

THE ACCOMMODATION OF RELIGIOUS LAWS IN CROSS-BORDER SITUATIONS: THE CONTRIBUTION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

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Resumen: La interconexión del mundo que se observa en todas las esferas de la actividad humana no ha terminado con la diversidad de legislaciones y de países en el planeta Tierra. Ello puede frustrar las expectativas de los particulares que desarrollan una vida internacional. El “choque de civilizaciones” que puede surgir a partir del enfrentamiento entre la cultura jurídica occidental y la musulmana puede ser paliado gracias a la labor de organismos internacionales como la Conferencia de La Haya de Derecho internacional privado. Así, por ejemplo, la Conferencia de La Haya de Derecho internacional privado ha impulsado instrumentos legales para regular adecuadamente los efectos jurídicos en Europa de los divorcios unilaterales o repudios, la protección de los menores desamparados en casos internacionales y para velar por la protección del derecho de los menores a relacionarse con sus padres incluso en supuestos transfronterizos.

Palabras clave: Conflicto de civilizaciones, Conferencia de La Haya de Derecho internacional privado, repudios, protección de los menores desamparados en casos internacionales, derecho de los menores a relacionarse con sus padres en supuestos transfronterizos.

Abstract: The interconnection of the world today can be observed in all the spheres of human activity. Nevertheless, planet Earth is still divided in a diversity of countries with its own laws and courts. It can create problems for individuals who are involved an international life. The so-called “Clash of Civilizations” that can arise between the legal western culture and the Muslim legal culture can be overcome by the work of some international organisations as The Hague Conference of Private International Law. The Conference has stimulated the signature of legal instruments to regulate adequately the legal effects in Europe of the unilateral divorces or repudiations, the protection of minors abandoned in international cases and the right of access to the children even in cross-border cases.

Key words: Clash of civilizations, Hague Conference of Private International Law, repudiations, protection of abandoned minors in international cases, right of access to children in cross-border litigation.

Table of contents: I. Introduction. II. Recognition of unilateral divorces. III. The provision of family care across borders for homeless children. IV. Protection of cross-frontier rights of contact of parents and their children in the context of the “Malta process”. V. Conclusion

I. Introduction.

1. Although our world is increasingly interconnected, it remains composed of a great variety of legal systems, reflecting different traditions, including cultural and religious traditions. Some of these also differ in the way they see the relationship between law and religion: as distinct, as in secular Western legal systems, or as essentially interconnected, as in the Jewish and Islamic traditions.

2. When people cross borders or act in a country other than their own, such legal differences may unexpectedly complicate or even frustrate their actions. For example, in some countries marriages take place according to various religious forms, while other countries require a civil marriage; will either system give effect to the other's form of marriage? When a Muslim husband in India repudiates his Italian wife by pronouncing the formula of repudiation "*talaq*" [I divorce you] three times, can this repudiation be recognised in Europe?¹ A Moroccan-Canadian couple separates and the father takes their children to Morocco; does the mother have a remedy if her custody rights are ignored? An Egyptian couple wishes to take out a mortgage which complies with *Shariah* law on their house in Amsterdam with a London bank that offers such interest-free mortgages – is that possible?

3. Since its inception, in 1893 at the initiative of TOBIAS ASSER (Nobel Peace Prize 1911),² it has been the concern of the Hague Conference to develop, and increasingly also to service, multilateral treaties which, despite the differences between legal systems, allow persons, families as well as companies to enjoy a high degree of legal security.³ After the Second World War bridging differing legal approaches between common law and civil law systems became an important challenge for the Hague Conference. When Egypt (in 1961) and Israel (in 1964) joined the Conference (later followed by Morocco (1993), Jordan (2001) and Malaysia (2002), among others), it also became necessary to find a way of taking into account the fact that these countries have a complex legal system based upon *personal* laws. Within these countries different laws apply to different categories of persons belonging to different cultural and religious traditions (Christians, Muslims, and Jews, for example). They may even have different court systems (ecclesiastical, *Shariah*, rabbinical courts, etc.) for these different categories of persons.

