Judicial Activism in International Child Abduction

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Introduction

What do I mean by Judicial Activism in International Child Abduction? I mean the judge's recognition that the challenges and opportunities of his office extend far beyond the delivery of justice in those cases that chance to be listed in his court. What are those challenges? The first is to work not in the isolation of his own court but collaboratively with the judge in the other jurisdiction. The second is to contribute to the development of law and good practice to ensure better outcomes for children and families enmeshed in trans-national court proceedings. Obviously this second responsibility rests only on judges who have chosen to specialise in the field of family law. The more senior the judge the greater is the responsibility. My fellow speakers at this conference demonstrate that there are judges from many jurisdictions who share this vision and who have developed great commitment to its advancement.

The modern concept of judicial activism is not confined to the field of international child abduction nor to family proceedings more generally. It has emerged in all areas of trans-national litigation: see the article: "Who now is my neighbour" by Mr Justice Baragwanath, a judge of the Court of Appeal of New Zealand.

Judicial Activism is the product of technical achievements that have transformed our world. The wide-bodied jet, the cell-phone and the internet have in combination created a reality of the old ideal of one international community. The freedom to communicate world wide contributes to the freedom to move across countries and continents and to the creation of intimate relationships from which may ultimately develop bitter parental disputes, conversely as these technical developments have become available to such a substantial percentage of the world population, a renewed surge of nationality has seen the disintegration of empires and unions with the consequence that the world is now divided into approximately two hundred autonomous states. International trade, international crime, and international families all require law and practice extending beyond the autonomous laws of the two or more states directly involved in the resolution of the issues. It is the development of practice that the

judges have a vital contribution to make. Judges do not make the law. At the most they may influence its development.

International family law originated in Conventions, consensually negotiated and subsequently adopted into the internal law of the jurisdiction. More recently international family law has developed by the directives and regulations of the European Union. Thus the primary lawmakers of international family law are the Hague Conference, the European Union, the United Nations and the Council of Europe.

This process of international family lawmaking is essentially governmental. European regulations are initiated by the Commission but national responses and resulting negotiations are in the hands of ministerial officials. The policy pursued in negotiation, the bottom line between what can be conceded and what can not, is set by the Executive. In the same fashion are the Conventions of the Hague Conference made and it is ministerial officials who set the future work programme of the Conference at the Annual General Affairs meeting.

However, in the United Kingdom the Executive now seeks the advice of specialist judges and academics before reaching policy decisions. Formal advice is taken from the North Committee of which I am a member. There is one other member, a Scottish academic, who is an international family law specialist. Less formally, ministry officials attend the meetings of the International Family Law Committee, which I chair, and invariably seek the advice of its members on policy issues which have also been referred to the North Committee or which did not merit reference to formal consultation. The Committee, although less august, has the advantage of a wide membership (judges, academics and practitioners) all of whom are specialists in international family law.

The successful operation of Conventions and Regulations obviously requires a high level of administrative co-operation between the jurisdictions engaged by the family dispute. Hence the instruments themselves require all participating jurisdictions to create a Central Authority. A parallel provision mandating co-operation during the judicial process is not to be found in the instruments themselves. At the date of the negotiation of the 1980 Hague Abduction Convention the concept of judicial activism had still to be born. The harnessing of the power of judicial co-operation has been developed informally by the Hague Conference over the last decade and more formally by the European Commission, which in 2001 introduced by Regulation the obligation on Member States to co-operate through the European Judicial

Network. I will consider these developments in greater detail in recording the birth and growth of judicial activism in the United Kingdom.

