

# INTERNATIONAL FAMILY LAW

AN INTRODUCTION

Barbara Stark

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## Introduction

# Why Study International Family Law?

### Why Study ‘International’ Family Law?

This question contains three related but distinct questions, all of which pivot on the multiple meanings of ‘international’ in this context. First, why study *international* family law as opposed to *domestic* family law? Second, why study *international* family law as opposed to *comparative* family law? Third, why study *international* (i.e. private *and* public) family law rather than private family law? The answers to these questions explain the purpose, scope, and approach of this book.

### ‘International’ vs. ‘Domestic’ Family Law: The Importance of International Family Law

The answer here is pragmatic. International Family Law (IFL) is an essential part of any Family Law curriculum, or any family lawyer’s library, because the practice of family law has in fact become globalized. Lawyers inevitably encounter clients whose family law problems extend beyond national boundaries, including problems in which the laws of more than one state must be taken into account. Lawyers everywhere are increasingly confronted with issues regarding international adoption, child abduction, divorce, custody and domestic violence, where the parties reside in, or are citizens of, different states.

This is not surprising. As the United Nations notes, families are the primary unit of social organization, and families are changing, trying to adapt to new demands and taking advantage of new mobility. Globalization is transforming family law. Women are seeking asylum as refugees, fleeing domestic violence. Workers are following jobs, leaving their families behind and sometimes starting new families in their new countries. Child abduction has become an increasing threat as parents of different nationalities divorce, and both want their children to be raised in their own national traditions.

Even as ties to such traditions become increasingly attenuated, their appeal may become stronger for some. Local religious leaders, similarly, may insist on even stricter adherence to local customs, especially those related to marriage, divorce, and the care and custody of children, as their authority is challenged by competing customs and international norms. In many States, such as Saudi Arabia, family law is basically left to religious authorities. This reflects both its relatively low importance to national governments (compared to matters of trade and finance, for example) and its

paradoxically high importance to those who seek to shape the national identity. As Article 9 of the Basic Law of Saudi Arabia states, 'the family is the kernel of Saudi society, and its members shall be brought up on the basis of Islamic faith.' There are powerful trends and countertrends everywhere, and competing norms of family law are at the core of each.

These play out in a range of contexts, such as the recognition of marriage, child custody jurisdiction, enforcement of foreign support awards, and adoptions, which already claim a significant amount of class time in family law courses and account for a similarly significant number of hours in family law practice. The extraterritorial expansion of family law poses new challenges, but the basic analytic framework remains the same. First, we identify procedures that do not mesh, distinguishing those that are better characterized as procedural from those that reflect more substantive differences in underlying policy. Second, we find or create mechanisms for reconciliation, where possible, or for the orderly resolution of disputes where reconciliation is not possible.

While major issues in international family law, such as those addressed in the Hague Convention on Child Abduction, can be at least touched upon in a general course, growing numbers of students go on to specialize in family law. For these future lawyers, IFL is increasingly a necessity. In fact, the failure to anticipate international family law issues, such as the removal of children to another country during visitation, may well expose a lawyer to a malpractice claim.

### **'International' Family Law vs. 'Comparative' Family Law**

Second, why study 'international family' as opposed to 'comparative' family law? 'International' here refers to shared or agreed upon rules and norms among a group of States, while 'comparative' refers to the respective rules and norms applicable in two or more particular States. Comparative family law is an essential component of IFL. The ways in which different domestic legal systems address custody disputes or invalidate marriages must be understood in the practice of IFL. The study of comparative law is also invaluable for gaining insight into other cultures and expanding horizons. Lawmakers increasingly look abroad for new approaches to intractable domestic problems.

They must keep in mind, however, that legal norms do not operate in the abstract, but in specific cultural contexts. A particular reform, such as retroactive laws opening adoption records, might be functional because it is compatible with the underlying social norms in one context but not in another. Comparative family law requires lawyers to focus on the ways in which culture supports or undermines law. The comparative perspective not only provides a window into another culture, but exposes the often unquestioned assumptions of one's own. Studying custodial presumptions in Islamic states, for example, exposes ways in which culture shapes such presumptions, which may not be as visible when dealing with the culture in which we are immersed.