4. As a result of massive migration and other movements of people to the West, in particular from countries within the Islamic tradition, the need to accommodate the differences between such systems and those of Western countries has increased considerably in recent years. And, given the political overtones of the public debate on cultural and religious differences in Western societies, it has become even more critical to develop legal strategies to protect the rights of persons and families caught in such "conflicts of laws". No wonder, then, that this has become an increasing concern of the Hague Conference, in addition to its many other activities. In 1998 (a few years after the first publication of Huntington's "The Clash of Civilizations?"⁴ but well before "9/11" (2001)), the Hague Conference and the University of Osnabruck together organised a pioneering colloquium on the interaction between Islamic laws and secular legal systems.⁵

5. In addition to this academic endeavour, however, the Hague Conference has, through its Conventions and activities in support of these Conventions, dealt with several issues resulting from this interaction. This article will give a few examples⁶ of such strategies developed by the Hague Conference on

¹ After Indonesia and Pakistan, India has the third largest Muslim population in the world.

² The first Session of the Hague Conference on Private International Law was held from 12-27 September 1893 at the Salle des Trèves in The Hague. This successful diplomatic conference laid the basis for "The Hague Legal Capital", as Boutros Boutros-Ghali would baptise The Hague a century later: see W. DEETMAN, 'Foreword', in P.J. VAN KRIEKEN / D. MCKAY, *The Hague Legal Capital of the World*, The Hague, T.M.C. Asser Press, 2005, at p. viii.

³ See for the Spanish translations of the authentic texts of the Hague Conventions developed since the Second World War: A. BORRÁS / J.D. GONZÁLEZ CAMPOS, *Recopilación de los Convention de la Conferencia de La Haya de Derecho internacional privado (1951-2007)*, 2^a ed. revisada y puesta al día, Marcial Pons, Madrid/Barcelona/Buenos Aires, 2008. See also the website of the Hague, www.hcch.net, (Spanish version).

⁴ See S.P. HUNTINGTON, "The Clash of Civilizations?", *Foreign Affairs*, 72, 1993, pp. 22-49. In 1996 S.P. HUNTINGTON published his book *The Clash of Civilizations and the Remaking of World Order*, New York, Simon & Schuster, 1996.

⁵ See C. VON BAR (Ed.), *Islamic Law and its reception by the Courts in the West / Le droit islamique et sa réception par les tribunaux occidentaux*, Cologne, 1999. The book includes contributions on (i) Islamic law: its essentials and varieties, (ii) the scope and application of Islamic law with regard to other religious and secular laws, (iii) the application of Islamic law to families and successions, and (iv) Islamic law and international commerce.

⁶ The Hague Conference has also developed such legal strategies in other fields. For example, during the negotiations on the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary* securities issued under Islamic law were specifically taken into account, and they are

Private International Law: (i) for the conditions under which unilateral divorces (repudiations) may be recognised; (ii) for the provision of family care across borders for homeless children; and (iii) for the protection of cross-frontier rights of contact of parents and their children in the context of what has become known as the “Malta process”.

II. Recognition of unilateral divorces.

6. The *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, which is in force for Spain, sixteen other Western States and Egypt, determines the conditions under which foreign divorces will have effect in each State Party. It thus helps to avoid “limping divorces”, i.e., divorces that are valid, or recognised, in one country but not in another, with all the problems attached to such legal entanglement including the impossibility to remarry for a person whose divorce is not recognised. The Convention does not use the word “repudiation”, but it does provide an effective strategy to give effect to “divorces and legal separations”, including religious unilateral divorces, under certain conditions.

7. In order for such repudiations to be recognised abroad, they must “follow judicial or other proceedings officially recognised” in the State where they take place. It is, therefore, not enough that in a certain State (India is an example) a Muslim husband may validly divorce his wife by pronouncing *talaq* three times. Such repudiation does not qualify for recognition under the Convention. First, there must have been *proceedings*, i.e., a minimum of formalities required to be taken by established rules and carried out by a public or religious authority, or at any rate with the agreement of such authority or in its presence. Increasingly, legal systems within the Islamic tradition now provide for such proceedings. The new Moroccan Civil Code introduced in 2004, while maintaining the institution of repudiation, has placed it under strict judicial control (while adding divorce by mutual consent).

