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Judicial bench guides – the case of Minnesota do they help or hinder the evolution of the Hague convention to address domestic violence

Abstract

Judicial bench guides, extensive case-specific documents that outline how judges should accept, interpret and make decisions are a hidden, but critical part, of the American justice system. Bench guides aren't just informing judges about the particulars of a given type of law or process. By their very nature, they are also a type of power – they influence and guide judges to act and judge a certain way. As such, they have a large, but hidden, influence in the way that cases are actually decided. The role that bench guides play in the Hague Convention on International Child Abduction has become increasingly critical over the past two decades as two different forces have emerged: a clear awareness by the global community that the Hague Convention can be an instrument that perpetuates international domestic violence, and a resistance, by an almost entirely male dominated ruling class (the vast majority of politicians and elected and non-elected leaders of countries that are party to the Hague Convention are male), to change the Hague Convention. This leaves Bench Guides, at least in the United States, as one of few potential tools of power to alter the Hague Convention in practice. It is critical to scholars to understand whether or not Judicial Bench Guides actually do that – do they, in fact, help or hinder the way in which the Hague Convention addresses domestic violence?

Keywords: Hague convention, domestic violence, article 13(b), grave risk of harm, habitual residence, judicial bench guides, Hague convention and custody, custody rights & domestic violence, gender and domestic violence, mother's rights and domestic violence

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Introduction

The Hague Convention on International Child Abduction[1] was adopted in 1980 and remains in force to this day in a broad number of countries around the world. While the primary purpose of the Hague Convention (to provide a civil mechanism for dealing with the issue of child abduction) is one that requires persistent international cooperation and the force of law, a secondary effect of the Hague Convention – a mechanism for perpetuating domestic violence for mothers (principally) attempting to protect themselves and their children – has been neither addressed nor corrected at the international level despite over 20 years of research into the negative effects of the Convention on weakening the rights of mothers and substantially affecting their capacity to escape domestic violence.

Despite 20 years of evidence of the potential harm it causes; numerous studies by top universities and legal scholars and mounting evidence of its use as a form of perpetuating abuse across international borders, there has not been any serious attempt internationally to reform it. This study will attempt to use Bourdieu's field of power theory to situate one specific dimension of the Hague Convention: US Judicial Bench Guides, in the context of domestic violence. Specifically, since it is publicly available, I will focus this study on the current Minnesota Judicial Bench Guide for the Hague Convention. The Minnesota Judicial Bench Guide, in addition, is one of the most comprehensive and serves as an excellent basis for future work in judicial bench guide analysis.

Since changing the Hague Convention would require the consensus of all of the countries that are party to it, and since this seems to be unlikely to happen anytime soon, the best place to look for data about how the Hague may or may not be changing, in practice, is Judicial Bench Guide – the formal guidelines drafted by diverse groups and presented to Judges for use when they have a Hague Convention case in their docket.

This research study aims to analyze those components of Judicial Bench Guides that deal with domestic violence. I believe that researching bench guides will provide a critical insight into the limitations of how the United States is currently dealing with the Hague Convention increasingly being used as a vehicle for both legitimizing and increasing domestic violence across borders.

I am specifically interested in the Hague Convention because it is a process I have been forced to go through by a former domestic abuser. I acknowledge my bias in this, in that, as a victim of domestic violence and as a victim of a Hague Convention petition rooted in perpetuating that violence, I am principally opposed to the persistence of the Hague Convention itself. I also acknowledge the complexities of the Convention and the fact that changing it would require extensive international cooperation and would take years.

Literature review

The Hague Convention on International Child Abduction[1] was put into force in 1980 as a tool for equalizing child custody rights across international jurisdictions and as a civil mechanism to prevent 'forum shopping' and parental abduction of custodial parents. The original intention of the Convention presumed that the it would principally be used to return children who were abducted by abusive fathers. However, exactly the opposite has happened over the past 20 plus years. Increasingly, the Convention has become a mechanism for perpetuating domestic violence by forcing mothers who are victims of domestic violence to either return to the country where they were abused or to lose their children. "A significant study of United States parental abductions by Grief and Hegar suggests that in at least half of the instances of parental abduction, violence was a relevant presence

in the parental relationship. About 54 per cent of the sample of left-behind parents identified domestic violence as occurring during or after the marriage or relationship".[2]

