PART II

Theory
Pragmatism and Private International Law

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[T]he modern legal mind has come to realize that the complexity of contemporary conflicts problems requires a toolbox approach – the more tools the better – rather than a single tool or method; that no single theory or school of thought has all the right solutions to all conflicts problems, but each school has something valuable to contribute; and that, rather than choosing a single school or method wholesale, it is better to draw the best ideas from each and properly combine them into a workable system.1

I. Introduction

Private international law is the branch of law that seeks to resolve conflicts arising from cross-border relationships and the potential application of conflicting normative systems to a given case. Scholars differ on the objectives of private international law and the methods for resolving conflictual problems.2

This chapter presents a pragmatic theory of private international law for the development of the subject globally, primarily by the Hague Conference on Private International Law (HCCH). It builds on earlier work by Kegel3 and by Beaumont and McEleavy4 that outlined the importance of the discipline’s ability to separate conflicts justice from substantive justice (the latter being protected where necessary by exceptions – public policy and overriding mandatory rules – to

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4 P Beaumont and P McEleavy, Anton’s Private International Law, 3rd edn (W Green/Thomson Reuters 2011) paras 2.87–2.99. For earlier attempts to build on this approach see L Walker, Maintenance and Child Support in Private International Law (Hart Publishing 2015) esp 6–8, who incorporates human rights into a pragmatic approach to private international law; and J Holliday, Clawback Law in the Context of Succession (Hart Publishing 2020) esp 28–30, 109-110 and 164, who follows Walker on human rights and develops pragmatic theory by emphasising the importance of comprehensive comparative law work on the substantive law underlying the area of private international law (in this case the law on clawback of lifetime gifts by a person to third parties as part of the succession process in relation to that person) as part of the process of developing a new private international law instrument globally or regionally.
the normal, objective conflicts justice rules).\textsuperscript{5} The pragmatic approach emphasises the empirical study of the effectiveness of a variety of private international law solutions and of the underlying substantive law differences in order to design the best private international law solutions. This chapter makes a new contribution to the theory of pragmatism of private international law. First, it goes back to the work of the founders of pragmatism as an intellectual idea,\textsuperscript{6} sets out some pragmatic goals for global private international law, and then develops the pragmatic method for global private international law relying on multilateralism, comparativism and empiricism.

\section*{II. Pragmatic Movements}

The pragmatism movement began in the United States in the late nineteenth century when Charles S Peirce (1839–1914) and a few other philosophers such as William James (1842–1910) started the Metaphysical Club in 1872. Other prominent members of the Club include Oliver Wendell Holmes Jr (1841–1935).\textsuperscript{7} The members of the Club met regularly to exchange ideas on topical issues of that time. They were puzzled by the dogmatic approach to philosophical thoughts, such as continental rationalism and German idealism amongst others, that had taken over the social, political and intellectual space in the United States.

Charles S Peirce and his colleagues evolved a new approach to analysing ontological and epistemological issues, focusing on the theory of truth and the foundation of knowledge. Their goal was to build a bridge between those philosophies that hold that true knowledge is grounded in reason (eg, rationalism) and those which hold that true knowledge is only derivable from facts and observation (eg, British empiricism).\textsuperscript{8}

The classical pragmatists offered what may be considered as a new perspective to the nature of truth and knowledge. Like other philosophical movements, the early proponents differed considerably in their ideas. Perhaps, this may be attributed to their different callings. Peirce was a mathematician, James was a psychologist and also had a medical degree, Holmes practised as a lawyer and judge. Their respective backgrounds influenced their propositions. Nevertheless, the common theme amongst them was that true knowledge is not entirely derived from \textit{a priori} propositions or beliefs. Rather, it is something that is inextricably linked with human practices and experience. Truth is discovered with actions and sensory experience. To say a proposition, idea, theory, or belief is true means that it has been tested and verified to be useful concerning practical matters of human experience. For James, an idea is true if it helps us ‘to get into satisfactory relation with other parts of our experience’.\textsuperscript{9} Otherwise, if a proposition or belief has no practical usefulness, then it is no true proposition or belief. Thus, as recorded in

\begin{itemize}
\item \textsuperscript{8} Grey, ibid, 799.
\item \textsuperscript{9} W James, \textit{Pragmatism: A New Name for Some Old Ways of Thinking} (Longmans Green & Co 1908) 58.
\end{itemize}
one of James’ titles, the pragmatists began a movement which shifted philosophical reasoning away from conceptions and abstractions to practical results, and from logic to life.\textsuperscript{10}

