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AFFAIRE RELATIVE A L'APPLICATION DE LA CONVENTION DE 1902 POUR RÉGLER LA TUTELLE DES MINEURS *

(PAYS-BAS c. SUÈDE)

CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANTS *

(NETHERLANDS *v.* SWEDEN)

* *Note du Greffe.* — Les renvois à un texte ayant fait l'objet d'une édition provisoire à l'usage de la Cour ont été remplacés par des renvois aux pages de la présente édition définitive.

* *Note by the Registry.*—Any references to a text which was issued in a provisional edition for the use of the Court have been replaced by references to the pages in the present definitive edition.

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE A L'APPLICATION DE LA CONVENTION DE 1902 POUR RÉGLER LA TUTELLE DES MINEURS

(PAYS-BAS c. SUÈDE)

ARRÊT DU 28 NOVEMBRE 1958

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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JUDGMENT OF NOVEMBER 28th, 1958

PRINTED IN THE NETHERLANDS

3. REPLY SUBMITTED BY THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

Plaintiff has submitted that the *skyddsuppfostran* (protective education) as ordered is not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands under the 1902 Convention on the guardianship of infants.

Defendant has submitted:

that the dispute bears on paternal power, not on guardianship, and therefore is not covered by the Convention, and

that, in the present case, the national law of the infant must yield to *ordre public*.

* * *

I. Netherlands Guardianship covered by the Convention

Succession of guardians

Since the decease of the infant's mother, two successive guardians have held office: first Mr. Boll, from December 5th, 1953 till August 5th, 1954, as parental guardian, and subsequently Mrs. Postema, from August 5th, 1954, as non-parental guardian.

The protective education has been maintained against the two successive guardians. Consequently defendant has to satisfy the Court that *neither* guardianship is covered by the Convention.

Against the parental guardianship defendant has developed certain arguments (Counter-Memorial, § 20 *et sqq.*), to which plaintiff shall revert hereinafter.

But these arguments, purporting to establish that parental guardianship is not covered by the Convention, cannot be pertinent in respect of the non-parental guardianship (Counter-Memorial, § 37).

Arguments against second guardianship

What arguments, then, has defendant brought against the second guardianship? Firstly, that the Dordrecht court, in releasing Mr. Boll from the guardianship, "sous couvert de décharge de tutelle, a atteint en fait des prérogatives de puissance paternelle, étrangères à la Convention". Secondly, that, in the present case, "cette mesure particulière de *onthefffing* ... est propre aux Pays-Bas et inconnue de celle des autres Parties Contractantes qui ne sont pas tenues d'y avoir égard" (Counter-Memorial, § 37).

Article 5 of the Convention

Both these arguments must be examined in the light of Article 5 of the Convention: "Dans tous les cas la tutelle s'ouvre ... pour les causes déterminées par la loi nationale du mineur."

The meaning and purport of this article is clear. It concerns the legal events that, under the Convention, must be *recognized* as causes that give rise to guardianship. Such recognition, then, is due to all events that are determined as causes by the national law of the infant.

But the article does not concern the manner in which these legal events are *created* and *established*. It does not and it could not. Under the various legislations of the Contracting Parties, the most frequent events that give rise to guardianship are the decease of an acting guardian and the dissolution of a marriage. Surely the Convention does not purport to lay down rules on death, on presumptive death, or on divorce. In these matters it just refers to the national law of the infant.

Release under Netherlands law

Thus, under Article 5, the only relevant question is: whether, under Netherlands law, the *ontheffing* (release) of a paternal guardian is a cause that gives rise to guardianship. Then the affirmative answer directly results from Articles 423 and 424 of the Netherlands Civil Code: "The Court ... may release a parent-guardian from the guardianship of one or more of his children; on pronouncing the release the court shall provide likewise in the matter of guardianship..."

Irrelevancy of defendant's first argument

And then, in the light of Article 5, the irrelevancy of defendant's arguments becomes obvious. Defendant has submitted that "under cover of release from guardianship", the Dordrecht court has "actually assailed the prerogatives of paternal power". This submission is explicitly denied by plaintiff, since it pre-supposes, and wrongly so, that paternal guardianship should be tantamount to paternal power *(vide infra)*. But even if it were admitted, it would be immaterial. Once the release, as pronounced by the Dordrecht court, is a cause that gives rise to guardianship under Netherlands law, it is *ipso jure* a cause that gives rise to guardianship under the Convention and must be recognized, respected and accepted as such by all Contracting Parties.

