International Child Custody Disputes Between India and the United States: No Hague, So Vague!

by
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I. Introduction:

> "The business of the law is to make sense of the confusion of what we call human life - to reduce it to order but at the same time to give it possibility, scope, even dignity."
>
> Archibald MacLeish

If international parental child abduction is any parent's worst nightmare, then having it happen to (or from) a non-Hague country may be a close second.

Child custody laws differ significantly between India and the United States of America. However, child custody disputes between the two countries are increasingly common due to the large Indian population in the United States. What does not help are the divergent views of the two countries concerning the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention").[1] While the United States is highly committed to meeting its treaty obligations under the Convention, India has refused to sign it. Similarly, while International Parental Kidnapping is a federal offense in the United States, Indian courts generally presume the custody of a child with a parent (usually the mother) as lawful unless there are extreme circumstances.

This article compares the applicable laws and standards in international child custody disputes in both countries, specifically

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1 Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

focusing on Indian child custody law. It centers on the typical issues that arise when one parent (the "taking parent") removes the child from the United States to India (or *vice versa)* without the consent of the other parent (the "left-behind parent"). Part I gives a broad overview of the article. Part II provides the statistical facts concerning the presence of a large Indian population in the United States. Part III discusses international parental child removal from the United States *to* India and *vice versa.* Part III.A. in particular discusses the cases of child removal from the United States to India. It differentiates the writ (habeas corpus) jurisdiction of an Indian court from the temporary emergency jurisdiction of a U.S. court. This Part further discusses the applicable standard for a writ of habeas corpus and the various governing factors for such a writ, in particular, the existence (and the weight) of a foreign custody order. It then lists the potential challenges for a left-behind parent in the United States.

Part III.B. sheds light on the issues that may emerge for a left-behind parent in the relatively limited (yet growing) number of cases where the child is removed from India to the United States. It discusses the need of the left-behind parent to secure a custody order from the appropriate Indian court. Part III.B. then discusses the provisions related to the enforcement of a foreign custody order in the United States. This Part further addresses the various potential issues with securing a temporary emergency custody order in the United States. Eventually, Part III.B. concludes with a discussion of the various challenges faced by a left-behind parent in India.

Part IV provides a brief overview of the Hague Convention, addresses the reasons for Indian's refusal to sign the Convention, and then discusses the efforts of the U.S. government to encourage India to sign the Convention. Part V enumerates and discusses various reasons why India must sign the Hague Convention. Part VI concludes with a suggestion that India must sign the Convention to address the rampant confusion regarding international child custody disputes involving India.

II. Indian Diaspora in the United States

India is not only the most populous country in the world but, with nearly 18 million Indians living abroad, it also has the largest

emigrant population of all the countries.[2] Of these 18 million Indian immigrants, roughly 2.7 million live in the United States and represent the second-largest U.S. immigrant group.[3] The overall Indian diaspora in the United States consists of a staggering number of 4.9 million U.S. residents who were either born in India or have an Indian ancestry or origin.[4]

In Fiscal Year (FY) 2022, 967,500 new citizens were naturalized in the United States, with 65,800 being Indians, the second largest group.[5] Also, in FY 2022, 72.6% of H-1B visa beneficiaries for high-skilled workers in the United States were Indian citizens.[6] In the 2021/22 academic year, India sent 199,182 students to study in the United States, making it the second top-sending country to the United States.[7] Many Indians come to the United States either through family sponsorship by a U.S. citizen or as dependents of someone holding the primary U.S. visa (as an employee or a student). Another lesser-known fact is that every year thousands of undocumented Indian nationals are increasingly arriving at the U.S. borders, mainly through Mexico. According to Customs and Border Patrol data, more than 16,290 Indian citizens were detained by the U.S. authorities at the Mexican border in 2022.[8]

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2 International Organization for Migration (IOM), *World Migration Report 2022* (Marie McAuliffe & Anna Triandafyllidou eds. 2021).

3 Ari Hoffman & Jeanne Batalova, *Indian Immigrants in the United States*, Migration Pol'y Inst. (Dec. 7, 2022), www.migrationpolicy.org/article/indian-immigrants-united-states.

4 *Id.*

5 U.S. Dept. of Homeland Security, Office of Immigration Statistics, *Fiscal Year 2022 Naturalization Statistics* (July 5, 2023), https://www.uscis.gov/citizenship-resource-center/naturalization-statistics#:~:text=Fiscal%20Year%202022%20Naturalization%20Statistics&text=USCIS%20welcomed%20967%2C500%20new%20citizens,naturalizations%20seen%20since%20FY%202008.

6 U.S. Dep't. of Homeland Security, U.S. Citizenship & Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2022 Annual Report to Congress* (2022), https://www.uscis.gov/sites/default/files/document/data/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2022.pdf.

7 Institute of International Education, *Open Doors 2022 Report on International Educational Exchange, Key Findings,* Open Doors (Nov. 2022), https://opendoorsdata.org/annual-release/.

8 Bernd Debusmann Jr., *US Immigration: Why Indians Are Fleeing Halfway Around the World,* BBC News (Oct. 10, 2022), https://www.bbc.com/news/world-us-canada-62893926.

As increasing numbers of Indian citizens arrive and settle in the United States as students, employees, dependents, sponsored by their families, and even through unauthorized means, the number of international marriages involving Indians in the country is also increasing.[9] Unfortunately, this rise in international marriages has also led to a surge in divorce cases and child custody disputes between India and the United States.

While there is a significant presence of Indian citizens in the United States, there appears to be much confusion regarding child custody cases involving the two countries. This is primarily due to the differences in their respective laws and public policies.

III. International Child Custody Disputes Between India and the United States

A. *Child Removal from the United States to India*

1. *Overview of the general process to secure the child's return to the United States*

India has not signed the Hague Convention. Therefore, if a parent takes his child from the United States to India without the consent of the other parent, then the left-behind parent does not have the option to initiate a Hague case against the taking parent to secure the child's timely return.

As far as matters concerning a child's welfare are concerned, the Indian courts' position is that such matters can be heard under the *parens patriae* jurisdiction of the court. The writ jurisdiction of an Indian court in a custody case comes under the scope of its *parens patriae* jurisdiction.

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[9] The Indian National Commission for Women, while establishing a Non-Resident Indian (NRI) department to deal with matrimonial disputes concerning NRI women, noted that, "It is . . . hardly surprising that there is growing evidence today that even as the number of NRI marriages is escalating by thousands every year, with the increasing Indian Diaspora, the number of matrimonial and related disputes in the NRI marriages have also risen proportionately, infact at most places much more than proportionately." National Commission for Women, *Introduction to NRI Cell of Commission,* http://ncw.nic.in/ncw-cells/nri-cell/introduction#:~:text=It%20is%20therefore%20hardly%20surprising,at%20most%20places%20much%20more (last visited Dec. 1, 2023).

2. *Writ of habeas corpus*

Thus, generally, when a child is wrongfully removed from the United States to India, the most sought-after option for the left-behind parent is to initiate a writ of habeas corpus with the appropriate Indian court and request the child be returned.

The Indian Constitution confers writ jurisdiction only on the superior courts of India, i.e., the Indian Supreme Court[10] and the High Courts.[11] In general practice, such a writ is usually initiated before the relevant Indian High Court under whose jurisdiction the child is physically present. The writ court's jurisdiction to make orders regarding custody arises as soon as the child is within its territorial jurisdiction.[12]

Indian courts use their writ jurisdiction sparingly, especially in child custody cases. The Supreme Court of India has held in *Gaud v. Tewari*, that habeas corpus is a prerogative writ, which is an extraordinary remedy, and the writ is issued where an ordinary remedy provided by the law is either unavailable or ineffective and where it is proved that the detention of a minor child by a parent was illegal and without any authority of law.[13] However, it must be noted that the custody of a child with either of his parents (especially the mother) is generally presumed lawful by the Indian courts.[14]

3. *Writ of habeas corpus v. temporary emergency jurisdiction*

In an inter-country custody dispute between India and the United States, it is possible for the attorneys to inadvertently compare the Indian concept of writ of habeas corpus to the American concept of temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA)[15] due to their superficial similarity.

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10 India Const. art. 32

11 *Id.* art. 226.

12 Majoo v. Majoo, (2011) 6 SCC 479, at 15 (India), http://indiankanoon.org/doc/637664/.

13 Gaud v. Tewari, (2019) 7 SCC 42, at 7 (India), http://indiankanoon.org/doc/184268381/.

14 Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454, at 14 ¶ 30 (India), http://indiankanoon.org/doc/53310178/.

