Habitual residence: towards a child centered approach

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Reference

BUMBACA, Vito. Habitual residence: towards a child centered approach. In: 6th Children's Rights Research Symposium, Belfast, 4-5 October, 2018

Available at:
http://archive-ouverte.unige.ch/unige:109044

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The international protection of children’s rights is topical in today’s world where modern issues are rising in a cross-border dimension, notably international mobility, migration and cross-cultural marriages. Individuals, especially children, require international protection through modern socio-legal remedies. Private International law (hereinafter PIL), whose primary scope is to protect individuals, especially children, must provide modern responses in the fullest respect of the legal order. Above all PIL has to refer to its social scope aiming to protect individuals’ needs, fundamental freedoms and rights across international borders – sociology of law. Beyond courts and tribunals, important new actors are involved as guardians of the legal order such as international social services. They act in respect of a child centred approach allowing international multidisciplinary remedies in respect of children’s best interests therefore allocating primary importance to the child’s well-being. By virtue of its social scope, PIL has nowadays integrated such remedies, notably intercountry child assessments. Such modern remedies prove very useful to determine international competence – child habitual residence – over cross-border custody proceedings and to ensure international protection. In the case involving a Chinese/Australian couple living in Australia and the Chinese mother wishing to relocate to China with their two children, a child centred approach would be useful to a) determine the children’s habitual residence; b) ensure international protection.

Habitual residence is a prevailing connecting factor in the field of child protection introduced by the Hague Conference on Private International Law. The ideology behind it was to better ensure the determination of jurisdiction across borders close to the child’s well-being – child’s best interests – in a transnational socio-legal context facing international mobility, migration and cross-cultural marriages, particularly for the better implementation of cross-border child protective measures such as visiting rights, custody rights, child return, cross-border placement and analogous measures. The importance of determining jurisdiction in cross-border family relationships refers to wish that State judicial and administrative authorities – the guardians of legal order – and individuals, in particular children – the beneficiaries of the legal order – respectively ensure and have access to international justice.

In relation to the above, habitual residence aims at determining the socio-legal nexus (proximity) between State jurisdiction and the child concerned – this is the theory. In order to fulfil the scope of identifying the

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1 UNCR, article 20.1.
4 UNRC, article 3.1.
more appropriate and neutral jurisdictional authority for the child, relevant habitual residence components, factors, shall be considered and recalled – this is the methodology\textsuperscript{11}.

Over the past years, other connecting factors were indicated in order to fulfil the determination of international jurisdiction (competence and applicable law in Private International Law), notably domicile and nationality\textsuperscript{12}. In the context of modernisation and globalisation where individuals are allowed to move and reside freely and temporarily (i.e. EU free movement principle, art. 21 TFEU) in States other than their Country of origin (i.e. nationality, or domicile of origin), it is important to provide a more effective and efficient criterion able to realistically connect the beneficiary and the guardian, more importantly when concerning children. Introducing the concept of habitual residence should therefore allow the possibility to request international protection in the place of the child’s physical presence, although some other conditions are needed in order to justify the clear-cut bond with one State rather than another – the State of habitual residence where entourage and enracinement are fundamentally present\textsuperscript{13}.

The child’s entourage and enracinement may refer to social and family life as well as traditional cultural origin bonds\textsuperscript{14}. Neither the Hague nor national law\textsuperscript{15} have provided individuals or State authorities with guidance about the “conditions” for requesting international protection, therefore jurisprudence has filled the socio-legal vacuum by allowing individuals to refer to a potential orientation\textsuperscript{16}. Such conditions according to the relevant case law are social and family environment, economic stability, schooling, language skills\textsuperscript{17}, including nationality, physical presence and durability of the stay\textsuperscript{18} that may be, these last ones, considered as decisive in some case scenarios such as those concerning relocation and unaccompanied minors or displaced children and refugee children\textsuperscript{19}.

However, some issues are encountered in practice: a) the disharmonised judicial reasoning of the child’s habitual residence whereby fragmentation occurs among national (i.e. China, Seychelles, Switzerland)\textsuperscript{20} and regional (i.e. EU, US)\textsuperscript{21} interpretations; b) the inconsistent reference to the conditions mentioned above, and especially the relevance given to some elements rather than others such as mere physical presence and nationality that are often considered with primary importance; c) the discrepancy between the scope of choosing habitual residence as a closer connecting factor and the practical operation of such criterion which may often appear not child oriented. The latter difficulties leave the child in a socio-legal disorder and chaos – jurisdictional limbo – where their paramount protection may be neglected so that Private International Law

\textsuperscript{11} I was asked to decide whether to intervene during the theory or methodology sessions. I believe that it is important to clarify theory and methodology aims concerning habitual residence in international family law, specifically relating to the international protection of children’s rights. I kindly ask to be included in the theory session where I will be talking also about methodology.


\textsuperscript{13} S. Pannaikadavil-Thomas and V. Bumbaca, The role of International Social Services in Private International Law, Yearbook of Private International Law, Vol. 19, 2018, at 539.

\textsuperscript{14} French Court of Cassation, decision No 1015 of 26 October 2011.


\textsuperscript{16} P. Beaumont, J. Holliday, Recent developments on the meaning of “habitual residence” in alleged child abduction cases, In M. Zupan (Ed.), Međunarodnoprivatnopravo u praksieuropskihsudova: obitelj u fokusu, 2015, at 54.

\textsuperscript{17} ECI, ‘A’, decision of 2 April 2009, ECLI:EU:C:2009:225, § 44.


\textsuperscript{20} Chinese People’s Court, ‘Judicial Interpretation of 2010’; Seychelles Supreme Court, ‘Dituro v. Dituro’; Swiss Federal Tribunal, decision No. 889/2011.

cannot fulfil its purpose of ensuring international justice\textsuperscript{22}. PIL should refer therefore to \textit{innovative and modern multidisciplinary mechanisms} to assess the habitual residence\textsuperscript{23}, thus the socio-legal nexus\textsuperscript{24}.

In the case involving a Swiss-Italian couple living in Italy with two children of respectively 4 and 6 years old, the mother wishes to relocate with her children because her husband is always working and not dedicating time to his family. The mother moves to Switzerland (Fribourg) without the father’s consent and the father submits a child return application in Italy which is approved. The mother does not proceed with the return, meanwhile she commits suicide and the children are placed in Institutional care. The local authority (Service de l’enfance et de la jeunesse/SEJ) decides to mandate the International Social Service Swiss member to carry out an intercountry child assessment in cooperation with the Italian member in order to assess the parental capacities of the father and allow for the children return to Italy, the Country of their \textit{entourage} and \textit{enracinement}. The assessment has shown that the family environment, housing, schooling and economic stability were safe and harmonious for the children fulfilling the spirit of a child centered approach, thus \textit{ensuring a safe return home}.


\textsuperscript{24} S. Pannaikadavil-Thomas and V. Bumbaca, The role of International Social Services in Private International Law, Yearbook of Private International Law, Vol. 19, 2018, at 552.