



# LAW MANTRA THINK BEYOND OTHERS

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## BRING OUR KIDS HOME AND HOW\*

### Abstract:

The issues of transnational-spousal child removal are many especially in the present world where people migrate across regions with much ease. Problems arise when children are caught in this migration. Problems become severe when one parent takes the child along without the permission of the other parent.

Thousands of children across the globe are abducted from his or her habitual residence by their own parents. Most of such removals are in defiance of custody orders by the courts.

India even in 2017 is not a signatory to The Hague Convention on Civil Aspects of International Child Abduction. The question of India's accession to the Convention first came up in 2007, but reached no logical end.

Indian Courts have analyzed each situation on a case to case basis. The position of law which is followed today is that any decision which is taken should be in accordance with the welfare and best interest of the child, comity of courts, priority principle and intimate connection test.

Now the big question is how would Indian Courts secure the prompt return of its children from foreign jurisdictions? How will Indian Courts ensure non- removal of Indian children to foreign jurisdictions in violation of local court orders? Which law would apply and how would it extend to a foreign country?

**Keywords:** transnational-spousal child removal, welfare and best interest of the child, comity of courts, priority principle and intimate connection test, The Hague Convention, parental child abduction.

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## **Introduction:**

*'Imagine your spouse and 3-year-old child leave for a "vacation" to India and days before their scheduled return to the United States, you receive a call, saying they are not coming back home. Your spouse then files for divorce in India and you petition the U.S. court for sole child custody. Over the next few years, you find yourself embroiled in bitter cross-border litigation, drained of all your life savings, making no progress. You seek assistance from U.S. and Indian governments, but there is little they can offer, because they have not created a legal path for return of abducted children.'*

**-- BOKH**

*'One day two years ago, my wife left for India taking our two-year-old son. I'm now fighting a long court battle for custody in India.*

*- A US-based Indian father to The Telegraph*

These are the experiences of many parents whose children are removed to other jurisdictions by the other parent.<sup>1</sup>

The issues of transnational-spousal child removal are many especially in the present world where people migrate across regions with much ease. Problems arise when children are caught in this migration. Problems become severe when one parent takes the child along without the permission of the other parent.

Thousands of children across the globe are abducted from his or her habitual residence by their own parents. Most of such removals are in defiance of custody orders by the courts. When parents split, they split across countries. These lead to conflict litigations in different nations. An aggrieved parent armed with a foreign decree requiring return of the child finds no relief in the Indian legal system. In the absence of a domestic law on "inter-parental child abduction" in India, NRI children become silent victims of their parents' marital dispute when they are forcibly brought back by one of the parents.

### **No domestic law on Parental Child Abduction**

But the question is why there is no domestic law on Parental Child Abduction?

Ninety-four states are party to the Hague Convention on Civil Aspects of International Child Abduction, which desires "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".<sup>2</sup>

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<sup>1</sup> It is reported that each year more than 1,000 American children are reported abducted by their parents from the United States to other countries. Between 2010-14, 6,000 cases were reported. Less than 40% of the abducted children are returned. India is the No. 1 non-Hague Abduction Convention signatory destination of IPCA from the United States and No. 3 overall. (U.S. Department of State, 2015)

<sup>2</sup> The Hague Convention on Civil Aspects of International Child Abduction, 1980

India even in 2017 is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction. The question of India's accession to the Convention first came up in 2007, but reached no logical end. Once again on June 22, 2016, the Ministry of Women and Child Development (MWCD) uploaded on its website a proposal to enact a draft of the Civil Aspects of International Child Abduction Bill, 2016. The proposed Bill, 2016, was placed on the Ministry's website for comments till July 13. It was said, once the Bill is approved, it will facilitate prompt return of any child under 16 who has been "wrongfully removed to or retained in other state which is not his/her habitual residence." The draft Bill was prepared following a reference made by the Punjab and Haryana High Court to the Law Commission of India to consider whether recommendations should be made for enacting a suitable law and for signing the Hague Convention.

