Submissions to the Committee on the Hague Convention on the Civil Aspects of International Child Abduction.

By Lawyers Collective and Suranya Aiyar

We urge the Government not to sign the Hague Convention on Civil Aspects of International (hereafter, 'Hague Convention') for the reasons set out below.

Fleeing parent is not an "abductor"

The terminology of the Convention is highly offensive, labeling the removal of children from a country by their own parents as "abduction". This misrepresents the situation when a parent (usually the mother) leaves a country with their children following divorce or separation from the other parent. The taking parent in most cases moves to another country to either protect themselves, the child, or both. The Law Commission Report No. 263 on The Protection of Children (Inter-Country Removal and Retention) Bill, 2016 acknowledges that the parents act in the best interest of the child, and they leave with the child out of over-whelming love for it, and not to harm the child. This is the reality in which India is being asked under the Hague Convention to forcibly remove children from their Indian parent and family, to deport them to foreign-domiciled parents, or even to foreign orphanages, or child protection agencies (cf. Article 8 of the Hague Convention, giving "any person, institution or other body" the right to claim a child in a member country.).

We should not stigmatize parents coming to India with their own children as "abductors". Under the Indian law, it has been well established that parents are the natural guardians of their children, so there is no question of treating them as "abductors" under Indian law.

The Hague Convention Comes Down Heavily on Abandoned and Abused Mothers

We urge the Committee to be sensitive to the plight of many mothers who flee to India with their children. Often they are either abandoned or have faced domestic violence. The Convention shows no recognition of the role played by domestic violence in compelling a mother to go back to her country of origin. The Convention will have the effect of pushing woman back into a violent relationship in a foreign land in pursuit of their children. Many countries, including Japan, have shown awareness of domestic violence while signing the Hague Convention by making exceptions in case of woman facing domestic violence in the country form which they have fled.

The Hague Convention Ignores the Best Interests of the Child

Under the Convention, the fate of the child hinges on the place where it was 'habitually resident' before it was brought to India. But this fails to take into account the needs and best interests of the child. A child's security, happiness and welfare, are not determined by the place of its residence. A child is happy anywhere with a well-loved parent. The question, from the point of view of the best interests of the child, is not where it reside, but who has been the primary care giver, and to whom it is attached.

For a newborn or baby of age one or two years, the concept of habitual residence is even more meaningless. A week-old infant may have technically spent its entire life in a particular country, but that is hardly relevant to the question of where it should be.

Many anomalous situations arise if we adopt this notion of 'habitual residence' as being decisive in inter-parental custody disputes. Suppose a woman is forced to stay in a foreign country under court injunctions while her divorce case is on-going, and she gives birth to a child in that period, is it fair of the law to consider that child as habitually resident there? Suppose the custodial parent becomes incapacitated for some reason from taking care of the child, is the other parent going to be denied custody merely owing to the child having been habitually resident elsewhere?

If a child has been detained by a foreign child protection agency under orders contested by the parents (as we are seeing in a number of cases involving NRI families, especially in Norway and the USA), is such child to be deported to the foreign agency away from its kith and kin in India?

Article 1 of the Hague Convention states as its sole objective is the "prompt return" of children. But, in the context to children taken from a foreign country by their parents, this heartless promptness may not be in the best interests of the child in every situation.

No recognition of Domestic Violence

According to the Law Commission report on Protection of Children (Inter- country Removal and Retention) Bill 2016, 68% of the cases filed in India were women and in 85% of the cases the women were the prime caregivers. A woman facing domestic violence is forced to escape to her country of origin. The Hague Convention if implemented will push that woman back to the environment of abuse she escaped if she wants to stay close to her child.

An Indian mother who went to a foreign country after marriage, or has spent only a few years there, may not have the network of her natal relatives and friends to set up life there by herself once the marriage has ended. She may not easily find

employment there. So it is understandable that a mother in this situation may want to return to India, especially if the children are young. Those favoring signing the Hague Convention say that such mothers may find support from NGOs and women's support networks there. But while this may be helpful in emergency situations, it is not practical for a woman to plan long-term residence in a foreign country solely on this basis.

The Civil aspects of International Child Abduction, 2016 (the Bill) also shows no recognition of the role played by domestic violence in a woman getting back to her country of origin.

The women of developing countries may rely on their spouses financially and on finding themselves abandoned leave for their country of origin. It has to be noted that the taking parent does not leave to a place of hiding but to a place of her family and acceptance.

Foreign courts and governmental authorities are biased against awarding custody to Indian parents, or to parents wishing to return to India.