15 Unif. Child Custody Jurisdiction & Enforcement Act, 9 U.L.A. 657 (Unif. L. Comm'n 1999) [hereinafter UCCJEA]. In the United States, the UCCJEA is the exclusive method for determining the proper state for

Under the New York version of the UCCJEA, a New York court has temporary emergency jurisdiction concerning a child if the child has been abandoned or if it is necessary to protect the child in an emergency due to abuse or a threat of abuse against the child, her parent, or her sibling.[16] The UCCJEA specifically limits the scope of emergency jurisdiction by excluding neglect cases.[17] These requirements differ from the maintainability of a writ petition, as discussed above in *Gaud,* which does not set forth the specific requirements for abandonment or abuse. Thus, the Indian court's ambit of writ jurisdiction is comparatively broad.

However, the child's physical presence in the court's territorial jurisdiction is required both in India and the United States. Moreover, the Indian courts have often held that they should invoke their writ jurisdiction sparingly. Similarly, in the United States, the standard for securing an emergency custody order from a U.S. court is difficult. The official comments to UCCJEA state that, temporary emergency jurisdiction is "an extraordinary jurisdiction reserved for extraordinary circumstances."[18] Accordingly, in keeping with the official comments, a New Hampshire court, while refusing to exercise its temporary emergency jurisdiction, held that "the exercise of temporary emergency jurisdiction is intended to be narrowly circumscribed."[19]

One of the significant differences, however, between the two is that if the U.S. court does exercise its temporary emergency jurisdiction, it will lose such jurisdiction as soon as the court in India issues a custody order.[20] In contrast, if an Indian court decides to entertain a writ of habeas corpus, even if the concerned U.S. court has issued a custody order, the Indian court still has the liberty to undertake a summary or an elaborate inquiry.[21] In a summary inquiry, the court may order the child to be returned

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jurisdictional purposes in child-custody proceedings that involve other jurisdictions. Forty-nine U.S. states have adopted the UCCJEA (with minor variations), except for the State of Massachusetts, which has similar laws in place.

16 N.Y. Dom. Rel. Law § 76–c (1).

17 Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act,* Juv. Just. Bull. 1, 6 (Dec. 2001), https://www.ojp.gov/pdffiles1/ojjdp/189181.pdf.

18 UCCJEA, *supra* note 15, § 204, cmt., 9(IA) U.L.A. at 676.

19 In the Matter of Yaman & Yaman, 105 A.3d 600, 614 (N.H. 2014).

20 N.Y. Dom. Rel. Law § 76–c (2).

21 *Raghavan,* 8 SCC 454, at 12.

to the United States. The Indian court's jurisdiction will end when the child leaves its territorial jurisdiction. But if, according to the Indian court, the facts and circumstances of the case warrant an elaborate inquiry into the question of the welfare and best interest of the child, the court may direct the parties to appear before the appropriate Indian forum to settle such dispute. Thus, unlike the temporary emergency jurisdiction, the Indian High Court will generally still retain appellate jurisdiction over the matter.

Another stark contrast between the two systems is that once a U.S. court exercises emergency jurisdiction, under the provisions of the UCCJEA, it becomes mandatory[22] for the U.S. court to then judicially communicate with the Indian court if the Indian court is hearing an existing custody case regarding the child that has been removed to the United States. However, there is no such mandate for the Indian court if it exercises its writ jurisdiction over a child who has been removed from the United States to India.

4. *Governing standard in the writ petition*

Whether it is a case of a summary inquiry (by the Writ Court) or an elaborate inquiry (by the Indian Guardians court[23]), the paramount consideration is the best interests and welfare of the child.[24] The Indian Supreme Court has held in this regard that it is a well-settled principle of law that the courts, while exercising *parens patriae* jurisdiction, would be guided by the sole and paramount consideration of what would best serve the interest and welfare of the child to which all other considerations must yield.[25] Indian statutory law defines "best interest of the child" as "the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development."[26]

In international child custody disputes, determining the child's best interest can be complex and influenced by numerous factors. In this regard, the Indian Supreme Court has held:

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22 N.Y. Dom. Rel. Law § 76–c (4).

23 Guardians and Wards Act, § 8 (1890) (the "Indian Guardians Act"), https://indiankanoon.org/doc/1874830/.

24 *Raghavan,* 8 SCC 454, at 12.

25 Kansagra v. Kansagra, (2020) SCC (online) SC 887, at 13 (India), http://indiankanoon.org/doc/181712544/.

26 Indian Juvenile Justice (Care and Protection of Children) Act § 2(9) (2015).

> The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.[27]

While there is no exhaustive statutory list of factors for courts to consider, they can be inferred from past legal cases. When taken together, these factors can significantly impact the court's decision and may sway in favor of one parent over the other. However, no single factor can determine the case's outcome; each is unique and fact-specific. Therefore, the final decision can go either way.

5. *Potentially applicable factors in a writ petition in India*

Prompt action by the left-behind parent

A heavy-weighing factor is how "promptly and quickly" the left-behind parent acts once the child is removed to India.[28] However, in a landmark case, where the child stayed in India for two years before the mother was effectively served with the notice of the writ petition against her because she was moving frequently (while enrolling the child in different schools) to avoid being served, the court considered such period insufficient for the child to have developed roots in the country and ordered the child to be returned.[29] It is worth noting that while it may have taken time for the father to serve the mother, he had initiated the habeas corpus petition "promptly and without any delay."[30] The two-year delay was from filing the petition to the mother being served.

Length of the child's stay in India

A second consideration is the length of the child's stay in India and the extent to which the child has become settled in India. The Indian Supreme Court refused to order the return of a six-year-old child from

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27 Sakhamuri v. Kodali, (2019) 7 SCC 311, at 20, ¶ 49 (India), http://indiankanoon.org/doc/75878380/.

28 *Raghavan,* 8 SCC 454, at 23, ¶ 43; Chandran v. Union of India, (2010) 1 SCC 174, at 16, ¶ 22 (India), http://indiankanoon.org/doc/376248/.

29 *Chandran,* 1 SCC 174, at 16, ¶ 22.

30 *Id*.

India to the United Kingdom because she had spent equal intervals of time in India and the United Kingdom, lived with extended family and maternal grandparents in India, and attended school in India for more than one year.[31] Under very similar circumstances, the Indian court yet again did not order the return of a child who was 2½ years old at the time of removal to India, then stayed in India continuously until the age of 5, attended a reputed school in New Delhi, lived with his father and paternal grandparents, and was generally well-settled in India.[32] The court, in this case, noted:

> [U]nless, the continuance of the child in the country to which it has been removed is unquestionably harmful; when judged on the touchstone of overall perspectives, perceptions, and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being.[33]

Existence of a foreign custody order

A question may arise in a situation in which the left-behind parent has secured a foreign custody order. The Indian courts' position concerning a foreign custody order is quite clear. The fact that the left-behind parent has secured a foreign custody order in his favor, by itself, is not dispositive of anything, "merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se."[34] In fact, the Indian Supreme Court has directed the lower courts not to fixate on the fact that there is a foreign court order requiring the child to be returned but to order such a return only if it is in keeping with the governing principle of the best interests and welfare of the child.[35] Thus, even when the left-behind father had a favorable foreign court order concerning the return of his two children, the Indian court, while considering it as one of the factors, still declined to order the children to be returned as opposed to the loving and caring environment that the children were accustomed to with their mother.[36] In this case, the

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31 *Raghavan,* 8 SCC 454, at 2.

32 Gupta v. Gupta, (2018) 2 SCC 309, at 21, ¶ 35 (India), http://indiankanoon.org/doc/69261674/.

33 *Id.* at 22, ¶ 35.

34 *Raghavan,* 8 SCC 454, at 15, ¶ 31.

35 *Id.* at 18, ¶ 32.

36 Sharma v. Sharma, (2000) 3 SCC 14, at 4 (India), http://indiankanoon.org/doc/59950409/.

left-behind father had excessive alcohol addiction issues and lived alone with his mother, who was eighty years old.[37]

Participation of both the parents in the foreign custody proceedings

If there is a foreign court proceeding, however, where both parents fully participated, this may alter the outcome. In one such case where the mother participated and obtained a series of consent orders concerning the child's custody/parenting rights, maintenance, etc., from the competent courts in the United States before she removed the child to India, the Indian Supreme Court held that an elaborate custodial determination was not required in this case and that the child must be ordered to return to the United States for an appropriate custody determination.[38]

Initiation of the foreign custody proceedings by the taking parent

A related issue is whether the taking parent initiated the foreign custody proceeding. In the *Chandran* case it was the mother, who was also the taking parent, who had initiated the custody proceedings before the Supreme Court of New York and had then removed the child to India when the proceedings were well underway in the state of New York. Similarly, in *Sahu v. State of Rajasthan*, where the mother herself approached the jurisdictional court in the United States, entered into an agreement based on which a consent order was issued, and then violated that order and came back to India with the child, it was a factor which the Indian court held against her.[39] In *Sakhamuri v. Kodali,* where the mother initiated custody proceedings in the United States, then brought the children to India in contravention of the U.S. custody order, and then commenced custody proceedings in India *while claiming in the U.S. court that she was in India only for a limited period*, the Indian court held it as one of the main factors in deciding against her.[40] Where the left-behind parent first consented to the removal of the child by the taking parent to India from the

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37 *Id.*

38 *Chandran,* 1 SCC 174, at 15, ¶ 21.