The pragmatic theory suggests that truths – ideas and propositions – must have a practical value. The next question is how a truth seeker arrives at a true position. In other words, how do we determine that a given proposition or belief works? This takes us to the second aspect of pragmatism which is its methodology. The major disagreement amongst the classical pragmatists lies in how to determine what works or the method of enquiry about truths. For Peirce, for a proposition to be meaningful, it must be verified to be true or false based on an objective or scientific process. Propositions must have effects that have practical bearings (i.e., solutions to practical problems) and those effects are verifiable by empiricism.\textsuperscript{11} Peirce’s pragmatism implies that any abstract ideas which have no conceivable practical effects are meaningless and mere deception.

On the other hand, James is a pluralist who believes that no singular method of enquiry is absolute. James thought that certain phenomena have practical effects that cannot be verified through a scientific process. Thus, he posited that beyond the field of scientific enquiry, issues concerning religious, moral and other ethical questions could be verified by subjective means such as experience, opinions and beliefs provided they have a value for real life.\textsuperscript{12}

### III. Pragmatism and Law

From the sophists’ era, rationality and logical thoughts had been part of civilisation. Many centuries before the emergence of philosophical pragmatism, rationalism which has always been a dominant philosophy had a great influence on legal theory. Its influence on the development of law could be seen in the activities of the Glossators who attempted to systematise and render the Justinian Code (Roman law) intelligible for students and practitioners.\textsuperscript{13} Legal rationalism further gained prominence in the enlightenment era due to the pre-eminence of science. In this same period, particularly in the late eighteenth and nineteenth centuries, many legal theorists considered law to be ‘rational knowledge obtained through concepts’.\textsuperscript{14} Building on this rationalistic approach, law was essentially thought to be autonomous, logically ordered and rationally determinate.\textsuperscript{15} Foundational premises are derivable from natural law, Roman law, codes or precedents as the case may be. From these premises, a body of rules can be derived. The preoccupation of many classical legal theorists was the formulation of abstract concepts and ideas to extract and analyse rules. For instance, in an attempt to treat law in a scientific manner, through which general principles can be derived, taught and applied by judges to varieties of cases, Georg Friedrich

\textsuperscript{10} See the lecture he delivered in 1898 titled ‘Philosophical Conceptions and Practical Results’ published in W James, Collected Essays and Reviews (Longmans Green & Co 1920).


\textsuperscript{12} Grey (n 7) 791; Siltala (n 7) 98–99.

\textsuperscript{13} A Padoa-Schioppa, A History of Law in Europe: From the Early Middle Ages to the Twentieth Century (Cambridge University Press 2017) 73–81.


Puchta came up with the *Science of Pandects* in Germany. This systemic study and analysis of Roman law opened the way for the development of law by judges and legal theorists through dogmatic and conceptual constructions. A somewhat similar experience could be observed in the United States where Christopher Columbus Langdell pioneered a scientific approach to the study of law at Harvard in the late nineteenth century through his casebook method.

Legal rationalism inevitably led us to legal formalism. Legal formalism gives credence to foundational principles and doctrines from which other lower-level rules and ideas are derived. The function of a judge in the administration of justice is to discover and apply the law to the established facts. Reason and logic play a vital role in decision-making as they provide an objective means of analysing the legitimacy and validity of decisions. The quality of a judicial decision, for instance, would be assessed by the extent to which it is rational, logical and in conformity with universal *a priori* principles, doctrines, concepts, or rules established by codes or precedents. Both in the Anglo-common law and civil law systems, broadly speaking, judges were not expected to rationalise based on set values or other policy considerations outside the well-established rules.