The Law Commission had recommended that India should frame a domestic law and sign the Hague Convention in its 218th report. Also in the 263rd report, the Commission examined the draft of the "Civil Aspects of International Child Abduction Bill, 2016" and came to a conclusion that it requires revision keeping in view the legislative precedents and practices followed in the drafting of bills and to suitably harmonize its provision with the Hague Convention, 1980. The Law Commission in this report had submitted a revised recommended Bill (Protection of Children (Inter-Country Removal and Retention) Bill, 2016, indicating the modifications made by the Commission.

Everyone thought that the bill would provide an enabling legislation to implement the provisions of the Hague convention that provides an expeditious method for returning a child. It was also believed that signing the convention will ensure enforcement of custody orders of foreign courts. The draft bill had also mandated setting up of a central authority, to be headed by a joint secretary level officer, where an aggrieved parent could approach the authority for the return of the child. The authority was to have the power to decide all such cases.

### **Decision not to sign the treaty**

But unfortunately, the ministry of Women and Child Development (MWCD), after consulting the external affairs ministry has decided against signing the treaty.

There has been a steady rise in parental abductions by Indians. In most cases, it is the mother who returns home with the child. The fear that signing the treaty will lead to victimization of the parent mainly the mothers is what is holding the Indian Government from signing the convention. The Government feels by ratifying the convention, India will not be able to protect its women and children from marital harassment and ill treatment. But if an NRI parent takes away a child and restricts the other parent from meeting or talking to the kid, there is no law in India to deal with the situation.

This is the story of many parents whose children have been removed from their place of habitual residence to another place across borders. The abducting parent **then files for divorce and sole child custody in India or in a foreign court and also restricts access to the child. The left behind parent finds himself in a bitter cross-border litigation, drained of all his life savings, making no progress. He then seeks assistance from U.S. and Indian governments, but there is little they can offer, because they have not created a legal path for return of abducted children.**<sup>3</sup> Then in that case, the courts in India will have to continue to decide such cases as per their "own wisdom"<sup>4</sup>.

### *Own Wisdom*

Now the crucial question is what is "own Wisdom"? The main aim of the Hague Conference, 1980 was to protect children from the harmful effects of international abduction by a parent by encouraging the prompt return of abducted children to their country of habitual residence, and to organize or secure the effective rights of access to a child. And custody and visitation matters were generally decided by the proper court in the country of the child's habitual residence.<sup>5</sup>

But many reasons are being put forth to defend the stand India has taken of not ratifying the Child Abduction Convention. One such reason and an important one at that is signing the convention would be to the disadvantage of Indian women as there were far more cases of Indian women escaping bad marriages abroad and returning "to the safety of their homes" in India than non-Indian women who are married to Indian men leaving India with their children, and that the majority of such cases involved women fleeing, not men but bad marriages.<sup>6</sup> Another reason is India was being pressured by fathers' rights groups to accede to the convention as fathers also had equal rights to their children as mothers did. But many felt that this kind of reasoning doesn't apply to India given the reality of Indian marriages. But as per [section 6](#) of Hindu Minority and [Guardianship Act, 1956](#), natural guardian is the father for a minor, who has completed the age of 5 years and mother has the custody of a child below the age of five.

It was believed that the Indian government had decided to sign the Hague Convention but finally changed its mind after interacting with women who have been abandoned by their

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<sup>3</sup> Refer to <https://www.change.org/p/barack-obama-bring-our-kids-home-we-urge-us-india-to-reunite-all-parent-abducted-american-children-now>.

<sup>4</sup> Dr Justice B.S Chauhan opined that in the absence of legislation the judges will have to rely on their own wisdom. The Law Commission headed by Dr Justice B.S Chauhan in its 263rd Report has recommended the Protection of Children (Inter-Country Removal and Retention) Bill, 2016.

<sup>5</sup> Important Features of the Hague Abduction Convention – Why the Hague Convention Matters, U.S. Department of State, Bureau of Consular Affairs website (last visited Jan. 11, 2016).