The Hague Convention presumes that all jurisdictions are equal when it comes to deciding custodial rights, but the experience of Indians in first world countries reveals deep prejudice against Indian parents. Indian-resident parents less likely to be granted custodial rights by courts of countries such as the USA and Norway, which are largely ignorant of India, except as a third-world country that any child would be lucky to escape. A recent study by Suranya Aiyar, submitted in August 2017 to the Ministry of External Affairs reveals that the United States is routinely removing Indian children from *both* Indian parents on spurious allegations of abuse. While child abuse is not a phenomenon to be ignored, laws authorizing social welfare agencies to remove children from their own parents have been heavily criticized in the USA and elsewhere as being a remedy worse than the problem.

Most of the families affected in the USA are young IT professionals, newly arrived with infants and toddlers to the US on work visas. In almost each case, parents are proving themselves innocent, but not until the children have spent months, even years, in foster care with total strangers. Indian parents give heartrending accounts of their children unable to eat, sleep. or even communicate with anyone in alien foster homes. Though international law permits repatriation of such children to their relatives in India while the parents prove their innocence in the US system, the child protection agencies obstruct and delay such repatriation. In some cases, repatriation has been obstructed even when the US courts have permitted it.

Norway is another country notorious for unjustifiably snatching the children of immigrants. Suranya Aiyar has worked with dozens of Indian, Romanian, Polish, Lithuanian, American and native Norwegian families whose children have been

wrongfully taken by its child welfare agency, Barnevernet. There have been well-known cases where Barnevernet makes culturally biased assessments of the family based on things like hand-feeding, or sleeping in the same bed with the child, or parents being "too religious". The threshold for child removal is so low, that families are now leaving Norway once Barnevernet come knocking on the door. It is just not safe to stay on, as the system does not give parents a fair hearing, especially immigrant parents. Last year, Norway signed the Hague Convention and the Norwegian child welfare agencies are threatening to use its provisions to re-capture children who leave Norway with their parents. We cannot allow a situation in India where foreign child welfare agencies would be enabled to force the deportation of children from India. Unfortunately, there are huge incentives for child welfare agencies in these foreign countries to have children in care and placed with foster carers or put up for adoption. In Norway fostering is considered a way of earning money. In all these countries there is a growing demand for children to adopt owing to declining birth rates. The Committee and the Indian Government must bear these dynamics in mind in order to properly understand how the Hague Convention will be used, not just in interparental disputes but also against both parents by foreign child protection agencies. This agenda of the Hague Convention is clear from Article 8, which is not restricted to custody clams by parents bellows custody claims to be made not just by a parent, but by "any person, institution or other body". This gives the rights to paid foster carers and foreign child protection agencies to make claims on Indian children.

Hague Convention Allows Custodial Claims Without Any Judicial Order

Section 3 of the International Child Abduction Bill proposed by the Ministry of Women and Child Development recognizes custodial rights based on not just judicial orders in a contracting state, but also under any administrative order or by "operation of law" of the foreign country; and Section 19 says that the High Court can rely on this statement of law without recourse to the usual procedures for the proof of foreign law in India. Section 19 of the Bill is derived from Article 14 of the Hague Convention which says that in making decisions in a custody claim, "the requested State may take notice directly of the law of the State of the claimant party "without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions that would otherwise be applicable."

This means that the foreign party does not even have to produce a court order to establish its right to custody. The foreign party can simply give its own interpretation of the foreign law claiming this entitles it to custody, and the Central Authority, or High Court has to act upon that.

If such laws were to be passed in India, it would amount to complete abdication of responsibility towards Indian children by the Indian Government. Let alone sending

children to a foreign parent without proper custodial, this would not even protect them from being trafficked by fraudsters and criminals.

International pressure to sign the Convention

The Hague Convention appears to be a Global North construct. It also does not take into account that the child may find in the country of origin of the taking parent a loving and caring environment as well, as opposed to an abusive, violent household in a developed country. The lobbying to sign the Convention arises mainly from countries such as the USA, which has several affluent Non-resident Families which have become dysfunctional due to domestic abuse.

In the case of Japan, one of the largest countries in Asia based on its GDP, resisted signing the convention till as recently as 2013. The domestic courts in Japan are obliged to consider whether the abuse toward the parents who abduct their children could psychologically harm them upon being returned to their habitual residence. Japan has shown awareness of domestic violence while signing the Hague Convention through the Act on Implementation of Convention on the Civil Aspects of International Child Abduction (the Implementation Act) but the Indian Bill as no such clause to protect India from children being taken away to the country where the mother fled from violence.

