Parental Child Abduction.**

## **II. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

“Civil Aspects of International Child Abduction” (“Convention”) is a multinational treaty focused at safeguarding the children from the deleterious consequences of abduction and retention to another country, by specifying a set of provisions for their safe return to the country of usual residence and ensuring the systematic execution of rights of custody of a party state in the other party state.<sup>10</sup> The Convention explicitly prohibits the removing of a child by a parent from the country of usual residence to another country when in conflict with the other parent/guardian’s custodial rights<sup>11</sup>. For the convention to be applicable in

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<sup>6</sup> “Paul R. Beaumont & Peter E. McEleavy, *The HCC-ICA 16-23 (1998)*”

<sup>7</sup> “Geraldine Van, *The International Law on the Rights of the Child 92 (1990)*”

<sup>8</sup> “18 U.S.C Crimes and Criminal Procedure, 107 Stat. 1998 (December 2<sup>nd</sup>, 1993)”

<sup>9</sup> “Writ. Petition No. 3367 of 2018”

<sup>10</sup> “W. Duncan, *Action in support of...the Permanent Bureau, 33 N.Y.U*”

<sup>11</sup> “Article-3, HCC-ICA, 25 October 1980, Hague XXVIII”

the instances of IPCA, it is a requisite that; **(a)** the child is below the age of 16 years; **(b)** the states involved have signed the Convention respectively. The process of a child's return can be initiated in the state of child's conventional residence (Requesting State) or in the state in which the child is requested (Requested State). After the return of the child to the parent's custody, the dispute can thereafter be resolved in the court of that particular jurisdiction as, the Convention doesn't specify about 'who has the custodial rights', and only addresses the place of jurisdiction.<sup>12</sup>

### **Conduct actionable under the convention**

Although, the terminology used in the Convention is "abduction" in its main title, it doesn't come under the category of an extradition treaty as, the erroneous removal or retention of a child by a parent is interpreted in a Civil sense and not a Criminal sense. The Hague Convention lays down specific provisions for the secure return of the so-called "abducted children" and focuses on resolving the overriding disquiet of the of the aggrieved parent. In contrast to the criminal extradition procedures, the Convention isn't concerned with the return of the "abductor parent" and doesn't recognize the aforementioned as a fugitive wrong-doer. However, it doesn't bar the operation of other legal provisions applicable in its party states; for instance, "International Parental Kidnapping Crime Act"<sup>Ibid</sup> of USA.<sup>13</sup>

The Article 3<sup>14</sup> is the cornerstone of the Convention because, it elucidates upon the two most pivotal aspects responsible for the efficacy of the Convention; **(a)** holders of the rights safeguarded by the Convention and, **(b)** elements of the unjustifiable removal or retention. Though, the primary beneficiary of the Convention is child, their role remains passive in accordance to the provisions as, it is the "person, institution or other body" per se that can officially invoke the Convention and seek relief. In a majority of instances, conventionally, it'd be one parent abducting the child from one contracting state to another by violating the custodial rights of the other parent. However, situations may arise where a person or an organization exhibits custodial rights of the abducted child and is therefore, eligible to seek support under the Convention; e.g., Grandparents, Foster Parents and public/private child care agencies. Furthermore, the Article-3 (a) & (b)<sup>Ibid</sup> duly recognizes that the custody might be upheld jointly or alone.

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<sup>12</sup> "Linda Silberman, 'Patching Up the Abduction Convention... to ICARA, 38 Texas INT'L LJ 41,49 (2003)'"

<sup>13</sup> "SILBERMAN, LINDA. "Hague Convention on ICA: A Brief Overview and Case Law Analysis." *Family Law Quarterly*, vol. 28, no. 1, American Bar Association, 1994, pp. 9-34"

<sup>14</sup> "The removal or the retention of a child is to be considered wrongful where..." 25 October 1980, *Hague XXVIII*"

### Judicial proceedings for return of the child

The Convention confers upon the aggrieved parent the right to seek a safe return of the abducted child which, can be established either by a direct application to a court in the party state to which the child has been abducted or through an application to Central Authority formulated by each of the party states<sup>15</sup>. Being mutually inclusive, the aggrieved party can invoke either or both the provisions. The Convention's Article 25 & 26, provides for the necessary **extension of legal support** to foreign nationals on the same bases as nationals; and **prohibits Central Authorities from charging for the expenditure** arising from the involvement of legal practitioners or counsel respectively.