<sup>6</sup> <http://indianexpress.com/article/india/india-news-india/india-will-not-ink-hague-treaty-on-civil-aspects-of-child-abduction-4397236/>

husbands abroad, had their passports snatched from them, been beaten up, and have somehow managed to get some money to flee and are in terrible fear.<sup>7</sup> The government also relied on 2010 research report on Hague Convention cases showing that globally 68% of the taking parents were mothers, 85% of these mothers were the primary caregivers of their children, and 54% had gone home to a country in which they held citizenship, with the majority being women fleeing abusive and violent homes. Those who were opposing the Convention said half of Hague Convention cases are not actually “parental abduction” but “flights to safety.”<sup>8</sup>

But there is a counter reasoning for signing the convention by India. Some have criticized the government’s decision saying that Indian policy makers were focusing too narrowly on the issue of “Indian women being abused,” instead of accepting that there are numerous reasons why parents abduct their children, and experts consider child abduction to be child abuse with long-lasting traumatic effects.<sup>9</sup> Because India has not signed the Hague Convention, there is no way for a foreign government to force the abducting parent or the Indian government to return the abducted child.<sup>10</sup> The U.S. State Department, in its 2016 international child abduction report, stated, “India demonstrated a pattern of noncompliance by persistently failing to work with the United States to resolve abduction cases in 2015.”<sup>11</sup>

India is known as a “safe haven” for abducting parents. But India in its pursuit to protect its women from bad marriages does what it does best, to keep mothers and children in secure environment. And to do so Indian Courts apply the best interest principle. Indian Courts also apply the local laws to the problem at hand. It is true to say that cultural, gender bias and negative stereotyping of left-behind fathers as abusive have held back India from ratifying the Hague Convention.

Indian Courts have analyzed each situation on a case to case basis. The position of law which is followed today is that any decision which is taken should be in accordance with the welfare of the child. Ormrod, L.J of the Court of Appeal in the case of *In Re C. (Minors)*<sup>12</sup> held that “all decisions relating to the welfare and future of the children have to be decided on the 'best interests' of the children principle and no other glosses are to be put on that text.”<sup>13</sup> However, the Courts have also recognized welfare cannot be regarded as an absolute standard.

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<sup>7</sup> Id.

<sup>8</sup> Jeffrey L. Edleson et. al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases* (Berkeley Project Report), Final Report, NIJ #2006-WG-BX-0006, Goldman School of Public Policy, Univ. of Cal.-Berkeley website (Nov. 2010).

<sup>9</sup> Refer to <http://bringourkidshome.org/our-stories/why-is-india-reluctant-to-act-against-parental-child-abduction>.

<sup>10</sup> Refer to <https://www.gov.uk/government/collections/child-abduction>.

<sup>11</sup> Bureau of Consular Affairs, *Annual Report on International Parental Child Abduction (IPCA)* 35 (2016), U.S. Department of State website.

<sup>12</sup> [1978] 2 All E.R. 230

<sup>13</sup> Report on the Hague Convention on the civil aspects of International Child Abduction and some related matters, Available at: [http://www.lawreform.ie/\\_fileupload/Reports/rChildAbuction.htm](http://www.lawreform.ie/_fileupload/Reports/rChildAbuction.htm) (Last visited: 10/16/2012)

As Thorpe L.J. put it in *Osman v Elasha*<sup>14</sup>, “what constitutes the welfare of the child must be subject to the cultural background and expectations of the jurisdiction striving to achieve it”. Therefore, while determining what the welfare of the child is, it is essential to look at various factors such as the educational opportunities, the benefits available, the health issues, emotional support, stability and other basic needs.

### **Bring Our Kids Home**

In April, 2016 Parent-led groups ‘Bring Our Kids Home’<sup>15</sup> (BOKH) reached out to lawmakers of US and India, to address the growing issue of International Parental Child Abductions. BOKH made a humanitarian appeal to Prime Minister Narendra Modi, requesting urgent action to give left behind parents in the US access to their abducted children in India. They **urged President Obama and Prime Minister Modi to address this serious issue and** sign a bilateral agreement on International Parental Child Abduction.

