

# INTERNATIONAL PARENTAL CHILD ABDUCTION AND THE FRAGMENTED LAW IN INDIA — TIME TO ACCEDE TO THE HAGUE CONVENTION?

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*Increased trans-national movement of people, and consequentially, families, has resulted in complex conflict of laws questions in family-related disputes, especially concerning the custody of children. Such questions often arise from differential criteria within the law in different jurisdictions, and not unusually, the application of differential meaning to the same criteria, resulting in prolonged and protracted custody-related disputes. The Hague Convention on the Civil Aspects of International Child Abduction has been a significant attempt to solve the jurisdiction-related questions, by emphasising the prompt return of the abducted child to the appropriate forum. However, with regard to non-signatories like India, concerns relevant to differential standards and interpretations remain. This article attempts to chronicle the existing law in India, both statutory law and judicial opinion, regarding international parental child abduction. It also reviews the recommendations of the Law Commission on India's accession to the Convention and the proposed draft legislation for such accession.*

## I INTRODUCTION

An Indian Hindu couple moved to the United States ('US') for career pursuits and started a family there. After a visit to India, the wife stayed back with the child and later refused to join the husband in the US. The husband obtained a wrongful removal of the child order from the US court and petitioned the Indian court for enforcement of the foreign custody order. The wife, citing professional reasons, as well as instances of marital discord, pleaded against enforcement of the foreign court's order. Apart from the issue of enforcement of the foreign court order, the Indian court was called upon to decide questions regarding custody of the child, and essentially to make a ruling on the welfare and best interests of the child.<sup>1</sup> Making a determination against enforcement of the foreign court's judgment, the court ordered custody of the child to the mother after an appreciation of the facts and circumstances of the case.<sup>2</sup> This decision is representative of the law in India regarding parental child removal — a combination of private international law rules and a preference for a determination of any application related to enforcement of foreign court judgments based on the facts.

One consequence of transnational interaction is the growing incidence of transnational marriages, which has led to conflict of laws issues such as the choice of jurisdiction or the applicable law in matters of divorce, judicial separation, custody of children etc.<sup>3</sup> The enforcement of custody-related orders in foreign jurisdictions has caused significant difficulty, particularly because differing personal laws (the law applicable to matters relating to family such as divorce, maintenance, custody, guardianship, succession etc., sourced from

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<sup>1</sup> *P K Srikumar v Harshitha Gopinathan* (2015) 6 MLJ 300 (4 August 2015) (High Court of Madras).

<sup>2</sup> *Ibid* 41 [63].

<sup>3</sup> See Lara Cardin, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One' (1997) 20(1) *Houston Journal of International Law* 141; Antoinette Sedillo Lopez, 'International Law — US/Mexico Cross Border Child Abduction — the Need for Cooperation' (1999) 29 *New Mexico Law Review* 289.

a person's religious faith) of parents have divergent opinions on custody, often influenced by individual religious law. A significant concern regarding the children of transnational marriages that arises during custody disputes is the problem of parental child abduction. International parental child abduction occurs when a parent withdraws the child across international borders to a jurisdiction that is not its own.<sup>4</sup> A parent fighting the custody dispute could withdraw the child from their habitual residence and relocate with the child to another country, leaving the left-behind parent to pursue litigation in a foreign jurisdiction. Private international law rules vary amongst nations and there is the possibility of protracted litigation for custody-related decisions across jurisdictions.

This article attempts to map the fragmented law in India, both statutory provisions and judicial opinion, applicable to international parental child removal disputes. The discussion on the Indian law is followed by a summary of the *Hague Convention on the Civil Aspects of International Child Abduction* ('the Convention'),<sup>5</sup> especially the position of the best interests of the child principle when juxtaposed against the return-centric approach within the Convention. There is also discussion of India's concerns regarding accession. The next section summarises India's draft bill, the Civil Aspects of International Child Abduction Bill 2016 (India), related to the Convention. The article concludes with a suggestion that legislative efforts should take notice of the contemporary issues related to international parental child removal.

The Convention is a significant attempt to prevent wrongful removal of the child and to ensure the return of the child to its habitual residence. It adopts a unique approach to violations of custody rights — it departs from jurisdiction rules and recognition of foreign judgments, instead preferring the 'return of the child' approach.<sup>6</sup> Silberman observed that such preference was explained by the fact that it is only a provisional remedy with no opinion delivered on the custody rights.<sup>7</sup> The provisions of the Convention ensure its application whenever there is a 'breach of rights of custody',<sup>8</sup> and not necessarily only when there is a formal custody order.<sup>9</sup> It applies to pre-decree scenarios like a breakdown of a marriage or where one of the spouses to a marriage has a reason to leave the marital residence and wishes to take the child with them. The purpose of the Convention is to discourage such unilateral action of removing a child. It aims to ensure the return of the child to the scenario that existed before the wrongful removal was affected. The Convention's objectives are to: reverse the abduction to help mitigate the psychological trauma for the child; return the child to its habitual residence, as the Convention perceives the State of habitual residence to be in the best position to address decisions on custody and visitation; and prevent similar behaviour in future by ensuring that the parent indulging in wrongful removal will not gain a new forum to address the custody dispute.

The Convention anticipates that the court in the child's habitual residence country will hear litigation of custody-related issues.<sup>10</sup> This is based upon the assumption that the child was removed from a place that they considered 'home' and removed to a jurisdiction unfamiliar

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<sup>4</sup> Noah L Browne, 'Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' (2011) 60(5) *Duke Law Journal* 1193, 1194.

<sup>5</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983).

<sup>6</sup> Linda Silberman, 'Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence' (2006) 18 *New York University Public Law and Legal Theory Working Papers* 1, 6.

<sup>7</sup> *Ibid.* Silberman suggests that 'the "return" remedy can be thought of as a "provisional" remedy because it does not dispose of the merits of the custody case — additional proceedings on the merits of the custody dispute are contemplated in the state of the child's habitual residence once the child is returned there'.

<sup>8</sup> *Hague Convention*, above n 5, art 3.

<sup>9</sup> Silberman, above n 6, 6.