Although signatories to the Hague Convention are, in theory, supposed to have 'equal protection' and follow the same child custody code (The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), numerous studies demonstrate that mother's rights and women's rights, when it comes to domestic violence, are not equally protected across the countries that are signatories to the Hague Convention. The wording of the Convention and its functional implementation deny this reality – and treat an order to return to the country of the abuser as being 'equal protection under the law'. "Return, as applied in domestic violence cases, denies women's autonomy, furthers cultural imperialism, and perpetuates class inequalities".[3] Numerous studies support this outcome. "Child abductions [where the mother as the victim runs away from the abuse across an international border] are often associated with domestic violence, and prompt return of these children can result in their re-victimization. Consequently, in international child abduction cases that involve domestic violence, the Hague Convention's primary interest in comity may conflict with the best interests of the children".[4] This issue of comity, or mutual respect between nations, presumes equal protection. That a disproportionate number of cases that involve domestic violence relate to mothers, who are victims, escaping with their children to countries that are seen as more protective of their rights should demonstrate that the basic principle of comity does, in fact, conflict with protection of victims of domestic violence.

In theory, the drafters of the Hague Convention understood that this potential for harm existed. And they wrote into the convention an exception: article 13(b), which basically said that the return of a child could he halted if it was proven that doing so would result in a grave risk of harm to the child. However, since it was written in 1980, that grave risk of harm was principally seen under the rubric of return to a war zone. Indeed, "Although the drafters of the Convention created an exception that the return is not required if there is a grave risk of danger to the child if he is returned, American courts have not interpreted this exception to include victims of domestic violence".[5] This is very significant in the context of this study because the Convention never mentions domestic violence and, almost unilaterally, American courts DO NOT consider domestic violence to be a 'grave risk of harm'. For example, in one US Hague Convention case, the Judge ruled that the child be returned to Greece, despite evidence of extreme domestic violence. The court found, "that there was no "grave risk of harm," which occurs only if the child is in imminent danger of being returned to a zone of war, famine, or disease, or if the courts of the country from which they fled are unwilling to give the child adequate protection".[6]

The 'war zone' reference is particularly ironic because it highlights the other major oversight, at the level of international conventions: that, de facto, mother's rights ARE NOT TREATED as human rights.

We are allowed to seek asylum, and that process of asylum could NEVER be interrupted through a civil process (Imagine, as a clear example of how absurd this – that a woman fleeing religious persecution in a country could be forced back to that country by a debt collector who demands she return to pay a loan on a car she left at the airport.) That would NEVER be allowed under any convention – where a civil claim took precedence over a human rights claim.

And, yet, Under the Hague Convention this is exactly what is permitted. A civil claim (my custodial rights as a father trump your rights as a mother to not be abused) takes precedence over a human rights claim (my right to live in dignity and not be subject to arbitrary abuse). This section of the bench guide shows very clearly, exactly how male-centric the Hague Convention is and how male-centric the theory of human rights is. Why is a woman allowed to seek asylum if she is being beaten for belonging to a religious minority, but she is not allowed to seek it if her husband is the one doing the beating?

Another major problem with the current framing of the Hague Convention, which links directly to the power of Bench Guides, is the question of evidence. Here, there is very clear evidence of gender bias. "In cases involving domestic violence where documentary evidence is lacking, expert evidence is often very important, be it in the form of a psychiatric or psychological assessment. Kubitschek, from a US perspective, highlights concern about evidential disparity and how that adversely affects the victim mother. She observes that on the one hand, some judges "have an extremely difficult time" making findings of fact and to "resolve conflicts in the evidence", thus they would "dismiss or discount the claims of violence as legally insufficient, a conclusion which saves the judge from having to decide whether or not the claims are true".[7] In other words, even in cases where a grave risk of harm exists, and that grave risk of harm is directly correlated to domestic violence, women, in many cases, risk losing their children in a Hague Convention petition because their story is not given equal weight before the court. In a majority of cases where a women's voice is heard, and her experience of domestic violence is accepted as an Article 13(b) defense, it is only because a male expert witness (such as a forensic psychologist) has affirmed her story and repeats it back to the Court.

