

The clash of legal cultures over the ‘best interests of the child’ principle in cases of international parental child abduction

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1. Introduction

In a debate in the Dutch Parliament in April 2009 on international child abduction, the Minister of Justice Hirsch Ballin stated that ‘international traffic and certainly international love traffic has increased in the last decades’.¹ He seemed to imply that because of this increase, transnational love problems in divorce, maintenance issues, visitation rights, custody over children, and cases of child abduction were here to stay for some time. Transnational problems bring about cultural problems. The idea of a ‘clash of civilizations’ (Huntington) translates to the everyday perception that cultures clash in today’s multicultural societies, and international love problems, specifically child abduction by parents, is where it is clearly demonstrated.

A complex of private international law and treaties like Brussels II Bis² provide for remedies in cases of different views on what are accepted grounds for divorce, the level of maintenance etcetera. Some problems are greater than the law, however, and they lie on the personal and the cultural level. The clash at the personal level is probably one of the reasons why mediation is becoming a mechanism to be used in transnational family law. The cultural level may, however, also pose problems that the law cannot resolve. When Members of Parliament in the same debate asked for ‘the interests of the child’ to be the primary concern for Dutch policy and the decisions of the courts, the Minister of Justice appealed to their ability to switch perspectives: ‘I want to draw your attention to the mirror image, namely that a child is abducted from the Netherlands to a country X. In that country they are convinced that it is in the interest of the child that he or she stays there, and is not raised in the Netherlands which in their eyes may be a country with low moral standards.’³ The fact that legal concepts like ‘the interests of the child’ have different cultural interpretations is a manifestation of the clash of legal cultures.

These international and transnational family law problems may be seen as consequences of the process of globalization, which refers to the increasing migration of people, the growing international flow of capital and economic exchange, and the increasing interdependence of

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1 *Handelingen II* (minutes of Parliamentary Proceedings) 15 April 2009, 77-6060.

2 By ‘Brussels II Bis’ is meant Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. It sets out simplified and uniform jurisdictional rules in the matters mentioned.

3 *Handelingen II* (minutes of Parliamentary Proceedings) 15 April 2009, 77-6059.

states, social groups and networks of people and organizations.⁴ Lawyers, judges, policy makers and others pay attention to this social process because in the long term it influences their day-to-day work and decision-making. It changes the standards and requirements of their legal profession, it changes their work routine and its underlying values, and in the end it changes the legal system and the culture of a country.⁵ The legal profession today requires that lawyers and most of the time even judges do not stick to the black-letter law of the national legal system.⁶

In this paper I address the question of what the clash of legal cultures in international child abduction entails. I will focus on a specific, contested part of legal cultures, namely the different interpretations of ‘the best interests of the child’ principle as mentioned in several treaties. The best interest principle thus functions as a bone of contention concerning interpretations that differ according to the legal culture in which the principle is embedded. I will first give reasons for narrowing the focus to the clash with Islamic legal cultures (Section 2). Then (Section 3) I will address the first sub-question of ‘in what ways this clash manifests itself’: what are typical cases in which legal professionals become involved, and how do they act in such cases? This part is bracketed in between the dominant modern and the Islamic interpretation of the best interests of the child principle. After the description of the more visible part of legal practice, I want to take a look ‘underneath the surface’ or ‘behind the curtain’ in order to better understand the problem and to look at possible future developments. In Section 4 I will therefore deal with the second sub-question of ‘which developments in the Dutch legal profession relate to and address the clash’: do legal professionals keep their ‘cultural knowledge’ up to date, do they develop alternative ways to deal with clashes like these, etc. This fourth section will show that these developments are haphazard and piecemeal. In the concluding Section 5 I will assess the meaning of the developments in the Dutch legal profession concerning ‘the best interests of the child as a bone of contention’.

2. Narrowing the focus to Islamic legal cultures

Since Islam was placed on the agenda as being possibly problematic, there has been an increase in ordinary people who perceive a clash of legal and religious values, also in the field of family and gender.⁷ Legal professionals, as I have noticed in my fieldwork, also mention, in the first place, Islamic ethnic minority cultures, but acknowledge that Western cultures and even the varieties in Dutch culture (then usually understood as class differences) may present just as many problems in legal cases. To simply demonstrate that the perception of cultural differences is not limited to ‘Islam’, we only have to look at the case of seven-year old Katja, who was abducted in May 2009 while playing outside during a school break. A few days after the abduction her American/Dutch father phoned the police to inform them that he, as the father, had been granted custody according to an American court, so that he had the right to decide where his child

4 On a national level the umbrella term is ‘multicultural society’, which refers to observably different groups with a specific ethnic or national background and with a culture (convictions, practices, and attitudes, see W. van der Burg, ‘Culturele diversiteit en de democratische rechtsstaat’, in W. van der Burg et al. (eds.), *Multiculturaliteit en recht*, Handelingen Nederlandse Juristen-Vereniging, 2008, pp. 1-62, which is distinct from a dominant national culture. This is not to say that every individual from one of these groups differs in culture, because group cultures are internally plural as well. The Netherlands in the past 50 years has experienced the immigration of 35,000 citizens connected with a Moluccan identity, 320,000 with a Moroccan identity, 360,000 with a Turkish identity, 330,000 with a Surinamese identity, 200,000 with an Asian identity, 100,000 with an African identity, and 125,000 with an Antillean or Aruban identity.

5 D. Nelken, ‘Using the concept of legal culture’, 2004 *Australian Journal of Legal Philosophy* 29, pp. 1-26.

6 M. Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 2007; P. Schiff Berman, ‘A Pluralist Approach to International Law’, 2007 *Yale J. Int’l L.* 32, pp. 301-329.

7 P. Sniderman & L. Hagendoorn, *When Ways of Life Collide. Multi-culturalism and its Discontents in the Netherlands*, 2007.

resided. According to Dutch law, however, both parents had custody rights. The case had also been contested before the Dutch courts after the divorce in 2007. The US court case on the abduction and custody rights is still pending. Questions were raised in Parliament as to the involvement of US agencies in the abduction, notably the Consulate in Germany which allegedly, and if the rumours are true, 'helps to undermine the Hague Convention'.⁸ There were two 'culture cards' played in the case of Katja. The first is the cultural difference between the father, who is a Dutch man who now has American citizenship, and the mother who was born and raised in the Ukraine. She allegedly adheres to strong family values and a motherly instinct.⁹ The second culture card is the 'pragmatic' and 'negotiation inclined' Dutch legal culture versus the 'no nonsense' legal decisions of the US courts.

Even if cultural differences may be perceived in almost every case, there is good reason to focus on the difference with Islamic legal cultures. Not only because Islam receives a great deal of attention in the media, but also because the differences seem to be magnified. As one interviewed lawyer put it: 'Of course there are cultural differences with France, but when Islam enters the picture, the differences become much greater.'¹⁰ It remains to be seen whether we may speak of a sliding scale of cultural differences and Islam being perceived as the 'other end of the spectrum', or that we could better speak of incommensurable differences.

In order to place the value clash in a relative perspective, it may be useful to take a look at the number of parental child abduction cases and the number of Islamic countries involved. Statistics on international child abduction by parents do not show high figures. The number of cases involving international child abduction by parents/ex-spouses does seem to be rising somewhat, but whether this is really a trend is not yet clear. In 2002 the Netherlands experienced 106 cases, in 2003 95 cases, in 2004 122 cases, in 2005 112 cases, in 2006 129 cases, in 2007 112 cases, and in 2008 132 cases. In the last three years we have a total of 373 cases, of which 118 abductions involved children being abducted abroad and brought to the Netherlands, and 255 children being taken from the Netherlands. A total of 253 abductions were by mothers, 120 by fathers (67% mothers). Some 66 cases (17%) were to or from countries that have not ratified the Hague Convention on International Child Abduction (in short: Hague Convention or HC). These non-HC countries as a rule do not cooperate in applying the basic idea that the courts in the country of habitual residence are best suited to assess the best interests of the child. The principle of 'first return the child, then talk' is not adhered to.¹¹ Non-HC countries with more than one abduction in these three years are Indonesia (3 cases), Iraq (7), Morocco (14), Pakistan (2), Russia (5), Sudan (2), Somalia (2), Surinam (4), Tunisia (2), and the United Arab Emirates (3).¹²

We have to bear in mind, however, that these are official figures in which the Dutch Central Authority of the Ministry of Justice was involved. There are a number of cases in which the Central Authority was not involved, for example when parents 'snatch' an already abducted child, when they negotiate with the help of family or third parties, where mediation is attempted, or where parents simply leave the situation as it is.

8 See *inter alia* <http://www.volkskrant.nl/binnenland/article1208290.ece/CDA_VS_hielp_mogelijk_bij_ontvoering>, last accessed on 30 March 2010.

