

THE INDIAN LEGAL FRAMEWORK GOVERNING INTER-COUNTRY PARENTAL CHILD REMOVAL AND RETENTION: NEED FOR REFORMS

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ABSTRACT

This paper critically examines the Indian legal framework governing inter-country parental child removal and retention, focusing on the gaps and challenges that arise in the absence of specific legislation addressing this issue. The lack of India's accession to the Hague Convention on the Civil Aspects of International Child Abduction (1980) creates significant legal ambiguities and complicates the resolution of cross-border child custody disputes. Current Indian laws, including the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956, are insufficient to address the complexities of international child abduction, often leading to protracted litigation and inconsistent judicial outcomes. The paper highlights the need for India to enact comprehensive legal reforms that align with international standards, particularly by ratifying the Hague Convention on the Civil Aspects of International Child Abduction (1980) and implementing clear, child-centric policies that prioritize the best interests of the child while ensuring swift and effective legal remedies. By analysing comparative international legal frameworks and Indian judicial precedents, the paper underscores the urgency of reform to prevent the misuse of parental rights and to protect the welfare of children in inter-country disputes.

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1. INTRODUCTION

The question of deciding upon the custody of children after their unlawful removal by parents either within the borders of the same nation or across borders of different nations has become an issue of major global concern. This is a question that can always arise due to the presence of children, irrespective of whether the spouses are domiciled in their country of nationality or on a foreign territory.¹ In case if the couple were resident in their country of nationality along with the children, then the custody of children can be easily decided by the courts of the respective country with the help of the domestic laws governing custody. However, the situation becomes extremely confusing if the sparring couple were resident on a foreign territory.² The confusion arises because in such cases both the laws of the foreign territory as well as the laws of the countries of nationality of the parties may become applicable at various stages depending on their location and situation relating to citizenship. Further, spouses engaged in custody battles often take away their children with them to their countries of nationality either immediately after separation or during the pendency of a divorce proceedings. At times, they even do so in violation of foreign custody orders which may have gone against them.³

In this context, this paper examines the feasibility, structure and content of a separate legislation in India dealing with inter-country parental child removal and retention. It is anticipated that such a legislation shall provide statutory guidelines particularly to practitioners and judges in the Indian courts as to the manner in which such cases should be dealt with in a more effective manner. Further, the new legislation also sets out to underline certain common parameters on the basis of which best interest of the child⁴ and comity of courts should be applied in such cases along with the grounds for recognition or non-recognition of foreign custody orders. Last

¹ K C Sheehan, 'Post-Divorce Child Custody and Family Relocation' (1986) 9(1) Harvard Women's Law Journal 135 <https://heinonline.org/HOL/P?h=hein.journals/hwlj9&i=143> accessed 19 July 2023.

² M Strous, 'Post-Divorce Relocation: In the Best Interest of the Child' (2007) 37(2) South African Journal of Psychology 223 <https://doi.org/10.1177/008124630703700202> accessed 13 August 2024.

³ *ibid* 224.

⁴ Hague Convention on the Civil Aspects of International Child Abduction 1980, 1343 UNTS 89 (entered into force 1 December 1983).

but not the least, the new legislation is recommended keeping in mind the objective of unification of the applicable principles of international law and domestic personal laws under one umbrella legislation. On a consideration of the legal perspectives, it is worthy of noting that such circumstances may arise either during the pendency of a custody battle among spouses or at the end of a custody proceedings between divorced couples wherein the court deciding over the custody grants it fully to one parent and awards only visitation rights to the other. Subsequently, over the years it has also been seen very often that the parent who is awarded visitation rights by a court makes an attempt to bring the child into their own custody forcefully or deceitfully in violation of court orders.⁵ This is invariably followed by custody proceedings initiated in the courts of the country of the visiting parent's nationality in order to make an indirect attempt to make such a removal completely legal or to escape Habeas Corpus petitions by the lawful parent in order to get back the custody of the removed child.⁶ The visiting parents feel that a custody order in their favour will allow them to retain and hold the custody of their children over long periods of time.⁷

1.1 Parental Child Removal within Domestic Territorial Limits

Further from the legal perspective, it is usually not a problematic situation where spouses belong to the same country and one spouse removes a child within the borders of that country from one state to another. Such situations would generally be regulated and controlled by the domestic family laws of the concerned nation. Even courts would apply the domestic laws thereby leading to uniform and consistent judicial decision-making as well.⁸ Such situations are also not an issue when it comes to the applicable laws and mutual recognition and enforcement of judgments among the

⁵ L Vinion, 'When Custody Conflicts Cross the Border' (1993) 15(4) Family Advocate 30 <https://heinonline.org/HOL/P?h=hein.journals/famadv15&i=209> accessed 26 March 2024.

⁶ *ibid* 36.

⁷ A K Pandey and R Santhalia, 'Inter-country Abductions and Private International Law' (2010) 3(2) NUJS Law Review 229 <http://nujlawreview.org/wp-content/uploads/2016/12/abhijit-kumar-pandey-and-roshan-santhalia.pdf> accessed 22 March 2024.

⁸ K C Sheehan (n.2) 140.

federal state courts of the same country. This is because even federal courts of the same nation apply the same laws thereby reaching the same conclusion in awarding custody to separated spouses.⁹

1.2 Inter-country Parental Child Removal

The second scenario of cross-border marriages, separations and custody disputes is the more problematic one to which the international community has not found an effective solution yet and which has also been a subject matter of extensive research for scholars and practitioners specializing in the conflict of laws.¹⁰ It occurs when the one of the separated parents takes away the child from its country of habitual residence to another country which is either a neutral territory or the country of nationality of the removing parent.¹¹ The similarity of the second scenario with the first is that in both cases there may be a multiplicity of custody-related litigation and court orders. However, the dissimilarity between the two situations is that in the former removal happens within the borders of the same nation and can therefore be regulated by the domestic law of one nation whereas in the latter removal happens transnationally and could therefore trigger the court jurisdictions and domestic family laws of two or more nations including the country of the child's habitual residence.¹² Further the second scenario can also trigger the jurisdictions and laws of all those countries in which the removing parent may have stayed with the child for considerable periods in order to prevent the child from coming into contact with the lawful parent.¹³

The second scenario therefore is also popularly called inter-country parental child removal and retention or alternatively international parental

⁹ V Brummel, 'Parental Kidnapping, Criminal Contempt of Court, and the Double Jeopardy Clause: A Recommendation for State Courts' (2016) 106(2) *Journal of Criminal Law and Criminology* 315 <https://heinonline.org/HOL/P?h=hein.journals/jclc106&i=331> accessed 26 March 2024.

¹⁰ A Malhotra and R Malhotra, 'Inter-Country Parental Child Removal and the Law' (2008) 8(1) *International Survey of Family Law* 137 <https://heinonline.org/HOL/P?h=hein.journals/intsfal15&i=169> accessed 26 March 2024.

¹¹ *ibid* 139.

¹² *ibid* 140.

¹³ *ibid* 141.

child abduction. Many countries around the world though such as the US, UK, the member countries of the EU etc. have labelled it as International Parental Child Abduction in pursuance of the Hague Convention of 1980 and also because they tend to consider such removal from custody as an intentional act.¹⁴ Such an act is identified in their domestic laws as a punishable offence for which separate domestic legislations have been passed by their legislatures making them applicable within the domestic limit. Wrongful removal has also been distinguished across the world from rightful or lawful removal as the latter may happen as a measure of protection taken by one parent in response to continuous domestic abuse and violence by another.¹⁵

In terms of the existing global legal framework, The Hague Convention on the Civil Aspects of International Child Abduction, 1980,¹⁶ The Convention on the Rights of the Child, 1989¹⁷ and The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996¹⁸ deal with matters relating to wrongful international parental child removal. The Conventions of 1980 and 1989 cover the substantive aspects such as custody rights of the lawful parent, best interests of the child and habitual residence while the Convention of 1996 covers the procedural aspects of jurisdiction, choice of law and mutual recognition and enforcement of foreign judgments on the issue. Simultaneously, in India the judiciary has used laws such as the Guardians

¹⁴ A Maxim, 'International Parental Child Abduction: Essential Principles of the Hague Convention' (2012) 69(4) Bench and Bar of Minnesota 18 https://ezproxy.svkm.ac.in:2124/HOL/NotSubscribed?bad_coll=barjournals&send=4a&bad_handle=hein.Barjournals/benchnbar0069&div=34&id= accessed 26 March 2024.

