Reforming New Zealand's conflicts process: the case for internationalisation

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The Conflict of Laws is by definition committed to recognition of the principle that trans-national legal problems cannot be dealt with according to a purely domestic conception of justice. Campbell McLachlan suggests therefore that reform should be directed towards the goal of an internationally unified Private International Law, and, in particular, argues the case for New Zealand participation in the work of the Hague Conference and proposes a process by which this may be achieved.

I. GENERAL PRINCIPLES

A. The Nature of the Conflict of Laws

The basic argument developed in this paper is that the Conflict of Laws ought to be developed on an international rather than a domestic plane. Such a development is needed because of the nature of the subject and the principles underlying its existence. The Conflict of Laws is concerned with the regulation and resolution of legal relations and disputes of a trans-national character. It is classically described as dealing with three issues: jurisdiction, choice of law and recognition and enforcement of foreign acts and court orders. All three of these issues are procedural in the sense that they do not determine in themselves any matter of substance which may be in dispute, but simply determine which court or which body of substantive rules should most appropriately decide the dispute. The subject is thus by its nature concerned with problems which cannot be resolved simply by the application of rules developed to deal with domestic situations. Nor, it is argued, can such problems be resolved adequately solely by domestic courts and legislatures. Development of rules to deal with trans-national disputes on a purely domestic plane means that such rules may be coloured by domestic conceptions of justice. Moreover a Conflict of Laws system developed domestically may fail to take account of a wider range of procedural solutions

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which international cooperation affords. This point is illustrated by the example of international child custody disputes used as a case-study in this paper.

The argument for the international development of the Conflict of Laws is enhanced when the philosophical basis of the subject is examined. If the subject is to be justified at all, it must be on the basis of a wider concept of justice for individuals caught in the web of trans-national disputes than the particular conceptions of justice embodied in domestic laws can afford.

Indeed Dicey himself suggested as much:[1]

> The application of the foreign law is not a matter of caprice or option. It does not arise from the desire of the sovereign of England or of any other sovereign to show courtesy to other States. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.

The theory proposed by John Rawls provides here a convenient structure for thinking.[2] Rawls' own conception of justice gives priority to the idea of liberty. The Conflict of Laws seeks to respect this in a number of ways. In choosing the law which is to apply to a contract the courts use the connecting factor of the proper law. To ascertain this they look in the first place to the intention of the parties:[3]

> The legal principles which are to guide an English Court on the question of the proper law of the contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive.

In the field of personal and family law the increasing concern world-wide is to connect the individual with the system of law which is most likely to reflect his or her intentions. Now a closely related concept is that of the rule of law:[4]

> We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled.

Thus if a legal system is concerned to respect legitimate expectations of rational persons it must be prepared when the occasion demands to look beyond its boundaries to the system of law by which such persons might reasonably expect to be governed and to the consequences which they might reasonably expect to flow from their actions. Bound up with this idea of the rule of law goes the idea of respect for the law. Especially in the area of the recognition and enforcement of judgments, some sort of internationalist approach is essential

1 Dicey *Conflict of Laws* (Stevens, London, 1 ed., 1896), 10, quoted in Graveson, "Philosophical Aspects of the English Conflict of Laws" in *Comparative Conflict of Laws* (Amsterdam, North-Holland, 1977).

2 Rawls *A Theory of Justice* (The Belknap Press of Harvard University Press, Cambridge, 1971).

3 *R.* v. *International Trustee for the Protection of Bondholders* [1937] A.C. 500, 529 per Lord Atkin.

4 Rawls supra n. 2, 235.

to ensure the efficacy and thus the maintenance of and respect for domestic legal systems. This is what Graveson called the positive policy:[5]

> . . . English Courts in building up the Conflict of Laws have always shown a desire to uphold transactions rather than to annul them, and to support institutions, even though unknown to English municipal law, rather than to reject them simply because they were outside the scope of the internal law.

The final strand which connects the idea of justice to the application of the law in the conflicts context is that of equality of treatment. As Rabel noted:[6]

> Since Savigny, it has been customary to regard the attainment of uniform solutions as the chief purpose of private international law. Cases should be decided under the same substantive rules, irrespective of the Court where they are pleaded.

This naturally requires that in the choice of law process the two legal systems in question should be viewed on the basis of uniform choice of law rules. Again there is a link to be made here with the reasonable expectation of the parties. Lord Hatherly recognised the importance of this principle in *Udny* v. *Udny*:[7]

> I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the Courts in every country on international questions.

Now it will be seen that all of these principles suggest that there must be in the Conflict of Laws a tendency towards an internationalist outlook, but such an outlook has been but imperfectly achieved. Why?

B. The Weaknesses of the Present System

The answer it is submitted lies in the way in which the Conflict of Laws has developed to date. In the Common Law system, the subject's development has been largely the work of the domestic courts, with the occasional nod to the theorists, notably to Professors Dicey and Cheshire.[8] But there is something inherently odd about consigning trans-national problems to be resolved by domestic courts. That oddness results from the essential commitment of domestic courts to their own domestic conception of justice. As has just been established, the Conflict of Laws is about justice too, but in the formulation of its rules it is clearly insufficient to have regard only to the rules which a particular society might regard as appropriate for its own internal regulation. This tension between domestic conceptions of justice and an internationalist concept of justice has characterised the development of the Conflict of Laws.

5 Graveson supra n. 1, 38.

6 Rabel *The Conflict of Laws: A Comparative Study* (University of Michigan Law School, Ann Arbor, 2 ed., 1958), 96.

7 (1869) L.R. 1 H.L. (Sc. & D.) 441, 452.

8 The reference is, of course, to the two prime textbooks: Dicey and Morris, *The Conflict of Laws* (Stevens, London, 10 ed., 1980), and Cheshire and North, *Private International Law* (Butterworths, London, 10 ed., 1979). For one example of such an "occasional nod" see *Radwan* v. *Radwan (No. 2)* [1973] Fam. 35, 45 per Cumming-Bruce J.:

> I have, with proper humility, to grasp the nettle and decide whether to award the accolade of this court to Dr J. H. C. Morris, the editor of *Dicey & Morris* . . . or to Processor Cheshire who has for many years advanced the contrary view.

