

***PARENTAL ABDUCTION IN INDIA- A DRAFT CRIME***

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**Abstract:**

*Usually, cross-border parental abduction occurs when couples who are in failed matrimonial relationships cannot settle over the issue of child custody and one spouse retains the child in some other territorial jurisdiction without the consent of the other parent. Unlike in typical child abduction cases where the lawful guardians are not aware of the location of the missing child, in parental abduction cases an abducted child need not be missing. In fact, in most of the parental abduction cases, a child might be unlawfully removed from the custody of her lawful guardians, but her whereabouts would be known to them. For example, a non-custodial parent can take the child to his house without the consent of the custodial parent and simply refuse to return the child. The Hague Convention of 25 October 1980 recognizes parental child abduction as a crime and seeks to protect children from abduction and retention across international boundaries. India, at present is not a signatory of The Hague Convention. The 218<sup>th</sup> Law Commission of India, however suggested India to accede to the provisions of The Hague Convention and become its signatory. This article analyses the offence of parental abduction and the absence of laws in the Indian legal arena regarding the issue. This article also reviews the Law Commission of India Reports and its suggestions regarding India joining The Hague Convention, draft legislation in India for the criminalization of parental abduction and the need for formulation of internal legislation regarding parental abduction in the country.*

*Keywords: Parental Abduction, Hague Convention, Absence of Legislations, 218<sup>TH</sup> Law Commission Report, Draft Legislation.*

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### **Parental Abduction- An Introduction to the Crime:**

An individual is said to be guilty of cross border parental abduction when he or she unilaterally and often maliciously takes their child across international borders and retains them there. The fear of losing one's child forever, dissatisfaction with custodial orders pronounced by the court, exacting revenge on one's partner or protecting the interests of the child are some of the most common motives behind parental abduction. No matter the intention of the parent behind the abduction, a parent does often end up harming the child emotionally by committing an act like abduction.

Parents who are citizens of other countries and have strong ties with their country of origin are potential abductors. The risk is intensified during a chaotic separation or divorce as the parent might find solace in their cultural roots after being discarded by their partner and returning back to their country of origin at the time of marital discord helps them reinstall their faith in themselves and their lives. Parents often take refuge in countries that are not signatories to The Hague Convention, 1980. This deprives the child from the company of the other parent and possibly cuts off the other parent from the life of the child forever.

Abduction by one of the parents is a recognized crime across countries. Neither does India recognize parental abduction as a crime nor has India acceded to the provisions of The Hague Convention. However, in the case of *Vahin Saxena and Another vs. State of UP and Another* (Habeas Corpus Writ Petition Number 467 of 2021), it was held that a writ of habeas corpus is entertainable where it is established that detention by parent is illegal and without authority of law. Further, in the case of *Yashita Sahu vs. State of Rajasthan* (CRIMINAL APPEAL NO. 127 OF 2020), it was directed by the Rajasthan High Court that the mother must return with the minor child to her husband's house in USA. The Supreme Court confirmed the direction given by the Rajasthan High Court.

Even though India has made progress in the field of child rights the courts still believe that parents know the best for their child and law must intervene only when absolutely necessary. This notion interferes with the growth of law and protects parents violating court orders and rules. By becoming a signatory to The Hague Convention and introducing a set of legislation

recognizing and penalizing parental abduction India wont only ensure the smooth execution of custody orders but also protect children from emotional trauma and make the already hostile divorce and custody proceedings somewhat more amicable.

### **Legal Provisions That Recognize Parental Abduction as a Crime:**

#### HAGUE CONVENTION

The Hague Abduction Convention is an international convention which protects children from international abduction by one of the parents. This convention ensures an easy return of the abducted child to her country of habitual residence. Many countries have acceded to the provisions of this convention. According to this convention, a child must be less than sixteen years old and must be residing in a convention country on a habitual basis immediately before the breach of custody rights. Main idea behind the formulation of this treaty is that in matters of custody, the competent court's decision must be ultimate and must be adhered to. It provides a shared civil remedy to the residents of member countries.

#### Important features of The Hague Convention are:

- A return of the child can only be arranged if the country to which the child has been abducted to is also a signatory to The Hague Convention.
- Countries that have acceded to The Hague Convention have an obligation of establishing a central authority that the parents can contact during instances of parental abduction. The Central Authority must help locate the abducted child and help provide amicable solutions to parental abduction cases.
- Documents submitted to the Central Authority can be admissible in courts of partner countries.
- A custodial order is not a necessary document that must be presented by the aggrieved parent. Rather the courts would consider factors such as the child's habitual resident, the parent usually catering to her needs etc.
- While deciding upon the matter of the return of the child to her country of residence, the immigration status of neither the parents or the child must be playing an important factor. Rather, the welfare of the child must be given primary importance.

- Hague convention is more child centric and less parent centric.

### 218<sup>TH</sup> LAW COMMISSION OF INDIA REPORT

In the year 2006, the Indian Government constituted the 218<sup>th</sup> Law Commission for a period of three years. The Commission, in its report emphasized on the change brought in the society with the advent of globalization and increasing trend of internationalism. The commission firmly believed that in order to ensure overall development the Indian legal system must change according to the needs of the society. India should recognize the fact that parental abduction is an instance which can and does occur and even parents can be classified as potential abductors in certain situations.