Curiously enough, defendant, in support of her argument, has quoted the Geneva decision of May 6th, 1912 (Counter-Memorial, § 37). The said decision, far from supporting the argument, just emphasizes the distinction between, on one hand, the question of the creating of a legal event, and, on the other hand, the question whether such event, under the Convention, is to be recognized as a cause that gives rise to guardianship. The latter problem—the decision holds—is governed by Article 5: "c'est d'après la loi nationale du mineur qu'il faut apprécier si la déchéance ... donne lieu à l'ouverture de la tutelle (art. 5 Convention)".

Irrelevancy of defendant's second argument

The second argument is again remarkable for supporting not defendant's but plaintiff's view. "This particular measure of *ontheffing* ... is distinct from deprivation of paternal power, is peculiar to the Netherlands, and is unknown to the other Contracting Parties, who are not bound to respect it." It is just the inverse argument that one would expect here. If it could be established that the release, though known to other legislations, were *unknown* to Netherlands law as a cause giving rise to guardianship, then defendant might well hold that, under Article 5, no respect to the release is due. But saying that the release is *known* to Netherlands law as a cause amounts only to confirming that, under Article 5, such release must be respected as a cause by all Contracting Parties.

Discussion of first guardianship not strictly necessary

Since the protective education has been maintained against both the successive Netherlands guardianships, and considering that, in plaintiff's opinion, defendant has not established that the second guardianship is not a guardianship within the meaning of the Convention, plaintiff might refrain from discussing the first guardianship: even if that guardianship were not covered by the Convention, the case would stand. For the sake of completeness, however, and in deference to defendant's observations (Counter-Memorial, § 20 *et sqq.* and § 37), plaintiff may be allowed to offer some remarks on the matter.

Arguments against first guardianship

What arguments, then, has defendant brought against the first guardianship? Firstly, that the Convention bears only on *tutelle*, guardianship, and not on *puissance paternelle*, parental—or paternal—power (Counter-Memorial, § 20). Secondly, that parental guardianship, as organized under Netherlands law, is not guardianship within the meaning of the Convention, but rather—to put it bluntly—parental power masquerading as guardianship (Counter-Memorial, § 26).

The first argument examined

Plaintiff readily admits that the Convention does not bear on parental power. But that rather raises than solves a problem, since a distinction must be made not between two, but between *three* legal institutions, to wit

(a) parental power, as vested in the infant's parents during marriage,

(b) parental guardianship, and

(c) non-parental guardianship.

Now the Convention does not cover *(a)* and does cover *(c)*. But does it, or not, cover *(b)*? The text of the Convention offers no answer:

parental guardianship is not explicitly included nor explicitly excluded.

Historical analysis

Failing an explicit provision, one may try to arrive at a conclusion by way of *historical* analysis. Owing to the scarcity of material in the *Actes et Documents de la Conférence de la Haye* such conclusion cannot be of absolute and indubitable character. But it is certainly appropriate to quote KOSTERS, *Het internationaal burgerlijk recht in Nederland*, 1917, who, after a thorough examination of the documents, summarizes his findings as follows (p. 579):

> "The question arises whether the Convention applies to parental guardianship...
>
> Although there is some margin for doubt and although the application of the Convention may sometimes lead to difficulties ... the terms of the Convention are general...
>
> The Convention applies to parental guardianship after dissolution of marriage."

Substantial analysis

But this historical analysis, and the conclusion it leads to, may not satisfy defendant. What she, apparently, favours is a *substantial* analysis: the problem should be solved not by considering the historical background, nor the denomination, nor the place in the legal system—in the Netherlands Code, as in practically all codes, parental guardianship is treated under the same heading as non-parental guardianship—, but only by looking at the *substance* of the institution.

The second argument examined

This then brings us to the second argument. Is parental guardianship, as organized under Netherlands law, substantially tantamount to non-parental guardianship, and therefore guardianship within the meaning of the Convention, or is it only parental power masquerading as guardianship?

The question can be settled by a comparison between the rights and duties attendant on *(a)* parental power, *(b)* parental guardianship and *(c)* non-parental guardianship.