It has led to four major weaknesses in the present system:

(i) The possibility of conflict between different Conflict of Laws rules in different countries. Contrary to the principle of equality of treatment, different connecting factors and different rules mean different solutions depending on the jurisdiction in which proceedings are heard;

(ii) The inherent preference for the lex fori and for the solutions arrived at both by the legislature and by the courts in solving domestic problems in the resolution of cases with foreign elements;

(iii) The irregularity of treatment between courts and the patchy recognition given to court orders made in foreign jurisdictions promote forum shopping and forum evasion;

(iv) The range of problems presented by cases with foreign elements, and the infrequency of judicial contact with them, especially in New Zealand, combine to make that "dismal swamp filled with quaking quagmires",[9] the obscurity and confusion of the present law.

The need for the Conflict of Laws, and the difficulties inherent in the present system are highlighted in the context of family law, because family law rules are very closely tied up with a particular society's conception of justice. This prompted Cavers to comment:[10]

> The answers our courts have worked out are far from satisfactory, but they appear to be the best that is compatible with that deep division in our mores which makes it seem preferable in [the family law field of the Conflict of Laws] to provide ways of evading the issues than to seek rational solutions for them.

Cavers is making an important observation on the present system. There is no doubt that, as the family is a basic unit of social organisation, rules about it have and will continue to have a close connection with the 'mores' of a particular society.

Examination of an early Common Law case like *Hyde* v. *Hyde*[11] might well justify Cavers' charge that the Conflict of Laws is simply about providing ways of evading the issues. Lord Penzance was hearing a petition for divorce from a man whose marriage had been potentially polygamous under the laws of the country in which he had married. He dismissed the petition on the grounds that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others",[12] and that as this marriage was not of that nature, an English court could not recognise it. English courts no longer take such a view of polygamy, and it is submitted that the Conflict of Laws has the potential to do the very thing Cavers suggests that it does not presently do: to seek rational solutions for the issues raised. As Rabel points out:[13]

9 Prosser *Selected Topics on the Law of Torts* (1953), 89, quoted in Inglis *Conflict of Laws* (Sweet and Maxwell, Wellington, 1959), 3.

10 Cavers *The Choice-of-Law Process* (The University of Michigan Press, Ann Arbor, 1965), 116.

11 (1866) L.R. 1 P. & D. 130.

12 Ibid., 133.

13 Rabel supra n. 6, 97-102.

> The function of private international rules is to choose the applicable law with all its evaluations whatever they may be. . . . The crucial point to be reformed is the blind subjection of conflicts rules to the private law of each country.

The Conflict of Laws indeed has the potential to preserve the diversity of domestic family law systems around the world and at the same time to provide practical procedural methods for the individual who is in some way caught between those systems.

II. THE NEW ZEALAND SITUATION: A CASE-STUDY OF INTERNATIONAL CUSTODY DISPUTES

Some of the features of the existing New Zealand process and some of the weaknesses of it emerge from a study of the international dimension of the custody of children.[14] The principle that the welfare of the child is paramount is one which has received wide international acceptance. That principle is expressly recognised for New Zealand in section 23 of the Guardianship Act 1968. The issue posed in the context of international custody disputes is who is to decide what is in the best interests of the child and from what perspective? The New Zealand approach has been to favour the domestic perspective.

Section 5 of the Guardianship Act gives the court power to exercise its jurisdiction, inter alia, whenever the child who is the subject of the application is present in New Zealand. If the child has been brought to New Zealand by one of the parents, although the other parent is by court order of a foreign country entitled to custody, is the New Zealand court bound to give effect to that foreign order? Essentially the New Zealand response has been: no.

The starting point is the proposition that overseas custody orders are not enforceable under the normal methods for the recognition and enforcement of foreign judgments in general because they are neither final, conclusive nor for a fixed pecuniary sum.[15] But to those initial difficulties, the courts have added further ones.

The leading decision of the Court of Appeal is *Re B.*[16] In that case the husband, an Italian by origin, and the wife, a New Zealander, had married and settled in Australia. When the marriage broke down the wife, without warning the husband, suddenly returned to New Zealand taking the children with her. The husband then obtained an interim order in the Supreme Court of New South Wales awarding him the custody of the children. He then applied to the Supreme Court of New Zealand for an immediate order to give effect to the New South Wales determination. Roper J. refused to make such an order and directed a hearing on the merits. The Court of Appeal upheld that decision. It did so on the grounds that the welfare of the child principle justified a complete redetermination on the merits, during which, in due course, proper weight could

14 See in particular on this subject: Martin *Parental Kidnapping of Children: Domestic Comparative and International Responses* (1982) unpub. V.U.W. research paper, and McClean *Recognition of Family Judgments in the Commonwealth* (Butterworths, London, 1983) Chapter 9 "Custody of Children".

15 Dicey and Morris supra n. 8, 439-443, 1092-1098.

16 [1971] N.Z.L.R. 143.

be given to the Australian order. The Court thereby followed the general Common Law approach enunciated in *McKee* v. *McKee*[17] which was permissive of re-determination. *Re B* has since been followed in the High Court, and applied, albeit uneasily, to reverse the orders of, inter alia, English and Canadian courts.[18] The *Re B* approach has three negative effects:

(i) It encourages parents to evade the orders made by the courts in the original forum and to shop around for a decision which favours them. As Denham Martin comments:[19]

> Thus a parent who is the victim of an unfavourable custody determination in jurisdiction A has little to lose, and much to gain, by kidnapping the children of the marriage, and then reapplying for custody in the courts of jurisdiction B.

(ii) It displays a lack of respect for the orders of foreign courts and a corresponding assumption that the local court is somehow better equipped and better qualified to reach the most 'just' decision.[20]

(iii) It encourages parents to uproot children from their habitual residence and to take them to a completely new environment. On the whole this has been shown to have a singularly disruptive effect on a child's development.[21]

These factors led the English and Scottish Law Commission to comment:[22]

> Promotion of the welfare of the child is, of course, the basic purpose of judicial intervention in matters of custody. However, in framing rules of jurisdiction, the legislature can, in our view, properly seek to ensure that concern for a child's welfare in particular cases does not produce a situation which will jeopardise the welfare of children generally.