39 Sahu v. State of Rajasthan, AIR 2020 (SC) 577, at 10, ¶ 31 (India), http://indiankanoon.org/doc/144083733/.

40 *Sakhamuri,* 7 SCC 311, at 20, ¶ 48.

United States and then subsequently secured a favorable custody order from the court in the United States, for the return of the child, the Indian court did not attach any significant weight to such an order in determining whether to command the return of the child.[41] It is also a settled position in Indian law that the principle of comity of courts, the first strike principle,[42] and the concept of "intimate contact"[43] must yield to the established doctrine of the welfare of a child.[44]

Initiation of regular custody proceedings in India by the taking parent

One factor that courts may find influential is whether the taking parent initiated a regular custody case in India after having removed the child to India. In a very recent case, an Indian High Court dismissed a writ petition of a left-behind father because after removing the child from the United States to India, the mother had initiated a divorce proceeding in India and asked for an interim custody order from the Indian court, less than three months before the father started a writ of habeas corpus in India.[45] Interestingly, in this case, before removing the child, it was the mother who had initiated custody proceedings in the State of New York.[46] After she unilaterally removed the child without the father's consent and in plain defiance of the New York court's jurisdiction, the New York court granted full custody to the father, and this fact was brought to the notice of the Indian court.[47] Even so, the Indian High Court did not allow the father's writ petition for the child's

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41 *Majoo,* 6 SCC 479, at 15.

42 "That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic)." Surya Vadanan v. State of Tamil Nadu, (2015) 5 SCC 450, at 13, ¶ 56, (India), http://indiankanoon.org/doc/85436368/.

43 The concept of intimate contact provides that a "foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court." *Vadanan*, (2015) 5 SCC 450, at 12, ¶ 53.

44 *Raghavan,* 8 SCC 454, at 22, ¶ 40*; Vadanan*, (2015) 5 SCC 450, at 9, ¶ 36.

45 Nathan v. State of Haryana*,* Punjab & Haryana High Court, (Aug. 21, 2023) CRWP 1671 of 2023 (O&M) (India), https://indiankanoon.org/doc/171491290/.

46 *Id.* at 2.

47 *Id.* at 3.

return and directed him to approach the Indian family court where the divorce proceedings were pending.

Taking parent "stealthily" securing the child's presence in India

Here, the mother and the child came to India from Canada for a purported visit of two months; then the mother informed the father that she did not intend to return to Canada and filed for custody of the child before the concerned Indian Guardian Court after almost three months of being in India.[48] The left-behind father filed an application raising objections about the jurisdiction of the Guardian Court, but the Guardian judge dismissed his application. The father appealed successfully before the Delhi High Court, and the mother's custody petition before the Guardian Court was accordingly dismissed by the Delhi High Court, holding that the Guardian Court lacked jurisdiction in this case because the mother had *stealthily* secured the child's presence in India.[49]

Steps taken by the taking parent to secure a favorable custody order in India

In several cases, where the taking mother had been in India for over two years, after having removed the child(ren) from the United States and had still not taken any substantial steps to secure even an interim custody order in her favor, the court, while ordering the return of the child, held this fact in favor of the left-behind father.[50]

The left-behind parent's role as a parent and his or her association with the child

Courts also examine the left-behind parent's association with the child. The court in *Sakhamuri v. Kodali* stated that the crucial factors to be kept in mind by the courts concerning the parents are:

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48 Gahun v. Gahun, 130 (2006) DLT 524, at 7 (India), http://indiankanoon.org/doc/330740/.

49 *Id.* at 7, ¶ 32.

50 *Chandran,* 1 SCC 174, at 16, ¶ 21*; Surya,* (2015) 5 SCC 450, at 17, ¶ 66*;* Bandi v. Jagadrakshaka Rao (2013) 15 SCC 790, at 12, ¶23 (India), https://indiankanoon.org/doc/132346468/.

> (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency; and last but not the least the factors involving a relationship with the child, as opposed to characteristics of the parent as an individual.[51]

Where the left-behind parent provided extensive details of his association with the child and of the steps he had taken since the birth of the child to be associated with his upbringing (including extended periods of alone travel and stay time with the child), the courts in India took notice of such details and considered them as a relevant factor in deciding that the child must be returned to his home country.[52] In this case, the mother showed no inclination to retain the child with her in India, even after unilaterally removing the child to India from the United States. It was also one of the factors that, in the court's opinion, favored the left-behind father, who was very keen on taking the child back to the United States.[53] On the contrary, the Indian court declined to order the return of the child from India to the United States, where the left-behind parent did not seem to want actual custody of the child, had remarried during the pendency of the custody proceedings, and seemed to be only interested in the fact that the child should be brought up in the United States (instead of India) even if it were in the sole custody of the taking mother.[54]

The age, gender, nationality, overall health, and the opinion of the child

Courts will consider the age, gender, health, nationality, and—where appropriate—the opinion of the child. Where the child was a girl of almost seven years of age, the Supreme Court stated that "ordinarily, the custody of a "girl child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in the custody of her mother."[55] While refusing the child's return, the court also bore in mind that the child in this

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51 *Sakhamuri,* 7 SCC 311, at 20, ¶ 49.

52 Bhattacharya v. State of Karnataka, 2021 SCC Online SC 928, at 6-7 (India), http://indiankanoon.org/doc/36377351/.

53 *Id.* at 9, ¶ 16.

54 *Majoo,* 6 SCC 479, at 15.

55 *Raghavan,* 8 SCC 454, at 18, ¶ 33.

case suffered from a "cardiac disorder and needed periodical medical reviews and proper care and attention."[56] However, in another case, a three-year-old child was medically diagnosed with hydronephrosis (a condition that required surgery). In this case, the mother traveled to India for six months (with the limited consent of the father) to get the surgery done and then refused to return. Here, the fact that the child had undergone successful surgery and only required periodic medical reviews (which could be done from the United States as well) was a factor that the court considered in favor of the left-behind father.[57]

Concerning the child's age, it must be noted that to assume that a child of tender years will not be ordered to return, especially if the taking parent is the mother, may not be entirely accurate. The Supreme Court of India, in recent years, in three different matters, has ordered children as young as 2½ years old[58] and 3½ years old[59] to be returned to the United States from India. In *Sahu and Mogal*, the Supreme Court conducted a factor-by-factor analysis to adjudge the considerations favoring each parent and, while ordering the child's return, noted that other than the age of the child, nothing is in favor of the mother. Therefore, the tender age by itself is not a decisive factor. In several such cases, the fact that the child was a "citizen by birth" of another country was considered one of the favorable factors in ordering the return of the child to that country.

Citizenship of the child plays a more relevant role when the left-behind parent can convince the court that the child was fully settled in his home country, had friends there, went to school in that country, and that removing the child from such a country would amount to uprooting him or her from her socio-cultural ties.

The Indian courts generally ascertain the child's wishes and opinion in such disputes if the child is mature enough to form an opinion. However, where an eight-year-old boy appeared to have been brainwashed by the taking mother against the left-behind

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56 *Id.* at 19, ¶ 33.

57 Sethi v. Bhaskar, 2022 SCC Online 143, at 11 (India), http://indiankanoon.org/doc/107349125/.

58 *Bhattacharya,* 2021 SCC Online SC 928, at 1.

59 *Sahu,* AIR 2020 (SC) 577, at 9, ¶ 29; Mogal v. Joshi, 2023 BHC AS 27116-DB at 25, ¶ 58 (India), https://indiankanoon.org/doc/20082980/.

father, the court did not hold that factor against the father and the child was ordered to be returned to the United States.[60] In a very recent case, an Indian court refused to order a nine-year-old child's return to Germany, while placing significant weight on his opinion that he wished to continue to live with the taking father (in Thailand), while noting that the child was brilliant, "with an high intelligent quotient and capable of exercising options wisely."[61]

Left-behind parent's cooperation in facilitating the taking parent's return

In ordering the return of a child, Indian courts often consider whether the left-behind parent is willing to accommodate the taking parent's needs and requirements in maintaining future contact with the child once the child is returned to his or her home country. Although it is not the sole consideration, Indian courts may be more inclined to order a return where the left-behind parent offers substantial access and visitation rights to the taking parent. In most cases where the Indian court ordered the return of the child, the left-behind parent made significant offers as to (a) bearing traveling expenses and making living arrangements for the taking parent, should he or she decide to return permanently to the home country of the child, (b) bearing the cost of travel and lodging arrangements for the taking parent if he or she decides to stay back in India (e.g., during school holidays), (c) the frequency of such visits, and (d) facilitating regular video conferencing, etc. between the child and the taking parent. The courts, in such cases, have often given special consideration to the fact that the left-behind parent is willing to request the appropriate U.S. authorities to drop the warrants (if any) against the taking parent. Where the left-behind parent has given an undertaking that he would not pursue any criminal charges against the mother for violating the U.S. court order, such a factor has been duly considered by the Indian courts.[62] Thus, as the Indian courts have repeatedly pointed out, in matters of international parental child removal to India, the

60 *Bandi*, 15 SCC 790, at 15.