Thus, the comparative element of international family law enables law

students to gain a perspective on their own law. While comparative analysis is an integral part of IFL, the analytic and procedural processes which govern the interaction between national laws is the focus of this book. That is, the emphasis here is on the legal mechanisms devised by the international community to resolve or reconcile the different perspectives that a study of comparative family law reveals.

### **‘International’ Family Law vs. ‘Private’ International Family Law**

‘Private’ international law historically referred to the rules regarding conflicts of law in disputes between private legal persons, including individuals or corporations. Public international law, in contrast, historically referred to the rules and norms governing disputes among nation States. As many commentators have observed, the distinction between public and private international law has steadily eroded. States increasingly engage in the same kinds of commercial activities as private entities. In addition, because of the growing influence of international human rights, the individual has increasingly become the subject of public international law.

Historically, IFL has been regarded primarily as the province of private international law, requiring familiarity with conflicts of law principles in general and the conventions promulgated by the Hague Conference on Private Law in particular. Public international law plays an increasingly important role, however. Even as the Hague Conference studies the problem of transnational child support, for example, States enter into growing numbers of bilateral treaties addressing the issue. (See Chapter 10, section 7.) Such treaties are governed by public international law.

International human rights law, moreover, has become an increasingly pervasive factor in international family law, from the refusal to recognize institutions such as polygamy (as a violation of human rights) to the recognition of reproductive rights. International human rights law also recognizes affirmative economic, social, and cultural rights, such as the right to maternal protection before and after the birth of a child, which are explicitly identified as rights owed to the family as such. Finally, rights of individuals within the family, such as the child’s rights to freedom of religion, raise issues of State interference with family privacy. The State has an obligation to protect the child’s rights without violating the rights of the family unit.

In sum, the erosion between public and private international law has been so thorough in the context of international family law that the subject can no longer be understood merely as a part of private international law. Rather, it requires a grasp of the applicable public international laws, especially human rights law, as well. Thus, this book addresses international family law, encompassing the principles of public as well as private international law.

## **The Approach**

Each topic in IFL is addressed in a separate chapter. Each chapter takes the same basic approach, although different aspects of this basic approach are emphasized for different topics. In general, each chapter tracks the following outline:

1. The Problem
2. Overview
3. Cultural Variations
4. Private International Law
5. Public International Law
6. Regional Conventions
7. National Implementation
8. International Organizations (IOs) and Nongovernmental Organizations (NGOs)

The substantive content and objectives of each section are described below.

### *The Problem*

Each chapter begins with one or two problems. There are concrete fact situations, often based on actual cases. The problem provides law students with a focus for the chapter and practitioners with analyses for some of the most common kinds of problems encountered in practice. The materials that follow explain the general principles to be applied and provide a few examples of local variations.

After reading the entire chapter the student should be able to answer the question posed or solve the problem presented in broad terms. It must be stressed, however, that local counsel should be consulted in actual practice. As a practical matter, foreign counsel is likely to be barred from actually representing a client under local or national rules governing the practice of law. As the problems indicate, however, legal representation is not always required in many cases where advice is sought. (At least no legal representation is required at that point.) The problem in Chapter 6, for example, presents a hypothetical in which the client wants to know which of three States is most likely to grant her asylum. Actually preparing an application for asylum would be the responsibility of the lawyer in the asylum State. Even where local counsel is necessary, moreover, a basic understanding of the substantive law and procedural posture will enable the lawyer to be more helpful to both the client and to local counsel.

Often, as in actual practice, there is not one correct answer but a range of possibilities. The question then becomes one of strategy, that is, how to present the case in a manner that is likely to lead to the client's desired outcome. Sometimes, of course, the client's desired outcome is not a realistic possibility. Then the question becomes: what is the best possible result for the client in this situation? How can other options be generated?



### *Overview*

The purpose of this section is both to introduce the particular topic to those for whom family law is a new subject and to broaden the understanding of the topic for those who have studied or practiced in a single national context. It begins by describing the scope and function of the law, the circumstances in which it becomes important and the parties likely to be involved. Each section includes a range of perspectives to remind the reader that there is no 'neutral' overview; any orientation necessarily reflects some perspectives and omits others.

