

Private International Law and the Voices of Children

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On 1 June 2023, International Children's Day, an online webinar discussing the issue of children's protection in private international law (PIL) was organized in collaboration with conflictoflaw.net and American Society of International Law Private International Interest Group at the Sydney Law School Centre for Asian and Pacific Law (CAPLUS). In the first part of the webinar, five experts were invited to share their views on the status quo, challenges, and potential solutions to protect the welfare of children in the international and transnational context. The second part of the webinar involved a roundtable discussion among the experts. This event was moderated by Dr. Jeanne Huang, Associate Professor at the Sydney Law School and CAPLUS co-director. The guest speakers were as follows:

- **Philippe Lortie**, co-head of the International Family and Child Protection Law Division at the Hague Conference on Private International Law Permanent Bureau. Mr. Lortie has more than 30 years of experience in the field of child protection.
- **Professor Lukas Rademacher**, Professor of Private Law, Private International Law, and Comparative Law at Kiel University, Germany. Professor Rademacher read law in Düsseldorf and Oxford and obtained a PhD in Münster. He wrote his postdoctoral thesis at the University of Cologne.
- **Miranda Kaye**, Senior Lecturer at the University of Technology Sydney. Ms. Kaye is a member of Hague Mothers, a project aiming to end the injustices created by the Hague Child Abduction Convention. She also has experience in public service (Law Commission of England and Wales) and as a practicing solicitor (family law in the UK).
- **Anna Mary Coburn**, former attorney for the US Government (USG) involving the Hague Children's Conventions and a Regional Legal Advisor and Foreign Service Officer for USAID. Ms. Coburn now has her own legal practice in private international family law, focusing on children's rights.

- **Haitao Ye**, lawyer at the Shanghai office of the Beijing Dacheng Law LLP specialising in marriage and family dispute resolution, as well as wealth inheritance and management. She is a former experienced judge in civil and commercial trials at the Shanghai Pudong New District People's Court.

Mr. Lortie opened the webinar by introducing the Hague Conference on Private International Law (HCCH), an intergovernmental organisation with a mandate to develop conventions to progressively unify the rules of PIL in all areas, including children's rights. Mr. Lortie's presentation covered three matters: the future of parent surrogacy, the 1996 Convention on Parental Responsibility and Protection of Children, and the 2007 Convention on the International Recovery of Child Support. After 10 years of working on its Parentage/Surrogacy Project, the HCCH has implemented a working group of state representatives to voice their views on the laws and policies of their respective states. According to Mr. Lortie, the HCCH's immediate mandate is to develop a single or two-instrument solution that applies to all children. Mr. Lortie explained that the recent US Supreme Court decision of *Golan v. Saada* emphasises the benefits of being a party to the 1996 Convention, as it allows judges to order protective measures in urgent circumstances under Art. 11 (such as returning a child post-abduction). The US is currently not a party to the 1996 Convention. Moreover, Mr. Lortie pointed out that Australia is not yet a party to the 2007 Convention, despite NZ, the US, EU, and UK being parties (and Canada having signed). This Convention allows applications for child support and communications to occur securely over the Internet and aims to keep procedural costs low for the benefit of member states.

Professor Rademacher's presentation explored whether well-intentioned protective measures could cause more harm than good, by examining the German Constitutional Court's (FCC) highly controversial recent decision declaring the unconstitutionality of Germany's "Act to Combat Child Marriage". Under that Act, passed in 2017 partly as a response to the large number of refugees seeking asylum in Germany, marriages made under foreign law were voidable if one spouse was under 18 at the time of marriage and null and void if they were under 16. It also prevented courts from applying the public policy doctrine of *ordre*

public. The FCC found that the Act violated the German Constitution's Article 6 on the basis that it disproportionately curtailed the freedom of marriage. Professor Rademacher explained that the FCC's ruling has been subject to misinterpretation - rather than endorsing child marriage, it highlights the nuanced balancing act required when considering a child's best interests. For example, the legislation did not regulate the consequences of a voided marriage - such as the minor spouse losing the legal protections of marriage, as well as rights arising from dissolution of the marriage (including financial claims). The FCC reasoned that these consequences ran counter to the purpose of protecting minors, as well as the protection of free choice. Professor Rademacher concluded that this FCC decision demonstrates that whilst legislatures may pass laws that delimit and regulate marriage, the most rigid laws may not necessarily be in best interests of protecting children.