BOKH says India is among the top five countries for international parent-child abductions, with 173 such abductions between 2010 and 2014. It also urged the two leaders to negotiate a bilateral agreement to expedite resolution of pre and post Hague abductions cases. As the Convention does not apply retroactively to pending pre-Hague cases, the pre-Hague abduction cases will be left in limbo, compounding the suffering of victimized children and families. BOKH has also urged the lawmakers of both nations on humanitarian grounds to facilitate seeking parents living in America to spend time with their children in India, until a U.S.-India bilateral agreement is in place, while ensuring their safety. They also said in their petition that studies show that children suffer from immense emotional and psychological issues as a result of IPCA. India has a moral and legal responsibility as a signatory to the UN Convention on Rights of Children to help victimized children and parents reunite, while ensuring safety of both. Petition also pointed to the fact that many abducting parents often claim “flight from abuse” to justify child abduction. But they say these claims are false and most importantly they are never reported in the U.S. prior to the abduction. In the case of *P.K.Srikumar v Harshitha Gopinathan*<sup>16</sup>, the Madras High Court also made the same observation.

### **India refuses to sign the Hague Convention**

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<sup>14</sup> [1999] EWCA Civ 1669, [2000] Fam. 62.

<sup>15</sup> Bring Our Kids Home is a parent-led organization that represents seeking mothers and fathers based in the United States, whose children are abducted to India. We have two primary goals: 1) To raise awareness and advocate for the return of all American children abducted to India, victims of IPCA and; 2) To engage the U.S. and Indian Governments to put in place a robust, long-term mechanism to prevent future abductions and enable prompt return of abducted children from both countries.

<sup>16</sup> Madras high court Judgement dated 25 July, 2016.

But the truth of the matter is India has refused to sign the Hague Convention on parental abduction.

Then what Next? How to protect children and parents both from IPCA?

*The only way out is to rely on and have faith on 'Own Wisdom'<sup>17</sup>.* The focal point would be the wisdom of the Judges.

Inter-parental child removal is not defined in any Indian legislation and is not specified as an offence under any statutory law. The problem is compounded by the fact that India is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction 1980. Hence, inter-parental child custody conflicts are invariably decided by Indian Courts on the principle of the welfare of the child as a paramount consideration in the best interest of the child. The writ of Habeas Corpus is a remedy, invoked by a distressed parent whose child has been removed to India from foreign homes. The Foreign Court Custody order forms the basis of invoking this extra ordinary constitutional remedy. A guardianship petition under the Guardian and Wards Act 1890, filed by the opposing spouse in India can delay and frustrate the decision-making process.

### **Children removed from foreign jurisdictions need to be returned**

Recently, the Apex Court<sup>18</sup> has given a clear mandate that children removed from foreign jurisdictions need to be returned to the country of their habitual residence on the comity of Courts principle for determination of their best interests and welfare which is the paramount consideration. The Apex Court<sup>19</sup> also observed that *“the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child’s welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons.”* The Court has upheld two main principles of comity of Courts and the best interest and welfare of the child to be paramount. The Court also observed that forum or Court shopping requires to be dealt firmly. It also said that relocation is now a well-known legal concept requiring the entitlement of Visitation, Guardianship and custody rights of the left behind spouses. The new emerging jurisprudence on child abduction law requires that domestic courts must respect foreign courts orders in matrimonial disputes. Cases of Parental Child Abduction need a robust legal framework and these cases must be processed in specialized courts with trained judges on IPCA issues. Whereas issues relating to recognition

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<sup>17</sup> Supra, fn 4.

<sup>18</sup> *Dr. V. Ravi Chandran v UOI* (2010) 1 SCC 174, *Shilpa Aggarwal v Aviral Mittal* (2010) 1 SCC 591 and *Arathi Bandi v Bandi Jagadrakshaka Rao* AIR 2014 SC 918,

<sup>19</sup> *Roxann Sharma v Arun Sharma* 2015 (2) Scale 488,

and enforcement of foreign decrees are concern, the Indian Courts finally seem to have made that very important shift in their mind set and have become more receptive to *The Principle of Priority* (or first strike principle).