<sup>10</sup> Rebecca K McKelvey, 'An Overview of the International Parental Child Abduction Provisions of the Hague Convention' (2010) 7(1) *Ankara Law Review* 67, 71.

to them.<sup>11</sup> The Convention's preference for habitual residence as the connecting factor for jurisdictional determinations emanates from the understanding that contracting States agreed that forum courts hearing return applications do not have the jurisdiction to hear the merits of the underlying custody dispute — their decisional power extends to determination of the wrongful removal of the child from the abducted-from country. Upon such determination and, if the abduction does not fall within the limited exceptions, the abducted-to country's court then orders that the child be returned to the abducted-from country — a summary return mechanism. The Convention envisages direct reporting on international judicial communications and other relevant measures to prevent parental child abductions.<sup>12</sup>

The Convention thus helped shift the focus from the earlier position of 'best interests of the child', which allowed forum-shopping by a parent who had enacted the wrongful removal of the child to a country that afforded a convenient forum for adjudication.<sup>13</sup> The Explanatory Report to the Convention ('the Report') explained the shift to the return-centric approach as caused by focusing on the rights of the child, as opposed to the child being viewed as property in a parental custody dispute.<sup>14</sup> Attempting to identify the juridical nature of this principle, as distinct from its manifestation as a sociological paradigm, the Report noted the fact that forum courts have, using the best interests of the child principle, made custody-related decisions using domestic subjective value judgments to impose upon the national community from which the child has recently been abducted.<sup>15</sup> The dispositive part of the Convention, therefore, contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or detained.<sup>16</sup> The stated objective of the Convention — addressing the preventive and curative aspects of international parental child abduction — corresponds to a specific idea of what constitutes the best interests of the child.<sup>17</sup>

However, noting the existence of exceptional circumstances that might justify the removal of a child from its habitual residence, the Convention allowed for the forum courts to decide upon the existence of any of the Convention's specified exceptions to return of the child, including a 'best interests of the child' challenge to a return application.<sup>18</sup> This principle, though a vague and subjective standard, ensures that forum courts make a detailed investigation of what would be in the best interests of the abducted child, but also frustrates the return process. Article 13 encapsulates the subjective nature of this principle — for example, return to the habitual residence may be prevented if there exists a grave risk of possible exposure of the child to physical or psychological harm or otherwise places the child in an intolerable situation. Courts hearing return applications under the Convention have

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<sup>11</sup> Barbara E Lubin, 'International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention' (2005) 4(2) *Washington University Global Studies Law Review* 415, 421.

<sup>12</sup> The International Child Abduction Database (INCADAT) is a repository of material, including a case law search, related to the Convention < <http://www.incadat.com/index.cfm?act=text.text&lng=1>>.

<sup>13</sup> Lubin, above n 11, 420.

<sup>14</sup> Elisa Pérez-Vera, '*Rapport Explicatif*' (1982) [Permanent Bureau trans, *Explanatory Report* 426 < <https://assets.hcch.net/upload/expl28.pdf>>].

<sup>15</sup> *Ibid* 432 [22].

<sup>16</sup> *Ibid* 432 [23].

<sup>17</sup> *Ibid* 432 [25].

<sup>18</sup> Article 13 of the Convention allows the forum court hearing the return application to make a 'best interests of the child' examination if the return application is challenged on the basis of the grave risk exception to return.

been known to apply the best interests subjective standard.<sup>19</sup> Such application has allowed the courts to often interpret public policy concerns and domestic laws within the contours of the best interests principle.<sup>20</sup> While signatories to the *Convention on the Rights of the Child* ('CRC') also adopted a custody rule that calls for decisions according to the best interests of the child,<sup>21</sup> legal systems founded upon religious law highlight the ambiguities and concerns with the best interests principle.<sup>22</sup> Sthoeger contested the underlying assumption of the *CRC* that the interests of the child are best protected in his or her place of habitual residence believing it not to be universally correct. Sthoeger observed that such an assumption was credible only to the extent that forum courts respect the best interests of child.<sup>23</sup> Furthermore, Bruch commented that a detached view of the best interests of the child might not be a possibility where the custody rights of the parents/guardian and the practices related to religion are accorded primacy.<sup>24</sup> Referring to diverse judicial opinion,<sup>25</sup> Bruch further argued that in countries where custody is awarded according to a child's best interests, the application of this standard varies; it is dependent upon its exercise by a religious judge or a secular judge.

Schuz proposed that the underpinning assumption in the Convention, that the return of the child to its habitual residence is in its best interest,<sup>26</sup> is valid only so long as courts in the place of residence respect the best interests of the child and secondly, only when the place of

<sup>19</sup> See, eg, *Blondin v Dubois* 78 F Supp 2d 283, 298 (2<sup>nd</sup> Cir, 2000). In a series of four successive applications before the District Court and the Court of Circuit, a return application resulted in an extensive investigation of the facts of the case. The Court of Circuit, hearing a review of the decision of the District Court affirmed the District Court's rejection of the return application on the basis of the factual record before it. See generally Marisa Leto, 'Whose Best Interest? International Child Abduction under the Hague Convention' (2002) 3(1) *Chicago Journal of International Law* 247, 249; Linda Silberman, 'The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues' (2001) 33(1) *New York University Journal of International Law and Politics* 221.

<sup>20</sup> Carol S Bruch, 'Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction Convention' (2000) 33(1) *New York University Journal of International Law and Politics* 49, 54. Bruch, citing Israel and Spain's laws, commented that the courts in these countries adopted differential standards drawing content from their domestic laws.

<sup>21</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3 ('CRC'). This article provides that:

1. 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.'

<sup>22</sup> Carol S Bruch 'The Hague Child Abduction Convention: Past Accomplishments, Future Challenges' (1999) 1 *European Journal of Law Reform* 97. See generally Peter McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' (2015) 62(3) *Netherlands International Law Review* 365.

<sup>23</sup> Eran Sthoeger, 'International Child Abduction and Children's Rights: Two Means to the Same End' (2011) 32(3) *Michigan Journal of International Law* 511, 526. See, eg, *DS v VW* (1996) 134 DLR (4<sup>th</sup>) 481 (Supreme Court of Canada). In this case, the Supreme Court of Canada upheld the order to return the child to the US on the alternate ground that return was in the best interests of the child under the relevant domestic provincial law. See also, Linda Silberman, above n 19, 231-2.

<sup>24</sup> Carol S Bruch, above n 22, 111-114. Bruch, citing jurisprudence from a few legal systems, concludes that best interests of the child in these countries was contextualised with the rights of the parents and the prescriptions of the religious code – often gender selectivity with regard to exercising custodial rights prevailed.

<sup>25</sup> Bruch, above n 20, 54.

<sup>26</sup> The Preamble to the Convention states: 'The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access...'

the child's residence is the forum *conveniens* to hear the case.<sup>27</sup> Even so, Schuz argued that it does not necessarily follow that it is in the best interests of the child to actually reside in the original place of residence pending the final settlement of custody rights. The assumption that prompt return would serve the best interests of the child is also contested. Furthermore, Schuz observed that the exemptions from return could be construed narrowly not to encompass all of the situations where a return might run contrary to the best interests of that child.<sup>28</sup>

The problem concerning the interpretation of best interests of the child principle is exacerbated with regard to return applications to forum courts in non-signatory nations, India being one such nation. The fragmented nature of Indian law, a mixture of religious law and secular law within the domestic law applicable to custody/guardianship rights, coupled with its non-signatory status, has adversely affected the process of return applications. Some of the recognisable features of the law include the lack of clarity in its application to international parental child abduction, absence of a clear theoretical construct that underpins the law, inclusion of the custodial rights of the parents within the determination of the best interests of the child, and difficulties regarding enforcement of foreign court orders.