A United Kingdom Perspective and Chronology

In tracing the birth and growth of judicial activism, I write principally of the developments in the United Kingdom and, more narrowly, in London, where the jurisdiction of England and Wales in international family proceedings is concentrated. In 1993 I was one of the 16 judges of the Family Division of the High Court, the Court to which all Hague Convention cases are assigned. I was also dealing with big money divorce cases, many of which involved competing proceedings in another jurisdiction. With the support of the Chief Justice of the Family Division I convened the inaugural meeting of the International Family Law Committee in October 1993. I had the sense that something was needed but had little sense of what its future roll might be. We began with regular meetings, often addressed by a distinguished speaker, however internal education took us only so far and engagement with specialists from other jurisdictions was the next step. At that date we were having particular difficulty in securing the return of abducted children from Germany. We decided to convene a meeting with German judges to discuss the problem and its solution. Persuading the Ministry to fund the conference proved difficult and delayed the event until May 1997. The outcome fully justified the Ministry's investment. One of the products of the conference was legislation that confined the jurisdiction in Hague abduction cases in the German courts from over 600 to 23. From this first conference developed the Anglophone/Germanophone Standing Conference which meets in alternate years and which brings together all the jurisdictions in Europe that use either English or German in their court proceedings.

An even more significant inception was the judicial meeting convened by the Hague Conference at De Ruwenburg in June 1998. This conference signalled the Permanent Bureau's conviction that the consolidation of the success of the 1980 Convention depended in judicial specialisation and collaboration. The importance of this meeting cannot be over-emphasised. The conference was global and launched the INCADAT website, the Judges Newsletter and the Hague Judicial Network, the creation of which I proposed with the support of the Chief Justices of Australia and New Zealand.

In the Summer of 2000 the United States hosted a meeting of the specialist judges of the common law world to discuss a common approach to international child abduction amongst a

number of jurisdictions all operating the 1980 Convention and all rooted in the common law tradition.

Another direct consequence of the De Ruwenburg meeting was the natural inclusion of specialist judges in Special Commissions convened to consider the operation and development of the 1980 Convention. Earlier Commissions involving only Central Authorities inevitably focussed more on the administrative than the judicial process. At the Special Commission in March 2001 direct international judicial communication and the development of the Network of specialist judges was debated. In recommendation 5.5-5.7 the Commission strongly endorsed both the expansion of the Network as well direct judicial communication, subject to safeguards, and direct judicial collaboration. In June 2001 we invited French judges to a residential conference in England at the same venue as our first meeting with the German judges four years earlier. Again this first meeting has developed into an Anglophone/Francophone Standing Judicial Conference which also meetings in alternate years and brings together the French and English speaking jurisdictions of Europe.

In 2003 the specialist family judges of the United Kingdom held meetings with the Chief Justice of the Supreme Court and with Chief Justices of the Courts of the Provinces which resulted in the signing of the Pakistan Protocol. The Protocol provides jurisdictional rules and stipulates reciprocal enforcement of orders made in either jurisdiction. The Protocol also provides for collaboration of judges between a Network judge in each jurisdiction. Currently my office is managing approximately 20 new cases a year calling for collaboration under the Protocol. The Protocol also constitutes a valuable precedent for bilateral Judicial agreements between an Islamic and a non Islamic state seeking to control the illicit movement of children between their jurisdictions. The Protocol has yet to be given the force of Statute in Pakistan. The efficacy of the Protocol, both as a precedent and as a remedy for jurisdictional disputes, would be greatly enhanced if given statutory force.

The specialist judges of the United Kingdom sought a similar accord with the Chief Justice and other judges of the Supreme Constitutional Court of Egypt. As a result of meetings in January 2004 and January 2005 an agreement modelled on the Pakistan precedent was achieved. The agreement is the Cairo Declaration. It has the same need for incorporation into Egyptian statute law but again demonstrates the ability of judges to identify the principles that should guide future legislation.

The first meeting with the Egyptian judges was in London and paved the way for the first meeting of judges from Islamic and non Islamic jurisdictions convened by the Hague Conference in Malta. This dialogue, known as the Malta Process, was resumed in 2006 and, most recently, in March 2009. The Resolutions passed at these judicial conferences again demonstrate that progress is most likely to be made by meetings of experienced judges rather than by meetings of Ministers or Diplomats representing their respective jurisdictions. The most concrete conclusion reached at the most recent Malta Conference was to initiate a structured procedure for the mediation for child abduction cases involving a Hague and a non Hague jurisdiction. In each acceding jurisdiction there would be a Central Authority to administer the collaborative mediation. This initiative was proposed by a senior specialist judge, Justice Chamberland of the Quebec Court of Appeal.