Ms. Kaye presented on Australia's recent amendment to the *Family Law Act* with respect to the Hague Abduction Convention (HAC), focusing on the potential unintended consequences of these changes on mothers fleeing the country due to domestic violence (DV). Under the HAC, children are generally returned to the left-behind parent with limited exceptions. Ms. Kaye focused on one exception, HAC Article 13(1)(b), which gives courts discretion not to order a child's return where there is a 'grave risk' that it would 'expose the child to physical or psychological harm'. Whilst there is no explicit reference to DV, Ms. Kaye explained that Article 13(1)(b) is most widely used in such cases. She went on to examine the new Reg 16 of the *Family Law (Child Abduction Convention) Regulations 1986* which implements HAC Article 13(1)(b), expressing concern towards its wording that courts 'may' (not 'must') consider whether returning a child may expose them to family violence, giving courts a potentially detrimental discretion. Ms. Kaye also raised the issue of inequality of arms - in Australia, a HAC application is brought by a central authority, not the left-behind parent. With no means-testing, left-behind parents often have a considerable jurisdictional advantage with better legal advice at their disposal than taking parents, who rarely receive Legal Aid in HAC cases. Optimistically, the government recently allocated \$18.4M of its Federal Budget to investing in children's protection, with \$7.4M dedicated to balancing legal representation. Finally, Ms. Kaye discussed the voice of the child, noting that Reg 16(c)(3) imposes more onerous wording

than the HAC, and additional evidential requirements. Ms. Kaye considered this in the context of a child's right to culture and connection to land, which, whilst of paramount importance in matters involving First Nations children, has proved difficult to translate in Hague cases.

Fourthly, Ms. Coburn shared her views on child participation in PIL proceedings. She began with an overview of the public international legal framework for children, for which the UN Convention on the Rights of the Child (UNCRC) and its Optional Protocols provide guiding principles. These three optional protocols concern children in armed conflict (OPAC), the sale of children, child prostitution and pornography (OPSC) and a communications procedure allowing direct child participation in individual cases (OPIC). Ms. Coburn noted that although the US has not ratified the UNCRC, its laws provide for child participation in proceedings involving parties from states that have ratified it. Child participation in Hague matters is relevant in two areas: 1) where a child has agency to express their views in proceedings that affect them, and 2) children's direct involvement in the formation and implementation of instruments designed to protect their welfare. Ms. Coburn noted that whilst the US is not party to the UNCRC nor OPIC, the Supreme Court in *Golan v Saada* appeared to apply a best interest standard in considering whether to return a child to their place of habitual residence under the HAC due to grave risk of harm. Ms. Coburn concluded that continued efforts amongst IGOs demonstrate a trend towards more forceful support for children's rights and participation, such as the WHO-UNICEF-Lancet Commission which advocates for improving child participation in all countries.

Finally, Ms. Haitao Ye discussed the emerging issue of protecting children's civil rights in cross-border surrogacy. Ms. Ye framed this issue in the context of rapid technological developments in the reproductive space, as well as the emotional stakes involved for interested parties. She began by discussing China's first (ongoing) custody dispute, where a Chinese same-sex couple shared surrogate children who were born in the US but taken to China by one parent when the relationship deteriorated. Ms. Ye also discussed *Balaz* (2008) involving a German couple and an Indian surrogate mother, where neither country's domestic laws allowed the surrogate twins to obtain citizenship of either country. These disputes

raise concerns about the lack of uniformity amongst surrogacy legislation, conflicting PIL principles of children's best interests and other domestic public interests and demonstrate the lag between current legislation and practical reality. *Balaz* illustrates the potential risk of surrogate children facing statelessness, which denies their access to certain rights such as welfare. Ms. Ye concluded by sharing her opinion that the current body of PIL is not ready to meet the challenges of transnational surrogacy, which poses the risk of commercial exploitation. Nonetheless, she suggested that joint efforts of the international community, such as establishing international and national central agencies to record, review and regulate transnational surrogacy should continue to further protect surrogate children.

In part two of the webinar, a roundtable discussion took place between the expert speakers on the core question: "How can we define the 'best interest' of a child?"

- Ye referred to a custody dispute case in the Shanghai No. 2 Intermediate People's Court, involving a German father and Chinese mother. Ms. Ye demonstrated that Chinese courts place paramount importance on a child's interests; in that case, the court considered factors such as the children's living and educational environment, parental income, nationality, and the best care that could be received from either party.
- Coburn opined that the US' failure to ratify UNCRC will become problematic as the PIL sector moves towards increasing child participation and their best interests. At a federal level, US courts are less likely to refer to children's best interests and right to participate. Moreover, although state courts interpret child protection principles that are similar to the UNCRC, they will not necessarily order protections that are not entrenched in statute.
- Kaye emphasized the significant difference between Australian Family Court matters (where a child's best interests are paramount) and Hague matters, where best interests are considered not in Australia, but in the country of habitual residence. She reiterated her concern that systematically, 'best interests' in Hague matters are not met in DV matters.
- Professor Rademacher drew attention to intersectional issues at play, noting that German court cases often implicate refugees and

disproportionately impact young women. This is a Europe-wide issue that has resulted in stricter child marriage laws in countries like France and the Netherlands - however, he observed that these jurisdictions tend to have more flexible public policy approaches than Germany with respect to underage marriage.

- Lortie concluded the roundtable by agreeing with Ms. Kaye that DV adds difficulties to putting in practice the principles and protections under the HAC and UNCRC, resulting in wrongful removal and retention of children. He emphasised the importance of education and states' responsibilities to implement solutions to combat DV on a domestic level.

The full online webinar can be accessed online by clicking [here](#).