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Comparative Law and the Work of The Hague Conference on Private International Law in relation to Family Law

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VOLUME 2 – 2022

LA MÉTHODOLOGIE DU DROIT COMPARÉ DE LA FAMILLE

COMPARATIVE FAMILY LAW METHODOLOGY

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CITATION / CITE AS
Rhona SCHUZ, 'Comparative Law and the Work of The Hague Conference on Private International Law in relation to Family Law' Ius Comparatum 2(2022) 6-27 [International Academy of Comparative Law: aidc-iacl.org]

COMPARATIVE LAW AND THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW IN RELATION TO FAMILY LAW

Rhona SCHUZ[1]

LEÇON INAUGURALE – INAUGURAL LECTURE

Cette leçon souligne l'importance du droit comparé dans les travaux de la Conférence de La Haye de droit international privé dans le domaine du droit de la famille, tant dans le processus d'élaboration des conventions que dans le suivi de la mise en œuvre des conventions après leur entrée en vigueur. Des exemples sont donnés de la manière dont différents types d'études de droit comparé ont été utilisés pour éclairer le travail de préparation des conventions et des divers outils de droit comparé qui ont été adoptés dans les efforts post-conventionnels pour promouvoir une mise en œuvre uniforme. L'importance du travail comparatif post-conventionnel est soulignée par une brève discussion sur l'importance d'une application uniforme des conventions et les risques réels de manque d'uniformité. Enfin, l'attention est attirée sur quelques problèmes méthodologiques qui se posent à propos des travaux de droit comparé évoqués.

Mots clés *: droit de la famille — méthodologie — Conférence de la Haye de droit international privé — droit comparé — harmonisation*

This lecture highlights the importance of comparative law in the work of the Hague Conference on Private International Law in the field of family law, both in the process of drafting Conventions and in monitoring the implementation of Conventions after they have come into force. Examples are given of the ways in which different types of comparative law studies have been used to inform the work of preparing Conventions and the various comparative law tools which have been adopted in post-Convention efforts to promote

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uniform implementation. The significance of the post-Convention comparative work is underlined by a brief discussion of the importance of uniform application of Conventions and the real risks of lack of uniformity. Finally, attention is drawn to a few methodological issues which arise in connection with the comparative law work discussed.

Keywords*: family law — methodology — Hague Conference on Private International Law — comparative law — harmonization*

TABLE OF CONTENTS

Introduction

The purpose of this lecture is to introduce the comparative law research conducted under the auspices of the Hague Conference on Private International Law (HCCH),[2] both in the course of preparation of Conventions in the field of family law and in monitoring the implementation of these Conventions, and to highlight the importance of this research. A significant feature of the comparative law work of the HCCH is the relatively large number and regional variety of the States included. Before proceeding to discuss this work, I will provide a brief background in relation to the HCCH family law Conventions and the unification of private international law rules in this field in general.

A. The HCCH Family Law Conventions

The HCCH was founded in 1893 as a platform for developing unified private international law rules. The initiative to set up the Conference was that of Tobias M.C. Asser, an expert in private international law with a vision to promote peaceful settlements of international disputes. In 1911 he received the Nobel Peace prize, above all for his devoted work at the HCCH. Today the HCCH has 85 members (84 States and EU) from all parts of the globe. It will be helpful to recall that private international law deals with three issues which can arise in disputes which are connected to more than one State, known as cross-border disputes: jurisdiction, applicable law and recognition and enforcement of foreign judgments.

Since the founding of the HCCH, nearly 50 Conventions have been negotiated and adopted under its auspices, each involving at least one private international law issue, and in some cases two or even three. Of these Conventions, 17 deal with family law issues (including three from 1902 - Conflicts of Law concerning Marriage, Divorce and Guardianship.) The table below contains a list of the family law Conventions signed during the last 50 years with the number of signatories.

[2] A wide variety of information about the work of the HCCH is available on their website. www.hcch.com .