61 Pradhan v. State of Karnataka, 2023 W.P.H.C No.79/2023 at 10, ¶ 25 (India), http://indiankanoon.org/doc/168486202/.

62 *Chandran*, 1 SCC 174, at 17, ¶ 26(iii).

bedrock principle is just one: the "best interests and welfare of the child." There is no exact science or applicable formula to conclude such cases. The Indian courts must conduct a fact-based analysis of each case and attach a certain weight to each additional factor while considering the above principle.

6. *Potential challenges for the left-behind parent*

Uncertainty of the outcome

One of the biggest challenges faced by a parent whose child has been taken to India is the concern of not knowing how to proceed in such a situation, accompanied by a fear of not being able to see his or her child again. Unlike a Hague abduction case, which is usually under a mandate to be resolved within six weeks of initiation, international custody disputes in India can be drawn out for years through appeals and other delaying tactics. While recommending that India sign the Hague Convention, the Indian Law Commission categorically noted this issue that there is an apparent lack of "uniform pattern" and "absence of progressive development" in the cases pertaining to minor children's custody.[63] According to the Commission Report, while some decisions were rendered by placing prime importance on the "welfare of the child," others were based on mere "technicalities of various provisions of law and jurisdictional tiffs."[64] The reason behind this divergence, the Report noted, "can be the absence of law that governs this aspect."[65] As the multiple cases discussed above indicate, no single factor is dispositive to the outcome.

Left-behind parent's dilemma whether to secure a U.S. custody order first or to directly approach the Indian court

Since a foreign custody order is, at best, only one of the factors to be considered by the Indian courts, a left-behind parent might wonder if it is it even worth securing it before initiating a writ petition in India. An existing foreign custody order appears to be particularly relevant when the taking parent initiated (and

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63 Law Commission of India, *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)* at 10 (2009), http://indiankanoon.org/doc/175662555/.

64 *Id.* at 11.

65 *Id*.

participated in) the foreign custody case. However, as pointed out earlier, in a very recent case, even despite such details, the concerned High Court did not order the child's return.[66]

Initiating a criminal complaint against the taking parent

Another question is whether the left-behind parent should initiate a criminal complaint against the taking parent. International Parental Kidnapping is a federal crime in the United States.[67] Therefore, the left-behind parent may (at the advice of counsel) or by himself initiate a criminal complaint against the taking parent once the child has been taken to India without his consent. However, there is no such offense as international parental kidnapping in India. Thus, the Indian courts may be cautious about ordering the taking parent to return the child to the United States because the taking parent may be arrested upon her return to the United States. This further deters the taking parent from coming back to the United States. Thus, the left-behind parent might be better off not initiating a criminal complaint against the taking parent.

Initiation of regular custody proceedings by the taking parent in India

As discussed in the following section, the Indian equivalent for the U.S. "home state" jurisdiction is "ordinary residence." However, one of the main differences between the two is the lack of a residency requirement under the concept of ordinary residence. As explained below, the length of stay is immaterial when considering the ordinary residence of the child; what matters is the parent's intention to make India his or her permanent abode. Thus, if the taking parent can initiate a regular custody case before the left-behind parent initiates a writ petition, it might prevent the left-behind parent from successfully initiating a writ proceeding in India.[68]

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66 *See Surya Vadanan v. State of Tamil Nadu,* (2015) 5 SCC 450 (India).

67 International Parental Kidnapping Act, 18 U.S.C. § 1204.

68 *See supra* discussion in text at notes 42-43. *See also Vandanan,* 5 SCC 450.

B. *Child Removal from India to the United States*

1. *Overview of the general process to secure the child's return to India*

When the taking parent removes a child from India to the United States, the left-behind parent in India has the following options:

a) To initiate a child custody petition under the Indian Guardians Act, seek an order for the return of the child, and then have that order enforced under the UCCJEA in the concerned state in the United States; or

b) To directly approach the concerned U.S. court under its "temporary emergency jurisdiction" and seek an order for temporary sole physical and legal custody of the child and his return to India; or

c) To avoid any delay, implement the above measures simultaneously.

2. *Securing an Indian custody order*

Ordinary residence: In India, child custody disputes are primarily governed by the Indian Guardians Act. Under this Act, the jurisdiction of the court is based on the concept of the "ordinary residence" of the child. This Act provides that the district court under whose jurisdiction "the minor ordinarily resides" is the appropriate jurisdictional forum for custody disputes.[69] There is, thus, a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court[70] on the one hand and a court under the Guardian and Wards Act on the other.[71]

Meaning of "ordinary residence": The term "ordinary residence" is not defined in the Indian Guardians Act. Thus, the meaning of this term is often derived from precedent-based law.

The Indian Supreme Court has held that the term "resides" implies something more than a "flying visit to" or casual stay at a particular place.[72] A person resides in a place if he, through choice, makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case.[73]

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69 Indian Guardians Act, *supra* note 23, § 9(1).

70 Where, as discussed earlier, the child's physical presence within the court's territorial jurisdiction is sufficient to confer jurisdiction.

71 *Majoo,* 6 SCC 479, at 15.

72 Kaur v. Singh, AIR 1963 SC 1521, at 5 (India), http://indiankanoon.org/doc/1126923/.

73 *Id.*

Thus, the question of ordinary residence of a child may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted, it can never be a pure question of law, capable of being answered without an inquiry into the factual aspects of the controversy.[74]

The purpose of residence, not the length, is relevant: While interpreting the term "ordinary residence," the Supreme Court of India relied on an English case,[75] which held that the question of ordinariness does not depend so much on the length of stay as it does on the genuine intention of living somewhere permanently.[76]

Effect of consenting to the child living in India: The Indian Supreme Court in *Majoo v. Majoo,* dealt with the interpretation of the term "ordinary residence," especially in the context of an international child custody dispute. In this case, the parties and their child visited India for a short trip from the State of California. However, owing to the father's past behavior and ongoing misconduct towards the mother, she informed him of her decision not to return to the United States and to continue to stay in India with their child. The father consented to this decision and returned to California alone. However, he changed his mind after a month of his return and initiated a divorce and custody case in California.

Throughout the various stages of this case, the mother's position before the Indian courts was that the father's consent to her decision to stay back in India with the child shifted the child's ordinary residence from California to Delhi. On the other hand, the father alleged that his consent was not given voluntarily and was a result of "duress and coercion."

The mother placed extensive evidence on record to show the father's free consent about the mother's decision to stay back in India with the child. The evidence included a consent letter from the father, where he gave his "whole-hearted support"[77] to the mother in her decision to stay back before leaving India. The mother also produced several emails from the father (after he left India), where he supported and seemingly assisted the mother

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74 *Majoo,* 6 SCC 479, at 15.

75 Cicutti v. Suffolk Cnty. Council, [1981] 1 W.L.R. 558 (England), http://uniset.ca/microstates/barnet.html.

76 Nayar v. Union of India, 2006 (7) SCC 1 (India), https://indiankanoon.org/doc/1903935/.

77 *Majoo*, 6 SCC 479, at 8.

with her move. These emails included their exchange regarding suggestions from the father concerning the child's school in India, leasing the mother's car in the United States, and the father's discussions with their common friends about the mother's decision to stay in India. Strangely, the father refused to produce any counterevidence to support his claim of duress, coercion, or threat in giving his consent.

Thus, in the light of the father's unsubstantiated claims of involuntary consent, the Supreme Court of India decided in favor of the mother, holding that the child was "ordinarily resident" in New Delhi, India, and the Guardians Court in New Delhi had the child custody jurisdiction.

Effect of acquiescence to a foreign court's jurisdiction: In *Malhotra v. Malhotra*,[78] the mother took her three children from India to New Zealand (apparently without the father's consent). She then initiated custody proceedings in New Zealand, and the father fully participated. The New Zealand court issued a consent agreement, requiring the mother to send the children to India for periodic visits. Accordingly, the mother sent the children to India to visit their father. However, on or about their scheduled return date, the father initiated a guardianship proceeding in India seeking custody of two of the three children. In this case, the mother successfully challenged the jurisdiction of the Guardianship Court. The primary reason for her success was that the Indian court found that the father had expressly acquiesced to the jurisdiction of the New Zealand court, according to which he had signed a consent custody agreement, thus making New Zealand (not India) the ordinary residence of the children.[79]

Governing standard: As mentioned previously, in India, the governing standard for custody cases, whether it is a writ petition or a regular custody case, is the best interests and welfare of the child.[80]

Temporary custody order: Where the child has been removed from India to the United States without the left-behind parent's consent, a temporary custody order can be sought from the concerned Guardians Court requiring the taking parent to return

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78 Malhotra v. Malhotra, Gujarat High Court, Spec. App. No. 523 of 2012, https://indiankanoon.org/doc/55356958/.