Two classes of rights and duties

On examining the Netherlands Civil Code, one then finds that there are two classes of rights and duties.

The first class pertains equally to parental power, to parental guardianship and to non-parental guardianship. It consists of the rights and duties to represent the infant in all legal matters, to administer its property with due care, of the duty to secure the infant's maintenance and of the right to educate the infant. No distinction is made between the non-parental guardian, the parental

guardian and the parent holding parental power, except for the latter two being under a special duty, to wit the duty *personally* to educate the infant.

The second class pertains to parental guardianship and to non-parental guardianship, but *not* to parental power. It consists of the duties to draw up an inventory, to deposit moneys, to obtain the judge's authorization for practically all dealings affecting the infant's property, to invest moneys in the safest manner possible, and to submit to the supervision of, and render annual and final accounts to, an assistant-guardian. No distinction is made between the non-parental and the parental guardian, except for the latter not being under the obligation to render *annual* accounts, unless the judge so directs.

The question settled

Now one would expect a third class, consisting of rights and duties pertaining to parental power and to parental guardianship, but *not* to non-parental guardianship. *But there is no such class.*

The only duty that could possibly be mentioned is the duty, already stated, incumbent both on the parent holding parental power and the parental guardian, personally to educate the infant.

This then, plaintiff submits, settles the question. A substantial analysis shows that, under Netherlands law, non-parental and parental guardianship have practically everything in common, whereas parental power differs fundamentally from both.

Parental power and parenthood as such

How then can it possibly be held that parental guardianship is no guardianship, and only parental power in disguise? Some confusion may have arisen from such rules as

that an infant needs parental consent for contracting a marriage,

that, to its parents, the infant owes not only reverence but also veneration,

that the parents shall maintain the infant in accordance with *their* financial status

— all rules that affect parents, and parents only. But the said rules have no relation whatsoever to parental power, nor to parental guardianship: they result from *parenthood as such*, irrespective of guardianship or power. Now the rights and duties pertaining to parenthood as such can never be taken away. This is clearly shown by the fact that they persist and remain intact even *after* the parent has been deprived of his parental power (or parental guardianship, as the case may be): the parental consent for marriage etc. is required as before.

It is then obvious that, in ascertaining whether parental guardianship is guardianship within the meaning of the Convention or only

parental power in disguise, rules resulting from parenthood as such cannot be taken into account.

Conclusions regarding Netherlands guardianship

Plaintiff submits that defendant has failed to establish that the successive Netherlands guardianships are not covered by the Convention.

The second, non-parental, guardianship is fully covered by the Convention as resulting from a cause that, under Netherlands law, gives rise to guardianship (Convention, Article 5).

This, by itself, would suffice. Besides, however, the first—parental—guardianship is likewise fully covered by the Convention, considering that historical analysis indicates and substantial analysis clearly shows that parental guardianship, as organized under Netherlands law, *is* guardianship within the Convention's meaning.

* * *

II. The Convention, Ordre Public and Protective Education

Defendant's arguments

Defendant has submitted, firstly, that the application of the infant's national law must yield to the provisions of such domestic laws as belong to *ordre public* and that the provisions of the Swedish law regarding protective education have an *ordre public* character (Counter-Memorial, § 38).

Plaintiff now proposes to show

that *ordre public* cannot operate against conventions,

that, assuming it could so operate, in the present case the conditions that would permit the operation of *ordre public* have not been established.

* * *

A. Ordre public and international conventions

Ordre public and caution

Defendant has outlined the principles of *ordre public* (Counter-Memorial, §§ 38-40), without however mentioning one principle which is of vital importance, to wit

that *ordre public* must be handled in a spirit of caution, reserve and self-restraint.

This principle, plaintiff believes, requires no detailed adstruction. It is expressed, elaborated and emphasized in all treatises and manuals of all countries. But it may be worth noting that, if there is any country where the principle is particularly insisted upon, it is Sweden. All Swedish authorities on private international law vie

in pointing out that *ordre public* should be applied in a spirit of self-restraint, reserve and caution, that it should never be made use of as a magic wand, as a convenience, in a light-hearted manner, and beyond absolute necessity, and that a rule of foreign law should be set aside by *ordre public* only if such rule is *abhorrent*—a term used by all authors—to Swedish law. *Vide:* EKSTRÖM, *Sju internationalett privaträttsliga uppsatser*, p. 58; HULT, *Föräldrar och barn enligt svensk internationell privaträtt*, p. 23; KARLGREN, *Kortfattad lärabok i internationell privaträtt*, p. 45, and the same in *Svensk Juristtidning*, 1956, p. 405; MICHAELI, *Internationales Privatrecht gemäss schwedischem Recht*, p. 67.