The Law Commission recognized the ambiguity faced by the Indian Courts when they had to adjudicate on matters where a child was removed from the custody of the lawful guardian by one of her parents. Different international jurisdictions further complicate matters for the involved courts. The Law Commission also recognized the dilemma faced by foreign judges who adjudicate on such matters. Such judges may be reluctant to allow the child to return to India as India has not acceded to The Hague Convention. This often acts against the interests of justice.

Hence, the Law Commission strongly suggested India to become a signatory to The Hague Convention.

### DRAFT CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL,2016

This bill has been proposed by the Union Government. This bill considers the removal or retention of children across international border. If this bill transforms into a full-fledged act, it would ensure that India becomes a signatory to The Hague Convention. This draft bill recognizes wrongful retention of a child across borders a crime. This bill also contains provisions which facilitate a prompt return of children to their country of habitual residence. This bill ensures that children who have been wrongfully retained in some other country after a breach of the lawful custody order are not subjected to further

mental torture and are returned to surroundings familiar to them. The bill also provided for the creation of a central authority that would regulate these cases.

### 263<sup>rd</sup> LAW COMMISSION REPORT

In the case of Seema Kapoor vs Deepak Kapoor (CR No 6449 of 2006), the High Court of Punjab and Haryana had referred certain matters to the Law Commission of India for further deliberation. As a result of that, in its 263<sup>rd</sup> report, the Law Commission examined various legal issues concerning cross border child abduction and retention. In addition to reiterating the recommendation of the 218<sup>th</sup> Law Commission Report that suggested India to accede to The Hague Convention, the 263<sup>rd</sup> Report also found that India already has a draft bill which addresses all the civil aspects of cross border child abduction. According to the commissions, certain additions to the bill were required before enforcing it. A jail term extending up to a year was suggested by the commission if a person was found guilty of wrongful retaining of a child from the custody of a lawful guardian. It also suggested a three-month imprisonment term for misrepresentation and concealment of facts. It recommended the draft bill to be enforced with the two changes. The Commission in its report also recognized the adverse effects of domestic violence on a psyche's and how no child must be subjected to it.

### **Countries That Recognize Parental Abduction as a Crime and What India Can Take Away from Those Countries:**

#### AUSTRALIA

Parental Child Abduction is a recognized crime under the Family Law Act of the country. After certain amendments in the year 2018, it was ensured that a parent guilty of abduction a maximum penalty of three years would be imposed. Abducting a child can also amount to kidnapping under the law. Under the law, the Federal Police can monitor telephonic activity, bank account activities and co-ordinate with overseas police to find the abducted child. In a similar fashion, India can criminalize parental abduction and empower its law enforcement agencies to co-operate with international police in order to find the abducted child.

### UNITED STATES OF AMERICA

United States of America is also a signatory to The Hague Convention. International parental abduction of American children has been reported world over. As those victims have been suddenly isolated from surroundings familiar to them and have been shifted to completely different environments, the mental health of the child is affected. The United States has legal procedures in place to extract children retained cross-border.

With an increase in globalization and liquidation of boundaries, a number of couples are settling abroad. It is a very common instance for an unhappy non-custodial parent to deprive the custodial parent of his rights by taking the child to their native country. The worst sufferers in such cases are the abducted children. By enacting a similar legal procedure in India, we will certainly ensure that guilty parents are recognized as guilty in the eyes of law and the mental and emotional well-being of the child is secured.

### UNITED KINGDOM

The Child Abduction Act brought into force in the year 1984 recognizes parental abduction as a crime. According to this act, the crime of parental abduction is recognized in the eyes of law. According to the provisions laid down under the act, a parent or guardian who removes a child from the custody of the lawful guardian and takes them outside the United Kingdom for more than twenty-eight days, they are said to be guilty of committing an act of cross border child abduction.

A similar legislation when enacted in India would not only recognize the crime of parental abduction but also penalize it. It would act as a deterrent for parents thinking of committing a crime as grave as abduction.

### **Conclusion:**

Revenge, disagreement with present custodial orders and safeguarding the interests of the child are some of the most common motives behind parental abduction. No matter the motive of the parent, the person tormented the most in an abduction case is the child.

Being removed from the habitual country of residence, changing multiple locations in a short span of time and being deprived of the care of the custodial parent are just some of the troubles faced by the abducted child. The mental health of the child is hugely affected and she might never see her other parent again until she becomes an adult depriving her of her right to the company and care of both parents.

The Hague Convention recognizes the mental trauma a child has to undergo when she is abducted by one of her parents. This convention ensures a safe and easy transfer of the abducted child to the country in which she habitually resides. Hague Convention has 101 member countries; Guyana and Barbados being the latest countries to join the convention.

Two Law Commission Reports have in very clear terms suggested that India should accede to the terms of Hague Convention. In addition to those reports, India has a draft bill in place that recognizes and penalizes the crime. By enforcing the bill as an act and becoming a signatory to The Hague Convention India would ensure that parental abduction is recognized as a crime, defaulting parents would be punished and children's mental wellbeing would be safeguarded.