

# СТАТЬИ

UDC 347.6

## Cross-border child abduction: An analysis of the jurisprudence of best interests of children in India

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**For citation:** Jolly, Stellina, Pathak, Apoorva. 2021. Cross-border child abduction: An analysis of the jurisprudence of best interests of children in India. *Pravovedenie* 65 (4): 367–381. <https://doi.org/10.21638/spbu25.2021.401>

Intercountry child abduction cases present a colossal challenge for the courts in determining courses of action. The Hague Convention on Civil Aspects of Child Abduction, 1980, provides for the mechanism of prompt “return of the child” to the “habitual residence”. The assumption is that the courts of habitual residence of the child are the best forum to promote the child’s best interests. “Welfare of the child” or “best interest of the child” are the guiding principles recognized by international law as the basis for child jurisprudence. However, India is not a signatory to the Hague Convention, which poses a significant challenge to applying orders of foreign courts relating to the custody and return of a child abducted to India. Considering the large diaspora and increasing cross border marriages, the issue of child abduction and the legal response in India assumes significance. Indian courts have devised their own term, “intimate contact”, as the connecting factor in lieu of “habitual residence” to address legal battles in intercountry child abduction cases. This article explores the Indian stance on intercountry child abduction. The article provides a critical analysis of the application of the principle of welfare of the child by the Indian judiciary in child abduction cases. Jurisprudence reveals that Indian courts have assessed the contours of the best interest of the child not just from the point of the habitual residence of the child, but considering the overall interest of the child. However, in the absence of a legislative framework, uncertainty prevails. The paper argues that there is a need for comprehensive legislation to address issues and challenges of intercountry child abduction cases, taking into account factors like “domestic violence”, child psychology, and other social factors pertinent for the determination of the best interest of the child.

*Keywords:* child abduction, welfare of the child, best interest of the child, intimate contact, Hague abduction convention.

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## Introduction

In 1948, the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR). Article 16 (3) of the UDHR states, “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>1</sup>. The legal structure surrounding family has been closely connected with religious and social practices — many jurisdictions including India have adopted personal laws<sup>2</sup> regulating matters of family law i. e. marriage, divorce, guardianship, child custody, succession, and inheritance<sup>3</sup>.

Globalization and the increased movement of individuals have resulted in an increase in relationships between individuals of different nationalities, cultural backgrounds and religious beliefs in ensuring the creation of transnational families<sup>4</sup>. Though the transnational families have been instrumental in dismantling the geographical boundaries, the situation has also given rise to varied cross-border legal disputes including creating a set of risks for children caught up in cross-border situations<sup>5</sup>.

One of the unfortunate consequences of litigation involving transnational families is the custody orders concerning children in foreign courts and under a law that is not necessarily comprehended by the parties, and there are concerns related to enforcement of such orders in a different jurisdiction<sup>6</sup>. Enforcement of custody-related orders in foreign jurisdictions is a problem because the personal laws of the parents, being different, often have different stances on custody, and are, in some cases, influenced by religious law. A related problem that often arises in such a scenario is parental child abduction. A parent fighting a custody dispute can withdraw the child from his or her habitual residence and relocate with the child to another country, thereby leaving the other parent to pursue litigation in that foreign jurisdiction. International parental child abduction occurs when a parent withdraws the child across international borders to a jurisdiction that is not his or her own<sup>7</sup>.

The Hague Convention on Civil Aspects of Child Abduction (Abduction Convention) 1980<sup>8</sup> is a significant attempt to prevent this scenario and ensure the return of the children to their habitual residence. The Abduction Convention ratified by more than 100 nations<sup>9</sup> has been founded on the principle of the best interest of the child<sup>10</sup>. Aided by the increased diaspora, India has become a major jurisdiction grappling with in-bound child

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<sup>1</sup> Universal Declaration of Human Rights. December 10, 1948. Available at: <https://www.un.org/sites/un2.un.org/files/udhr.pdf> (accessed: 20.05.2021).

<sup>2</sup> *Galanter M., Krishnan J.* Personal law systems and religious conflict: A comparison of India and Israel // Religion and personal law in secular India: A call to judgment / ed. by G. J. Larson. Bloomington: Indiana University Press, 2001. P. 270–300; *Subramanian N.* Making family and nation: Hindu marriage law in early postcolonial India // The Journal of Asian Studies. 2010. Vol. 69. P. 771–798.

<sup>3</sup> *Estin A. L.* Marriage and divorce conflicts in international perspective // Duke Journal of Comparative & International Law. 2017. Vol. 27. P. 485–517.

<sup>4</sup> *Malhotra A.* To return or not to return: Hague convention countries vs. non convention countries // Family Law Quarterly. 2014. Vol. 48, no. 2. P. 297–318.

<sup>5</sup> Ibid.

<sup>6</sup> *Johnson T. A.* The Hague Child Abduction Convention: Diminishing returns and little to celebrate for Americans // New York University Journal of International Law and Politics. 2000. Vol. 33. P. 125–178.

<sup>7</sup> *Browne N. L.* Relevance and fairness: Protecting the rights of domestic-violence victims and left-behind fathers under the Hague Convention on International Child Abduction // Duke Law Journal. 2011. Vol. 60. P. 1193–238.

<sup>8</sup> Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980 (entered into force 1 December 1983). Available at: <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bfe102911c8532.pdf> (accessed: 20.05.2021).