Double caution in the field of international conventions

Now if, in applying *ordre public* generally, caution is to be observed, surely double caution must be observed in the field of international conventions. Defendant, it seems, more or less suggests that, in applying *ordre public*, it makes no difference whether an international convention has been concluded or not. This certainly cannot be held, and that for four reasons.

Firstly, in concluding a convention whereby foreign law is to be applied, a state not only announces that it adopts a principle—an announcement that may be retracted at any time—, but it also binds itself towards its partners to maintain that principle. *Pacta sunt servanda.*

Secondly, before concluding such convention, a state naturally first examines whether the existing laws of its partners—laws it must henceforth apply—are of a character such that, although different from its own system, at least they are acceptable for application within its realm, and not "abhorrent" to its own laws. If that examination would not have yielded a positive result, the convention would not have been concluded, and so the very fact of its conclusion shows that the partner's laws, as they stand, *are* acceptable and cannot be set aside by *ordre public*.

Thirdly, by concluding a convention, a state shows its confidence—at least for the period the convention is going to last—in the future development of its partners' legislation; failing such confidence it would have abstained from entering upon the convention. And that very confidence precludes the state from rejecting its obligations. In highly exceptional circumstances confidence may be betrayed, a fundamental change of the partner's political régime may reflect on its private law, but even so the obligations must be respected, be it reluctantly and subject to the desire to denounce the convention at the earliest opportunity.

And, last not least, the operation of *ordre public* against a convention, if allowed, would enable any contracting state to destroy the very object of the convention—under the motto of *ordre public* it would have a free hand, both through contrary judicial decisions

and through contrary legislation, to divest the convention of all its contents, its value and its binding power.

For all these reasons, once a convention has been concluded, the scope and margin for *ordre public* is much narrower than before—so much narrower that it may well be held that henceforth there is practically no scope and margin left.

Doctrine

And *that* is the thesis, supported by a galaxy of learned authors. Defendant has made the astonishing statement that, in the opinion of practically all authors on conflict of law, *ordre public* can overrule conventions—"l'avis des publicistes est formel" (Counter-Memorial, § 42)—and that there are only few authors "qui hésitent à admettre de façon générale que l'ordre public puisse faire obstacle à l'application du statut personnel prescrite par une convention" (*ibidem*, § 49).

That is an astonishing statement, since one has only to consult the doctrine in the various countries in order to arrive at the opposite conclusion and to observe that the learned authors quoted by defendant represent a minority view—and even that with qualifications, in so far as the view appears to be limited to "la législation à venir" (quotation from BATTIFOL, Counter-Memorial, § 42).

The thesis that *ordre public* cannot generally overrule conventions is held, amongst others, by NUSSBAUM, *Deutsches Internationales Privatrecht*, p. 70; FRANKENSTEIN, *Internationales Privatrecht* I, p. 222; WALKER, *Internationales Privatrecht*, p. 875; SCHNITZER, *Handbuch* I, p. 237; LEWALD, *Das deutsche internationale Privatrecht*, p. 28 and in *Revue Darras* 1928, p. 149; BOLLA, *Grundriss des österreichischen Internationalen Privatrechts*, p. 24; WOLFF, *Das internationale Privatrecht Deutschlands*, p. 70; MELCHIOR, *Grundlagen*, p. 358. The scope of the present statement forbids extensive quotations from all the foregoing treatises, but it may be allowed to insert the opinions of the two authors last mentioned.