What is seen consistently is that the practice of Hague Convention cases, by Judges, has a gender bias that puts women who are mothers in harm's way. We can conceptualize the 'Hague Convention' and all of its constituent actors as a 'field of power'.[8] That field of power contains agents who have respective powers to act upon others. It appears to be the case that, despite many working groups, despite massive evidence to the contrary and despite the fact that many mothers have either lost children or been forced to return to conditions of extreme domestic violence, the 'field of power' of the Hague Convention is one dominated by men that do not seem fundamentally concerned with a true and functional interpretation of women's rights as human rights. Part of this problem is that the Convention never mentions women's rights or mother's rights. Indeed, "Because the Convention focuses exclusively on children, it does not explicitly recognize domestic violence between children's parents as a reason to deny children's return to the habitual residence, even if return means placement with the children's abusive parent. This gap in the Convention is significant because social science research tells us that many families experience both domestic violence and child maltreatment."[9]

[8]Bourdieu's 'field of power' model can help situate discourse by recognizing that gendered agents are situated within a field of other gendered agents. According to Gender scholars such as Beate Krais, we can "assess the problem of gender in terms of social theory of Pierre Bourdieu; that is, as a social construction and a social relation emphasizing the symbolic order of the world."[10] This social construction is, implicitly, a form of symbolic violence.[11] From this perspective the Hague Convention is NOT a convention about the equal rights of parents during a custody dispute. It is a form of symbolic violence where the nations that are signatories to it collectively agree to undermine the specific rights of mothers and women. This is precisely the lens through which I intend to conduct my analysis of judicial bench guides.

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Hypothesis

It is my primary hypothesis that US Judicial Bench Guides are a type of 'trojan horse' – a mechanism that appears, on the surface, to support strengthening the protection for parents who are victims of domestic violence, but actually perpetuates that violence even more by legitimizing the legal mechanisms in the Hague Convention for a subjective rejection of claims. In other words, instead of fixing the real issue, which is the Hague Convention itself, Judicial Bench Guides appear to be increasingly 'addressing' domestic violence, but the way in which they are addressing it serves to further legitimize the structural problems in the Hague Convention itself.

I intend to conduct an extensive discourse analysis of sections of the Minnesota Judicial Bench guide that deal with guidelines for domestic violence claims. I have chosen the Minnesota Bench Guide as the primary source for this study since it is publicly available. This analysis, as aforementioned, will be rooted in Bourdieu's 'field of power analyses. In other words, I will be looking at the respective 'fields of power' of diverse, and gendered, agents within the Hague Convention 'field' to situate those sections of the bench guide that reference methods for responding to, and passing judgment on, claims of domestic violence.

Research questions

The primary research question related to my hypothesis is: How do the sections of the bench guide that refer to domestic violence frame evidence and decision-making with respect to components of the Hague Convention? And, does that framing, from a power perspective, strengthen or weaken the legal ability of victims of domestic violence to be protected from further harm?

Research method

The primary research method for this study is a discourse analysis of text in the Minnesota Judicial bench guide for the Hague Convention, from a perspective of fields of power. Bench guides are formal documents issued by either Federal or State Attorney Generals or Legal Organizations. These 'bench guides' are meant to serve as 'guides for judicial action and decision-making'. Theoretically, a judge does not need to use a bench guide; any judge is free to interpret the law directly as it written. However, in practice, a vast majority of judges are not versed in all possible conventions and laws that may appear before them. As such, we have to assume that bench guides play, at the least, an influential role in the way that judges behave. From a research perspective, we have no guarantee that bench guides will result in judicial actions or decisions that follow the bench guide itself. And, indeed, huge differences in how judges rule of Hague Convention cases demonstrate clear variance from bench guides. However, a bench guide, from a research perspective is a great place to start.

This study is intended to be a qualitative research study that analyzes the way in which an existing framework of power (the Hague Convention plus the bench guides for judges that hear Hague Convention cases) functions. Data for this studied will be compiled from existing primary sources: the publicly available Judicial Bench Guide for the Hague Convention for Minnesota. I will focus on and interpret those sections of the bench guide that deal with domestic violence. I intend to collect and categorize those sections in a single appendix file and then conduct a discourse analysis of that text.