Under the Civil Aspects of International Child Abduction Bill, 2016 as proposed by the Ministry of Women and Child Development, no judicial consideration is required before taking the serious step of sending a child away from the Indian to the foreign parent. Instead of courts, we are to have a Joint-Secretary-level government official acting as the "Central Authority" making this decision. The Central Authority has all the power of a civil court to locate and seize the child using the police, and (under Section 5(b)) to take over its custody pending deportation to the United States. It can do so without even so much as a warrant or show cause notice from a judge. It is not required to hear the Indian parent.

Under Chapter V of the Bill, the Central Authority may approach the High Court for deportation of the Indian child. This part of the Bill, places some limits on the High Court's powers. For instance, deportation is not to be ordered if the child has settled into his home in India, or such deportation would place the child in an intolerable. But the High Court's jurisdiction is said to be "without prejudice" to the Central Authority's powers. This is a mere formality as the High Court , can be circumvented if the Central Authority acts in exercise of its own powers (under Chapter III) and the Court will await the decision of the Authority before taking any decision and will be influenced by the decision.

There is also no provision for the Indian parent to approach the High Court under this Bill. Only the Central Authority may do so, and, the High Court, under Section 16(5),

can ignore the decision of any other Indian court regarding the child's custody. This means that even if the Indian parent were to obtain a judicial order in India, granting him custody of the child, the High Court can ignore that decision on being petitioned by the Central Authority!

No reciprocal rights are given to Indian-resident parent under the Bill. About children wrongfully removed from India, the Bill merely says that the Indian Central Authority may apply to its counterpart in the United States. This means that even the weak and reluctant hearing an Indian parent would get in the US system has been extinguished, as they would be no longer able to make a direct claim in a US court for their children, but would, under the legal principle of 'exhaustion of local remedies' have to apply to the Central Authority in India.

We already have laws for the implementation of foreign custody judgments

Indian law does not automatically recognize foreign judgments. Now by signing the Hague Convention, we will be compelled to recognize a foreign judgment regardless of the justness of the decision on custody under Indian law or whether it was delivered ex-parte.

The Civil Procedure Court (CPC) of India, already provides recourse to foreign-resident parents justifiably claiming custody over children taken. Under CPC, a foreign custodial order is *prima facie* conclusive, and it is only in exceptional circumstances that an Indian court can override the determination of a foreign court as to the placement of a child, or any other issue.

The *test for conclusiveness* of a foreign judgment or decree is laid down in section 13 of the CPC which states that a foreign judgment shall be conclusive unless:

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

This provides a reasonable and fair check on foreign judgments and is not an invention of India's but an articulation of well-established common law principles on the subject. The Indian system is not impervious to the fact that in some cases it may be in the best interest of children to be placed with their foreign-resident parent. Our

legal system already provides recourse to foreign-resident parents justifiably claiming custody over children taken to India.

The humane and practical approach is to let these cases to be decided on a case by case basis by a trained judicial officer, taking into account the actual situation of the child in question and based on carefully elaborated principles of the law of child custody, which borrow heavily from foreign jurisprudence, including that of United states.

In a recent Supreme Court judgment, of Nithya Raghavan v. State of NCT &Anr. where the Appellant mother had been living with respondent father in United Kingdom with their daughter, and had allegedly illegally removed the daughter from the custody of the father and brought her to India. The appellant came back to India along with her daughter because of the alleged violent behavior of respondent father. She informed him that her daughter would not be coming back to the UK due to her own well-being and safety.

Respondent father filed a custody/wardship petition before the High Court of Justice, Family Division, UK, seeking the return of his daughter to the jurisdiction of the UK Court. On this petition, the High Court of Justice passed an ex-parte order *inter alia* directing the appellant to return the daughter to the UK and to attend the hearing at the Royal Courts of Justice.

The court observed,

"42. In the present case, we are of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the minor (Nethra) to remain in custody of her mother (appellant) else she would be exposed to harm if separated from the mother. We have, therefore, no hesitation in overturning the conclusion reached by the High Court."

And further added,

"Whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign Court can be reckoned only as one of the factor to be taken into consideration."

Therefore, the Court overturned the conclusion reached by the High Court and held that the HC unjustly impressed by the principle of comity of courts and the obligation of the Indian Courts to comply with a pre-existing order of the foreign Court for return of the child. However, at the same time it was held that the appellant cannot disregard the proceedings instituted before the UK Court and must participate in those

proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice.

This is a good example of a case where the Indian courts respected the jurisdiction of the foreign courts by insisting that the appellant submit to the foreign proceedings, but at the same time protected her from the injustice of an *ex parte* order given by the foreign court *after* her coming to India with her daughter.