<sup>9</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Status Table. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (accessed: 20.05.2021).

<sup>10</sup> Hague Convention on the Civil Aspects of International Child Abduction. Preamble.

abduction and the scenario is a matter of serious bilateral contention. However, India has consistently maintained a position of non-acceptance of the Convention. India's refusal to sign the treaty is due to the fact that it would amount to victimizing women escaping a bad marriage. Most of the countries from which the children are abducted to India are party to the Abduction Convention and the fact that India has not acceded to the Abduction Convention creates legal uncertainty to the parties involved in child abduction<sup>11</sup>.

The paper evaluates the legal and judicial responses to intercountry parental child abduction in India with a focus on the invocation of the best interest of the child principle. Part 1 of the paper highlights the core elements of the Abduction Convention. Part 2 of the paper explores the legislative and judicial statements on intercountry child abduction in India. Special focus is paid to the content analysis of the principle of the best interest of the child and scrutinizes how the judicial positions have clarified the contours of the best interests. Part 3 of the paper critically analyzes the Indian judicial statements on child abduction and its reliance on the best interests of the child especially in the context of domestic violence.

## 1. Inter-country Child Abduction and Best Interest of Child

The 1980 Hague Child Abduction Convention establishes procedures through which a parent can seek to have their child returned to their home country in case of international parental child abduction<sup>12</sup>. The main objectives of the Convention are to: 1) secure a prompt return of children who have been wrongfully removed or retained in any contracting state, and 2) ensure that the rights of custody and access under the law of one contracting state are effectively respected in other countries<sup>13</sup>. The basis of the Convention is the "welfare of the child". The best interest of the child has been considered as the core of child jurisprudence by the international community<sup>14</sup>.

Because any kind of wrongful removal of the child causes emotional and psychological problems, it assumes that a prompt and quick return order of the children to the State of their habitual residence immediately prior to their abduction ensure the welfare of the child<sup>15</sup>. Habitual residence is considered to be the best forum to determine the custody and welfare. Hence a return is considered to be the best solution. However, it should be noted that the Convention perceives return as a "provisional" remedy because a return

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<sup>11</sup> *Jhambolkar L.* Domestic violence and the Hague Abduction Convention: the Indian perspective // *Indian Journal of International Law*. 2017. Vol. 57 (1–2). P. 179–188.

<sup>12</sup> Hague Convention on the Civil Aspects of International Child Abduction 1980. Preamble; *Schuz R.* The Hague Child Abduction Convention: A critical analysis. London: Bloomsbury Publ., 2015; *Rivers D. R.* The Hague International Child Abduction Convention and The International Child Abduction Remedies Act: Closing doors to the parent abductor // *The Transnational Lawyer*. 1989. No. 2. P. 589–640; *Beaumontand P. R., McEleavy P. E.* The Hague Convention on International Child Abduction. Oxford: Oxford University Press, 1999.

<sup>13</sup> Hague Convention on the Civil Aspects of International Child Abduction. Art. 1.

<sup>14</sup> Article 3.1, Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 U. N. T. S. — As per the official Outline of the Hague Convention, the convention "helps give effect to the fundamental rights of the child, such as those expressed in CRC Art. 9.3". Art. 9.3 of CRC states that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests"; *McKinney L.* International adoption and the Hague Convention: Does the implementation of the convention protect the best interests of children // *Whittier Journal of Child and Family Advocacy*. 2006. No. 6. P. 361–412; *Wills M.* Interpreting the Hague Convention on International Child Abduction: Why American courts need to reconcile the rights of non-custodial parents, the best interests of abducted children, and the underlying objectives of the Hague Convention // *The Review of Litigation*. 2006. Vol. 25. P. 423–449.

<sup>15</sup> *Silberman L.* Interpreting the Hague Abduction Convention: In search of a global jurisprudence // *New York University Public Law and Legal Theory Working Papers*. 2006. Vol. 18 (1). P. 1–34.

order does not dispose of the merits of the custody case. Instead, it is contemplated that additional proceedings dealing with the merits of the custody dispute will take place in the state of the child's habitual residence once he or she is returned there<sup>16</sup>. This means that the Convention does not allow the court to make a comprehensive assessment of the best interests of the child including determining any custody issue. To strengthen the return mechanism, only a few grounds exist to prevent the return of the child to its habitual residence. These include:

- the filing of the return petition after one year of the wrongful removal and the child being settled in its new environment<sup>17</sup>;
- there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation<sup>18</sup>;
- a child who has attained an age of maturity objects to return<sup>19</sup>; and
- the return is not permitted by the fundamental principles of the requested State relating to the protection of human rights<sup>20</sup>.

These exceptions provided under the Convention attempt to balance the best interests of the children and the need for prompt return. Provisions like a child of maturity are asked about his objections, assessment of whether a return order would place the child in an intolerable condition shows that the best interest of the child is significantly incorporated. However, in making this determination, courts have faced criticism due to the lack of consideration for the child's best interests, since they have generally given a restrictive interpretation to Art. 13 (b) because of the fear that this will defeat and dilute the purpose of the Convention<sup>21</sup>. It should be noted that in 2006, an attempt to incorporate explicit reference to the best interests of the child to the Convention failed<sup>22</sup> as it was felt that the provisions of grave risk and the intolerable situation can be used to consider the best interests of the child.