Number of Contracting States	Name of Convention and Date Adopted
20	Recognition of Divorces and Legal Separations 1970
3	Law Applicable to Matrimonial Property Regimes 1978
3	Celebration and Validity of Marriages 1978
101	Civil Aspects of International Child Abduction 1980
104	Inter-country Adoption 1993
53	Child Protection 1996 (updates 1961 Convention)
43	International Recovery of Child Support 2007 (updates 1958 and 1973 Conventions)
30	Protocol on Law Applicable to Maintenance Obligations 2007 (updates 1956 and 1973 Conventions)

As can be seen, the membership of the Abduction and the Inter-country Adoption Conventions is much larger than any of the other Conventions. Two explanations immediately spring to mind. The first is that these Conventions address a serious international problem which endangers the welfare of children. The second is that, over and above traditional unification of private international law rules, these Conventions (and also the 1996 and 2007 ones) contain the additional innovative element of cross-border co-operation between State authorities.[3]

[3] L. Silberman, 'The Hague Children's Conventions', *Receuil de Cour* vol. 323 at 276-278, 465-467.

I am not going to explore the reasons why the earlier Conventions attracted so few members, but I would point out that all the HCCH States did vote to adopt each Convention. So, the text itself does indicate consensus at a certain level, although some Conventions do provide for States to make reservations from particular provisions, in relation to which there exists a divergence of opinion. Moreover, even where few States have joined the Conventions, law reform in individual States might have been influenced by some of the solutions in those Conventions and indeed they might have been a starting point for later unification initiatives. For, example the 2016 EU Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (EU Matrimonial Property Regulation)[4] takes some of the ideas in the 1978 Hague Convention on Matrimonial Property and modifies them.[5] In any event, the pre-Convention comparative law research, which covered most, if not all, of the Member States at the time, is of interest in its own right, irrespective of the number of States which eventually signed the Convention.

B. Unification of Private International Rules in Relation to Family Law

Mention should be made of other international bodies that work to unify private international rules in relation to family law and in particular the EU[6] and the Inter-American Specialized Conferences on Private International Law.[7] In the context of this lecture, particular attention should be drawn to the EU

[4] Council Regulation 2016/1103 [2016] OJ L183/18 implementing enhanced co-operation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (EU Regulation).

[5] For an analysis of the choice of law provisions in the Hague Convention and the EC Regulation, see R Schuz, 'Choice of Law in Relation to Matrimonial Property in the 21st Century' (2019) 15 *Journal of Private International Law* 1 and R. Schuz, Chapter 38 – Matrimonial Property in P. Beaumont et al, *A Guide to Global Private International Law* (Hart, forthcoming).

[6] Council Regulation 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. (L 338/1–29, (Brussels II bis); Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

[7] e.g. (adoption of minors ((1984), Return of children (1989), Support Obligations (1989).

Matrimonial Property Regulation[8] because of the extensive comparative law research which preceded it. This involved preparation of 16 detailed national reports from EU Member States and a detailed comparative summary. [9] The research was carried out on behalf of the EU Commission under the auspices of the TMC Asser Institute in The Hague (a research institute named after the founder of the HCCH and affiliated with the University of Amsterdam).

It is also pertinent to briefly consider the main reasons why in the field of family law attempts to unify private international law rules have been considerably more successful than attempts to unify or even harmonize[10] substantive law. Firstly, unification is the only effective way to resolve many of the problems arising in cross-border family cases, such as forum shopping; limping status of adults and children caused by disparities between the laws of different States and/or conflicting judicial decisions and phenomena which are potentially harmful to children or other vulnerable persons: such as international child abduction, inter-country adoptions and international surrogacy arrangements. Secondly, unification of conflicts rules is more feasible because they are less likely to be deeply rooted in national and cultural norms than substantive rules and so it is easier to find common ground. Thus, to the best of my knowledge, all attempts at unification or harmonization of substantive family law have been regional,[11] although it should be remembered that international human rights treaties such as the UN Conventions on the Rights of the Child and Elimination of Discrimination of Women clearly impact on substantive family law and so, to the extent that Member States do comply with the principles, do have a harmonizing effect. Moreover, these treaties are relevant to private international law rules in the area of family law and so clearly

[8] Supra n. 4.

[9] Final Report (2003), available at: www.asser.nl/upload/ipr-webroot/documents/cms_ipr_6_1_Final%20Report%20EU%20Commission%20030703.pdf

[10] Harmonization involves the approximation of the laws of different jurisdictions and so is less far-reaching than unification, which involves the provision of identical rules, see K. Boele-Woelki, 'Unifying and Harmonizing Substantive Law and the Role of the Conflict of Laws,' *Receuil des Cours*, Volume 340 (2009), 275, 298-300.