## II THE INDIAN LAW REGARDING CHILDREN AND CUSTODY

In the case of wrongful removal to a non-signatory country, the domestic law of the country to which the child was removed to applies.<sup>29</sup> Though all domestic laws are perceived to believe that custody applications are to be decided noting the 'best interests of the child', interpretation of the phraseology has witnessed diversity in interpretation in various nations.<sup>30</sup> The difficulties arising from non-signatory status are exacerbated by the fact that foreign law and foreign systems are likely to be viewed with scepticism and apprehension.<sup>31</sup> The left-behind parent therefore finds it difficult to obtain a foreign court order compelling the abducting parent to physically hand over the child. While it is possible to approach the government of the country from which the child was wrongfully removed, there are not many cases to demonstrate that parents could successfully secure their child's return in doing so. Governments have rarely intervened to provide information and direction in handling the situation to secure the return of the child.<sup>32</sup>

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<sup>27</sup> Rhona Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12(2) *Transnational Law and Contemporary Problems* 393, 439.

<sup>28</sup> *Ibid.*

<sup>29</sup> McKelvey, above n 10, 67.

<sup>30</sup> Lara Cardin, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One' (1997) 20(1) *Houston Journal of International Law* 141, 156-7. Cardin has observed that the culture of a region, its religion and social practices have had a significant influence on the explanation of the 'best interests of the child' and that courts tend to believe, under influence of a certain cultural milieu, that it is in the best interests of the child to be raised within their respective nation or culture, rather than in another nation. Cardin also cites the example of Japan — cultural beliefs related to mother-child bonding have placed a foreign father who is a left-behind parent at a disadvantage, especially because Japanese culture believes in family disputes settled outside the court system, which could make the process complicated for a foreign parent.

<sup>31</sup> *Ibid* 157.

<sup>32</sup> *Ibid* 158. Cardin was of the opinion that it could be tentative to presume the repeated success of intervention by governments and diplomacy to secure a wrongfully removed child's return.

There has been discussion surrounding the non-signatory status of India,<sup>33</sup> with the Indian judiciary suggesting accession.<sup>34</sup> Parental child abduction cases in India have, except for a few rare exceptions,<sup>35</sup> been recognised as child custody related disputes, for which the personal law is applicable. US government data reveals that a high number of wrongfully withdrawn children are removed to India, especially in comparison to other countries. A 2016 report stated that there were 99 unresolved custody return applications in India, including 24 such applications made in 2015.<sup>36</sup>

### A Statutory Law

The Hindu law governing custody of children is closely linked with the law on guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept regarding the upbringing and day-to-day care and control of the minor.<sup>37</sup> The term ‘custody’ is not defined in any Indian family law, secular or religious. The *Guardians and Wards Act 1890* (India) (‘GWA’) defined ‘guardian’ as a person having the care of the person of a minor or of their property or of both.<sup>38</sup> The GWA is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion.<sup>39</sup> While issues of substantive law can still be handled under the religious law, the GWA is the applicable procedural law. It authorises district courts to appoint guardians of the person or property of a minor when the natural guardian, as per the minor’s personal law or the testamentary guardian appointed under a will, fails to discharge their duties towards the minor. Section 17(2) specifies that determinations regarding the welfare of a minor will be based on consideration of their age, sex and religion; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing or previous relation of the proposed guardian with the person or property of the minor. Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court may consider their preference. Section 19 of the GWA then deals with cases where the court may not appoint a guardian. Furthermore, s 25 of the GWA deals with the authority of the guardian over the custody of the ward, and s 25(1) allows for the court’s order to be applied to secure the ward’s return.

The *Hindu Minority and Guardianship Act 1956* (India) (‘HMGA’) designates the father as the natural guardian of a minor, and after him, the mother.

<sup>33</sup> Foreign & Commonwealth Office, UK, *India – Child Abduction* (20 March 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368267/child\\_abduction\\_-\\_india.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368267/child_abduction_-_india.pdf)>. See also US House Committee on Foreign Affairs, *Hope Deferred: Securing Enforcement of the Goldman Act to Return Abducted American Children* (14 July 2016) <<http://docs.house.gov/meetings/FA/FA16/20160714/105221/HHRG-114-FA16-Wstate-AbbiR-20160714.pdf>>. The UK government upload states that while India, a non-signatory to the Convention, penalises parental child abduction, there is no obligation on the abducting parent or the Indian government to return the child to UK.

<sup>34</sup> *Seema Kapoor v Deepak Kapoor* (2016) Supreme Court Cases Online (Punjab & Haryana) 1225 [11]. The judge referred the core legal issue of wrongful removal of the child from their habitual residence and their restoration to the same to the Law Commission for suitable recommendation to the Government of India for accession to the Convention.

<sup>35</sup> *V Ravi Chandran v Union of India* (2010) 1 Supreme Court Cases 174 and *Arati Bandi v Bandi Jagadrakshaka Rao* (2013) 15 Supreme Court Cases 790 being the two instances where there was a penal law application for parental child abduction. The relevant sections of the *Indian Penal Code 1860* (India) are s 361, which deals with kidnapping a minor from the lawful custody of the guardian and s 362, which deals with abduction.

<sup>36</sup> Bureau of Consular Affairs, US Department of State, *Annual Report on International Parental Child Abduction (IPCA)* (11 July 2016) <[https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20\(July%2011\).pdf](https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20(July%2011).pdf)>.

<sup>37</sup> Sonali Abhang, ‘Guardianship and Custody Laws in India – Suggested Reforms from Global Angle’ (2015) 20(7) *IOSR Journal of Humanities and Social Sciences* 39, 41.

<sup>38</sup> *Guardians and Wards Act 1890* (India) s 4(2) (‘GWA’).

<sup>39</sup> Abhang, above n 37, 42.

1. In case of a minor boy or unmarried minor girl, [the natural guardian is] the father, and after him, the mother ...
2. The custody of a minor who has not completed the age of five years shall ordinarily be with the mother.<sup>40</sup>

In *Gita Hariharan v Reserve Bank of India*,<sup>41</sup> the court held that the term ‘after’ in the *HGMA* s 6(a) should not be interpreted to mean after the lifetime of the father, but rather that it should be taken to mean in the absence of the father.<sup>42</sup>

The *GWA* and the *HMGA*, however, differ on the welfare principle. While the former places parental authority before the welfare principle, the latter upholds the primacy of the welfare principle in determining guardianship. Therefore, the guardianship of a Hindu child is based upon the welfare principle, overriding parental authority, whereas for a non-Hindu child, the court’s authority to intervene in furtherance of the welfare principle is subordinate to that of the father, as the natural guardian.<sup>43</sup> To summarise the law applicable to custodial claims concerning children, it is arguable that the concept of best interests of the child has not become a foundational theoretical construct within the law. This is largely because the law’s content, derived from religious law, favours one parent, the father, over the mother by designating his right over the custody/guardianship. The *Gita Hariharan* judgment is a significant attempt at changing the relative position of the parents in a custody dispute,<sup>44</sup> arguably the preferential position of father for custody/guardianship has been removed.

