

Oklahoma Law Review

Volume 63 | Number 4

Symposium: Divorcing the Multi-National Family

2011

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William Duncan

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Recommended Citation

William Duncan, *Transcript: Globalisation of the Hague Children's Conventions with Emphasis on the Child Abduction Convention*, 63 OKLA. L. REV. 607 (2011).

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OKLAHOMA LAW REVIEW

VOLUME 63

SUMMER 2011

NUMBER 4

TRANSCRIPT: GLOBALISATION OF THE HAGUE CHILDREN'S CONVENTIONS WITH EMPHASIS ON THE CHILD ABDUCTION CONVENTION*

WILLIAM DUNCAN**

Introduction

To Dean Harroz, Professor Tepker, Rob Brown, and your wonderful colleagues who have helped to make us feel very welcome, I want first of all to say thank you for the invitation to be here. I am honoured, and it is a huge pleasure to be part of this tribute to Bob Spector.

I would like to begin by associating myself with the warm remarks that Bob Spector made about Gloria DeHart, and to underline her contributions to the development of international family law both through her work at the Hague Conference and in many other contexts.. So Gloria, it is a great pleasure to see you here.

Some of you will know that in the last thirty years the Hague Conference on Private International Law has generated four modern Hague Children's Conventions. The first of these is the 1980 Convention on the civil aspects on international child abduction.¹ The second is the 1993 Convention on intercountry adoption.² The third is the 1996 Convention on international

* This article is a transcript of the keynote address delivered by Deputy Secretary General Duncan. This speech was the first of many presentations given in honor of Professor Robert Spector's decades of contribution to the field of international family law to coincide with this Symposium Issue.

** Former Deputy Secretary General of the Hague Conference on Private International Law; Professor Emeritus, Trinity College, Dublin.

1. Convention on the Civil Aspects of International Child Abduction (Oct. 25, 1980), available at <http://www.hcch.net/upload/conventions/txt28en.pdf>.

2. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993), available at <http://www.hcch.net/upload/conventions/txt33en.pdf>.

child protection.³ And the most recent is the 2007 Convention on the international recovery of child support.⁴

I want to say at this point how much Bob Spector has contributed to the development and the implementation of those Conventions. He has visited the Hague on many occasions. He has been part of the US delegation at Special Commissions and Diplomatic Sessions. He has also been involved in Drafting Committees and Committees of Experts. He has been a very important part of the international movement to provide better protection for children in cross frontier situations, and has always represented the US with clarity, firmness and good humour.

I would like to address the theme of the globalization of the Hague Children's Conventions, in other words, their gradual world-wide acceptance, but concentrating on the Abduction Convention. None has yet achieved universal acceptance but some of them are moving in that direction. I would like to talk about the challenges that still confront us in achieving even wider acceptance.

You will know that the Hague Children's Conventions establish very practical working systems. They are not like the United Nations Convention on the Rights of the Child, which contains broad and general principles. They are practical instruments that provide workable procedures for cross-border cooperation at the administrative and judicial levels. They put "arms and legs" on some of the general principles and give them real effect.

Child Abduction

The Child Abduction Convention of 1980 is the first of the modern Conventions. This Convention now has eighty-four contracting states from all around the world. To give you a flavour of the broad membership, the three states to come on board during the last year were Morocco, Singapore, and Gabon. The Convention has been widely adopted in the Americas, in Europe, and Australasia, but there are still some significant gaps. There are particular States missing such as the Russian Federation, Japan, India and mainland China. Also, there is a large group of States whose laws are based on or influenced by Shariah law which have not yet decided to join the 1980 convention.

3. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (Oct. 19, 1996), *available at* <http://www.hcch.net/upload/conventions/txt34en.pdf>.

4. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Nov. 23, 2007), *available at* <http://www.hcch.net/upload/conventions/txt38en.pdf>.

The reasons why these gaps appear are various but for the most part they have little to do with the fundamental principles that underlie the 1980 Convention. One of the principles that underlies the 1980 convention is the general principle contained in the UNCRC that, save in exceptional circumstances, the child should have personal contacts and direct relations on a continuing basis with both parents, even where the parents live in different countries.

There are still some countries in which the principle is accepted more in theory than in practice. In Japan, for example, what happens in practice after a divorce is that the father usually takes a back seat, participating little in the life of the children, leaving the mother to care for them.

It is also broadly accepted now that States have an international responsibility to cooperate with one another to combat cross border abductions, cross boarder wrongful detentions, and removals, and to do so in the interests of the children.

Again, it is widely accepted that States have an obligation to repair the relationship between a child and a family member, or at least provide the mechanisms that enabled that relationship to be repaired where it has been disrupted. This is an idea that is gaining in strength and has been supported, in particular, by the European Court of Human Rights.

If the general principles that underlie the Convention are broadly accepted, why don't more States come into the Convention? The reasons are various. They differ for each State and for each Region.

