

1	Name of the Scholar	SYED MUJTABA ATHAR
2	Name of the Supervisor	Prof (Dr) Ghulam Yazdani
3	Name of the Faculty	Faculty of Law, Jamia Millia Islamia, New Delhi
4	Title of the Ph.D.	Recognition and Enforcement of Foreign Custody Orders in South Asia
5	Date of PhD Notification	COE/Ph.D./(Notification)/570/2024 dated 25/11/2024

ABSTRACT

Keywords: International Family Law, Private International Law, Child Rights, Custody and Guardianship, International Parental Child Abduction.

Custody and guardianship are often used interchangeably in common parlance. However, both connote to different meaning in law. Guardianship has been defined in law as the right of an adult with respect to a child pertaining to his well-being and property, while custody is the direct possession of a child by an adult and is often narrowed to day-to-day care and control of a child as opposed to the concept of guardianship.

In South Asia, many couples relocate to foreign countries or marry partners from different nationalities, some of which end in unsustainable marriages and marital conflicts resulting in intercountry custody disputes. Sometimes when the courts of law issue custody order, it is not respected and the child is taken out of the country by the parent who loses the case. Foreign Custody Orders, in such cases, are considered an interim relief across all major judicial systems of the world. Therefore, the general principles for recognition and enforcement of foreign judgments in private international law are not applicable. In this legal impasse, the formulation of a treaty-based legal process that seeks to minimise the cases of wrongful removal or retention of the child from its 'habitual residence' while encouraging its prompt return is suggested. Thus, The Hague Convention on the Civil Aspects of International Child Abduction (1980) (hereafter, The Hague Child Abduction Convention) was drafted under the aegis of HCCH (Hague Convention on Private International Law). This effort, though laudable, is often criticised as being Global North-centric as it talks in the framework of "universalism" over "cultural relativism", "executive-mechanic process" over "judicial prudence" involving 'best interest of child' in cross-country disputes and the need for a "legal positivist approach" over an "intersectional approach" in such cases. This thesis analyses the differing methodologies used by South Asian countries in resolving cross-border child custody conflicts, specifically emphasising the implementation techniques as all except Sri Lanka and Pakistan have refrained from signing The Hague Child Abduction Convention. Benefitting from the extensive materials collected from various national and international institution and libraries including the Peace Palace library of The Hague Academy of International law at The Hague, Netherlands, the study makes a comparative legal analysis to examine how these two countries have established uniquely diverse frameworks for addressing transnational child abduction cases while preserving their cultural and legal sovereignty. This is studied under Sri Lanka's 'dualist model' of ratifying the convention and Pakistan's 'organic approach' that avoids formal legislative enactment, prioritising the enhancement of institutional capacity and active involvement in the HCCH's Malta Process. The research technique includes both doctrinal and empirical components. The study utilises a three-phases empirical approach. The first phase involves comprehensive interviews with subject matter experts; the second part employs vignette-based qualitative analysis with specified stakeholders; the third phase entails a methodical survey of the bar and bench in Delhi, using standardised questionnaires. This study culminates in the proposal of a hybrid framework that amalgamates the advantages of both the dualist and organic approaches, providing an evidence-based model for other South Asian countries to establish their own systems for safeguarding children's interests in international custody disputes while maintaining their legal and cultural autonomy.