On the issue of child custody where a Foreign Court is concerned on the one hand and an Indian Court (or Domestic Court) is concerned on the other, the Apex Court held<sup>20</sup>:

*“In passing an interim or an interlocutory order, a Foreign Court is as capable of making a prima facie fair adjudication as any Domestic Court and there is no reason to undermine its competence or capability... If the jurisdiction of the Foreign Court is not in doubt, the ‘first strike’ principle would be applicable... If there is a pre-existing order of a Foreign Court of competent jurisdiction and the Domestic Court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the Domestic Court must take into consideration:*

- *The nature and effect of the interim or interlocutory order passed by the Foreign Court.*
- *The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the Foreign Court.*
- *Whether the repatriation of the child causes any moral or physical or social or cultural or psychological harm to the child, or causes any legal harm to the parent with whom the child is in India.*
- *The alacrity with which the parent moves the concerned Foreign Court or the concerned Domestic Court.”*

There is a need to minimize conflicting and parallel court orders as they result in parallel child custody proceedings in foreign and Indian Courts. Therefore, it is of primary importance to determine whether the foreign court has jurisdiction over the child whose custody is in dispute. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect by applying the principle of priority or first strike principle. But if there is a pre-existing order of child custody of a foreign court of competent jurisdiction and the domestic Indian court decides to conduct an elaborate inquiry, they must be special reasons to do so and not as a matter of routine.

In the case of *P.K.Srikumar v Harshith Gopinathan*, when the father was returning back from India to USA along with his child, the child was snatched away by the wife/ mother with the help of police. Thereafter, on his return to USA, the father/husband initiated proceedings before the Superior Court of California, County of Orange, USA for permanent custody of the

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<sup>20</sup> *Surya Vandanam v State of Tamil Nadu*, SC judgement dated 27 February, 2015.

minor child. The notice of the petition with the copies of documents was duly served on the respondent wife at Chennai. The Superior Court of California ordered notice to show cause. The respondent was granted one month's time to send her response to the petition. In response to the said notice, the respondent sent by post, her detailed reply, along with the declaration in the required format to the Superior Court of California. Copies of the said reply were also served on the appellant through his counsel. The respondent was also called upon to attend the mediation. Notice of the said mediation was also duly served on the respondent and she attended the mediation telephonically.

Finally, the Superior Court of California, County of Orange, passed an order granting sole legal and physical custody of the minor child to the appellant/father. The husband then filed for enforcement of the foreign court order seeking relief of declaration that the Judgment passed by the Superior Court of California, County is conclusive and binding on the respondent wife and enforceable within the jurisdiction of Indian Courts and also for consequential declaration that the father is the natural guardian of his minor son and is the legal custodian of the minor child.

The wife filed two petitions before the family court in Chennai seeking permanent custody of the minor child and second seeking dismissal of the suit filed by the husband. The respondent wife also argued that she had not participated in person and hence foreign court order was not binding on her.

The Madras High Court held that in the proceedings initiated by the father before the Superior Court of California, for the custody of the minor child, the mother fully participated even though it was telephonically and final order was rendered and hence binding. The court also held since the minor child is a citizen of USA by birth, jurisdiction as to the custody lies only with the competent Court of USA and the Judgment of that Court is binding upon the parties. The Court also held that the Judgment of the Superior Court of California is conclusive as to the issue of permanent custody of the minor child for the reason that the child is a citizen of United States of America and the custody is governed by the Laws of United States of America.

This judgement demonstrates the preparedness of the Indian Courts to apply the conflict of law rules which are part of the domestic law. The court not only applied - a) the priority principle, b) comity of courts, c) applied intimate connection test, d) best interests and welfare of child. But also, went a step further and adopted a liberal interpretation to the *Hague convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965* and recognized and allowed electronic service of documents on the respondent in India.