Enforcement of foreign court orders is discussed under the *Code of Civil Procedure 1908* (India) (*CCP*).<sup>45</sup> Sections 13 and 14 enact a rule of *res judicata* in cases involving foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as *res judicata* between the parties thereto (except in the cases mentioned in s 13):

1. A foreign judgment must be conclusive.
2. Such a judgment must be by a court competent according to the law of the State which has constituted it, and must have directly adjudicated upon the ‘matter’ which is pleaded as *res judicata*. The parties must have submitted to its jurisdiction or been present or represented at the proceedings in the foreign court.<sup>46</sup>
3. A foreign judgment must have been given on the merits of the case.

In few cases within the domain of matrimonial disputes have Indian courts explained the import of s 13 of the *CCP* with regard to enforcement of foreign court orders. In *Y Narsimha Rao v Y Venkata Lakshmi*,<sup>47</sup> the Supreme Court observed that courts in India would not

<sup>40</sup> Hindu Minority and Guardianship Act 1956 (India) s 6(a) (*‘HMGA’*).

<sup>41</sup> (1999) 2 Supreme Court Cases 228 (*‘Gita Hariharan’*).

<sup>42</sup> *Ibid* [25].

<sup>43</sup> *GWA* s 17 emphasises custody issues to be decided by a combined reading of the law to which the minor is a subject with the primacy of the welfare of the minor. See also Abhang, above n 37, 43.

<sup>44</sup> (1999) 2 Supreme Court Cases 228.

<sup>45</sup> *Code of Civil Procedure 1908* (India) s 13 reads as follows:

‘A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

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

<sup>46</sup> Anil Chawla, *Legal Status of Foreign Decree of Divorce for Hindu Couple Married in India* (15 April 2014) India Legal Help < <http://www.indialegalhelp.com/files/foreigndivorce.pdf>>.

<sup>47</sup> (1991) 3 Supreme Court Cases 451 (*‘Y Narsimha Rao’*).

recognise a foreign judgment not founded upon merits. Interpreting s 13, the Court held that a competent court is to be identified in accordance with the matrimonial law applicable to the dispute or if the disputants have voluntarily and unconditionally subjected themselves to the jurisdiction of that court. According to the *CCP* s 13(b), a foreign judgment should be founded upon the matrimonial law of the parties and it should not be an ex parte decision. Section 13(c) of the *CCP* specifies that where the judgment is founded upon a refusal to recognise that Indian law is applicable, the Indian courts will not recognise such judgment given by the foreign court. In *Y Narsimha Rao*,<sup>48</sup> the court held that the applicable law ought to be the matrimonial law of the parties. If a foreign judgment is founded on a jurisdiction or on a ground not recognised by such matrimonial law, such judgment is not conclusive and therefore, unenforceable in India. Hence, it could be said that the private international law rules applicable in India for enforcement of a foreign judgment specify that forum courts ought to have taken notice of the foreign law (in this case, the Indian law) for their orders to be enforceable. In *International Woolen Mills Limited v Standard Wool (UK) Limited*,<sup>49</sup> the Supreme Court made a comprehensive analysis of s 13(b) of the *CCP*, dealing with the merits of the case. A judgment based upon an incorrect view of international law or a refusal to recognise the law of India, where such law is applicable, is not conclusive.

The statutory provisions of the *CCP* and the existing judicial opinion allows a derivation that Indian law, concerning enforcement of foreign court orders, permits an examination of the merits of the case, and the factual question of the applicability of Indian law. It could be difficult to reconcile this derivation in the context of parental child abduction and the Convention's vision of a return-focused approach,<sup>50</sup> which is based on the idea that the wrongfully removed child ought to be returned to its habitual residence, and courts at the habitual residence are in a better position to address custody of the child. The following section discusses the approach of the Indian courts in the context of international parental child abduction.

### B Judicial Opinion

Indian courts have applied the *GWA* and the *HMGA* to disputes involving custody and guardianship of minors born or residing abroad. However, the conceptual rationale explaining the judicial opinion — best interests of the child, return to the habitual residence, and welfare of the child — has focused on factual determination rather than on development of any theoretical constructs. While there have been references to foreign court opinion in a few cases and stray allusions to conceptual strands of private international law, it does not follow that such references indicate that Indian courts borrowed any theoretical constructs to develop a pattern in handling these disputes, nor has there been an attempt to develop an indigenous one.

In *Surinder Kaur Sandhu v Harbax Singh Sandhu*,<sup>51</sup> and *Elizabeth Dinshaw v Arvind M Dinshaw*,<sup>52</sup> the Supreme Court exercised summary jurisdiction to return the minor children to their habitual residence. This trend, however, did not continue. In *Dhanwanti Joshi v Madhav Unde*,<sup>53</sup> the court specified that the applicable law would be the law of the court in the country to which the child was removed. The court would hear the merits of the case and the welfare of the child would be the primary factor influencing its decision.<sup>54</sup> Noting that the custody orders were interlocutory in nature, the court specified that changes to such orders

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<sup>48</sup> Ibid.

<sup>49</sup> (2001) 5 Supreme Court Cases 265 (25 April 2001).

<sup>50</sup> Silberman, above n 6, 6.

<sup>51</sup> (1984) All India Reporter 1224 (Supreme Court of India) ('*Surinder Kaur*').

<sup>52</sup> (1987) All India Reporter 3 (Supreme Court of India).

<sup>53</sup> (1997) 8 Judgment Today 720 (Supreme Court of India) ('*Dhanwanti Joshi*').

<sup>54</sup> Ibid [31].



ought prioritise the best interests of the child.<sup>55</sup> This dictum is indicative of the fact that Indian courts prefer a review on merits of all enforcement applications related to foreign court custody orders based upon welfare of the child criteria — criteria to be decided under the law of the country to which the child is removed — in the *Dhanwanti Joshi* case,<sup>56</sup> the *GWA* and the *HMGA*.

In *Sarita Sharma v Sushil Sharma*,<sup>57</sup> the Supreme Court heard an appeal against the enforcement of a foreign court order. The husband, with a foreign court order for sole custody after the appellant's violation of her visitation rights and removing the children to India, made an application to the High Court for the custody of the children through enforcement of the foreign court order. In a later challenge in the Supreme Court by the appellant, the Court noted that the decree of divorce and the order for the custody of the children had been passed after she came to India. The Court held that in view of the facts and circumstances of the case, though the decree passed by the US was a relevant factor, it could not override the consideration of the welfare of the minor children.<sup>58</sup> The Court noted the following relevant principles regarding custody of the minor children of the couple and transnational custody disputes generally:

1. Principles of conflict of laws indicate that the court that has the most intimate contact with the issues arising in the case should exercise jurisdiction.
2. Welfare of the minor prevails over the legislative provisions in s 6 of the *HMGA*.
3. The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.<sup>59</sup>

Referring to the British court's dictum in *McKee v McKee*,<sup>60</sup> the Court held that forum courts in non-signatory states could decide upon the welfare of the child, making an independent appreciation of the merits the primordial guiding factor for its decision.