[11] E.g. the work of the Commission on European Family Law on harmonization of family law in Europe. For details, see their website, at https://ceflonline.net/.

need to be taken into account in preparing and interpreting HCCH Conventions in the field of family law.[12]

II. COMPARATIVE LAW IN THE PREPARATION OF CONVENTIONS

A. Introduction

At the outset of any unification project, comparative law in relation to substantive and conflicts rules is necessary in order to identify the need for a Convention and the problems which it is designed to resolve. Comparison of substantive rules facilitates clarification of the extent and implications of potential conflicts between the laws of different States. Comparison of private international Law rules facilitates clarification of the differences between the various laws which need to be bridged and assessment of the likelihood that it will be feasible to achieve a consensus.

Preparatory comparative law may also serve an additional purpose and that is to shed light on the intentions of the drafters, which can be taken into account later when interpreting and applying the Convention. For example, two pieces of comparative research were carried out prior to the adoption of the Abduction Convention, which will be discussed below. From both of them, it can be seen that the typical international abduction scenario at that time was where a non-custodial father took the child away from the custodial mother. Thus, it is reasonable to assume that this must have been the situation which the drafters primarily had in mind when drafting the provisions of the Convention. This insight is highly relevant when considering how these

[12] For example, the CRC is relevant to the HCCH Parentage/Surrogacy project (discussed below) and is relevant in interpreting the Child Abduction Convention – see for example Guide to Good Practice on art 13(1)(b) at https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf at p. 56 and generally, R. Schuz, 'The Hague Child Abduction Convention and the United Nations Convention on the Rights of the Child,' *Transnational Law And Contemporary Problems* Vol. 12 , 393 (2002) and R. Schuz, 'The Hague Abduction Convention and Children's Rights Revisited' [2012] *International Family Law* 35. For relevance of CEDAW to choice of law rules in relation to matrimonial property, see R. Schuz, Choice of Law in Matrimonial Property supra n. 5 at 40.

provisions should be applied to cases where the abductor is the custodial mother, which is the typical scenario today.[13]

In the next section, I will give a brief overview of the comparative law research methods used by the HCCH in the course of Convention preparation and then I will proceed to consider in more details the comparative law research undertaken within the framework of the current parentage project.

B. Comparative Law Research Methods used by HCCH in Pre-Convention Work

Three main research methods can be detected in the published pre-Convention work at the HCCH. The first is traditional literature-based research conducted by the professional staff at the Permanent Bureau of the HCCH (PB).[14] The second is a collection of information about the laws in the various States via questionnaires addressed to Governments.[15] The responses are usually published in the volume of *Actes et Documents* of the session of the HCCH at which the Convention is adopted, [16] but in most cases are not accompanied by comparative analysis. The third is obtaining information about the impact of the law in practice via questionnaires addressed to nongovernment stakeholders. For example, in relation to the Abduction Convention, International Social Services branches were asked to complete questionnaires about abduction cases which had been referred to them.[17] As

[13] Statistical Analysis of Applications Made in 2015 under the Hague Child Abduction Conventions, Prel Doc. No. 11A of 2017, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6598&dtid=32 at 7-8.

[14] See e.g. Dyer reports: in relation to the Abduction Convention (Prel. Doc. No. 1 of August 1978, Actes et documents of the 14th Session vol. 3 at p. 12); in relation to Celebration of Marriage (Prel. Doc No. 1 of 1974, Actes et documents of the 13th Session vol. III at p. 14); in relation to the Child Protection Convention (Prel. Doc No. 3, Actes et documents of the 18th Session vol. 3 at p. 67) and Van Loon Report in relation to Inter-country Adoption (Prel. Doc. No. 1 of 1990, Actes et documents of the 17th Session vol. 2 at p. 11).

[15] The questionnaires usually also request the opinion of States in relation to the scope of the proposed Convention and whether they would be prepared to accept particular solutions. This is not comparative law in the formal sense but is essential in assessing the feasibility of achieving consensus.

[16] See e.g. in relation to the Abduction Convention (Prel. Doc. No. 2 of 1979, Actes et documents of the 14th Session vol. 3. at p. 61) and in relation to the Matrimonial Property Convention (Prel. Docs. No 1 and No. 2, 1974, Actes et documents of the 13th Session vol. 2 at p. 9).

[17] Prel. Doc. No. 3, 1979, Actes et Documents of the 14th Session, Vol. 3 at p. 130.

part of the parentage project, questionnaires were sent to a variety of stakeholders, as I will explain in the next section. The use of such questionnaires represents an attempt to look beyond the Law in the Books to the Law in Action.