Minnesota bench guide

This primary source analysis looks at the Minnesota Bench Guide for the Hague Convention. The guide was prepared specifically to guide judges on how to interpret the law and make decisions under what is called an Article 13(b) exception to return in the Hague Convention. More specifically, as the bench guides state, "The court is not required to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. ICARA requires the respondent to demonstrate, by "clear and convincing evidence," that the return of the child would expose the child to a grave risk. Considerable inconsistency exists between the way state and federal courts have interpreted the grave risk defense, both at trial and on appeal."

The last line is the most important line and part of the whole problem in both the United States and globally: that considerable inconsistency exists between the way state and federal courts have interpreted the grave risk defense, both at trial and on appeal. A large part of my research in this proposal is understanding the nature of this inconsistency, and what factors affect it. For the purposes of this primary source analysis, I am going to analyze and compare specific components that directly reference domestic violence. The Minnesota Bench Guide (All quotes in this section are from the Minnesota Bench Guide (2011).

Analysis of reference legitimacy

The bench guide consistently references "Social Science Research" as a basis for providing information. In other words, the guide does not only reference prior law (following the normal US legal precedent of judicial review), but it is also legitimizes the data it presents to judges by stating that it comes from 'social science research'. What is peculiar about this phrase is that it appears several times throughout the bench guide, but it does not appear with specific research studies or sources (except in footnotes). Nor does it provide reference to quantitative social science data. Rather, it looks to establish a rationale for deciding against returning a child because of domestic violence, because of the long-term qualitative social science data about general domestic violence.

While, on the surface, it looks like the bench guide is supporting, in this instance, the significance of Article 13(b) and is providing a framework for judges to more actively use domestic violence as a rationale for not letting an abuse parent force the return of a child to another country, in fact, this does not appear to exactly be the case.

The reason is very simple: the phrase 'social science research' is too weak, from a power perspective and it is not specific enough to provide a consistent measure of what 'grave risk of harm' is.

Here are some examples of this type of reference

1. Social science research shows that domestic violence may be a factor in the parties' intentions to permanently relocate.
2. While existing studies suggest.
3. Social science research indicates that if the child is exposed to violence in the home, the child will suffer serious consequences that constitute a grave risk.
4. A growing body of social science literature points to significant risks of harm to children exposed to adult domestic violence in their homes.
5. The social science research on the potential harm.

This type of language choice – one that consistently reference the phrase 'social science research' is odd in a bench guide. I would expect it to say, "the law says" or "courts say". While it is good that

social science research is being used to justify an explanation – part of the problem is that using 'social science research' as an introduction appears to indicate that it is not self-evident. That somehow, domestic violence and its effects were a mystery until 'social scientists' came along and discovered the long-term risk of harm. This is, frankly, painful to women, and especially to mothers. What it really says is, "The pain that you experience, as mothers, to protect your children, is not legitimate and not real unless 'social science' says it is real." From a broader perspective, the Hague Convention has it completely backwards – it not only denies the validity of that pain, it puts the burden on the mother, in almost all cases, to 'prove' by using the voice of experts that the violence she and her child experienced are 'enough violence' to justify a grave risk, because, of course, there is plenty of violence that can happen that is not a 'grave risk'.

Re-framing habitual residence by linking it to coercion

This is a very interesting part of the Minnesota Bench Guide that I found surprising, because it provided a unique avenue to correcting deficiencies in the Hague Convention with respect to domestic violence. This unique avenue has to do with extending, in judicial practice, the 13(b) defense to another section of the Hague Convention – the section that deals with 'habitual residence'.

The basic idea, without going into the details of it is simple: a child, according to the Convention, needs to returned to his/her habitual residence. On the surface that sounds simple – basically it says that issues of custody should be resolved in the place where the child habitually resided. However, this is not so simple in practice. This issue of habitual residence even went before the US Supreme Court, in the case of Monasky v. Taglierei (18-935); however that case was about defining residence. The Minnesota Bench Guide goes a step further and introduces the concept of 'coerced' habitual residence.