In *Shilpa Aggarwal v Aviral Mittal*,<sup>61</sup> the Supreme Court, hearing an appeal against an order of the High Court in connection with a foreign custody order in favour of the father observed that there are two contrasting principles of law, namely, comity of courts and welfare of the child and that, in matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.<sup>62</sup> Upholding the High Court decision and ordering the appellant to return the minor to the foreign court jurisdiction, the Supreme Court opined that matters of child custody ought to be adjudicated by courts that have the closest connection with the dispute in question. Relying upon the principle of comity and the best interests of the child, it ordered the return of the child to the English courts' jurisdiction where both parents permanently resided.

In *Ruchi Majoo v Sanjeev Majoo*,<sup>63</sup> the Supreme Court heard a petition from the mother against the father wherein she challenged the High Court's interim order that quashed the guardianship order given in her favour under the *GWA* by the District Court. In this case, the appellant made the application when legal proceedings had already been initiated in a foreign court. The High Court quashed the guardianship order and also held that the issue of the child's custody ought to be decided by the foreign court because it had already passed the protective custody warrant order, and also because the child and his parents were US citizens

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<sup>55</sup> Ibid [21].

<sup>56</sup> (1997) (8) Judgment Today 720 (Supreme Court of India).

<sup>57</sup> (2000) (2) Judgment Today 258 (Supreme Court of India).

<sup>58</sup> Ibid 264-5.

<sup>59</sup> Ibid 265.

<sup>60</sup> [1951] AC 352.

<sup>61</sup> (2009) (14) SCALE 511 (9 December 2009) (Supreme Court of India).

<sup>62</sup> Ibid [23].

<sup>63</sup> (2011) 6 Supreme Court Cases 479.

who were ordinarily resident in the US. Hearing the appeal, the Supreme Court framed three questions for decision:

1. Was the child 'ordinarily resident' in India for the District Court to exercise jurisdiction?
2. Was the High Court right in declining to exercise extraordinary jurisdiction under the *Code of Civil Procedure 1908* (India) s 151, citing 'principle of comity of courts'?
3. Did the order granting custody to the mother need modification to include visitation rights to the father?<sup>64</sup>

It answered the first and the third questions in the affirmative, but the second in the negative, holding that the High Court was wrong to deny jurisdiction. The term 'ordinarily resident', the Court held, must be addressed as a factual question requiring cumulative examination of the circumstances including place of birth, duration of residence etc. On the second question, the Court made an explanatory statement on the role of Indian courts in transnational child custody related disputes:

The duty of a court exercising its *Parens Patraie* [sic] jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration, the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.<sup>65</sup>

In *V Ravi Chandran v Union of India*,<sup>66</sup> the Supreme Court heard a habeas corpus application for custody of the child by the father as he pleaded wrongful removal of the child from the US by the mother in violation of a foreign court custody order. It was held that there was nothing on record that could remotely suggest that it would be harmful for the child to return to his native country; hence, the Court directed the repatriation of the child to the jurisdiction of the foreign court. The Court attempted a summation of the law and held that a domestic court deliberating upon the best interests of the child could consider the foreign court order, though it is not conclusive.<sup>67</sup> The persuasiveness of such an order is factual and dependent upon the circumstances of each case. Welfare of the child is of paramount importance,<sup>68</sup> and the principle of comity of courts requires effective consideration of a foreign court order, not an unquestioned enforcement.<sup>69</sup> In decisions involving removal of the child to the jurisdiction of the foreign court, the domestic court could make a summary decision or conduct an elaborate inquiry. In a summary inquiry, the child would be returned to the jurisdiction of the court in the country before the removal was affected unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits to determine where the permanent welfare of the child lay and ignore the order of the foreign court, or treat the fact of removal of the child from another country as only one of the relevant circumstances. The decision on the return order is based upon a determination of the best interests of the child,<sup>70</sup> and the application of the conflicts rule concerning jurisdiction of the state that has the most intimate contact with the issues arising in the case. Jurisdiction, the

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<sup>64</sup> Ibid [5].

<sup>65</sup> Ibid [33].

<sup>66</sup> (2010) 1 Supreme Court Cases 174.

<sup>67</sup> Ibid [15].

<sup>68</sup> Ibid [20].

<sup>69</sup> Ibid [24].

<sup>70</sup> Ibid [19]-[20]. In *Surya Vadanam* contact with a few principles that made an effective summation of the law on the subject. child custody rel

Court observed, ‘cannot be vested by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged’.<sup>71</sup>

In *Arathi Bandi v Bandi Jagadrakshaka Rao*,<sup>72</sup> the Supreme Court heard a challenge against a habeas corpus order for the custody of the child, and upheld the High Court order for return of the child to the foreign court’s jurisdiction. The Court held that jurisdiction vested in the courts of the state that has the most intimate contact with the issues arising in the case and could not be attracted ‘by the operation or creation of fortuitous circumstances’.<sup>73</sup> The Court cautioned against assumption of jurisdiction by another state in such circumstances as it could encourage forum shopping.<sup>74</sup>

In *Surya Vadanam v State of Tamil Nadu*,<sup>75</sup> the Supreme Court showed renewed commitment to the principle of comity of courts. It upheld the return of the disputant parties’ two minor children to the United Kingdom (‘UK’) for a determination of custody by the UK courts. The Supreme Court referred to the fact that there was a prior order from the English court, hence the ‘first strike principle’ required the decision of that court be respected, through exercise of self-restraint, if the best interests of the child have been effectively addressed by the foreign court.<sup>76</sup> It opined that a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic) must be accorded due respect.<sup>77</sup> The Court held that domestic consideration of the foreign court orders/decrees in child custody disputes ought to be based upon the principle of comity of courts, and the principle of the best interests and the welfare of the child.

The Court held that though these principles appear to be ‘contrasting’ in the manner of their interpretation, leading to either a summary inquiry or an elaborate inquiry into the dispute, they nevertheless require a cumulative application to the facts of any given case.<sup>78</sup> It would not be appropriate for a domestic court with much less intimate contact with the dispute and the disputants (as against a foreign court in any given case) to make a determination on the best interests and welfare of the child.<sup>79</sup> Such determinations are, appropriately, within the purview of the courts with the closest connection with the child before its removal.<sup>80</sup> The Court preferred not to jettison the comity of courts rule, except for special and compelling reasons. It decided against such a deviation in disputes where only an interim or an interlocutory order has been passed by a foreign court.<sup>81</sup> Foreign court orders might be disregarded when such court did not have jurisdiction, for example, if the parties are not ordinarily resident within that jurisdiction. Furthermore, when there is an interim order of a foreign court, the domestic court must have special and compelling reasons to order an elaborate inquiry as against a summary inquiry. An elaborate inquiry must be preceded by an appreciation of the following:

1. The nature and effect of the interim or interlocutory order passed by the foreign court.
2. The existence of special reasons for and against repatriation of the child to the jurisdiction of the foreign court.

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<sup>71</sup> Ibid [21].

<sup>72</sup> (2013) 15 Supreme Court Cases 790.

<sup>73</sup> Ibid [21].