The New Zealand response was to develop, in co-operation with the Australian Standing Committee of Federal and State Attorneys-General,[23] a scheme to deal

17 [1951] A.C. 352, P.C.

18 See, for example, *C.* v. *C.* [1973] 1 N.Z.L.R. 129 Speight J.; *E.* v. *F.* [1974] 2 N.Z.L.R. 435 Mahon J., who held, 440, that:

> My approach to the question for determination must be controlled by the judgment of the Court of Appeal in *Re B* (supra). It is quite clear from a study of that case that once the whole facts have been investigated the existence of a contemporary foreign order recedes into the background and is supplanted by the primary inquiry as to the present and future welfare of the child on the facts as found . . . were it not for the decision in *Re B* I think I would have decided the case the other way.

19 Martin supra n. 14, 8.

20 With respect that assumption seems to be built into the factors listed by Speight J. in determining the weight to be given to the foreign order in *C.* v. *C.* supra n. 18 at 131: "The status of the Court, the type of hearing, whether it was a full one or a mere formality, and the similarity or otherwise of the laws in question".

21 See Martin supra n. 14, 9-14.

22 English Law Commission Working Paper No. 68 and Scottish Law Commission Memorandum No. 23, *Custody of Children — Jurisdiction and Enforcement within the United Kingdom* (London, 1976) 36.

23 This committee was established in 1961, and New Zealand has been regularly represented on it since 1968. Indeed some of the committee's meetings have been held in Wellington. Aside from custody, the other major contribution to the reform of the Conflict of Laws made by the committee was in the area of domicile: for New Zealand see the Domicile Act 1976. For a brief history and outline of the committee see Bowen "The Work of the Standing Committee of Attorneys-General" (1971) 45 A.L.J. 489.

with trans-Tasman parental kidnapping. The scheme is designed to give effect in New Zealand to "overseas custody orders" from "prescribed overseas countries".[24] Currently the scheme applies only to Australia and the United Kingdom. It was introduced by the Guardianship Amendment Act 1979 and came into force on 1 January 1980. It is now found in sections 22A-22C of the Guardianship Act 1968. Section 22A establishes an administrative system for the transmission and registration of overseas custody orders. Once registered such orders have, by virtue of section 22B, the same effect as a custody order made by a New Zealand court. When that section is read with section 19, the court has the power to order the return of the child to a prescribed overseas country, should enforcement of the overseas custody order require that. The power of a New Zealand court to determine for itself any custody matter decided in a registered overseas order is closely prescribed by section 22C. That section provides that no New Zealand court shall exercise jurisdiction where an overseas order is registered here, unless either (a) every custodian consents or (b) there are substantial grounds for believing the welfare of the child will be adversely affected if the court does not intervene. Even if on this basis the court may exercise jurisdiction, it shall not make an order unless the applicant satisfies the court that (a) the welfare of the child is likely to be adversely affected if the order is not made, or (b) there has been such a change in the child's circumstances that the order ought to be made.

The scheme thus represents a legislative response which overcomes, by means of trans-Tasman co-operation, many of the weaknesses in the Common Law approach detailed above. It suffers, however, from one major defect: it is limited in territorial application to Australia and the United Kingdom. Thus two standards are applied concurrently in New Zealand: the Guardianship Amendment scheme if there is an overseas custody order from Australia or the United Kingdom, the *Re B* approach if there is not. The international forum shopping supermarket is still wide open.

The study of child custody disputes illustrates some of the problems raised when trans-national disputes are resolved by domestic courts. The wider interests of children are not sufficiently perceived by courts dealing with particular cases. The administrative machinery which could ensure a rapid return of the child to its home and custodial parent does not exist. The Guardianship Amendment Act is a beginning but not a complete answer. That can only be found within a wider framework for international co-operation. Such a framework is important for the Conflict of Laws as a whole for the reasons of principle outlined in Part I. The primary focus for international co-operation in the reform of the Conflict of Laws is the Hague Conference on Private International Law, and it is to a discussion of the work of that body that this paper now turns.[25]

24 Both terms are defined in s. 2 of the Act.

25 While there are many organisations devoted to the international unification of private law generally, few have become involved in the Conflict of Laws. For a discussion of the various agencies which have done some work in this field see McLachlan supra n. 1, 69-74, and David "The International Unification of Private Law" (1971) II 5 *International Encyclopedia of Comparative Law.*

III. INTERNATIONAL UNIFICATION: THE HAGUE CONFERENCE[26]

A. Organisation

Despite its name, the Hague Conference is a permanent international organisation. Its modern era began in 1951 with the signing of a statute to govern its organisation.[27] The first article provides that the goal of the conference is to be the progressive unification of the rules of private international law. It goes on to detail the administrative organisation of the conference. The conference itself is diplomatic in character and meets in plenary session every four years. The work of the conference is supervised by a standing governmental committee of the Netherlands, which is aided in its tasks by a permanent bureau. The whole conference then is run on a very small scale footing, but its sphere of membership has continued to increase. The conference has met seven times since 1951 and by 1980 had 29 member states. It is no longer dominated by its Western European founding members, who number only 17. The others are Czechoslovakia and Yugoslavia from the socialist bloc; Egypt, Israel and Turkey; Argentina, Venezuela, Surinam, Canada and the United States of America; Japan and Australia. There is a significant Common Law representation of five states: the United Kingdom, Australia, Canada, Ireland and the United States of America. Looking beyond the list of members, to the wider list of countries who have acceded to one or more conventions, the picture changes again. It includes a further group of socialist states, Hungary, Poland, Romania, the German Democratic Republic, and the U.S.S.R.; a group from Africa including South Africa, Swaziland, Lesotho, Malawi, Botswana, and Niger; two countries from the South Pacific region, Fiji and Tonga; as well as Lebanon, Morocco, the Holy See, Liechtenstein, Mauritius, Bahamas, Cyprus, Malta, Seychelles, Barbados and Singapore. All of this suggests nothing more than an expanding internationalism. By developing links with other major unification agencies such as UNIDROIT, the United Nations, the Organisation of American States, the Council of Europe and the Commonwealth Secretariat, the Hague Conference has carved for itself a pre-eminent place in the reform