The "Convention" doesn't explicitly specify the **pleading requirements** to submit the application for the judicial return proceedings. In lieu, the Article 8 sets forth basic prerequisites for an application placed before the Central Authority for the return of the child. And since, the primary objective of the Convention is reminiscent; the child's return, whether the court or the Central Authority is approached by the aggrieved for the return application of the child, it is necessary that the court is supplied with at least as much information as a Central Authority in compliance with the Article-8.<sup>16</sup> Furthermore, in accordance to the Article 23, there exists no mandate for legalization/any alike formality for the **admissibility of evidence** however, it specifies that the systematic authentication of private documents would be necessary. The Convention puts the respective court under the **obligation to work expeditiously** for the child's homecoming once an application has been submitted under Article 11.<sup>17</sup>

### III. THE 1996 CONVENTION (REINFORCEMENT OF THE 1980 CHILD ABDUCTION CONVENTION)

The rationale behind the compilation of the Convention of 1980 was to ameliorate the protection of the children in international scenarios, intending to prevent the conflict between the legal systems of the contracting states and expedite the delivery of justice. Recollecting the pivotal role of international cooperation for the children's protection, the contracting states felt the requirement of an emendation to the earlier provisions. Consequently, with the intentions to compile provisions to this effect, keeping into

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<sup>15</sup> "Article-12 & 29, HCC-ICA, 25 October 1980, Hague XXVIII"

<sup>16</sup> "How to win an IPCA Case, Jeremy D. Morley"

<sup>17</sup> "Filing and Litigating a HCCA Civil Case in Federal Court/Central Authority, Jamie Stone Womble Bond Dickinson, JDSUPRA (November 12, 2015)"

consideration the CRC<sup>18</sup>, the parties consented to ratify the “**1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Convention)**”.<sup>19</sup>

By underlining the predominant roles of the authorities of the country of child’s conventional residence for protecting the child in the long run, the **1980 Convention reinforces the 1996 Convention**. Furthermore, it contributes to the efficacy of any transient safeguarding measures ordered by a Judge while the homecoming of a child to the country of their conventional residence, by making such measures enforceable in that country until the counterpart respective authorities are able to execute such measures.

#### **IV. INTERNATIONAL PARENTAL CHILD ABDUCTION TO INDIA (CASE STUDY ANALYSIS)**

##### **(A) Shehzad Hemani vs Nadia Rashid (WP-3367-18(J))**

The case revolves around a four-years old girl ‘Insiya’ a Dutch national, whose father is an Indian and mother is a Dutch & Pakistani. In the chronology of the facts, it all began when Insiya’s mother took her to Netherlands for a vaccine as, both the parents had mutually agreed to relocate to Amsterdam. When Shehzad visited Netherlands on 15 occasions to get in touch with his daughter, he was granted limited access which was excessively monitored. Afterwards, the respondent explicitly stated her reluctance from moving back to India and let plaintiff and their daughter meet. The plaintiff brought it to the Dutch court under Article 3 of the Convention on the grounds that the respondent had removed Insiya from the country of her habitual residence, i.e., India. The events took turn when the plaintiff moved Insiya to India and, the respondent alleged him for abduction.