> "Lewald rightly emphasizes the dangers that arise, once *ordre public* is upheld in respect of state conventions. This would enable any state practically to restrict the application of the convention *ad libitum*, and, in such manner, to divest the convention of practically its entire value" (WOLFF, *l. c.*).
>
> "In my opinion it should be held, in case of doubt, that within the realm of state conventions on conflict of law, application of *ordre public* cannot be allowed. Normally the states that are parties to the international convention will intend to create obligations of an equable and predictable character. If, however, one admits exceptions by virtue of *ordre public*, one must interfere considerably with the state convention, and this in a manner that can hardly be foreseen on contracting, since *ordre public* is less clearly defined than other conflict principles. And if one is to permit the courts to apply *ordre public* within the realm of state conventions, one must necessarily also approve such ulterior laws of a contracting

state as undermine the convention in the name of *ordre public*. This, in case of doubt, would be undesirable" (MELCHIOR, *l.c.*).

Case law

The case law on the problem—*vide* LEWALD in *Darras*, and MELCHIOR—is rather scanty. But this, by itself, proves that, though the number of conventions that *might* have given rise to questions of *ordre public* is considerable, litigants and courts have felt that, in the face of conventions, *ordre public* ought not to be invoked, much less be admitted.

In respect of the French decisions, quoted by defendant (Counter-Memorial, § 42), plaintiff may point out that said decisions are concerned with adjective law and not—as in the present case—with substantive law and that they do not express any general principle. Furthermore it is well worth noting that the two Italian decisions, quoted by BATIFFOL, *Traité*, No. 364, go *against* the thesis of the primacy of *ordre public*, the thesis of which the distinguished author is one of the few advocates.

Conclusion on ordre public and conventions

Plaintiff primarily submits that *ordre public* cannot be invoked against international conventions generally and consequently not against the 1902 Convention. Accordingly *ordre public* cannot set aside the "statut personnel du mineur", as embodied in the Convention.

Plaintiff subsidiarily submits that, insofar as a margin might be granted to *ordre public* as against international conventions, such margin should be considerably narrower than in the absence of conventions. Within this margin double caution should be observed, and the conditions for *ordre public*—to which conditions plaintiff shall now proceed—should be taken as established *only* if established in the most indubitable and incontestable manner.

* * *

B. Conditions for ordre public

Foreign law versus domestic law

Before entering upon the examination of the conditions required for the operation of *ordre public*, plaintiff may be allowed—for brevity's sake—to re-state the issue in terms of foreign law and domestic law.

Defendant has stated that "l'éducation protectrice affecte la garde de l'enfant... et fait obstacle à ce que ce droit de garde soit exercé" (Counter-Memorial, § 34) and that, in her opinion, this is justified by the principle that "l'application du statut personnel d'un étranger doit céder devant les dispositions du lieu qui relèvent de l'ordre public" (*ibidem*, § 38).

Plaintiff may paraphrase this statement as follows:

that the full application of the foreign law has been impeded by the application of the domestic law and this by operation of *ordre public.*

Conditions: connection and facts

What, then, are the conditions for the operation of *ordre public?*

Firstly, that there should be a manifest *connection* between the situation to which *ordre public* is applied, and the country where it is applied. Obviously, failing such connection, there is no basis for *ordre public.*

Secondly, that there should be facts of such character that they bear out a departure from the normal application of conflict rules.

Considering that *ordre public* operates as an exception to the normal functioning of conflict of law rules, as "un élément perturbateur", it is for defendant to show that, in the present case, the above two conditions have been fulfilled. However, plaintiff is ready to show that they have not.

I. ORDRE PUBLIC: CONNECTION

Adjective and substantive connection

For the operation of *ordre public* it is, first of all, required that the *forum* should have jurisdiction. A procedural, an *adjective* connection is indispensable. But does the operation of *ordre public* also require what may be called a *substantive* connection? Is it required that the situation, the matter under jurisdiction, should have a certain connection with the country of the *forum*?

For an affirmative answer plaintiff may be allowed to quote LEWALD, *Règles générales des conflits des lois*, p. 125:

> "Mais il existe encore une relativité de l'ordre public ... qui me semble d'une importance particulière. Pour que l'ordre public de la *lex fori* puisse empêcher l'application de la loi étrangère compétente, il faut que les circonstances de fait qu'il s'agit d'apprécier aient une attache suffisante avec le pays du for. Dans des cas rares et exceptionnels, il suffit, pour que cette relation existe, que le juge national ait à connaître du litige... Mais, cependant, dans la plupart des cas, cette attache n'est pas suffisante pour justifier l'intervention de l'ordre public... C'est donc l'intensité de l'attache existant entre le rapport à juger et le pays du for qui est décisive."