It is no coincidence that one of the early jurisconsults to challenge legal formalism in the nineteenth century was Oliver Wendell Holmes who was also one of the members of the Metaphysical Club pragmatists. In 1881, Holmes published his famous book, *The Common Law*, where he derided legal formalism. Holmes disagreed with the prevalent view of the pre-eminence of logic in the judicial decision-making process. According to him, law ‘cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics’. There is more to law than syllogism. Laws must grow organically taking into consideration the necessities of the time, social policy and other non-legal norms like history, economics and practical experience.

Holmes was not standing alone. There were a few other legal scholars who called for a paradigm shift in legal theorising and the judicial decision-making process. Rudolf von Jhering and Roscoe Pound also advocated against mechanical jurisprudence. Justice Benjamin Cardozo in various writings and lectures argued that the common law rules are a ‘working hypothesis’ and precedents are often tested and re-examined based on emerging circumstances. While these scholars might not have described themselves as legal pragmatists, they called for a paradigm shift away from the mechanical application of law without regard for social facts and practical legal problems.

What then is legal pragmatism? Brian Tamanaha notes that legal pragmatism gained prominence as one of the offshoots of the struggle against legal formalism. It initially represents a meeting point for scholars from law and economics, critical legal studies and others who identified with no school of thought. Today, there are as many legal pragmatists as there are variations

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20 Ibid, 1.


24 Ibid, 127.
in what pragmatism itself means. However, like the pragmatism of Peirce and James, certain core principles unify them. Legal pragmatism in its general outlook is a theory that disavows purely a priori and rationalistic approaches to the legal and judicial decision-making process. Legal pragmatists hold the view that law is to be contextualised, should be instrumental, and should take full account of experience.25 As Thomas C Grey has said: ‘A pragmatic legal theorist will embed questions about law in a context and address them for a purpose, and so may reach different and apparently inconsistent answers as context and purpose vary’.26 Laws are required to solve practical problems that the citizenry face in their daily pursuits; civil and commercial transactions, social engagements, and so on. In formulating policies or making laws, legislators and judges must consider the practical effects of these laws and whether they meet the needs of the time. Laws are often made with regard to a specific context. For instance, the concept of territorialism was developed at a time when we had hard borders and every State needed to defend its sovereignty against external interference. A pragmatist judge must consider these contexts when addressing territorialism in this age where globalisation continues to shrink State borders. Where this is taken for granted, the courts will be turning out rulings that have no bearing with the concrete problems that litigants submit for adjudication. This, in our view, summarises what pragmatists mean when they say laws should be contextual, instrumental and experience-based. On this note, the connection between legal pragmatism and philosophical pragmatism is established.

Legal scholarship on legal pragmatism often focuses more on legal reasoning and the judicial process rather than the policy or law-making processes. For instance, most of the works of Richard Posner on pragmatism are on judicial pragmatism. Posner sought to detach legal pragmatism from philosophical pragmatism by introducing what he refers to as ‘everyday pragmatism’. His view of pragmatic adjudication can be broadly summarised as a common-sense approach to judicial decision-making. He argued that in resolving disputes placed before courts, judges should be guided by facts and consequences of their decisions rather than conceptualisms and generalities.27 Accordingly, a pragmatic judge is one who makes the ‘most reasonable decision … all things considered’.28 Posner’s view on legal pragmatism was essentially anti-theoretical.29 While other legal pragmatists agree that law and judicial decision-making should be driven by contextualism and instrumentalism, they are of the considered view that they should not necessarily be a just-do-it approach with no theoretical basis or methodology.30 We agree that legal pragmatism needs not to be a just-do-it approach to law-making or judicial reasoning. The founders of philosophical pragmatism did not conceive it as anti-theoretical. Indeed, James has this to say on this point:

Theories thus become instruments, not answers to enigmas, in which we can rest. We don’t lie back upon them, we move forward, and, on occasion, make nature over again by their aid. Pragmatism unstiffens
all our theories, limbers them up and sets each one at work. Being nothing essentially new, it harmonizes with many ancient philosophic tendencies. It agrees with nominalism for instance, in always appealing to particulars; with utilitarianism in emphasizing practical aspects; with positivism in its disdain for verbal solutions, useless questions, and metaphysical abstractions … As the young Italian pragmatist Papini has well said, it lies in the midst of our theories, like a corridor in a hotel. Innumerable chambers open out of it. In one you may find a man writing an atheistic volume; in the next someone on his knees praying for faith and strength; in a third a chemist investigating a body’s properties. In a fourth a system of idealistic metaphysics is being excogitated; in a fifth the impossibility of metaphysics is being shown. But they all own the corridor, and all must pass through it if they want a practicable way of getting into or out of their respective rooms.\(^31\)

Therefore, legal pragmatism is not averse to theories. Rather, it extracts from every theory what works best for a given practical problem. Seen in this light, pragmatism is no different from other socio-legal thoughts and movements such as realism and law and economics. The major difference is this: while scholars in law and economics consider issues from cost and benefit perspectives for instance, a pragmatist is not so constrained. He considers a diverse set of data and applies those suited for identified legal problems.

**IV. A Pragmatic Theory of Private International Law**

Legal scholars have regarded private international law as a very technical field due to the primacy of highly sophisticated rules that have been developed over the years to resolve conflictual problems. Little wonder William Prosser describes private international law specialists as ‘eccentric professors who theorise about mysterious matters’.\(^32\) For centuries, the rules have developed into a dogmatic approach where judges are simply required to select applicable laws based on some pre-defined connections without any interest in the substantive result of the law chosen. This approach, which was formulated and popularised by Savigny became the dominant approach in continental Europe and many other States. The approach was challenged in the twentieth century by prominent scholars from the United States who opposed a dogmatic and mechanical solution to private international law disputes.\(^33\) As it is well known, this challenge led to what might be considered as the greatest debate in private international law post-Savigny: the conflicts-justice and material justice dichotomy. Kegel remained the foremost defender of the conflicts-justice approach after Savigny. From the other side of the Atlantic, we had scholars like Currie who promoted a government interest analysis approach and others who can be broadly classified as pro-material justice. The latter is led by Leflar who argued that courts should be able to choose the law that would produce a just and better result amongst the potentially applicable laws.\(^34\) Thus, private international law like other areas of law is also caught in the web of dogmatic or result-driven approaches to legal theorising and judicial decision-making. The question that follows is what has pragmatism to offer private international law?

The above excerpt from James is quoted at length to demonstrate the inclusive strand of pragmatism upon which we intend to build our pragmatic theory of private international law.

\(^31\) James (n 9) 53–54.
\(^33\) R Michaels, ‘Private International Law and the Question of Universal Values’ in F Ferrari and DP Fernández Arroyo (eds), The Continuing Relevance of Private International Law (Edward Elgar 2019) 156–57.
\(^34\) Symeonides (n 5); Michaels, ibid, 157–58.
Pragmatism and Private International Law

We shall discuss pragmatism as a theory and method of private international law. This involves a synthesis of the core of philosophical pragmatism and legal pragmatism. To this end, we agree with Tamanaha that law is a means to an end. The core of our pragmatic theory is that private international law must address the practical challenges that cross-border litigants face and as such it must be practical, value-driven and deliver desired results. A pragmatic theory necessarily has a pluralist outlook in substance and in its methods since it stands for no particular result but rather any or a combination of results that are found to be useful. It is anti-theoretical to the extent that it is not preoccupied with abstractions and conceptions. Rather, it is open to, and ready to explore different theories and techniques that deliver on pragmatic goals. The pragmatic goals are likewise not etched in fixed abstracts and concepts. They are identified through empiricism and practical experiences.

As mentioned in the preceding section, legal pragmatism is often considered from the prism of the judicial decision-making process. While the brand of pragmatism we seek to establish in this chapter can be applied to the judicial decision-making process, our primary focus is the legislative process. In most jurisdictions, civil law, common law and others, the primary responsibility of law-making rests squarely on the legislators. This is more apparent in private international law where the laws are largely codified. Judges are required to apply laws as formulated by the legislators or treaty makers. When the law needs to be reformed it is also the latter's responsibility. The subsequent sections shall expand on this theory and its application in practice.