**The District Court (Hague) observed that Netherlands is a ratifier of the Convention, whereas India is not. By applying Article 2 & 13 in analogy, the court assumed jurisdiction under the Article 11 and ordered an immediate return of the minor child Insiya to the respondent and asked the plaintiff to hand over all the necessary travel documents. On not returning the custody of the child, plaintiff was charged with criminal provisions and sentenced 9 years in prison by Dutch Court and till date, no action has been taken by Indian Government and Insiya remains in India illegally.**

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<sup>18</sup> “Preamble, Hague Convention on Jurisdiction, Applicable Law... of Children, 1996”

<sup>19</sup> “Convention was finalized on October 19<sup>th</sup>, 1996; Enforcement from January 1<sup>st</sup> 2002”

**(B) United States of America vs Fazal-Ur-Rehman-Fazal (No. 02-2215)**

In 1990, after getting married in India, Dr. Fazal Rehman and Saihba Ali returned to Massachusetts and in the year 1992, they became permanent residents. In 1996, Rehman's marriage was going under tumultuous times and their two children; a daughter and a son, were suffering because of the couple's conflicts. Displeased by the actions of Saihba, Rehman insisted on filing a divorce with her. In November 1997, he travelled to his former abode in Nagpur, India, his both the Children and filed a petition in Nagpur's Family Court for the children's custody, alleging his wife of adultery and incapability to look after the children and under the Islamic Law demanded complete custody of the children.<sup>20</sup>

**With a series of legal proceedings going on parallelly in the USA and India, Rehman was pressed with criminal charges under the provisions of International Parental Kidnapping Act (IPKCA)<sup>21</sup> and was arrested upon his return to USA to attend a civil suit. He was sentenced 3 years of imprisonment, followed by 3 years of supervised release.**

**V. LAW COMMISSION OF INDIA (REPORT NO. 218<sup>TH</sup>)**

In the Law Commission of India's 218<sup>th</sup> report, "**Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)**", as the name suggests, the Law Commission put strong emphasis on the importance to formulate some structural provisions for the protection of children in the instances of parental abductions. The report outlined that the India's abstinence has resulted in numerous confusions with regard to the competence of the courts, in jurisdictional aspects, in the instances of IPCA. The report shed light upon the issues regarding the secured return of the child to India as, the foreign Judge might be disinclined to give permission to travel to India. **The report put forth the view that India should keep pace with changes and therefore, recommended signation to the Hague Convention.**

**VI. WAY FORWARD & CONCLUSION**

The growing international pressure on the Government of India, especially from UK and USA to reform its approach towards the IPCA cases, was marked by a turnaround after WCD Ministry's decision to **not ratify the Hague Convention on Child Abduction in 2017** was announced, turning a blind eye even towards the Law Commission's recommendation report

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<sup>20</sup> "*Fines and Restitution in Federal Criminal Cases; Peter N. Allerton*"

<sup>21</sup> "*107 Stat. 1998*"

no. 218. The WCD Ministry's rationale behind their abstinence was that of to protect the Indian women who are running from their 'bad marriages in abroad' back to the safety of their home country and apparently, a majority of the cases involved such instances. WCD Minister Maneka Gandhi reported about her interactions with various women and informed about how, in various ways Indian women and their children who had left U.S. were **traumatized by their husbands and even beaten up**. The Ministry quoted the issue of "parental abduction" to be a misnomer, and highlighted that these instances were more of a **"flight to safety"**.<sup>22</sup>

As a matter of fact, Ministry's decision to not ratify the Convention for the "protection of Indian Women" is counterintuitive and atomistic in approach. The fact that India's legal system lacks any structured set of provisions with regard to the instances of International Parental Abductions, makes it arduous for the Indian Judges to deliver justice and ultimately, jeopardizes the child involved in the case putting a lasting impact on their psychology. Not only does it make it make India a country of easy accessibility for the purpose of parental abduction, but also makes it strenuous for an aggrieved Indian parent to seek justice. With the judges deciding on arbitrary basis, courts choosing to decide custody on the undefined terms of 'best interest' and the Indian Court's inability to prove/disprove charges, it only tears down the judicial credibility of the Indian Judicial Apparatus.

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<sup>22</sup> *"India: Decision Not to Sign Hague Treaty on Child Abduction, Library of Congress"*