

Interjurisdictional Parental Kidnapping

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A substantial number of Indians reside and work abroad. Owing to matrimonial disputes, one spouse may decide to return to India when both spouses are abroad, or may choose not to return abroad when one spouse is already in India, taking the child without the consent or knowledge of the other spouse. Such situation often led to criminal complaints for kidnapping against the spouse who takes the child away from the other. This research paper examines the issues of intercountry parental kidnapping of child under private international law. In Addition, this paper deals with the definition of Kidnapping under the Indian Criminal Law, parental kidnapping, child custody, Jurisdiction in conflict, remedies available under the Indian laws, and how the Indian Courts deals with these issues in view of best interest of the child. Finally, I argue that the kidnapping a child by a parent would not be construed as an offence under the Indian Criminal Law.

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Introduction

A child, being inherently innocent and more vulnerable, is dependent on their parents or Guardians for care, love, protection, and emotional support. However, in some cases, the parents who need to protect the child's well-being may inadvertently become a source of distress. Due to matrimonial discord, a child who should be expressing affection toward both parents may instead develop fear, anxiety or emotional insecurity as a result of the conflict between the parents. Generally, when disputes arise between spouses, one of the most contentious issues is who has to take custody of the child. This custodial battle can sometimes extend to the unlawful removal or

kidnapping of the child by a parent. This article examines the issues of kidnapping of the child by a parent in view of Private International Law and the remedy available under the Indian Law.

Kidnapping: Definition

Kidnapping[1] is of two kinds: kidnapping from India, and kidnapping from lawful guardianship;

- a. whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from India;
- b. whoever takes or entices any child below

the age of eighteen years or any person with mental illness, out of the keeping of the lawful guardian of such child or person with mental illness, without the consent of such guardian, is said to kidnap such child or person from lawful guardianship.

Parental Kidnapping

Where the child was taken by one of the spouses without the permission of the other spouse due to marital discord or due to domestic violence, from one country to another such as from a foreign jurisdiction to India or vice versa. This issue is frequently framed as parental child abduction or kidnapping. In such cases, the court typically addresses the matters not only as removal or retention of the child by one parent without the consent of the other, but also as a custody dispute.

Parental Kidnapping and Child Custody

Kidnapping of the child and the custody of the child are closely interconnected, as custody disputes often serve as the underlying cause for one parent unlawfully removing or retaining the child without the consent of the other. Such acts are frequently rooted in unresolved matrimonial conflicts and may be intended to gain a strategic advantage in ongoing or anticipated custody proceedings.

Jurisdiction in conflict

When a child is born to parents who is/are Non-Resident Indian (NRI), the custody of the child often becomes complex, due to distinct jurisdiction and the laws in conflict. It is common for one parent to initiate custody proceedings before a court in their country while the other parent simultaneously approaches a court in a different jurisdiction, such as India. As a result, the custody issue may be adjudicated in two different legal jurisdictions, potentially leading to contradictory judgments. This situation gives rise to conflict of laws in matters of child custody, particularly with respect to the recognition and enforcement of foreign custody orders and vice versa.

Custody-an emotional trauma

In most cases, the parent who genuinely loves and cares for the child seeks custody out of concern for the child's well-being. However, there are some

instances where the custody of the child is not sought primarily for the welfare of the child, but rather as a strategic tool in matrimonial litigation. For example, a mother who has custody of the child may, (i) claim higher alimony or maintenance, (ii) avoid attending regular hearings in a distant court by citing caretaking responsibilities and (iii) seek the transfer of legal proceedings to her local jurisdiction on the ground of long duration and inconvenience and child health and care. Similarly, a father in custody may (i) attempt to reduce or contest maintenance claims, (ii) seek transfer or oppose a transfer petition. In such cases, the child may be used whether consciously or unconsciously as both a shield and a weapon in the legal battle between the parents.

Ultimately, it is the child who suffers most in the matrimonial disputes, often becoming the unintended victim of prolonged litigation and parental conflict. In matrimonial conflicts, the child often becomes the silent victim. Caught between the emotional struggles, egos, and competing claims of both parents, the child is frequently left feeling isolated and confused, and emotionally overwhelmed. They may be unable to understand where they truly belong or who genuinely cares for their well-being.

If a child is taken from India by a spouse, what should be done?

- register the complaint at the local police station.
- approach the Mediation Cell, the National Commission for Protection of Child Rights (NCPCR)
- approach the Child Welfare Division, Ministry of Women and Child Development
- file a case for the Custody of a Child in India

- ake a complaint to the Embassy of the country where the child has been taken
- ile a case against the spouse where the child has been taken
- ile a Habeas Corpus Petition before the High Court or Supreme Court in India

Is kidnapping a child by a parent from the custody of their spouse an offence?