## 2. Indian Legal Framework on Child Custody and Guardianship

In the absence of comprehensive legislation addressing international parental child abduction in India, issues related to abduction have been largely addressed as custody disputes. Few statutes are dealing with the issue of custody<sup>23</sup>. The term "custody" is not defined in any Indian domestic statutes. The Guardians and Wards Act 1890 (hereinafter

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<sup>16</sup> *Jolly S., Garimella S. R.* International parental child abduction and India — Attempting engagement with the Hague Convention // *Australian Journal of Asian Law*. 2018. Vol. 19, no. 1. P. 1–20.

<sup>17</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Art. 12

<sup>18</sup> *Ibid.* Art. 13 (b).

<sup>19</sup> *Ibid.* Art. 13.

<sup>20</sup> *Bruch C. S.* The unmet needs of domestic violence victims and their children in Hague Child Abduction Convention cases // *Family Law Quarterly*. 2004. Vol. 38. P. 529–545.

<sup>21</sup> *Quillen B.* The new face of international child abduction: Domestic-violence victims and their treatment under the Hague Convention on the Civil Aspects of International Child Abduction // *Texas International Law Journal*. 2014. Vol. 49. P. 621–643; *Konno Y.* A haven for international child abduction: Will the Hague Convention shape Japanese family law? // *California Western International Law Journal*. 2015. Vol. 46. P. 39–68.

<sup>22</sup> *Loo H.* In the child's best interests: Examining international child abduction, adoption, and asylum // *Chicago Journal of International Law*. 2016. Vol. 17, no. 2, article 7. P. 609–636.

<sup>23</sup> Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980). Report no. 218. Para 2.10 // Law Commission of India. 2009. Available at: <https://lawcommissionofindia.nic.in/reports/report218.pdf> (accessed: 03.05.2021).

referred to as GWA) regulates the appointment of guardians in appropriate cases<sup>24</sup>. The Act defines a guardian as a “person having the care of the person of a minor or of his property or both his person and property”<sup>25</sup>. The welfare of the minor is the primary consideration, which guides the court when appointing a guardian for the person or property or both of a minor under the Act. Section 17 (2) details the parameters for determining the welfare of the minor; courts can take into consideration the age, sex, and religion of the minor; the character and capacity of the proposed guardian, the relationship of the guardian with the child, and the wishes of the deceased parents<sup>26</sup>. GWA is applicable to all religious communities. Hindus can also rely on Section 26 of the Hindu Marriage Act 1955, which states that “a court can pass orders and make such provisions in the decree in any proceedings under the Act concerning the custody, maintenance and education of minor children upon an application for that purpose as expeditiously as possible”<sup>27</sup>.

Indian legislation exhibits a clear bias in favor of the father being the natural guardian<sup>28</sup>. The Hindu Minority and Guardianship Act 1956 confers the primary guardianship on the father in the case of a minor boy or unmarried minor girl. It was only in *Gita Hariharan v. Reserve Bank of India*<sup>29</sup>, the court extended the natural guardianship to the mother in the absence of the father. In Islamic law, the father is the natural guardian but custody vests in the mother until a son reaches the age of seven and a daughter reaches puberty<sup>30</sup>. In cases of international parental child abduction, the Hindu Minority and Guardianship Act 1956, which has an extraterritorial operation, is often resorted to by Hindu parents seeking guardianship rights-respecting their child<sup>31</sup>. Aggrieved parents also resort to the constitutional remedy of the writ of habeas corpus under article 226 and 32 of the Indian Constitution<sup>32</sup> giving rise to a robust jurisprudence in the country. The next part of the paper explores the judicial decisions on child abduction and examines the parameters espoused by the judiciary while considering the best interest of the child.

*Surinder Kaur v. Harbax Singh Sandhu*<sup>33</sup> was one of the earliest cases in which the Indian judiciary addressed claims of international parental child abduction. The parties married in India and moved to England, where a child was born to them. Marital discord resulted in the husband plotting a criminal assault on the wife, leading to his conviction and imprisonment. The husband, on probation, removed the child from England and brought him to India. The wife, in possession of an order of Ward of the Court, arrived in India and filed a petition before the judicial magistrate for custody. The husband successfully argued that the Hindu Minority and Guardianship Act espouses the father as the natural guardian. The wife’s writ petition for custody of the child was dismissed on the ground that

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<sup>24</sup> Guardians and Wards Act 1890, The GWA is secular legislation and applies to all persons irrespective of religion.

<sup>25</sup> Guardians and Wards Act 1890, Act no. 8 of Year 1890, dated 21<sup>st</sup> March, 1890. Sec. 4 (2).

<sup>26</sup> Ibid. Sec. 17 (2).

<sup>27</sup> Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980). Para 2. 11.

<sup>28</sup> *Mulla D. F., Desai S. A.* Mulla Principles of Hindu Law. New Delhi: Lexis Nexis Butterworths, 2013.

<sup>29</sup> *Gita Hariharan v. Reserve Bank of India* AIR 1999, 2 SCC 228.

<sup>30</sup> Reforms in guardianship and custody laws in India. Report No. 257. Para 2.2.13 // Law Commission of India. 2015. Available at: <https://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf> (accessed: 20.05.2021).

<sup>31</sup> *Mulla D. F., Desai S. A.* Mulla Principles of Hindu Law; Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980). Report no. 218. Para 2.13.16.