## So what is *The Principle of Priority*?

*Is it the same as early bird gets the worm, in the present scenario, the worm being the child.*

When there are two or more competing equitable interests, the maxim *qui prior est tempore potior est jure* applies which means he who is earlier in time is stronger in law. Accordingly, where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property (child in the present context) first will be entitled to priority over the other. Where the equities are equal and neither claimant has the legal estate, the first in time prevails. It is a principle of natural justice that if rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law. This rule, however, applies only to cases where the conflicting equities are otherwise equal.<sup>21</sup>

The Principle of Priority in Conflict of laws operates when two jurisdictions have concurrent jurisdiction over a dispute, the “principle of priority” generally applies to allow the first-filed action to proceed.<sup>22</sup> In its narrowest sense the principle applies only to courts “within one sovereignty,” however, although the principle is not applicable between sovereign jurisdictions as a matter of duty, but as a matter of comity a court may, in its discretion, stay a proceeding before it on the grounds that a case involving the same subject matter and parties is pending elsewhere.<sup>23</sup> Undue delay in the first-filed action could justify denying a stay in the later action, and that unstated additional factors or circumstances might also warrant a denial of a stay in the later action.<sup>24</sup>

The courts do not require both cases to involve the exact same cause of action or legal remedy. Rather, the question is whether the issues in the two cases are substantially similar?<sup>25</sup> Therefore, grant of stay is appropriate where two actions are pending simultaneously involving same parties and substantially same causes of action.

Under general comity principles, the courts can refuse to apply or recognize foreign law that is contrary to its public policy. Indian Courts can refuse enforcement and recognition of foreign court orders and judgments under section 13 of CPC. Section 13 lays down grounds when foreign judgments are not conclusive.<sup>26</sup>

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<sup>21</sup> *S. Arunachalam v Sivan Perumal Asari*, AIR 1970 Mad 226 at p.230

<sup>22</sup> *Bedingfield v Bedingfield*, 417 So.2d 1047 (Fla. 4th DCA 1982); *Siegel v Siegel*, 575 So.2d 1267 (Fla. 1991); *Graham v Graham*, 648 So.2d 814 (Fla. 4th DCA 1995).

<sup>23</sup> *Ibid*, 417 So.2d 1050.

<sup>24</sup> *Id* at 1272.

<sup>25</sup> *See Robinson v Royal Bank of Canada*, 462 So.2d 101 (Fla. 4th DCA 1985)

<sup>26</sup> Section 13 of the Code of Civil Procedure deals with Foreign Judgment, which is extracted below :

Sec.13 : When foreign judgment not conclusive - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except -

(a) where it has not been pronounced by a Court of competent jurisdiction;

The principle presupposes concurrent jurisdiction in both courts, which is not always present. In interstate and international scenarios the principle is discretionary. In family-law contexts where the two courts are not of the same sovereign, the principle of priority, being a matter of comity, is also a matter of common law, based on case precedent rather than statutory law.

The Madras High Court held<sup>27</sup> that the Judgment of the Superior Court of California is conclusive as to the issue of permanent custody of the minor child for the reason that the child is a citizen of United States of America and the custody is governed by the Laws of United States of America. The High Court upheld the comity of courts principle and applied the priority or first strike principle. The court also held since the minor child is a citizen of USA by birth, jurisdiction as to the custody lies only with the competent Court of USA and hence, the Judgment of that Court is binding upon the parties.

However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child.

The Court has specifically approved the modern theory of conflict of laws, which prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.

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### **Law needs to be codified**

However, law still needs to be codified. India's accession to the Hague Convention would resolve many issues of child removal and retention. It is also based on the principle that the removed child ought to be promptly returned to his or her country of habitual residence to enable a court of that country to examine the merits of the custody dispute and thereupon award care and control in the child's best interest. This is because the courts of the country where the child had permanent or habitual residence are considered to best determine the child's interest.

### **Solution**

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- (b) where it has not been given on the merits of the case;
  - (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
  - (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
  - (e) where it has been obtained by fraud;
  - (f) where it sustains a claim founded on a breach of any law in force in India."

<sup>27</sup> Supra fn. 16.

<sup>28</sup> Supra fn. 18.

There is no straight forward solution to the problem of Inter-Country Removal and Retention of children by parents under Indian Law. There is a sudden and alarming rise in such cases.