9 See *inter alia* <<http://www.kovandijkvertelt.nl/category/katja-leendertz/>>, last accessed on 20 January 2010.

10 An experienced lawyer in private international law (contract law and family law) who has dealt with several cases of international child abduction by parents. Interviewed on 15 August 2008. Some researchers prefer the term 'distinct culture/community' to stress a greater distance from values of the dominant culture as compared to 'different culture/community' when that distance is not that great. See for example A. Hoekema, 'Does the Dutch Judiciary Pluralize Domestic Law?', in R. Grillo et al. (eds.), *Legal Practice and Cultural Diversity*, 2009, pp. 190-191.

11 Art. 12 and related articles of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

12 Figures are not available, but most abductions where the child is taken to Islamic non-HC countries are by fathers.

Despite the relatively low figures, the social impact of every single international child abduction is large, especially when a child is taken to countries that have not signed the Hague Convention, and more especially when these are Islamic countries. The fear of an abduction and being taken to Islamic countries is much greater than the possibility of this actually occurring, because there are growing constructions¹³ of fundamental religious and cultural differences that pervade legal systems.¹⁴ The media play a large role in this process.

3. How the clash concerning the ‘best interests’ principle manifests itself

In this section I address the first sub-question of in what ways the clash concerning the best interests of the child principle manifests itself: what are the typical cases in which legal professionals become involved, and how do they act in such cases? It is meant to be a description of the more visible part of legal practice. This part is bracketed in between the dominant modern and the Islamic interpretation of the best interests of the child principle.

The dominant modern interpretation of ‘the best interests of the child’

The Convention on the Rights of the Child states in Article 3.1: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ The Convention does not say explicitly what the ‘best interests’ entail, but some aspects may be deduced from other articles. These include the right to life (Article 6) the right to know and be cared for by his or her parents (Article 7), the right to identity and to family relations (Article 8). When it comes to state responsibility, Article 18.1 is relevant for the assessment of family relations: ‘States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. (...)’ Article 14.1 further states: ‘States Parties shall respect the right of the child to freedom of thought, conscience and religion.’

States also have a duty to respect, as far as possible, local customary practices in child-rearing issues. Article 5 states: ‘States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.’

The underlying view of the convention on the rights of children is largely based on dominant values in modern liberal societies. The basic unit of thought is the nuclear family, with some rights for members of the extended family and others to provide ‘appropriate direction and guidance’. The child should preferably develop into an individual who makes conscious life choices, among which are choices in ‘thought, conscience and religion’.

The ‘best interests of the child’ principle is further and more concretely developed in the pedagogical sciences. In a recent update to research on the meaning of the ‘best interests’ principle in Dutch law, Kalverboer and Zijlstra state that ‘continuity and stability’ are considered to be of primary importance, as is a biological parent who provides for a situation in which the

13 Modern Western and Islamic legal cultures are increasingly *constructed* as fundamentally different. ‘Difference’, ‘equality’ etcetera are social constructions contingent on place, time, and historical circumstances. This does not imply that they are ‘merely’ constructions: since people act on them, they have social consequences.

14 B. de Hart, *Internationale kindertvoering*, 2002, p. 18.

child can develop emotional attachments. A child should be encouraged, within boundaries that are explicitly stated and that can be argued, to experiment in order to develop a positive self-image. It should be given responsibilities and also be encouraged to negotiate over the set boundaries in order to develop an autonomous self.¹⁵

The dominant modern liberal interpretation of the open legal concept of the 'best interests of the child' in short consists of the following aspects: preferably both biological parents raise the child affectively in a consistent way and in a stable environment. The goal is an autonomous self with a positive and curious attitude toward continuous development.

Manifestations of 'possible abductions'

The above interpretation of the 'best interests of the child' principle is at stake when lawyers and judges are confronted with the possibility of child abduction in ethnic minority family cases. Empirical arguments on the best interests of children are usually left implicit, but they may be inferred from cases and forms of behaviour. Possible cases of child abduction become manifest in the strategies of lawyers to prevent them. One obvious strategy is to request the court to diverge from shared custody (as is the legal rule) and to award custody to only one of the parents after divorce.¹⁶ This is not readily granted, however, partly because judges realise that the argument 'I am afraid that my child will be abducted' is often strategically used and cannot always be supported with sufficient evidence, and partly because shared responsibility by parents over their children is highly valued in the law. Judges prefer to follow the preference of the law for shared custody and then maybe to award supervised visitation rights, for example. Only if the Child Care and Protection Board in its report warns against serious possible consequences like abuse or abduction will the court grant exclusive custody to one of the parents.

A confrontation with possible child abduction also manifests itself in cases where one party or his/her lawyer requests the court to remove the names of the children from the other party's passport. The argument used is often 'a fear of child abduction' as removing the names from a passport prevents the other parent from taking the children abroad. This argument is also not taken lightly by judges. In assessing the relative value of the statement 'I fear an abduction', judges take several factors into account, such as whether the parent has regular employment in the Netherlands, has lived there for several years, has family there, his (sometimes her) legal status as a resident is not at issue etcetera.¹⁷ These strategic uses of 'a fear of child abduction' not only refer to the fact that abduction is a crime and against family law, but implicitly also to the idea that children are in the best position when they are raised in the Netherlands. It is clear that Muslim men who depend on someone else financially and for their legal residence will be much more readily deprived of the possibility to travel internationally with their children.¹⁸

Lawyers are of course also confronted with actual cases of child abduction. It is important to note that many of these cases do not end up in the official statistics. Lawyers do not immedi-

15 M. Kalverboer & E. Zijlstra, *Het belang van het kind in het Nederlands recht. Voorwaarden voor ontwikkeling vanuit een pedagogisch perspectief*, 2006, pp. 17, 19, 24. See also A. Nuytinck & J. Grapperhaus, 'Bescherming van zwakkere personen, de zogenaamde 'personae miserabiles'', in het familie(vermogens)recht, in het bijzonder het belang van het kind', 2008 *Ars Aequi*, December, pp. 861-875, and J. Zermatten, *The Best Interests of the Child From the Literal Analysis to the Philosophical Scope*, Working Report 3-2003, Institut International Droits L'Enfant, esp. pp 13-14.

16 Art. 251 of Book 1 of the Civil Code. 251.1: During their marriage the parents exercise joint parental authority. 251.2: After dissolution of their marriage, other than by death or after a judicial separation, parents who exercised joint parental authority shall continue to exercise such parental authority jointly unless the parents or either of them request the district court to provide that parental authority over a child or the children shall vest in only one of them, in the best interests of the child.

17 One example of a court case in which certain criteria were used to assess whether a 'fear of abduction' was well founded is LJN BD9281.

18 This is because Muslim women in the Netherlands have better rights in relation to their children when compared to Islamic-based family law systems, so the assumption is that they prefer to remain here. See later when *wilaya* and *hadana* are described.

ately take the case to the Central Authority of the Ministry of Justice, for example. Such action immediately labels the case as one of child abduction, which is sometimes better to avoid, according to the lawyers. Lawyers also say that they need to act quickly, and they know that the Central Authority, as a bureaucratic organization, is slower to act. This may also have strategic advantages. When a child is abducted and is brought to the Netherlands and lawyers represent the abductor, these lawyers know that they do not have to act with haste in their contacts with the Central Authority. The best strategy for their client is to slow the whole process down as much as possible.¹⁹

Another reason why a confrontation with child abduction cases does not always lead to a case for the Central Authority and thus ending up in the statistics is that lawyers make use of personal contacts to ‘resolve’ cases informally. Several lawyers have informed me that they ‘know people’ at Dutch embassies, or they ‘know people who know people there’. They simply call them for information and for help and to obtain the names of local and trustworthy lawyers. They often also know lawyers in the other country who work in the same legal field, and if they do not then they contact the International Child Abduction Centre which has a network of foreign lawyers, or they may contact Reunite in the UK that also has its own networks. Last but not least, some lawyers cooperate with Dutch ethnic minority lawyers. As one lawyer said: ‘We have many contacts with lawyers in Morocco, because we have Mohammed working as a lawyer in our office. He is from Morocco originally, and it is very useful that he knows a lot of people there and travels there several times a year.’²⁰ Another lawyer recalled a case in which the mother had abducted her child and taken that child to Tunisia. The father came to the lawyer’s office and said it was a case of child abduction. He had ‘seen the signs’, such as ‘she left in haste’ and ‘she did not tell me that she was going away’. The father knew that she had gone to family members and he knew a lawyer in that city. The man’s lawyer immediately contacted that lawyer over the phone; the lawyer in Tunisia contacted the mother, and he was able to persuade her to return. ‘In retrospect’, the lawyer said, ‘we could say that this was not an official abduction case. Let us consider it to have been an extended holiday. This is also what the mother later said. You will not find these cases in the statistics because they are not officially registered as such.’²¹

Of course, in the case of lawyers it is difficult to untangle the legal, moral, and strategic reasons for all the efforts to ‘get children to or to keep them in the Netherlands’. I have not had any indications, however, that lawyers consider the possibility of a child’s interests requiring that it be raised elsewhere, in a different cultural environment. I infer from this that apart from legal and strategic considerations, the principle of the ‘best interests of the child’ is probably interpreted as ‘growing up in the Netherlands’.