The introduction of Brussels II in 2003 and its significant extension in 2005 created the obvious need for a Network of specialist judges to expand the function of the European Judicial Network beyond its original Civil Justice remit. It was the specialist judges of the United Kingdom, particularly myself and Mr Justice Singer, who advocated this development both with the European Commission and with other member states. We were fortunate to have the support of the then Minister for European Family Justice, Baroness Ashton. Mr Justice Singer achieved chapter 10 of the Good Practice Guide that supports in terms direct judicial collaboration.

In April 2005 the increasing need for judicial activism in international family proceedings was recognised by the creation of my post as Head of International Family Justice. In order to enable me to fulfil the potential my court sittings were reduced to two days a week on average, an office was created with a fully qualified legal secretary and an experienced administrative secretary both working full time. Additionally the Judicial Office budgeted for all my reasonable travelling expenses. Thus resourced I am able to provide a comprehensive service to trial judges in my jurisdiction who encounter difficulties in trans-national cases or who wish to communicate directly with the judge in the other jurisdiction. Equally my office is ready and able to meet any requests for information or assistance from judges in other jurisdictions. In setting up this office I was able to draw upon the experience and advice of Judge De Lange-Tegelaar, who, with Judge Keltjens, had previously been appointed to create a similar operation in the Netherlands. Whether this model, which has proved so successful

in my jurisdiction and in the Netherlands, will be adopted in other European jurisdictions remains to be seen.

In February 2006 the European Commission demonstrated its conviction by giving half a day of the EJN meeting to a debate on direct judicial communication. At that meeting I proposed that the Commission and the Permanent Bureau should jointly host a conference to consider how the European and Hague Judicial Networks might be integrated. This proposal bore fruit in January of this year, the concluding event in this chronology.

In May 2006 I led a delegation from the United Kingdom to discuss with the judges of the European Court of Justice in Brussels how references under Brussels II revised could be managed within the time frame of a child's life given that the average span of an ECJ reference was then 23 months. Our meeting was convened by Judge Sheman from the United Kingdom who had invited the judges of the court with particular responsibility for procedural issues. Subsequently the court introduced the accelerated procedure which enabled the referenced in Rinau to be disposed of in approximately 2 months. This is surely as good an example as I could find of judicial activism influencing the development of the international justice system to meet the needs of children and families.

In November 2006 at the 5th Special Commission on the 1980 Convention it was Judge Eberhard Carl of Germany who proposed that an expert group of judges should be invited to draft a guide to good practice in judicial collaboration. His proposal was adopted by the Commission and the first meeting of the group took place in the Hague in July 2008.

In December 2006 I attended meetings in Delhi which resulted in a statement by the Government of their intention to accede to the 1980 Convention. Unfortunately that statement of intent has yet to be implemented.

In early 2007 the Chief Justice of South Africa introduced special measures for the future conduct of return applications under the 1980 Convention. In April I assisted Judge Van Heerden in the delivery of a training seminar to the 14 judges nominated under the new procedure.

In October 2008 I was invited to present a paper to the judges of the Family Court of New Zealand on the development of International Family Law and the International Family Justice System.

This chronology aptly concluded with the Brussels Conference on 15th - 16th January 2009. The importance of the Brussels Conference can hardly be overstated. Judges and experts attended from 54 jurisdictions to discuss direct judicial communications on family law matters and the development of judicial networks. Of the 17 Resolutions agreed at the conclusion of the Conference the following are of particular relevance to this paper:

" 1. The conference emphasises the value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications.

2. States that have not designated Network judges are strongly encouraged to do so.

3. Judges designated to a network with responsibility for international child protection matters should be sitting judges with appropriate authority and experience in that area.

11. Efforts should be made within States to promote the appropriate use of direct judicial communications in the international protection of children and to increase awareness of the existence and role of Network judges.

13. Adequate resources, including administrative and legal resources, should be made available to support the work of the Network judges.

14. States experiencing a high volume of international child protection cases should consider setting-up an office to support the work of the Network judge or judges."