¹⁵ *ibid* 22.

¹⁶ The Hague Convention on the Civil Aspects of International Child Abduction 1980 <https://assetsectionhcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> accessed 26 March 2024.

¹⁷ The United Nations Convention on the Rights of the Child 1989 <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 23 March 2024.

¹⁸ The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996 <https://assetsectionhcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf> accessed 19 July 2024.

and Wards Act 1890,¹⁹ Constitution of India 1950,²⁰ Hindu Minority and Guardianship Act 1956,²¹ the Family Courts Act 1984²² and the Code of Criminal Procedure 1973²³ to deal with such cases. A more detailed analysis of the existing Indian legal framework reveals the gaps to be filled.

2. INDIAN JUDICIAL APPROACH TOWARDS THE APPLICATION OF THE EXISTING LEGAL FRAMEWORK GOVERNING INTER-COUNTRY PARENTAL CHILD REMOVAL AND RETENTION

Individuals involved in child custody disputes over the years have approached the Indian judiciary under various codified laws in order to establish their *locus standi*²⁴ to seek relief from the courts. It is imperative to understand the context of application of the laws in order to better understand the precedential jurisprudence of international child custody disputes in India.

2.1 Existing Indian Legal Framework Governing Inter-Country Parental Child Removal and Retention

2.1.1 Constitutional provisions

In several cases, the Supreme Court of India and the state High Courts have

¹⁹ The Guardians and Wards Act, 1890 (Act 8 of 1890) <https://www.indiacode.nic.in/handle/123456789/2318?locale=en> accessed 24 March 2024.

²⁰ The Constitution of India, 1950 <https://legislative.gov.in/sites/default/files/COI.pdf> accessed 24 March 2024.

²¹ The Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) https://www.indiacode.nic.in/handle/123456789/1649?sam_handle=123456789/1362 accessed 25 March 2024.

²² The Family Courts Act, 1984 (Act 66 of 1984) https://legislative.gov.in/sites/default/files/A1984-66_0.pdf accessed 25 March 2024.

²³ The Code of Criminal Procedure, 1973 (Act 2 of 1974) <https://legislative.gov.in/sites/default/files/A1974-02.pdf> accessed 25 March 2024.

²⁴ A Latin maxim which literally means “place to stand”. In simple language it implies the ground(s) on the basis of which an individual gets the right to seek relief from the court. Such legal basis or right can come from codified law, unwritten common law principles or from precedents.

issued the writ of *Habeas Corpus* under articles 32 and 226 of the Constitution of India, respectively. The parent deprived of the custody of a child has often petitioned the higher judiciary in India against the other parent who may have retained custody of the child wrongfully. The primary objective behind doing so was to get back the physical custody of a child who has been wrongfully removed by a parent. *Habeas Corpus* is a writ usually issued against state authorities in case if such authorities have wrongfully detained an individual without producing him or her for trial before an appropriate court. Such a writ is generally issued against any authority that qualifies as “state” under Art.12 of the Indian Constitution.²⁵ Interestingly, the same has been issued in favour of and against private individuals in cases of wrongful removal of children by parents. As a result, in many cases the parent who had removed the child wrongfully had to handover custody of the child to the parent in whose favour the writ was issued.

The major issue with the use of these important Constitutional remedies is that they have been permitted to be used too frequently in both domestic and international custody disputes before the Indian courts, particularly before the Supreme Court of India. While the use of Article 226 to approach High Courts still makes sense for deprived parents, petitioning the apex court under Article 32 for the release of children from custody seems to be problematic. Litigants and advocates have never cared about the fact that there are a host of writ petitions and public interest litigations already pending before the apex court for various issues of greater national concern and importance. In the midst of all such petitions, more numbers of *Habeas Corpus* petitions for the release of children by private individuals becomes an additional burden for the apex court. The reason is that the right of custody is only recognized as a statutory right under

the Indian personal laws²⁶ and not a fundamental right for which the remedy under Article 226 would be the only relevant remedy for aggrieved

²⁵ The definition of state under Article 12 includes law enforcement authorities in India who work under the direct supervision and control of the central or state governments and have the power to arrest and detain people who may be suspected of being involved in offences and violation of the law. MP Jain, *Indian Constitutional Law* (8th edn, LexisNexis India 2021) Ch titled “state”.

²⁶ The right to file custody applications arises from the Guardians and Wards Act 1890, Hindu Minority and Guardianship Act 1956, and the Family Courts Act 1984, rather than from Part III of the Constitution of India, which enumerates fundamental rights.

parents. The apex court was therefore left with no other choice apart from entertaining such petitions when they were brought before it in the *Dhanwanti Joshi*,²⁷ *Nithya Anand Raghavan*²⁸ and *Gerry Douglas*²⁹ cases.

2.1.2 Marriage and Divorce Laws

In all cases, disputes relating to the custody of children arose in the first place in consequence of divorce petitions filed by spouses before civil courts or Family courts under the Indian personal laws relating to marriage and divorce.³⁰ The various marriage and divorce laws listed above contain sections for the award of custody to parents on the sidelines of divorce proceedings. Section 4(a) of the Hindu Minority and Guardianship Act, 1956 defines “minor” to mean “a person who has not reached the age 18 years”. And, under the Act, the custody of a child is given to any person, be it the child’s natural parents or guardian (appointed by the court) with the prime importance given to the welfare of the child. Section 26 of the Hindu Marriage Act states that courts may pass interim orders relating to the custody, maintenance and education of children according to their wishes and keeping their welfare in mind. This section has two issues. Firstly, though it talks about taking custody decisions for the welfare of children, yet it does not lay down the factors to be considered for the welfare of children while awarding custody. Secondly, the very fact that it accords only interim nature to the custody orders makes such orders amenable to multiple challenges before higher courts and may make them unenforceable on foreign territories, in case if non-resident Indian couples are involved in such disputes. Section 38 of the Special Marriage Act is an exact mirror reflection of the section under Section 26 of the Hindu

²⁷ *Nithya Anand Raghavan v State (NCT of Delhi)* (AIR 2017 SC 3137).

²⁸ *Lahari Sakhamuri v Shobhan Kodali* (AIR 2019 SC 2881).

²⁹ *Soni Gerry v Gerry Douglas* (2018 SCC Online SC 7).

³⁰ The relevant laws governing divorce and marriage in India include:

- (a) Indian Divorce Act, 1869
- (b) Parsi Marriage and Divorce Act, 1936
- (c) Muslim Personal Law (Shariat) Application Act 1937
- (d) Dissolution of Muslim Marriages Act, 1939
- (e) Special Marriage Act, 1954
- (f) Hindu Marriage Act, 1955.

Marriage Act thereby giving rise to the same kind of issues again. Similar sections exist in the Muslim, Christian and Parsi personal laws applicable in India as well.