<sup>32</sup> *Jolly S.* International parental child abduction and legal standards in India // International Journal of Law, Policy and the Family. 2017. Vol. 31, no. 1. P.20–40.

<sup>33</sup> *Surinder Kaur v. Harbax Singh Sandhu* 1984, 3 SCR 422.

the financial and social condition of the wife in England was not conducive to the welfare of the child<sup>34</sup>.

Against the order of the High Court, the wife brought a Special Leave Petition in the Supreme Court of India. Espousing the welfare and best interests of the child as the foundational guidance for decisions on international parental child abduction, the court observed, "Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor"<sup>35</sup>. The court noted the evidence related to the child's welfare at his habitual residence in England and found that: 1) the welfare of the boy did not require his residence with the father and grand-parents; 2) the "traumatic experience of a conviction on a criminal charge" was not a factor in favor of the father, especially when the post-probation conduct did not show any remorse; and 3) the father attempted to procure a travel document for the child founded upon a misrepresentation. It, therefore, ruled in favor of the mother<sup>36</sup>.

The decision also saw the Indian courts relying on the doctrine of "intimate contact" as the basis of jurisdiction. The stance of the Indian court differs from the Convention's reliance on habitual residence as the basis of jurisdiction. The reliance on "intimate contact" presents to the judiciary the opportunity to explore numerous factors in determining the return order<sup>37</sup>.

A similar position was reiterated in *Dhanwanti Joshi v. Madhav Unde*<sup>38</sup>. Madhav Unde, the respondent married the appellant, Dhanwanti in the USA. The couple had a son and when the child was just 35 days old appellant left her husband and came back to India with her infant son. The Supreme decided on the matter of custody of the child when he was more than 12 years old. The court decided that even though the father may have obtained custody from the US Court, the "best interests of the child" demanded that the child be allowed to continue to stay with the mother in India who had brought up the child single-handedly in India, subject to visitation rights of the father. The Supreme Court reiterated the "welfare of the child" as the primary principle and found that the custody of a minor child below five years of age should remain with the mother. The court observed that the welfare of the child is not to be measured by money alone nor by physical comfort only. The word "welfare" must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. The court noted that the ties of affection cannot be disregarded, hence, the father's financial capacity in the present case was not considered to be the sole factor in determining what would be the best interest of the child. The court acknowledged that orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of a change of circumstances requiring a change of custody but such change in custody must be proved to be in the paramount interests of the child<sup>39</sup>.

The Indian Supreme Court decisions illustrate the paramount weight assigned to the "welfare of the child" even if the husband has obtained an order for custody in a foreign court. In *Saritha Sharma v. Sushil Sharma*<sup>40</sup>, the respondent initiated proceedings for dissolution of his marriage in the District Court of Tarrant County, Texas, the U. S. A. in 1995. A divorce decree was passed by the American court in 1997. It also passed an order de-

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<sup>34</sup> *Surinder Kaur v. Harbax Singh Sandhu* 1984, 3 SCR 422.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Jolly S., Garimella S. R.* International parental child abduction and India. P. 1–20.

<sup>38</sup> *Dhanwanti Joshi v. Madhav Unde* 1998, 1 SCC 112.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Saritha Sharma v. Sushil Sharma* 2000, 3 SCC 14.

claring that the sole custody of the children shall be of Sushil (respondent). The appellant took the children with her and came to India. The appellant contended that the respondent should not be given physical custody of the children as he was an alcoholic and violent person which was disclosed by the material on the record of the divorce proceeding. The Delhi High Court took note of the fact that a competent court having territorial jurisdiction, has passed a decree of divorce and ordered that only the father, i. e. Sushil, shall have the custody of the children. However, the decision of the High Court was reversed by the Supreme Court.

Supreme Court reiterated its earlier stand and observed that Section 6 of the Hindu Minority and Guardianship Act, 1956, constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. The court stated, "In view of the facts and circumstances of the case, the decree passed by the American court though a relevant factor, cannot override the consideration of the welfare of the minor children"<sup>41</sup>. The court observed that the respondent was staying with his old age mother with no one else in the family and the respondent was also an alcoholic. The court concluded that "though it is true that both the children have the American citizenship and there is a possibility that in the U. S. A. they may be able to get a better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young"<sup>42</sup>. Court also noted that since one of the children is a female aged about 5 years, the child should be allowed to remain with the mother so that she can be properly looked after. Observing that both the children should not be separated from each other, the court said that it will be in the interest of both the children that they stay with their mother, considering the proper care given by the mother. Both the children also had the desire to stay with the mother which was considered by the court.

The courts have consistently ruled that the existence of a foreign order is only one of the factors that are considered in the determination of child return proceedings<sup>43</sup>. In *Dr V. Ravi Chandran v. Union of India & Ors*, the court ruled that:

- the welfare of the child is the first and paramount consideration;
- although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one way or the other<sup>44</sup>;
- one of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country<sup>45</sup>.

The Supreme Court of India in *Surya Vadanan v. State of Tamil Nadu & Ors*<sup>46</sup> revisited its jurisprudence. The appellant (Surya) a British citizen, and the respondent (Mayura) an Indian citizen, were married in Chennai, India in 2000. Two children were born to them in the UK. Following matrimonial discord, Mayura, along with their children, returned to India in August 2012. She filed a divorce petition and a custody order application in the Family Court at Coimbatore, India. Surya arrived in India to attempt amicable resolution of differences but was unsuccessful. The Family Court summoned Surya to appear before it. He, however, filed a petition in the High Court of Justice in England, seeking to make the children wards of the court. On 13 November 2012, the High Court of Justice granted him

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> *Noronha F. E.* Private international law in India: Adequacy of principles in comparison with common law and civil law systems. Allahabad, India: Universal Law Publ., 2010.

