



**GOVERNMENT OF INDIA**

**LAW  
COMMISSION  
OF  
INDIA**

**Need to accede to the Hague Convention on  
the Civil Aspects of International Child  
Abduction (1980)**

**Report No. 218**

**March 2009**



## **LAW COMMISSION OF INDIA (REPORT NO. 218)**

### **Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)**

**Forwarded to the Union Minister for Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 30th day of March, 2009.**

**The 18<sup>th</sup> Law Commission was constituted for a period of three years from 1<sup>st</sup> September, 2006 by Order No. A.45012/1/2006-Admn.III (LA) dated the 16<sup>th</sup> October, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.**

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D.O. No. 6(3)/136/2007-LC (LS)  
March, 2009

30<sup>th</sup>

Dear Dr. Bhardwaj Ji,

Subject: Need to accede to the Hague Convention on  
the Civil Aspects of International Child  
Abduction (1980)

I am forwarding herewith the 218<sup>th</sup> Report of the Law  
Commission of India on the above subject.

Statistics show that the number of divorce cases and custody disputes has increased ever since the advent of globalization and technological development leading to a very busy life-style and work culture. The international parental child abduction/child removal finds its root here.

International parental child abduction or removal can be defined as the removal of a child by one parent from one country to another without the approval of the other parent. Child removal, in this context, encompasses an interference with the parental rights or right to contact with the removed child. These acts by a parent when brought before a court of law have in the past created considerable amount of confusion specifically in the area of competence of courts with regard to jurisdictional aspects.

The international community acted to solve this crisis by adopting on October 25, 1980 an International Convention on the Civil Aspects of International Child Abduction which entered into force on December 1, 1983.

Many States of the world (81) have become signatory to this Convention. Some States like Australia have brought about amendments in their family law legislations to make the Hague Convention operative in their nation. India, however, is not a signatory to this Convention. The time has come for some international perspective in this regard. The fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a foreign judge who is deciding on the custody of a child. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical upshot, India should become a signatory to the Hague Convention and this will, in turn, bring the prospect of achieving the return to India of children who have their homes in India.

The Commission is of the view that India should keep pace and change according to the changing needs of the society. The Commission, therefore, recommends that the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their homes in India.

With warm regards,

Yours sincerely,

(Dr. AR. Lakshmanan)

Dr. H. R. Bhardwaj,  
Union Minister for Law and Justice,  
Government of India  
Shastri Bhawan,  
New Delhi-110 001.

**Need to accede to the Hague Convention on the  
Civil Aspects of International Child Abduction  
(1980)**

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## I. INTRODUCTION

1.1 Owing to the advent of technology with the establishment of easier and economic forms of travel and communication, national boundaries have increasingly become irrelevant for the purposes of cultural exchanges.<sup>1</sup>

1.2 The globe has shrunk to an extent that cultural taboos do not hold back anybody to go in search of greater achievements. This brings in a package of both desirable and undesirable effects. Every employment opportunity especially the ones established under the modern technological umbrella comes with a lot of responsibility and financial benefits with the aftereffect being increasing independence of individuals and ego inflations, which paves the way for undesirable familial problems.<sup>2</sup>

1.3 Earlier spousal and interparental conflict were simply equated with divorce, or with various measures of marital dissatisfaction, hostile attitudes, and physical aggression. This failure to distinguish among types of conflict has confounded the debate about the extent to which different kinds of divorce conflict are normal and functional. Divorce conflict has at least three important dimensions which should be considered when assessing incidence and its effects on children. First, conflict has a *domain dimension*, which can refer to disagreements over a series of divorce issues such as financial support, property, division, custody, and access to the children, or to

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<sup>1</sup> Dr. Justice AR. Lakshmanan, International Child Abduction - Parental Removal (2008) 48 IJIL 427

<sup>2</sup> Ibid.

values and methods of child-rearing. Second, conflict has a *tactics dimension*, which can refer to the manner in which divorcing couples informally try to resolve disagreements or it can refer to ways in which divorce disputes are formally resolved by the use of attorney negotiation, mediation, litigation, or arbitration by a judge. Third, conflict has an *attitudinal dimension*, referring to the degree of negative emotional feeling or hostility directed by divorcing parties towards each other, which may be covertly or overtly expressed.<sup>3</sup>

1.4 Statistics show that the number of divorce cases and custody disputes has increased ever since the advent of globalization and technological development leading to a very busy life-style and work culture. The international parental child abduction/child removal finds its root here.<sup>4</sup>

1.5 International parental child abduction or removal can be defined as the removal of a child by one parent from one country to another without the approval of the other parent. Child removal, in this context, encompasses an interference with the parental rights or right to contact with the removed child. These acts by a parent when brought before a court of law have in the past created considerable amount of confusion specifically in the area of competence of courts with regard to jurisdictional aspects.<sup>5</sup>

1.6 The international community acted to solve this crisis by adopting on October 25, 1980 an International Convention on the Civil Aspects of

