PARTY AUTONOMY IN FAMILY MATTERS IN THE EUROPEAN AND IN THE MACEDONIAN PRIVATE INTERNATIONAL LAW - FROM A COMPARATIVE PERSPECTIVE

Toni Deskoski [*]

Vangel Dokovski[**]

Abstract

This article is an examination of the party autonomy regarding family issues in private international law with main focus to marriage, matrimonial and patrimonial issues and divorce. It provides a comparative overview of the current situation in the EU Private International Law and in the Macedonian Private International Law.

I. Introduction

Family matters with international element are very often in the area of conflict of law, since questions related to the family are part of everyday living. The Family Law has five functions – *protective, facilitative, dispute resolution, expressive and channeling*.[1] Many family law matters require reference to the law of another country. Hence, if we analyze Family Law from a Private International Law perspective, the International Family Law has two functions – *choosing applicable law* and *dispute resolution*. Families who are split across international borders face unique challenges. Disputes between these families can have significant effects on both children and parents in a variety of ways.[2]

The Republic of Macedonia adopted the new Private International Law Act (PILA) in 2007, whereby article 38-51 regulate the conflict of laws in family matters. Party autonomy has a very limited role in Macedonian PIL Act regarding the family matters. It is accepted as connecting factor only for contractual matrimonial property relations. The spouses may choose the law applicable to their contractual relations (marital contracts and other contracts concluded between spouses). If parties did not choose applicable law, then contractual matrimonial property

[*] Toni Deskoski, PhD, Full Professor, Ss. Cyril and Methodius University, Faculty of Law "Iustinianus Primus", Skopje, R. Macedonia

[**] Vangel Dokovski, PhD, Fellow, Ss. Cyril and Methodius University, Faculty of Law "Iustinianus Primus", Skopje, R. Macedonia

[1] These functions are determined by Carl Schneider in *The Channelling Function.* See also Wriggins Jennifer, Marriage Law and Family Law, Autonomy, Interdependence, and Couples of the Same Gender, Boston College Law Review, Vol. 41:265 (2000).

[2] https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/default.aspx.

relations shall be governed by the law which at the time of conclusion of the agreement was applicable to personal and statutory patrimonial relations. A conclusion can be drawn that Macedonian PIL Act has made a difference between statutory and contractual matrimonial property relations. This is very important regarding the question of *renvoi*.

Due to the particularity of European private international law, certain family relations cannot be regulated directly by application of internationally unified rules. In this sense, one of the main objectives sated by Member States in the integration process is maintaining the European Union as an area of freedom, security and justice. However, in the EU Private International Family Law, party autonomy is much more accepted. Article 5 of the Rome III Regulation gives limited party autonomy to the spouses in divorce matters. In Macedonia, however, the Kegel's ladder is used to designate the applicable law for divorce. Having in mind the provision from the Rome III Regulation and from the Proposal for Matrimonial Regulation, it is evident that there is a clear difference between the status of party autonomy in the EU PIL and in the Macedonian PIL.

II. Nationality, domicile, habitual residence, party autonomy and *lex fori* – in search for "appropriate" connecting factor in Family matters

When a given PIL rule leads to the conclusion that a court in a given State (X) is competent to adjudicate a private law dispute with an international element, that decision can usually be traced to the existence of a certain connection – the existence of one or more connecting factors – which serves to provide a legally sufficient link between the forum State (and its courts) on the one hand and the parties and circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given State (X) decides to choose and apply the substantive law of that State or of a different State (Y).[3] Each country has its own conflict of laws rules dealing with these issues, and their rules can differ considerably.[4] Nationality, domicile, habitual residence, party autonomy and lex fori are often used as connecting factor in International Family Law.

[3] J. Lookofsky, K. Hertz, *EU-PIL European Union Private International Law in Contract and Tort* (JurisNet, Copenhagen 2009) p. 15.
[4] M. James, *Litigation with a Foreign Aspect. A Practical Guide* (Oxford University Press, 2010) p. 5.

"Nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin.[5] Nationality also represents a person's political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalisation, it depends essentially on the place of birth of that person or on his or her parentage.[6] In Continental Europe, most civil laws define nationality as a personal quality, providing that the national law of a person governs his family relations and all matters linked – directly or indirectly – to the personal status. It also holds that the national law best responds to the expectation of a person who relies on the law in planning his or her family, even if the conduct takes place wholly within another state's jurisdiction.[7]

We can point out to several factors that have made nationality an important connecting factor in matters relating to personal status such as personal identity or marital status. This concerns first of all the stability of nationality as compared to habitual residence (it is habitual residence rather than domicile counterpart of nationality as a connecting factor). The element of stability, in turn, is closely linked to legal certainty and predictability. Use of nationality instead of habitual residence is also considered to be more appropriate as it takes into account a person's cultural identity, thereby paying due respect to fundamental human rights.[8] International harmony may be ensured at the outset when the PIL rules of the countries in question employ the same connecting factor. Nationality, seen from the point of view of Mancini and his followers, may be regarded as naturally contributing to this goal, since it represents, at least in the field of personal and family law, a connecting factor based on rational grounds.[9]

On the other side, The ECJ's complex jurisprudence demonstrates that Article 12 EU prohibits any disparate treatment mandated by a Member State's national law if it arises from subjective connecting factors that cannot be justified objectively; however, it does not prohibit any differentiation arising from subjective connecting factors that are objectively justified. In this framework, the doctrine has raised the question of whether the adoption of the nationality

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[5] Article 2 (a) of the European Convention on Nationality; also Article 2 of the Law on Nationality of Republic of Macedonia from 2004.

[6] http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm, para. 15.

[7] M.-C. Foblets, *Conflict of Laws in Cross-Cultural Family Disputes. Choice-of-Law in a time of unprecedented mobility* (1997), p. 50.

[8] W. O. Vonk, *Dual Nationality in the European Union, A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Leiden/Boston, Martinus Nijhoff Publishers, 2012) p. 117.

[9] P. Franzina, 'The Changing Role of Nationality in International Law' in: A. Annoni, S. Forlati eds, *The evolving role of nationality* (New York, Routledge, 2013) p. 198.

connecting factor as part of the neutral rules of conflict is compatible with the Community principle of non-discrimination.[10]

Since the 1950's , however, domicile became more popular as the connecting factor for personal and family matters. In Belgian conflict of laws, domicile also became a substitute for nationality in family affairs when both spouses are of different nationality and the newly discovered equality between man and woman made it no longer possible to choose the national law of the husband.[11] Domicile is a "connecting factor" or link between a person and the legal system or rules that will apply to him in specific contexts, such as the validity of a marriage, matrimonial causes (including jurisdiction in, and recognition of, foreign divorces, legal separations and nullity decrees), legitimacy, succession and taxation. Thus, for example, the law of the country of the domicile of a person will determine whether, as regards such requirements as age and capacity, he or she may validly be married elsewhere and whether he or she may obtain a divorce that will be recognised elsewhere.

Habitual residence has for some time been used as a connecting factor. It has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency and prolepsis.[12]

The term habitual residence was used for the first time in a number of bilateral treaties on Legal Aid in which the authority of the habitual residence of the applicant was designated as the proper authority competent to issue a certificate of indigence. A similar provision is to be found in the first Hague Convention in Civil procedure of 14 November 1896. Why preference was then given to this term rather than the usual reference to domicile, has not become apparent. Van Hoogstraten presumes that the term, apparently to be found for the first time in a treaty between France and Prussia of 1988, is a translation of the German expression "gewohnlicher Aufenthalt".[13]

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[10] B. Ubertazzi, 'The Inapplicability of the Connecting Factor of Nationality to the Negotiating Party in International Commerce' 10 *Yearbook of Private International Law* (2008), p. 716. According to Ubertazzi, p. 719: "I believe that the application of the nationality connecting factor is compatible with Community law when neutrally used to determine the law applicable to capacity, like in the Italian private international law's provision on personal status".

[11] H. Van Houtte 'Updating Private International Law, The Belgian Experiment', *in Liber Memorials Petar Sarcevic, Universalism, Tradition and the Individual* (Sellier, 2006) p. 72.

[12] http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm, para. 18.

[13] L. I. de Winter, 'Nationality or Domicile? The Present State of Affairs' 128 *Recuiel des Cours* III (1969) p. 423.