When we focus on judges, I have already observed that they have developed practical criteria to deal with allegations of child abductions in divorce cases. Today, they may try ‘court-annexed mediation’ (see below), but most of the time they hardly approach the law and the Hague Convention in a flexible manner. Dutch judges faithfully apply the law as it stands, is a complaint which is sometimes heard; politicians have argued in Parliament that ‘the Netherlands should not act as the goody-goody in class’ (implying that judges should bend the rules in favour

19 Lawyers do keep an eye on what they think is ‘objectively’ in the best interests of the child, so they do not only strategically defend their clients. At least this is what they say they do!

20 A female lawyer specializing in family law with many clients from ethnic minorities, interview September 2008.

21 A female lawyer specializing in private international law cases, interview August 2008. She said that had the mother stayed in Tunisia, she of course would have informed the Central Authority ‘because they have much more legal means available’.

of children remaining in the Netherlands). Judges also interpret the law and open legal concepts like 'the best interests of the child' in line with the dominant Dutch cultural interpretation.²²

Below I will describe in more detail some actual cases of child abduction in order to demonstrate the complexity and intangibility of legal, social and moral issues and values that legal professionals encounter in practice.²³

The actual manifestation of child abduction in the case of Rachida

Introduction

Rachida's husband Aziz took his family for a vacation in Morocco, but he had planned to leave them there. He succeeded in leaving his only son in Morocco, but the remainder of his family were able to return to the Netherlands. In legal terms, Aziz had abducted his son, because it was against the wishes of Rachida and thus against Dutch legal custody rules. During the divorce and subsequent custody proceedings, Dutch legal professionals implicitly used typical images of 'Moroccan men' and 'Moroccan women', and to a large extent unconsciously applied the Dutch standard interpretation of the 'best interests of the child'.²⁴ The question whether Aziz as a father could *possibly in his view* have served the best interests of his children was not addressed. Rachida's case is also interesting because it shows how professional legal actors bend private international law rules in order to be able to apply Dutch law.

Rachida, after divorcing her husband, first asked the court if the children could live with her, and later she also requested exclusive custody of her children. The legal question to be decided was whether exclusive custody by Rachida was 'in the interests of the children'. The stakes were quite high because her ex-husband Aziz kept their son hidden in Morocco. The fact that Aziz had criminally abducted their son and taken him to Morocco was never formally stated by Rachida's lawyer or by the judge. He was also not criminally accused of abduction. It merely lingered in the background and had an influence on assessing his credibility, trustworthiness, and capacities to raise his children properly.

Also in the background was the media debate on the abduction of children and the fact that they were taken to their country of origin by Islamic fathers. In 2006 there was a great deal of media attention concerning the case of the abducted children Sara and Ammar (see below on this case). It confirmed an image of a 'typical Islamic abduction' that had something to do with 'the Islamic upbringing' of children in Rachida's case. The image consists of men who secretly prepare and make plans to abduct their children while women are submissive or know nothing. This image goes hand in hand with the depiction of women who under Islamic law seem to be treated as second-class human beings. When it comes to important financial decisions concerning

22 A. Hoekema & W. van Rossum, 'Empirical conflict rules in Dutch legal cases of cultural diversity', in M.-C. Foblets et al. (eds.), *The Response of State Law to the Expression of Cultural Diversity/Le droit face à l'expression de la pluriculturalité*, Brussels, Franqui Foundation 2010 (forthcoming), ca. 25 pp., and Susan Rutten, *Cultuur en familierecht in eigen kring*, Preadvies Nederlandse Vereniging voor Rechtsvergelijking, 2005.

23 Actually the statement 'legal professionals' is of course too broad. My research relates only to a small section thereof, namely those that regularly deal with abduction cases. My estimation is that some 30 to 50 lawyers currently specialize in multicultural family law issues, while the District Court in The Hague functions, in practice, as the court where many abduction cases are heard.

24 This case is taken from my report 'Gelet op de cultuur' ('Paying attention to culture'). This report consists of an extensive reconstruction of five actual legal cases (three family law cases, two labour law cases). The reconstructions are based on the documents and files of the lawyers and the court, but more importantly on interviews with all the actors in the case. For an extensive methodological justification of why five qualitatively described cases have much more relevance for understanding the decision-making process of legal professionals than surveys and statistics, see the original report (W. van Rossum, *Gelet op de cultuur*, The Hague, Raad voor de Rechtspraak 2007) and W. van Rossum, 'Resolving Multicultural Legal Cases: A Bottom Up Perspective on the Internationalization of Law', in J. Klabbers & M. Sellers (eds.), *The Internationalization of Law and Legal Education Series: Ius Gentium: Comparative Perspectives on Law and Justice*, 2008, pp. 113-128.

their children or choosing their education, the father has the only and final say. Women are only allowed ‘to do household chores and to take the daily care of their children’.²⁵ Or so the image depicts.

Development of the interpretations

It seems that every bit of information in Rachida’s case is relevant to understand the development of the interpretations. Of course, I cannot present the whole file, but extensive information is necessary in order to obtain an idea of the complexities with which lawyers and judges are sometimes confronted. Rachida married Aziz when she was 17 and he was 30 years old (and an illegal immigrant in the Netherlands). Rachida’s parents had selected Aziz as a wedding candidate and strongly advised Rachida to accept. Three children were born from the marriage: two girls and one boy. After 12 years of marriage, Aziz fell in love with a young woman during a holiday in Morocco. He regularly visited her from then onwards. After two years the family again visited Morocco. Aziz then had plans to leave his family in Morocco, to marry the young girl, and to take her to the Netherlands. He took Rachida’s passport, and moved his three children to secret locations. He wanted Rachida to approve of him marrying a second wife.

Rachida objected and with the help of family members she managed to have her passport returned. With her two daughters, she was able to return to the Netherlands. She could not find her son. Aziz apparently thought that his son was better off with his family in Morocco.

Back in the Netherlands, Rachida requested a divorce and a court order stating that her children could stay and live with her. The Child Care and Protection Board produced a report (a judge is legally obliged to ask for such a report in these kinds of cases) in which this was indeed their advice. The Board, however, also advised (without being asked) that Rachida should be given legal custody with Aziz being excluded. This advice, it appeared in the interview with the Board’s social workers, was largely based on the opinion that Aziz ‘did not act in the best interests of his children’, which was for the most part based on information obtained from Rachida. Aziz namely refused to react to questions from the Child Care and Protection Board and to appointments for interviews and observations. This, of course, did not contribute to being amenable towards Aziz. The report, however, did not explicitly state that it was based solely on information from Rachida. The social workers from the Board came to the conclusion that Aziz had ‘abducted’ his son, had (again) ‘threatened to abduct’ his two daughters once back in the Netherlands, and had tried to abandon his wife in Morocco.

Thus, in Rachida’s case, ‘abduction’ played a leading role in the Board’s advice and consequently in the court’s legal decision. When professionals like judges and social workers from the Board talk about child abduction in Islamic cases, typically the father is the abductor, the father acts on the basis of a secret plan, and the mother is submissive or is ‘caught up in a web of lies’. Although the information in Rachida’s case could have led to the critical questioning of Rachida and Aziz in court as to what had actually occurred, due to language problems this did not take place. Assumptions about the ‘abduction’ therefore glued the judge and other professionals, so to speak, to the cliché version. When I interviewed Rachida, for example, she told me

25 The discussion on the removal of children to Islamic countries reached a sort of legal apotheosis in 2004 when a judge, Van der Reijt, wrote in the Dutch ‘Journal for the Judiciary’ on his experiences when taking part in ‘the first Arab-European conference of judges on child abduction’. He concluded: ‘It is highly irresponsible for a juvenile court judge to order a mother after divorce to allow a young child to visit the father regularly if the father is of Arab and Islamic origin, while the mother is not, and the child is living with her.’ He came to this conclusion because judges from Islamic countries had made it clear to him that fathers were mostly successful in asserting their rights to safeguard (= abduct) their children. In short, he said: No unrestricted visiting rights for Muslim men! See F. van der Reijt, ‘De eerste Arabisch-Europese rechtscferentie over kindertontvoering, gehouden te Malta van 14 tot 17 maart 2004’, 2004 *Trema*, pp. 453-456, at p. 456.

openly that even when still in the Netherlands she knew what Aziz was up to because he told her about his plans to take a second wife and tried to persuade her to stay in Morocco. Moreover, she said, he packed the suitcases with typical winter clothing while they went on a summer holiday. Rachida stated in the interview: 'I knew what he wanted to do.' Again at the Spanish-Moroccan border Aziz told Rachida that he wanted her to stay in Morocco, because he was going to marry a second wife. Rachida protested but went along with it anyway. This might relate to her being submissive, or to her being confident that she could get help if she really needed it. The judge did not ask, and neither did her lawyer.

The Board's social workers, who wrote the report and advised the court, said in the interview that they vaguely knew what had actually happened: 'They went for a holiday, and then he left them there, isn't that it?' Sometime later in the interview, this possibility of a nuance was lost in cliché terms: 'He did not consult the mother, the child did not even have an opportunity to say goodbye and was suddenly pulled out of his familiar environment.'²⁶ The judge went along with the Board. In particular, the fact that the Board advised on custody without being asked caught the attention of the judge.