79 *Id.* at 25.

80 *Raghavan,* 8 SCC 454, at 12.

the child to India.[81] The left-behind parent can then approach the concerned U.S. court with such an order to enforce it.

3. *Enforcement of a foreign custody order pursuant to the UCCJEA (and exceptions)*

The U.S. Department of State authoritatively reports[82] that:

> The UCCJEA requires State courts to recognize and enforce custody determinations made by foreign courts under factual circumstances that substantially conform with the UCCJEA's jurisdictional standards and to defer to foreign courts as if they were State courts.[83] However, State courts need not apply the Act (i.e., enforce a foreign court order or defer to a foreign court's jurisdiction) if the child-custody law of the foreign country violates fundamental principles of human rights.[84]

In addition, some U.S. States require that to enforce a foreign custody order, the custody decisions in the foreign country must be based on the "evaluation of the best interests of the child."[85]

The UCCJEA provides expedited enforcement procedures for enforcement of a foreign custody order.[86] Additional procedures are in place to register such custody orders before enforcement.

4. *Securing a temporary emergency custody order in the United States*

In Part III.A.3 this article discussed basic details regarding a U.S. court's temporary emergency custody.[87] It must be noted that either parent can invoke the temporary emergency jurisdiction.

Initiation of the temporary emergency custody proceedings by the left-behind parent: Where the left-behind parent in India has initiated regular custody proceedings in India but is somehow unable to secure an Indian custody order promptly, he can directly approach the concerned U.S. court and seek the child's return. In such cases, the left-behind parent must inform the U.S. court that he has initiated regular custody proceedings in India (even

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81 Indian Guardians Act, *supra* note 23, § 12(1).
82 Hoff, *supra* note 17, at 5.
83 UCCJEA, § 105 (International Application of [Act]).
84 Hoff, *supra* note 17, at 5
85 N.J. UCCJEA, § 2A:34-57 (C).
86 N.Y. Dom. Rel. Law § 75-g.
87 *See supra* section III.A.3.

if he does not have an order yet). If no proceedings have been commenced in India, the U.S. temporary emergency custody order may become a final determination (if the order so provides) when the issuing U.S. State becomes the child's home State[88] (i.e., in six months).[89]

Initiation of the temporary emergency custody proceedings by the taking parent: Alternatively, and usually, it is the taking parent who invokes the emergency jurisdiction of the concerned U.S. court almost as soon as landing in the United States, and as a part of that proceeding explains the circumstances that would help the U.S. court determine if the child (his parent or sibling) is subject to abuse. In this case, if the custody proceedings are ongoing in India, as discussed previously, the U.S. court may still issue temporary emergency orders concerning the child's custody. Still, it would be required to judicially communicate with the Indian court to resolve the emergency.[90]

Where custody proceedings are pending in India, the U.S. emergency custody order must specify an adequate period within which the person seeking emergency relief (whether it is the taking parent or the left-behind parent) may obtain a custody order from the Indian court. However, if no custody proceedings are pending in India, then the U.S. court's order may become final in six months.

5. *Potential challenges for the left-behind parent*

a. Delay in securing a final Indian custody order

As discussed in the previous section, the query regarding the ordinary residence of a child is highly fact-intensive. Thus, it can be expected that the taking parent will produce a hoard of facts that challenge the ordinary residence jurisdiction of the Indian Guardian Court. This may delay the trial or prevent the left-behind parent from securing an Indian custody order, which he may then enforce in the United States.

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88 For instance, in New York, the home state is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." N.Y. Dom. Rel. Law § 75-a(7).

89 Hoff, *supra* note 17, at 6.

90 *Id.*

b. Abuse of the Indian appellate system by the taking parent

If the left-behind parent does secure a favorable Indian custody order, the taking parent may prefer to appeal it. Such an order can be appealed in the concerned State High Court.[91] A High Court's order may then be appealed before the Indian Supreme Court. Thus, it may be several years before a final order is issued concerning the child's custody, and the child may have become fully settled in the United States by then. Therefore, understandably, at such time, the U.S. court may be reluctant to uproot the child from his current settings and order his return.

It is also important to note that, according to the U.S. State Department's website, a custody order is required to use the UCCJEA's expedited enforcement procedures.[92]

c. Refusal of the U.S. court to enforce the Indian order

Section III.B.3 discussed the requirements under the UCCJEA to enforce a foreign custody order and the applicable exceptions. Although, once secured, there are limited defenses that apply to the enforcement of such an order. Nevertheless, in some instances, even if the left-behind parent can secure a return order from the Indian court, a U.S. court need not accept it if any of the defenses apply.

d. Refusal of the U.S. court to exercise its temporary emergency jurisdiction on behalf of the left-behind parent

Even though the left-behind parent in India might directly approach the U.S. court in the hope of a faster resolution, it is not certain that the U.S. court will agree to exercise its temporary emergency jurisdiction. The U.S. courts exercise their temporary emergency jurisdiction sparingly and only under extraordinary circumstances.[93] Thus, in a case where the mother had unilaterally

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91 Indian Guardians Act, *supra* note 23, § 47.

92 U.S. Dep't of State, *Getting Your Custody Order Recognized & Enforced in the U.S.*, Oct. 8, 2023, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/getting-custody-order-enforced-in-US.html.

93 Saavedra v. Schmidt, 96 S.W.3d 533, 545 (Tex. App. 2002) (no pet.); *In re* Marriage of Lai, 333 S.W.3d 645, 649–50 (Tex. App. 2009) (orig. proceeding).

removed the child from India to Texas, the Court of Appeals of Texas overruled the emergency jurisdiction order passed by the Texas district court, which required the return of the child to India.[94] The Court of Appeals held that the mother's move with the child from India to Texas without the father's knowledge or consent did not constitute "mistreatment" or "abuse," supporting the exercise of temporary emergency jurisdiction. In this case, the mother had tendered evidence of the father's alcohol addiction and verbal and physical abuse of the mother (sometimes in the child's presence). On the other hand, the father did not produce any evidence to suggest that the mother had ever abandoned, mistreated, abused the child, or threatened to do so. In fact, the father testified that the mother had never been physically violent with the child and was a good parent.

Thus, it appears (especially) in the case of a non-Hague country like India that notwithstanding the allegations against the taking parent, where the child was removed from India without the consent or knowledge of the left-behind parent, the U.S. courts may refuse to assume temporary emergency jurisdiction, if there is no evidence to prove that the child is being mistreated, abused, or threatened with any immediate harm.

e. Taking parent invokes the temporary emergency jurisdiction of the concerned U.S. court

On the other hand, the taking parent can file for temporary emergency custody of the child almost as soon as she lands in the United States with the child. Since the taking parent has already taken the drastic measure of unilaterally removing the child from her home country, she is generally prepared to raise all possible arguments against the left-behind parent. In other words, the taking parent will approach the concerned U.S. court with all kinds of evidence supporting her position that the child's removal was done to avoid immediate harm to the child by the left-behind parent.

f. No defined residency requirements under the Indian Guardians Act

Another potential issue, briefly touched upon earlier, is that, unlike the UCCJEA, the Indian Guardians Act does not

94 *In re* S.J., 522 S.W.3d 576 (Tex. App. 2017).

provide a defined "residency requirement" (e.g., six consecutive months immediately before the commencement of a child custody proceeding). Thus, "home state" (i.e., the ordinary residence) jurisdiction may be established in India almost instantly, depending on the other supporting facts. This might cause confusion, and it is possible that the U.S. court may be cautious about enforcing the Indian court order if the taking parent can convince the U.S. court that her stay in India was merely a "holiday" or a "flying visit," and thus, India lacked the equivalent of the "home state" jurisdiction.

g. Immigration challenges

It may be the case that the left-behind parent in India does not have a valid visa to travel immediately to the United States at the time of the child's removal. Due to COVID-related backlogs, it could take months (if not more) for someone to secure even a mere tourist visa to countries like the United States. The length of stay of the parent in the United States could be another cause of concern for the left-behind parent, since the permissible period of stay as a tourist in the United States is usually restricted to six months. Some true emergency measures could be implemented but are generally available only for a limited period and limited purposes. The criteria to be granted such an emergency visa are limited to only a few categories (e.g., death/funeral, medical needs, urgent business travel, or for studies), and an international child custody dispute does not seem to fall under those criteria.[95]

IV. The Hague Convention

A. *General Overview*

The Hague Convention aims to protect children from the harmful effects of their international removal (or retention). The Convention seeks to achieve this goal by establishing a legal procedure (a "shared civil remedy" among partner countries) for promptly returning internationally abducted children to their country of habitual residence. In doing so, the Convention thwarts

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95 U.S. Embassy and Consulates in India, *How to Request an Expedited Appointment,* Nov. 9, 2023, https://in.usembassy.gov/visas/#:~:text=How%20to%20Request%20an%20Expedited,to%20request%20an%20expedited%20appointment.

any attempts at forum shopping by the taking parent without the knowledge or consent of the left-behind parent.