Various authors have attempted to define further what factual situation "habitual residence" is supposed to denote. F.A.Mann does not see any difference of principle between "habitual residence" and domicile.[14] In fact, the only difference is that in order for one person to obtain "habitual residence" no formal condition regarding administrative registration or obtaining a residence permit. For example, in the new Romanian Private International Law, habitual residence, represents, for natural persons, the synonym for domicile.[15] In Cruse v. Chittum, an early case which concerned the recognition of an overseas divorce, habitual residence was said to denote "regular physical presence which must endure for some time. In several cases, the courts have said that is is a question of fact;, this has turned out to be over-optimistic and, unavoidably, legal rules have developed.[16]

The traditional function of the party autonomy as part of Private International Law is selecting of the rules that govern private relationships with international elements. Party autonomy made its entrance into the area of international family law in the second half of the seventies. Notwithstanding the substantive advantage of party autonomy, until today in many European countries, courts remain relatively reluctant to apply the solution of the parties' will in the field of international family law. In practice, only a restricted freedom of choice is permitted: the choice is generally confined to a choice from among a limited relevantly connected legal systems: either the common national or the common domiciliary law. In matrimonial property regulation, for example, only a limited choice is accepted. The spouses may, prior or during the marriage, choose the law of either party's present nationality or domicile, as well as the *lex rei sitae* in respect of immovable property.

In European private international family law party autonomy has traditionally been more limited but has nevertheless served as the starting point for the determination of the law which is applicable to various family relationships. For example, the Maintenance Regulation in conjunction with the corresponding Hague 2007 Protocol enables limited party autonomy for choosing the applicable law for the international maintenance obligations.[17]

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[14] Ibid, p. 428.

[15] C. Darisecu, 'New Romanian Choice-of Law Rules on Marriage Effects', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537200, p. 92.

[16] J. G.,Collier, *Conflict of Laws* (Third Ed., Cambridge University Press 2001) p. 55.

[17] M. Torga, 'Party autonomy of spouses under the Rome III Regulation in Estonia – can private international law change substantive law?' 4 *NiPR* (2012) p. 547.

Finally, lex fori is used as connecting factor for the formal validity of the marriage. This rule is widely accepted in the countries in the world. It is a well established principle that the formal validity of a marriage depends entirely on the law of the place where the ceremony is performed *(lex loci celebrationis)* and, therefore, non-compliance with the requirements of that law will invalidate the marriage. Also, there are legal systems that apply the lex fori generally for divorce since they have liberal approach to divorce

III. Issues of family matters in Private International Law

There are many issues of family matters in private international law sense. Marriage and other Adult Relationships (the meaning of marriage, formalities of marriage, capacity to marry, civil partnership), Matrimonial and Related Causes (divorce, nullity and judicial separation, also dissolution, nullity and separation of civil partnership), highly complex law relating to children, Legitimacy, Legitimation, Adoption, Matrimonial and Patrimonial relations, are all issues of family matters. All of these issues are very complex, and therefore authors of this paper will only address the questions of marriage, divorce, matrimonial and patrimonial relations between spouses from a comparative perspective.

Since proclaiming its independence, the Republic of Macedonia has kept the Federal Conflict of Laws Act in force, as well as a certain number of other Federal Acts from 1982. On July 4, 2007, the Macedonian Parliament adopted the Private International Law Act (PIL Act), which went into force on July 19, 2007.[18] The Republic of Macedonia entered into the Process of Stabilisation and Association to the EU, by entering into Stabilisation and Association Agreement of 26 March 2001.

a. Marriage

It has often been observed that, while marriage may be based on agreement, it is an agreement sui generis, in that it confers on the parties a particular status. Marriage provides an excellent counter example to the notion that classifications can be made on the basis of analytical jurisprudence and comparative law. While it is a universal institution, in that all societies have a concept of marriage, very different cultural traditions have influenced the development of the concept in the various countries of the world. So that, while the institution can be ecognized

[18] Official Gazette of Republic of Macedonia No. 87/2007, 156/2010.

easily enough, its attendant incidents vary considerably. Even within the Western Christian cultural tradition, different rules on capacity and form and different attitudes to the termination of marriage produce important variations from the core of monogamy.[19]

i. Capacity to marry – essential validity

Assessment of the validity or invalidity of marriage requires a preliminary distinction to be drawn between formal validity, capacity to marry, and other impediments to marriage.[20] Thus, a major issue relating to choice of law in the context of marriage is the question of which law governs capacity, otherwise known as essential validity. This question covers a wide range of issues, such as: consanguinity (blood relationships); affinity (relationships created by virtue of marriage); remarriage; lack of age; and parental consent (unless it is classified as an issue of formalities).[21]

