

Center for Adoption Policy Studies, First Annual Adoption Conference Summary of Proceedings

Intercountry Adoption, the European Union and Transnational Law

an interdisciplinary conference sponsored in conjunction with New York Law School and Diplomatic History, (the journal of the Society for Historians of American Foreign Relations), held on May 21, 2004 at New York Law School.

Diane B. Kunz (Executive Director, Center for Adoption Studies) welcomed the audience to the conference. She challenged the conference participants and members of the audience to use today's symposium as a building block toward a common goal -- a permanent family for every child.

The keynote speech was delivered by Adam Pertman (Executive Director, Evan Donaldson Adoption Institute). Mr. Pertman began by stating that 6 million Americans were adopted. These adopted people in turn touch the lives of tens of millions of other people. Adoption is often viewed merely as a children's issue but this view is wrong because adoptees grow up to be adult members of society. The focus on children also makes adoption a niche issue, maintained Mr. Pertman. As a supposed niche issue, adoption receives far less media coverage and financial support than if it were properly portrayed as an issue vital to society.

Summary of Papers Presented

Panel 1: The United States, the United Nations and the European Union

Professor Robert D. Schulzinger (University of Colorado at Boulder) presented the first of the papers on the international institutions that govern Intercountry Adoption (ICA). In his presentation, "the United States and Multilateralism", Professor Schulzinger focused on the growth of American interest in multilateralism. He located the beginning of this process during World War II when policymakers such as President Franklin Roosevelt and Secretary of State Cordell Hull, focussed on planning the post-war order. They were determined not to repeat American mistakes made in the period following 1918, especially the decision of the United States to reject the Versailles (and associated) peace treaties and to refuse to join the League of Nations. Seeing these decisions as part of the explanation for the Second World War, high level Americans helped draft the United Nations Charter, and pushed for the creation of the IMF and World Bank. Professor Schulzinger also explained how the sheer power of the United States allowed American officials to assume that the United States would be able largely to control any institution that it joined.

Professor Maarten Pereboom concentrated on the creation and expansion of the European Union (EU) in his presentation, "The European Union and the place of Central and Eastern Europe in the European World." The beginnings of the EU lay in the same time period, the end of the Second World War, which saw the founding of the United Nations. French officials, notably Jean Monnet and Robert Schuman, believed that economic ties between France and Germany, which had fought three wars against each other in seventy five years, could be constructed in a way which would bind these countries too close to allow war to separate them. The result was the European Coal and Steel Community of 1951. France and Germany, together with the Benelux countries and Italy then formed the European Economic Communities in 1956. What in the nineteen fifties had been a custom union began to take on much more important roles, especially after the expansion of the EC to nine countries in 1973 with the inclusion of Britain, Ireland and Denmark. By 1992, when the Treaty of European Union was signed in Maastricht, the EU was responsible for freedom of movement, joint policy on security, national budgetary policy and would soon issue its own money, the Euro, which would replace member countries' currency. The EU constitution, now under debate, would expand the EU's authority even further at a time when the EU, as of May 2004, had grown to 25 Members.

Dr. Diane Kunz spoke about "The European Union's Organic Documents and Judicial Institutions." She focused particularly on Romania, one of two applicants to join the EU in 2007. Dr. Kunz traced the way Baroness Nicholson of Winterbourne, a member of the European Parliament and rapporteur (chair) of the EP's committee on Romanian Parliament, has used her position to terrorize the Romanian government on the issue of ICA. Lady Nicholson's dictatorial actions were far from typical; ICA was not even a subject of discussion during the accession process of virtually all of the ten nations admitted this year. In early 2004 Lady Nicholson pressured the Romania government to jettison the ICA legislation that had been drafted with the help and comments of international experts in favor of legislation that would effectively ban ICA. Dr. Kunz suggested that one feasible step is to advise the Romanian government to make sure that ICA is not mentioned in the accession treaty that Romania will sign with the EU. This step is important because the principle of subsidiarity means that the EU does not regulate adoption laws in member states once they are admitted to the EU. Unless Romania binds itself by the accession treaty to a certain position on ICA, it will legally be free to change its approach once it is admitted to the EU.

Panel 2: International Adoption: the Current Legal Paradigm

Professor Elizabeth Bartholet (Harvard Law School) spoke on "The Politics of International Adoption: Halting Process and Perennial Problems." She attacked the "false romanticism" of critics of ICA. Rather than focus on community views, she urged that the focus remain on the abandoned and neglected children who will remain in institutions or foster care if they are not

adopted. In illustration, Professor Bartholet recounted her discussions with the wife of then Georgian President Edvard Schevardnadze. Mrs. Schevardnadze was a vituperative opponent of ICA at a time when Georgian orphanages were filled with neglected children who would be left incarcerated for the rest of their lives. Professor Bartholet bemoaned the anti-ICA approach taken by international NGOs such as UNICEF. Professor Bartholet also recounted the background of the Hague Convention on Intercountry Adoption (HCIA) and explained that a pro-ICA document had been watered down by anti-ICA forces. In this context Professor Bartholet suggested that it was very important to work to convince NGOs, human rights groups and those who support these endeavors that ICA is a force for good, rather than a neo-colonialist activity.