C. Parentage/Surrogacy Project

I have chosen to elaborate about the comparative law research undertaken within the framework of the parentage/surrogacy project[18] as, apart from being highly topical, it illustrates well the importance of such research in preparing unification Conventions. The original motivation behind this project was the urgent need to regulate International Surrogacy Arrangements (ISAs), largely because of the potential for violation of fundamental human rights of both the child and the surrogate mother. These risks had come to the fore as a result of publicity given to some cases in which children were left stateless or without parents and the film Google baby, highlighting the problematic practices of some clinics in India.

However, the project is considerably wider and aims to provide solutions to problems caused by substantial variations between the laws of different countries in relation to the question of which adults are considered as the legal parents of a child. In an era of globalization and increased international mobility, these variations can result in limping status. i.e. the parents who are raising a child may be recognized as his legal parents in country A, but not in country B.

In 2012, a preliminary document was published, outlining different approaches to both domestic and international surrogacy arrangements.[19] In order to provide an evidence base for the discussion in relation to the desirability and feasibility of future work on the parentage/surrogacy project, information was collected both about the legal position in each State and about the factual situation on the ground, by distributing four different questionnaires

[18] For chronology of the project and relevant documents, see the relevant section of the HCCH website: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

[19] Prel. Doc No. 10 of 2012, A Preliminary Report on the Issues arising from International Surrogacy Arrangements, available at https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf.

to various stakeholders in Member States.[20] The first questionnaire, addressed to Member States, comprised 92 detailed questions concerning national substantive and private international law rules relating to determination of parentage, covering a wide range of matters such as registration and parentage as well as the approach to parentage in cases of artificial reproduction technology (ART).[21] The second, addressed to legal practitioners, comprised 39 questions mainly about their experience of advising parties in ISAs (both incoming and outgoing).[22] The third, addressed to health professionals, comprised 32 questions concerning their experience in cases of ISAs and their views in relation to the minimum safeguards necessary in any global regulation of ISAs.[23] The fourth, which was addressed to surrogacy agencies, comprised 33 questions about their experience and problems encountered.[24] In addition, 31 submissions were received from intending parents who had been party to ISAs.

Effectively this study is a mixture of comparative law and sociology. Unfortunately, the responses to the questionnaires themselves have not been published yet, but the PB prepared a detailed summary of the responses,[25] categorising the approaches to the various issues and giving concrete examples documented in the questionnaires. The diversity of approaches revealed by the questionnaires have informed the work of the Experts Group, set up in 2015 to explore the feasibility of advancing work in this area. This diversity, together with the views expressed by respondents, explain the cautious approach that has been taken in relation to the scope of the project, as evidenced by reports of the meetings of the Experts Group.[26] This Group is expected to report in March 2023 to the Committee of General Affairs and Policy, which makes decisions about the HCCH's work.

Whilst the reports of the Experts Group indicate that they think that it should be possible to achieve consensus for a Convention concerning the

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[20] Available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2011-2015.)

[21] 46 States responded.

[22] 50 practitioners responded.

[23] 11 health professionals responded.

[24] 6 agencies responded.

[25] Prel. doc 3C of 2014, A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements, available at https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf.

[26] Available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

recognition of judicial decisions and perhaps even applicable law in relation to parentage in cases of natural birth, it is far from clear that a Convention providing for recognition of parental status resulting from an ISA in another State would command sufficient support. In particular, receiving States insist that recognition be dependent on safeguards in the States of birth, inter alia to ensure protection of the surrogate mother's basic rights, and it is far from clear how it will be possible to check that such safeguards are being met. The political volatility of the topic is perhaps illustrated by the fact that in nearly every document concerning the project published by the PB, there is an express disclaimer that the project does not indicate that the PB is in favour of or opposed to surrogacy.

It is worth highlighting the fact that whilst the comparative research was of critical importance at the outset of the project, its long-term value is rather diminished by the changing dynamics of ISAs.[27] For example, some developing states (such as India) no longer allow surrogacy by foreign residents and some anti-surrogacy States are giving some degree of recognition to parental status, largely on human rights' grounds. The PB did provide an update in 2015[28] referring to the CRC committee's comments on the subject and the jurisprudence of the European Court of Human Rights in the case of *Mennesson v France*,[29] in which it was held that France's refusal to recognize formally the biological father's paternity violated the children's right to identity and their right to family life. However, even that case has to be read in the light of later jurisprudence, including a recent case which seems to limit the impact of *Mennesson*.[30]