Each party is required to have capacity to marry the other according to their *lex personalis*. Article 38 of Macedonian PIL Act deals with the substantive conditions for conclusion of a marriage. Under this article, the substantive requirements of marriage are governed by the national law of each spouse at the time of marriage (Article 38(1)). Hence, *lex nationalis* is used as a connecting factor for determining applicable law for the substantive condition for conclusion of a marriage. This means that every spouse should satisfy the substantive requirements under his *lex nationalis*. *Lex nationalis* is also accepted in Bulgarian PIL Act (Article 71(1)) and in Polish PIL Act (Article 48).

However, if the marriage is to be concluded in Macedonia, it is expressly provided that certain impediments provided by Macedonian substantive family law must be applied. They are (1) the existence of an earlier marriage, (2) consanguinity, and (3) mental incapacity. This leads to the conclusion that the characterization category of capacity to conclude marriage includes the question of polygamy, prohibited degrees of relationship and marital capacity.

It shall be pointed out that there are authors in the theory that strongly object the use of *lex nationalis* as a connecting factor. They support the use of *lex domicilii*. The reason is said to be that whether and when someone is ready to marriage is determined by the society in which he

[19] J. O'Brien, *Conflict of Law* (Cavendish Publishing Limited, London 1999) p. 409.
[20] A. Brigs, *The Conflict of Laws* (Oxford University Press 2013) p. 329.
[21] A. Mayss, Principles of Conflict of Laws (Great Britain 1999) p. 215.

or she has grown up. Some authorities suggest that the law of the intended matrimonial home might be a more appropriate test, but none has so decided, and the inherent uncertainty of such a test makes it difficult to support, at least when the question arises prospectively.[22] If we compare civil law and common law countries we may conclude that while civil law countries are using *lex nationalis* or habitual residence as connecting factor for the capacity to marry, common law countries are using *lex domicilii*. There are two main views as to the law which should govern capacity to marry – the dual domicile doctrine, and the intended matrimonial home doctrine.[23]

The Renvoi-question implies that there is a difference between the rules of I.P.L. adopted by two States with regards to the same matter. In the early days of the science, however, the rules of I.P.L. were in theory at any rate, uniform; they were conceived of as constituting universal law adopted by all individual systems *ex comitate*: in such circumstances there could be no Renvoi-question. In the 19th century it became finally apparent that this uniformity was impossible even as an ideal. Fundamental conceptions began to diverge; this was especially so in matters of the personal statute (Status, Capacity, Family Law; Movable Succession); in these matters domicile ceased to be the universal criterion, nationality begin, by many systems, adopted in its place. This made the Renvoi-question possible.[24]

Therefore, in the area of marriage (capacity to marry) there is a space for application of renvoi. In PIL Act, Article 6 covers renvoi. However, renvoi is excluded where the parties have the rights to choose the applicable law (Article 6(3)). Since parties do not have the right to choose the applicable law for the essential and formal validity of the marriage, Article 6(3) cannot be applied. Thus, if the rules of PIL Act provide that the law of a foreign State applies, the rules thereof determining the applicable law shall be taken into consideration (Article 6(1)). If the rules of a foreign State determining the applicable law refer back to the law of the Republic of Macedonia, the law of the Republic of Macedonia shall apply, without taking into consideration the rules on reference to the applicable law (Article 6(2)). This will always be a situation when foreign applicable law will use *lex domicilii* as connecting factor for essential validity of marriage. It may create a situation where Macedonian Family Law Act to be applied for the essential validity of marriage if foreign law contained *lex domicilii* as connecting factor for condition for concluding a marriage and future spouses have their domicile in Macedonia.

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[22] A. Brigs, *The Conflict of Laws* (Oxford University Press, 2008) p. 244.
[23] Cheshire, North & Fawcett, *Private International Law* (Oxford University Press, 2008) p. 895.
[24] J. Bate Pawley, *Renvoi in Private International Law* (Forgotten Books 2012) [Originally Published in1924] p. 4.