Specifically, it states

"A recently completed study for the U.S. Department of Justice found that 41 percent of abducting mothers alleged that their family's residence in the other country was the result of coercion or deception. U.S. courts are split on whether domestic violence should be considered as a factor in determining the parties' intentions to relocate Some courts have considered the presence of domestic violence as a factor in determining the place of a child's habitual residence, particularly in the way domestic violence affects the interpretation of "settled intent."

"The Eighth Circuit has recognized that habitual residence is not established when the removing spouse is coerced to move or to remain in another country, but has limited this rule to some degree when the abuse did not occur prior to or immediately after a relocation. In other circuits, courts have found that the presence of domestic violence can preclude a finding of a change in habitual residence. A district court in Washington held that a petitioning father's abuse of the respondent mother precluded the family from making Greece the country of the child's habitual residence. Finally, a district court in Utah ruled that habitual residence necessarily entails an element of voluntariness in "settled purpose."

In the above quotes from the bench guide, a particular pattern emerges. Unlike other bench guides, the Minnesota Bench Guide is providing a pathway for judges to reframe the definition of habitual residence through the lens of domestic violence.

This is far more important than it seems. The Article 13(b) defense is currently the ONLY part of the Hague Convention that allows for the introduction of domestic violence as a reason to deny a petition for a Hague return.

By encouraging judges, and providing them with evidence of decisions from other circuit courts, to use the definition of habitual residence as a factor that is linked to domestic violence, it opens the door for a more rationale approach to treating domestic violence evidence.

Why? Because the 'grave risk of harm' defense is, according to many of the Hague cases, a 'higher barrier to breach' than a 'habitual residence' question.

However, this issue is not so clear cut. The bench guide provides another example

"In another case, a federal district court in Ohio considered a woman's abuse by her husband in determining habitual residence. The woman argued that at the end of the couple's relationship she was not permitted to leave her home in Norway without being accompanied by her battering husband. The court also noted that the husband hid the mother's and children's passports, thus preventing them from leaving Norway. Under these facts, the court ruled that for much of the woman's time in Norway she remained there "voluntarily, albeit reluctantly," and as a result, Norway was the children's habitual residence."

In the Ohio example, the Bench guide is somewhat confusing. The idea of 'voluntarily, albeit reluctantly' is a very loaded and presumptive concept. In fact, it is even odder that this phrasing is used, considering the other context in which it very, very clear that voluntarily, albeit reluctantly is anything but consent: date rape.

I find it particularly odd that many countries have defined the concept of voluntarily, albeit reluctantly as lack of consent in the case of rape, but not in the case of residence. Why is it that coercion and psychological violence that results in someone living somewhere 'voluntarily, albeit reluctantly' are not significant enough to protect a mother/child from further harm?

According to the Minnesota Bench Guide, "A district court in Utah ruled that habitual residence necessarily entails an element of voluntariness in "settled purpose." In the final analysis, this reference, although it does not say it directly, speaks to one of the major problems with the Hague Convention. Voluntariness in 'settled purpose' is almost never questioned with respect to the father. It is only questioned, in almost every single Hague Petition case, with respect to the mother. In other words, the father's right to choose where to live and when and under what conditions is an absolute right. But the mother's right to do the same must be defended and must be proven. She has to prove, through the voice of others, that her coercion is enough coercion to constitute in involuntary situation. Why is it not self-evident on her word? So many court cases show that women, in almost every country on Earth, have a lesser voice before the law. Their testimony counts for less than men's. In the Hague Petition, that horrific asymmetry is blindingly obvious, especially with respect to habitual residence and coercion.

Conclusion

It is my hypothesis that the primary agents responsible for changing the Hague Convention through the 'path of least resistance' – modifying judicial bench guides are purposely not modifying those guides because of much deeper embedded patriarchal structures that can be revealed through Bourdieu's model. This is, I believe, largely because the Convention itself represents a form of symbolic violence that the primarily male-centered structures of power in the world do not want to change. By examining the actual instruments of power of the Hague Convention (bench guides) I believe Bourdieu's theory

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will be most helpful – in situating the real behavior of those actors that are most responsible for either using the convention to help or hurt victims of domestic violence.

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