The lack of statutory guidelines for the judiciary to determine what is in the best interests of children seems to be the primary issue across the marriage and divorce laws of all communities in India. Though it is admitted that these laws play a greater role in divorce proceedings rather than that of custody, yet the method of determination of custody could have been laid down in a little more detail in these laws. Such sections would have supplemented the sections of other legislations that focus solely on custody and guardianship such as the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 thereby filling the vacuum created by the custody-specific laws. The interim nature of custody orders under these legislations also needs to be changed to reduce the burden of the higher judiciary in entertaining appeals and reviews against lower court judgements. Finality of such orders can also convince foreign courts to recognize and enforce such orders within their domestic jurisdictions which in turn will lead to the mutual global enforcement of comity of courts.

2.1.3 Guardianship and Custody Laws

2.1.3.1 Guardians and Wards Act 1890 (Act No. 8 of 1890)

Various sections of this legislation such as Sections 7, 12, 17 and 25 have been used so far by advocates and judges in custody disputes in order to decide upon the parents deprived of custody have successfully availed of these sections to obtain custody after having lost custody due to a removing parent's actions. The first one, i.e., Section 7 provides that all orders relating to the guardianship of minor children should be made keeping their best interest and welfare in mind. Section 12 of the act provides that any person who has the custody of a child and is asked by any court to produce the child at a particular place and time, should do so immediately. The Indian courts have applied this section in some cases such as the *Indira*

Khurana,³¹ *Shyam Sunder Trikha*³² and *Jacqueline Kapoor*³³ verdicts to oblige removing parents to produce children before the courts or alternatively before the lawful custodian. The courts considered such production to be in the best interest of children as they were placed back under the care and supervision of the lawful guardians.

Further Section 25 provides that if any minor child is removed from the lawful custody and guardianship of a parent, courts may pass orders for immediate return of the child to such parent's custody as such return would be considered to be in the best interest of the child. In the aforementioned cases, sections 7, 12 and 25 were used in combination to compel removing parents to hand over the custody of children to their lawful guardians.³⁴ Interestingly, the underlying theme behind a majority of the sections of this act is the enforcement of the best interest standards. It is also important to note that in spite of being a pre-independence era legislation, it still harps on the best interest principle. This means that compliance with this principle in matters relating to children, especially that of custody was a primary consideration even for the then ruling imperial government. The post-independence era legislations relating to children including those that talk about custody have carried the same legacy forward, keeping the best interest principle as the main consideration over long periods.

However, the major issue with this law is that even though it directs the courts to decide custody and guardianship issues keeping the best interests of children in mind, yet it does not lay down any criteria exhaustively for the courts to understand the factors that can determine the best interest and welfare of children. The only traces of such factors can be found in Section 17(2) of the act which provides that in appointing guardians for the welfare of children, the term welfare can be understood to mean the child's own preferences, age and maturity, guardian's capabilities etc. This leaves the best interest standards in the context of the act completely open-ended and makes the judges' job of taking appropriate actions much more difficult.

³¹ *Indira Khurana v Prem Prakash* (1995) 60 DLT 633.

³² *Shyam Sunder Trikha v Sunita* (1997) 67 DLT 619.

³³ *Jacqueline Kapoor vs Surinder Pal Kapoor*, 1994 (2) HLR 97 (P & H).

³⁴ *ibid* 100.

2.1.3.2 Hindu Minority and Guardianship Act (Act No. 32 of 1956)

Along with the act of 1890, this act has also been used by courts in several cases over the years. Section 6 of this legislation reiterates the position prevalent in the Hindu personal laws that for minor children usually father should be regarded as the natural guardian and in his absence, the mother. However, the children under five years, the mother should ordinarily be regarded as the natural guardian and therefore should be preferred over the father in enjoying permanent custody.³⁵ Based on this position, in some cases such as the *Rosy Jacob*³⁶ and *Thrity Hoshie Dolikuka*³⁷ cases courts have awarded custody of a minor child to the mother even after the removal and retention of the child's custody by the mother. Section 13 of the act is the corresponding section to Section 17 of the Guardians and Wards Act, 1890. Both these sections lay down that appointment of guardians shall be made keeping the best interests of children in mind. Any appointment which does not seem to be for the welfare of children should not be made. In the *Surinder Kaur Sandhu*,³⁸ *Elizabeth Dinshaw*,³⁹ *Atya Shamim*,⁴⁰ *Eugenia Archetti*⁴¹ and other similar cases, these sections were applied to uphold the foreign custody orders awarding permanent custody to a particular parent, thereby making them the court appointed guardians of the subject children as well. In all such cases, custody applications by the removing parent before the Indian courts were rejected asking them to either return to the foreign country with the children or file fresh applications before the foreign court itself to obtain custody. Such orders helped the Indian judiciary in enforcing comity as well.

Unfortunately, similar to the Guardians and Wards Act 1890, even the Hindu Minority and Guardianship Act 1956 does not define the term best interest. Furthermore, it does not even venture to use the term anywhere except in the last Section which is Section 13. It also does not make the

³⁵ The Hindu Minority and Guardianship Act, 1956, s 6.

³⁶ *Rosy Jacob v Jacob A. Chakramakkal* (AIR 1973 SC 2090).

³⁷ *Thrity Hoshie Dolikuka v H.S. Dolikuka* (AIR 1982 SC 1276).

³⁸ *Surinder Kaur Sandhu v Harbax Singh Sandhu* (AIR 1984 SC 1224).

³⁹ *Sarita Sharma v Sushil Sharma* [JT 2000 (2) SC 258].

⁴⁰ *Miss Atya Shamim v Deputy Commissioner/Collector, Delhi* (Prescribed Authority under Citizenship Act) (AIR 1999 J&K 140).

⁴¹ *Eugenia Archetti Abdullah v. State of Kerala* 2005 (1) HLR (Ker) 34.

minimum effort to lay down any factors to determine best interests which is at least done by the Guardians and Wards Act 1890 in its Section 17. This creates a problematic scenario for the courts as the Hindu Minority and Guardianship Act 1956 is the main legislation that has been referred to by the courts in deciding domestic and international child custody disputes in the past. Such a law being devoid of even basic criteria to determine best interests creates a void for the judiciary as in the absence of statutory guidelines, judges have no other choice left to themselves but to determine best interests in awarding custody inconsistently on a case-to-case basis.

2.1.3.3 Family Courts Act, 1984 (Act No.66 of 1984)

This Act confers jurisdiction on Family Courts situated across India to deal with matters relating to marriage, divorce, adoption, custody and guardianship and all other issues arising out of marital relations. Section 7 of this Act has been used either in conjunction with or alternatively to the sections of the Hindu Marriage Act, 1955 to apply for divorce and child custody before the family courts in India in several domestic and international custody disputes. In cases such as *Margaret Pulparampil*,⁴² *V. Ravi Chandran*,⁴³ *Ruchi Majoo*,⁴⁴ *Surya Vadan*⁴⁵ and other similarly notable cases, the verdicts of family courts awarding or not awarding custody to a particular parent using this piece of legislation has been appealed against before the higher judiciary. Though this legislation has been used by the family courts to decide custody disputes keeping the best interest principle as the primary consideration, yet just like the Guardians and Wards Act 1890 and the Hindu Minority and Guardianship Act 1956 even this statute does not contain any express guidelines or parameters to determine actions which would be in the best interest of children in custody disputes.

⁴² *Margaret Pulparampil v Dr. Chacko Pulparampil* (AIR 1970 Ker 1).

⁴³ *V. Ravichandran v Union of India* (2009) 14 SCALE 27.

⁴⁴ *Ruchi Majoo v Sanjeev Majoo* (2011) 6 SCC 479.

⁴⁵ *Surya Vadan v State of Tamil Nadu* (2015) 5 SCC 450.