Principle of Comity of nations

The principle of comity of nations is also part of Indian jurisprudence and enables the recognition of foreign rulings provided they meet certain requirements of fairness and justice.

In the decision of the Delhi High Court ***Shiju Jacob Varghese & Anr. vs. Tower Vision Ltd. & Ors. [196 (2013) DLT 385]*** the Court observed that the principle of comity of court was applicable to the provisions of Section 13 and 14 CPC:

"*48. The doctrine of comity of courts thus requires that the court should gauge the effect of the proceedings instituted in a foreign court on the proceedings instituted before itself and let the decision in a previously instituted suit in a foreign country determine the effect on the proceedings before it. Our codified law in the form of the statute of the Code of Civil procedure also gives due regard to this principle as it would be evident that under Section 13 of the Code of Civil Procedure, 1908 judgments given by the foreign courts have been held to be binding and conclusive until and unless they fall in any of the exceptions as spelled out in clause (a) to (f) of the same. Under section 14 of CPC, there is a presumption of conclusiveness attached to any foreign judgment being pronounced by the court of competent jurisdiction unless the contrary appears on record. It would be thus quite manifest that unless any foreign judgment is impeached on any of the grounds as envisaged in sub-clause (a) to (f) of Section 13 CPC, the foreign judgments are binding on the parties and this section engrafted in CPC is in due recognition of the principle of the concept of comity of courts and in recognition of the sovereignty and territorial integrity of jurisdiction of foreign courts. This court has the onus to carry the mantle and be alive to its responsibility laid down by the dicta of the Apex Court in the case of Narendra Kumar Maheshwari vs. Union Of India, 1990 (Supp) SCC 440 wherein the court held that before the courts grant any injunction, they should have regard to the principles of comity courts in a federal structure and should have regard to self-restraint, circumspection, although no definite norms were laid down. It was also held that it may be impossible to lay down hard and fast rule of general application because of the diverse situations which give rise to problems of this nature as each case has its own special facts and complications and it will be a disadvantage rather than an advantage, to attempt and apply any stereotyped formula to all cases, and the High Courts themselves should introduce a certain amount of discipline having regard to*

the principles of comity of courts administering the same general laws applicable all over the country in respect of granting interim orders which will have repercussion or effect beyond the jurisdiction of the particular courts."

The Hague Convention Seeks to Circumvent the Indian Legal System

Article 14 to 18 of the Hague Convention effectively circumvents Indian laws and courts on the issue of the custody of children within its jurisdiction. Article 14 (discussed above) says that custody claims based on foreign law shall be decided without recourse to the procedures for proof of that law or the recognition of foreign decisions otherwise applicable in the requested State. Article 15 makes it optional for the person claiming custody of the child to obtain a decision on whether the removal of the child from the so-called place of "habitual residence" was wrongful. In other words, we rely solely on the word of the claimant that the child was wrongfully removed. Article 16 prevents an Indian court from making an order as to the child's custody once a foreign party has made a claim in relation to a child here. This means that even if there is no custody order in the foreign court, the Indian court will be prevented from deciding upon the custody of the child, merely because of the claim of the foreign party. Article 17 seals the door shut by saying that any decision already given by an Indian court (India being the requested State, for purposes of this discussion) would not be a ground for refusing forced deportation of the child to the foreign country. These provisions make clear that the real intent of the Hague Convention is to shut off any recourse in the home country for the child and parent leaving the foreign "habitual residence" country. This is not an arrangement that India should agree to keeping in mind the practical realities of prejudice in foreign courts and authorities over custody and the plight of mothers returning to India with their children.

The draft Bill that seeks to implement the Hague Convention in India circumvents our courts and their *parens patria* jurisdiction over children. It also sweeps away our entire jurisprudence on child custody in one blow. Under the Bill as proposed, no judicial consideration is required before taking the serious step of sending a child away from the Indian to the foreign parent. Instead of courts, we are to have a Joint-Secretary-level government official acting as the "Central Authority" making this decision. The Central Authority has all the power of a civil court to locate and seize the child using the police, and (under Section 5(b)) to take over its custody pending deportation to the United States. It can do so without even so much as a warrant or show cause notice from a judge. It is not required to hear the Indian parent.

There is also no provision for the Indian parent to approach the High Court under this Bill. Only the Central Authority may do so, and, the High Court, under Section 16(5), can ignore the decision of any other Indian court regarding the child's custody. This means that even if the Indian parent were to obtain a judicial order in India, granting

him custody of the child, the High Court can ignore that decision on being petitioned by the Central Authority!