Today, the scenario has changed, earlier we had cases of foreign children being brought to India against parental consent. But now *we are witnessing cases where Indian Children are being removed from India to other foreign countries.*

Now the **big question is how would Indian Courts secure the prompt return of its children from foreign jurisdictions?** How will Indian Courts ensure non- removal of Indian children to foreign jurisdictions in violation of local court orders? Which law would apply and how would it extend to a foreign country?

As India is not a signatory to the Hague Convention nor has any bilateral or multilateral agreements with other nation states, hence India will not be able to do much to get back its kids home. Then what is the remedy Indian parent has? All they can do is petition the foreign courts or hope foreign courts will enforce and recognize Indian Court orders and judgments.

But how viable will this solution be? **To litigate in a foreign land is no solution at all.** The litigation expenses are very exorbitant, many parents cannot afford it. It is not just financial constraints but also travel related formalities which will cause difficulty in reaching foreign jurisdictions. What will happen if the parents do not get travel visas? All these hurdles will prove as deterrents for getting back the kids home.

Therefore, laws need to be codified.

It is absolutely necessary that India signs the Hague Convention on Child Abduction. Convention applies between contracting states. The Convention requires that the removed child ought to be promptly returned to his or her country of habitual residence to enable a court of that country to examine the merits of the custody dispute and thereupon award care and control in the child's best interest. This is because the courts of the country where the child had permanent or habitual residence are considered to best determine the child's interest.

Therefore, the one and only solution to how Indian Courts would secure the prompt return of its children who have been removed to foreign jurisdictions is by India becoming a party to the Hague Convention on Civil Aspects of International Child Abduction, which desires "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".<sup>29</sup>

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<sup>29</sup> The Hague Convention on Civil Aspects of International Child Abduction, 1980

And secondly, in cases where the children are removed, retained and abducted by a parent without the permission of the other parent is to criminalize such acts.

United States Federal Laws prohibit a parent from removing a child from US or retaining a child in another country with intent to obstruct another parent's custodial rights. This act is a criminal offence under the federal laws. Convicted offenders can face up to three years of imprisonment.

Under the UK laws parental child abduction is a criminal offence. Even under the Canadian Criminal Code, Parental Child Abduction is a crime. The Offenders are dealt with seriously.

India not only needs to accede to the Hague Convention, it also requires provisions in the domestic laws which will send a clear message that unilateral actions by one parent that affect lawful care and control rights of the other parent will not be tolerated. Indian Penal Code needs to be amended to declare parental child abduction as a crime, a punishable offence. Such amendments to criminal laws would have a deterrent effect and the cases of parental kidnapping will come down.

Though parental child abduction is child abuse and hence be declared as a crime. Not all cases of parental child abduction will warrant criminal charges. Child abduction by parents will have a detrimental effect on the well-being of the children involved.

Therefore, parents need to be discouraged from using self-help remedies such as abduction, removal and retention to deal with custody disputes. Parents need to be encouraged to comply with existing orders or agreements and to resolve disputes with the other parent through civil processes. But in those cases where parents are unwilling, and the court feels the child is being abused, the courts may consider the option of declaring the child to be the ward of the court within its *Parens Patriae* Jurisdiction<sup>30</sup>.

## **To Conclude**

The best way forward for India is to be a party to the Hague Convention on Civil Aspects of International Child Abduction. Secondly, India must criminalize parental child abduction because *“children who are victims of family abduction are uprooted from their homes and deprived of their other parent. Often they are told the other parent no longer loves them or is dead. Too often abducted children live a life of deception, sometimes under a false*

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<sup>30</sup> *Parens patriae* is a Latin phrase meaning "parent of the country," which means that a state may act as the guardian of any child within its borders. The concept was used by courts under traditional common law to provide their authority for making custody decisions and other decisions affecting minors and adults legally unable to care for themselves.

*name, moving frequently and lacking the stability needed for healthy, emotional development.”<sup>31</sup>*



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<sup>31</sup> Quote from Family Abduction: Prevention and Response, 6th ed., The National Center for Missing & Exploited Children, 2009.