2.1.3.4 Code of Civil Procedure, 1908 (Act No.5 of 1908)

It is very surprising that Section 13 of the Code of Civil Procedure was referred to by the Supreme Court of India only in the *Marilynn Anita Dhillon Gilmore*⁴⁶ case. Section 13 of the code lays down that the Indian courts can consider foreign judgements to be conclusive and binding on themselves except under some exceptional circumstances.⁴⁷ The omission of Section 13 while deciding whether to recognize or deviate from foreign custody orders in custody disputes is a major flaw of the decision-making process in such disputes. Courts ought to have applied the criteria listed in the section as yardsticks to measure the feasibility of recognition and enforcement of pre-existing foreign custody orders in all cases since 1970. A look into the section reveals that it mainly emphasizes on the fact that foreign custody orders should not be against the Indian public policy or contradictory to the Indian statutory framework for them to be recognized in India.⁴⁸

2.2. The Indian Judicial Approach towards Cases Relating to Inter-country Parental Child Removal and Retention

There are some common characteristics in the Indian judicial approach towards cases relating to inter-country parental child removal and retention heard by the Indian courts over the years. Based on the analysis given in 2.1 above, it is evident that since the first ever judgement delivered on the issue by the Kerala High Court in the late 1960s⁴⁹ till date, best interest and welfare of the child has always been the paramount consideration behind awarding custody in such cases. However, the application of this principle along with comity of courts⁵⁰ has not led to uniformity and

⁴⁶ *Marilynn Anita Dhillon Gilmore v Margaret Nijjar* 1983 (1) RCR (Criminal) 396 (P & H).

⁴⁷ The Code of Civil Procedure, 1908, s 13(a)-(f). The six exceptions to the Section provide that the foreign judgements which cannot not be considered as binding on the Indian courts and therefore enforceable by them within India include those that may have been pronounced by incompetent courts without considering the Indian or international law properly, may have gone against natural justice, may not have been decided on merits or may have been obtained by fraud.

⁴⁸ *ibid* S.13(e).

⁴⁹ *Marggarate Maria Pulparampil v Dr. Chacko Pulparampil & Ors.* (AIR 1970 Ker 1).

⁵⁰ Thomas Schultz and Niccolo Ridi, 'Comity in International Courts and Tribunals'

consistency in the judicial interpretation and application of these principles of international law while deciding such cases. Furthermore, custody verdicts have witnessed wide variations in spite of application of these principles in various phases.⁵¹ There seem to be no uniform guidelines and parameters on the basis of which custody has been awarded either to fathers, mothers, grandparents or relatives post removal of children from the custody of the lawful parent or guardian.⁵² Further, there are various phases noticed in the Indian judicial decisions when it comes to recognition or non-recognition of pre-existing foreign custody orders in such cases.⁵³

In the first phase the Indian courts promoted respect for the principle of best interest of the child and often refused to grant custody to a removing parent citing health and other concerns of children that would have been contrary to their welfare.⁵⁴ In the second phase the Indian judiciary began according primacy to the principle of comity of courts over the best interest and welfare of children at times in order to recognize and enforce foreign custody orders within the Indian territory.⁵⁵ The third phase has witnessed attempts by the Indian judiciary in reconciling the principles of best interest of the child with comity of courts.⁵⁶

Some amount of consistency and predictability is also noticed with the application of the custody and guardianship laws such as the Guardians and Wards Act 1890 and the Hindu Minority and Guardianship Act, 1956 as mentioned earlier. In all cases where the child whose custody was in question was aged 5 years or below, the Indian courts awarded custody to the mother using Section 6 of the Hindu Minority and Guardianship Act as

(2010) 50(3) Cornell International Law Journal 578 <https://heinonline.org/HOL/P?h=hein.journals/cintl50&i=607> accessed 13 December 2023.

⁵¹ A Malhotra and R Malhotra, *The Removed Child and the Law in India* (1st edn, Universal Law Publishing, New Delhi 2018) 9-16.

⁵² *ibid* 14.

⁵³ R Lakshana, 'Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues' (2019) 5(2) Indian Journal of Law and Public Policy 11 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/ijlpp5&div=16&id=id=&page=>> (accessed 13 August 2024)

⁵⁴ *ibid* 16.

⁵⁵ *ibid* 17.

⁵⁶ *ibid* 18.

discussed above. This was because as per the basic principles of the Indian custody laws, children below 5 years of age are considered as infants who are constant need of maternal care, attention and feeding.⁵⁷

At the same time, when it comes to recognition and enforcement of foreign custody orders, Section 13 of the Code of Civil Procedure (CPC) was not used at all except in one case which is a loophole in the application of the existing framework. Section 13 of the CPC lays down certain criteria on the basis of which Indian courts can decide whether to recognize foreign judgements and orders in civil and matrimonial disputes including custody disputes.⁵⁸ Consistent use of this section would have kept the judiciary away from demonstrating the unpredictability that it has demonstrated finally while deciding such cases.

Thus, the trend in the Indian judicial approach towards cases relating to inter-country parental child removal and retention shows an unpredictable pattern and style of judgement rendering using some basic principles of domestic and international law. Surprisingly this has happened since the late 1960s till date even after the use of best interest of the child and comity of courts as the paramount consideration in all cases.⁵⁹ At this point, a detailed discussion of the major loopholes in the existing Indian legal framework and the judicial approach in India needs to be analyzed so that solutions can be found to the same.

⁵⁷ A Bajpai, *Child Rights in India: Law, Policy and Practice* (1st edn, Oxford University Press, UK 2017) 176, 187.

⁵⁸ The Code of Civil Procedure, 1908, s 13 reads as follows:

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;
- (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) (f) where it sustains a claim founded on a breach of any law in force in [India].

⁵⁹ *Surya Vadanam v State of Tamil Nadu* (AIR 2015 SC 2243).

3. MAJOR ISSUES IN THE INDIAN LEGAL FRAMEWORK GOVERNING INTER-COUNTRY PARENTAL CHILD REMOVALS

The Indian legal regime and jurisprudence relating to international child custody disputes has left a lot to be desired. This part discusses some of the most serious substantive and procedural issues which have hindered the smooth enforcement of the existing framework combating inter-country parental child removals. The issues range from inconsistent application of the most important principle of best interest of the child leading up to the inconsistent application of statutory laws governing inter-country parental child removals in India.

3.1 Various Interpretations of Best Interests of the Child in the Indian Legislative Framework and Judicial Interpretations

Legislatively, the concept of best interests of the child have been given different meanings within different Indian laws such as the Guardians and Wards Act 1890, Hindu Minority and Guardianship Act 1956, Protection of Children against Sexual Offences Act, 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2015. This has added to the confusion prevailing over the definition of best interests of the child in Indian domestic law and conflicting opinions in judicial decisions on the same. Apart from the aforementioned laws, Indian judicial decisions on international and domestic child custody disputes have also revolved around certain sections of the Indian Penal Code and Criminal Procedure Code.⁶⁰ Further, as discussed in the earlier Indian judicial decisions, even custody orders have varied depending on what courts have thought best for the sake of welfare of children.

