The Hague Convention: A Protector or a Menace in Disguise

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ABSTRACT

This paper makes an attempt to study, in detail, the Hague Convention on the Civil Aspects of International Child Abduction, 1980. The Convention provides for a summary procedure wherein the requested State is directed to return the child who was wrongfully removed or retained.

The Convention has a number of flaws for it fails to define some basic and technical terms such as grave risk and habitual residence. Due to the lack of a concrete definition, these terms have been given different meanings by local courts in various jurisdiction, thereby compromising on uniformity. Further, it ignores the fact that people are governed by different personal laws and the Convention holds its rules superior to any personal law, thereby infringing rights of the people. A peculiar set of problems are created for States that do not ratify the Convention. It is difficult to order the return of a child from such a State and they are under no legal obligation to comply with the orders of a foreign court. The Convention is not concerned with custodial rights, but merely with the return of the child.

India did not sign the Convention for it goes against the very nature of the Indian judicial system and its parens-patriae jurisdiction. It would be of no aid for vulnerable Indian mothers, who run away with their child to escape abuse and violence. Also, acceding to the Convention would require numerous amendments in our existing legislations.

India prepared a draft Bill in 2016, namely The Civil Aspects of International Child Abduction Bill, 2016. This Bill is in conformity with the principles of justice followed by Indian courts. Further, it is heavily reliant on the High Courts for active and precise decision making. The Bill provides safeguards for a number of issues encountered in the Convention.

I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction (“Convention”) was concluded on 25th October, 1980, desiring to protect children internationally from the harmful effects of their wrongful removal or retention. The Convention binds the signatories to take action in cases where the child (upto the age of 16) has been removed or retained and to secure their prompt return to their habitual residence. Further, the

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Id.


The Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), s. 6(a).
against the dualist theory, followed by a number of States, including India.

The Convention provides that the judicial authority is not bound to order the return of the child in case there is grave risk that his return would expose him to physical or psychological harm or place him in an intolerable position.\(^\text{10}\) The term ‘grave risk’ is an umbrella term and can ideally include every possible situation and scenario. Though the term is flexible, it makes the abuse of this exception extremely likely. Due to this reason, the term has been construed narrowly by the courts all over the world. However, in practice, the language signifies that the courts can order the return of the child even if the existence of grave risk has been established.\(^\text{11}\)

In *Friedrich v. Friedrich*\(^\text{12}\), the U.S. Court of Appeals for the Sixth Circuit stated that a grave risk of harm can exist only in two situations. *First, there is a grave risk of harm when the return of child would put the child in imminent danger prior to the resolution of the custody dispute, for example, by returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases where the petitioning parent has conducted serious child abuse or neglect, or the child has developed extraordinary emotional dependence on the abducting parent, and the court in the country of the habitual residence may be incapable or unwilling to give the child adequate protection.* In *Thomson v. Thomson*\(^\text{13}\), the Supreme Court of Canada held that there should be great psychological harm when the child is moved from one jurisdiction to another, which must create an intolerable situation for the child. Further, it is necessary to prove specific harm to the individual child for the successful application of this exception.\(^\text{14}\) In *Lozano v. Montoya Alvarez*\(^\text{15}\), the United States Supreme Court held that the return of the child may be refused if doing so would contravene the fundamental principles relating to the protection of human rights and fundamental freedom. In *Walsh v. Walsh*\(^\text{16}\), the First Circuit expressly recognized domestic violence as a reason for not ordering the return of the child. In the case of *DR v. AAK*\(^\text{17}\), the Supreme Court of Canada failed to recognize previous sexually inappropriate behavior of the father with the abducted child as grave risk. Also, the exception of grave risk is more strictly applied when the domestic country has insufficient provisions for the protection of the child. However, because of the lack of guidelines, grave risk is interpreted by the judicial authorities as per their own knowledge and experiences, thus reducing the objective of uniformity in international child abduction cases to a mere nullity.

The Convention makes provisions for the prompt return of the child to his habitual residence. The Convention

\(^{10}\)Supra note 4.

\(^{11}\)Miller v. Miller, 240 F.3d 392, 402 (4th Cir. 2001).

\(^{12}\)78 F.3d 1060, 1069.

\(^{13}\)[1994] 3 SCR 551 (CanLII).

\(^{14}\)Silverman v. Silverman, 338 F.3d 886, 900 (8th Cir. 2003).

\(^{15}\)34 S.Ct. 1224 (2014).

\(^{16}\)221 F.3d 204, 218 (1st Cir. 2000).

\(^{17}\)2006 ABQB 286.
fails to specify what exactly will constitute habitual residence. It is completely upto the courts to define and interpret this term as per their own whims and fancies. This further leads to ambiguity and confusion.