<sup>74</sup> Ibid [36].

<sup>75</sup> (2015) All India Reporter 2243 (Supreme Court of India) (*Surya Vadanam*).

<sup>76</sup> Ibid [50].

<sup>77</sup> Ibid [56].

<sup>78</sup> Ibid [31].

<sup>79</sup> Ibid [53].

<sup>80</sup> Ibid [53].

<sup>81</sup> Ibid [54].

3. The possible causation of physical or psychological harm to the child, or any legal harm to the parent with whom the child is in India. Domestic courts ought to make orders with due regard to this possibility.
4. The alacrity with which the parent moves the concerned foreign court or the concerned domestic court. If the time gap is unusually large and is not reasonably explicable, and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.<sup>82</sup>

### 1 Shared Custody/Residence Orders

The concept of shared custody/residence orders is a recent occurrence in India.<sup>83</sup> In *Eugenia Archetti Abdullah v State of Kerala*<sup>84</sup> the court, pending custody proceedings in the foreign court, ordered custody of the children to the mother with the stipulation of shared custody/visitation rights until the mother left India. In *Leeladhar Kachroo v Umang Bhat Kachroo*,<sup>85</sup> the court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child. Owing to the absence of a statutory provision regarding shared residence orders within Indian law, the courts interpret foreign courts' shared residence orders in light of the best interests of the child.<sup>86</sup>

### C Indian Jurisprudence on Foreign Courts' Custody Orders – A Few Conclusions

The different judgments described above lead to a few conclusions.

1. The 'most intimate contact' and the 'closest concern' determinants, derived from the *Surinder Kaur* decision, remains the law.<sup>87</sup> A foreign court in a jurisdiction that has the most intimate contact and the closest concern with the child, rather than a domestic court, would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up.
2. The principle of comity of courts remains the preferred interpretation rule. Foreign court orders could be disregarded only when there exist special and compelling reasons to do so.
3. Best interests of the child and welfare of the child, derived from the law of the country to which the child is removed, are the criteria that the courts would apply to review on merits in an enforcement application founded upon a foreign court custody order. However, the jurisprudence in India has not developed any detailed criteria to decide the best interests of the child. As evident in the case law, while in some cases the welfare of the child alone has been the determining factor, in other matters welfare was understood along with the custody rights of the parents under the religious/secular law, which could accord the priority to the father. Thus, the decision on the best interests of the child, in those circumstances, would be dependent upon the rights of the parent under the respective religious law. The saving grace within the judicial dicta has been the reiteration of the welfare of the child as a determinant factor.
4. The habitual residence of the minor and the parents could be an important consideration, a feature that has also been adopted by the courts in contracting States.

<sup>82</sup> Ibid [60].

<sup>83</sup> Anil Malhotra and Ranjit Malhotra, *India, Inter-country Parental Child Removal and the Law* (30 September 2008) <<http://www.reunite.org/edit/files/articles/2008%20IFSL%20Contribution.pdf>>.

<sup>84</sup> 2005 (1) Himachal Law Reporter (Ker) 34 (7 April 2004) (Kerala High Court).

<sup>85</sup> 2005 (2) Himachal Law Reporter (Del) 449 (8 June 2005) (Delhi High Court).

<sup>86</sup> Malhotra and Malhotra, above n 83, 18.

<sup>87</sup> (1984) All India Reporter 1224 (Supreme Court of India).

### III THE HAGUE CONVENTION ON CIVIL ASPECTS OF CHILD ABDUCTION

Silberman viewed the Convention's return-focused approach to be remedial and preventive.<sup>88</sup> Noting the fact that enforcement of foreign custody orders could result in protracted and delayed litigation, the Convention enjoins contracting States to use the most expeditious procedures available.<sup>89</sup> Return, however, is discretionary if more than one year has passed and the child is settled in the new environment.<sup>90</sup> The court determining the return application in civil proceedings may hear proof concerning possible perceived harm to the child from return to the country of habitual residence.<sup>91</sup> The court may also take into account a child's preference if the child is determined to be of sufficient maturity to express such preference.<sup>92</sup> The abducting parent can raise defences, but these are purposely limited. The Convention aims to 'educate'<sup>93</sup> the judiciary to encourage a change in attitude that would reflect an abandonment of the practice of using the best interests of the child to justify keeping the child in the jurisdiction to which the child has been removed.<sup>94</sup>

The Convention's Explanatory Report observed that re-establishing 'the status quo [in the child's habitual residence] disturbed by the actions of the abductor'<sup>95</sup> was necessary, since to do otherwise would assist the abductor to gain an unfair advantage — and a return order prevents forum shopping.<sup>96</sup> The appropriateness of habitual residence as the sole connecting factor in the Convention cases has been explained by two main reasons. Firstly, parents who abduct their children do so with the intention of 'creating jurisdictional links which were more or less artificial'.<sup>97</sup> The purpose is to alter the existing custody status quo, and prompt summary return was seen as remedying this problem. It could, therefore, be said that the Convention's purpose is more of a forum decider, a result of ss 16 and 19: that courts upon receiving the application for return shall not decide upon the merits of the custody dispute, and that decisions under the Convention shall only be concerning the return of the child and not on any custody issue. Secondly, a child's habitual residence immediately preceding their abduction was viewed as providing the most appropriate moral and cultural framework in which to construct the best interests of the child legal standard.<sup>98</sup>

#### A *Exceptions to Return*

The exceptions articulated in art 13 of the Convention<sup>99</sup> are to be interpreted to benefit protection of the best interests of the child. The first limb provides exception when a removal

<sup>88</sup> Silberman, above n 6, 6.

<sup>89</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 2.

<sup>90</sup> *Ibid* art 12.

<sup>91</sup> *Ibid* art 13(b).

<sup>92</sup> *Ibid* art 13.

<sup>93</sup> Lara Cardin, above n 30, 143.

<sup>94</sup> Cornelis D van Boeschoten, 'Hague Conference Conventions and the United States: A European View' (1994) 57(3) *Law and Contemporary Problems* 47, 54.

<sup>95</sup> Pérez-Vera, above n 14, 430.

<sup>96</sup> Danielle Bozin-Odhiambo, 'Re-examining Habitual Residence as the Sole Connecting Factor in Hague Convention Child Abduction Cases' (2012) 3(1) *Family Law Review* 4, 5.

<sup>97</sup> Pérez-Vera, above n 14, 429.

<sup>98</sup> *Ibid* 431.