26 The literature on the modern work of the conference is vast and multilingual. The Permanent Bureau has produced a *Bibliography relating to the work of the Conference* (1945-1978) (La Haye, Imprimerie Nationale, 1978) which provides a complete key to the publications of the conference itself and to academic writings on it. The conventions themselves are contained in *Conférence de La Haye de Droit International Privé Recueil des Conventions (1951-1977)* (La Haye, Martinus Nijhoff, 1977) (hereinafter cited as *Recueil*). The fate of the conventions in the courts is detailed in Asser *Institut Les Nouvelles Conventions de La Haye: Leur Application par les Juges Nationaux* (Tome I: Sijthoff, Leyden, 1976; Tome II: Sijthoff and Noordhoff, Alphen aan den Rijn; Maarten Kluwer, Anvers, 1980). The proceedings of the Hague Conference are published in a series of volumes entitled *Actes et documents de la Conférence de La Haye de Droit International Privé* (these are not available in New Zealand). A complete table of signatures and ratifications of the Hague Conventions is published as of the first of March of each year in the first issue of the *Revue Critique de Droit International Privé,* and as of the first of September in issue 4 of the *Netherlands International Law Review.*

27 Statut de la Conférence de La Haye de Droit International Privé (1955) *Recueil* 1.

of conflicts law internationally. Moreover, while it works extensively as a diplomatic conference between states, member states are in fact represented predominantly by conflicts experts. So the conference provides a forum which is at once interested and impartial.

B. Common Law influence

From a New Zealand perspective the harmonization of the conference with the Common Law tradition is clearly of major importance. In this regard the United Kingdom has taken the lead. Since 1951 it has ratified seven conventions. These have been translated into Common Law style legislation.[28] Moreover many of the conventions thus ratified have been extended in operation to Britain's colonies and dependencies around the world.

The United States, Canada and Australia have not had such outstanding success. In part this results from their federal system which makes ratification difficult.[29] The most recent sign of the conference's expanding interest in the Common Law is the inclusion as the major topic on the agenda of the fifteenth regular session in 1984 of a draft convention on trusts. The final strand in Common Law participation, is the achievement of observer status to the conference by the Commonwealth Secretariat. The Secretariat convened a caucus of Commonwealth members on the eve of the 1980 conference to discuss parental kidnapping, and has been much involved in the planning stages of the work on the law of trusts.[30]

C. Method

Does a common method emerge from the work of the conference? The conference has covered procedural issues as well as the three classical conflicts

28 1. Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions 1961, given effect in the Wills Act 1963 (U.K.);
2. Convention abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (no legislation required);
3. Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions 1965, given effect in the Adoption Act 1968 (U.K.);
4. Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters 1965, given effect in Order 11, rule 6 of the Rules of the Supreme Court (England);
5. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, given effect in the Evidence (Proceedings in Other Jurisdictions) Act 1975 (U.K.);
6. Convention on the Recognition of Divorces and Legal Separations 1970, given effect in the Recognition of Divorces and Legal Separations Act 1971 (U.K.);
7. Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations 1973, given effect by the Maintenance Orders (Reciprocal Enforcement) Act 1972 as modified by the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979, S.I. 1979 No. 1317.

29 See Nadelmann "Ways to Unify Conflicts Rules", *De Conflictu Legum* (1962) 9 N.I.L.R. 349 for the American perspective on this problem.

30 See Commonwealth Secretariat, "The Commonwealth Secretariat's Activities in the Field of Private International Law", L.M.M. (83) 15, memorandum to the 1983 Meeting of Commonwealth Law Ministers.

questions: jurisdiction, choice of law and enforcement of foreign judgments. It has proceeded on an issue by issue basis, determining for each area of substantive law the principles and interests at stake and the best solutions to be adopted. It has sought to achieve certain rules and procedures in place of domestic divergence and judicial discretions. Of paramount importance for the achievement of unification, the Hague Conferences increasingly have erga omnes effects rather than merely inter partes ones.[31] Of course this is not possible in procedural matters, but many of the recent choice of law conventions are clearly to apply in place of existing domestic conflict rules. For instance that on maintenance obligations provides in article 3 that "the law designated by this convention shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a contracting State."[32]

Perhaps the most significant advance of all has been the promotion of the new connecting factor "habitual residence".[33] Whatever the direction of a jurisdictional or choice of law rule, some means of connecting a person to a territory is going to be an important part of it. The Common Law has always used domicile as its prime connecting factor. By contrast civil law countries preferred nationality. This was reflected in the early conventions of the Hague Conference. However, increasing mobility and the major upheaval of the world wars along with trends within the Conflict of Laws which emphasized respect for people's reasonable expectations, led to a widespread dissatisfaction with nationality. In the Common Law world there has been similar dissatisfaction with the rigidity and artificiality of domicile. This led the Hague Conference to adopt the new connecting factor of habitual residence. Since 1951 it has figured prominently in its conventions, both as a ground of jurisdiction and as an element of choice of law rules. Habitual residence possesses the singular advantage of being able to step aside from the complex legal requirements which hedge about domicile and nationality. It has also avoided much potential conflict between proponents of the other two factors. The key to the factor's success has been its emphasis on a factual examination of the person's situation. Habitual residence does not seek to define a person's legal headquarters but only to find a territory with which he is realistically and closely associated. Its determination thus remains a question of fact. Efforts to define it have on the whole been resisted by its proponents. Professor McClean, in a paper prepared for the meeting of the Commonwealth Law Ministers in 1983, concludes that it may have significant advantages for Common Law countries because it avoids the legal and evidential difficulties surrounding domicile and provides the chance of achieving a new unity in approach.[34]

31 For discussion of the significance of this see Vitta "International Conventions and National Conflict Systems" (1969) 126 *Recueil des Cours* 111, Chapter II.