A. Pragmatic Goals

One of the major tasks of the legislators is to determine the nature of the problems posed by private international law disputes and what the needs of cross-border litigants are. The nature of these problems should determine the objectives and goals which the lawmakers should pursue. Having a clear picture of the practical problems will enable law reformers, judges and legal commentators to experiment with the efficacy or otherwise of the extant or proposed legal solutions. Without having a firm grasp on what the problems are, it is difficult to determine whether the law works or not and if other options would have worked better.

Pragmatism dictates that there is no one-size-fits-all approach to looking at issues. In designing a legal framework for any branch of private international law, the goals are not necessarily the same since the nature of the problems differs from one branch to another. While some problems may be peculiar to specific private international areas, others may be a common theme in all private international law disputes.

The cross-border nature of private international law disputes and the practical problems that have been recorded from the menu of cases in court readily suggest some general or common problems. These problems are issues that cross-border litigants deal with in real life. They are practical and not theoretical, real not imagined. Litigants need access to justice in an appropriate forum; they need legal certainty as to the law applicable to govern their transactions; they need to be able to enforce fairly obtained judgments in other countries; they need protection against litigation in unforeseeable or inconvenient jurisdictions; they need simple, efficient and cost-effective mechanisms to make cross-border litigation work (eg, reliable service of documents and taking of evidence); they expect a high degree of respect for their prior agreements on where litigation should take place and which law should govern their disputes (party autonomy); and

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35 Borrowing from the title of Tamanaha, see above (n 23).
when the parties have not previously agreed on these questions they expect that the private international laws on jurisdiction, applicable law and recognition and enforcement of judgments will broadly satisfy their reasonable and legitimate expectations. States need to be able to protect some fundamental aspects of their sovereignty and essential legal principles and they need to be able to make appropriate use of their judicial resources. The list is not exhaustive.\[^{36}\]

The problems highlighted above engage issues concerning legal certainty, mutual trust (the presumption that a foreign jurisdiction and a foreign law are in principle acceptable to resolve disputes – subject only to limited exceptions like public policy and overriding mandatory rules), legitimate expectations of parties, party autonomy, efficiency and access to justice. Other scholars have also identified these issues as substantive values of various national laws.\[^{37}\] Thus, a pragmatic private international theory looks beyond the conflicts justice and material justice debate. As a value-driven approach, it takes cognisance of the inherent values of both concepts as well as those enumerated above. While these items do not constitute an exclusive list, they should, however, form the broad goals of private international law frameworks whether national, bilateral, regional or multilateral.

**B. The Pragmatic Method**

The next task is to carefully select theories that reflect the enumerated goals and to use techniques that can balance the goals so that the resulting framework is best suited to address the underlying problems. In this way, pragmatism is not devoid of theory. Neither is it a just-do-it approach to law-making or judicial decision-making.

Pragmatism endorses methodological pluralism. There is no one perfect way of delivering a pragmatic private international law framework. Rather, pragmatists are open to any method (eg, multilateralism) that offers useful ideas that can deliver a framework that works. It also entails that even if a specific method is adopted, a pragmatist should be able to mix and match concepts from different legal traditions to arrive at a practical solution.

This chapter has a particular focus on pragmatism in the context of developing global private international law. It identifies three methods – multilateralism, comparativism and empiricism – that are crucial to creating excellent global private international law consistent with the pragmatic goals identified above.