In A v. A and Anr.\(^{18}\), the UK Supreme Court held that habitual residence signifies the place which reflects some degree of integration in a social and family environment' in the country concerned.

It is also to be noted that the concept of habitual residence fails when the parent who applies for the return of the child to the habitual residence also moves from the said place of residence to a new place. This is a very common phenomenon in cases where people are frequently transferred for professional reasons. Since the Convention clearly mentions that the child is to be returned to his habitual residence and not to the custody of the other parent, the provisions of the Convention have limited applicability in such cases.

Out of 195 States in the world, only 82 States have ratified the Hague Convention. In cases where the child has been removed to a non-signatory State, the provisions of Hague Convention are rendered futile. It also follows that the non-signatory does not establish a Central Authority to look after international child abduction cases. Even if the aggrieved parent obtains an order of return from judicial authorities in the place of habitual residence, the execution of such orders is subject to the discretion of the non-signatory State and it cannot be compelled and thus, will have no legal consequences. For non-signatories, 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.\(^{19}\) Further, the principle of comity cannot be strictly applied in case of non-signatories, their first consideration always has to be the welfare of the child and the foreign decree has a mere persuasive value.\(^{20}\)

Execution of orders from a foreign court raise another set of complications in the effectiveness of this Convention. For example, in India, the execution of foreign judgments in Indian Courts is subject to the provision of Section 13, Code of Civil Procedure, 1908. According to Section 44A\(^{21}\), only those decrees can be enforced in Indian courts which have been passed by a reciprocating territory, which has been notified in an Official Gazette. If the Convention is to be followed, all decrees have to be executed, irrespective of the fact if they fall under the category of reciprocating territories or not. This goes against the law of the land and once again, goes against the dualist theory.

The procedure, as stipulated in the Convention, is that of a summary inquiry. The issues are not decided on merits.\(^{22}\) There are certain exceptional cases which might require an elaborate inquiry into the facts and

\(^{18}\) [2013] UKSC 60.

\(^{19}\) Dhanwanti Joshi v. MadhavUnde, (1998) 1 SCC 112.


\(^{21}\) The Code of Civil Procedure, 1908 (Act 5 of 1908), s. 44A.

circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child’s welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education,—for these are all acts which could psychologically disturb the child. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed.23 Thus, should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child.24

The Convention simply prescribes that the child has to be returned, and is not concerned with claims of custody or rights of access. For custodial claims, separate suits will have to be filed, leading to multiplicity of suits. Moreover, the Convention does not encourage alternative dispute resolution mechanisms such as mediation and negotiation. This, in turn, leads to bitter court battles. Further, if a parent is aggrieved by the decree, there is no recourse mentioned in the Convention. A regular appeal has to be filed in the municipal courts, as per the domestic laws, which again goes against the objective of bringing a sense of uniformity in such proceedings. It is also to be noted that the Convention does not provide any remedy for situations wherein the abducting parent refuses to return the child. This is also subject to the powers of the local courts, which further reduces the need for such a convention.

Thus, it is clear that the objective of speedy justice seems to be only on paper. Limited inquiry is prescribed under the Convention, on the basis of which, orders for return of the child are passed. Due to the time limit of 6 weeks being provided for completion of proceedings, hasty and unwise decisions are often taken by the judicial or administrative authorities. The entire procedure is extremely intricate and complicated, which will lead to a

23McKee v. McKee, (1951) 1 All ER 942 (PC); L. Re., (1974) 1 All ER 913 (CA).
24V. Ravi Chandran (Dr.) (2) v. Union of India, (2010) 1 SCC 174.
very high degree of confusion. Further, it also fails to accommodate the needs of children born through IVF, surrogacy, and other artificial means of reproduction.

Though the Convention states that the interests of the child is of paramount interest, in reality, this is a parent-centric convention, which only satisfies the ego of the parents and does no significant good for the child. The child is perplexed because of the tussle between his parents and is adversely affected. Moreover, being constantly moved from one place to the other is detrimental to the overall development of the child.

III. INDIAN POSITION

Despite immense international pressure, India has not signed the Hague Convention yet. This is because the Indian legal framework does not treat parents as abductors, which is a highly offensive term. Parents often leave with the child due to their overwhelming love for them and not to cause any harm to them.\(^{25}\) Being the natural guardians, they are assumed to act in the best interests of the child.

Also, the Convention is extremely harsh towards mothers who flee to India, having faced violence and abuse at the hands of their husbands. It basically forces the mother to go back to the place of abuse if she wants to maintain close ties with the child. Moreover, the Convention places more reliance on the habitual residence of the child rather than his interests. The love, care and support that a child receives from his parents plays a pivotal role and encompasses the habitual residence theory.