<sup>99</sup> 'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

is not perceived to be wrongful — for example, when custody rights did not exist or they were not being exercised. The burden of proof is on the abductor to prove that custody rights either did not exist or were not being exercised by the dispossessed parent, otherwise the removal is deemed wrongful. The second limb specifies that the summary return mechanism may not be activated when there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place them in an intolerable situation.<sup>100</sup> The defences are coupled with discretion, founded upon a belief that, in certain situations, the child's interests may require more than its summary return.<sup>101</sup> Forum courts ought to remember that an inquiry into a plea of defence may not become a comprehensive investigation into the merits of the underlying custody case.<sup>102</sup> The defences under art 13 of the Convention include:

1. Actual exercise of custody rights.
2. Acquiescence or consent to the removal — a return need not be ordered by the court if the respondent demonstrates by a preponderance of evidence that the person having care of the child had consented to the removal or retention or subsequently acquiesced in the removal or retention of the child. Proof of consent or acquiescence by a parent to a child's residing in the foreign country rebuts a claim for 'wrongful' removal or retention. Silberman observed 'the validity of this defense turns on competing versions of whether the departing parent left with or without consent'<sup>103</sup> Further, there could be instances of the left-behind parent negotiating custodial arrangements with the abducting parent, and that could trigger an acquiescence defence.<sup>104</sup>
3. Grave risk of physical or psychological harm to the child.
4. Furthermore, art 20 of the Convention specifies that a court is not bound to order return of the child if the parent proves that the return of the child would result in a violation of fundamental principles of human rights and freedoms. However, there is no existing case law concerning art 20.<sup>105</sup>

### B *The Hague Convention – India's Concerns Regarding Accession*

Apprehension exists regarding the non-signatory status of India,<sup>106</sup> especially with regard to an elaborate inquiry into the best interests/welfare of the child. There are also a few concerns regarding the perceived gaps in the Convention. They include non-consideration of domestic violence within the exceptions, the threat of criminal law application against the abducting parent upon return with the child, and the absence of a safe harbour order for the abducting parent upon return of the child to the jurisdiction of the courts of habitual residence.

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The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

<sup>100</sup> Lubin, above n 11, 428.

<sup>101</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 13.

<sup>102</sup> Lara Cardin, above n 30, 148.

<sup>103</sup> Linda Silberman, 'Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis' (1994) 28(1) *Family Law Quarterly* 9, 25.

<sup>104</sup> *Ibid* 26. Silberman suggested that courts should desist from looking for generalised patterns derived from precedent, and be generally circumspect about attempts to translate negotiation into acquiescence.

<sup>105</sup> *Ibid* 29. Silberman drew attention to a suggestion that art 20 could be invoked whenever the State of habitual residence does not ensure a 'due process' hearing on the issue of custody. She however cautioned against importing any one national standards of fairness overlooking the fundamental premise of the Convention that the State of habitual residence has the strongest claim in having its procedure and its standards applied, irrespective of similarities with the law of the nationality of the parties.

<sup>106</sup> Malhotra and Malhotra, above n 83; US House Committee on Foreign Affairs, *Hope Deferred: Securing Enforcement of the Goldman Act to Return Abducted American Children* (14 July 2016) <<http://docs.house.gov/meetings/FA/FA16/20160714/105221/HHRG-114-FA16-Wstate-AbbiR-20160714.pdf>>.

Another significant concern has been the restricted interpretation of the art 13(b) grave risk exception under the Convention.<sup>107</sup> Schuz suggested a narrow construction of the exemptions as not to include all of the situations where a return might run contrary to the best interests of the child.<sup>108</sup>

The Convention seems to address the problem of parental child abduction within the context of removal from the habitual residence in contemporary times where transnational families are increasingly becoming a reality.<sup>109</sup> The changed pattern of parental child abductions could be difficult to address within the parameters of the Convention, especially when read with causes like domestic violence that trigger the wrongful removal of children.<sup>110</sup> The exceptions to return, ie grave risk of exposure of the child to physical or psychological harm,<sup>111</sup> have led to adoption of a restrictive approach — a derivation from the interpretation of this exception states that the Convention's art 13(b) exception 'was not intended to be used by defendants as a vehicle to litigate (or re-litigate) the child's best interests'.<sup>112</sup> A broadly worded exception may also undermine the purposes of the Convention to act as a deterrent against international child abductions and return of the child to their habitual residence.

However, in light of the changed profile of abductors, a narrow interpretation of art 13(b) does little to protect victims of domestic violence or their children.<sup>113</sup> Quillen argued that the overwhelming importance attached to the quick return of the child could result in a court's limited analysis of the art 13(b) defence.<sup>114</sup> The Convention prescribes the remedy of prompt return of the child to its habitual residence. A victim of domestic violence who relocated with the child to another jurisdiction to escape the violence could be placed at a higher risk of being subjected to separation violence by the abuser.<sup>115</sup> Or the abducting parent who fled from a domestic-violence scenario may be faced with an order to return the child alone. The abducting parent would, as Merle Weiner observed, return with the child rather than risk returning the child alone.<sup>116</sup> While there is no academic writing or published data concerning domestic violence-induced parental child abductions to India, there are narratives drawn from the court cases,<sup>117</sup> and reports in the media,<sup>118</sup> that suggest a pattern of violence often

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<sup>107</sup> *Freidrich v Freidrich* 78 F 3d 1060, 1069 (6<sup>th</sup> Cir. 1996) ('*Freidrich*'). See Yoko Konno, 'A Haven for International Child Abduction: Will the Hague Convention Shape Japanese Family Law?' (2016) 46(1) *California Western International Law Journal* 39. Konno commented that the art 13(b) exception is not likely to be applied to a case involving unsubstantiated domestic violence involving the mother, following the *Freidrich* opinion where the court required grave risk/harm to the child if returned.

<sup>108</sup> Schuz, above n 27, 439.

<sup>109</sup> Bozin-Odhiambo, above n 96, 12

<sup>110</sup> Carol Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) 38(3) *Family Law Quarterly* 529; Shani M King, 'The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence' (2013) 47(2) *Family Law Quarterly* 299; Brian Quillen, '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' (2014) 49 *Texas International Law Journal* 621.

<sup>111</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 13(b).

<sup>112</sup> Browne, above n 4, 1202. Browne observes that while art 13(b) of the Convention is the common exception pleaded by the defendants, there is similarity in the opinion of the Congress, the State Department and the Convention drafters that it ought to be interpreted narrowly.

<sup>113</sup> Carol Bruch, above n 110, 532-5.

<sup>114</sup> Brian Quillen, 'above n 110, 626-7.

<sup>115</sup> *Ibid* 627.

<sup>116</sup> Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69(2) *Fordham Law Review* 593.

<sup>117</sup> See, eg, *Arati Bandi v Bandi Jagadrakshaka Rao* (2013) 15 Supreme Court Cases 790 [3]. The Supreme Court of India noted the factual existence of a US court order related to pleadings of domestic violence.

preceding the wrongful removal and relocation of the child to India by the abducting parent. These reports also explain the cultural nuances that inform such patterns of violence.<sup>119</sup> Furthermore, Schuz suggested that a forum court hearing a return application could interpret the exceptions to return, especially the 'grave risk' exception, to deny return when the return cannot be reconciled with the obligation to consider the best interests of the child as a primary consideration.

In the *Surya Vadan* case,<sup>120</sup> the Indian return order included the accompaniment of the mother. However, an abducting parent could be facing a criminal law action in the country of the habitual residence to which they are ordered to return the child. Return of the child could be safeguarded by having courts in the habitual residence make a 'safe harbour' order prior to the entry of a return order in the requested-from state.<sup>121</sup> They could help ensure that courts in the requested-from state would treat return applications as such and not enter custody-related orders.