Second, the State where the proceedings take place must *officially recognise* such proceedings. That would normally exclude repudiations pronounced by a husband at his consulate in a Western country such as the Netherlands, or before a religious authority there.⁷

Finally, the Convention establishes as a general condition for the recognition of divorces that there must be a *genuine link* between the State where the divorce was obtained and the divorced or separated spouses, and that both spouses have had the *opportunity to present* their case. In the context of repudiation, this requirement helps to protect, for example, a Spanish woman living in Spain whose husband would wish to divorce her in Algeria.

8. The Hague Divorce Convention thus provides a framework for accommodating religious divorces which are unknown in Western systems, but which do give rise to questions regarding their recognition by such systems. It would be highly desirable if the Convention were in force, not just for twelve, as is currently the case, but for *all* twenty-seven EU Member States, which might then encourage other States, for example south and east of the Mediterranean, also to join this treaty.

III. The provision of family care across borders for homeless children.

9. According to a prevailing interpretation of the Koran, the adoption of a child is not legally permissible. In principle, the only way to create a legal parent-child relationship is when a child is born to a married couple. Most countries within the Islamic tradition therefore do not allow the adoption of

included in the Convention’s definition of securities. See R. GOODE / H. KANDA / K. KREUZER, with the assistance of C. BERNASCONI, *Hague Securities Convention — Explanatory Report*, Leiden, Brill, 2005, p. 31.

⁷ See e.g. Supreme Court (*Hoge Raad*) of the Netherlands, 31 October 1986, *Nederlandse Jurisprudentie* 1987, n° 924, according to which in the Netherlands a divorce, as a matter of *ordre public*, requires the intervention of the courts.

children.⁸ This raises an issue when a homeless child from such a country is placed, or is to be placed, with a family in a Western country. If adoption is not possible in the country of origin, is it possible to apply an alternative institution such as *kafala* known in Arab countries with a view to placing a child abroad? While both adoption and *kafala* are measures of child protection, they differ in critical respects: *kafala* neither terminates the pre-existing legal relationship between the child and his or her mother and father, nor does it establish a legal parent-child relationship with the new parents. While *kafala* fulfils a function similar to adoption, from the perspective of its legal structure it appears closer to foster care.

10. Increasing family contacts and relationships across the Mediterranean and beyond (Pakistan, Malaysia, among other countries, may be concerned) may give rise to the placement of a parentless child from a country within the Islamic tradition with, for example, the child's relatives in France or the Netherlands. There are also many homeless children in institutions in Arab countries.⁹ As a result, the provision of care overseas to such children through legal measures of protection has become an issue. It is obvious that such problems are best solved through international co-operation on the basis of clear agreed rules that take the differences between the adoption and *kafala* into account.

11. The Hague Conference has met this challenge by drawing up *two* Conventions. The first is the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption*. This global treaty, which is now in force among eighty States, provides a framework for international co-operation between countries willing to accept the departure, under strict conditions, of their children to other countries for the purpose of adoption. One of these conditions is that it is for the authorities of the country of origin to establish that the child is adoptable. Countries within the Islamic tradition are likely to take the position that their authorities should never make such a decision, and may therefore decline to join the Convention. However, during the negotiations on this Convention, in the early 1990s, the delegations of Egypt and Morocco expressed the view that the basic ideas of co-operation, safeguards and procedures embodied in the Convention would be equally useful for cross-border placements of children through *kafala* between countries within the Islamic tradition as well as with other secular systems. It was decided, however, that this could best be done separately from the 1993 Convention in the context of the negotiations on a new more general Convention on the protection of children.

12. As a result, the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* contains special provisions to deal with cross-border family care for children other than through their adoption in the country of origin. *Kafala* is specifically mentioned. Like the 1993 Convention for adoption, the 1996 Convention requires the involvement – through consultation and the co-ordination of decisions – of both the State of origin and the receiving State whenever the provision of care across borders by *kafala* or an analogous institution is contemplated. This makes it possible for children from countries within the Islamic tradition to be placed in family care in Europe, for example, under controlled circumstances. Such a placement may then be followed by an adoption in the receiving country, unless that country's laws prescribe the continued respect of the original *kafala* for the child.¹⁰

Morocco was one of the first States to join the 1996 Convention. At the end of 2007, the UK and Spain finally resolved a political issue concerning the application of this Convention to Gibraltar, completely unrelated to its content, which had held up the common ratification of the Convention by nineteen EU Member States, including the Netherlands. This has made it possible for these EU Member States to implement the common decision, already taken in 2002,¹¹ to join this important instrument.

