Fall 2004

Introduction: Practical Applications and Critical Perspectives in International Family Law

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The practice of family law has become globalized. Lawyers inevitably encounter clients whose family law problems extend beyond national boundaries. Increasingly, the laws of more than one country must be taken into account. More and more, lawyers confront international adoption, child abduction, divorce, custody and domestic violence.

This is not surprising. Globalization is transforming family law. As the United Nations notes, families are the primary unit of social organization, and families are changing, trying to adapt to new demands and new mobility. Workers follow jobs, leave their families behind and sometimes start new families in their new countries. Women seek asylum as refugees, fleeing domestic violence. Child abductions have increased as parents of different nationalities divorce, and both want their children to be raised in their own national traditions.

Even as ties to such traditions become increasingly attenuated, their appeal may become stronger for some. Local religious leaders, similarly, may insist on even stricter adherence to local customs, especially those related to marriage, divorce, and the care and custody of children, as their authority is challenged by competing customs and international norms. In many countries, such as Saudi Arabia, family law is basically left to religious authorities. This reflects both its relatively low importance to national governments (compared with matters of trade and finance, for example) and its paradoxically high importance to those who seek to shape the national identity. As Article 9 of the Basic Law of Saudi Arabia states, "the family is the kernel of Saudi society, and its members shall be brought up on the

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basis of Islamic faith." There are powerful trends and counter-trends everywhere, and competing norms of family law are at the core of each.

This plays out in a range of contexts, such as the recognition of marriage, child custody jurisdiction, enforcement of foreign support awards, and international adoptions. Children are torn, not only between parents, but between cultures. Courts attempt to adapt homegrown rules to exotic contexts. Clients call with support orders from foreign courts, 'agreements' that might or might not be recognized domestically as such, grounds for divorce no longer actionable in most states, and custody awards that are problematic under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Family lawyers increasingly find themselves dealing with the upheavals of globalization on the ground.

This Symposium should help. It began as a panel at the Annual Meeting of the Association of American Law Schools in January 2004, co-sponsored by the Sections on Family and Juvenile Law and International Law, and drew on experts from each. This is not the first time the *Family Law Quarterly* has focused on international family law. In 1995, a *Special Symposium on International Marriage and Divorce Regulation and Recognition* discussed laws in sixteen countries.[1] In 1998, an issue, *Selected Topics in International Family Law,* featured four articles, focusing primarily on international child support and abduction.[2]

There are two major differences between the 1998 symposium and this one, reflecting two emerging trends over the past six years. First, human rights questions have come to the fore in international family law, as noted in virtually all of the articles that follow.[3] Second, growing efforts to coordinate and harmonize divergent, often competing, systems have exposed the increasing complexity of international family law, and the growing need for practical guidance like that offered by the contributors to this Symposium.

In this issue, a stellar group of experts begins with two perspectives on the shifting terrain of international family law, and proceeds with four in-depth, practitioner-oriented analyses of three different contexts, all of which involve children. It concludes with a hands-on account of the actual law-making process through which such dilemmas may be addressed, and the difficulties in reaching closure on the international level.

The first two authors provide an invaluable overview from their respective perspectives as international law and family law professors. Berta

1. *Special Symposium on International Marriage and Divorce Regulation and Recognition in Argentina, Austria, Canada, England, Italy, Jamaica, Japan, Korea, Malaysia, Malta, the Netherlands, Russia, Sierra Leone, Sweden, Switzerland, and Tunisia,* 29 FAM. L.Q. 497 (1995) (Professor Lynn Wardle was the issue coordinator).

2. *Selected Topics in International Family Law,* 32 FAM. L.Q. 521 (1998).

3. FAMILY LIFE AND HUMAN RIGHTS (PETER LODRUP & EVA MODVAR EDS. 2004).

Hernández-Truyol, internationally known for her work in human rights law, begins by adding a new phrase to the human rights lexicon—"Asking the Family Question." Professor Hernández-Truyol argues that international lawmakers should ask, as a threshold question, "what impact, if any, a particular international law or policy will have on children and families." She begins by describing the central importance of the family in international rhetoric. Using the case of the United States' embargo against Cuba as a concrete example, she shows how the failure to "ask the family question" can lead to disaster. Professor Hernández-Truyol vividly demonstrates the ripple effects of the embargo on Cuban families, offering a rich and detailed description of contemporary Cuba.