Or even more interesting situation, where both spouses are foreign nationalities with domicile in Macedonia - under Article 38(1) *lex nationalis* will designate the applicable law for essential validity of marriage. If they have different nationalities, different foreign law will apply. And if in one of their private international law rules, *lex domicilii* is used as connecting factor for essential validity of marriage, under Article 6(2) from PIL Act, Macedonian Family Law Act will apply for that spouse. As for the other spouse, if under his *lex nationalis* there is a same connecting factor (*lex nationalis*), that foreign substantive law will apply. At the end even without *lex domicilii* as connecting factor, for foreign nationalities, Macedonian Family Law Act can be applicable simply because of the doctrine of renvoi.

ii. Formal validity

Multiple communities may claim an interest in regulating certain behaviors, such as marriage. Thus, families, church communities, and state officials may all claim some jurisdiction over the creation of marriage via family traditions, religious rites, and state laws. The rules of different communities sometimes create diverse, inconsistent, even conflicting, obligations for individuals who belong to multiple communities. For example, when the rules of one community require certain behavior (such as religious celebration), but the rules of another community prohibit that behavior (such as state law requiring state formation first or exclusively), there is potential for conflict between those communities.[25]

There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage, *ie* that an act is governed by the law of the place where it is done.[26]

There are many questions that need to be characterized. In some countries for example the question for the form of marriage is treated as issue of formal validity (in England), and in others is treated as issue of essential validity.

Thus in England, the question whether there is need for a public, civil, or religious ceremony, whether particular words need to be spoken in the course of the ceremony, whether the ceremony must be held in temple, registry, or out in the fresh air, whether a religious practitioner need be in attendance, whether it is necessary for either spouse to be present in

[25] D. L. Wardle, 'Marriage and Religious Liberty: A Comparative Law Problems and Conflict of Laws Solutions' 2 *Journal of Law & Family Studies* (2010) p. 317.
[26] Ibid, p. 879.

person or by proxy, or whether it is necessary for the parents or other parties to give their consent, are all characterized as issues of formal validity. They are all answered by recourse to the *lex loci celebrationis*, and the consequences in terms of nullity or otherwise are determined by it as well. If the marriage would be invalid by the domestic law of the place of celebration, but would be valid by reference to the law to which a judge at the locus celebrationis would look if he were trying the issue, the marriage will be formally validated via the principle of renvoi.[27]

As for the party autonomy, it is widely accepted that it cannot be used as choice of law rule. Marriage is a contract in the sense that there can be no valid marriage unless each party consents to marry the other. But it is a contract of a very special kind. It can be concluded (at least as a general rule) by a formal, public act, and not, e.g. by an exchange of letters or over the telephone; no actions for damages will lie for breach of the fundamental obligation to love, honor and obey; the contract cannot be rescinded by the mutual consent of the parties: it can only be dissolved (if at all) by a formal, public act, usually the decree of a divorce court.[28]Although marriage is a form of contract between woman and man, public interest is always present and therefore, party autonomy cannot be used as connecting factor for determining applicable law for essential and formal validity of marriage.

b. Divorce

Divorce cases with international issues appear with increasing frequency. This is consistent with anecdotal evidence and logic. The world is shrinking, globalization marches on, and the mobility of people is growing. The issues in divorce that can have international aspects are myriad. Some, such as international child abduction, are addressed by treaties. Some, such the immigration consequences of divorce on an alien spouse, are more the product of national law. Others, such as the couple divorcing in a country different from their nationalities or former residence, may implicate the courts and national laws of more than one country. [29]

The choice of law rules for divorce have been slightly reformed in the Macedonian PIL Act. The common *lex nationalis* of the spouses at the time of filing is still the primary connecting factor (Article 41(1)). But, a major change has been introduced in the choice of law rule for divorce when the spouses have different nationalities at the time the divorce petition is filed. The

[27] Brigs, op.cit. n. 25 /27, p. 331.
[28] M. McClean, *The Conflict of Laws* (Sweet&Maxwell, 1993) p. 143.
[29] H.H. Hatfield, 'Private International Law Concepts in Divorce' *19 American Journal of Family Law* 2 (2005) p. 1.

1982 Act provided for the cumulative applicability of the *lex nationalis* of the spouses in such situations, unlike the new choice of law rule that has been enacted in paragraph 2 of Article 42. Thus, if at the time when the application is made the spouses are nationals of different States, the divorce shall be subject by the law of the State in which the spouses had their last common domicile, and if they never had a common domicile, the law of the state where the application is submitted shall be applicable.