'That is very exceptional. I have never seen that before. When the Board advises like this without being asked, then I think there must be a very good reason for it, they must have been shocked by the father's behaviour.'

Aziz could not have shocked the Board because they had never even met him.²⁷ They themselves said that they given the premature advice because they knew that 'the question was going to come up anyway, one day or another; besides it's completely up to the judge to decide what he does with our report and advice'.

The Board advised the court to award custody exclusively to the mother, and the court followed that advice. We may assume that the assessment of an 'abduction' by Aziz, coupled with him not showing up at the Board's request, led to this legal outcome. In Rachida's case this could only lead to one decision, namely to award Rachida sole custody over her children.

Did the Board and the judge consider whether Aziz might have acted in the interests of his children? As we have seen, the Board found this to be out of the question. In the interview they said: 'This kid is in Morocco. Other people raise him. We don't know how well he is, we only know he is not being raised by his father because he is not in Morocco very often. And we think a child has to be raised by a parent. That is the most important thing.' The act of abduction coupled with Aziz having his child raised by *others*, led to a firm 'no' to the question whether it was in the best interests of the child that Aziz had custody.²⁸

In her written judgment the judge merely referred to the advice of the Board. There was no mention of private international law rules, even though the boy had been held in Morocco for almost two years before legal action was taken. According to international standards like in the HC, a child is considered to be habitually residing in a country when he/she has lived there for a year. Concerning the issue of custody over the boy, the judge actually had no jurisdiction or should have applied Moroccan law. In the interview, however, the judge said the following:

26 This is true, of course, but it puts the emphasis on the boy, while the whole family went on the vacation.

27 Of course the judge could have said so because Aziz not showing up for interviews with the Board was reason enough for them to be shocked. When I confronted the judge with the fact that the Board had never had any actual contact with Aziz, she admitted that the report was solely based on the information provided by Rachida and that the Board accepted her version of the events.

28 In the interview the judge said that she was willing to consider whether a child would be better off in Morocco, only Aziz was not clear on this and did not provide this as an argument.

‘I have talked this over with the court clerk and we thought it important to keep the case in our hands, that is to decide this case even when the boy had been in Morocco for over a year, and to decide that Dutch law was applicable. We believed that it would be better for the child if we looked at the case from the perspective of Dutch law, because we know that when we apply Moroccan law, which would also have been possible according to private international law, the mother does not have a leg to stand on. My estimation is that most of my colleagues, in these kinds of issues, will do their best to apply Dutch law.’

Analysis

It is interesting to see that legal decisions are based on a construction of facts that is to a large extent ‘mouldable’. The construction is based on some hard facts like the family staying in Morocco and Aziz not showing up at the Board, but also on guesswork, preconceptions about abduction and the legal role of men and women in Islamic/Moroccan social relations. This construction of the facts or rather ‘the story of Rachida as legally constructed’ is connected to the standard interpretation of what is in the interest of children. The possibility that Aziz could have acted in the interests of his children or at least his son was not taken into consideration. The potential for the law, in this case the interpretation of the best interests of the child, to provide for a struggle did not materialize in the sense that the possibilities for an argument and a struggle were evaded. It was smoothly covered in the written legal decision and carefully avoided during court proceedings. Of course, this was partly due to language problems and to Aziz not being able to express himself clearly. And maybe we should not expect too much from communication over fundamental value differences in legal settings. We must also not forget that the judge is in a dominant position and needs only to apply the current law as it stands in a case that is scheduled to take 30 or 40 minutes. This assessment should not lead to the conclusion that Rachida’s case is a prime example of a manifestation of child abduction. On the contrary, it shows perfectly how such a case manifests itself in complex and often indefinite ways, and how legal professionals act and react. It also shows that judges and lawyers could just as well explicitly argue in terms of children’s rights, clarify important values of modern law (equal treatment of men and women), or search for and promote common values – even if only procedural – underlying Moroccan/Islamic and Dutch law. It would have provided the opportunity to discuss cultural assumptions underlying an open standard like the ‘best interests of the child’, gender roles in Moroccan and Dutch culture, and the preferences of child rearing in different countries. This could lead to a better argued case (not necessarily to a different outcome).

The actual manifestation of child abduction: the case of Sara and Ammar

In 2006 there was a great deal of media attention concerning the case of the children Sara (girl) and Ammar (boy), who had been abducted and taken from the Netherlands to Syria by their father in 2004. The children were able to flee to the Dutch embassy and were eventually allowed to return to the Netherlands. The media presented an image of a ‘typical Islamic abduction’ in which Muslim men ‘prepare the abduction in secret’, while their ex-wives are submissive or unknowing.²⁹ After the divorce the children lived with the mother, while the father saw his children regularly. One day, pretending he was going on holiday to Disneyland Paris, he took Sara and Ammar to Syria. Sara was then nine years old, while Ammar was eleven. After the

29 In 2007 Sara and Ammar’s mother published a book about her experiences. The mother stated that she had too much faith for too long in the good intentions of the father, who had continuously promised during the strenuous marriage to ‘better his life’. See J. Schoonhoven & M. Roossink, *Kom niet aan mijn kinderen*, 2007.

abduction, the Dutch mother visited her children every few months, but she could not persuade her ex-husband to let the children go. He said he was acting in the best interests of the children by having them grow up in proper surroundings and in that way he was acting in accordance with Islamic-based Syrian law. Islamic law states that during marriage guardianship (*wilaya*) lies with the father and he has responsibility for the children's proper upbringing. The right to raise and care for the child on a daily basis (*hadana*) will be with both the father and the mother. After divorce, the father loses the *hadana* which he enjoyed during the marriage. *Hadana* usually lasts until the age of 7-12 for boys and 9-12 for girls. Guardianship/*wilaya* may seem superficial, but actually entails a heavy responsibility especially regarding financial matters, education, and religious upbringing. Syrian family law states that *hadana* for a boy ends at nine, for a girl at eleven (Article 146 Family Law Code).³⁰ Syria has not signed the Hague Convention on International Child Abduction because it objects to the equality of father and mother in custody rights.

In June 2006 Sara and Ammar were able to flee to the Dutch embassy. After a great deal of diplomacy (even by the Minister for Foreign Affairs, which is very exceptional), negotiation and mediation the father allowed them to return to the Netherlands in December 2006.³¹ The media mentioned in August 2006 that a 'mediator from the Arabic world' had been found to mediate. They presented the case largely as a conflict between Syrian Islamic law and Dutch legal principles like equality between men and women. The choice for an *Arabic* mediator had been made, so the story goes, because the father would probably trust him and would feel that he would be understood as regards his culture, legal position, and his honour. The father said in a television interview that he trusted the mediator and that he was confident about the future.

The mediator, as became clear in my interview with him, had earlier experiences in mediations in child abduction cases.³² He said that in this case Islam and Syrian law only played a role for the authorities, which insisted that the father had custody rights and that the biggest issue was the different interpretations of the 'best interests of the child'. The father 'made a drama out of this', but the more important issue to be dealt with, the mediator said, was a stubborn father who wanted to take revenge against his ex-wife. He convinced the father and his lawyers that 'the interest of the child' should be primary, and that the father should also think of himself:

'If he would keep the children, he would never be able to travel to the Netherlands or to Europe again. He would lose everything. And he realized that. I told him that if he allowed the children to go, I could probably arrange things for him, to improve his situation. He could not visit the Netherlands, of course, because there he would be arrested. But in other ways I could improve his situation.'

The mediator explicitly asked the father to consult his lawyers and to bring them to the next meeting. 'I did not want him to think that I was against him.' It took one full week of talks and discussion with the father and his lawyers, an arranged meeting at the embassy between the father and his children, and a promise to improve the father's situation. In the end the mediator was able

30 Some say guardianship/*wilaya* is a property-like right. See for example B. Bix, 'Best Interests of the Child', *Minnesota Legal Studies Research Paper* No. 08-08, 2008, available at SSRN: <<http://ssrn.com/abstract=1092544>>.

31 On 9 October 2007 the District Court of Groningen decided to award custody of the children to the mother and to deny the father any visitation rights (LJN BB5592).

32 Telephone interview in 2008. Actually he described his role not as that of a mediator, but 'my job was to persuade the authorities and the father that it was wrong to displace the children from the Netherlands to Syria'. The man is an expert in international law and children's rights.

to persuade him to accept international law, not ‘local law’. ‘He was living in the Netherlands, and his children were born there and lived there. Then you have to accept that children have to stay there. You cannot then apply your local law and say that you have *wilaya*! If they had lived in Syria, he would have had the right to have them stay with him, I told him, and in the end he accepted the situation.’ Even when the Hague Convention did not formally apply, arguments from the treaty and the Treaty on the Rights of the Child helped in arguing the case and to persuade the father to accept the international Hague Convention rule which says that the best interests of children require a decision by a court of the country in which the children have their habitual residence.³³

Subtle diplomacy by embassy personnel formally staying in the background, but doing a great deal of informal work in the sense of lobbying local court judges, the police, academics, and imams from local mosques, was not publicly displayed.³⁴ The sensitivities in a case are best served by keeping a low profile. Only insiders know about local involvements.