Ann Laquer Estin, well-known to family lawyers and academics as the lead author of a widely-adopted casebook, provides an overview from a family law perspective, focusing on the project of "building a multicultural family law." Professor Estin considers a range of contexts in which "cultural and religious accommodation has become an issue in private law disputes." More specifically, she rigorously examines the circumstances under which American courts are willing to recognize foreign marriages, divorces and custody decrees. Just as Professor Hernández-Truyol grounds her analysis in international human rights law, Professor Estin concludes that diversity should be incorporated within "a large framework of fundamental values established in American and international law."[4]

The next three papers hone in on the question of human rights in the specific contexts of litigation seeking the return of the child under the Hague Abduction Convention and child custody litigation in the United States under the UCCJEA. All three authors are well-known and outspoken advocates for victims of domestic violence and their children.

Professor Carol Bruch, highly respected throughout the world for her path-breaking work in multiple arenas of international family law, begins the discussion with a rigorous analysis of the origins of the Convention. As she cogently notes, "Widespread inattention to this history has caused much of the difficulty we now see in domestic violence cases."[5] She proceeds to elucidate the range of errors committed by well-meaning courts, which have contributed to what she argues is a wrong-headed and unfortunate trend. Professor Bruch concludes that much of the "gratuitous harm now being inflicted on abused family members in the name of the Convention can be greatly alleviated by a simple return to the scheme the drafters provided."[6]

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4. *Id.* at 2.

5. *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 532 (2004).

6. *Id.*

Professors Marianne Blair and Merle Weiner, co-authors of the first casebook on international family law, "The Family in the World Community," tackle the dilemmas confronting American lawyers seeking to rely on international norms in domestic courts. Professor Blair's article, "International Application of the UCCJEA: Scrutinizing the Escape Clause," is a perfect companion piece to Professor Bruch's article, focusing on the interpretation of the escape clause of the UCCJEA. As she points out, this was drafted to complement the "fundamental freedoms" provision of the Hague Abduction Convention. Noting that Section 105(c) was never intended to carve out a large exception to the strict requirements of the UCCJEA, however, she urges its judicious application "where the safety of a child or parent would be jeopardized."[7]

Professor Blair asks what "fundamental rights" really mean in an American court. Professor Weiner focuses more on the possibilities of "creative applications." Lawyers obviously need to know how domestic courts have interpreted "fundamental rights" in international cases, but knowing how these cases can be built upon to prevent and deter further violence against mothers and children may be equally important. Human rights law has already been used to combat domestic violence. For example, more than 180 countries, including the United States, have recognized through the Declaration Against Violence Against Women that domestic violence violates women's "fundamental freedoms." Professor Weiner maps out the doctrinal maze of the Convention on Abduction with rigor and lucidity, explaining the origins of the "fundamental freedoms" exception. She breaks important new ground in arguing for an interpretation of the exception that would safeguard victims of domestic violence and their children. Her analysis is essential reading for lawyers and judges dealing with this issue.

The next article, "The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents" by Professors Nancy G. Maxwell and Caroline J. Forder, considers how an approach developed in one country may be constructively adapted by another. The authors compare Dutch law, which grants rights to a co-parent in a same-gender relationship, with what they characterize as the "all-or-nothing" model of parenthood established by U.S. law. They criticize both models, urging instead for the adoption of an "intentional parenthood" standard, derived from the evolving law of assisted reproduction. Their painstaking examination of the failings and possibilities of both legal systems shows how useful international exchange can be to those drafting new laws to incorporate evolving public policy.

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7. D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause,* 38 FAM. L.Q. 547 (2004).

Professor William Duncan, Deputy Secretary General of the Hague Conference on Private International Law, concludes the Symposium with another overview, but from the perspective of one immersed in the actual, arduous process of international law-making. Professor Duncan has played a major role in initiating a worldwide effort for a new convention on maintenance. The process began with the distribution of an exhaustive questionnaire, which showed why a new convention was needed. Domestic collection practices have become much more sophisticated and domestic laws have changed. Professor Duncan's cogent piece provides a rare glimpse into the necessarily time-consuming process of achieving international consensus. More provocatively, it suggests why such consensus might sometimes be impossible. Jurisdiction, for example, may be predicted on fundamentally incompatible notions of the role of the state. The extent to which states are willing to compromise on such issues remains an open question. Professor Duncan sets out the alternatives, as well as the costs, where consensus cannot be achieved.

As this Symposium suggests, there are many such areas, and much international family law remains unsettled. Those who pick up this Symposium for guidance on a particular narrow question may at first be disappointed that their question is not directly addressed. Even if the authors do not answer a particular question, however, they may well cite a text, or a Web site, or suggest an analytical framework that will bring a workable resolution closer. Equally important, they demonstrate the crucial role of the family law practitioner in shaping international family law.