Let us look first of all at Africa, where the take-up of the Hague Conventions generally has been slow. Part of the problem has been a lack of familiarity with the Hague Conventions. Very few African countries are members of the Hague Conference on Private International Law. Very few took part in the negotiations of the 1980 Convention. Egypt was represented during the negotiations. Morocco sent observers.

Also within Africa, the techniques employed by the Hague Conventions are unfamiliar and, therefore, the potential benefits of the Conventions are not always realized. Implementation can be very challenging, particularly in the States where a significant part of the population does not have effective access to formal legal procedures or legal services. The demographic and social factors which provide the context for abductions are often very different in African countries from those which pertain in western countries. For example abductions occurring in Africa, are sometimes very different from the typical inter-parental abductions which are common in Europe or the United States. Some abductions are associated with specific patterns of cross-border migration for work and other reasons. Interestingly also, the 1980 Convention may be useful in some African countries to

combat abductions carried out by third parties rather than by parents. It is sometime forgotten that the 1980 convention also operates where the abductions are carried out by persons unknown to the family.

I was told recently of a case in which a number of Kenyan children had been abducted from Kenya by child traffickers. They were eventually discovered living in London. The Kenyan authorities had to use diplomatic and consular channels to recover the children. This was slow and complicated, and only later did the Kenyan authorities realize that, had the 1980 Convention been operating between the UK and Kenya, it would have provided a swift and uncomplicated means of securing the return of the children to Kenya. Kenya is currently examining the possibility of acceding to the Convention.

Other African countries are beginning to engage with the Children's Conventions. Several African countries are already Parties to the 1993 Inter-country Adoption Convention, and Morocco was the first State to ratify the 1996 Child Protection Convention. A particularly interesting case is that of Namibia which is currently revising its child protection legislation. The authorities are considering annexing to their child protection legislation all four of the Hague Children's Conventions. They are not going to implement them all at once, recognizing that effective implementation requires careful preparations in respect of each Convention. Nevertheless, the annexing of the Conventions to the child protection legislation sends out a clear message of intent, and will facilitate accession when the time is ripe.

The Case of Japan and the 1980 Convention

There is, as some of you will know, an active public debate going on about whether Japan should ratify the 1980 convention. The Japanese authorities are extremely careful in researching international instruments and the practice surrounding them before they decide on ratification. They have already looked into the operation of the Hague Convention in great detail. Some of the concerns they have are important not only for the Japanese but also for other countries that are parties to the Convention.

What are the reasons for Japan's hesitation? One is the issue of domestic violence. Many in Japan anticipate that most abducting parents will be Japanese mothers who have returned to Japan with their children and claim that they have been victims of domestic violence in the countries from which they fled. There is much interest in Japan about the manner in which such allegations are handled in Hague proceedings and the use of Article 13 of the Convention (which sets out certain ground for refusing to return a child) in such cases. There is interest also in the question of whether

violence against a parent can also amount to violence against a child for the purposes of that Article.

The linkage between Hague proceedings and criminal proceedings has also been a matter of concern. It is not uncommon, in the United States and in some other countries, when a child is abducted abroad, for the left behind parent to institute criminal proceedings against the alleged abductor. This can sometimes present an obstacle to the return of the child, particularly where the abducting parent is a child's primary caregiver and wishes to return together with the child.

There are also worries about problems of access to justice. I should explain that most alleged abductions under the 1980 Convention (about 70%) are by a primary caregiver or a joint primary caregiver. That means the abduction is very often by a mother. When a child is returned or sent back to where the child has a habitual residence under the convention, very often it is on the basis that the mother will go with the child. It is important that the return of the mother with the child takes place in conditions of safety and that, when the mother goes back, that she has effective access the courts in the State of the child's habitual residence to have litigated the issues of contact and relocation.

We know that in several countries there are problems for returning mothers in gaining effective access to the courts. In the United States you do not have a universal system of free legal aid in civil cases. We do hear, from time-to-time, about worrying cases where a mother has come back to the United States (the problem is by no means confined to the United States), and has found it difficult to obtain timely access the court, and with appropriate representation, to have the underlying issues of custody, access and relocation dealt with.

Another relevant factor is that the United States Department of State each year issues a compliance report for the 1980 Convention in which certain countries, if they are judged to be noncompliant with their Convention obligations, are identified and named. Generally speaking, countries do not relish the thought of coming under the microscope of the State Department.