The case of Sara and Ammar makes clear that a stalemate in legal terms does not mean that there is no movement on the ground. This is where in this case the argument over the ‘best interests of the child’ principle took place. The choice of a specific mediator with specific expertise, who came from an Islamic country and who enjoys a certain status within government circles, were crucial in this struggle over how to understand this legal concept. A different mediator would probably have been turned down or would not have reached the same outcome. The case also makes clear that we have to keep in mind different levels in the struggle over ‘human rights and children’s rights’. Sometimes the contest is at the level of legal and official state actors, while another is the lower level of actors in the case itself. We should not forget the media as a separate level either, with their own interests to pursue in which certain images are more prominently displayed. The Syrian father, for example, if we believe the mediator, merely used the legal rules of *hadana* and *wilaya* in order to obstruct the wishes of his ex-wife. The Syrian state actors relied on the official law, and the Dutch media used that to construct a fundamental clash of values. Different actors apparently make for different interpretations, which makes it all the more important to empirically describe and analyse concrete cases in order to attempt to disentangle the struggle over the ‘best interests of the child’.

The best interests of the child as a contested cultural construction

It is clear from these ‘manifestations of value clashes in abduction cases’ that legal professionals are increasingly aware of legal pluralism in all its forms and try to find a *modus vivendi* for the problems and cases they have to deal with.³⁵ Whether it concerns a lawyer or a judge, when confronted with an international child abduction human rights law, the Hague Conventions, and the possibilities and restrictions of the national legal systems will be taken into account when assessing the case. At the same time, every legal professional knows that there is no reason to believe that different legal cultural perspectives on what is best for children will ever disappear. Most legal professionals dealing with multicultural issues realize that national law is only one,

33 Under the Hague Convention the ‘habitual residence’ of Sara and Ammar was still in the Netherlands, since some form of legal action was taken within a year of their abduction. See Art. 12 of the Hague Convention.

34 Interview with two high-ranking officials from the Dutch Ministry of Foreign Affairs (in 2008) who informed me about the background diplomacy in the case of Sara and Ammar.

35 On legal pluralism, see among many others B. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, 2007 *Sydney Law Review* 29, available at SSRN: <<http://ssrn.com/abstract=1010105>>.

and maybe not the most effective, tool which they can use in looking for a just and effective solution to the problems with which they are confronted.³⁶

Starting from a global perspective, we are confronted with many different national legal systems worldwide that all have a certain, culturally fuelled perspective of what family life is and entails, what the role of fathers and mothers and children may be, what is in their best interest etcetera.³⁷ Some children are taken from one country and jurisdiction to another, for example because a French mother who was married to a Dutch man wants to return to her native country after the divorce. Because she has taken care of the child in the Netherlands, she may find it quite normal to take the child with her, even when the father objects. Some Dutch politicians call this a 'so-called child abduction'.³⁸ In the past French law and legal culture may have stated that the mother had a right to take the child, while Dutch law may have had the opposite rule. The Hague Convention on the Civil Aspects of International Child Abduction was meant to end these stalemate-like situations by introducing the meta-rule that abducted children should be returned to their country of habitual residence if so requested within a year of the abduction (Article 12 in conjunction with Article 3 Hague Convention). Countries that have not ratified the HC have not only retained their national legal system, but also their system of private international law.³⁹ Stalemates between legal systems that accept the Hague Convention and those based on Islamic law, but also, for example, the legal system of Russia, still exist. Many Islamic countries have not ratified the HC because of the gender equality of fathers and mothers with regard to custody rights.⁴⁰ In concrete cases this may mean that a Moroccan man who abducted his children in the Netherlands and took them to Morocco after divorce, is legally allowed and may even be obliged to do this when his divorced wife remarries or does not raise the children in the proper Islamic way. The underlying legal concept of the 'best interests of the child' thus provides for a battlefield that allows for radically different interpretations between legal cultures.⁴¹ This becomes clear by reading a leading Islamic text while keeping in mind the dominant modern liberal interpretation of 'the best interests of the child':

'Children are gifts and awards from the Almighty Allah; they are a trust in our custody. We must therefore care well for them and preserve them by implementing the teachings of Islam, and following what has been stated in the Noble Qur'an and what our Noble Prophet – Peace Be Upon Him – has guided us to be in his pure Prophetic tradition, where he says: 'Each of you is a shepherd, and each of you is accountable for his or her flock.'⁴²

36 See for the US perspective J. Morley, 'Parental Abductions. When the Hague Convention Won't Help', 2005, with examples from Saudi Arabia, Japan, and Mexico, <NK"http://www.internationalfamilylawfirm.com/"http://www.internationalfamilylawfirm.com/>, last accessed on 24 February 2010.

37 Discussions in UN committees like that on the rights of the child make this very clear. See <http://www2.ohchr.org/english/bodies/crc/>.

38 Apparently to distinguish this situation from others that are 'real' abductions. They did not describe those real abductions, however. *Kamerstukken II* (Parliamentary Papers) 2008–2009, 30 072, no. 16, p. 3.

39 See <http://www.hcch.net/index_en.php> for the website of the Hague Conference on Private International Law, which calls itself 'a melting pot of different legal traditions, [which] has developed and serviced Conventions which respond to global needs'. See <http://www.hcch.net/index_en.php?act=conventions.status&cid=24> for a list of the contracting 81 states (last accessed on 24 February 2010).

40 See for example K. Hashemi, 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation', 2007 *Human Rights Quarterly* 29, pp. 194–227.

41 See D. Ong, 'Parental Child Abduction in Singapore: The Experience of a Non-Convention Country', 2007 *International Journal of Law, Policy and the Family* 21, pp. 220–241 for an analysis of abduction cases in which Singaporean British and Muslim laws were applied. See also N. Deuraseh, 'The role of Islamic family law in preserving children's health and well-being', 2004 *The Yale Journal for Humanities in Medicine*, <<http://yjhm.yale.edu/essays/ndeuraseh1a.htm>>, last accessed on 24 February 2010.

42 Statement by His Eminence the Grand Imam Sheikh of Al-Azhar Al-Sharif Professor Muhammad Sayyid Tantawi in: *Children in Islam: Their Care, Upbringing and Protection*, The Islamic International Centre for Demographic Studies and Research Cairo, The Study, Al-Azhar University/Office of Public Partnerships (OPP) UNICEF House, 3 United Nations Plaza, New York, 2005, p. 1.

When Islam proves to be the leading guide in the upbringing of children, the concepts of *halal* (allowed) and *haram* (forbidden) are central, as is the development of morality:

‘The issue of childhood is at the core of the first objective, namely, safeguarding children and immunizing them against dangers. On this theme, Islam introduces bountiful and precise laws that are almost nonexistent in other religions or social systems.

It would suffice to point to the rigorous legislation dealing with the child from the early days of formation in the womb of the mother, all the way until he or she attains the age of puberty. (...) The basic elements that constitute the personality, mind and conscience of the Muslim child are subject to two indispensable guiding factors that exist in all Islamic systems. The first factor pertains to the fact that a Muslim, whether an adolescent, a child or an older person, is controlled by the cycles of *halal* (what is permissible) and *haram* (what is prohibited). This is what the scholars of the fundamentals of jurisprudence teach as the five legal capacity provisions.

(...) The second factor pertains to the fact that the movement of a Muslim, whether child or adult, is governed by a comprehensive system of morality. This system does not permit a child, under whatever banner of freedom or personal rights, to be drawn towards any form of prohibited anomaly. They should not be embroiled in any ideological or behavioural aberration objected to by rational wisdom or divine religions. While there are some pedagogic systems that facilitate the opening of doors for children to indulge in such activities under the pretext of freedom and the prevention of violence, Islam opposes deviations that it deems to be aberrations, diseases and ills that should be resisted and from which the young generation should be protected.⁷⁴³

At the national level the issue of international child abduction by ex-spouses is explicitly fought out in the media. Judges and lawyers, as we have seen, only implicitly argue in terms of possible different cultural interpretations of the rights of children. Thus far, there have been no court cases in which the possibility of allowing for *wilaya* and *hadana* were taken into account.⁴⁴ In cases of international child abduction where the child is taken to and from Islamic countries, Dutch judges have so far not taken into account the possibility of an Islamic perspective on the best interests of the child.⁴⁵ It is not probable that this will occur in the near future, since the tone in the public debate is strongly ‘anti-Islam’. The debate on forced marriages, for example, seems to be spreading towards a strong rejection of arranged marriages, while on a sidetrack informal marriages are also targeted and there is debate on the total non-acceptance of polygamy.⁴⁶ So far this only appears in policy measures and the spreading of information. There are, however, government plans for legislation that restricts family immigration via the route of not accepting inter-cousin marriages as being valid. The strong anti-Islam sentiment of today puts a brake on the official legal recognition of cultural differences. Some fear that this will widen the gap between dominant and minority legal cultures, with minorities turning away from the national

43 Prof. Ahmad El-Tayyib, Head of Al-Azhar University, in: *Children in Islam. Their Care, Upbringing and Protection*, The Islamic International Centre for Demographic Studies and Research Cairo, The Study, Al-Azhar University/Office of Public Partnerships (OPP) UNICEF House, 3 United Nations Plaza, New York, 2005, pp. 3-4.