[27] For more recent comparative research in this area, see J. M. Scherpe, C. Fenton-Glynn and T, Kaan (eds), *Eastern and Western Perspectives On Surrogacy* (Intersentia, 2019).
[28] Prel. doc 3A of 2015, The Parentage/Surrogacy Project: an Updating Note, available at https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf.
[29] App. no. *65192/11* (26 June 2014*).*
[30] *Valdís Fjölnisdóttir and Others v. Iceland,* App. no. 71552/17 (18 May 2021) holding that Iceland had not violated the rights of the child born as a result of an ISA to a now divorced lesbian couple, neither of whom was genetically related to him, because the couple had been allowed to foster the child, even though they were not recognized as his legal parents.

III. THE ROLE OF COMPARATIVE LAW IN THE MONITORING OF CONVENTIONS

Before examining the methods which the HCCH uses to monitor the implementation of Conventions, I will make a few preliminary comments about the importance of uniform implementation and the reasons why there are likely to be real disparities in the way Conventions are implemented, if active steps are not taken to promote uniformity. This will enable us to understand the importance of comparative law in the HCCH's post-Convention work.

A. Importance of Uniform Implementation

There are a number of reasons why uniform implementation of international Conventions is important.[31] Firstly, significant lack of uniformity indicates that Conventions are not being interpreted and applied in accordance with their underlying substantive objectives. Secondly, if Contracting States interpret and apply the Conventions differently, then the primary goals of unification will be undermined. Thus, for example, there will be an incentive to forum shop; adults and children may suffer from limping status and there is a risk of inconsistent and conflicting decisions in different Contracting States.[32] Thirdly, lack of uniformity leads to lack of predictability and certainty, which serves as an incentive to litigate and therefore reduces the chances of an agreed settlement. Fourthly, disparity leads to lack of equality among people affected by the Conventions in different countries.

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[31] For more detailed discussion, see R. Schuz, 'Disparity and the Quest for Uniformity in Implementing the Hague Child Abduction Convention', *Journal of Comparative Law* Vol. 9, 3 (2014) at 37-39.

[32] A classic example is the United States case of *Johnson v Johnson* 26 Va App. 125 (1997) , in which the Swedish court refused to return the child to US because it took the view that the child was habitually resident there, whilst the US court ordered return of the child on the basis of agreement between the parties that child's habitual residence should remain in the U.S, *AFJ v TJ* RÅ 1996 ref. 52, *AFJ v TJ*, 9 May 1996, Supreme Administrative Court of Sweden [INCADAT cite: HC/E/SE 80].

B. Causes of Disparities

There are many reasons why without taking active steps to ensure uniform implementation, there will be disparities in the way in which the Conventions are applied in different States. I will briefly discuss some of the main ones.

(a) Ambiguities in Conventions: It is inevitable that there will be lacunae and ambiguities in international Conventions. Sometimes this is because of lack of foresight. Other times, things have been left vague because this is the only way to achieve consensus. Where there are ambiguities in national legislation, it is possible to amend, but in relation to international Conventions, it is virtually impossible to obtain consensus from enough Member States. This is why plans for a protocol resolving ambiguities which came to light in the Abduction Convention had to be abandoned.[33]

(b) Differences in National Law: Sometimes variations can be found in implementing legislation in those States where international treaties are not self-executing. More importantly, general differences in the structure, characteristics, and traditions of different legal systems may lead to significant disparity in implementing the Conventions. For example, the same term may have different meanings in different States. In relation to the Abduction Convention, this problem has arisen for example in relation to the terms 'habitual residence" and "rights of custody."[34] Similarly, mechanisms adopted to fill lacunas in the Convention might not be recognized in all systems. For example, in abduction cases, common law systems started requiring left-behind parents to make undertakings (e.g. to provide accommodation for returning abducting parent, not to bring criminal proceedings against abductor) to ensure that the abductor could return with the child, without the child being exposed to a grave risk. The concept of undertakings is not known in many civil

[33] See Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the Desirability and Feasibility of Further Work in Connection with the 1980 and 1996 Conventions', Preliminary Document No. 13 (2011), www.hcch.net/upload/wop/abduct2012pd13_e.pdf.