No reciprocal rights are given to Indian-resident parent under the Bill. About children wrongfully removed from India, the Bill merely says that the Indian Central Authority may apply to its counterpart in the United States. This means that even the weak and reluctant hearing an Indian parent would get in the US system has been extinguished, as they would be no longer able to make a direct claim in a US court for their children, but would, under the legal principle of 'exhaustion of local remedies' have to apply to the Central Authority in India.

Policing and Invasion of Privacy of the Child

Article 7 of the Hague Convention allows Central Authorities constituted under the Convention in member States to liaise with each other to find and deport children. Without the any supervision of a judicial authority or intervening rights of the parents of the children, these authorities are allowed to "discover the whereabouts of a child"; "take provisional measures", "exchange information relating to the social background of the child" and so on. This is a gross invasion of the privacy of the child; and that too by a no-judicial body, without any countervailing rights given to the child's de facto custodial parent in order to balance the powers of the Central Authority. Under the Bill, no judicial consideration is required before taking the serious step of sending a child away from the Indian to the foreign parent. Instead of courts, we are to have a Joint-Secretary-level government official acting as the "Central Authority" making this decision. The Central Authority has all the power of a civil court to locate and seize the child using the police, and (under Section 5(b)) to take over its custody pending deportation to the United States. It can do so without even so much as a warrant or show cause notice from a judge. It is not required to hear the Indian parent.

Disregard of Best Interests of the Child

Article 12 and 13 of the Hague Convention place some restrictions on the power of a contracting State to deport a child, but the Bill as drafted renders these null and void. Under Chapter V of the Bill, the Central Authority may approach the High Court for deportation of the Indian child. This part of the Bill, places some limits on the High Court's powers. For instance, deportation is not to be ordered if the child has settled into his home in India, or such deportation would place the child in an intolerable. But the High Court's jurisdiction is said to be "without prejudice" to the Central Authority's powers. This is a mere formality as the High Court can be circumvented if the Central Authority acts in exercise of its own powers (under Chapter III) and the Court will await the decision of the Central Authority before taking any decision and will be influenced by its decision.

Article 13 of the Convention provides for refusal to order return of the child 'if the child objects' or it will place the child in 'intolerable situation'. At the same time, it has a puzzling provision that "information relating to the social background of the child" provided by the State of habitual residence (i.e. the State of the claimant) shall be taken into account in considering the child's circumstances. It would appear that the Court would have to compare the social background of the child when in India as opposed to when it is in some foreign country. This seems to be a very discriminatory clause, aimed at undermining the Indian parents' claim on the child solely based on her material circumstances. We already have some experience of the prejudicial approach of international organizations in this regard. For example, the standard 'Home Study' template for International Social Services, an NGO that processes inter-country placement of children, asks questions such as whether the persons to whom the child is to be sent have air conditioning and what their homes are like. The implication that someone of humble means is not worthy of keeping a child is very clear.

Under Article 12 of the Hague Convention, if the child has been in India for less than one year, then the child has to be sent back automatically, and considerations of whether it has settled in India with its Indian family do not apply. This timeline is meaningless for infants – one or two years old babies who havebeen in India for a year or close to that period know nothing else, and should not be treated as settled in India. Moreover, for a small child, one year is not a short period, but a very long one. Every three to six months it goes through radical cognitive and emotional changes. A Sic months in the eyes of a small child is a much longer time than in the eyes of an adult. So one year is not a child-centric timeline at all. In fact, mere number of days with the Indian resident parent should not be relevant, but a fair assessment of the situation of the child.

Also, though there is some provision under 15 for the views of the child to be taken into account, this is of no relevance for infants and who are toddlers are unable to express themselves. There is no recognition in the Hague Convention of the fact that ordinarily suckling infants, toddlers and small children have a deep need for their mothers. It is cruelty and enslavement of these helpless babes in arms to be subjected to laws that would result in their almost total deprivation of their mothers. Many parents day that they are refused visas to foreign countries owing to custody disputes over their children, so if such children are removed, the Indian parent would not even be able to follow them to the foreign country.

Rights of Left-Behind Parents

Though the Hague Convention is a draconian and insensitive law that should not be brought into force in India, we recognise that ideally a child should have access to both its parents. While the Hague Convention falls heavily on fleeing mothers, marital breakdown can result in fathers being shut out from the lives of their children –

especially if the mother leaves for another country. Let us, by all means, negotiate terms with foreign Governments that would preserve and foster a child's relationship with both its parents. But the Hague Convention and so-called Child Abduction Bill are not the means to do so. And, in considering this issue, let us be clear that we will not allow foreign child protection agencies to come into India through the backdoor using laws that are meant to cover international custody disputes between parents.

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