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

International Child Abduction which entered into force on December 1, 1983. This Convention seeks to protect children from harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. The main objects of the Convention are:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.<sup>6</sup>

1.7 Many States of the world (81) have become signatory to this Convention. Some States like Australia have brought about amendments in their family law legislations to make the Hague Convention operative in their nation. India, however, is not a signatory to this Convention.<sup>7</sup>

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<sup>6</sup> The Hague Convention on the Civil Aspects of International Child Abduction (1980), Article 1

<sup>7</sup> Supra note 1

## **II. THE HAGUE CONVENTION**

2.1 The Hague Convention lays down that, when a court has jurisdiction over a child, the first question to determine is whether the Hague Convention applies to the case. Two conditions must be satisfied before the Convention applies:

- (a) the child must be under 16 years of age; and
- (b) the child must have been habitually resident in a Convention country immediately before any breach of custody or access rights.<sup>8</sup>

2.2 In *Cooper and Casey*<sup>9</sup>, it was held that a child can have only one place of habitual residence which should be determined by focusing on the child's past experience and not on its or its parents' intentions.

2.3 The Hague Convention is expressly intended to enhance the international recognition of rights of custody and access arising in the place of habitual residence, and to ensure that any child wrongfully removed or retained from that place is promptly returned (Article 1). In most cases, therefore, the court's obligation to act in the best interests of the child is displaced as a consideration bearing on who is to have care or control of the child. The Hague Convention

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<sup>8</sup> Supra note 6, Article 4

<sup>9</sup> [1995] 18 Fam LR 433

creates central authorities throughout the Convention countries to trace an unlawfully removed child and secure its return. It is important to consider what principles and rules determine whether a child is or is not to be returned to a Convention country. The Convention mandates return of the child only when there has been a wrongful removal or retention of a child from a Convention country (Article 12). In securing rights of access, the following issues should be considered:

- wrongful removal or retention;
- excusable removal or retention; and
- access.<sup>10</sup>

## WRONGFUL REMOVAL OR RETENTION

2.4 Article 3 of the Hague Convention provides that removal or retention of a child is wrongful where it is in breach of rights of custody and at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention. Removal occurs when a child is taken out of the place of habitual residence, whereas retention occurs when a child who has, for a limited period, been outside the place of habitual residence is not, on the expiration of the period, returned. It is not the removal or retention of the child from the parent which constitutes a breach of Article 3 but the removal or retention from the place of habitual residence that creates the wrong. It is important to identify the event constituting removal or retention because on an application

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<sup>10</sup> Supra note 1

made within one year of such removal or retention, the court must order the return of the child, whereas if this is done after one year, the court must also order the return of the child unless it is satisfied that the child has settled into its new environment.<sup>11</sup>

## EXCUSABLE REMOVAL OR RETENTION

2.5 There are also some grounds which enable the removal or retention of the child to be excused (*vide* Articles 12, 13 and 20) and these are:

- (i) Applicant not exercising custodial rights – The Court can refuse to order the return of the child if the applicant was not actually exercising rights of custody when the child was removed or first retained.
- (ii) Consent to or subsequent acquiescence – The order for the return of the child can be refused if the applicant had consented to or subsequently acquiesced in the removal or retention. This consent or acquiescence may be expressed or inferred from conduct in circumstances in which different conduct might be expected if there was no consent or acquiescence.
- (iii) Risk to the child – The Court may refuse a return if there is a grave risk that the return of the child to the country in which it habitually resided immediately before the removal or retention would expose the child to

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<sup>11</sup> Ibid.

physical or psychological harm or otherwise place the child in an intolerable situation.

(iv) Child's objection – The Court may refuse to order return if a child, who has obtained an age and degree of maturity at which it is appropriate to take account of the child's views, objects to the return. It should be an emphatic objection and not a mere preference to remain where it is.

(v) Protection of rights and freedoms – The Court may refuse to order return if it would be contrary to the protection of human rights and fundamental freedoms.

(vi) Expiry of one year – The application for return was made more than one year after a wrongful removal or retention and the child settled into its new environment.<sup>12</sup>

## ACCESS

2.6 The Hague Convention does not give rights of access either the importance or attention but it devotes to rights of custody. It defines "rights of access" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence" [vide Article 5(b)]. The Hague Convention does not impose any specific duty on a court in a Convention country in relation to rights of access and it, therefore, appears that the

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<sup>12</sup> Ibid.

question of access should therefore be decided with reference to the best interests of the child as a paramount consideration.<sup>13</sup>

2.7 India is not a signatory to the Hague Convention. The Supreme Court has observed in the case of *Sumedha Nagpal v. State of Delhi*<sup>14</sup> as under:

“No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. No court welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child.”<sup>15</sup>

2.8 A case law study will depict a clear picture in this regard. The Supreme Court in *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu*<sup>16</sup> and *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*<sup>17</sup> exercised summary jurisdiction in returning the minor children to the country of their parent. In a later case of *Dhanwanti Joshi v. Madhav Unde*<sup>18</sup>, the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters and India being a country which is not a signatory to the Hague Convention,

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<sup>13</sup> Ibid.