[34] For detailed discussion, see R. Schuz, *The Hague Child Abduction Convention* (Hart Publishing, 2013) at pp. 186-195 and 148-150.

systems.[35] Another inherent difference, which is a serious obstacle to uniformity, is the fact that in some legal systems, foreign decisions are not relied on, even when interpreting international conventions.[36]

(c) Political Will and Resources: Effective implementation of the Conventions whose operation requires the involvement of the authorities of the Contracting States is dependent on the provision of adequate manpower and other resources to those authorities. This has been particularly evident in relation to the Abduction[37] and Inter-Country Adoption Conventions.[38]

(d) Impact of Regional and Global Instruments: The interrelationship between Hague Conventions and other regional and global instruments may cause disparity between the way in which a Convention is interpreted and applied by those States which are party to such other instruments and those which are not. In relation to the Abduction Convention, a good example is the well-known decision of the European Court of Human Rights in *Neulinger v Switzerland*,[39] which emphasized the need to consider the child's best interests in deciding Hague Abduction Convention cases, an approach which appears to be at odds with the Convention's automatic return mechanism, as understood by the vast majority of Hague Abduction Convention States. Whilst the Grand Chamber in its decision in *X v Latvia*[40] backtracked to some extent, clarifying that the best interests of the child have to be evaluated in the light of the exceptions in the Convention, the lack of clarity is still likely to lead to lack of

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[35] See e.g. Swiss decision in Urteil AppGer BS vom 17 November 2011, consid. 7.1 (discussed in Alfieri AC Alfieri, Enlèvement international d'enfants : premières expériences avec la LF-EEA, La pratique du droit de la famille.ch–2012– 550,564), in which it was held that there was no legal basis to make the return conditional on the left-behind parent making payments to support the child.

[36] E.g. Sweden, see J. Shiratzki, 'Friends at Odds – construing Habitual Residence for Children in Sweden and the United States', 15 *International Journal of Law, Policy and the Family* 297 (2001) at 304.

[37] For examples of complaints against the inadequate functioning of CAs, see the responses of Contracting States to the Permanent Bureau's 2010 Questionnaire, www.hcch.net/index_en.php?act=publications.details&pid=5291&dtid=33 .

[38] See e.g. Prel. Doc 3 of 2015, 20 Years of the 1993 Convention: Assessing the Impact of the Convention on the Laws and Practices Relating to Inter-Country Adoption and the Protection of Children, available at https://assets.hcch.net/docs/f9f65ec0-1795-435c-aadf-77617816011c.pdf at para. 25, 28 and 81.

[39] App no 41615/07 (6 July 2010).

[40] App. no. 27853/09 (26 November 2013).

uniformity, even among those States who are party to the European Convention on Human Rights.[41]

(e) Ideology and culture: An additional explanation for the disparities in the ways in which different States apply Hague Conventions is national differences in ideology and culture. A good example of this can be found in Katerina Trimmings' study of the handling of return applications within the European Union.[42] Her empirical analysis revealed significant differences between the "new" States (Central and Eastern European countries which had joined the European Union in 2004) and the "old" States, both in relation to outcomes and the time taken to process applications. Her follow-up research, which included interviewing representatives of two Central Authorities in the "new" States and literature searches, produced two main explanations for this divergence. One of these relates to the fundamental historical differences, stemming largely from the communist history of the "new" States and a lack of trust towards their former enemies. Thus, her research suggests that the old communist-era judges would find it difficult to return a child to a "capitalist" requesting State, particularly where the abductor was a local national. Differences in ideology and culture are likely to become increasingly relevant as more non-Western States accede to Conventions. In relation to Conventions which are applied by individual judges, differences in application may also be due to the personal ideology of the judges. For example, in the case law on the Abduction Convention, it is possible to discern differing worldviews in relation to domestic violence and the rights and capacities of children.[43]

C. Methods to promote uniformity.

Once lack of uniformity has been identified, comparative law can inform steps taken to reduce the disparities. For example, official recommendations,

[41] See e.g. T. van Hof and T. Kruger, 'Separation from the Abducting Parent and the Best Interests of the Child, A Comparative Analysis of Caselaw in Belgium, France and Switzerland,' *Netherlands International Law Review* Vol. 65, 131 (2018) and C. Mol and T. Kruger, 'International Child Abduction and the Best Interests of the Child: an analysis of judicial reasoning in two jurisdictions', *Journal of Private International Law* Vol. 14, 421 (2018).

[42] K. Trimmings, *Child Abduction Within the European Union* (Hart Publishing, 2013), 167-180.