The provision of the Federal Conflict of Laws Act of 1982 that required applying Macedonian Law when divorce could not be obtained by cumulative application of the national law of the spouses has been abrogated.[30]

The question for Renvoi once again may arise if the applicable foreign law contains different choice of law rules that refer back or transmit to law of a third state. If the rules of a foreign State refer back to the law of Republic of Macedonia, the law of the Republic of Macedonia will be apply, without taking into consideration the rules on reference to the applicable law (in line with Article 6(2) of PIL Act).

Party autonomy is a still unknown connecting factor for divorce under Macedonian PIL Act, unlike the situation in the EU. Reference must be made to the Regulation no. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. This Regulation is part of the European Private International Law and the enhanced cooperation is used as a new method for unification of the conflict of laws. The enhanced cooperation was originally introduced by the Treaty of Amsterdam in 1995. In 2009 the Treaty of Lisbon improved the mechanism for enhanced cooperation by amending questionable rules and grouping all provisions in one chapter. Only after these improvements the mechanism has been used for the first time in order to partially unify the conflict of laws rules.[31]

The regulation employs habitual residence as its main connecting factor in situations of absence of choice of law made by the parties. Hence, parties are free to choose applicable law for their divorce (Article 5) - 1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws: (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or (b) the law of the

[30] Deskoski, Dokovski, op. cit. n. 23, p. 17.

[31] A. Sapota, 'The Enhanced Cooperation – is it an instrument efficient enough to avoid the divergence between national regulations of private international law in the EU?' Available at: http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Sapota.pdf p. 28.

State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or (d) the law of the forum. It is clear that the chosen law must have some connection with the parties or with the forum.

An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized (Article 5(2)). If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum.

The application of Renvoi is excluded under Article 11 of the Regulation. Where Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law. It is notable to be pointed out that Macedonian PIL Act differs from the Rome III Regulation in the sense of applicable law for divorce. Having in mind Article 68(4) of the Stabilisation Agreement between Macedonia and EU, it is expected that Macedonian authorities will take activities in order to harmonize the conflict rules for divorce with the Rome III Regulation (for example such harmonization has been already done with the conflict of law rules for non contractual obligations – they are harmonized with the Rome II Regulation). New conflict rule for divorce shall be enacted by the end of 2015.

It is common trend nowadays for abrogating nationality as connecting factor for divorce within Europe. However, if we read carefully Article 5 of the Rome III Regulation, nationality still plays an important role. Under article 5 the spouses are allowed to choose, *inter alia*, the law of the State of either of the spouses at the time the agreement is made.[32]

In the absence of choice, Article 8 lays down the Kegel's ladder. Thus, in absence of a choice of law pursuant to Article 5 of the Rome III, divorce and legal separation shall be subject to the law of the State: (a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that (c) of which

[32] Vido de Sara, 'The relevance of Double Nationality to Conflict of Laws Issues relating to Divorce and legal Separation in Europe' 4 *Cuadernos de Derecho Transnacional* 1 (2012) p. 226.

both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized.

It is clear that the concept of domicile that has been used for a long time in common law countries as a connecting factor for divorce has been replaced with the habitual residence, and that the common nationality of the spouses has been demoted from the status of the main connecting factor in the countries with continental system of law to the position of a subsidiary one.

At common law, the sole basis of the jurisdiction of the English courts in divorce was domicile, and no choice of law problem arose. English law was applied and this could be justified either as the application of the law of the domicile to issues affecting status or as the application of the law of the forum on the basis that dissolution of a marriage is a matter which touches fundamental English conceptions of morality, religion, and public policy, and one which is governed exclusively by rules and conditions imposed by the English legislature.[33] Today, this has been changed as a result of the Rome III. Determination of applicable law for divorce within the EU is resolved by party autonomy and habitual residence. Nationality as a connecting factor has acquired a subordinated position if we compare with the habitual residence. Still, one problem regarding the nationality in Rome III that may arise is the problem with double nationality.