⁸ Exceptions include Indonesia and Tunisia.

⁹ See comment (concerning Algeria and Morocco) by C. BRIÈRE, annotation of *Cour de Cassation*, first Civil Chamber, 10 October 2006, Nos 06 –15264/15265, *Journal du droit international (Clunet)* 2007, vol. 134, pp. 564-572 (at p. 569).

¹⁰ This is currently the position under French law. Dutch, Italian and Spanish law, for example, take a more flexible view (see the comment cited in the previous footnote).

¹¹ Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and*

A decision to the effect that the EU Member States which are not yet bound by the Convention should ratify or accede to it if possible before 5 June 2010 was taken in 2008.¹² The 1996 Convention has the potential to be of great assistance in providing family care across “religious borders”.

IV. Protection of cross-frontier rights of contact of parents and their children in the context of the “Malta process”.

13. The negotiation process of multilateral treaties, however inclusive, transparent and carefully orchestrated, is just a first step. The negotiating States remain free to join or not to join a Convention even if they have adopted its text at the Diplomatic Session of the Hague Conference. Practice shows that States may be hesitant to commit themselves by joining Conventions in areas they consider as sensitive. For example, while the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* has attracted eighty States Parties from all continents, very few of them, as yet, are predominantly from within the Islamic tradition.

14. One of the challenges, and indeed tasks, of the Hague Conference is therefore to promote its Conventions by providing information and assistance and, where a ratification is not or not immediately achievable, to promote solutions or approaches enshrined in the Hague instrument, perhaps as a step towards ratification at a later stage.

15. The human pain involved in separations and divorces of mixed couples across the Mediterranean is considerable, and children, in particular, may suffer irreversible traumas as a result of their wrongful removal and the loss of contact with one of their parents. While there are several bilateral arrangements between some Western countries and Egypt, Tunisia, Algeria, Morocco and Lebanon, for example, these agreements are largely based on the idea of promoting voluntary settlements, and their success has been very limited. The problem is the lack of legal machinery and of clear definitions of mutual obligations between the States concerned, and the absence of clear legal principles, as provided in the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. These legal principles are indispensable in ensuring that the parents will occupy equal bargaining positions, and that the outcome of the bargaining will be in the interest of the child.¹³

16. The Member States of the Hague Conference have asked the Permanent Bureau to keep the development of these bilateral agreements under review. That review made it clear that, in the absence of firm legal principles, exclusive reliance on mediating procedures would not be sufficient to resolve these complex cases of child abduction and parental disputes over contact with children. This conclusion inspired the Permanent Bureau of the Hague Conference to start, in co-operation with the Government of Malta and with the support of other Member States, a series of judicial conferences. Judges and other experts from countries south, east and north of the Mediterranean convened in Malta to discuss how to secure better protection for cross-frontier rights of contact of parents and their children and the problems posed by international abduction between the States concerned.

17. The first judicial conference, in March 2004, brought together judges from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the

Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, Official Journal L 48, 21 February 2003.

¹² See Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, L 151, 11 June 2008.

¹³ See W. DUNCAN, “Towards the Malta Process”, in Hague Conference on Private International Law, *The Judges’ Newsletter, Vol. VIII, autumn 2004, Special Focus, Malta judicial conference on cross-frontier family law issues involving certain Hague and non-Hague States, National Reports by 14 States and the Conclusions of the Judicial Conference*, pp. 4-8, at p. 6, also accessible through the website of the Conference (*supra* n. 2).