### *Cultural Variations*

The third section discusses both specific national approaches and ethnic or religious approaches that cross national boundaries. In each chapter, this section focuses on one particular aspect of the law, such as the requirement of 'consent' in Chapter 1, to suggest the range of approaches to a single issue.

The point is to problematize what might otherwise be perceived as straightforward doctrine. The simple requirement of 'consent,' for example, may refer to the consent of the parties to the marriage, or it may refer to the consent of their fathers. Cultural variations are often expressed in the form of legal presumptions, that which a particular culture accepts as 'natural.' Under the Hanafi school of Islamic family law, for example, the assent of a virgin to a marriage may be presumed from her silence, her laughter, or her tears, which are interpreted as regret about leaving her parents (El Alami and Hinchcliff, 1996). The range of presumptions in a particular context illustrates the range of custom that has been naturalized. Indeed, in some cases, such as custody presumptions in favor of fathers or mothers, 'cultural variations' may include polar opposites.

### *Private International Law Conventions*

Each chapter sets out the pertinent provisions of the private international law conventions, if any, that govern that particular issue in family law. Family law in many States is a matter of national or sub-national, i.e., state or provincial, law. A major exception is those States in which family law is basically delegated to religious authorities. IFL focuses on the ways in which these various systems are harmonized on the international level.

This has been accomplished through private international law conventions, such as the Hague Convention on Child Abduction, the Hague Convention on Intercountry Adoption, and the Convention on the Law Applicable to Maintenance Obligations Toward Children. A list of the Hague Conventions on Private International Law can be found at [www.hcch.net/e/conventions/index.html](http://www.hcch.net/e/conventions/index.html). (Lists of States Parties are also available at this site.) These treaties are binding on States parties. In many States, such treaties become enforceable in national courts through implementing legislation. Under international law, a State is legally obligated under a convention it has ratified

even if it has not yet enacted domestic law to implement that treaty.

An excellent introduction to the Hague Conference is available on its website. An excerpt is printed below.

### *Hague Conference InfoSheet<sup>1</sup>*

*Intro* The Hague Conference on private international law is an intergovernmental organization the purpose of which is 'to work for the progressive unification of the rules of private international law' (Statute, Article 1).

*Background, Establishment and Status* The First Session of the Hague Conference on private international law was convened in 1893 by the Netherlands Government on the initiative of T.M.C. Asser. The Seventh Session in 1951 marked the beginning of a new era with the Plenary Sessions meet in principle every four years in ordinary diplomatic session. In case of need, as occurred in 1966 and 1985, an Extraordinary Session may be held. The Plenary Sessions discuss and adopt the draft Conventions (and sometimes Recommendations) prepared by the Special Commissions and take decisions on the subjects to be included in the agenda for the Conference's work. All of the texts adopted are brought together in a Final Act which is signed by the delegations. Under the rules of procedure of the Plenary Sessions each Member State has one vote. Decisions are taken by a majority of the votes cast by the delegations of Member States which are present at the vote. Non-Member States invited to participate on an equal footing with Member States also have the right to vote.

\* \* \*

*Secretariat* The activities of the Conference are organized by a secretariat – the Permanent Bureau – which has its seat at The Hague and whose officials must be of different nationalities. The Secretary General is currently assisted by four lawyers: a Deputy Secretary General and three First Secretaries. The Permanent Bureau's main task is the preparation and organization of the Plenary Sessions and the Special Commissions. Its members carry out the basic research required for any subject that the Conference takes up.

\* \* \*

*Methods of operation* The principal method used to achieve the purpose of the Conference consists in the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law (international judicial and administrative co-operation;

\* \* \*

maintenance obligations, status and protection of children, relations between spouses. After preparatory research has been done by the secretariat, preliminary drafts of the Conventions are drawn up by the Special Commissions made up of governmental experts. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, which is a diplomatic conference.