Substantive connection and doctrine

In further support of substantive connection—"Innenbeziehung", "Binnenbeziehung"—as a *conditio sine qua non* for the operation of *ordre public*, the following learned authors may be quoted:

WOLFF, *o. c.*, p. 66:

> "In most cases... the exclusion of foreign law by *ordre public* is made conditional on a connection with Germany, either the person to be protected being a German, or the situation materializing in Germany."

MELCHIOR, *o. c.*, p. 343:

> "As a rule... there must be a special connection for justifying the interference of German *ordre public*. The German legislator does not want to create a world-legislation... He does not issue rules for cases that have no connection whatsoever with Germany. If, therefore, the application of foreign law is to be viewed as an infringement of a German law... the matter on which the foreign rule is to be applied must have a certain connection with Germany, the German territory or the German people."

NIEDERER, *Einführung in die allgemeinen Lehren des internationalen Privatrechts*, p. 296:

> "The 'Binnenbeziehung', in my opinion, always exists when one of the parties concerned is domiciled in the country or when the property under dispute is situated in that country. No sufficient 'Binnenbeziehung' however is established, in my opinion, by a seizure effected by a foreign creditor against a foreign debtor who happens to have property in Switzerland" (*i.e.* the country of the *forum*).

See also: SCHNITZER, *Handbuch* I, p. 230; AGO, *Recueil* LVIII, p. 447; LEWALD, *Das deutsche internationale Privatrecht*, p. 35.

Substantive connection and cases

To what extent has this principle of substantive connection been adopted by the courts in the various countries?

The principle has hardly ever been pronounced by any court explicitly (MELCHIOR, *l.c.*). There are some decisions where it has been laid down implicitly. See for instance the well-known judgment of the Austrian Supreme Court of June 18, 1907, where it was ruled that no *ordre public* objection could be raised against marriages contracted abroad by foreigners domiciled abroad—the Court, it was held, must not set up as a "Weltjudikatur" (WALKER, *Internationales Privatrecht*, p. 315). See also the two judgments of the Netherlands Supreme Court, both of March 13, 1936, where, in respect of two international loan-contracts, *ordre public* was applied, respectively not applied, on the ground that the one was to be performed in the Netherlands and the other was not (LEWALD, *Règles générales*, p. 126; VAN BRAKEL, *Nederlands Internationaal privaatrecht*, p. 86). But, and this is far more important, in the practice of the courts, in all countries, the *principle is always taken into account and complied with*. It would be hard to quote any decision, from any country, and in any sector of private international law, where *ordre public* has been applied without there being —in addition to the procedural connection—some substantive connection such as nationality, domicile, or residence of parties, or property under dispute situated, or an act or an office performed, or to be performed, within the country.

Substantive connection and protection of infants

And this applies particularly to decisions concerning the protection of infants in the widest sense. Plaintiff has been at pains to examine the decisions in this field, as pronounced in the states that are parties to the 1902 Convention, and elsewhere, including those quoted by defendant (Counter-Memorial, §§ 41 *et sqq.*). She has found no judgment, invoking *ordre public*, where one or more substantive connections could not be traced, such as domicile of parents and child, and parental power, or guardianship, exercised, or to be exercised, within the country.

The three Netherlands decisions

The three decisions of the Netherlands Supreme Court, quoted by defendant (Counter-Memorial, pp. 87-91, Annex G), afford an excellent illustration of the upholding of the substantive connection principle. In all three cases both the guardian *and* the infant reside in the Netherlands. And in all three cases the guardianship has been exercised and is further to be exercised within the country. It is particularly this materializing of the situation in the country of the *forum*—see WOLFF, quoted above, and also MICHAELI, *o.c.*, p. 68—that is taken into account: the interests of the community, so the Supreme Court holds in its judgment of September 23, 1949, require that children should not grow up *here* ("ne grandissent pas ici") in such manner that they should be threatened with mental or physical ruin.

Substantive connection in the present situation?