Common double nationality may cause some problems when the first two connecting factors fail. At first sight, common habitual residence and the last common habitual residence seem to be the connecting factors applicable in the majority of cases. Nevertheless, a hypothetical situation may be envisaged: it may be that two spouses have a common residence in an EU Member State, where they moved from their Member State of origin soon after the marriage. Let us imagine that they hold the nationality of the State where they were born and that they also have the nationality of the State of residence. Let us further imagine that, after some years, one of the spouses moves abroad, leaving the marital house, whereas the other one returns to his/her State of origin. Subsequently, the spouses agree to start divorce proceedings before the Court of the State (bound by the Rome III regulation) where one of them is habitually resident. The seized court must determine the applicable law in accordance with Regulation no. 1259/2010. The first two connecting factors cannot be resorted to. The third connecting factor

[33] Cheshire, North & Fawcett, op. cit. n. 28, p. 966.

operates, but the common nationality is double. Considered the evolution of European society and the fact that people move frequently from one State to the other, this situation does not seem so uncommon. Which law will the judge apply, since nationalities are considered equivalent as said by the ECJ for the grounds of jurisdiction?[34]

The theory of Mancini for nationality still shall be analyzed and used for answering such question. Should the judge use the effective nationality, or should *lex fori* be applied? Therefore, nationality has not completely lost its role in private international law and if it is used properly it may give very good result in the area of conflict of laws.

III. Choice-of-law rules on the matrimonial and patrimonial regime

In Macedonia, the personal and property effects of marriage are primarily governed by the common national law of the spouses. However, of spouses, are nationals of different States, the law of the State shall apply in which they have domicile. If the spouses have neither the same nationality nor domicile in the same State, the law of the State shall apply in which they both had the last common domicile. At the end, if applicable law cannot be determined under these connecting factors, the law of the Republic of Macedonia shall apply (Article 42). It is evident, that nationality is still using as a primary connecting factor for the personal and property effects of marriage. Concept of domicile is used only if spouses do not have common nationality.

The spouses may choose the law applicable to their contractual relations (marital contracts and other contracts concluded between spouses). By a written agreement, spouses may choose one of the following laws: the law of the state of at least one of the spouses is a national; the law of the state in which at least one of the spouses is domiciled; for immovable estate, the law of the place where such immovable estate is situated (Article 43(2)). If parties did not choose applicable law, then contractual matrimonial property relations shall be governed by the law which at the time of conclusion of the agreement was applicable to personal and statutory patrimonial relations (Article 43(1)). From the wording of article 43 of the PIL Act, conclusion can be drawn that Macedonian PIL Act has made a difference between statutory and contractual matrimonial property relations. This is very important regarding the question of renvoi.

[34] De Vito, op. cit. n. 37, p. 228.

Since 2001, under the Law on ownership and other related rights,[35] spouses may conclude agreement for their common and individual property and by doing that, they are converting the statutory character of their patrimonial property relations into a contractual one (argument from Article 71 of the Law on ownership and other related rights). Most of the patrimonial property relations are statutory, unless the spouses have agreed otherwise. From the wording of Article 43 of the PIL Act, if spouses have concluded contract for their patrimonial relations, then the judge will determine the applicable law in accordance with the party autonomy. If the spouses failed to agree in writing for the applicable law, then, the judge will apply the choice of law rules contained in art 42 without the application of the doctrine of renvoi. This is a direct result of Article 6(3) of the PIL Act, where it is stated that the provisions for renvoi shall not apply in cases when the parties have the right to choose the applicable law. Even without choosing the applicable law, spouses, by converting their statutory patrimonial relations into contractual one, by having a substantive marriage agreement, are excluding the future application of renvoi. If spouses have not agreed for their statutory patrimonial relations, then the judge will apply Article 42, but this time he will also apply the rules for renvoi, since for statutory patrimonial relations, spouses cannot choose applicable law, and the application of renvoi cannot be excluded under Article 6(3).

It may be concluded that the application of renvoi will depend on whether the parties have used their party autonomy, not for the purpose to choose applicable law, but rather to convert their statutory into contractual patrimonial relations in the sense of the Law on ownership and other related rights of Macedonia.

Lex nationalis is often used in many PIL Acts in Europe as a choice of law rule for the matrimonial regime. For example, under Article 51 of the Polish PIL Act, Personal and patrimonial relationships between spouses shall be subject to the law of their current common nationality. In the absence of the common nationality, the law of the country in which both spouses have their place of permanent residence – or, in the absence of the latter, of their common habitual residence – shall apply. Where the spouses are not habitually resident in the same country, the law of the country with which both are otherwise most strictly connected shall apply. Also, under Article 52, the spouses may make their patrimonial relationships governed by the law of nationality of the either spouse or by the law of the country in which one of them is

[35] Official Gazette of Republic of Macedonia No. 18/2001, 92/2008, 129/2009, 35/2010.

permanently or habitually resident. The choice of law may be made also before the conclusion of marriage. The marriage agreement shall be subject to the law chosen by the parties according to the paragraph 1 of Article 52. In the absence of the law choice, the marriage agreement shall be governed by the law applicable to the personal and patrimonial relationships between the spouses at the time of entering into the agreement. When choosing the law applicable to patrimonial relationships between spouses or for the marriage agreement, it shall be sufficient to comply with the form prescribed for marriage agreements either by the law chosen or by the law of the country in which the law choice was made.