Ordinarily, when a father or mother takes away a child from the custody of the other parent, it does not constitute the offence of kidnapping under the Indian Criminal Law. However, such an act may amount to kidnapping if it is done in violation of a valid custody or guardianship order.

Both the father and the mother are recognized as the natural and lawful guardians of their child under the Indian Law. As such, each parent holds equal legal and natural rights to the custody and care of the child.

As contemplated in Section 6 of the Hindu Minority and Guardianship Act, 1956, the father is a natural guardian, after him, the mother. Section 4(2) of the Guardians and Wards Act, 1890 defines 'guardian' means a person having the care of the person of a minor or of his property, or of both is person and the property.

Sections 359, 360, and 361 of the Indian Penal Code, 1860, and its corresponding provisions of section 137 of Bharatiya Nyaya Sanhita, 2023, deal with the offense of kidnapping a child from lawful guardianship and punishment for it. Furthermore, it explains that the word '*lawful guardian*' includes any person lawfully entrusted with the care or custody of such child or other person. The provisions have an exception that the act of any person who in good faith believes himself to be the father of an illegitimate child below the age of eighteen years, or who in good faith, believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Therefore, the act of a parent taking away their own

child does not, by itself, constitute a criminal offence as both parents are considered natural and lawful guardians unless contrary to a court order.

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Complaint for the kidnapping

When one of the parents unilaterally takes the child without the consent or knowledge of the other spouse, particularly due to matrimonial distress, the parent who lost custody of the child lodges a complaint at the local police station alleging kidnapping by the other parent. Although the Indian Criminal Law provides that 'the act of any person who, in good faith, believes himself to be entitled to the lawful custody of such child' does not amount to kidnapping.

However, in practice, the cases are frequently registered against a parent who takes the child from the custody of the other parent. This often occurs even in the absence of a custody order or specific injunction, due to a gap between the substantive law and its procedural law. Conversely, when the police receive a complaint that a child is missing or has been taken by regardless of by whom, they are legally bound to register a First Information Report (FIR) under the section 154 of the Code of Criminal Procedure which mandates the registration of an FIR upon receipt of information disclosing the commission of a cognizable offence and initiate an investigation under 157 of Code of Criminal Procedure, 1973.

But sometimes, the FIR is registered with the intention to harass the other spouse, and legal proceedings are initiated with an ulterior motive. The misuse of criminal law in family and matrimonial matters has been consistently criticized by the Supreme Court^[2] which has emphasized the need to prevent the criminal justice system from being used as a tool of harassment in domestic disputes.

Courts on Parental Kidnapping

The Court in India routinely addresses the matrimonial dispute through a mediation-oriented approach, taking into account the well-

being of the parties and, most importantly, the paramount interest of the child. Especially, in cases involving the custody of a minor child, the predominant criterion is the best interest and welfare of the child. Generally, the court often interacts directly with the child to give preference to and ascertain their wishes, which are given due weight in the decision-making process. After exhaustively examining all relevant factors and every possible way, the court issues an appropriate order to grant or transfer the custody.

In an instance, the US-born 7-year-old child was abducted by his mother from New York to India in 2007, violating the local court orders. The Supreme Court directed the CBI to find and produce the child before it. These kinds of cases have been reported in the NCPCR.

The Supreme Court has quashed the FIR filed against the father for taking away his minor son from the Mother's custody. During the hearing, Justices UU Lalit, Ravinda Bhat and Sudhanshu Dhulia criticized the lodging of FIR in such cases and asked,

"In a matter like this why should there be FIR and criminal charges? You will be actually putting burden on your normal criminal courts. What kind of FIR is this? The Father has taken the custody of the child. Therefore, he is supposed to be guilty of what? We'll quash the FIR on the condition that he will take care of the child, whatever is supposed to be the financial expenditure for school education, the father will take care."[3]

In *Kushagra vs. State of Karnataka*[4], the High Court emphasizes that *"10. The father of a child will not come within the scope of section 361 IPC. Even if he takes away the child from the custody of the mother. She may be lawful guardian as against any other except the father or any other person who has been appointed as a legal guardian by virtue of an order of the competent court. So long as there is no divestment of rights of guardianship of the father, he cannot be held guilty of the offence under section 361 IPC."*

In *Shri. Ashish vs. State of Maharashtra*[5] *"12. In case at hand, the applicant is a natural guardian. Moreover, he is a lawful guardian too along with the mother, therefore, in absence of any prohibition by the order of the competent Court, the applicant father cannot be booked for taking away his own minor child from the custody of his mother."*

The High Court of Delhi[6] observed in *Kiran Lohia vs. State and Ors.* that the respondent cannot avail the benefit of the exception to section 361 of IPC as he is taking custody of the Baby contrary to the express orders of the court, and the act of taking Baby outside India without consent of mother also attracts the offence of kidnapping under section 361 IPC. Further held that the submission that a biological parent can never kidnap his/her own child or that a writ of habeas corpus is not maintainable against a biological parent is untenable in law. The Court formed the Joint Committee and directed it to take steps to produce the minor baby before this court.

parens patriae

The Courts in India constantly strive to ensure the welfare of the child. The judiciary exercises its *parens patriae* jurisdiction to act as a guardian for those unable to protect themselves, particularly children, persons with mental illness, and persons with disabilities, in order to safeguard their well-being and overall welfare.