Very interestingly, even a look at the judicial decisions from around the world reveals varied interpretations of the concept which is even more surprising. This was one form of jurisprudence of international child custody disputes where disparity in the application and interpretation of

⁶⁰ It is noteworthy that none of these laws have defined the parameters to identify what measures can be taken in the best interest of the child. Further, there is no definition of the term best interest in these laws. Yet, over the years courts and the legal fraternity generally have always identified these laws to be functioning in the best interest of the child.

the principle was the least expected. This is because the best interest standard is established globally by the UN Convention on the Rights of the Child to which most UN member countries including India are signatories.⁶¹

3.2 Multiplicity of Laws and Their Inconsistent Application

It is noteworthy that over the years the Indian judiciary has applied domestic family laws such as the Guardians and Wards Act 1890, Hindu Minority and Guardianship Act 1956 and the Hindu Adoptions and Maintenance Act 1956 inconsistently in dealing with such cases thereby leading to inconsistency in judicial opinion. This has resulted in confusions over the identification of the actual natural and legal guardians of children who were removed wrongfully by parents.⁶² Further, at the time of the final determination of questions of custody of wrongfully removed children, courts have given a variety of orders including orders for return of children to their place of habitual residence and kept them interim at the same time. Such orders finally, have been left open therefore to further interpretations by other Indian and foreign courts.⁶³

3.3 Sporadic Use of Mediation in Cross-Border Custody Disputes Decided in India-

Due to the lack of technological know-how among the litigants, advocates and judges in India, offline and online mediation has not been the preferred mode of dispute resolution in international child custody disputes involving Indian nationals and children. Referral of international child custody disputes to individual and institutional alternative dispute resolution has been sporadic thereby increasing the burden on the

⁶¹ Article 3, Convention on the Rights of the Child 1989, UNGA Res 44/25 (20 November 1989) UN Doc A/RES/44/25, entered into force 2 September 1990, [1989] 1577 UNTS 3.

⁶² S Jolly, 'International Parental Child Abductions: An Explorative Analysis of Legal Standards and Judicial Interpretations in India' (2017) 31(1) International Journal of Law, Policy and the Family 20 <https://doi.org/10.1093/lawfam/ebw016> accessed 22 March 2024.

⁶³ *ibid* 25.

judiciary.⁶⁴ Stakeholders are still failing to realize even now that this can be an effective tool in the speedy resolution of such disputes. This is because the conventional nature of all kinds of family disputes allows the settlement of such disputes through the easier routes of counselling and negotiation. Mediation and other alternative dispute resolution mechanisms have failed to draw the attention of the judges and practitioners in India. It is a known fact that those involved and working in the judiciary have not been given enough training for the daily use of technology in dispute resolution proceedings, either judicial or *ad hoc*.⁶⁵ Also, the judges and practitioners in India are very mostly very senior in age and experience. Therefore, it has been difficult for them at times to grasp the nitty-gritties of the use of technology in dispute resolution proceedings. Further, the practice of awarding shared parenting and joint custody has also taken a backseat in India so far unlike the other more developed common law jurisdictions such as Australia where such a remedy has become common practice.

In the backdrop of the issues discussed in this part of the paper, it is necessary to study and understand the remedial efforts that have been made so far in India in order to combat inter-country parental child removals effectively. A discussion on the efforts made shall be followed by an analysis of the efficacy of such efforts in dealing with the menace.

4. REMEDIAL EFFORTS IN INDIA TO COMBAT INTER-COUNTRY PARENTAL CHILD REMOVALS- A CRITICAL STUDY

It must be recognized that a lot of efforts have been made in recent times to bring about reforms in the current Indian legal framework governing inter-country parental child removals and the recognition of foreign custody orders. The main highlight of such efforts was the Protection of Children (Inter-country Removal and Retention) Bill, 2016 formulated by the Law Commission of India but never presented before the Parliament of India. This part therefore critically analyzes the recommendations that

⁶⁴ B Arora, 'Child Custody through Mediation' (2021) Law Times Journal <https://lawtimesjournal.in/child-custody-through-mediation/> accessed 25 March 2024.

⁶⁵ *ibid*.

have been made by various statutory and government bodies for reforms in the existing legal framework. The recommendations shall be followed by a discussion on the inadequacy of such efforts and the reasons for the same.

4.1 Report no. 218 of the Law Commission of India and its Recommendations

The Law Commission of India in its 218th report⁶⁶ recommended that India should accede to the Hague Convention immediately. In the final report, the Commission mentioned that other common law countries such as the UK, US Canada and Australia have become parties to the convention and have incorporated the same in their domestic laws.⁶⁷ Further, the Commission noted a lot of inconsistencies in the Indian judicial decisions delivered over the last five decades in international child custody battles.⁶⁸ It found through its research that while some cases were decided on the basis of application of the best interest principle, some others were decided only on the basis of the currently prevalent custody laws and principles of jurisdiction.⁶⁹

4.2 The Draft Civil Aspects of International Child Abduction Bill, 2016 Prepared by the Ministry of Women and Child Development, Government of India

This Bill prepared and placed on its own website by the ministry of women and child development of the central government marks the second major remedial legislative effort after the placing of the International Child Abduction Bill of 2007 in Parliament.⁷⁰ However, the Bill prepared by the

⁶⁶ Law Commission of India, 'Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction 1980' (Law Commission No.218, 2009) 21 <https://cdnbbsr.s3waasectiongov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081042.pdf> accessed 26 March 2024.

⁶⁷ *ibid* 22.

⁶⁸ *ibid* 23.

⁶⁹ *ibid* 24.

⁷⁰ Ministry of Women and Child Development, Government of India, 'Civil Aspects of International Child Abduction Bill, 2016' (2016) <https://wcd.nic.in/sites/default/files/>

ministry was never tabled in Parliament as the Law Commission prepared and drafted another modified version of the same Bill in the same year. The Bill prepared by the Law Commission was later presented to the Parliament by the commission but has still not been discussed and debated in the Parliament.⁷¹ The Bill prepared by the Women and Child Development Ministry had to be corrected for the use of certain vague terms such as the 'interests of children' instead of 'best interests of children'. The ministry's draft did not define the procedure of appointment, powers and functions of the officers of the proposed central authority clearly. The same had to be done by the law commission in its draft bill.⁷² Further, the former had not laid down punishments for wrongful removal and retention of children which the law commission later added in its own draft.⁷³

4.3 Report of the National Commission for Women's Consultation Session on the Draft Bill Prepared by the Ministry

In August 2016, the National Commission for Women organized a consultation session on the draft Civil Aspects of International Child Abduction Bill that had been prepared and placed on its website by the women and child development ministry earlier in the same year.⁷⁴ The report of the consultation session can be summarized in the following manner:

- (i) The report highlighted the concerns of NRI women who are separated from their spouses and have children whose custody is in dispute. It stated that the solution of return of children as provided by the Hague Convention and the draft Bill of 2016 is

Draft_Implementing_Legislation_Hague_Convention_0.pdf accessed 24 March 2024.

⁷¹ Law Commission of India, 'Report No.263 on the Protection of Children (Inter-country Removal and Retention), Bill, 2016' (October 2016) <https://cdnbbsr.s3waassectiongov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081679.pdf> accessed 25 March 2024.

⁷² *ibid.* Chapter II, Annexure I. Constitution, Powers and Functions of Central Authority

⁷³ *ibid.* Chapter VIII, Annexure I. Offences and Penalties.

⁷⁴ National Commission for Women, 'Report on the Consultation Session on the Draft Civil Aspects of International Child Abduction Bill Prepared by the Ministry of Women and Child Development, Government of India' (30 August 2016) https://ncwappsectionnic.in/pdfReports/Report_Consultation_on_Draft_International_Child_Removal_and_Retention_Bill_201621022017.pdf accessed 25 March 2024.

inadequate as it does not consider situations where a woman would have been forced to leave the matrimonial home with her children to save them and herself from domestic violence and abuse by the husband. Moreover, in order to save herself and to return to India in such cases, a woman needs to withdraw her dependent's visa status.