32 Convention on the Law Applicable to Maintenance Obligations 1973, *Recueil* 219.

33 See Cavers "'Habitual Residence': A Useful Concept?" (1972) 21 A.U.L.R. 475. See also Dicey and Morris supra n. 8, 144-8, and McClean supra n. 14, 28-32.

34 McClean "Reform of the Law of Domicile in Commonwealth Jurisdictions", Annex to L.M.M. (83) 11, material also available in McClean supra n. 14.

IV. AN INTERNATIONALISATION PROCESS FOR NEW ZEALAND

A. Reasons for Participation at the Hague Conference

The Hague Conference provides the major international forum for the creation of private international law. To that extent it fulfils a requirement for the creation of a just system of the Conflict of Laws which has so far gone largely unmet: namely, the provision of an appropriate forum for the development of common rules. Moreover it provides the necessary machinery to move away from the inherent preference for the lex fori, which any judicially administered system of domestic Conflict of Laws seems to reflect. Its modern organisation as an assembly of legal experts and government officials from countries with a wide range of legal traditions suggests that degree of limited altruism which will ensure the development of the most fair and equal rules for the citizens of all participant states. From New Zealand's point of view, the work of the Hague Conference has become much more approachable with the increasing participation of Common Law and Commonwealth member countries. This ensures that Common Law problems and Common Law conceptions of justice are put into the mix in the development of uniform rules.

The direction taken in the work of the Hague Conference also reflects New Zealand's needs and interests. It has concentrated on the development of rules and procedures which are easy and practical to apply. It has paid particular attention to the improvement of international civil procedure, which is a need much evinced in New Zealand — a small isolated country with extensive international links. Moreover it has done much work on family law problems, which is an area of the Conflict of Laws on which the New Zealand legislature has bestowed considerable attention, in the course of reforming domestic family law.

The Hague Conventions respond to weaknesses apparent in the current position both in New Zealand and internationally. As far as possible the conventions step outside the traditional connecting factors, opting instead for "habitual residence". The confusion and obscurity, which still surround much of the Conflict of Laws, are replaced by clear and codified rules. Their adoption world-wide provides a common body of experience in their application and interpretation. The problems of state sovereignty and lack of political will, are more easily dealt with on an international plane, where each country lays down its sovereignty at least to the extent of participating in the conference and where the conference itself keeps conflicts problems under review. The conference provides a response too to the weaknesses of forum shopping and forum evasion. Uniform choice of law rules and efficient international civil procedure limit the value of forum shopping. Increasing universality in the service of process and the enforcement of judgments limits the possibilities for forum evasion.

The actual practice, then, of the Hague Conference promotes the principles to which the Conflict of Laws is devoted. The connecting factor of habitual residence promotes liberty of action to the extent that it reflects a person's true living habits, rather than tying him artificially to some legal order. Uniform choice of law rules and benevolent rules for the recognition of foreign legal acts favour the reasonable expectation of the parties as well as equality of treatment, regardless of the court before which one happens to appear.

Finally, and nowhere is this more important than in family law, the Hague Conference is aimed at the selection of value free procedural rules which determine the application of substantive rules. While this has been done on the basis of a balance between the interests of the states and individuals, the result is to maintain a clear distinction between the role of the Conflict of Laws and the application of substantive law and to minimize the judicial tendency to blur the two.

For all these reasons New Zealand's participation at the Hague Conference is essential for the necessary reform of our conflicts process. It remains to outline the most appropriate means for implementing such participation.

B. Implementation through Australasia and the Commonwealth

If, as has been argued in this paper, the development of Private International Law ought to be conducted on an international plane, it would be insufficient for the Hague conventions to be considered simply on an ad hoc basis, as they appear to respond to domestic needs. Trans-national problems ought to be considered within a process specifically devoted to them. What New Zealand needs is a process which ensures regular consideration of all developments at the Hague and which gives us a voice in deliberations. Even looking no further than family law, New Zealand has made many innovations both in dealing with the domestic and the trans-national situation which could usefully be contributed at the Hague.[35] Nevertheless, as a political reality, actual membership seems a somewhat remote option. The expense involved may be seen as too great for a branch of the law which is remote from the exigencies of government. It is, however, possible for New Zealand simply to build on the framework for international co-operation of which we are already a part. Australasia and the Commonwealth are both traditional forums in which New Zealand expresses its international voice. The Australian Standing Committee of Federal and State Attorneys-General and the meetings of Commonwealth Law Ministers, aided by the work of the Legal Division of the Commonwealth Secretariat, have both been involved in the reform of Private International Law. New Zealand already participates in both forums. Through these channels New Zealand could easily and effectively participate in, and reap the advantages of the Hague Conference, without actual membership.

Work already done within the Commonwealth and the practical possibilities for the implementation of the Hague conventions are now briefly considered.

Commonwealth Law Ministers have been meeting regularly since 1965. Co-operation in private international law matters, an area well within the bounds of the Commonwealth legal tradition, has figured in discussions. So, for instance, at their 1973 meeting, law ministers discussed inter-Commonwealth legal relations in the field of execution of judgments and requested the compilation of a background report by the Secretariat preparatory to a Commonwealth scheme. The

35 To draw again on the example of custody, New Zealand innovations include the power of the court to appoint counsel for the child under s. 30 of the Guardianship Act 1968, and the trans-Tasman scheme discussed in Part II above.

presentation of that detailed report to the 1977 meeting in Winnipeg occasioned the following response in the communique:[36]

> Ministers felt that the legal heritage of the Commonwealth made it both practical and justifiable for its independent members to continue special procedures and rules in their relationships inter se which might differ from those ordinarily in force between sovereign states. These special arrangements fashioned for intra-Commonwealth co-operation did not preclude adherence to more universally applicable rules; nor did they prevent non-Commonwealth participation. They were conscious of the need to develop these rules in a way compatible both with activity in the international sphere and with existing obligations of Commonwealth countries. They suggested that arrangements should be kept under regular review so that they are brought up to date and improved, and where practicable extended for the benefit of all the peoples of the Commonwealth. They were also conscious of the potential for the Commonwealth to use its collective influence in other bodies such as the Hague Conference and Unidroit so as to take a lead in developing private international law to the benefit of the world community. . . . Ministers recommended that the Commonwealth Secretary-General explore with the Hague Conference on Private International Law the possibility of his keeping those Commonwealth governments who are not members of the conference fully informed of developments there and, by providing the Hague Conference with details of relevant activity within the Commonwealth, assisting the conference in its endeavours.