Some Other Interested States

So these are some of these concerns the Japanese authorities have. I would note also that there are other East Asian countries, such as Korea and, at a less advanced stage, the Philippines, which have been giving thought to the 1980 Convention. Increasing numbers of marriages with foreigners is part of the explanation. The Philippines is a very interesting example because of the tens of thousands of the population are living and

working in different parts of the world, including in the Persian Gulf where the 1980 Convention has not yet unfortunately taken root

With regard to the Russian Federation, careful thought is being given to accession to the 1980 Convention, encouraged by EU States such as Finland which are experiencing a rise in abduction cases involving the Russian Federation. [Note that the Russian Federation has now joined the Convention]

One of the reasons for the delay in the Russian Federation has been a certain preference for bilateral arrangements. In fact here are a number of advantages to the multilateral approach First of all, the development of bilateral agreements with a number of different states is time consuming and it creates complications for practitioners and judges. Becoming a party to a Hague Convention, particularly the Hague Convention on Child Abduction, implies being part of a global community, comprising world-wide networks of central authorities, of judges, of practitioners, who are sharing experiences, who are working towards best practices, and who have the support of the Hague Conference in the work we do to help with effective implementation and consistent application of the Convention. One also has to remember the practical matter than in abduction cases more than two States may become involved.

States from Within the Islamic World

One of the great challenges for international family law is the need to construct better and more effective means of cooperation between the Muslim states and other states in the world. This applies not just to abduction but it applies to child protection issues in general. For example, it applies also in relation the recovery of child support across frontiers.

The obstacles to progress in this area are many. There is first of all a great deal of suspicion between our legal systems. There is a lack of mutual understanding about how our respective legal systems work. There is a need to develop mutual trust and confidence between the judges. For cross-border judicial cooperation to work well, we need to develop more judicial contacts, so that when a judge in one country sends a child back to the other country, he or she can be confident that things are going to be dealt with in a sensible way. For parents the lack of information about, and access to, the different legal systems is a crippling problem.

From a legal point of view, the big problem is the absence of an agreed basis for exercising jurisdiction in child protection matters. If an agreed approach to jurisdiction does not exist this makes the mutual recognition and enforcement of judgments problematic. As a result there may be

competition over the exercise of jurisdiction and conflicting decisions in child protection matters

Three of the Hague Children's Conventions (the 1980, 1996 and the 2007 Conventions) do offer a potential basis for the cooperation that is needed. In particular, the connecting factor which is used in the Hague Conventions, the factor of habitual residence of the child, should be able to provide a neutral mutual basis for judicial cooperation. However it may take time to persuade some countries to move away from concepts like nationality or connecting factors like religion which in some of the Muslim States is the connecting factor linking the child to particular legal system.

There are signs of hope. We in the Hague some five years ago began a dialogue (known as the Malta Process) with Muslim states that began as a discussion between a number of so-called Hague Convention States and a number of non-Convention States within the Mediterranean and North Africa Region. This was then extended to other Muslim states around the world. So now included within the Malta process are States like Pakistan, India, Malaysia Indonesia (which has the biggest Muslim population in the world), and certain Gulf States.

The building up of mutual understanding is not a rapid process but there are already some signs that the process is bearing fruit, and a number of new States are considering more actively the possibility of coming into the Hague Conventions, particularly the 1996 Convention.

The dialogue continues and we are working in the Hague in a number of different directions. Meetings have been organized in particular countries. Just before Christmas a meeting was held in Morocco on the implementation of the 1996 Convention. A number of countries in the Region were involved. There was also a training session for Moroccan judges on the 1980 Convention. In April of this year a meeting is to take place in Qatar which will involve most of the States in the Gulf region.

Another consequence of the Malta process has been the work of a small group of twelve States to encourage the development of mediation structures to provide some hope for parents who are seeking the return of their children or access to them. Six of the States involved have laws which are based on or influenced by Shariah law. Six of them are Hague-Convention States. The group has agreed a set of principles concerning the establishment of structures for mediation, and the information that should be provided to parents who are seeking access to these different legal systems.

Mediation alone is not enough and indeed, mediation alone has certain dangers especially when it is conducted outside the shadow of the law. If there is no legal structure surrounding mediation then the bargaining

positions of the two parties may not be equal. The parent who has acted unilaterally, who has taken the child, will usually be in a much stronger bargaining position and a background of legal rules is needed to make sure that any mediated agreement will be properly enforced in the countries involved. So it is not being forgotten that agreed legal rules and structures (in effect a rule of law) are needed.

Keeping Conventions Fit-for-Purpose

As with all legal instruments, monitoring and review of the Abduction Convention is needed to ensure that it continues to serve its purposes effectively and that it responds to the changes in the social and legal environment which have occurred over the last thirty years. The work of academics and researchers is an important element in this. Indeed some of the leaders in the field are here at this gathering. At the Hague Conference work continues, not only to assist the progress of globalization, but also to take full advantage of the developments that are occurring in areas such as mediation and direct judicial communications. We are also carrying out work on domestic violence in the context of Hague abduction proceedings, as well as on the related subject of international family relocation.

Let me conclude by reiterating my admiration for Bob Spector and expressing thanks on behalf of an important sector of the international community for the extraordinary contribution he has made to international child protection.