(ii) Experts attending the session noted that reforms are needed in the Bill with regards to definitions of certain terms such as habitual residence which presently only means the place where the father lives and works. They also opined that the Bill does not consider children born out of live-in relationships or those who became victims of domestic violence and abuse.⁷⁵

(iii) It was mentioned and discussed that Indian custody orders are seldom recognized abroad and hence there is no respect for comity globally. Further the Convention of 1980 is in contravention of Section 13 of the Code of Civil Procedure which does not recognize *ex parte* decrees obtained from foreign courts. The delegates discussed that most foreign custody orders being presented before the Indian courts by husbands are *ex parte* decrees obtained by them in the absence of the wives. Such foreign judgements cannot be accepted by the Indian courts under any circumstances as they go against Section 13 of the Civil Procedure Code.⁷⁶

4.4 THE DRAFT PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016 ADOPTED AND RECOMMENDED BY THE LAW COMMISSION OF INDIA

The gaps in the Bill prepared by the ministry of women and child development prompted the law commission to come up with its own version later. Subsequently therefore, the Law Commission of India in its 263rd report published in 2016 adopted and laid down the full text and recommended the enactment of the Protection of Children (Inter-Country Removal and Retention) Bill 2016⁷⁷ into legislation. Since this Bill was a modified version of the earlier Bill prepared by the women and child

⁷⁵ *ibid* 26.

⁷⁶ *ibid* 27.

⁷⁷ 263rd Law Commission of India Report (n 72).

development ministry, even the title of this draft version was changed by the law commission. The Commission raised objections in the report about the use of the word ‘abduction’. It mentioned that the word abduction is only an abridged version of the term ‘wrongful removal or retention’ which has been used everywhere throughout the main text of the bill. It further opined that the Indian concept of abduction as used in Section 362 of the Indian Penal Code, 1860 cannot be applied to parental abduction in order to label parents as abductors of their own children.⁷⁸

4.5 Report of the Justice Rajesh Bindal Committee Published in 2018

A high-level committee was constituted on 18 May 2017 under the chairmanship of Justice Rajesh Bindal who was a sitting judge of the Punjab and Haryana High Court at the time.⁷⁹ The objective of this committee was to review and examine the two bills of 2016 on inter-country removal and retention of children prepared by the Ministry of Women and Child Development of the central government and the Law Commission of India. The committee was also given a mandate of suggesting further reforms in the Indian legal framework governing inter-country parental child removal and retention. It reviewed both the bills as well as the existing Indian legal framework and suggested further reforms in the bills as well as the legal framework. The committee then submitted its final report on 21 April 2018.⁸⁰ The major highlights of the report are as follows:⁸¹

- (i) The most important recommendation was the constitution of an inter-country parental child removal disputes resolution authority.

⁷⁸ *ibid.*

⁷⁹ Justice Bindal was later elevated to the position of Chief Justice of the Allahabad High Court in 2021 and to the position of judge of the Supreme Court of India on 13 February 2023.

⁸⁰ Justice Rajesh Bindal Committee, ‘Examination of the Civil Aspects of International Child Abduction Bill, 2016 and the Protection of Children (Inter-country Removal and Retention) Bill, 2016’ (Committee Report, 21 April 2018) 190-204 <http://cja.gov.in/Articles/Volume%20I%20HMJ%20Rajesh%20Bindal.pdf> accessed 25 March 2024.

⁸¹ *ibid* 193.

- (ii) The second most important suggestion offered by the committee was the more frequent use of mediation at various stages of return and subsequent custody proceedings in both the member as well as non-member countries of the Hague Convention.
- (iii) The committee felt that the Hague Convention on the Civil Aspects of International Child Abduction, 1980 is an outdated international instrument and should be scrapped completely. Instead, India should have a new law in consonance with the best interest standards prevailing in the country and one that takes the domestic violence exception into consideration.
- (iv) An alternative was proposed by the committee to the enactment of the new legislation in the form of addition of a separate chapter to the Juvenile Justice (Care and Protection of Children) Act, 2015. Such chapter, it mentioned, should lay down the procedure to deal with and finally decide international child custody disputes arising from the unlawful removal and retention of children into or out of India.

4.6 Public Interest Litigation in the Supreme Court Requesting Formulation of Guidelines on Shared Parenting and Joint Custody

On the 21 of July 2019, a Delhi based NGO called the Save Indian Family Foundation (SIFF) had filed a public interest litigation (PIL) before the Supreme Court of India under Art. 32 of the Constitution of India praying for the issuance of a writ of mandamus.⁸² They were representing the petitioner Mrs. Y. Sulochana Rani, a divorced woman who was seeking shared parenting and joint custody of both father and mother for her child. The objective of the PIL was to request the apex court to declare Ssection6(a) and 7 of the Hindu Minority and Guardianship Act, 1956 as unconstitutional. The PIL is pending for a final hearing before the highest court of India. In the course of the PIL a request was also made by the petitioners to the apex court issue directions to the central government to make a new law which would have guidelines for shared parenting. It was reasoned by the NGO that the same is essential for the incorporation of the

⁸² Save Indian Family Foundation, 'PIL to Supreme Court on Shared Parenting' (22 July 2019) <https://www.saveindianfamily.org/pil-to-supreme-court-on-shared-parenting/#:~:text=SIFF%20has%20filed%20PIL%20in,Pratap%20Singh%20and%20Kumar%20Ratan> accessed 25 March 2024.

concept of shared parenting in the Indian framework of custody and guardianship laws. The NGO felt that since shared parentage was being ordered by courts globally, Indian courts should now follow suit. Moreover, it was anticipated that introduction of this concept into the Indian legal system will do away with the practice of awarding permanent custody and visitation rights. In *Y. Sulochana Rani v Union of India*,⁸³ an argument was made by the petitioners in favour of establishing shared parenting as a common practice based on the premise that both parents should be designated as caregivers for their children rather than only one parent.

4.7 A Critical Analysis of Previous Reforms

It needs to be acknowledged that a number of remedial measures have been taken over the years administratively, legislatively and judicially as discussed earlier in this chapter and elsewhere. However, at the same time it has to be said that all efforts undertaken so far to remedy the situation have proven to be inadequate. This is because such efforts seem either to be confusing and sporadic or difficult to be implemented logistically. The Rajesh Bindal Committee report suggests the establishment of an authority to monitor inter-country parental child removals into and out of India which seems out of place since India is still not a signatory to the Hague Convention of 1980. Moreover, setting up of such an authority centrally and probably having its branches in every Indian state will require a lot of time, money, resources and establishment of additional infrastructure which ultimately becomes a laborious task. Also, there is no guarantee that even after the establishment of such an authority, enforcement of the current Indian legal framework would be done in a better manner. Additionally, it can be noted that at the international level no effort has been made to reform the existing legal framework to ensure better enforcement domestically. Hence, the existing Hague Convention on the Civil Aspects of International Child Abduction, 1980 is now being dubbed as redundant and in need of reforms.⁸⁴

⁸³ Writ Petition (Civil) No. 903/2019.

⁸⁴ As opined in both the consultation session of the National Commission for Women and in the report of the Justice Rajesh Bindal Committee discussed in the earlier part of the paper on the major efforts undertaken for reforms in India, till date.

As far as the bills proposed by the ministry of women and child development and the law commission of India in 2016 are concerned, both have been shelved for technical and procedural defects. For instance, the Bill proposed by the ministry suffers from ambiguity of definitions and incomplete sections with respect to certain matters such as powers and functions of the proposed central authority. The Bill drafted by the Law Commission was presented to the Parliament but has still not been converted into legislation. Further there are no judicial guidelines on the subject matter in spite of a PIL for the same being submitted to the apex court. Though the Indian judiciary has tried hard to bring uniformity in its decision-making process in international child custody disputes, yet glaring inconsistencies have been noted in its decisions delivered even in the new millennium. No further efforts at reforms have been undertaken since the publication of the Bindal Committee report in 2018. These circumstances warrant immediate change in the existing Indian legal framework governing inter-country parental child removals and recognition of foreign custody orders. Therefore, it is high time now that reforms are proposed and implemented in the Indian legal system particularly for the courts here to be able to handle international child custody disputes in a better manner with the help of uniform statutory guidelines.