It will be immediately appreciated that the Commonwealth law ministers had thus set about creating the very kind of channel which would allow both for use of Hague Conventions and participation in its deliberations from a Common Law perspective, which it is argued New Zealand needs. The Commonwealth Secretariat responded in a multi-faceted way. It concluded observer status with the Conference. Its influence in the development of the convention on international child abduction and the forthcoming convention on trusts has already been noted.

The publication of the report by Professors McClean and Patchett of *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth*[37] was followed up by three regional meetings held in St. Kitts (April 1978),[38] Western Samoa (April 1979)[39] and Kenya (January 1980).[40] This last meeting enjoyed the participation of Georges Droz, Secretary-General of the Hague Conference. All of the meetings stressed the importance of the work of the Hague Conference and the desirability of making greater use of its conventions through the medium of the Secretariat. The meeting in Western

36 Meeting of the Commonwealth Law Ministers (1977), Selected Memoranda London, Commonwealth Secretariat, 1977, 5.

37 (Commonwealth Secretariat, London, 1977).

38 *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Basseterre, St. Kitts 24-28 April 1978,* London, Commonwealth Secretariat, 1978.

39 *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Apia, Western Samoa, 18-23 April 1979,* London, Commonwealth Secretariat, 1979.

40 *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held in Nairobi, Kenya, 9-14 January 1980,* London, Commonwealth Secretariat, 1980.

Samoa, at which New Zealand was represented, saw particular virtue in using the channel of the Commonwealth Secretariat for smaller jurisdictions.[41]

> It saw a most necessary role for the Secretariat in making inputs to the Hague Conference on behalf of those who were not members, and particularly of those whose resources not only precluded them from applying for membership but were already gravely stretched by other essential international legal activity. Participants were alive to the fact that as the membership at the Hague tended to comprise larger States with highly developed legal structures, there was a danger that solutions might be developed which could only be accommodated by these sophisticated structures and so preclude adherence by smaller, less well endowed, jurisdictions. There was a special role for the Commonwealth Secretariat to play in countering any such developments. The subject matter under consideration at the Hague, too, was often highly specialized and complex, and it was generally unrealistic to expect diplomatic personnel accredited to the Netherlands, or to nearby States, to have the necessary expertise to be able effectively to represent the interests of States in the expert discussions.

As a means of awakening Commonwealth members to the opportunities afforded for reform by the work of the Hague Conference, these meetings were doubtless indispensable. However the Secretariat attempted to go further than this in arguing for the adoption of the Hague Conventions on a Commonwealth-wide basis. In their original report, Professors Patchett and McClean had noted that "Commonwealth members have played a disappointingly small part in the work of the Hague Conference."[42] In an effort to improve this, the Secretariat has begun the practice of publishing explanatory documentation on the Hague Conventions. The first such publication was *The Hague Conventions on the Service of Process, the Taking of Evidence and Legalisation.*[43] The work includes a text of the conventions, a commentary on the text and operation of the conventions, guidance as to governmental decisions required prior to accession, and guidance as to possible legislation. The attempt then was to provide all that was necessary for Commonwealth jurisdictions to accede to these conventions and to translate them into domestic law. The Secretariat report to the 1980 meeting of ministers in Barbados urged Commonwealth-wide accession.[44]

Since April 1980 the Secretariat has followed up this initial step with five "accession kits".[45] Although the initial catalyst for the production of these accession kits was work on the recognition and enforcement of foreign judgments, the kits now provide for many other areas of private international law. While the coverage

41 Supra n. 39, vii.
42 Supra n. 37, 105.
43 (Commonwealth Secretariat, London, 1979).
44 *Meeting of the Commonwealth Law Ministers (1980): Memoranda,* London, Commonwealth Secretariat, 1980, 236: "In view of the unanimity of opinion at the Regional meetings, Ministers may feel that it would be timely for those Commonwealth countries who have not already done so to set in hand consideration of accession to the Convention".
45 *The Hague Convention on International Access to Justice* (1982); *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1981); *International Conventions Concerning Applications for and Awards of Maintenance* (1981); *International Conventions in the Field of Succession* (1980); *The Hague Convention on the Civil Aspects of International Child Abduction* (1981).

is by no means complete as yet, family law subjects are well represented. It seems likely that the draft model bills included in these kits could be used as the basis for implementation in New Zealand. This is particularly so as New Zealand reform initiatives have been taken into account in the preparation of the bills. It should not be forgotten also, that the United Kingdom has now ratified seven Hague Conventions and its domestic legislation, while not necessarily satisfactory or appropriate, provides an additional model for New Zealand work. Perhaps more significant is the United Kingdom experience in the administration and benefits of the conventions, which can help New Zealand in fitting this international work into a Common Law framework.

The most recent report of the Secretariat to the Commonwealth law ministers meeting at Sri Lanka in February 1983[46] notes that the work of Patchett and McClean on judicial assistance was adopted as a foundation for a law reform report on the topic prepared by the Law Reform Commission of Western Australia at the request of the Standing Committee of Federal and State Attorneys-General. This body, which has already provided for Australasian reforms in the law of domicile and the parental kidnapping of children, could provide a second link in the chain from New Zealand to the Hague. Australia has been a member of the Hague Conference since 1973 and although it has signed only one convention as yet, does contribute significantly to a Common Law perspective on Hague proceedings. The Standing Committee of Attorneys-General, which has laid particular emphasis on the development of uniform laws and on improving civil procedures, seems destined to encourage greater interest in the work of the Hague Conference. Finally, New Zealand has developed a close working relationship with the Standing Committee. Officials in the Law Reform Division of the Department of Justice have already had cause to consider many of the Hague Conventions. By linking up with the Standing Committee of Attorneys-General, and with the work of the Commonwealth Secretariat and of the meetings of the Commonwealth Law Ministers, New Zealand could set in motion a truly international process for the reform of its Conflicts of Laws.