<sup>44</sup> *Dr V. Ravi Chandran v. Union of India & Ors* 2010, 1 SCC 174.

<sup>45</sup> Ibid.

<sup>46</sup> *Surya Vadanan v. State of Tamil Nadu & Ors*, Criminal Appeal no. 395 of 2015 arising out of S. L. P. (CRL) no. 3634 of 2014.

his petition. Surya then applied to the writ jurisdiction of the Madras High Court, pleading that Mayura held illegal custody of their children. The court ruled in favour of Mayura, relying on the best interests of the child principle and reiterating that as the mother could not be held to have abducted her own children, custodial rights exercised by her would not be illegal. Surya then appealed to the Supreme Court of India.

Supreme Court laid down the following principles:

- the best welfare/interest of the child should apply in child abduction cases;
- the principle of “first strike”, that is, whichever court is seized of the matter first ought to have the privilege of the jurisdiction in adjudicating the best interest of the child;
- the rule of “comity of courts” should not be abandoned except for compelling special reasons to be recorded in writing by a domestic court;
- an elaborate or summary inquiry by local courts must be held when there is a pre-existing order of a competent foreign court; it must be based on reasons and not ordered as routine when a local court is seized of a child custody litigation<sup>47</sup>.

In *Lahari Sakhamuri v. Sobhan Kodali*<sup>48</sup>, the marriage of the parties was solemnized according to Hindu rituals in Hyderabad in 2008. The couple had a son in 2012 and a daughter in 2014. Both the children were US citizens having US passports and had the social and cultural values of the USA embedded in them as they had stayed in the US since their birth. The court stated that the ultimate decision of custody and guardianship of the two minor children will be taken by the US courts which has the exclusive jurisdiction to make the decision as the children happened to be US citizens. The court highlighted the principle of “best interest of child” wide in its connotation and identified crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children such as: 1) maturity and judgment; 2) mental stability; 3) ability to provide access to schools; 4) moral character; 5) ability to provide continuing involvement in the community; 6) financial sufficiency and last but not the least the factors involving the relationship with the child, as opposed to characteristics of the parent as an individual<sup>49</sup>.

Unlike the Convention countries, the Indian judicial statements do not reveal a fascination for the prompt return of the children. Under the existing law, the paramount “welfare of the child” is required to be kept in view by the courts as an overriding principle. Indian judicial statements reveal an explicit reference to the “best interests of the child” which gives large discretion to the court, to safeguard the interests of the child in the context of each case while determining the return of the child<sup>50</sup>. Despite the little clarity on the application of the welfare of the child principle, certain parameters are evident in espousing the welfare or the best interest of the child.

The welfare of the child has priority over the statutory provisions as far as guardianship is concerned<sup>51</sup>. An application of the “best interest” principle, it was accepted that a child should not be uprooted from the environment with which he/she is familiar and attached; this includes not merely the place but the persons, i. e., generally the mother with whom the child has been living<sup>52</sup>. In *Nil Ratan Kundu v. Abhijit Kund*<sup>53</sup> the Supreme Court

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<sup>47</sup> *Surya Vadanam v. State of Tamil Nadu & Ors*, Criminal Appeal no. 395 of 2015 arising out of S. L. P. (CRL) no. 3634 of 2014.

<sup>48</sup> *Lahari Sakhamuri v. Sobham Kodali* 2019, 7 SCC 311.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Jhambolkar L. Conflict of laws // Fifty Years of Supreme Court / ed. by S. K. Verma Kusum. India: Oxford University Press, 2013. P. 650–681.*

<sup>51</sup> *Noronha F. E. Private international law in India.*

<sup>52</sup> *Jhambolkar L. Domestic violence and the Hague Abduction Convention. P. 179–188.*

<sup>53</sup> *Nil Ratan Kundu v. Abhijit Kund* 2008 (SUPPL) (4) CHN 32 (SC); 2008, 9 SCC 413; 2008, 7 MLJ 248 (SC).

laid down some of the parameters for the welfare consideration, including the “child’s ordinary comfort, contentment, intellectual, moral, physical development, his health, education and general maintenance and also favorable surroundings”. Other factors include, amongst others, the violent nature of the husband towards his wife, his habitual drinking, and the efficiency or otherwise of the support system available for the maintenance of the children<sup>54</sup>.

### 3. Best Interest of Child in Indian context: A Critique

It was noted by Vivatyarphol, that in the context of international child abduction, the welfare of the child requires a personalized inquiry into each individual case and the analysis prolongs the entire process<sup>55</sup>. Similarly, Indian courts have steadfastly ruled in favor of the welfare of the child being of paramount consideration in custody-related disputes, and have frequently held that the welfare of the child is to be determined based on the relevant facts and circumstances in each specific case. However, unlike the Abduction Convention that ascribes “habitual residence” of the child as the basis of jurisdiction and assumes that “habitual residence” is the best forum to promote the best interest of the child, the Indian judicial statements espouse “intimate contact” as the basis of jurisdiction to promote the best interest of the child. In assessing or determining the intimate contact, numerous factors including the parent’s intention, domicile, nationality, place of marriage, and habitual residence are considered<sup>56</sup>. Thus a clear disconnect exists between the Indian approach and the Convention practice.