Under Article 14 of the Turkish PIL for the matrimonial properties, spouses may choose either the law of domicile or one of their national laws at the time of marriage; in the cases that such a choice has not been made for the matrimonial properties, the joint national law at the time of marriage; in the cases where no joint national law is existing, the law of joint domicile at the time of marriage; if this is not existing either, the law of the place where the matrimonial properties are located shall be applicable. The spouses, who have a new joint law after the marriage, are subject to this new law, under the reservation of the third parties' rights.

Kegel's ladder also is used in Germany, Romanian, Montenegrin, Serbian and almost all countries in order to designate the applicable law for matrimonial and patrimonial property relations. Party autonomy is frequently used, but with certain restrictions in the sense for conditioning the choice of law made by parties with certain relations provided by the Law (parties are not generally free to choose law that has no connection with them or with the property – such connection can be in a form of nationality, domicile or habitual residents of at least one of the spouses is always a condition for validity of the agreement for choice of law).

Within the EU, still there is not Regulation for applicable law for matrimonial property regime. In the absence of an effective choice of law or valid pre- or postnuptial agreement, a forum state must determine the law or laws that determine and define matrimonial property. However, there is a proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS)). Under this proposed regulation together with the amendments from 2013. The spouses or future spouses may agree to designate or to change the law applicable to their matrimonial property regime, as long as it is one of the following laws: (a) the law of the State where the spouses or future spouses, or one of them,

is/are habitually resident at the time when the agreement is concluded, or (b) the law of a State of which one of the spouses or future spouses is a national at the time when the agreement is concluded. 1a. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only. 1b. If the spouses choose to make that change of applicable law retroactive, its retroactive effect shall not affect the validity of previous transactions entered into under the law hitherto applicable or the rights of third parties deriving from the law previously applicable. If no choice-of-law agreement is made pursuant to Article 16, the law applicable to the matrimonial property regime shall be: (a) the law of the State of the spouses' common habitual residence at the time of marriage or of their first common habitual residence after their marriage or, failing that, the law of the State with which the spouses jointly have the closest links at the time of the marriage, taking into account all the circumstances, regardless of the place where the marriage was celebrated.

If we analyze these proposed provisions we may conclude that conditional party autonomy is also welcomed into the new-draft Regulation and it is in the line with PIL Acts of the most of countries. However, there is a difference from the national provisions regarding the applicable law in absence of choice of law made by spouses in the sense that nationality and domicile are substituted by spouses' common habitual residence. The closes connection will also be used as connecting factor for determining applicable law for matrimonial property regime – *the law of the State with which the spouses jointly have the closest links at the time of the marriage, taking into account all the circumstances, regardless of the place where the marriage was celebrated.*

V. Conclusion

The unification of conflict of law rules is positive for international relations, because it makes the applicable law more predictable, favours the international harmony of solutions and avoids *forum shopping*. The Hague Conference on Private International Law has been the organisation that has been traditionally more involved in the unification of these rules.[36] This

[36] Diaz Beatriz Campuzano, 'Uniform Conflict of Law Rules on Divorce and Legal Separation vie Enhanced Cooperation' Available at: http://centro.us.es/cde/justicia_civil_2011/mod_003.html

article provides a commentary on the party autonomy provisions of EU harmonization instruments, actual and proposed, in family law.

In Republic of Macedonia, nationality is part of the tradition as conflict of law rule that is used in the area of the family matters. Also, in most countries in Europe, nationality is the primary conflict of law rule regarding the capacity to marry. However, party autonomy now days start to have greater impact in this area of conflict of laws. Not so many years ago, party autonomy was reserved just for conflict of laws in the area of contract. Today, under the Rome III Regulation, party autonomy becomes primary conflict of law rule within the EU for the divorces with international elements.