United Kingdom, and experts from the European Commission and Council, as well as from NGOs. They adopted a Declaration in which they affirmed the principles of the *1989 UN Convention on the Rights of the Child* as a basis for action, and agreed, among other things, that efficient and properly resourced authorities should be established in each State to co-operate in securing cross-frontier rights of contact and in combating the illicit transfer and non-return of children. It was further agreed that common rules were needed to specify which country's courts are competent to make decisions concerning custody and contact, and that such decisions made by a competent court in one country should be respected in other countries.¹⁴

It was quite remarkable, and encouraging, that when these judges from different legal systems, secular and religious, were asked to indicate solutions for hypothetical cases drawn from actual practice, their views often concurred. This suggests that when expert judges from different legal backgrounds are asked to give their professional view on transfrontier parental abduction and contact cases, their sense of justice with regard to the rights of children and families may well be more similar than one might expect. The discussions also generated novel avenues for legal co-operation. As an example, it was pointed out that when an Egyptian Muslim father would swear before a Western European court that he would return his children to Europe after a vacation in Egypt, such an oath would in principle be honoured by the authorities in Egypt.

18. The second judicial conference, again held in Malta in 2006, was attended by judges from the same countries as in 2004, but in addition from a wider circle of countries: Australia, Canada, Indonesia, Libya, Malaysia, Turkey and the United States. The participants, in the Second Malta Declaration, reaffirmed the conclusions and recommendations of the first judicial conference, and added a number of concrete points, including support for the efforts of the Hague Conference to provide training programmes for judges in matters of international child protection, the further development of the international network of liaison judges (who may be contacted for information purposes in cross-border situations in addition to the diplomatic channels), and explicit support for the Permanent Bureau of the Hague Conference to provide States, on request, with technical assistance when they consider the possibility of joining the 1996 and 1980 Hague Conventions.¹⁵

19. The third Malta judicial conference took place in March 2009. Bangladesh, India, Israel, Jordan, Oman, Pakistan, Qatar and Switzerland were represented for the first time in addition to most of the countries that participated in the first Malta conference. One of the most significant conclusions of this meeting was the recognition of the urgent need to develop a more effective structure for the mediation of cross-border family disputes involving, on the one hand, a State Party to a relevant Hague Convention and, on the other hand, a non-State Party. The participants recommended the establishment, under the aegis of the Hague Conference on Private International Law, of a Working Party to draw up a plan of action for the development of mediation structures to assist in the resolution of cross-frontier disputes concerning custody of and contact with children.¹⁶ Experts from Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, The United Kingdom and the United States of America as well as a small number of independent mediation experts were invited to join the Working Party. The group met for the first time via a conference call in July 2009. The meeting identified a number of issues, including the need for central entry points facilitating access to mediation, the importance of the enforceability of mediation agreements across borders and the need to discuss standards regarding mediation models for cross-border family mediation all of which the Working Party will continue to address.

20. Progress in such a sensitive area can only be made gradually, but the Malta process, unmistakably, has built up a momentum that is promising. The Permanent Bureau is very committed to continuing its efforts, which have found broad support among its Members. This is not a process that has made headlines on television or in newspapers, yet it serves a very important cause, above all that

¹⁴ See <www.hcch.net> Welcome > Child Abduction Section, scroll down to "Judicial Seminars on the International Protection of Children – The Malta process", [Judicial Conference on Cross-frontier Family Law issues](#)

¹⁵ *Ibidem*, [Second Judicial Conference on Cross-Frontier Family Law Issues](#)

¹⁶ *Ibidem*, [Third Judicial Conference on Cross-Frontier Family Law Issues](#)

of protecting the interests of vulnerable children and families involved in complex cross-frontier and cross-cultural legal situations.

V. Conclusion.

21. In conclusion, these few examples illustrate how the Hague Conference has a special role in accommodating religious laws in cross-border situations. The approach is eminently practical and adapted to evolving realities. While the Conference will continue to promote wide ratification of its principal legislative instruments, the Hague Conventions, in parallel it makes use of judicial conferences and work in experts' groups. Much more work needs to be done, and is possible in this field, provided resources are made available.¹⁷ Global co-operation in this civil law area has enormous potential to help bring, at the micro level – for citizens – and as a result also at the macro level – for human societies and States and regions – peace, justice and (personal) security for all.

¹⁷ The Malta process depends for its funding essentially on support from outside the regular budget of the Hague Conference on Private International Law.