To complicate the matters, there are no legislative guidance or formula elaborating the key elements of intimate contact and the best interest of the child that characterize it. In the absence of legislative guidance or a set formula regarding what factors should be used to assess the best interests of a child, courts have given varied interpretations, used numerous formulas and analyses based on their personal ideas about what is best for the children<sup>57</sup>. In the absence of concrete parameters, indeterminacy and speculation in determining the welfare of the child principle remain a significant concern<sup>58</sup>. Where an indeterminate standard is used, the decision to protect the child is arrived at by evaluating parental attitudes, conditions, and beliefs against the judge’s personal values and beliefs instead of a journey into the life of the child and surroundings<sup>59</sup>. Its indeterminate and speculative nature is a natural consequence of a lack of consensus on what constitutes the best interest of the child but also the inability to make accurate predictions about what would further the best interests of a child<sup>60</sup>. It is also noted that while dealing with child abduction cases, Indian courts have not referred to the human right legal instruments to which India is a party including the UN Declaration of the rights of the child 1959 or the Convention on the Rights of the Child. Neither have they referred to the rich and robust jurisprudence developed by the Indian courts on the child jurisprudence. The issue of child abduction has been addressed as a standalone issue and the best interest of the child was evaluated based on the intimate contact doctrine. The doctrine of “intimate contact”

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<sup>54</sup> Ibid.

<sup>55</sup> *Vivatvaraphol T.* Back to basics: determining a child’s habitual residence in international child abduction cases under the Hague Convention // *Fordham Law Review*. 2009. Vol. 77, no. 6. P. 3325–3369.

<sup>56</sup> *Jolly S.* International parental child abduction and legal standards in India. P. 20–40.

<sup>57</sup> *Parashar A.* Welfare of child in family laws — India and Australia // *Nalsar Law Review*. 2003. Vol. 1, no. 1. P. 49–72.

<sup>58</sup> Ibid.; *Singh K.* Child custody cases in the context of international migration // *Marriage, Migration and Gender* / eds R. Palriwala, P. Uberoi. New Delhi: Sage Publ., 2008. P. 326–347.

<sup>59</sup> *Schuz R.* The Hague Child Abduction Convention: A critical analysis.

<sup>60</sup> *Sahiba Ali v. State of Maharashtra & Ors* AIR 2003, SC 4205.

goes against the underlying assumption of the CRC that the interests of the child are best protected in his or her place of habitual residence. However, it has also been argued that the assumption that habitual residence would always protect the best interest of the child need not be absolutely correct always<sup>61</sup>.

The scenario is also plagued by the inability of the system to ensure the participation of the child in the entire decision-making process. The solution to the indeterminacy surrounding the best interest of the child lies in evolving a core set of inviolable rights / parameters that forms or promotes the best interest of the child. The right of a child to be heard and participate can form part of the core set of child rights in abduction proceedings. In this context the provisions of the Convention on Child Rights (CRC) can be pertinent since India is a party to this Convention<sup>62</sup>. Also under the Constitution of India, it provides for the mechanism to incorporate international law into municipal law<sup>63</sup>. CRC requires that States parties put in place facilitative mechanisms that are appropriate to hearing the views of the child. There is also an obligation on decision-makers to give due weight to the opinion of the child and recognizing that the child can and should have a direct influence (in accordance with their age and maturity) on her/his future<sup>64</sup>.

A discussion on the best interest of the child in the Indian context cannot be completed without a discussion on the relationship between domestic violence and child abduction.

One of the fundamental objections India has persistently articulated concerning the accession to The Hague Convention is the absence of explicit acceptance of domestic violence as a ground of defence against the return of wrongfully removed children to their habitual residence<sup>65</sup>. India considers most instances of child removal as a flight for the safety of battered spouses rather than as an abduction. Conceived as a treaty that focuses exclusively on the child, The Hague Convention does not expressly recognize domestic violence against a spouse as a reason to deny the return of the child to the habitual residence. For a parent who has abducted a child to escape domestic violence, the only relevant defence is Art. 13 (b) of the Convention<sup>66</sup>. The problem is that the determination of domestic violence is contextualized on the premise of the welfare or the best interest of the child and never operates independently of it<sup>67</sup>. The result is that the individual victimization and traumatization of the parent is irrelevant in the context of grave risk and deprives the victim of the sole defence available to her. This is in spite of the fact that stud-

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<sup>61</sup> *Stoeger E.* International child abduction and children's rights: Two means to the same end // *Michigan Journal of International Law*. 2011. Vol. 32, No. 3. P.511–526.

<sup>62</sup> Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> (accessed: 20.05.2021). India ratified the Convention on December 11, 1992.

<sup>63</sup> Art. 51, 73, 253 of the Constitution of India, effective January 26, 1950.

<sup>64</sup> Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990, Art. 12.

<sup>65</sup> *Singh K.* Child custody cases in the context of international migration. P.326–347; *Anand P.* India // *Family Law: Jurisdictional comparisons* / ed. by J. Stewart. London: Sweet and Maxwell, 2011. P. 181–200.

<sup>66</sup> *Jhambolkar L.* Domestic violence and the Hague Abduction Convention. P. 179–188.