<sup>14</sup> JT 2000 (7) SC 450

<sup>15</sup> Ibid., page 453

<sup>16</sup> AIR 1984 SC 1224

<sup>17</sup> AIR 1987 SC 3

<sup>18</sup> (1998) 1 SCC 112

the law is that the Court within whose jurisdiction the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance. It was in this case the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning children to its parent and observed that the welfare and best interest of the child or children should be of paramount consideration. This observation by the Supreme Court was followed in a later decision by the Supreme Court in the case of *Sarita Sharma v. Sushil Sharma*<sup>19</sup>. In 2004, the Supreme Court, in the case of *Sahiba Ali v. State of Maharashtra*<sup>20</sup> declined to grant the custody of her children to the mother but at the same time issued directions for visitation rights in the interest and welfare of the minor children. In another case of *Kumar V. Jahgirdar v. Chethana Ramatheertha*<sup>21</sup>, the Supreme Court came to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification in safeguarding interest of the child. Further, in a recent case of *Paul Mohinder Gahun v. State of NCT of Delhi*<sup>22</sup> the Delhi High Court refused to grant custody of the child to the father and observed that the question of conflict of laws and jurisdictions should take a back seat in preference to what lies in the interest of the minor.

2.9 In a recent decision dated March 3, 2006 of the High Court of Bombay, at Goa, the Court declined to issue a writ of *habeas corpus* thereby refusing the custody of a girl child to her mother while

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<sup>19</sup> JT 2000 (2) SC 258

<sup>20</sup> 2004 (1) HLR 212

<sup>21</sup> 2004 (1) HLR 468

<sup>22</sup> 2005 (1) HLR 428

relegating the parties to normal civil proceedings in Goa for a decision on the point of the custody of the child without disturbing the custody with the father in Goa. The High Court clearly declined the return of the child to Ireland in exercise of its writ jurisdiction and held that this question requires analysis of disputed question of facts.<sup>23</sup>

2.10 Indian laws that deal with the principles of custody of children are not too many. To name a few:

- The Hindu Marriage Act, 1955
- The Hindu Minority and Guardianship Act, 1956
- The Guardians and Wards Act, 1890

2.11 Section 26 of the Hindu Marriage Act, 1955, states that a court can pass orders and make such provisions in the decree in any proceedings under the Act with respect to the custody, maintenance and education of minor children upon an application for that purpose as expeditiously as possible.

2.12 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. A landmark case that decided the same was *Githa Hariharan v. Reserve Bank of India*.<sup>24</sup>

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<sup>23</sup> Mandy Jane Collins v. James Michael Collins, (2006) 2 HLR 446

<sup>24</sup> (1999) 2 SCC 228

2.13 The High Court by way of the writ of *habeas corpus* can order custody of a minor at the behest of a parent applying for the same, with predominant focus placed on the welfare of the child.<sup>25</sup>

2.14 In *Dhanwanti Joshi v. Madhav Unde*<sup>26</sup>, the Supreme Court referred to the Hague Convention on the Civil Aspects of International Child Abduction and observed as follows:

'32. In this connection, it is necessary to refer to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the Convention prohibits the court from going into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

33. So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in *McKee v. McKee* unless the Court thinks it fit to exercise summary jurisdiction

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<sup>25</sup> Supra note 1

<sup>26</sup> Supra note 18

in the interests of the child and its prompt return is for its welfare, as explained in L., Re. As recently as 1996-1997, it has been held in P (A minor) (Child Abduction: Non-Convention Country), Re: by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence -- which was not a party to the Hague Convention, 1980, -- the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction: Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13)]. This answers the contention relating to removal of the child from USA.'

2.15 From the above, it can be observed that, the Indian Courts while deciding cases pertaining to minor children have not followed a uniform pattern. There also is an absence of progressive development in the subject. If some matters are decided with prime importance placed on the welfare of the child, some are based on the technicalities of various provisions of law and jurisdictional tiffs. The reason cited for this can be the absence of any law that governs this aspect. This only will affect the condition both physical and emotional of the child, who is caught in the fire of shattered relationships.<sup>27</sup>

2.16 This situation only shows that the time has come for some international perspective in this regard. The fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a

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<sup>27</sup> Supra note 1

foreign judge who is deciding on the custody of a child. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical upshot, India should become a signatory to the Hague Convention and this will, in turn, bring the prospect of achieving the return to India of children who have their homes in India.<sup>28</sup>

### **III RECOMENDATION**

We believe that India should keep pace and change according to the changing needs of the society. The Commission, therefore, recommends that the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their homes in India.

(Dr. Justice AR. Lakshmanan)

Chairman

(Prof. (Dr.) Tahir Mahmood)  
Member

(Dr. Brahm A. Agrawal)  
Member-Secretary

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<sup>28</sup> Ibid.