44 S. Rutten, *Cultuur en familierecht in eigen kring*. Preadvies Nederlandse Vereniging voor Rechtsvergelijking, 2005, p. 62.

45 *Ibid.*, pp. 68-70.

46 Polygamy is illegal in the Netherlands, but a Moroccan man, for example, can legally marry a second wife in Morocco. This marriage could, until recently, be registered with Dutch municipalities. This could lead to future rights, for example the right to family reunion, but not as long as the first wife was still alive and living in the Netherlands.

Dutch law, a tendency which has been observed among immigrants in the UK by Menski.⁴⁷ For example, on 4 November 2009 the leading newspaper NRC published an article on the increasing number of Egyptian-Dutch children who are sent to Egypt for their education. Parents have given a variety of reasons for doing so, among which are cultural reasons (too much freedom for children in the Netherlands, increasing intolerance towards Islam), economic reasons (Egypt is cheaper), and other reasons (ethnic minority schools are seen as a hindrance to a good education).⁴⁸

In this section I have clarified how legal professionals are confronted with cases of (possible) child abduction and I have described their actions and behaviour in these cases. I have also made clear that their behaviour is related to the different legal cultural interpretations that are best termed as the dominant modern interpretation versus its Islamic equivalent.

4. Developments in the Dutch legal profession addressing the culture clash

In this section I will deal with the second sub-question of 'which developments in the Dutch legal profession relate to and address the clash'. Do legal professionals keep their 'cultural knowledge' up to date, do they develop alternative ways to deal with such clashes, and which other developments are relevant? In other words this section takes a look 'below the surface' of the concrete manifestations of child abduction in Section 3. The current section will show that these developments are haphazard and piecemeal. In some instances they will provide for a better understanding of the behaviour of legal professionals in possible and actual cases of child abduction, in other instances they demonstrate future directions for dealing with international parental child abductions.

The development of knowledge and 'cultural sensitivity'

The development of knowledge and training in 'cultural sensitivity' among Dutch legal professionals has, up to now, been haphazard and piecemeal, not structural. This is probably one of the reasons that explain the basically standard Dutch cultural interpretation of legal rules and concepts. Psychologically speaking, information on ethnic minorities and their culture becomes part of the existing mental interpretative framework of legal professionals. Interactions with ethnic minority groups in legal practice, special courses and attendance at conferences, as well as the influence of the media all play a role in filling in the content of the mental framework with cultural information. Here I will turn quite extensively to specialist courses and media influence because my interview findings show that these are the most important sources on which legal professionals rely.

The most important player in training the Dutch judiciary is the Study Centre for the Judiciary (SSR). It provides courses on specific fields of law and on 'legal knowledge updates' for Dutch judges and prosecutors. Several courses focus on multicultural issues. Some 20 to 40 judges (mostly family law and criminal law judges) attend these courses each year. Most judges follow courses on multicultural issues because they are personally interested and because they

47 W. Menski, 'Indian Secular Pluralism and its Relevance for Europe', in R. Grillo et al. (eds.), *Legal Practice and Cultural Diversity*, 2009, pp. 31-48.

48 See the newspaper article published on 4 November 2009 at <http://www.nrc.nl/international/article2404708.ece/Egyptian_parents_dont_want_to_raise_their_children_in_the_Netherlands>, last accessed on 24 February 2010.

want to have a platform for debate with colleagues. I will briefly describe the two-day courses that pay attention to Moroccan Islam-based family law and to Turkish legal culture.⁴⁹

From 2005 onwards the literature for most courses that address multicultural issues consists of texts by academic experts like Buskens (Moroccan family law), Werdmölder (Moroccan juvenile crime), Rutten (Islam and private international law), and Winkel (the psychology of intercultural communication). It is inevitable that these authors influence the knowledge base of the Dutch legal profession. According to Buskens, for example, Moroccan family law is modern in its form, but the content is ‘orthodox patriarchal’, treating men and women unequally as far as children, inheritance etc. are concerned. Werdmölder is of the opinion that many Moroccan juveniles are strongly influenced by Moroccan – mostly Berber – culture, which prescribes that people should cover up crimes, and that the streets are the playgrounds of male youth. International child abduction and family law is not an explicit theme.

Apart from SSR courses there have been some large-scale conferences on multiculturalism and Dutch law in the last few years. There was a two-day conference in 2005 for trainee judges, with plenary speakers, discussions in small workshops, additional literature and a film on the cultural defence. It is interesting to observe that the whole range of topics was diverse: clashes between culture and religion, on the one side, and the law on the other; the strategies of defence lawyers when mounting a cultural defence; the interpretation of certain behaviour by the courts; equal treatment; social security issues; and the clash between the legal principles of freedom of religion versus freedom of speech etc. Some 250 trainee judges attended.

In June 2008 a one-day conference was organised by the Dutch Jurists Association (*Nederlandse Juristen-Vereniging, NJV*), a general association of legal practitioners. Three previously published papers were discussed, all of which were of a general nature and by researchers whose point of view is generally known among academia. The discussion focused on a pragmatic versus a principled approach, freedom of expression, the unequal treatment of sons and daughters in Islam, the protection of religion against offence, religious signs and clothing in public spaces and for police officers, and cultural diversity in the legal profession. The focus was not on the criminal law and honour-related violence, which was dominant several years ago. A reflection on the conference by some authors in the most widely read legal journal, the *Nederlands Juristenblad (NJB)*, takes the pragmatic point of view that despite all the ‘important words’ like respect, democracy, civil society, the rule of law etcetera, the law does not provide simple answers to concrete problems. One opinion on religious headscarves can just as well be countered with an opposite view.⁵⁰

Apart from large-scale national conferences there are regular ad hoc meetings and guest lectures by researchers at local courts, as well as workshops organized by private organizations etcetera. Few judges keep up with the new literature in the field, for example PhD research on multicultural criminal law; most of them scan the reviews in the legal journals on new research. Most judges never read up on topics outside their specialist legal field. A review of the Dutch monthly Journal of Family and Juvenile Law (*Tijdschrift voor Familie- en Jeugdrecht, FJR*) reveals that in the last ten years around 10 to 15 articles have been published on legally relevant issues concerning ethnic minority families. Many of these address the issue of child custody in Islam, gender inequality connected to *wilaya* and *hadana*, and the possibility of child abduction by the father after divorce.

49 Other parts of the course pay attention to honour-related violence, the cultural defence, Turkish organized crime, family structures, and Moroccan juvenile crime. In 2008 a visit to a Mosque was included.

50 T. Hartlief, ‘Beeld van multicultureel recht’, 2009 *Nederlands Juristenblad*, no. 23.

What do lawyers who specialize in private international law, family and juvenile law, multicultural issues etcetera, do to keep up to date? Since 2005 I have extensively interviewed more than 25 specialist lawyers and with some I have regular contact to update information. I have also interviewed many other lawyers via the telephone concerning their experiences with multicultural family issues. What I find striking is that none of them have attended or plan to attend a course on intercultural communication, nor have they read specialized articles or books on this issue. They all say that 'they are just good listeners' and 'take their time', and, besides, 'they have built up quite some experience' in communicating with clients.⁵¹ They also do not specialize in specific countries and therefore do not generally orient themselves towards, for example, the Turkish, Egyptian, or Moroccan legal system and culture. The common notion is that when they are confronted with a problem, they will look for a solution to that concrete problem. They do attend required courses by the Bar Association on recent legal developments and new Supreme Court decisions, and they do follow, with special interest, a workshop or lecture organized by the International Child Abduction Centre. But very few attend academic lectures.

When turning to the topic of the media influence on 'common knowledge' concerning Islamic family law, several issues stand out in the Netherlands in the last few years. A great deal of attention has been devoted to the abandoning of Moroccan/Dutch women by their husbands, while child abduction by men has been on the media agenda for quite some time. Two reports by the Advisory Committee on Migration Affairs (*Adviescommissie voor Vreemdelingenzaken*) in 2005 – one on the abandoning of ethnic minority women in their country of origin, the other on forced marriages – attracted a lot of attention and received quite some political deliberations in Parliament.⁵² Connected to the abandoning of Moroccan women is – at least in the media – the issue of child abduction. In cases where the mother is granted exclusive child custody after divorce and she remarries or enters into a new relationship, all the literature, including these reports, mention that Muslim fathers will feel responsible for the child's/children's proper upbringing. Some fathers are of the opinion that a proper Islamic upbringing is not at all possible in the Netherlands, and thus take their children to family members in their country of origin. The image that emerges from the media attention to these reports and the ensuing political debates is that women have almost no say in Islamic cultures and marriages, that men keep tight control over their family, and that men are ultimately in charge of their wife and children even after divorce. Despite this quite gloomy picture, there are also optimistic sounds to be heard. Several people point out, for example, that child abduction and their transportation to Islamic countries is a rare phenomenon, and that among most culturally-mixed couples the problems are not greater than among other couples. Muslim men also seem to adapt to Dutch cultural family values. These aspects do not always receive wide attention in the media, however.