**i. Multilateralism**

Private international law is traditionally seen as a branch of domestic law. The traditional approach in many jurisdictions is to develop private international rules or frameworks unilaterally. Both judicial and academic discussions are focused on the private international law of each country.\[^{38}\] This approach often leads to uncertainty and unpredictable results as litigants are faced with diverse national rules. Since States will often act in self-interest, it is inevitable that national responses, in some cases, may be parochial.\[^{39}\] This may lead to reciprocal treatment

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\[^{36}\] Symeonides (n 1) 338–39, has also considered the goals of contemporary private international law to include international uniformity, national interests and values, conflicts justice, material justice, legal certainty and flexibility.

\[^{37}\] Michaels (n 33) 157–60.

\[^{38}\] Kegel (n 3) 12.

\[^{39}\] For the relationship between unilateralism and multilateralism as private international law methods and especially the non-parochial use of unilateralism, see Symeonides (n 1) 131–94.
from other States with the attendant consequences of the denial of access to justice or expensive and time-consuming cross-border litigation because of the non-cooperative attitude of States. This approach can lead to unpragmatic results in most cases for litigants and States as both are affected by inefficient legal frameworks or absence of coordination amongst States. Private international law benefits from having its own international organisation, the HCCH, dedicated to the ‘progressive unification of the rules of private international law’. It further serves as a platform through which the tension arising from the competing values/goals of private international law are harmonised. Eighty-nine Member States and the EU are committed to achieving this objective and therefore believe in playing their parts to bring about the gradual multilateralisation of the rules of private international law.

In the HCCH many of the lawyers in the Secretariat, those representing the Members and those involved as experts are pragmatists. While keeping tabs on the pragmatic goals, they adopt different techniques to deliver a workable framework. Many are devoted experts and technicians but at the same time realists (in the ordinary sense), who are problem-solvers. They are open minded and ready to adapt, refine and remix legal theories and concepts to arrive at concrete results. While pursuing private justice and private interests, they are not unaware of the political undertones of cross-border issues. Thus, the pragmatic negotiators engage various doctrines in aggregating or balancing States’ interests and policies in order to arrive at the optimum result that can be achieved by consensus. As Ralf Michaels once suggested, doctrinal and political approaches to private international law are not mutually exclusive. This is the hallmark of pragmatism. It can deliver a framework that prioritises private justice and yet is acceptable to the State and regional economic integration organisation (REIO) actors that are needed to drive the framework. This method has delivered several useful conventions on evidence, service, recovery of maintenance, choice of court agreements, and foreign judgments, amongst others.

**ii. Comparativism**

One of the legacies of James’s pragmatism is his views on pluralism. In his preface to *The Will to Believe*, James rejected the monist view of the universe because ‘there is no possible point of view from which the world can appear an absolutely single fact’. In an epistemological context, it also means that no single point of view represents an absolute knowledge of any phenomenon. Put differently, there are other reasonable and valid points of view about any idea different from those we hold, and those views should be respected. The interest of a pragmatist should therefore lie in the ‘cash value’ from other points of view. James’s pluralism reflects comparative law and its values. Hence, it is our second prescribed pragmatic method for private international law. Its relevance to the field of private international law is its transnational nature and
Comparative law methodology is relatively new in legal scholarship when compared with other prevalent doctrinal or dogmatic legal methods. Its emergence towards the end of the nineteenth century was facilitated by the burgeoning cross-border trade and commerce of the new European States and the divergent laws and policies arising from the implementation of national codes. Coincidentally, pragmatism made an inroad into private international law scholarship through comparative law. The German comparatist, Ernst Rabel has been credited as the leader of this pragmatic movement in private international law.

Comparative law methodology is an integral part of a pragmatic theory of private international law. It is useful in policy and law-making, as well as judicial reasoning. To start with policymakers, negotiators and legislators, the use of comparative law exposes them to many solutions to a given set of problems that are available in different legal systems. In this regard, Rabel's functional methodology can be used to solve many practical problems that cross-border litigants face. Whether they are on national assignments or negotiating an international treaty, functional comparative law enables legislators to move beyond theoretical conceptions and abstractions by focusing on how similar problems have been treated elsewhere, the results that have been achieved and the utility of those results. It allows them to pick from the best results or to come up with a new solution.

Legislators who are working on the development of private international law should have adequate time and resources to carry out an extensive macro-comparative inquiry to further identify the underlying circumstances which make some solutions work better in one legal system and not the other. Thus, they should not confine themselves to a mere black letter law comparative study.