The secretariat of the Hague Conference maintains close contacts with the Governments of its Member States through National Organs designated by each Government. For the purpose of monitoring the operation of certain treaties involving judicial or administrative co-operation, the Permanent Bureau enters into direct contact from time to time with the Central Authorities designated by the States Parties to such treaties. In order to promote international co-operation and to ensure co-ordination of work undertaken by different bodies, the Hague Conference also maintains continuing contacts with a number of international organizations, including the United Nations – particularly its Commission of

International Trade Law (UNCITRAL), UNICEF, the Committee on the Rights of the Child (CRC) and the High Commissioner for Refugees (UNHCR) – the Council of Europe, the European Union, the Organization of American States, the Commonwealth Secretariat, the Asian-African Legal Consultative Committee, the International Institute for the Unification of Private Law (Unidroit) and others. Certain non-governmental organizations, such as the International Chamber of Commerce, the International Bar Association, International Social Service, the International Society of Family Law and the International Union of Latin Notaries also send observers to follow the meetings of the Hague Conference.

*Achievements, monitoring of results and work in progress* From 1951 to 2002 the Conference adopted 35 international Conventions. Until 1960 the Conventions were drafted only in French; since then they have been drawn up in French and English. Among those that have been the most widely ratified, the following Conventions should be mentioned: maintenance obligations, recognition of divorces, protection of minors, international child abduction and intercountry adoption. Some of the Hague Conventions deal with the determination of the applicable law, some with the conflict of jurisdictions, some with the recognition and enforcement of foreign judgments and some with administrative and judicial co-operation between authorities. Some of the Hague Conventions combine one or more of these aspects of private international law.

From time to time, Special Commissions are held at The Hague to monitor the practical operation of Hague Conventions. In the past, such Commissions have been convoked for the Child Abduction Convention, the Intercountry Adoption Convention and the Conventions on maintenance (support) obligations.

### *Public International Law*

State family law is also subject to public international law, including international human rights law. As set out in the Statute of the International Court of Justice, there are three sources of international law. First, international law may be made by treaty; that is, a binding agreement entered into by two or more States. Examples include the U.N. Charter and the human rights conventions discussed below, all of which are multilateral treaties, and the bilateral treaties regarding child support (discussed in Chapter 10) and spousal maintenance (discussed in Chapter 5).

Second, international law may be found in customary international law, which has two elements: (1) State practice, and (2) *opinio juris*; that is, the belief that such State practice is legally mandated. Torture, for example, is a violation of customary international law. No State claims that it may legally engage in torture. On the contrary, all States have official policies against torture, reflecting their common understanding that it is prohibited in the international community. This does not mean, of course, that no State actually engages in torture. It simply means that it does so secretly, or contends that a particular practice is not in fact ‘torture.’ As discussed in Chapter 11, for example, domestic violence may amount to torture although this is not recognized by most States.

Customary international law may be shown through State practice over time, in the form of State adherence to international treaties, declarations, or General Assembly resolutions, through the enactment of domestic legislation, through executive action,

and through a State's own judicial decisions. The accretion of such practice, accompanied by evidence that the State believed that such practice was legally mandated, constitutes customary international law. Where consensus among States is clear and no State objects, less practice may be needed.

Third, and finally, international law may be found in the 'general principles' of law recognized by States. These include principles such as *res judicata* or the commonly accepted understanding that statements made to one's lawyer are privileged. In the context of ILF, however, general principles may not be applicable. *Res judicata*, for example, may not apply to the custody determination of one State because another considers that determination subject to its modification, or contrary to the best interest of the child.

The major international human rights treaties affecting family law are the International Covenant on Civil and Political Rights ('ICCPR' or the 'Civil Covenant'), the International Covenant on Economic, Social, and Cultural Rights ('ICESCR' or the 'Economic Covenant'), the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW' or the 'Women's Convention'), and the Convention on the Rights of the Child ('CRC' or the 'Child's Convention'). The pertinent sections of each of these instruments are set forth in the chapters in which they apply most directly. There is some cross-referencing in order to avoid repetition, but there is also some repetition for the reader's convenience. Complete texts of the instruments can be found in the treaty series cited in the chapters or at <http://www1.umn.edu/humanrts/instree>. (Lists of States Parties are also available at this site.)