And then one may well ask: where, in the present situation, is the substantive connection always required for *ordre public*? Neither the infant nor the guardian are Swedish nationals. Nor is the guardian a domiciliary or a resident of Sweden. And it is certainly not intended to exercise any future guardianship in Sweden; it is not in Sweden that the legal relation is going to materialize. On the contrary: no effort has been spared to have the infant removed to the Netherlands. It is even particularly in order to *prevent* such transfer of the child that the protective education has been maintained—*vide* the motives of the Decree of October 5th, 1954 (Memorial, p. 24, Exhibit E; Counter-Memorial, p. 58, Annex 7).

Residence of infant substantive connection?

Now here defendant may submit that, though other connections are wanting, there *is* one connection: the infant resides in Sweden.

Against this submission plaintiff may primarily hold that the single residence of the infant is not a sufficient connection. It should be borne in mind that the protective education, the measure ordered by the *forum* by virtue of *ordre public*, implies a criticism of the guardian, not of the infant. Then the centre of gravity of the

measure lies with the guardian, and, accordingly, not in Sweden but in the Netherlands.

Forced connection is no connection

But there is another aspect to the matter. "La notion d'ordre public", PILLET says, "fait partie des choses qu'on sent mieux qu'on ne les exprime." One somehow feels that, in accepting the infant's residence as a connection, something is wrong that is not quite easy to explain. Nevertheless, plaintiff may try. It is that the infant's residence in Sweden—not originally, but certainly at a later stage—has been determined, not by normal causes such as the wish of the guardian, but *by the protective education itself*. When the measure was first taken, it might be held, the infant just happened to reside in Sweden. Since then however—as stated above—no efforts have been spared to take it out of the country. But in vain: the transfer has been blocked by the protective education. Consequently, at the later stage, and at the present day, the residence has been determined by the continuation of the measure.

And then one is struck by the paradox of the situation. If the residence is based on the measure, how then can the measure be based on *ordre public* which has the residence for its only basis? Surely *ordre public* cannot have for its foundation the very fact it has provoked. It is exactly by the same token that NIEDERER—*vide supra*—cannot allow a seizure to function as a substantive connection. Just as, after the seizure, the property is henceforth located in the country of the *forum* by virtue of the seizure, so, after the protective education has been pronounced, the infant is henceforth a resident by virtue of the protective education—just so, and even more so, since it is certain that, but for the measure, the infant *would* have been transferred.

What, then, is wrong with taking the infant's residence as a connection? That an *ordre public* measure cannot forcibly create its own foundation: *forced connection is no connection.*

Conclusion

Plaintiff submits that substantive connection is a *conditio sine qua non* for the operation of *ordre public* and that, in the present case—and this in contradistinction to all known cases where *ordre public* has been applied—a substantive connection has not been established.

2. ORDRE PUBLIC: FACTS WARRANTING DEPARTURE

Defendant's plea

In the present case—according to defendant's plea—the protective education is justified by *ordre public*.

In pleading *ordre public*, what does defendant ask from the International Court?

Defendant's request may be put in plain words.

There is no need to introduce such highly controversial terms as "loi d'ordre public" (Counter-Memorial, § 38) or "effet négatif et positif" (*ibidem*, § 39) or "droit public et droit privé" (*ibidem*, § 49-50). What defendant, in pleading *ordre public*, asks from the Court is:

> to allow and authorize a departure from the normal application of private international law, as embodied in a convention.

Such departure, obviously, can be considered only on the strength of *facts* whereby the departure is warranted and borne out.

A hypothetical situation

Hypothetically speaking, such facts may occur. An illustration may be taken from the very case at issue, as it seemed to stand at an earlier stage.

Soon after the decease of his wife Mr. Boll was accused, in Sweden, of having committed an infamous crime against his little daughter, then eight years old.

Now as long as this accusation was pending, one can well understand and appreciate that the Swedish authorities felt extremely reluctant to abandon the child to a father-guardian whose possible depravity might seriously and permanently endanger its physical and mental health. In fact, it was for this reason that on May 5, 1954, the protective education was first ordered (Memorial, p. 21, Exhibit B; Counter-Memorial, p. 51, Annex 2).

Obviously the legal position at that time was fundamentally different from the present one.

Here was, if not a fact, at least the possibility of a fact of a character so intolerable, so horrifying, so contrary to the moral principles of the Swedish community—and of any civilized community—that it certainly *did* warrant and bear out a departure from the normal application of conflicts rule. Here the connection was not a forced one, since, at the time, the child resided in Sweden not by virtue of the protective education but by the father-guardian's wish. Here, even in observing the greatest caution and restraint towards conventions, one might seriously consider to have the 1902 Convention overruled by *ordre public*.