5. RECOMMENDATIONS

The reforms needed in the Indian legal framework governing international child custody disputes revolve around the necessity of bringing about immediate and comprehensive changes in the substantive law. Further, there is a need to bring in a new and comprehensive legislation in India governing all cases of wrongful international parental child removal.

5.1 Need to Consolidate and Reintroduce the Shelved Bills Of 2016 as a New Law with Suitable Modifications

The redrafted improved version of the 2016 Bill can be a permanent solution. But before such reintroduction, the following changes need to be made to the earlier version of 2016 which was put up for public viewing and comments on the website of the Ministry of Women and Child Development, Government of India. The reason for this recommendation is that now since India has decided not to ratify The Hague Convention on

the Civil Aspects of International Child Abduction, 1980 it can have its own separate law dealing with cross-border parental child removals into and out of India. This also gives us an excellent opportunity to go much beyond the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and include provisions in the new law relating to determination of custody as well. The Hague Convention on the Civil Aspects of International Child Abduction, 1980 only mandates the return of children to their place of habitual residence post removal. But the new law with its sections on determination of custody with finality can prevent removing parents from attempting to take away the child once again after its return to the place of habitual residence. If custody is determined finally by the Indian courts through a combined application of this as well as other existing legislations as the applicable law, the number of international child custody disputes arising in India can be reduced to a great extent. With this objective in mind therefore, a separate chapter for the determination of custody post removal should be added to the new law, to be applied wherever necessary.

5.2 Addition of A Separate Chapter on The Determination of Custody with Finality Post-Removal to and from India

In consonance with the aforementioned recommendation, a separate chapter for the determination of custody titled “Determination of Custody in cases of wrongful removal of children to and from India and unlawful retention thereof” needs to be added to the Bill before its reintroduction. This chapter can be placed after chapter VII (Rights of Access) as the new chapter VIII. The objective behind the insertion of this chapter in the proposed law is to ensure that the new law becomes the single most comprehensive statute to be referred by the judiciary in all cases of inter-country parental child removals. The proposed new chapter mainly concentrates on the substantive aspects. The new chapter VIII should compulsorily have the following constituent sections:

5.2.1 Section 28- Basis of Jurisdiction of the Indian Courts for the Determination of Custody

In this section, the principles of private international law governing the determination of jurisdiction of courts should be listed. This will help the Indian courts to identify whether they have the jurisdiction to determine

custody in international child custody disputes coming before them. The determining principles are:⁸⁵

- (1) Real and Substantial Connection- Jurisdiction to be determined on the basis of the place with which the subject child has the most substantial personal, familial and cultural connection.
- (2) Intimate Contact and closest concern- The place with which the subject child is in intimate contact and with which it shares the strongest bond both physically and emotionally.
- (3) Habitual Residence- Jurisdiction shall also be determined in accordance with the place of habitual residence of the subject child over a considerable period of time

Corresponding definitions of these principles coming from the tenets of private international law should be added to the definition and interpretation clause of the bill.⁸⁶

5.2.2 Section 29- Determination of Custody in Accordance with the Best Interest and Welfare of Children

This section should mention that once it is determined that an Indian court has jurisdiction as per section 28 to deal with an international child custody dispute, the child's custody should be determined on the basis of the best interest standards followed globally. The following criteria should be used and applied by the courts in determining the best interest and welfare of children in cases relating to inter-country parental child removal and retention:⁸⁷

⁸⁵ These principles are integral to private international law, especially in cross-border child custody disputes. See Cheshire, North & Fawcett, *Private International Law* (15th edn, Oxford University Press, UK, 2017) 1075, 1087.

⁸⁶ In India, usually section two of every Act of Parliament and assemblies contains the definition and interpretation clause. This clause defines the common terms and phrases which are generally to be used throughout the act. Such a clause is added to assist readers in understanding the meaning and context in which such terms and phrases have been added in the sections of the act. The same should be done in this case as well with the inclusion of the definition of these principles of conflict of laws in Section 2 of the Bill. The terms can then be used in the abovementioned section.

⁸⁷ These criteria have been formulated on the basis of criteria commonly used to determine best interest of children around the world and includes some of the criteria

- “(1) In all cases of removal and retention of children, the final custody should be determined in accordance with the best interest and welfare of the child.
- (2) In determining the best interest of the child, the following factors need to be considered:
- (i) Child’s own opinion subject to age and maturity
 - (ii) Basic needs of food, clothing, shelter and education
 - (iii) Suitability of the immediate environment in and around the place of residence
 - (iv) Presence or absence of siblings
 - (v) Presence or absence of either one of or both the parents and other relatives, close friends and guardians
 - (vi) Financial condition of the parent seeking custody
 - (vii) Physical and mental capacity, character, background and conduct of the parent, relative or guardian seeking custody
 - (viii) Either of the parents living in a joint family
 - (ix) Physical and mental condition of the subject child and the ability to travel in case of joint custody and shared parenting
 - (x) Any other factor which courts may deem fit in the interest of justice and good conscience

Proviso- The aforementioned factors shall not prejudice any other factors mentioned under any other laws relating to custody and guardianship applicable in India”.

5.2.3 Section 30- Indian Law Relating to Custody and Guardianship to be the Applicable Law in Determination of Custody

Through this section, the Indian law relating to custody and guardianship should be designated as the applicable law for the determination of custody in all cases of cross-border parental child removal. This will mean that the

considered by the United Nations Child Rights Committee established under the UN Child Rights Convention of 1989. See United Nations Committee on the Rights of the Children, ‘General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)’ (2013) <https://www.refworld.org/legal/general/crc/2013/en/95780> accessed 26 March 2024.

Guardians and Wards Act 1890 (Act 8 of 1890), Constitution of India 1950, Hindu Minority and Guardianship Act 1956 (Act 32 of 1956) and the Family Courts Act 1984 (Act 66 of 1984) would be used consistently to determine custody in such disputes. However, this section should contain an explanation stating that in the resolution of cases relating to inter-country parental child removal and retention the applicable foreign laws, foreign custody orders and principles of conflict of laws should be applied. The need for such an explanation appended to this section arises because custody disputes among the Indian domiciled parents can be decided conclusively by applying the domestic custody laws without the need to look into the foreign jurisprudence on the issue.

5.2.4 Section 31- Code of Civil Procedure, 1908 to be the Applicable Law for the Recognition of Foreign Custody Orders and Special Directions Wherever Necessary

Very often Indian courts are seized of foreign judgements relating to custody in cases of cross-border parental child removal. In such cases, the courts need to apply sections 13 and 151⁸⁸ of the CPC to identify whether a particular foreign custody order should be enforced domestically and whether any special orders are necessary in such a case. If these sections are applied, there can be two results:

- (1) If an Indian court accepts and recognizes a foreign custody order, it can pass a “mirror order”⁸⁹ which is usually an exact mirror reflection of a foreign custody order. This will result in custody being given to the same parent as that ordered by the foreign court. Alternatively, in case of pending proceedings before a foreign court or issuance of

⁸⁸ Along with S. 13 which has been explained earlier, S. 151 of the CPC shall also be a guiding light for the Indian judiciary in such cases particularly if special directions, orders or guidelines such as mirror orders need to be issued in each case. Section 151 gives inherent powers to the higher judiciary in India to pass special orders and directions at its discretion thereby evolving new principles of theory and practice applicable for future similar cases. S. 151 of the CPC becomes an extremely important section in the context of determination of custody after wrongful removals as in the past courts have had to deviate many times from the established practice to lay down a jurisprudence of new theory and practice.

⁸⁹ As adopted from the principles of private international law in the UK and applied by the Supreme Court of India in *Smriti Madan Kansagra v Perry Kansagra* [(2020) SCC Online SC 887].

interim orders by the court, parties can be referred back to the same court by the Indian courts for final determination of custody.