Professor Ethan Kapstein (INSEAD) focused on the HCIA in his presentation "Regulating International Adoption: The Role of the Hague Conference." He laid out three interrelated sources of tension. The first was between sending and receiving countries. The second was between the best interests of the child and the legal framework of the HCIA and the third was between the need for adoption services and the fear of improper financial gain. Professor Kapstein worried that the tools available to enforce an honest regime of ICA were blunt, at best. For example, when corruption is found in a sending country, the usual response has been to declare a moratorium on adoptions from that country. But shutting down all adoption penalizes the abandoned children and yet the moratorium does not even guaranteeing that the perpetrators of the fraud and corruption will be punished. Professor Kapstein urged the audience to consider how to better enforce a legal and efficient system of ICA.

Professor Paul Dubinsky (New York Law School) located the HCIA in the continuum of Hague conventions in his presentation, "The U.S. and Various Hague Conventions." While those interested in ICA only focus on the HCIA, there are well over 30 Hague Conventions. These treaties are mainly commercial in nature, governing how nations will treat international commerce. Professor Dubinsky suggested that research should be done as to why the Hague was chosen as the vehicle for a treaty on ICA. Professor Dubinsky also pointed out that EU nations, instead of voting separately, now vote the EU position. This development has major ramifications for the HCIA because it means that the U.S. will not be able to lobby European nations individually but will instead confront a single EU position which can wield 25 votes. Having just returned from a State Department briefing on the various Hague Conventions, Professor Dubinsky informed the audience of the befuddlement of the State Department at receiving over 1600 comments on the proposed regulations under the HCIA. Unlike the Department of Health and Human Services, State does not customarily issue regulations and does not have an existing mechanism for handling such a large volume of comments. For this reason, the ratification of the HCIA has been pushed back from its target date of 2004 to 2006. Professor Dubinsky urged that the adoption community attend State Department briefings and other information sessions.

Ann Reese (Executive Director, Center for Adoption Policy Studies) discussed "Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles," a presentation based on an article written by Professor Sara Dillon of Suffolk Law School, who could not be present at the conference. Children were originally seen as the property of their fathers. However in the 20th Century three attempts were made to provide them with certain rights. The most recent, the United Nations Convention on the Rights of Children (UNCRC) dates from 1989. But the UNCRC did not go far enough. Just as there is an existing right not to be tortured, children should have the right not to be institutionalized. Indeed, because institutionalized children are not free to leave their orphanages, they are analogous to political prisoners. Granting children the right not to be institutionalized, a right that could be inferred in the UNCRC, will provide those that fight for children with a powerful legal instrument. With millions of children world wide institutionalized and another 100 million street children worldwide homeless, this argument is of great practical importance. Professor Dillon in her paper pointed out that ICA alone will not solve the entire problem just as granting amnesty will not itself solve the problem of political persecution. However, ICA can be viewed as a particular form of amnesty that will rescue individual children.

Panel 3: The United States in the Adoption World

Professor Rita Simon (American University) discussed "The Historical Framework of a Transformation." Professor Simon has conducted three decades of research on multiracial and intercountry adoption. Her longitudinal studies refute the critics of transracial adoption. The children (now grown to adulthood) that she has studied, are successful, functioning adults. They show no added issues, such as drugs, alcoholism or delinquency, than do the control groups. Those who search out birth parents do so not as a rejection of their adoptive parents whom the adoptees view as their "real parents." However, Professor Simon did emphasize the importance of trans-racial cultural education. Racial differences should be recognized and celebrated, not hidden or pretended away.

Professor Debora Spar (Harvard Business School) discussed "Trading Places: International Adoption and the Regulations of Reproductive Technologies." Professor Spar described 16 ways to make a baby. These ranged from the traditional way to the most esoteric assisted reproductive technology (ART) to ICA. What she emphasized was the way that reproductive technology was viewed in a totally separate category from adoption. This dichotomy sets in train many further distinctions. Adoption in general and ICA in particular were heavily legally related; many aspects of ART are not. Professor Spar questioned why society allows putative parents to choose virtually any form of ART without restriction while making it so difficult to adopt.

ART expenses are wholly or partially covered by insurance while ICA expenses are generally funded out of pocket by the potential parents. Does it make sense

for society to pay for ART to bring more children into the world while refusing to fund a life in a family for children who are suffering?, she asked.

Professor Mary Hansen (American University) focussed on the "Economics of the U.S. Regulations Implementing the Hague Convention." Professor Hansen stressed the self-regulatory nature of the current version of the Hague regulations, which were published by the State Department in 2003. Rather than being at the forefront of adoption regulations, Professor Hansen maintained that the U.S. lagged behind other nations. She believes that the HCIA did not envision the privatization and delegation that these regulations appear to favor. The HCIA is supposed to root out corruption and conflicts of interest, but Professor Hansen believes that these regulations will do little about either problem. She supports redrafting the regulations and therefore applauds the delay in ratification. Professor Hansen worries that if the Hague regulations are not strengthened, other countries will ultimately decide not to allow ICA from their countries to the United States.

Dr. Jane Aronson (World Wide Orphans Foundations) gave a presentation on Medical Considerations in EU Adoption. Dr. Aronson brought the audience to tears with her descriptions of life in an orphanage. Indeed, her account of children neglected to death was powerful in a manner that words alone cannot convey. Dr. Aronson did not want to see more delay or negotiations -- she wanted to get the children out. But not all children will be adopted. Therefore Dr. Aronson urged programs such as her own Orphan Ranger program that aids the children left behind. One example is the "granny" program in Bulgaria set up by Dr. Aronson. Women are recruited to feed, change and nurture orphanage babies and children. It is a win-win situation: unemployed women get trained for well-paying jobs while languishing children start thriving.