<sup>67</sup> *Bala N., Chamberland J.* Family violence and proving “grave risk” for cases under the Hague Convention Article 13 (b). Draft background paper for the Working Group on a Guide to Good Practice on Article 13 (1) (b) of the Hague Convention on Child Abduction // *Queen's University Legal Research Paper no. 2017-091*, January 2015. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2987207](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2987207) (accessed: 20.05.2021).

ies reveal a clear risk of emotional, social, and psychological harm to children exposed to domestic violence<sup>68</sup>.

Despite the popular narrative of domestic violence and child abduction<sup>69</sup>, few Indian judicial decisions have explicitly explored the linkage of domestic violence and child abduction<sup>70</sup>. It was only in *Chandrashekar Mungerveli Putappa v. Commissioner of Police, Chennai Suburban*<sup>71</sup>, did the issue of domestic violence act as the primary deciding factor in refusing to return the child. However, it needs to be emphasized that, in this case, domestic violence was established in the habitual residence and was directed against the child also and not just the mother. Thus, the return order was considered to be against the best interest of the child. However, even in this case, the court did not elaborate on the principles, threshold, standard, and nature of proof to be considered in cases of domestic violence and left it to be determined by specific facts of the case. Thus lack of clarity persists as to when a spouse abducts a child owing to domestic violence, should the child be returned? Can we not construe that violence against a spouse as not in the best interest of the child? Art. 9 of CRC addresses cases which often involve situations of abuse within the family including active abuse, as well as passive abuse such as being left unattended or other forms of negligence. Furthermore it provides that the child must maintain personal relationships and direct contact with both parents unless this threatens the best interests of the child. This may include situations of open conflict between the child and one or both parents<sup>72</sup>. This provision can also be used as a guiding principle when adjudicating upon best interest of the child.

In this regard, it is important to mention that due to mounting pressure from various domains<sup>73</sup>, the Ministry of Women and Children (WCD) drafted the Protection of Children (Inter-Country Removal and Retention) Bill, 2016. The Bill, almost on the same lines as

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<sup>68</sup> Rossman B. B. R. Longer-term effects of children's exposure to domestic violence // *Domestic Violence in the Lives of Children: The Future of Research, Intervention, and Social Policy* / eds S. A. Graham-Bermann, J. L. Edleson. 1<sup>st</sup> ed. American Psychological Association, 2001. P.35–65; Appel A. E., Holden G. W. The co-occurrence of spouse and physical child abuse: A review and appraisal // *Journal of Family Psychology*. 1998. Vol. 12, no. 4. P.578–599; Edleson J. L., Lindhorst T., Mehrotra G., Vesneski W., Lopez L., Shetty S. Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention Cases (Final Report National Institute for Justice), November 2010. Available at: <https://www.ojp.gov/pdffiles1/nij/grants/232624.pdf> (accessed: 20.04.2022); Behind closed doors: The impact of domestic violence on children // UNICEF. Available at: <https://www.ojp.gov/ncjrs/virtual-library/abstracts/behind-closed-doors-impact-domestic-violence-children> (accessed: 20.05.2021).

<sup>69</sup> Dasgupta S. D. Exploring South Asian battered women's use of force in intimate relationships // Manavi Occasional Paper Series. 2007. Vol. 13. Paper 1; Misra N. International child abduction and domestic violence: Why children are sent back to violent homes. Business World, 2016.

<sup>70</sup> Jayanthi v. Commissioner of Police 2012, SCC Online Mad 1809; Gurmeet Kaur Batth v. State of Punjab & Ors. 2009, SCC Online P&H 689; Aviral Mittal v. State & Anr. 163, 2009, DLT 627 (DB); Kulwinder Dhaliwal v. State of Punjab and Ors. 2008, SCC Online P&H 885.

<sup>71</sup> Chandrashekar Mungerveli Putappa v. Commissioner of Police, Chennai Suburban, Madras High Court, 2011. See also: Jolly S., Sharma A. V. Domestic violence and inter-country child abduction: An Indian judicial and legislative exploration // *Journal of Private International Law*. 2021. Vol. 17, no. 1. P. 114–146.

<sup>72</sup> Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990, Art. 9.

<sup>73</sup> See generally: Annual Report on International Parental Child Abduction (IPCA) // U. S. Department of State Bureau of Consular Affairs. 2016. Available at: [https://travel.state.gov/content/dam/child-abduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20\(July%2011\).pdf](https://travel.state.gov/content/dam/child-abduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20(July%2011).pdf) (accessed: 20.05.2021). The report criticizes India's position on inter-country parental child abduction. Around the same time, the "Bring Our Kids Home" started a petition on change.org. The group represents Indian parents. Available at: <https://www.change.org/p/barack-obama-bring-our-kids-home-we-urge-us-india-to-reunite-all-parent-abducted-american-children-now> (accessed: 20.05.2021).

the Hague Convention, was put on the Ministry's website for inputs from stakeholders<sup>74</sup>. The basic objectives of the Bill are to secure the prompt return of children wrongfully removed or retained in any contracting State, to ensure that the right of custody and access under law. Despite the strong narratives on domestic violence and child abduction, the Bill failed to incorporate any provision on domestic violence. Law Commission deemed it appropriate to supplement its Report with a Draft Bill titled "The Protection of Children (Inter-Country Removal and Retention) Bill, 2016". Unlike the Bill drafted by the WCD, the model law drafted by the Law Commission provided for domestic violence as a ground for the non-return of children<sup>75</sup>. Despite these legal developments, the Ministry reiterated its stand in June 2018 saying that signing the Convention would be against the interests of women who are fleeing bad marriages<sup>76</sup>.