- (ii) If the foreign court's order does not meet any of the criteria for recognition by the Indian courts specified under section 13, then fresh orders can be passed by the Indian courts by going into the merits of the case. Once again through a combination of section 13 and 151 of the CPC, justice can be ensured through special orders and directions on case-to-case basis.⁹⁰

The proposed section 31 of the new law has these consequences and should therefore encourage the application of the aforementioned sections of the CPC. The guiding principle of law behind this section naturally is the principle of comity of courts. As mentioned earlier, application of the principle of comity of courts manifested through section 13 does not only the verbatim recognition and enforcement of foreign custody orders within India. It can also mean referral of the parties involved in such disputes back to their country of habitual residence for further order section.

5.2.5 Section 32- Online Dispute Resolution to Ensure Timely Return of Children and for the Determination of Custody

This section should provide the option to disputing parents to opt for online dispute resolution in the form of online mediation as in cross-border parental child removal and retention, parents and children are usually located in different countries. Governments in the concerned countries should enter into bilateral arrangements from time to time to enforce this option. The choice of a suitable mediator in such cases should either be left open to the parties or upon the courts of the country where the matter is being heard. In case if courts decide, they can refer parties to court-annexed mediation in which case the mediator shall be chosen by the judge who needs to pass final orders in the case.⁹¹

⁹⁰ Section 151 of the Code of Civil Procedure, 1908 states:

“Saving of inherent powers of Court - Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

⁹¹ M Thorpe, ‘Mediation to Resolve Child Abduction Issues for Hague and Non-Hague Convention Countries: A Personal Account of the Author's Experience in Legal

Further, mediation awards in such cases should be recognized and enforced across borders by courts of different countries by enhancing and enforcing the concept of comity of courts through which courts of different countries respect and uphold each other's decisions irrespective of whether they are signatories or non-signatories to the Hague Abduction Convention.⁹²

5.2.6 Section 33- Shared Parenting and Joint Custody to be Preferred over Permanent Custody and Visitation

It has been accepted globally that shared parenting and joint custody seems to be the most appropriate mode of award of custody in international child custody battles.⁹³ India is not far away from it as well, as in recent times such an award has been made in one or two cases. The concept of shared parenting and joint custody was enforced by the Delhi High Court in 2013 when it granted a habeas corpus petition by Philip Dexter, a South African father and also asked the separated couple to follow the original shared custody orders passed by the High Court of South Africa so that both of them could take care of their daughter jointly.⁹⁴ Furthermore, in this case the Delhi High Court upheld the South African court's decision and declared that the separate couple should stay at the same location in South Africa separated at the most by a few kilometers. This would ensure better enforcement of the shared parentage orders as the child would not have to travel across borders from South Africa to India or vice versa for it to be able to stay with both parents intermittently. It is anticipated that orders of shared parentage with parents staying in the same vicinity to each other can ensure the smooth enforcement of the concept of joint custody in similar cases in the near future.

However, this provision should also mention that shared parenting and joint custody orders shall be passed by the Indian courts only after

Practice' (2018) 30(1) Singapore Academy of Law Journal 575 <https://heinonline.org/HOL/P?h=hein.journals/saclj30&i=589> accessed 26 March 2024.

⁹² *ibid* 580.

⁹³ M H Weiner, 'Thinking outside the Custody Box: Moving beyond Custody Law to Achieve Shared Parenting and Shared Custody' (2016) 16(4) University of Illinois Law Review 1535 <https://heinonline.org/HOL/P?h=hein.journals/unillr2016&I=1561> accessed 26 March 2024.

⁹⁴ *Philip David Dexter v State of Delhi Writ Petition (Crl.) No. 1562 of 2012.*

considering the facts and circumstances of each case. Further, this section should mention that in case if there are pre-existing foreign custody orders in any particular case, Indian courts shall pass joint custody orders only after looking into the merits of such foreign orders and also after considering the need for fresh orders to be passed in such a case.⁹⁵

6. CONCLUSION

The Indian legal framework governing inter-country parental child removal and retention stands at a critical juncture, reflecting both the challenges and opportunities of a globalized society. As cross-border marriages and transnational families become increasingly common, the legal complexities surrounding parental child removal and retention have intensified. India's existing laws, while grounded in well-established principles of family law and child welfare, exhibit significant gaps and inconsistencies that undermine the effectiveness of legal remedies available to aggrieved parents and, more importantly, compromise the best interests of the child involved. This calls for a comprehensive overhaul of the legal system to address these challenges. At the heart of the issue is India's reluctance to ratify the Hague Convention on the Civil Aspects of International Child Abduction, 1980 a key international treaty designed to protect children from the harmful effects of abduction and retention across international borders. The Convention provides a framework for the prompt return of abducted children to their country of habitual residence, thereby minimizing the potential for prolonged legal battles and emotional trauma. India's non-ratification of this Convention has led to a fragmented legal approach, where domestic courts are left to navigate complex international legal issues without the benefit of a uniform, globally recognized standard. The current legal mechanisms in India, particularly under the Guardians and Wards Act, 1890, and the Hindu Minority and Guardianship Act, 1956, are primarily designed to address domestic disputes over child custody and guardianship. However, they fall short when applied to the context of international parental child removal and retention. These laws often fail to account for the transnational nature of such disputes, leading to prolonged litigation, jurisdictional conflicts, and inconsistent judgments. Moreover, the lack of a clear legal framework for the recognition and enforcement of foreign custody orders exacerbates the

⁹⁵ *ibid* para 4.

problem, leaving children caught in the middle of protracted legal battles between parents residing in different countries. The need for reform is underscored by the increasing number of cases involving cross-border parental child removal. Globalization has led to a rise in international marriages, often involving Indian nationals. When these marriages break down, the issue of child custody becomes even more complicated, particularly when one parent chooses to relocate to another country with the child. In the absence of a robust legal framework, the left-behind parent is often left with limited recourse, and the child is subjected to the psychological trauma of being uprooted from their familiar environment. To address these challenges, India must prioritize the adoption of a comprehensive legal framework that aligns with international best practices. First and foremost, India should ratify the Hague Convention on the Civil Aspects of International Child Abduction. This would not only facilitate the prompt return of abducted children but also provide a clear legal pathway for resolving cross-border custody disputes in a manner that respects the rights of all parties involved, particularly the child. Ratification would also send a strong signal of India's commitment to upholding international norms and standards in the protection of children. In addition to ratifying the Hague Convention, there is a pressing need for the establishment of specialized courts or tribunals with the expertise to handle inter-country parental child removal cases. These courts should be equipped with the necessary legal tools and resources to resolve disputes expeditiously, with a focus on the best interests of the child. Furthermore, the Indian judiciary must develop comprehensive guidelines for the recognition and enforcement of foreign custody orders. This would help reduce the legal uncertainty faced by parents and children and ensure a more consistent application of the law.

Judicial sensitivity to the psychological impact of child abduction and retention is also crucial. The legal process should prioritize mediation and alternative dispute resolution methods, which often provide more amicable solutions that can reduce the emotional and psychological toll on the child. Mediation, in particular, can help parents reach a mutually agreeable solution without resorting to adversarial litigation, thereby preserving the child's relationships with both parents.

In conclusion, while India has made significant strides in modernizing its family law system, the issue of inter-country parental child removal and retention remains inadequately addressed. The current legal framework, characterized by its fragmented approach and lack of alignment with

international standards, fails to effectively protect the rights of children and parents in an increasingly interconnected world. By adopting necessary reforms, including the ratification of the Hague Convention and the establishment of specialized courts, India can create a more coherent and effective legal system that ensures the welfare of children and respects the rights of parents in cross-border custody disputes.