The latest media and policy issue is polygamous and informal Muslim marriages. Even if the figures are unknown, or are very low, or if investigations find no problematic issues, the media still tend to 'make a mountain out of a molehill'.⁵³

51 There is a great deal of Dutch research that refutes their ideas and experiences, for example A. Vrij, *Misverstanden tussen politie en allochtonen: sociaal-psychologische aspecten van verdacht zijn*, 1991, W. van Rossum, *Verschiijnen voor de rechter. Hoe het hoort en het ritueel van Turkse verdachten in de rechtszaal*, 1998, and Y. Yeşilgöz, *Allah, Satan en het recht. Communicatie met Turkse verdachten*, 1995.

52 See <<http://www.acvz.org/en/home>>; the reports are 'Tegen de wil achtergebleven. een advies over in herkomstlanden achtergelaten vrouwen en kinderen', and 'Tot het huwelijk gedwongen. een advies over preventieve, correctieve en repressieve maatregelen ter voorkoming van huwelijksdwang'.

53 J. van der Leun & A. Leupen, *Informeel huwelijken in Nederland, een exploratieve studie*, 2009.

The general picture concerning all issues is something like the following: Muslim men treat their women badly by not marrying in the official Dutch way, have more than one wife, want to rule the family and have a submissive wife, and decide on important issues without consulting her. This leads to two somewhat contradictory messages. On the one hand, a value clash becomes visible. Family values differ fundamentally between Moroccan/Islamic and Dutch/European cultures. As principles, these differences cannot be reconciled, only stated, understood, and respected (or scorned as being backward). On the other hand, there is the message of a pragmatic approach of continuing interaction and dialogue despite a fundamental clash, and favouring a superficial accommodation of practices and cultures that in the far future might lead to a convergence of these fundamental values.⁵⁴

The development of mediation

Apart from 'knowledge and sensitivity development', legal professionals are also involved in non-legal mechanisms to deal with conflicts between legal cultures. The Hague Conference on Private International Law, for example, has a bureau that gathers expertise in the field of mediation in order to develop guides on 'best practices'.⁵⁵ One of the organizations at the forefront of the development of mediation in child abduction cases is Reunite in the UK. A project evaluation of mediations in child abduction cases in which parties from Hague Convention countries were involved in 2006 is said to be promising: 28 cases were mediated in one year and almost all of them ended in consensus. The Reunite model consists of two mediators: one male, one female, of whom one is a lawyer (the other may be a psychologist etc.). Both are ideally trained in cultural issues and sensitivities and at least one of them is able to speak the language of the parents. Per mediation they organise several sessions during a two-day period. Since this project concerned mediation with parties from countries that have signed the Child Abduction Treaty, the possibilities still need to be explored where the parties are from non-treaty countries.⁵⁶

In the Netherlands the International Child Abduction Centre (*Centrum Internationale Kinderontvoering*), a private initiative (government funded) in 2006 that is becoming a centre of expertise, has been closely involved in setting up a Dutch version of the Reunite mediation model. It is further developing a one-year master's course to train certified mediators in international child abduction cases. Some 60-80 persons, most of them lawyers in family law practice, attended the preliminary conference that it held in November 2007. The conference programme consisted of a variety of plenary sessions and workshops, and a wide range of topics such as interpreting black-letter treaties, preventive measures, and the influence of the Enlightenment on current European thought and world views. Most of these topics emerge more extensively in the course on mediation.⁵⁷ Only persons who are already certified mediators can follow this one-year master's course.

The International Child Abduction Centre is also involved in setting up a pilot programme in court-annexed mediation at the District Court on The Hague. The pilot programme will run from November 2009 until April 2010. The mediations are set up to work along strict procedural rules and deadlines and in close collaboration with the District Court and the Court of Appeal.

54 J. Nieuwenhuis, 'Multicultureel recht: hoe is het mogelijk?', in W. van der Burg et al. (eds.), *Multiculturaliteit en recht*, Handelingen Nederlandse Juristen-Vereeniging, 2008, pp. 125-164, cit. on p. 138.

55 See its website <http://www.hcch.net/index_en.php?act=text.display&tid=21>, last accessed on 24 February 2010.

56 Reunite International Child Abduction Centre, *Mediation in International Parental Child Abduction, The Reunite Mediation Pilot Scheme*, funded by The Nuffield Foundation, October 2006.

57 The first courses started in May 2009. The programme will be evaluated in mid-2010.

The procedure should take a maximum of 18 weeks. The main goals are to speed up decision-making, and to contribute to the acceptance of the outcomes by involving the parties personally in the procedure and giving them a voice. This should lead, the Minister of Justice Hirsch Ballin said in Parliament, 'to a solution that is more durable than when one only has a court order'.⁵⁸ The project will be evaluated in connection with the master's course of the International Child Abduction Centre. This evaluation will not only entail questions like 'how many mediations have been successful', but also more problematic aspects of mediation like 'the possibility for the mediator to be neutral', 'how to compensate verbal or intellectual inequality between the parties', and 'how to address gender inequalities relating to cultural values' etc.

Establishing networks

A third issue that highlights the recent developments in the legal profession is the increasing ability of actors to form and make use of transnational networks. Lawyers and judges follow somewhat different paths on this issue. Lawyers, as we have seen in the section on manifestations of 'possible abductions' (Section 3), work in ad hoc networks established on a case by case basis and without any institutional framework. Judges, however, are involved in the formal legal organizations of the EU and the Hague Convention, which makes it easier to develop stable informal networks. In this section I will therefore focus on the activities of judges, especially the Dutch liaison judges and their contacts with colleagues from the Islamic world. Liaison judges are at present the most important legal professionals in the legal field of 'transjudicial communication'.⁵⁹

There are presently two Dutch liaison judges working with support staff at the Office of the Liaison Judge in International Child Protection (*Bureau Liaisonrechter Internationale Kinderbescherming, BLIK*) at the District Court of The Hague which currently functions as the 'child abduction court'.⁶⁰ The Council for the Judiciary established the BLIK in 2005. The task of BLIK is to facilitate contacts between judges in the Netherlands and their counterparts abroad in child-related matters (also in cases of international child abduction). It is also the first contact point for the Central Authority and may act as a central mailbox for notifications about decisions. It further serves as a 'help desk' and a source of knowledge. At present about 45 liaison judges work worldwide; some only work on an ad hoc basis.⁶¹ These judges learn how to work in the shadow of different legal systems, which necessarily involves networking.

BLIK judges attend most conferences organized by the Hague Conference on Private International Law several times a year.⁶² Most conferences only involve Member States and address general topics. Of the Arabic states, only Egypt and Morocco are members. During the

58 *Kamerstukken II* (Parliamentary Papers) 2008–2009, 30 072, no. 16, p. 12, and the Letter to Parliament by the Minister of Justice on 14 September 2009 on the 'current state of affairs' concerning international child abduction.

59 The term is taken from A.-M. Slaughter in her article 'A Typology of Transjudicial Communication', 1994 *University of Richmond Law Review* 29, pp. 99–137. Slaughter herself focuses on judicial communication in and through court decisions, but she acknowledges that, for example, European constitutional courts citing each other's ideas and formulas are partly brought about by face-to-face meetings at conferences (p. 103). These judges increasingly 'perceive themselves as members of a transnational community of law' (p. 133).

60 There is a discussion on whether to concentrate all child abduction cases within the jurisdiction of the District Court of The Hague. From February 2009 this court is officially (for a period of 3 years) a secondary court for all courts in the Netherlands concerning cases of international child abduction, which means that every court has the possibility to refer a case to The Hague. See <<https://zoek.officielebekendmakingen.nl/stcrt-2009-2698.html?zoekcriteria=%3Fzkt%3DEenvoudig%26vrt%3Dstcrt%2B2009%2B35&resultIndex=0&sorttype=1&sortorder=4>>. The Court of Appeal in The Hague has established a special chamber for international child abduction cases. In practice, the District Court of The Hague already functions as a 'child abduction court'.

61 HCCH document on the International Hague Network of Judges of September 2009, see <<http://www.hcch.net/upload/hagenetwork.pdf>>, last accessed on 24 February 2010.

62 There are three divisions, one of which is on family related issues. The three divisions are 'International Protection of Children, International Family and Family Property Relations', 'International Legal Co-operation and Litigation', and 'International Commercial and Finance Law'.

formal yearly conferences family law judges always arrange informal meetings, for example lunch meetings. These informal meetings are used to deliver brief presentations and to arrange short discussions, but also to socialize, to get to know each other, and to exchange of names and addresses. The ‘list of names’ used to circulate informally but is now publicly available, and is used whenever a problem arises. As one of the liaison judges said in the interview: ‘With that list and with the picture of that person in mind, it is much easier to just call him. Of course you have to be careful not to bypass important other persons – this is quite delicate sometimes.’⁶³ The same mechanism of networking and circulating lists of names of judges, who can be approached informally as a liaison judge, is also used at several smaller-scale conferences.