A comprehensive law, factoring in the varied scenarios related to parental child withdrawal, including safeguards for domestic violence could help address and alleviate concerns about the protection of women and the interests of children. In the absence of such law reform efforts, the judiciary will continue with its reliance on the best interest of the child based on unset factors resulting in uncertainty for the disputants.

## Conclusions

The inter-country child abduction cases have in the past and still continues to pose a great challenge to the Indian Courts of redeeming between the custody of the child and the best interest/welfare of the child in its decisions. The enigma between "habitual residence" and "intimate contact" has plagued the courts while determining the best interest of the child in such cases when deciding the custody of the child. In the absence of legislative guidance in setting the standards and parameters of welfare/best interest of the child, the courts have no other option but to decide each case on its merits. The problem with the same is that there is clear inconsistency and indeterminacy of the factors to be considered while applying the principle of welfare/best of the child. In the case of India, in most child abduction cases, it is the mother who takes away the children to escape domestic violence and a bad marriage. Therefore there is a fear that signing the treaty might result in further victimization of the mothers/women, as the Convention does not recognize "domestic violence" as a ground to refuse the prompt "return of the child".

Another factor that should be considered in such cases is the impact on the "psychology of the child", especially in cases of domestic violence. Even if the child is not the direct victim of domestic violence, it still impacts the child's psychology which could be detrimental to the child's development and ultimately its welfare. This pertinent factor is not recognized by the Convention and is even neglected by the courts. There is also no absolute requirement of considering a child's own choice/opinion to be considered by the courts under Indian laws or even under the Convention in the application of the principle of "welfare/best interest of the child".

Therefore for India to address the issues and challenges of intercountry child abduction cases, there is a need for legislation that takes into account the factors like "domestic violence", child psychology, and other social factors pertinent to its domestic settings before acceding to the Hague Convention. Legislation that has a comprehensive scope

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<sup>74</sup> The Protection of Children (Inter-Country Removal and Retention) Bill, 2016. Report no. 263 // Law Commission of India. 2016. Available at: <https://lawcommissionofindia.nic.in/reports/Report263.pdf> (accessed: 20.05.2021).

<sup>75</sup> Section 17 (1) (c) Protection of Children (Inter-Country Removal and Retention) Bill, 2016.

<sup>76</sup> *Gupta M. D.* India may not sign Hague Convention on International Child Abduction // *Hindustan Times*. 2018. 19 June. See also: *Jolly S., Khanderia S.* Indian private international law. London: Hart Publ., 2021.

including the social, psychological, economic, cultural factors to be considered in the application of the principle of “welfare/best interest of the child” while determining the custody of the child in intercountry child abduction could be a solution. International human rights treaties such as Convention on Child to which India is already a signatory, can provide guidance required for enactment of requisite legislation. A provision in the law itself, providing for “expert advice” of psychologist will also help in evaluating the best interest of the child in such cases.

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Received: May 23, 2021  
Accepted: November 13, 2021

## Трансграничное похищение детей: анализ судебной практики в области обеспечения наилучших интересов детей в Индии

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**Для цитирования:** Jolly S., Pathak A. Cross-border child abduction: An analysis of the jurisprudence of best interests of children in India // Правоведение. 2021. Т. 65, № 4. С. 367–381. <https://doi.org/10.21638/spbu25.2021.401>

Дела о трансграничном похищении детей представляют собой колоссальную проблему для судов при определении порядка действий. Гагская конвенция 1980 г. о гражданско-правовых аспектах похищения детей предусматривает механизм оперативного возвращения ребенка на обычное место жительства. Предполагается, что суды по месту обычного жительства ребенка являются оптимальным вариантом для обеспечения его наилучших интересов. Благополучие ребенка (наилучшие интересы ребенка) — руководящий принцип, признанный международным правом в качестве основы ювенальной юстиции. Однако Индия не подписала Гагскую конвенцию, что создает серьезные проблемы при исполнении постановлений иностранных судов, касающихся опеки и возвращения похищенного ребенка в Индию. С учетом большой диаспоры и увеличения количества браков за границей проблема похищения детей и правового реагирования в Индии приобретает особое значение. Индийские суды разработали термин «тесная связь» вместо термина «обычное место жительства» для разрешения судебных споров по делам о похищении детей в других странах. В статье исследуется позиция Индии в отношении международного похищения детей. Дается критический анализ применения принципа благополучия ребенка индийской судебной системой в делах о похищении детей. Судебная практика показывает, что индийские суды оценивали контуры наилучших интересов ребенка с учетом не только обычного места жительства ребенка, но и его общих интересов. Однако в отсутствие законодательной базы преобладает неопределенность. Необходимо всеобъемлющее законодательство для решения вопросов и проблем, связанных с делами о похищении детей в другой стране; нужно принимать в внимание домашнее насилие, детскую психологию и другие социальные факторы, имеющие отношение к определению наилучших интересов ребенка.

*Ключевые слова:* похищение ребенка, благополучие ребенка, наилучшие интересы ребенка, тесная связь, Гагская конвенция о похищении.

Статья поступила в редакцию 23 мая 2021 г.  
Рекомендована к печати 13 ноября 2021 г.

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