Some States ratify human rights conventions subject to reservations regarding specific provisions. This means that the State accepts its obligations under the treaty with the exception of the particular article to which it has taken a reservation. Many Islamic States, for example, have taken reservations to Article 16 of the Women's Convention, addressing family rights. The usual reservation provides that the State accepts the cited article to the extent that it is consistent with Shari'ah, Islamic personal law.

### *Regional Conventions*

This section sets forth the pertinent regional conventions, private and public, governing and harmonizing national family law. Most of the regional private law conventions involve European States.

The relevant provisions, if any, of the various regional public law conventions, establish another layer of human rights protection. The most important regional conventions for purposes of IFL include the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the African Charter on the Rights and Welfare of Children. The European Convention has been useful in protecting the rights of sexual minorities, particularly gays, lesbians and transgendered persons. The Inter-American Convention has been used to establish State responsibility in connection with domestic violence. The African Charter restricts

intercountry adoption in Africa, explicitly preferring institutionalization in the child's country of origin to intercountry adoption. Where there are no feasible alternatives, intercountry adoption may be considered, but even then, it is limited to those countries which are also parties to the Charter or to the CRC. This has recently been challenged under the South African Constitution, as discussed in Chapter 3.

### *National Implementation*

This section considers the national implementation of international norms. Implementing legislation may be required in those States, like the United Kingdom and the United States, which do not incorporate international treaties as part of domestic law. Implementing legislation may be useful even in those States which do incorporate treaties, since it enables the State to tailor the treaty to national circumstances.

In addition, national laws often function on both a national (or federal) and a local level. While cooperation with a local lawyer will probably be necessary, an overview of the national family law system may facilitate such cooperation. The U.S. State Department maintains some useful sites, e.g., <http://travel.state.gov/abduct.html> (International Parental Child Abduction, with links to Application for Assistance; Booklet, Islamic Family Law, Judicial Education), and country-specific flyers.

Conflicts questions are apt to be decided under the national conflicts law of the State asserting jurisdiction. As in the domestic sphere, *forum non conveniens* arguments may sometimes prevail. In general, however, the foreign State is likely to retain jurisdiction where it believes that the issue raises important public policy concerns. Deference to foreign law, reasonably expected in a commercial context, is more elusive when matters involving highly-charged family issues are at stake.

### *IOs and NGOs*

The last section describes some of the roles played by non-State actors in IFL. International organizations (IOs), that is, organizations comprised of States such as the United Nations or UNIFEM, often exert a strong influence in this area. As discussed in Chapter 6, for example, UNIFEM has established an internet working group to end violence against women. This represents a broad-based effort, which coordinates strategies involving education, training, mobilization, and changing male behavior. The World Health Organization ('WHO'), similarly, has supported efforts throughout the world to educate teenagers and young adults about reproduction and different forms of birth control. These are described in Chapter 7.

Non-governmental organizations (NGOs) are also increasingly important in lobbying for and raising consciousness about family law issues. The European Women's Lobby, for example, has taken strong positions on a number of issues from domestic violence to family leave. Non-State actors play important roles in establishing, maintaining, enforcing and challenging family law norms. In addition to NGOs, these may include religious and local communities which shape and support cultural norms. As noted above, for example, in some States family law is explicitly

left to religious authorities. Cultural norms, such as the son's responsibility for aged parents in China and parts of India, may undermine or even negate more formal law.

### *An Approach to the Problem*

Each chapter offers a possible approach to the Problem set out in the first section. Legal problem-solving is more of an art than a science and there are usually a range of possible approaches to any particular problem. Indeed, if there were only one, obvious solution, there would be no 'problem' to be solved, since there would be no basis for contesting that solution. The proposed approach, accordingly, is neither the only solution nor necessarily the optimal solution. It is, however, a solution that constructively deals with the material at hand, that is, the material set out in the preceding sections for that chapter.