[43] Schuz, Disparity and Uniformity supra n. 31 at 36-37.

guides to good practice and other handbooks and checklists[44] are often based on approaches and practices adopted by some Member States. Similarly, courts are sometimes influenced by the way in which a particular Convention provision has been interpreted or applied in other Member States.[45] In addition, identification of non-compliant States[46] makes it possible to provide assistance and training to those involved in implementing the Convention in those States or in extreme cases to blacklist them.

IV. COMPARATIVE LAW TOOLS USED BY THE HCCH IN POST-CONVENTION WORK

(a) Traditional Research Methods: Case law and literature-based research comparing judicial decisions have provided important insights into the application of the Abduction Convention. For example, the PB's Reflection Paper on "Domestic Violence and the art. 13 grave risk exception,"[47] analysing case law from a number of jurisdictions was the first step in developing a Guide to Good Practice on art. 13(b) published in 2020.[48] It is to be hoped that this Guide will ensure more uniform application of this exception and increase

[44] See e.g. Recommendations of Special Commissions (in relation to Abduction, Child Protection and Inter-Country Adoption Conventions), Guide to Good Practice Guide in relation to the Abduction Convention (in 6 parts), available at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction; Practical Handbook to the Operation of the Child Protection Convention, available at https://www.hcch.net/en/instruments/specialised-sections/child-protection and checklists and model forms in relation to the Inter-Country Adoptions Conventions, available at https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption and Practical Handbooks in relation to the Child Support Convention, available at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support

[45] See e.g. US Supreme Court case of Abbott v Abbott, 130 S. Ct. 1983.

[46] See e.g. US State Department Reports on compliance by other countries, available at e at http://travel.state.gov/content/childabduction/english/legal/compliance.html.

[47] Permanent Bureau, 'Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper', Prel. Doc. No. 9 of 2011, available at www.hcch.net/index_en.php?act=progress.listing&ca.

[48] Available at https://www.hcch.net/en/publications-and-studies/details4/?pid=7059.

judicial awareness as to the risks involved in returning children in cases where there was domestic violence before the abduction.[49]

(b) Case-Law Database: The INCADAT database[50] contains summaries of judicial decisions in Abduction Convention cases from different Contracting States and where available a link to full text. It is possible to search the summaries of cases via keywords, Convention provisions or States involved. In addition, the database contains analysis of case law in relation to specific issues. This database substantially increases the range of decisions which can be compared and analysed by scholars and by the PB itself. In recent years, the number and variety of States from which summaries are included in the database has increased. For example, cases can be found from. China, Japan, El Salvador, Korea, Paraguay and Peru. On the other hand, the number of cases per year reported seems to have decreased.

(c) Statistical Surveys: Four Statistical Surveys have been conducted under the direction of Prof Nigel Lowe.[51] These have been based on data provided by Central Authorities in relation to incoming and outgoing abduction and access cases in which they were involved, including information in relation to parties, children, outcomes and ground for refusal to return.

These surveys are absolutely invaluable in understanding how the Abduction Convention works. In particular, the surveys have consistently shown that over 70% of abductors are women who are primary carers/ joint primary carers,[52] whereas as mentioned above the Convention seems to have been drafted on the basis of the assumption that the typical scenario is that of abduction by non-custodial fathers.

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[49] For reservations about the wording of a critical sentence in the Guide, see R. Schuz and M. Weiner, 'A Mistake Waiting to Happen: the Failure to Correct the Good Practice Guide on art. 13(1)(b)' [2020] *International Family Law* 87.

[50] Available at https://www.incadat.com/en.

[51] Available at https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24.

[52] Supra at n. 12.

In relation to inter-country adoption, Peter Selman conducted, on behalf of the HCCH, an analysis of data obtained from receiving and sending states 2004-2019.[53]

(d) Country Profiles: These are forms completed by Member States, designed to provide information about national law and procedure relevant to the Convention in question. They provide assistance both to professionals and lay persons affected by the Conventions worldwide. Country profiles are used in relation to Abduction Convention,[54] the Adoption Convention (divided into receiving and sending States)[55] and the Recovery of Child Support Convention.[56]

(e) Questionnaires in relation to operation of Conventions: These questionnaires are typically sent to Member States as part of preparation for Special Commission meetings that take place in relation to some Conventions approximately every five years in The Hague, at which delegates from the Member States discuss issues which have arisen in relation to the operation of the Convention. The responses to these questionnaires, which are published on the website of the HCCH,[57] contain a vast amount of fascinating information about the operation of the Conventions in different States. They generally include reference to decided cases, practice and specific problems encountered. However, a significant drawback is that not all States submit the questionnaires. Sometimes the questionnaires address a specific issue. For example, a questionnaire concerning enforcement of return orders under Abduction Convention provides information for a comparative study written by PB staff[58] and this later formed the basis of the Good Practice Guide in relation to enforcement of such orders.[59]