Conclusions from the Chronology

Given the size of the judicial congregation and the authority of both the Hague Conference and the European Commission these recommendations are not simply aspirational. Ministries of Justice in all jurisdictions operating the 1980 Convention now have a clear obligation to give effect to these concluding recommendations. The special provisions contained in Article 11 of Brussels II revised amount to no more than a refining protocol without meaning or

effect, divorced from the Hague 1980 Convention operated by all the 27 member states of Europe. Thus logically the appointment of a specialist judge to the European Judicial Network is by implication an appointment of that judge to the Hague Global Network. Thus the obligation on the specialist judge within the European Judicial Network is to work collaboratively with any jurisdiction operating the Hague Convention whether a European member state or not. Nor should specialist judges within the European Judicial Network refrain from collaboration with the judge in a jurisdiction that is yet to accede to the Convention. Although the potential may be reduced, as our experience with Pakistan and Egypt demonstrates interstate judicial collaboration improves the prospects of a just outcome.

From the detailed chronology which I have written the high peaks that stand our are the 1998 De Ruwenburg Conference with its products, the development of the EJN to embrace family matters within its function and the partnership between the Hague Conference and the European Commission that delivered the Brussels Conference.

What the chronology as a whole demonstrates is that almost all the recorded developments have resulted from judicial activism. Given all that has been achieved over the last 15 years it must be acknowledge that judicial activism is a potent force. Of course judicial activism requires an institutional framework which has been provided by the Hague Conference, the European Commission and those governments which have encouraged judicial activism by the nomination of a specialist judge to the judicial networks and by the provision of the resources with which to do the job. Obviously the resources must be proportionate to the workload. The size and composition of the UK population creates exceptional demand. Smaller jurisdictions are likely to generate only occasional calls on the Network judge.

The Future

I have demonstrated that much has been achieved within the last 15 years, however undoubtedly there remains much more that has to be achieved before the responsibility of nations to support judicial collaboration in family matters is as transparent as the obligation to provide administrative support through a Central Authority. Although the battle to establish judicial activism as best practice has clearly been won, there are still states, in all other respects exemplary in their performance of their Convention obligations, who neither encourage nor permit their judges to join the community of activists. Without wishing to point and accusatory finger, the European states bordering the Mediterranean and the

Francophone states still remain aloof from best practice at the 1998 De Ruwenburg Conference France was the only jurisdiction to oppose the creation of a judicial network. A decade later there 4 delegates from France at the Brussels Conference but not 1 a sitting judge. The concept of encouraging specialisation in international family justice is no doubt contrary to the tradition and to the current policy of the Ministry. France has introduced concentration of jurisdiction for abduction applications. Procedural step engenders judicial specialisation. For almost all aspects of the work of a specialist network judge it is not practical to offer as a substitute a qualified magistrate seconded to the Ministry of Justice.

Another required development, much more easily achieved, is to ensure that the European family network is administered and supported by the Commission as diligently as the Hague Network is by the Permanent Bureau. Administration and support require not just the maintenance of a regularly updated directory but also the publication of the existence and function of the Network so that its existence and accessibility is known not just to the community of other specialist judges but to all trial judges before whom a Hague application can be listed and to all practitioners who undertake this specialist work.

Conclusion

All that I have written is relevant to every judge attending this conference. Judicial activism is not an esoteric option practiced only by the few nominated to represent their jurisdictions in the Hague and European Judicial Networks. It is an opportunity and responsibility for every judge who may encounter a trans-national family case in court. As a convert to judicial activism your first thought should be: is this abduction not but one exchange in a developing family battle campaign? Your second should be: why not refer, not just the contested return application but the wider dispute to international mediation? In all cases in which there are proceedings on foot in the other jurisdiction your third should be: should I not communicate directly with my brother or sister judge to ensure procedural compatibility? You may well use your own network judge to make the practical arrangements for the communication: ie. when, by what mechanism and in what language. So if you do not already know who is your Network Judge, make enquiry and, if you discover that your country has no nominated network judge, lobby your Chief Justice and your Ministry to nominate one.

Besides the responsibility of the trial judge to support international mediation and direct judicial communication in specific cases, there are now many opportunities to enlarge and

share our expertise at conferences such as these. We must be militant where we see that inadequate procedures or insufficient resources have been devoted to international family proceedings in our respective jurisdictions. This is for all of us the responsibility and the challenge.