A special network-facilitating initiative by the Hague Conference is the so-called Malta process, a three-day conference in Malta, which was established in 2004. It was repeated in 2006 and again took place in 2009. The Malta Conferences are explicitly aimed at co-operation between members who are signatories to the HC Child Abduction Treaty and Islamic countries.⁶⁴ Central to the set-up of the conference is a discussion of fictional cases, about which the participating judges make statements as to how the case would be resolved in their home country, while also stating the underlying legal and cultural assumptions as far as possible. Each country also presents a statement about recent developments in their country. Some countries, as reported in the ‘Judges Newsletter’, are able to present themselves as ‘a near perfect state’. In 2004, for example, Tunisia started its statement with the following sentences:

‘Promoting human rights and ensuring a balanced psychological and social life begins in childhood. Accordingly, preserving the rights of children, bringing them up, protecting them and ensuring their growth, are all values inherent to Arabic-Islamic civilization. Tunisian legislation pays special focus to the care and protection of children and has accordingly established numerous regulations and laws for respecting the rights of children and ensuring their balanced development.’

The same was true of Egypt:

‘During the decade between 1989 and 1999 much was carried out in the field of child protection in Egypt, including the creation of a child protection system in relation to health and social background. The Council of Motherhood and Childhood was also created to reaffirm the desire of Egyptians to protect children who represent the future for all nations.’

The Netherlands, by way of Judge Van der Reijt, seemed to be more realistic:

‘The official point of view of the Dutch Government is that the Netherlands has fulfilled all the obligations arising from the United Nations Convention on the Rights of the Child, but of course in practice there are some doubts! There is no doubt however that the Netherlands fulfils its obligations in matters of illegal transfer of children to our country. It is even a reproach from pressure groups such as, for example, Stichting Gestolen

63 Interview in January 2008 with two judges from the BLIK.

64 Beginning of the final Declaration in 2004: ‘On 14-17 March 2004, Judges and Experts from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the United Kingdom, the European Commission, the Council of the European Union, the International Social Service and Reunite, as well as the Hague Conference on Private International Law, met in St. Julian’s, 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.’

Kinderen ('Stolen Children') that Dutch authorities work harder and are far more effective in returning children from the Netherlands to foreign countries – even if they are not a party to the Convention – than they are in their attempts to get children back from abroad.'

The biggest gain from the Malta process, the Dutch liaison judges said in the interview, does not lie in the official statements, but in the discussions about cases and in those moments of informal contact. Actual discussions about a specific legal case somehow seem to make clear in a very direct way where the lines of division and separation lie. Arabic judges, for example, may bluntly say that a Muslim father has a full right to 'abduct' his child from a 'morally hazardous situation because the mother cohabits'. So yes, they say, a court order from a European country will be disregarded.⁶⁵ If, anywhere, human rights and specifically child rights can be seen as a site of struggle, it is here. At the level of official state actors and judges, the site of struggle seems to lead to a stalemate in which neither can win. But even if there seems to be a collision course, liaison judges are of the opinion that one needs to continue the dialogue.

'The aim of the Malta process is to open windows and to build bridges. This is not an easy thing to do. In plenary sessions especially the Islamic countries tell us how well they have arranged everything. They say that "if problems arise, we will arrange regular meetings for the mother in an informal way, so she can always visit our country". Then we have an exchange of viewpoints in several workshops. The goal is to come up with a common statement, but this is usually only an intention that it is "very important to keep talking". What is important, however, is to meet people, to see faces.'⁶⁶

The Declaration of the Malta II Conference in 2006 entails just that: It is important that it took place, activities and efforts need to be intensified, there is respect for legal cultural differences, and the process of dialogue should continue.⁶⁷ The same holds true for the 2009 meeting, but the tone now seems to be somewhat discontent and without any hope of future improvement. The Press Release⁶⁸ opens with two quotes, of which the second is from William Duncan, the Deputy Secretary General of the Hague Conference:

'We still have a long way to go. The consensus achieved among judges and other experts still has to be widened to a broader range of States and translated into practical working arrangements. More work is needed to bring our legal systems not into line, but into a state of fruitful co-operation. We need to continue to work to break down barriers of ignorance and mistrust. Our children and their parents deserve no less.'

On the actual developments the Press Release says:

'Particularly, the Conference in Malta explored the development of closer co-operation among governmental bodies and networking among judges; it discussed ways in which parental abductions can be prevented; it promoted parental agreement; it discussed

65 Case described in Van der Reijt, *supra* note 25, p. 454.

66 Interview in January 2008 with two judges from the BLIK.

67 The Judges Newsletter, Volume XI/2006, pp. 121-125, obtained from <http://www.hcch.net/index_en.php?act=text.display&tid=21>, last accessed on 24 February 2010.

68 HCCH Press Release 26 March 2009, obtained from <http://www.hcch.net/index_en?act=events.details&year=2009&varevent=161>, last accessed on 24 February 2010.

practical arrangements needed to facilitate transfrontier visits such as visa problems; and it highlighted and encouraged the exchange of information concerning the laws and practices of the different legal systems. This Conference continued the process of dialogue (...).’

Apart from the formal yearly and other conferences and the Malta Conferences organised by the Hague Convention, liaison judges for example have meetings with Moroccan judges invited by the Dutch Association for the Judiciary, and accept invitations by an Egyptian court for an exchange of views and lectures on legal developments. They further participate in conferences organised by the International Child Abduction Centre and other non-profit foundations, and organise lectures for themselves. Maybe we must conclude that the tone of discontent that seems to have influenced the Press Release of the last Malta Conference mostly relates to the legal and formal aspect. It can be complemented with the informal, brighter aspect of the value of a legal network:

‘We liaison judges contact ad-hoc liaison judges in non-Treaty countries when necessary. We have met these judges at international meetings. Sometimes we can successfully mediate to get people talking again, or to have a situation looked into.’⁶⁹

Dutch liaison judges, like Dutch lawyers who specialize in private international law and multicultural family issues, increasingly act as transnational legal professionals who value not only the law, but also the informal sphere of ‘knowing the right people’ and networking. To a certain extent, of course, this has always been so. What is added is an increasing awareness of legal cultural differences. This knowledge will in the long run pay off for the Dutch legal professional world as a whole, as it will spread through the national networks.

5. Conclusion

The Dutch liaison judges informed me in the interview that their job is to ‘build bridges’. That, of course, is a nice metaphor and is also used in the Judges Newsletter. They lay the foundations for legal connectivity. These foundations are the knowledge of different legal systems and cultures, networking skills, to keep talking when one opposes the other view, the willingness to postpone a legal and moral judgement and to view a case from a different angle, to switch to a different legal perspective, to respect that perspective, but still to return to one’s own. In terms of the interpretive sociologist Harold Garfinkel, liaison judges, just like lawyers working in the same field, are in the process of learning new ways to *locate cases* in several legal cultural frameworks.⁷⁰

The metaphor of ‘building bridges’ is in my opinion a tricky one. Instead of the metaphor of building bridges, another and more suitable metaphor in use is that of ‘supplying a juridical airport in every country’, which probably comes closer to what is actually occurring.⁷¹ Legal professionals know ‘where to land’ when they need information and help, but they have postponed the ideal that legal cultures come any closer. The increase in knowledge concerning different legal cultures and how best to deal with problems in this legal area does indeed lead to

⁶⁹ Interview with liaison judges in the ‘Journal for the Judiciary’, 2009 *Trema*, no. 5, p. 205.

⁷⁰ H. Garfinkel, *Studies in Ethnomethodology*, 1967.

⁷¹ One of the liaison judges used this metaphor.

a broadening of horizons, but not necessarily to a consensus handshake somewhere halfway on a bridge. Knots still need to be cut, and they are usually cut on this or that airport, and afterwards the actors fly back to their own legal culture.

Over time and out of pure necessity, legal professionals have learned how to prevent a solid 'stalemate', and how to proceed towards (even if slow) movement. This movement, in the case of judges, takes place during conferences and meetings, in which informal moments are just as important as formal lectures and statements, while for lawyers ad hoc informal networks are broadened and extended through new institutions like the International Child Abduction Centre. In general the search is for pragmatic solutions in individual cases.

Courses in comparative law, socio-legal studies, comparative legal cultures, and the anthropology of law – courses that confront law students with sometimes radically different perspectives of law and legal values – will only become more important in the future because they analyse, and make explicit, situations of legal pluralism.⁷² So far, the battle in the Netherlands over different interpretations of the 'best interests of the child' principle is largely being fought out implicitly. Only in the transnational arena and in the media are legal cultural clashes explicitly addressed. For the near future we probably cannot expect huge changes. After all, most legal professionals never have to visit a foreign legal airport.

72 P. Shah, 'Transforming to Accommodate? Reflections on the Shari'a Debate in Britain', in R. Grillo et al. (eds.), *Legal Practice and Cultural Diversity*, 2009, pp. 73-91.