Further, the Hague Convention makes a presumption that all jurisdictions are equal and that courts will decide the matters in an impartial manner. However, this is far from reality, since courts tend to give preference to its own citizens. Indians, particularly, face a lot of discrimination from first world countries and it becomes extremely difficult for Indian parents to obtain custodial rights from such countries. USA and Norway are specifically known for their stern outlook towards immigrant countries and prefer sending such children to foster care while the parents fight the legal battle.\(^{26}\)

It is pertinent to note that India already has a legal system whereby decrees of foreign courts are recognized here. As long as foreign decrees fulfill the mandate of Section 13 and Section 44A of the Code of Civil Procedure, 1908, they can be easily executed. This is because \textit{due recognition is given to the principle of the concept of comity of courts and recognition of the sovereignty and territorial integrity of jurisdiction of foreign courts}.\(^{27}\) Also, adopting the Hague Convention would nullify the precedents on child custody developed over a


\(^{27}\)Shiju Jacob Varghese &Anr. v. Tower Vision Ltd. &Ors., [196 (2013) DLT 385].
long period of time by the judiciary. The approach of the Court will forcefully be changed from the best interest of the child to habitual residence. Moreover, several laws such as the Indian Penal Code, 1860, Code of Civil Procedure, 1908, and Hindu Minority and Guardianship Act, 1956 would have to be amended to bring it in consonance with the Convention.

The Convention gives unfettered power to the Central Authority to find and deport abducted children. They perform judicial functions and can send back the child without any judicial interference. Delicate matters like that of child custody require great deal of precision and application of judicial mind and it is unjust to confer such powers on the Central Authority.

IV. THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016

The Ministry of Child and Women Development prepared a draft bill before acceding to the Convention, based on the recommendations of the Law Commission Report\(^{28}\), named ‘The Civil Aspects of International Child Abduction Bill, 2016’ (“Bill”). The Bill has a number of positive aspects, which have been discussed below.

The Bill has a definition clause (Section 2) which aims at reducing the ambiguities surrounding the various terms mentioned in the Convention. Habitual residence has been defined \textit{the place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred.}\(^{29}\) This definition places importance on the living arrangement of the child, involving one or both the parents, instead of the physical place where the child last resided. It also considers situations wherein the child lives with a guardian other than the parents. Such a broad interpretation is necessary since it is pivotal to the best interests of the child.

Under the Bill, the High Court has an extensive role. As soon as the Central Authority receives an application for the return, it may apply to the High Court in whose territorial jurisdiction the child was last seen, to order the return of such child to his habitual residence.\(^{30}\) The High Court is also empowered to pass interim orders for the welfare of the child\(^{31}\) and takes into consideration the social background of the child before ordering the return.\(^{32}\) While determining wrongful removal, the High Court may take notice of the law and judicial decisions formally recognized or not, in the State of habitual residence of the child.\(^{33}\) This provision is in conformity with the principle of comity of courts and harbouring respect for international relations.

\(^{29}\) The Civil Aspects of International Child Abduction Bill, 2016, s. 2(f).
\(^{30}\) The Civil Aspects of International Child Abduction Bill, 2016, s. 13.
\(^{31}\) The Civil Aspects of International Child Abduction Bill, 2016, s. 14.
\(^{32}\) The Civil Aspects of International Child Abduction Bill, 2016, s. 16(4).
\(^{33}\) The Civil Aspects of International Child Abduction Bill, 2016, s. 19(1).
The Central Authority, under Section 6, has been given the powers of civil courts in respect of summoning witnesses, production of documents, requisitioning public documents and issuing commissions. Thus, helps in bringing uniformity and controlling the manner in which the Central Authority exercises its unfettered powers mentioned in the Convention. Further, if the Central Authority refuses to accept an application, the aggrieved person may appeal to the Secretary, Ministry of Child Development, Government of India within 14 days. The Central Authority has to submit an annual report to the Central Government for maintaining data records and keeping track of the number of cases of international child abduction.

V. CONCLUSION

Thus, it is apparent from the discussion above that the Hague Convention comes with its own set of problems. While it seems to be ideal on paper, its enforcement and applicability are tainted by multiple flaws. The draft Bill prepared by India makes an attempt to remedy the errors and lacunae of the Convention. The High Court plays a substantial role in determination of such applications and would thus lead to better decision making and application of judicial minds. It would further help to protect the interest of the vulnerable parents as well as do what is in the best interest of the child. The underlying tone of the Bill appears to be that the interests of the child are of paramount importance and lesser value has been given to the habitual residence principle. This is in accordance with the judicial precedents set by the Indian Courts so far.

It is my personal view that the draft Bill helps in eliminating a lot of complications and issues that India encountered with the Hague Convention. Thus, India should sign the Convention and pass the draft Bill to tackle cases of international child abduction effectively.

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34The Civil Aspects of International Child Abduction Bill, 2016, s. 12.