The Perez-Vera Report, which is generally considered the official commentary of the Convention, states that the situations envisioned by the Convention are those that derive from the use of force to establish artificial jurisdictional links on an international level to obtain custody of a child. The idea behind the Convention is *not* to settle a child custody dispute.[96] The Convention merely backs the notion that child custody matters should be decided by the court in the country of the child's habitual residence.[97] In fact, it is only after the child's return to its habitual residence that questions of custody rights will arise before the competent tribunals.[98] This principle applies as much to removal that occurred before any custody decision was taken by the competent court in the child's country of habitual residence as it does to removal in breach of a pre-existing custody decision.[99]

More than one hundred countries have signed the Hague Convention. As mentioned earlier, India is not one of those countries.

B. *Applicable Standard in a Hague Return Case in the United States*

Unlike a regular custody case, in the United States, the standard for determining a child's "habitual residence" in a Hague case is "totality-of-the-circumstances."[100]

C. *India's Refusal to Sign the Hague Convention*

India has refused to sign the Hague Convention primarily because it is India's position that the "concept of habitual residence is not synchronous with the [Indian standard of the] best interest of

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96 Elisa Pérez-Vera, *Explanatory Report by Elisa Pérez-Vera, the Hague Conference Permanent Bureau* at 3, ¶ 11, Euromed Justice III Project (2012), http://www.euromed-justice-iii.eu/document/hcch-1981-explanatory-report-elisa-perez-vera-hague-conference-permanent-bureau.

97 *Id.* at 3, ¶ 9.

98 *Id.* at 4, ¶ 16.

99 *Id.* at 5, ¶ 19.

100 Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).

the child."[101] Although the Hague Convention became effective in the early 1980s, India did not take its first official stand until 2009, when the Law Commission of India issued its 218th report titled, *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)* (the "Report"),[102] advising the government of India to sign the Hague Convention. In the Report, the Law Commission noted that international parental child abduction is "an interference with the parental rights."[103] Such acts by parents create a "considerable amount of confusion," specifically concerning the competence of courts with regard to jurisdictional aspects of cases.[104] The Report highlighted the fact that India not being a signatory to the Hague Convention may have a negative influence on a foreign judge who is deciding on the custody of a child because without the guarantee that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to permit the child to travel to India.[105]

The Report discussed several Indian judgments concerning international child custody disputes with varying outcomes and stated that there is an apparent lack of "uniform pattern" and "absence of progressive development" in the cases of minor children's custody.[106] According to the Report, while some decisions were rendered by placing prime importance on the "welfare of the child," others were based on mere "technicalities of various provisions of law and jurisdictional tiffs."[107] The reason behind this divergence, the Report noted, "can be the absence of any law that governs this aspect."[108] Such an approach that is mired by lack of uniformity could affect a child both physically and emotionally, the Report stated.

However, no substantial steps were taken until seven years after the Report. In 2016, the Indian authorities seemingly amped up their efforts to devise a solution concerning the menace of international child abduction in India. Ever since then, various authorities

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101 Rajesh Bindal, *Report of Justice Rajesh Bindal Committee to Examine The Civil Aspects of International Child Abduction Bill, 2016, and The Protection of Children (Inter-Country Removal and Retention) Bill, 2016* 190 (India), https://cja.gov.in/Articles/Volume%20I%20HMJ%20Rajesh%20Bindal.pdf.

102 Law Commission of India, *supra* note 63.

103 *Id.* at 4.

104 *Id.*

105 *Id.*

106 *Id.* at 10.

107 *Id.* at 11.

108 *Id*.

have drafted several (unpassed) bills concerning India's stand on international child abduction:

In early 2016, the Ministry of Women and Child Development (the "MoWCD") drafted a Bill on the Civil Aspects of International Child Abduction,[109] purporting to sign the Convention.

On October 17, 2016, the Law Commission of India submitted its 263rd Report,[110] which contained another draft bill titled The Protection of Children (Inter-Country Removal and Retention) Bill, 2016. Once again, the Law Commission recommended that India should sign the Convention.

In 2017, the MoWCD formed a Committee (the "Committee") to study the previous draft bills and develop a mechanism to address the difficulties the parents embroiled in international child abduction disputes faced. In April 2018, the Committee submitted its final report[111] to the Ministry, acknowledging the Convention's "noble intent" yet not recommending that India sign it.

The Committee submitted another draft piece of legislation titled The Protection of Children (Inter-Country Removal and Retention) Bill, 2018.[112] The Committee also proposed that an "Inter Country Parental Child Removal Disputes Resolution Authority" (the "Proposed Authority") must be established to provide a "one-window solution" in cases of inter-country removal and retention of children.[113]

Additionally, the Committee stressed mediation to resolve such conflicts.[114] According to the Committee's recommendations, a Mediation Cell was established in 2018[115] by the National Commission for the Protection of Child Rights to mediate international custody disputes.

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109 Ministry of Women and Child Development, *The Civil Aspects of International Child Abduction Bill* (2016) (India), https://wcd.nic.in/sites/default/files/Draft_Implemnting_Legislation_Hague_Convention_0.pdf.

110 Law Commission of India, *The Protection of Children (Inter-Country Removal and Retention) Bill*, Report No. 263 (2016) (India), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081679.pdf.

111 Bindal, *supra* note 101.

112 *Id.* at 205.

113 *Id.* at 192.

114 *Id.* at 193-94.

115 U.S. Dep't of State, *Annual Report on International Child Abduction* 29 (2023), https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Annual%20Report-fv.pdf.

However, it has been five years since those recommendations. The Proposed Bill has yet to be signed, the Proposed Authority has yet to come into existence, and the Mediation Cell has yet to resolve any abduction cases (at least between[116] the United States and India). Meanwhile, matters concerning international child removal to (and from) India are rising.

D. *U.S. Efforts to Encourage India to Sign the Hague Convention*

The United States has tried to encourage India to accede to the Convention for years. Under the auspices of the International Child Abduction Prevention and Return Act (ICAPRA),[117] the U.S. Department of State is required to (a) submit an Annual Report on International Child Abduction to Congress by April 30 and (b) submit a subsequent report to the U.S. Congress on the actions taken towards those countries determined to have been engaged in a pattern of noncompliance.

In its Annual Report on International Child Abduction, 2023,[118] (the "Annual Report") the U.S. Department of State (as it has in the past) listed India as one of the "Countries Demonstrating a Pattern of Noncompliance" concerning any protocols regarding international parental child abduction.

While noting that some abduction cases were resolved by the Indian courts in 2022, the Annual Report categorically stressed that the "lack of clear, viable legal options for addressing international parental child abduction cases"[119] under Indian law continued to make it difficult for India to resolve such cases[120] (a sentiment that was very clearly reflected in the Indian Law Commission's 218th Report).

The U.S. State Department then issued its Action Report on International Child Abduction, 2023 (the "Action Report"),[121]

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116 *Id.*

117 In the United States, ICAPRA is intended to ensure compliance with the Convention, to establish procedures for the prompt return of abducted children, and for other purposes.

118 U.S. Dep't of State, *supra* note 115, at 29.

119 *Id.* at 30.

120 *Id*.

121 U.S. Dep't of State, Action Report on International Child Abduction 16 (2023), https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Action%20Report.pdf.

where, once again, India has been declared by the State Department to be non-compliant with the Convention every year for the past eight years.

The Action Report details the steps the U.S. State Department took to resolve the pending parental child abduction cases between India and the United States and persuade India to accede to the Convention. It further highlights the fact that despite conducting bilateral meetings, issuing several diplomatic notes, calling for a "high-level" consular dialogue, holding discussions with Indian judges, Indian judicial leaders, government officials, and child advocates, and delivering a Demarche, India continues to demonstrate a pattern of non-compliance with the Convention.[122] And these steps have yet to yield any positive results.

V. Is It Time for India to Sign the Hague Convention?

A. *Comparison of the Writ of Habeas Corpus and the Hague Defenses*

1. *Purpose of a writ of habeas corpus v. purpose of a Hague case*

As noted earlier, the purpose of the Hague Convention is not to settle custody disputes. Interestingly, the Indian Supreme Court, while dealing with the maintainability of a writ of habeas corpus in a child custody case, held that "Habeas corpus proceedings [are] not to justify or examine the legality of the custody. Habeas corpus proceedings are a medium through which the custody of the child is addressed to the discretion of the court."[123]

2. *Applicable factors in a writ of habeas corpus v. Hague defenses*

Although India has not signed the Convention, over the last couple of decades, it has developed a list of applicable factors in cases seeking the return of a child to her home country from India. These factors were discussed in Section III.A.5. of this article. It is *critical* to note that

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122 *Id.* at 16-18.