At the global level, an extensive comparative study becomes a preparatory work upon which treaty makers can build an effective and efficient system of private international law that can work in harmony with the divergent (both in terms of procedure and substantive law) national systems. They can also build bridges across the seemingly irreconcilable concepts and conceptions of various national legal systems, or develop a brand new legal framework which takes cognisance of the concrete legal problems of cross-border transactions by mixing and matching from different national concepts. This will culminate in the universal adoption of best rules.

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48 Beaumont and McElevany (n 4) para 2.88.

49 Beaumont and McElevany, ibid; Basedow (n 47) 832–33.

50 Lord Reed, 'Comparative Law in the Supreme Court of the United Kingdom' (Centre for Private Law, University of Edinburgh, 2017), available at: www.supremecourt.uk/docs/speech-171013.pdf.

51 Michaels, 'The Functional Method of Comparative Law' (n 46) 376–77; O Elias, 'Globalisation and private international law: reviewing contemporary local law' (2001) 36 Amicus Curiae 6. See also Holiday (n 4) and Albert Font i Segura and Jayne Holliday, 'Succession', ch 22 in this book, showing the vital need to do careful comparative law research on substantive law, in relation to tricky issues where the characterisation of an issue (in this case clawback of lifetime gifts to third parties) varies amongst States, before developing harmonised private international law rules at a regional or global level.
Michaels has described this as the systematising, evaluative and universalising functions of comparative methodology. In the Hague Judgments Convention 2019 ‘place of performance’, ‘purposeful availment’ and ‘substantial connection’ were blended to deliver an acceptable indirect jurisdictional rule for contracts, thereby ending the US/EU divide which stalled previous attempts. Article 5(2) of the HCCA eliminated the practical problems arising from the common law allowing the chosen court to decline jurisdiction and Articles 5 and 6 eliminated the ‘Italian torpedo’ tactics in civil law systems by allowing the chosen court to proceed without waiting for the non-chosen first seised court. The summary return mechanism of the 1980 Child Abduction Convention was conceived as a pragmatic and original solution to the problem of cross-border child abduction when the harmonisation of traditional private international law could not be agreed and would not provide the expeditious remedy needed.

Comparative law methodology can also assist national judges in the progressive development of private international law frameworks as part of evolving a uniform global interpretation of harmonised private international law rules in accordance with the rules provided by the Vienna Convention on the Law of Treaties. Uniform interpretation is a key objective of the Hague Conventions. The clearest example of its success to date is in the Child Abduction Convention where leading courts have been guided by the official explanatory report to the Convention, academic analysis informed by careful studies of the travaux préparatoires, and by the case law interpreting the Convention (notably by the leading courts in the world).

Insofar as national private international law rules are open to judicial development, judges can borrow from the best foreign legal solutions (including international treaties that have not yet been ratified by their State). Many of the useful techniques of private international law such as characterisation, renvoi and preliminary questions, connecting factors, public policy and mandatory provisions, amongst others, can be developed in similar ways by different legal systems. They are already broadly adopted and assimilated into most national legal systems today and the process of comparative methodology can increase the high-quality use of the private international law toolbox in specific cases.

### iii. Empiricism

Empirical legal studies just like comparative methodology are new and evolving. Empiricism is the tool of a pragmatist and it is indispensable in any pragmatic theory. If pragmatism is about
delivering legal solutions that work, it goes without saying that there is a need for the experimentation of laws to determine whether they are fit for purpose. Arguably, evidence-based legislation or treaties will produce better results than those which are derived from overarching principles or personal prejudices. Empiricism is required to identify the concrete problems cross-border litigants face. It is required in designing the appropriate framework. Still, it is further required to assess the operation of that framework to see whether it works.

Legal empiricism may come in many forms. Comparative law enquiry is a form of empiricism. In the Anglo-American jurisdictions, it is not unusual for lawyers and judges to do a critical assessment of a line of authorities when faced with important legal issues. This is a form of judicial empiricism. One way or the other, it is possible to have an insight into the practical legal problems through this analysis and it is often discovered whether the law works or not. Although, having formed an opinion on the practicality or otherwise of the extant laws, judges may defer to the legislature for the appropriate legal changes. This is to avoid judicial legislation and the uncertainty that often attends it.