To further address the concerns arising from international parental child abduction, the Indian courts could refer to the US court decision in *Condon v Cooper*,<sup>122</sup> an interesting example of judicial craftsmanship. The Court of Appeal heard an appeal against an order permitting relocation of the mother to Australia that would adversely affect the father's non-custodial rights. The Court made a notable grafting in the order by subjecting the mother's relocation to certain conditions. The mother had consented to (and the Court accepted) continuing jurisdiction of the matter in the California courts, and the Court imposed a bond to ensure the mother's compliance with the concession, as well as the other conditions attached to the order permitting relocation. While the creativity illustrated by this dictum is interesting, a more effective and cooperative way, especially for non-signatories like India, would be to also consider accession to the *Hague Convention on Parental Responsibility and Protection of Children*,<sup>123</sup> which provides for enforcement of custody and access orders of contracting states and establish formal methods of cooperation, communication, and mutual assistance between those states.

#### IV THE 2016 BILL

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<sup>118</sup> Mridula Chari, *Why Domestic Abuse Victims Are Opposed to India's New Bill on International Child Abduction* (17 August 2016) Scroll < <http://scroll.in/article/813953/why-domestic-abuse-victims-are-opposed-to-indias-new-bill-on-international-child-abduction>>; Neeta Mishra, *International Child Abduction And Domestic Violence: Why Children Are Sent Back To Violent Homes* (1 September 2016) Business World < <http://businessworld.in/article/International-Child-Abduction-And-Domestic-Violence-Why-Children-Are-Sent-Back-To-Violent-Homes/01-09-2016-105113/>>.

<sup>119</sup> S D Dasgupta, 'Exploring South Asian Battered Women's Use of Force in Intimate Relationships' (2007) *Manavi Occasional Paper Series* 1, 13. Dasgupta traces the pattern of violence experienced by South Asian women as connected with cultural patterns of marital relationships that are taken to their life in the host country; unfamiliarity with the language, culture and the legal system and a strange society within the host country turns the women diffident to approach the law enforcement authorities; further they are dissuaded to do so by their spouses, who often preempt their effort for legal help by preempting them in approaching the law enforcement agencies.

<sup>120</sup> *Surya Vadan* (2015) All India Reporter 2243 [16], [73] (Supreme Court of India).

<sup>121</sup> Silberman, above n 6, 25. See also, Linda Silberman, 'Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA' (2003) 38(4) *Texas International Law Journal* 52, nn 71.

<sup>122</sup> 73 Cal App 2d 33 (1998).

<sup>123</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, opened for signature 19 October 1996, [2008] EC 431 (entered into force 1 January 2002) < <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>>.



In 2009, the Law Commission of India recommended India's accession to the Convention.<sup>124</sup> Their Report lamented the adverse effects on children caught in the fire of shattered relationships,<sup>125</sup> and cautioned that non-accession to the Convention may have a negative influence on a foreign judge's decision on custody-related matters, including permission to travel to India.<sup>126</sup> However, there is currently no legislation in place. The draft legislation concerning accession to the Convention has been opened for comments, review and parliamentary approval.<sup>127</sup> It seeks to create a central authority for responsibilities under the Convention for securing the return of removed children by instituting judicial proceedings in the concerned High Court. It outlines the following:

1. The appropriate authority, or a person of a contracting country, may apply to the central authority for return of a removed child to the country of habitual residence.<sup>128</sup>
2. The High Court may refuse to make a return order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to refusal for return of a child by the court.<sup>129</sup>
3. The court, if convinced of the child's age and maturity, may also consider its view on the return order.<sup>130</sup>
4. Prior to the return order the court could request the central authority to obtain information from the relevant authorities of the country of habitual residence, a decision or determination related to wrongful removal of the child.<sup>131</sup>
5. The return order could include a direction that the person responsible for removal of the child from its habitual residence pay the expenses for their return.<sup>132</sup>
6. The Secretary, Ministry of Women and Child Development, Government of India could be appealed to within fourteen days of the order of refusal by the central authority to process the return application.<sup>133</sup>
7. The High Court, on application, could make interim orders for the welfare of the child.<sup>134</sup>

## V CONCLUSION

While the need for an expeditious return mechanism cannot be gainsaid, it is imperative that the proposed accession to the Convention and the ensuing legislation take note of the contemporary profile of the abduction, especially factors such as transnational families and relocation, domestic violence and, most importantly, policy decisions recommending safe harbour orders that would ensure no harm to the abducting parent accompanying the returning child. Japan's enabling law upon accession to the Convention has an interesting version of the art 13(b) exception. The judges presiding over return cases are authorised to take a wide variety of factors into account in evaluating whether an exception is applicable,

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<sup>124</sup> Law Commission of India, *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction* (1980), Report No 218 (2009).

<sup>125</sup> *Ibid* [2.15]-[2.16].

<sup>126</sup> *Ibid* [2.16].

<sup>127</sup> The Civil Aspects of International Child Abduction Bill 2016 (India) <[http://www.prsindia.org/uploads/media//draft/Draft\\_Implementing\\_Legislation\\_Hague\\_Convention.pdf](http://www.prsindia.org/uploads/media//draft/Draft_Implementing_Legislation_Hague_Convention.pdf)>.

<sup>128</sup> *Ibid* s 7(1).

<sup>129</sup> *Ibid* s 16(1)(a)-(b).

<sup>130</sup> *Ibid* s 16(2).

<sup>131</sup> *Ibid* s 19(2).

<sup>132</sup> *Ibid* s 20.

<sup>133</sup> *Ibid* ch 4.

<sup>134</sup> *Ibid* ch 5.

including the risk of violence (including verbal behaviour) to the taking parent or the child after a return.<sup>135</sup>

India's accession to the Convention would help ensure application of international standards when applying the best interests of the child principle. Furthermore, accession would help position this principle independent of the custody rights within the applicable domestic law. Thus, the concern that gender-selectivity between parents applicable in child custody disputes may impact an international child removal-related application, could be removed. As India charts its course to accession, legislative efforts to implement the Convention should factor in the changed profile of the abductors and the reasons prompting wrongful removal, thereby better ensuring that the child is not subjected to any unnecessary and preventable physical and psychological hardship. The legislation should also specify that a return application before the forum courts would be conducted according to the legislation alone. Furthermore, as an extended agenda for future legislative efforts, the concerns regarding gender-selectivity within the domestic custody/guardianship laws should be addressed.

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<sup>135</sup> *Act for Implementation of Convention on the Civil Aspects of International Child Abduction (the Implementation Act) 2013* (Japan) art 38(1)(4). See, Colin P A Jones, 'Towards an "Asian" Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention' (Working Paper No 31, Asian Law Institute, August 2013) 25. Jones commented that this provision could involve an evaluation of both parents' custodial capacities, a determination that is essentially prescribed by art 19 of the Convention.