### *For Further Research*

Finally, each chapter concludes with suggestions for further research. These include the bibliographic material relied upon for that chapter. Sources relied upon for this chapter, for example, along with other helpful sources on international family law in general, are set out below. In addition, bibliographies have been compiled for several of the Hague Conventions. These can be accessed through the Hague Conference website.

## **For Further Research**

1. For a comprehensive text on IFL, see Blair, D. Marianne and Weiner, Merle (2003), *Family Law in the World Community*, Carolina Academic Press, Durham. The International Society of Family Law publishes an annual survey, *The International Survey of Family Law*, providing information on current developments in family law throughout the world. Other noteworthy global surveys include Eeklaar, J. and Katz, S. (eds 1978), *Family Violence*, Butterworths, Canada; Eeklaar, J. and Katz, S. (eds. 1980), *Marriage and Cohabitation*, Butterworths, Canada; Eeklaar, J. and Katz, S. (eds 1984), *The Resolution of Family Conflict*, Butterworths, Canada; Meulders-Klein, M.T. and Eeklaar, J. (eds 1988), *Family, State, and Individual Economic Security*, Story Scientia and Kluwer, London; Lowe, N. and Douglas, G. (eds 1996), *Families Across Frontiers*, Martinus Nijhoff, London; Stark, B. (ed 1992), *Family Law and Gender Bias: Comparative Perspectives*, JAI, Greenwich.
2. For a current survey of family law in twenty-two Islamic States, in Africa and Asia as well as the Middle East, see Islamic Family Law <http://www.law.emory.edu/ifl/legal/html>. For an overview of Islamic laws, codified as well as uncoded, in the Arab world, see El Alimi, Dawoud and Hinchcliff, Doreen (1996), *Islamic Marriage and Divorce Laws of the Arab World*, Kluwer, London.

3. For an introduction to the harmonization and unification of family law in Europe, see *The European Family Law Series*, including Boele-woelki, K., Breat, B. and Summer, I. (eds 2003), *European Family Law in Action: Grounds for Divorce*, Interscientia, Antwerp. For an analysis of the European Community's changing approach to family law, see McEleavy, P. (2002), 'The Brussels II Regulation: How the European Community has moved into Family Law', *International & Comparative Law Quarterly*, Vol. 51, pp. 883-908.

## Note

<sup>1</sup> <http://www.hcch.net/e/infosheet.html>.





## Chapter 1

# Marriage

### 1. The Problem

*Julia and Amitabh met when both were students at the London School of Economics. Julia is a citizen of the U.K. and an agnostic; Ami is a citizen of India and a Hindu. They fell in love and decided to marry. Julia wanted to marry in the Savoy Hotel in London. Ami wanted to marry in his village in India. They agreed to do both.*

*After a joyful wedding at the Savoy, they wrote to Ami's Uncle in India and asked him to arrange a wedding for them there. Ami's parents had died in an earthquake when he was 8 and he had been raised by his Uncle, who had quickly sent him off to boarding school in the U.K. Ami and Julia have just received the following letter from his Uncle:*

*My Dear Nephew,*

*I am very sorry to be the one to have to tell you this, but you should probably reconsider your desire to return to Rajasthan for your wedding. You were in fact married here 18 years ago, when you were just four years old. Your wife, Ratna, was sent to your father's house when she was 11, but you had already left for boarding school when you were 9. The dowry was paid in full and I never heard of any action for divorce or annulment. I do not know where she went when your parents died.*

*I look forward to seeing you soon, but it would probably be unwise to attempt to marry here. Your Fond Uncle*

*Ami and Julia come to you. Assuming that his Uncle's statements are true, how does this affect their marriage in London? How does it affect their planned marriage in India? Does Ami have any obligation to Ratna? What are his options?*

### 2. Overview

Anthropologists agree that the institution of marriage began as a way to connect the families of the bride and groom. It was usually arranged between the families and often accompanied by an exchange of property (usually from the wife's family to that of the husband, in the form of a 'bride price' or 'dowry') and the formation of alliances. In patriarchal societies, a young woman or girl would leave her family and join that of her husband.

The modern notion of companionate marriage is very different. It also involves a long-term commitment between a man and a woman, but it is a relationship which they