It is preferred that empirical legal research should be carried out on behalf of governments and international organisations (legislators) by expert non-governmental bodies (usually academics). This will deliver pragmatic results compared with judicial empiricism. For instance, legislators have the time and resources to ensure painstaking empirical research is done. They can commission experts who can devote enough time and energy to dig out the problems associated with the law. Unlike judicial officers who are not specially trained in empirical research, academic experts or specially commissioned bodies are well suited to do a thorough and scientific investigation.

Private international law has several stakeholders who need to be consulted to determine the impact of a given law in real life. Some of the issues to be investigated involve the perception of litigants on procedural matters, whether they have access to practical justice, the functioning of central authorities and how simple and effective does the process appear to the administrators and users, whether litigants’ legitimate expectations concerning their transactions are met, the disposition of States to proposed legal solutions amongst others. Thus, apart from the litigants, the judicial and administrative officials, government legal departments, relevant regulatory agencies, and international organisations all may need to be consulted in a proper empirical study. These highlighted issues are often complex. Diverse data, both quantitative and qualitative, are therefore required to produce an objective truth about the law in practice. This objective truth is desired for setting legislative goals, the design of the legislation, and its subsequent reviews.

65 Partington, ibid.
66 See Rubin v Eurofinance [2012] All ER (D) 258. The Irish Supreme Court in Re Flightlease (Ireland) Ltd [2012] IESC 12, shared a similar sentiment while noting that adopting the Canadian real and substantial connection test for recognition and enforcement of foreign judgments would amount to judicial legislation.
67 For instance, see some of the recent empirical research on private international law as listed in Kramer (n 64).
68 Nielsen (n 63) 956–57.
69 The HCCH has limited resources but it has benefited from some very important empirical studies on how Conventions are operating in practice which are then discussed at Review Special Commissions, notably on Child Abduction (see the excellent statistical analyses prepared by Nigel Lowe and his team since 1999, available at: www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24).
V. Conclusion

Since the beginning of the twentieth century, private international law has continued to evolve owing to the rapid change in the ways cross-border transactions occur. As time changes, the objectives of private international law and the needs of the end-users of the law change as well. Certain theoretical frameworks that were developed in the formative years to resolve conflictual disputes might have met the need of that time, but human experience dictates that at some point in time, those frameworks would have outlived their usefulness. Hence, the need for a fresh look at how private international law responds to cross-border disputes.

Conflicts justice was widely adopted as the appropriate response to cross-border disputes. The American conflicts revolution brought in new perspectives in the twentieth century. The central debate amongst private international law scholars then became (and still is) whether private international law should be neutral and thus should simply select the jurisdiction and law which should govern a given legal relationship or whether the preferred approach should be a policy and result-oriented approach.

Our view is that private international law has something to learn from legal and philosophical pragmatism. It is easy to confuse legal pragmatism with any or all legal movements that promote a result-oriented approach to legal theorising. While such schools or movements have many things in common with pragmatism, what makes pragmatism stand out is its pluralist outlook and the openness to engage any theory, idea or solution that focuses on practical legal problems.

Pragmatic private international law theory is emerging. It seeks to build a framework that can potentially be applied to all aspects of the field. The debate today is beyond conflicts justice and material justice. While pragmatism acknowledges that there are inherent values in both, other values are also engaged in cross-border disputes. The focus today, therefore, is to identify through empirical methods the state of the law, the problems posed by current laws and practices, the relevant values that are engaged, and how these values are to be balanced in order to deliver the best response to the identified problems.

To this end, conflicts justice will be adopted because of its inherent values and material justice will be integrated because of its inherent values. The same attitude is maintained towards other values such as party autonomy, legal certainty and predictability, efficiency, State interests, access to justice and others that have been enumerated in this chapter. Pragmatism dictates that legislators and judges should tolerate and be open to fresh and better ideas that can potentially work better than what is available in their legal traditions or systems. This openness will lead to dialogues, coordination and harmonisation of thoughts preferably through multilateral solutions. This pragmatic approach which focuses on practical and realistic solutions will better address the numerous challenges of private international law today.