C. A Case-study of Implementation: International Child Abduction

In order to illustrate how the proposed process could operate in the implementation of a specific Hague convention, and to outline some of the potential advantages, the Hague Convention on the Civil Aspects of International Child Abduction 1980[47] will be briefly examined. Choice of this convention is particularly apposite because it is currently under consideration by the New Zealand government.

The convention arose from increasing world-wide concern at the problems of parental kidnapping of children. Existing judicial responses were manifestly inadequate. While various states and regional organisations had been developing

46 "Review of the Legal Activities of the Commonwealth Secretariat", *Meeting of Commonwealth Law Ministers* (1983) L.M.M. (83) 2 (Commonwealth Secretariat, London, 1983), 8.

47 Reproduced in McClean, supra n. 14, Appendix D.

new processes to deal with the problem, it was Canada that first brought the matter to the attention of the Commonwealth Law Ministers, presenting a report to their 1977 meeting at Winnipeg.[48] It was Canada also that had proposed in 1976 placing the matter on the agenda at the Hague Conference.[49] That proposal resulted in the development of the convention which was adopted at the 1980 session of the conference. The convention had been prepared in meetings of a special commission, and drafted by a committee chaired by the Canadian H. Allen Leal. On the eve of the Plenary Session the Commonwealth Secretariat had convened a caucus of Commonwealth members to discuss a common approach. The convention thus adopted had considerable Commonwealth Common Law input. This had been sanctioned by the Commonwealth Law Ministers, meeting in April 1980 at Barbados:[50]

> Prompt and concerted collective action was regarded as essential, and it was of great importance that any arrangements should include non-Commonwealth, as well as Commonwealth jurisdictions. The Meeting welcomes the fact that the matter is to be considered by The Hague Conference on Private International Law in October this year. A number of Governments were convinced that the present Draft Hague Convention on the topic, with jurisdiction based on the "habitual residence" of the child, was an appropriate response to the problem. The meeting expressed the sincere hope that the deliberations at The Hague would be successful, and that a large number of countries would accede to any resulting Convention as a matter of priority. The meeting was anxious to ensuree that the Hague Conference was made aware of views held in various Commonwealth countries. Ministers asked the Commonwealth Secretary-General to undertake the necessary consultations, and to arrange a meeting of the Commonwealth countries who will be represented at the Hague to explore the possibility of their adopting a common approach. They also expressed the hope that the Secretariat, in its capacity as an accredited "observer", would be able to be represented at the relevant sessions, so that the views of other Commonwealth Governments could be made known.

What are the salient features of the convention thus developed? The axiomatic feature appears from the preamble that in protecting the interests of children as of paramount importance, the convention establishes procedures to ensure their prompt return to the country of their habitual residence. The convention is thus committed to a view on the best interests of children which aims to preserve settled development, a view which is supported by most research on the subject. It also emphasises a *procedural* solution. Of what does this consist?

Each contracting state is to designate a central authority, a device used in many of the Hague Conference's procedural conventions.[51] This authority will co-ordinate the administration of the convention. Any person claiming that a child has been removed in breach of custody rights may apply to any central

48 Supra n. 36, 69.

49 For an outline of the development of this Hague Convention see Dyer "International Child Abduction by Parents", in Droz, Pelichet and Dyer "The Hague Conference on Private International Law 25 years after the Founding of its Permanent Bureau: Achievements and Prospects" (1980) 168 *Recueil des Cours* 231, 237-243.

50 Supra n. 44, viii.

51 See Chapter II — *Central Authorities*. For another prominent convention which uses the authority see Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, *Recueil* 76.

authority for assistance in securing the return of the child.[52] The application, which may follow a standard form, is to contain the information needed to establish the custodian's claim and to aid the central authority in finding the child.[53] The central authorities of contracting states have a duty to co-operate with one another to ensure the rapid transmission of the application in the state wherein the child is present. The central authority will then set in motion judicial or administrative proceedings for the return of the child. A premium is placed on time. In general, determinations should be made within six weeks of request.[54] Moreover, if the judicial or administrative authority entertains the application within one year of the removal, it is bound to order the return of the child except in closely defined exceptional circumstances.[55] It is not to determine the issue on its merits, it is simply to return the child to the country wherein it is habitually resident. Any further issue as to custody is to be determined there. Judicial intervention is thus avoided.

It will be appreciated that this kind of response could only have been developed internationally. It relies on a suspension of domestic jurisdiction in favour of a wider conception of justice for the child, and its custodian. It leaves domestic laws as to custody untouched, providing simply a procedure for the trans-national case:[56]

> . . . family law in particular reflects different cultural patterns and, if the Convention is to operate successfully, there must be mutual respect among States for these differences. The child's future should normally be determined according to the cultural practices of the place of his habitual residence.

The fact that the convention has been developed and adopted by international agreement surely strengthens the chances of this. Finally the convention establishes a common set of procedures and organisations for contracting states. The uniform procedure ensures a reliable, consistent and rapid response where necessary.

To date only seven states have signed it, but there are a variety of moves within the Commonwealth towards greater acceptance. The Scottish Courts Administration has prepared a consultation paper for adoption in the United Kingdom.[57] In New Zealand the Law Reform Division of the Department of Justice is canvassing views and undertaking research. The Commonwealth Secretariat has produced an accession kit,[58] prepared by Mr. J. M. Eekelaar, containing a summary of the effect of the convention and a draft bill for its adoption in Commonwealth jurisdictions.

How might reform in New Zealand be implemented?

1. It should begin with discussion at the Standing Committee of Federal and State Attorneys-General. Australia is a member of the Hague Conference and

52 Article 8. 53 Idem. 54 Article 11.

55 Articles 12 and 13, and article 20.

56 Eekelaar *The Hague Convention on the Civil Aspects of International Child Abduction* (London, Commonwealth Secretariat, 1981), 24.