The Supreme Court[7] held that *parens patriae* refers to *"the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection"*.

In *Roxann Sharma vs. Arun Sharma*[8], the Supreme Court has held that *"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's*

crossing the age of five years.”

Habeas Corpus

One of the primary legal remedies available to a parent seeking directions for finding and securing the return of a child taken by the other parent without the consent is the filing of a Writ of habeas corpus before the High Court under Article 226 or the Supreme Court under 32 of the Constitution of India, 1950. This remedy serves as an expeditious judicial mechanism to secure the custody of the child.

It is a well-settled principle of law that a writ of habeas corpus is maintainable even against a biological parent. In cases where the custody of a child is removed from a foreign country and brought to India, or vice versa, the parent who lost the custody can approach either the High Court or the Supreme Court. In several decisions, the Supreme Court has not only entertained the habeas corpus petitions under Article 32 but has also under Article 136, examined the correctness of the orders passed by the High Courts in exercise of jurisdiction under Article 226 of the Constitution of India, particularly on the question of custody of the child.

In *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*[9], the court has held that “*Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise, a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.*”

Contempt of courts

Consistently, the High Courts and the Supreme

Court have served as productive platforms and effective forums for the protection and enforcement of children’s rights in matters involving intercountry jurisdiction. At the same time, the courts never hesitate to recall and set aside their order if it has been obtained through fraud or has not been duly complied with, and to initiate contempt proceedings.

In the instance case, the court granted the custody of the child to the father and directed him to obtain a mirror order from the competent court in Nairobi. This direction aimed to protect the interests of the child in transit from one jurisdiction to another, and also to safeguard the interests of the parent who is losing custody. However, it was later revealed that the custody order had been obtained by false and fraudulent representation. Consequently, the court recalled its earlier custody order and held the father in contempt of court.[10]

NCPCR

Another legal mechanism available to address such cases is the Mediation Cell established in the National Commission for Protection of Child Rights (NCPCR).

As directed by the Central Government, the National Commission for Protection of Child Rights (NCPCR) has constituted a Mediation Cell to resolve the cases of children who were taken away by one of the spouses without permission of the other spouse due to marital discord or due to domestic violence from Overseas countries to India or vice versa. The mediation process is expected to be completed within six months, following which the Mediation cell will furnish a report to the Integrated Nodal Agency (INA). Based on this report, INA will issue a speaking order. This process is intended to complement the formal legal procedure and shall not be construed as a substitute for a judicial proceeding.

Hague Convention

India is not a signatory to the Hague Convention on the Civil Aspects of

International Child Abduction, 1980, which seeks to protect children from the harmful effects of abduction and retention across international boundaries, and provides a procedure to bring about children's prompt return. According to this convention, the removal or retention of a child by a parent, without the consent of the other parent, is considered a wrongful act. If India accedes to this convention, it would be obligated to facilitate the prompt return of the child to another signatory country from India and vice versa. Signing in this Convention would enable India to secure the return of the child taken out of India to another country. Conversely, India is bound to return the child who has been brought into India, against the will of the parent who actually resides in India.

Currently, there is no specific legislation in India addressing issues related to abduction of children from and into India. However, the Law Commission of India had submitted the 218th Report titled "Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction, 1980" on 30th March, 2009. In view of this report, the Ministry of Women and Child Development prepared a draft Bill titled "The Civil Aspects of International Child Abduction Bill, 2016.[11] Despite several discussions and recommendations, the Bill has not yet been enacted into law.

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Conclusion

Kidnapping a child by a parent happens because of a stronger bond and attachment with the child. The spouse in marital strife has no option except to hold the child as a source of love and affection and a medicine for their loneliness and depression. More so, they believe that they can alone provide care, love and affection for their child, and they are not ready to entrust their child with anyone, not even to their spouse. At times, it occurs to prevent the child from experiencing the harassment they encountered. Sometimes, it happens out of fear that the child may be removed from their custody. Overall, the intention behind the kidnapping of a child by a parent is care, affection, and a desire to ensure the safety and well-being of the child. Although these issues carry serious legal and emotional consequences for both the child and the parents involved, in resolving such cases, the courts invariably prioritize the best interests of the child, equally safeguarding the custody and visitation rights of both parents in a balanced manner. As a result, a parent taking their own child does not by itself constitute the offence of kidnapping under Indian criminal law, unless the act involves harassment, inflicts harm on the child, or violates a court order.