123 *Gaud,* 7 SCC 42, at 7, ¶18.

the various factors applied by the Indian courts are significantly similar to the defenses available under the Convention, discussed below.

Article 13 of the Convention lists the circumstances under which a State is not bound to order the child's return. The interpretation of the exceptions provided in Article 13 may vary from country to country. As far as the United States is concerned, a court may deny the return of an abducted child if:

> (a) there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; (b) the child objects to being returned and has attained an age and degree of maturity at which the court can take account of the child's views; (c) more than one year has passed since the wrongful removal or retention occurred, and the child has become settled in his or her new environment; (d) the party seeking return consented to or subsequently acquiesced to the child's removal or retention; (e) the return would violate the fundamental principles of human rights and fundamental freedoms in the country where the child is being held; and (e) the party seeking return was not actually exercising rights of custody at the time of the wrongful removal or retention.[124]

Thus, in a Hague return case in the United States, if the taking parent is able to prove by "clear and convincing"[125] evidence that there is a grave risk that return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation, then that parent may have the defense of grave risk of harm.[126] A finding of grave risk of harm essentially means that returning the child to the country of his habitual residence would exposes him to "situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of

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124 U.S. Dep't. of State, *Important Features of the Hague Abduction Convention - Why the Hague Convention Matters* (Oct. 8, 2023), https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html#:~:text=The%20purposes%20of%20the%20Convention,of%20access%20to%20a%20child.

125 22 U.S.C. § 9003(e)(2)(A).

126 *See*, e.g., Deborah Reece, *Exposure to Family Violence in Hague Child Abduction Cases*, 36 Emory Int'l L. Rev. 81 (2022); Stephen J. Reen II, Note, *The Tightrope of Article 13(b): Judicial Interpretation of the Hague Abduction Convention's "Grave Risk of Harm" Exception in the United States and Canada,* 32 Ind. Int'l & Comp. L. Rev. 131, 132 (2022); Andrew A. Zashin*, Domestic Violence by Proxy: A Framework for Considering a Child's Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13(b) Grave Risk of Harm Cases Post* Monasky, 33 J. Am. Acad. Matrim. Law. 571 (2021).

repatriation."[127] Similarly, in India, the courts have declined to order the return of a child to her home country, where serious allegations of abuse (e.g., severe alcohol addiction,[128] sex addiction, and adulterous behavior[129]) were leveled against the left-behind parent.

The child's objection to returning to the country of her habitual residence is also a defense in a Hague case if the child has attained an age and degree of maturity at which the court can consider the child's views.[130] Similarly, Indian courts generally ascertain the child's wishes and opinion in such disputes if the child is mature enough to form an opinion.[131]

It is a Hague defense where more than one year has passed since the wrongful removal or retention of the child; similarly "prompt action"[132] of the left-behind parent is a heavy weighing factor in a writ of habeas corpus in India.

Where the party seeking return consented to (or subsequently acquiesced) to the child's removal or retention, that behavior amounts to a defense in a Hague return case. Similar requirements of consent[133] and subsequent acquiescence[134] have been discussed in the Indian context previously.

Where the party seeking return was not actually exercising rights of custody at the time of the wrongful removal, that can amount to a defense in a Hague return case. Similarly, where the left-behind parent was not able to show any special bond with the child or was only interested in the child's return to the United States, even if the child was in the sole custody of the mother, Indian courts have refused to order the child's return.[135]

3. *No need for an actual custody order (unlike the UCCJEA)*

As discussed, an actual foreign custody order is required to use the UCCJEA's expedited enforcement procedures.[136] However, no

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127 Blondin v. Dubois, 238 F.3d 153, at 162 (2d Cir. 2001).

128 *Sharma,* 3 SCC 14, at 4, ¶ 6.

129 *Majoo,* 6 SCC 479, at 15.

130 *See* U.S. Dep't. of State, *supra* note 124.

131 *Bhattacharya,* SCC Online SC 928, at 1; *Sahu,* (SC) 577, at 9, ¶ 29; *Mogal*, BHC AS 27116-DB at 25, ¶ 58.

132 *See* III.A.5.

133 *Majoo,* 6 SCC 479.

134 *Malhotra,* Spec. Appeal No. 523 of 2012.

135 *Majoo,* 6 SCC 479, at 15.

136 *See supra* note 86.

custody order is necessary to initiate a Hague case or to establish that the left-behind parent had existing rights of custody.

Therefore, if India were to sign the Hague Convention, the left-behind parent in India would have the simple option of initiating a Hague case instead of taking several long steps to successfully secure and enforce an Indian custody order in the United States.

B. *A Narrow Focus on Domestic Violence and Unfair Presumptions Based on Gender*

It appears that India has chosen not to sign the Convention due to its desire to help women of Indian origin who face domestic violence while residing in foreign countries by being able to provide these women with the option to return to their home country.[137] Despite the noble intention behind this decision, there may be a better approach to this issue.

It is true that domestic and gender-based violence are critical concerns, but these issues are not exclusive to India. These phenomena are a global menace, and most of the Hague countries, including the United States, have effective measures in place to address this issue. A victim of domestic violence has the right to file a civil complaint,[138] as well as a criminal complaint against the abuser. Additionally, the victim can also seek an order of protection. "An order of protection is issued by the court to limit the behavior of someone who harms or threatens to harm another person. It is used to address safety issues, including domestic violence."[139] To protect the victim, a judge can issue an order that prohibits the defendant from threatening or harassing the victim, the victim's family, or anyone else specifically listed in the order. This order may also require the defendant to stay away from the victim, have no contact with the victim, vacate the victim's residence, comply with custody orders, and pay child support, among other things.[140] Another similar term for such an order is a temporary restraining order (TRO) which

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137 Bindal, *supra* note 101, at 152.

138 *Domestic Violence*, N.J. Dep't of Law & Pub. Safety, https://www.nj.gov/njsp/division/operations/domestic-violence-info.shtml (last visited Nov. 15, 2023).

139 *Domestic Violence Order of Protection Basics,* NY Courts, https://nycourts.gov/CourtHelp/Safety/OP.shtml (last visited Nov. 15, 2023).

140 *Id.*

may be obtained on similar grounds as an order of protection.[141] Within ten days of the TRO the court will schedule a hearing and both the victim and the abuser will have a chance to testify, and the judge will then consider both testimonies before issuing a final restraining order.[142] It is important to know that there are domestic violence hotlines and domestic violence programs available in most states to assist victims of domestic violence free of charge. These services are available to everyone regardless of gender identity, age, race, ethnicity, religious beliefs, ability level, or immigration status. Some agencies listed on the State websites have staff or volunteers who can speak multiple languages and can offer assistance in the language of the victim.

The victim can also file for separation or divorce. If there is credible evidence of severe abuse, especially directed towards the child or towards the victim in the presence of the child, victims could seek sole legal and physical custody of the child. In addition, they may seek the court's permission for international child relocation.[143]

The standard of review in relocation cases is the best interests of the child.[144] In such an analysis, several factors come into play when the court is faced with a motion to relocate, which include: (1) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the non-relocating parent; (2) The reasonable likelihood that the relocation will enhance the general quality of life for both the child and the parent seeking the relocation, including, but not limited to, economic and emotional benefits, and educational opportunities.; (3) The probable impact that the relocation will have on the child's physical, educational, and emotional development. Any special needs of the child should also be taken into account in considering this factor; (4) The feasibility of preserving the relationship between the non-relocating parent and child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties; (5) The existence of extended family

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141 *See Domestic Violence*, *supra* note 138.

142 *Id.*

143 *See, e.g.,* Merle H. Weiner, *You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence,* 28 UCLA Women's L.J. 223 (2021).

144 DePrete v. DePrete, 44 A.3d 1260, 1271 (R.I. 2012).

or other support systems available to the child in both locations; (6) Each parent's reasons for seeking or opposing the relocation; (7) In cases of international relocation, the question of whether the country to which the child is to be relocated is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction will be an important consideration; (8) To the extent that they may be relevant to a relocation inquiry, the *Pettinato v. Pettinato* factors[145] also will be significant.[146] However, no single factor is dispositive of an outcome.[147]

> In geographic relocation cases where the relocation will substantially affect the visitation rights of the noncustodial parent, a presumption arises that " 'such relocation is not in the child's best interest' " (Matter of Atkinson v. Atkinson, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, quoting Hathaway v. Hathaway, 175 A.D.2d 336, 337, 572 N.Y.S.2d 92). The relocating parent must rebut such presumption by a *showing of compelling or exceptional circumstances.*[148]

Here the wife's relocation to Puerto Rico from the state of New York was held in the child's best interest because the father abused alcohol and marijuana and subjected the mother to "continued domestic violence."[149] Furthermore, the father was unemployed and testified that if he were granted the custody, he would support the child "through food stamps and Medicaid in addition to his unemployment allowance."[150] The mother in this case was employed in Puerto Rico and was going to live in her father's house free of charge. The court thus held that such compelling or exceptional circumstances, including domestic

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145 1. The wishes of the child's parent or parents regarding the child's custody. 2. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. 3. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings, and any other person who may significantly affect the child's best interest. 4. The child's adjustment to the child's home, school, and community. 5. The mental and physical health of all individuals involved. 6. The stability of the child's home environment. 7. The moral fitness of the child's parents. 8. The willingness and ability of each parent to facilitate a close and continuous parent-child relationship between the child and the other parent. Pettinato v. Pettinato, 582 A.2d 909, 913-14 (R.I. 1990).

