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Methodology: Who, What,
Why and How?

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COMPARATIVE FAMILY LAW METHODOLOGY: WHO, WHAT, WHY AND HOW ?

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FOREWORD

This second *Ius Comparatum* Volume addresses comparative family law, more specifically the use of various methods when comparing family law systems from a national, regional or international perspective. The call for abstracts (not more than 1000 words) was published in December 2020. As a guideline the following topics were considered to be of relevance: the selection of jurisdictions, the focus on systems of family law from specific regions/common backgrounds, comparability, the accessibility of legal sources, the combination of the law in the books with the law in action and the interdisciplinary approach. In March 2021 we received a considerable number of contributions. From the outset we informed the authors that only ten contributions would be selected for publication. Given the uncertain pandemic situation in late 2020 and 2021, the Academy decided not to organize a conference to take place in Paris or Hamburg. Instead we opted for a new online format to efficiently discuss and highlight the contributions before their final publication. This decision resulted in organizing an entire week indicated as the Comparative Family Law Methodology (CFLM) Week. Alexandre Senegacnik,

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Deputy Secretary-General of the International Academy of Comparative Law, has been highly instrumental and supportive in organizing the whole process.

Each evening during the week of 18-22 October at 6 pm EST we met in a video conference for no longer than 75 minutes. On the first day, Prof. Rhona Schuz from the Bar Ilan University delivered a keynote speech on the comparative law approach of the Hague Conference on Private International Law. On the following three days, the submitted papers were discussed. The authors were given the opportunity to explain their contribution in a three-minute video and these short introductions were made accessible on the IACL website before the CFLM week. At the online sessions the authors did not present their contributions; instead two expert discussants for each topic immediately started their discussions with the authors. They asked questions and made suggestions for improvement. The expert discussants were: Masha Antokolskaia (Amsterdam), Marie Cresp (Bordeaux), Marion Ho-Dac (Arras), Katharina Kaesling (Bonn), Benyam Mezmur (Cape Town) and Christa Rautenbach (Potchefstroom). The respective contributions had not only been sent to them in advance, but they were made available to all participants beforehand. The discussions were exceptionally fruitful also due to the excellent preparations by the discussants. The feedback enabled the authors to improve their manuscripts before submitting them for final publication. On the last day, a roundtable discussion took place with all discussants and participants on the jointly developed results. The aim was to identify key methodological questions in order to conduct comparative family law research. We addressed the following questions: Who, What, Why and How?

With regard to the question of "Who?", a distinction must be made between the (group of) researchers, on the one hand, and the addressees, on the other. Is it a team of researchers from the same or different jurisdictions, is it an international organization or an individual legal scholar who are carrying out the comparative research? In addition, the allotted timeframe and the available finances as well as access to the compared jurisdictions – including the necessary language skills – determine the scope and depth of comparative studies. In the case of the recipient horizon, a variety of “clients” exist such as

ministries of justice or scientific/academic institutions, in addition to the scientific discourse with peers at international conferences. Furthermore, attention must be paid to whether the addressees have knowledge of other legal systems or whether they only have knowledge of their own jurisdictions.

When it comes to the question of "what?", the collection of family-related legal objects is extensive. In addition to the classic matters concerning personal status, names, marriage, the rights and duties of spouses, divorce, matrimonial property law, spousal, partner and child maintenance, parentage, parental responsibility, adoption, the protection of minors and disabled (older) persons, new topics have emerged such as gender identity, same-sex relationships, non-formal relationships, agreements regarding children in the case of separation/divorce, parental facilitation, the participation of children in family law proceedings, ADR, artificial insemination, embryo transplantation, surrogacy and multiple parenthood. The choice of the subject of study and its demarcation – the importance of which should not be underestimated – depends on the purpose pursued by the comparative study. In this context other "what" questions arise such as what the challenges are when comparing regional systems and what role historical developments play? Finally, the most central methodological question is the following: what does comparative family law research entail? Do subjects from at least two legal systems have to be compared, do similarities and differences have to be discovered and explained, and finally, does an evaluation have to take place? Opinions differ on this. In any case, the sole presentation of a problem in one legal system, even if it is in a different language, does not meet these requirements, although the author should be concerned about the addressees, who are embedded in their own legal way of thinking and probably have no knowledge of the legal system that is newly presented to them.

The next questions starting with "why" do not only refer to the reasons for undertaking comparative research regarding family relations but also to the motivations as to why certain jurisdictions have been or should be selected for the comparison. Decisive for this selection are usually a combination of objective and subjective criteria. In any case, there is agreement that the choice

of legal systems should be justified. More importantly, family relations are the subject of extensive sociological, pedagogical, psychological, demographic and economic research. Scholars from these disciplines are studying the same real-life events such as partnering, parenting, separation/divorce, blended families and care for children and the elderly. Observing the trend towards more comparative family law, on the one side, and more multidisciplinary research into family relations, on the other, leads to the following question: whether, to what extent and how is it possible and necessary to combine comparative legal research in family law with comparative research in other disciplines, such as sociology, psychology or economics?

The final question as to “how” the comparative family law research should be carried out requires a general decision on whether the findings should be presented either simultaneously or successively. There is no general preference for one presentation method or the other. The approach depends on the number of questions, but also on personal predilection and feasibility. In both options the answers to the previously established questionnaire are to be obtained. In the simultaneous approach, more emphasis is placed on the comparison, which takes place directly after contrasting the answers to the part-problems with each other, whereas in the case of successive presentation the comparison is only made at the end. It requires a good memory with regard to the previous elaborations which can amount to a great deal of information. Furthermore, the time element must also be taken into account. The selected legal systems are not examined at the same time, but regularly one after the other. Usually, the collection of material often first takes the form of country reports. A second processing of the comparative material enables a simultaneous presentation if the focus is laid on the details. A combination of both forms of presentation is also possible. This should only be done if a logical distinction can be made between, for instance, substantive law on the one hand and private international law on the other. The incorporation of or a combination with other disciplines is challenging. Should, for example, a sociological or psychological study be carried out not only in one (one's own) legal system, but also in the other second legal system or can such a study, carried out in only one jurisdiction or even in another country, be used after

all? This field of combined comparative research is systematically still unexplored and we can only derive some guidelines from studies which have followed this path more or less successfully.

Many of the above methodological considerations are also relevant to other areas of law. The contributions published in this Volume show how the authors have coped with the challenges in comparative family law.