But then, by the end of 1954, or the beginning of 1955, the accusation appeared to be entirely unfounded. *Vide* Resolution of the Östergötland County Government of October 28, 1955 (Memorial, p. 27, Exhibit G; not produced by defendant).

Evidently there now remained no further fact that could warrant and bear out the departure from the normal application of conflict

rules. Mr. Boll's character had proved unstained; besides he had been released meanwhile of his guardianship — this at his own request — and replaced by Mrs. Postema, whose repute and qualification had never been subject to any doubt (Memorial, p. 23, Exhibit D; Counter-Memorial, p. 54, Annex 5).

It was for these motives that the Östergötland County Government ordered the protective education to be declared at an end.

The present situation: documents

And now, *at the present time*, is there any fact left that warrants and bears out the departure from the normal application of conflicts rules?

In the Counter-Memorial proper no such fact is mentioned.

Among the Annexes, there is only one that offers any handhold at all. It is the Decree of the King in Council of October 5, 1954 (Counter-Memorial, p. 58, Annex 7; Memorial, p. 24, Exhibit E).

In this Decree it is held that certain facts—allegedly amounting to a danger to the child's mental health—require the protective education, and, consequently, impose a departure from the normal application of conflict rules.

What, then, are these facts, and do they warrant and bear out such departure?

The present situation: facts?

In the Decree the following facts—or rather motives—are mentioned:

> "It has not even been stated under what conditions Catharina Postema would take care of the child nor how far she is suitable to do so."

It may be taken that the Dordrecht Court would not have appointed Mrs. Postema if she were *not* suitable. But the motive is particularly remarkable for shifting the burden of proof. Surely it is not for the authorities who appoint a guardian to prove that the appointee is suitable, but for those who order protective education to prove that he is not.

> "One cannot read from the decision of the (Dordrecht) Court that the father has resigned as guardian."

The Dordrecht decision explicitly releases the father from his guardianship.

> "For lack of information... it is impossible to judge whether the arrangements ordered by the Court may be expected to be permanent."

The guardianship of Mrs. Postema has been arranged—as all guardianships—for an indefinite period; obviously no guarantee can be offered that it is to be continued permanently (*i.e.* till the child's majority).

> "For lack of information... it is impossible to judge whether the child might not even in that case (*sc.* on possible termination of the guardianship of Mrs. Postema) come under the influence of her father."

This motive carries no weight whatsoever, unless it is stated and proved that the father's influence, at some future time, may affect the child's mental health.

Thus far, no fact has been stated that could possibly bear out or warrant a departure of the normal application of conflict rules.

But now, in the very last paragraph of the Decree, there is a remarkable statement:

> "In view of the dissensions to which the child has been exposed and of the other circumstances stated in evidence, it is obvious that the removal of the child to a wholly strange environment would at present seriously endanger her mental health."

The "other circumstances stated in evidence" again offer no handhold. But what about the "dissensions to which the child has been exposed"? If the child has been so exposed it must have been at its Norrköping home, and—since the father and Mrs. Postema were practically never admitted—by the persons charged with the protective education and by other persons *they* may have admitted to the child.

Thus the motive adduced for the continuation of the protective education rather appears a motive for its *discontinuation*.

Conclusion

Plaintiff submits that no fact has been mentioned that warrants and bears out the departure from the normal application of conflict rules.

* * *

FINAL CONCLUSIONS

The protective education in respect of Marie Elisabeth Boll is not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the 1902 Convention governing the guardianship of infants, on the following grounds:

I. that the protective education affects Netherlands guardianship, fully covered by the Convention;

II. that *ordre public* cannot prevail against the Convention, because

A. *ordre public* generally cannot overrule conventions, and

B. even if *ordre public* could overrule conventions, the conditions for *ordre public* have not been complied with, since, in the present case,

1. there is no substantive connection between the situation and Sweden;

2. no facts have been stated that warrant and bear out a departure from the normal application of conflict rules.

Therefore, Sweden is under the obligation to discontinue the protective education.

The Hague, June 18th, 1958.

(Signed) W. RIPHAGEN,
Agent for the Government of the
Kingdom of the Netherlands.