146 Ainsworth v. Ainsworth, 186 A.3d 1074, 1082 (R.I. 2018).

147 *Id.*

148 Sheridan v. Sheridan, 204 A.D.2d 771, at 773 (N.Y. App. Div. 1994) (emphasis added).

149 *Id.* at 772.

150 *Id.*

violence and economic necessity, made the child's relocation to Puerto Rico permissible, even if that would deprive the father of regular and meaningful access to the child.

In another matter, where the wife sought to relocate with her child to Australia from the state of Arkansas, after getting divorced from her husband due to his alcohol problems, temper, and violence, the Arkansas Court of Appeals held that the trial court's decision to allow the ex-wife to relocate to Australia with the child was not clearly erroneous.[151] The wife provided substantial evidence by having several friends testify to the fact that the husband had alcohol and temper-related issues. She also informed the court that she felt that the child was in an unsafe environment in the husband's house in Arkansas. In allowing her to relocate to Australia with the child, the court also considered factors such as the wife's Australian citizenship, her minimal ties to Arkansas, the fact that she had a job in Australia, that she owned real and personal property in Australia, and that the child was too young to express a preference.

Moreover, identifying domestic violence as the sole or primary reason for international parental child abduction is correct. As reported by the Library of Congress:

> [A]dvocates for signing the Convention and passing an Indian anti-child-abduction bill maintained in the run-up to the government's decision that Indian policy makers were focusing too narrowly on the issue of "Indian women being abused," instead of accepting that there are numerous reasons why parents abduct their children, and experts consider child abduction to be child abuse with long-lasting traumatic effects.[152]

The notion that domestic violence is not the primary reason for international child abduction is further supported by the Canadian Center for Child Protection which provides that,

> A parent may make the decision to abduct their child(ren) for a number of reasons, including: Disagreement with a court decision about custody, Fear for the child(ren)'s safety, Desire to control or seek revenge against the other parent, Disregard for authority, Mental illness, Paranoia about the other parent.[153]

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151 Rawe v. Rawe, 264 S.W.3d 549 (Ark. Ct. App. 2007).

152 Barry Lerner, *India: Decision Not to Sign Hague Treaty on Child Abduction*, Libr. of Cong. (Jan. 23, 2017), https://www.loc.gov/item/global-legal-monitor/2017-01-23/india-decision-not-to-sign-hague-treaty-on-child-abduction/.

153 Canadian Centre for Child Protection Inc., *Domestic Violence and the Fear of Parental Abduction*, (2019), https://missingkids.ca/pdfs/MK_DomesticViolenceParentalAbduction_en.pdf.

C. *Overwhelming Changes in Socio-Economic Status and Immigration Statistics Concerning Indian Immigrants*

It is important to consider the sea change in immigration and socio-economic statistics of Indian immigrants in countries such as the United States. The reported number of Indian immigrants in the United States has risen from a mere 206,000 (in the 1980s) to a staggering 2,709,000 (as of 2021).[154]

Today, Indians have much higher incomes than the total foreign- and native-born populations.[155] Thus, most Indian couples have the money and resources to seek the help they need if they decide to separate, but some choose not to.

Most of the immigrant couples make a well-planned and well-researched move to countries like the United States in search of greener pastures. They plan their families accordingly, and it is often on their agenda to give birth to and raise their child in America. When things get rough (as in many international marriages), one of the parents simply (perhaps in the heat of the moment) decides to take off with the child to their home country. However, in doing so, they choose not to pursue the available legal options and decide to take matters into their own hands.

There is a limited section of illegal immigrants who first try to obtain asylum in countries like the United States by painting a very radical picture of the Indian government, and then once they find it challenging to continue staying in the United States, they rush back to India and convey an equally untrue picture of lack of assistance from the "foreign authorities" in the United States and the unsympathetic attitude of foreign courts towards the Indian taking parent.

D. *The Burden on the Indian Judiciary*

It is important to mention the burden that unresolved (yet avoidable) custody disputes put on an already overburdened Indian judiciary. Once the taking parent is in India, it is difficult to predict how the situation might unfold. However, it is common for false cases to be filed under the infamous Section 498-A of the Indian Penal Code[156] or for made-up domestic violence charges to

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154 Hoffman, *supra* note 3.

155 *Id*.

156 Indian Penal Code (the "IPC"), § 498-A, https://indiankanoon.org/doc/538436/.

be brought forward. While dealing with a false case initiated under Section 498A of the IPC, the Indian Supreme Court observed as follows:

> There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. *The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives.* The simplest way to harass is to get the husband and his relatives arrested under this provision.[157]

In some cases, the outdated petition for the restitution of conjugal rights is initiated.

Very recently, the Indian Law Minister reported to the Indian parliament that the backlog of cases in India has crossed the fifty million mark, with 50,039,981 cases pending before Indian courts, the highest number in any country worldwide.[158]

The National Judicial Data Grid (NJDG) in India is a government-funded database of pending cases in India. It is updated on a near real-time basis and provides information relating to judicial proceedings and decisions of the Indian Supreme Court, all the High Courts, and all the computerized district and subordinate courts of the country.

The NJDG's data establishes that as of August 4, 2023, about 44 million cases (44,407,204 cases) were pending before the lower-level (first instance) courts in India.[159] Out of these 44 million, almost 28 million cases (i.e., 28,420,0510) have been pending for more than a year.[160]

If India were to sign the Hague Convention, it would provide both parents with a clear and structured path to follow in case of an international child abduction to (or from) India. The taking

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157 Kumar v. State of Bihar, (2014) 8 SCC 273, at 1, ¶ 6 (India), https://indiankanoon.org/doc/2982624/ (emphasis added).

158 *Cases Pending in Courts Cross Rs 5 Crore Mark: Law Minister in Rajya Sabha,* India Today (July 21, 2023), https://www.indiatoday.in/law/story/cases-pending-in-courts-cross-rs-5-crore-mark-law-minister-in-rajya-sabha-2409541-2023-07-21.

159 The National Judicial Data Grid (NJDG), *Pending Dashboard* (Oct. 8, 2023) (India), https://doj.gov.in/the-national-judicial-data-grid-njdg/.

160 *Id.*

parent would have an opportunity to oppose the return of the child by establishing one of the legal defenses[161] provided under the Convention. On the other hand, the left-behind parent would feel assured that the system is fair, as opposed to the current structure where there is no defined legal recourse available for them. As a result, the left-behind parent often feels helpless and takes any and every step that might prove beneficial in exerting some kind of pressure against the other parent. The taking parent, on the other hand, ends up engaging in all the steps she feels necessary to prevent the left-behind parent from seeking the child's return. This puts an additional burden of disingenuous and spiteful cases on an already overburdened judicial system.

E. *Possible Future Difficulties for the Indian Taking Parent*

When a child has been unilaterally removed by the taking parent, the left-behind parent can seek a temporary custody order requiring the child's return from India to the country of his habitual residence. If the taking parent still defies such an order, he can be held in contempt, possibly leading to an imprisonment order.

Furthermore, as far as the United States is concerned, the offense of international parental kidnapping is a felony punishable by imprisonment of up to three years and a substantial fine.[162] In addition, an Interpol "red notice" may be issued against the taking parent, and should he try to travel internationally again, he may be arrested in a foreign country (other than the United States) and then extradited to the United States.

VI. Conclusion

Indian emigrants not only settle in the United States. but also in other top destination countries, including the United Kingdom, New Zealand, Australia, and Canada. It is noteworthy that all these countries have signed the Hague Convention.

By choosing not to sign the Convention, India seems to be avoiding the problem. However, this could lead to significant issues in the future.

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161 Hague Convention, *supra* note 1, art. 13.

162 U.S. International Parental Kidnapping Act, 18 U.S.C.A. § 1204 (a).

Since India is the world's fifth-largest economy and is projected to become the second-largest by 2075, it is crucial to address the issue of international parental child abduction. With Indians increasingly moving in and out of the country, this problem cannot be ignored.

While signing the Hague Convention may not entirely solve the various problems resulting from international child abduction, it is certainly a step in the right direction. And, once India embarks on this journey, there is always room for improvement.