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[53] Available at https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=69.
[54] Available at https://www.hcch.net/en/publications-and-studies/details4/?pid=5289.
[55] Available at https://www.hcch.net/en/publications-and-studies/details4/?pid=5003.
[56] http://hcch.cloudapp.net/smartlets/sfjsp?interviewID=hcchcp2012.
[57] For questionnaires in relation to the inter-country adoption Convention, see https://www.hcch.net/en/instruments/conventions/publications1/?dtid=33&cid=69;
[58]Prel. Doc. No. 6 of 2006 'Enforcement of Orders Made under the 1980 Convention a Comparative Legal Study, ' available at www.hcch.net/upload/wop/abd_pd06e2006.pdf.
[59] Available at https://assets.hcch.net/docs/49dc30cf-79cb-42ae-af36-dd2fc20bb11e.pdf.

(f) Judges' Newsletter: This publication is devoted to articles about the operation of the various Conventions in different States. Sometimes the articles are about one State and sometimes they are in the form of national reports.[60]

V. METHODOLOGICAL ISSUES

Whilst I have no doubt that comparative law research has been invaluable to the work of the HCCH for many years both in preparing Conventions and more recently in monitoring their implementation, it seems to me that some of the work does raise certain methodological issues, which are of general relevance. Since this lecture is being delivered in the framework of a workshop on comparative law methodology, it seems appropriate to comment on these issues, if only briefly.

A. Source of Material

Much of the material is provided by Governments of member States. This has certain advantages. In particular, Governments have access to information, including papers relating to individual cases, that is not available to individual researchers. On the other hand, there may be disadvantages, particularly in relation to preparatory work, because Government employed lawyers who prepare the responses may not necessarily be experts in the relevant field.

B. Keeping Up to Date

The dynamism of many areas of family law over the last few decades can mean that comparative law studies can become outdated very quickly, as we saw in relation to the parentage project. It is particularly important to ensure that materials used in relation to post-Convention work, such as country profiles and INCADAT are kept up to date. For example, the value of the case law analysis is significantly reduced if it is out of date. Whilst the INCADAT case

[60] See e.g. Special Focus- The Child's Voice- 15 years later, Judges' Newsletter Vol. XXII, Summer-Fall 2018, containing reports on the procedure for hearing children in return proceedings under the Abduction Convention in 13 different States.

analyses do include a caveat that they are only correct to the date of the latest case cited there, the reader does not know whether the fact that no later cases are covered is because there were no significant later cases or because the analysis has not been updated.

C. Nature of Research

Much of the comparative law research undertaken by the HCCH is effectively collection of raw materials, without any published comparative analysis. Examples include responses to questionnaires, country profiles and case summaries. Similarly, the case law analysis published on INCADAT is usually a list of which cases support which approaches, without any deeper or more nuanced analysis of the significance of different approaches.

Presumably, these limitations reflect not only limited resources, but also the need for the HCCH to remain neutral and so to avoid preferring the approach of one State over that of another. However, in some cases, it seems to me that the usefulness of material obtained by means of questionnaires might be increased by a wider use of cases studies, asking the respondents to explain how a particular situation would be addressed by law in their State, rather than simply setting out the legal position.[61] In any event, the task of deeper analysis of the implications of the information provided by the raw materials published by the HCCH is left to researchers, such as the participants in this workshop.

Conclusion

Comparative Law is essential for any project designed to unify or even harmonize law. The HCCH has developed useful tools for comparative law research both in preparatory work and monitoring Conventions in the field of family law. The comparatively large membership of the HCCH creates a potential for broader comparative law than in most traditional studies. Needless to say, this potential could be more fully realized if more resources

[61] In a few questionnaires, there is a limited use of case studies e.g. in the first part of the questionnaire in relation to the Matrimonial Property, supra n. 16.

were available. One possible option might be wider collaboration with academic researchers on particular projects, which would reduce the pressure on PB staff and enable use to be made of these academics' research expertise.

However, despite the limitations mentioned above, there is no doubt that the comparative law research conducted by the HCCH has contributed considerably to the success of some of its Family Law Conventions and provides a wealth of material which is extremely interesting and highly useful for those of us involved in comparative family law research.