57 Noted in (1983) 9 Commonwealth Law Bulletin 634.

58 Supra, n. 56.

participated in discussions on the convention. The existing trans-Tasman scheme ought to be overhauled to prevent a multiplicity of procedures.

2. The convention may be acceded to by depositing the instrument of accession with the Ministry of Foreign Affairs at the Netherlands. It would enter into force three months from that time, but will only have effect as between those contracting states as declare their acceptance of the accession.[59] This is because of the procedures which must be in place in member states for the convention to operate.

3. The convention must be translated into domestic legislation to take effect in New Zealand courts. The Secretariat's draft model bill could provide a drafting precedent here, but the final form should be enacted as an amendment to the Guardianship Act 1968. New Zealand possesses a distinct advantage here, having none of the hurdles which a federal system places in the way of implementing international obligations.

4. The Guardianship Act is particularly compatible with the convention. The Act draws a distinction between rights of "custody" and "guardianship".[60] Custody refers only to the right to possession and care of the child, while guardianship comprises the right of control over the upbringing of the child. Custody can thus be dealt with as a separate issue to the more general rights of a parent. The convention is concerned only with "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[61] The personal application of the convention expires when the child reaches 16 years, as does the Act in all but special circumstances.[62] Under both the convention and the Act the welfare of the child is expressed to be paramount.[63] The convention is committed to the principle that prompt return of the child to his habitual residence will, in all but exceptional cases, best promote his welfare. Within the trans-Tasman scheme introduced by the Guardianship Amendment Act 1979, New Zealand has also accepted that return of the child will best promote its welfare.[64] Finally, the trans-Tasman scheme has already involved the establishment of a procedure for forwarding custody orders through the Department of Justice to the court and for the subsequent return of the child to an overseas country.[65]

5. A central authority must be designated. The obvious choice would be the Department of Justice. However, as Eekelaar points out,[66] particular functions of the central authority could be farmed out. So, for example, the discovery of the child could be delegated to the police.[67] Prevention of harm to the child could be undertaken by the Department of Social Welfare.[68] Section 30 of the Guardianship Act empowers the court to appoint a barrister or solicitor to assist the court or to represent any child who is the subject of proceedings. The duties of counsel for the child are outlined in a Family Court Practice Note.[69]

59 Article 38.
60 Section 3, N.Z.F.L.S. 6401-3.
61 Article 5.
62 Article 4, section 24.
63 Convention preamble; Guardianship Act s. 23(1).
64 Guardianship Act s. 23(3).
65 Guardianship Act 1968 ss. 22A and 19.
66 Supra, n. 56, 9-11.
67 Article 7a.
68 Article 7b.
69 (1 January 1982) N.Z.F.L.S. 9901-3.

They include an investigative and mediation role, as well as representation at any hearing. This innovation is thus attuned to fulfil the roles of amicable resolution and the participation of legal counsel designated by the convention.[70]

The convention thus secures benefits for New Zealand in dealing with a problem which does indeed beset New Zealand, both in practical and legal terms. Implementation of the convention would be compatible with both the principles and the specific rules in the New Zealand legislation. Reference to the work of the Commonwealth Secretariat and consultation with the Australian Standing Committee would facilitate an easier path to reform, and one more compatible with the trans-national nature of the subject.

V. CONCLUSION: THE NEED FOR INTERNATIONALISATION

The reform of the law relating to international child abduction illustrates some of the basic themes developed in this paper. The problems faced by individual litigants involved in trans-national disputes cannot be solved by the work of domestic courts alone. The necessary administrative machinery and internationalist outlook can only be established by international agreement.

The need is for a just process for reform. Such a process can only be one which reflects both the nature of the subject and all the interests involved. Private International Law, being the subject which would develop were the myriad of domestic systems of the Conflict of Laws to become unified, is inherently devoted to supra-national questions. As such its development from purely domestic law reform is inherently flawed. Domestic legal systems are committed to their own legal solutions and to their own conceptions of justice. Of course these must be considered in the formulation of international solutions, but the singular virtue of the conflicts method is that it potentially leaves domestic substantive law untouched, simply providing procedural rules to determine the sphere of application of each domestic system. In terms of a process for reform this means that there must be a "reflective equilibrium"[71] between domestic conceptions of justice and the wider principles motivating Private International Law — a balance to be struck anew in each particular subject area. The Hague Conference, by its very nature, provides an opportunity for this. Once the balance has been struck, the international codification process tends towards the development of uniform and certain rules, unamenable to variation by the exercise of judicial discretion in member states. This goal of a regular, uniform procedure for the determination of trans-national disputes is not to be shirked lightly, in view of the support which it lends both to the operation of domestic systems and to the conduct of affairs internationally by private individuals.

An examination of the trans-national dimension of family law throws these themes into high relief. Here is an area where individuals rely on international legal co-operation. Here, too, is an area where the conflicts method is particularly

70 Articles 7c and 7g.

71 The term is drawn from Rawls, supra n 2, 48-53, where it is used in relation to the development of moral theory.

appropriate. Family law continues to reflect the distinctive patterns and preoccupations of a particular society. Such a conception of justice is to be preserved, and the conflicts method ensures that the diversity of family law solutions worldwide can continue to co-exist, while simply determining the proper sphere of operation of each and the greatest efficacy of each.

The New Zealand experience is instructive. At least as regards family law, the problem of the case with foreign elements is not to be pushed to one side. Cases do arise frequently, as is only to be expected in a country with a highly mobile population. Furthermore, the legislature has not been blind to these issues. They are contemplated in all major family law statutes. As the example of the Guardianship Amendment Act 1979 shows, New Zealand is capable of taking the initiative in trans-national reform.

All of this suggests that the logical and necessary next step is to set in motion a process for the conscious and thorough-going reform of the Conflict of Laws. The natural and obvious forum for this is the Hague Conference, and participation in the work of the Hague can be achieved through the medium of the Australian Standing Committee and the Commonwealth.

New Zealand has a considerable amount to gain from, and a considerable amount to contribute to the international unification of the Conflict of Laws.