

Nationality, domicile, and private international law revisited

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Introduction

During the past decade, legal commentators in Europe and beyond witnessed a remarkable integration of legal institutions accompanied by an increased harmonization of laws.¹ In the field of private international law, for instance, several E.U. Regulations containing common rules for jurisdiction, choice-of-law, and enforcement of judgments in a variety of private law issues were enacted.²

This “modern European private international law” is designed to operate in an environment of free movement of persons sharing a “European citizenship”,³ free movement of goods, workers, enterprise

¹ See Lagarde & von Hoffmann, *The Europeanisation of Private International Law, passim* (1996).

² See, for example, the “Rome Regulations” on the law applicable to contractual obligations (Regulation (E.C.) 593/2008 – “Rome I”), non-contractual obligations (Regulation (E.C.) 864/2007 – “Rome II”), divorce and legal separation (Regulation (E.U.) 1259/2010 – “Rome III”), and successions (Regulation (E.U.) 650/2012 – “Brussels/Rome IV”).

³ Article 20(1) TFEU: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.” See *Isin/Saward, Enacting European Citizenship, passim* (2013); Grammatikaki-Alexiou, Papasiopi-Pasia & Vassilakakis, *Private International Law*, 519 et seq. (5th edition, 2012) [in Greek].

and capital within an internal market,⁴ and free movement of judgments within a common area of freedom, security, and justice.⁵ This evolution of European private international law was celebrated as a contribution to *multiculturalism* in an era of *globalization*.⁶

The underlying policies of multiculturalism and globalization also justified an important change in the choice of *connecting factors* in the modern choice-of-law process. The traditional debate between *nationality* and *domicile* gave way to the emerging connecting factor of *habitual residence*.⁷ The harmonization process also “invaded” areas of the law that were traditionally considered more “sensitive” areas, such as family and succession law.⁸

But, recent political developments (e.g., Brexit, the Italian referen-

⁴ Article 26(1) and (2) TFEU: “1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.” See Egan, ‘Single Market’ in Jones, Menon & Weatherill, *The Oxford Handbook of the European Union*, 407 et seq. (2012).

⁵ Article 67(1) and (4) TFEU: “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States ... 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.” See, e.g., the “Brussels regulations” on jurisdiction, recognition and enforcement of judgments in general civil and commercial matters (Regulation (E.U.) 1215/2012 – “Brussels Ibis”), in matrimonial and parental matters (Regulation (E.C.) 2201/2003 – “Brussels IIbis”), and in matters of succession (Regulation (E.U.) 650/2012 – “Brussels/Rome IV”).

⁶ See Basedow, ‘Multiculturalism, globalisation, and the law of the open society’, 62 *RHDI* 715, 733 et seq. (2009); Vrellis, ‘La loi et la culture’, 62 *RHDI* 449 (2009).

⁷ See Vrellis, *Private International Law*, 80 (3rd edition, 2008) [in Greek].

⁸ Family and succession law issues were originally excluded from E.C. competence, only to be added in later Treaty amendments by way of special procedure (“enhanced cooperation”). See Article 328(1) TFEU. See also recital 8 of the preamble to Regulation (E.U.) 1259/2010; recitals 7 and 8 of the preamble to Regulation (E.U.) 650/2012.

dum, and the lingering threat of Grexit) and an accompanying Euro-scepticism have led some commentators to suggest that the pendulum may be swinging back to a more “traditional” and less “globalized” Europe. To the author of this humble contribution in honor of a truly global scholar such as Professor Courakis, this debate is reminiscent of an older discussion concerning the perennial tension between nationality and domicile as connecting factors in the choice-of-law process. The purpose of this short article is to revisit this discussion.

In Search for the Optimum *Personal Law*

Every natural person has (or ought to have) a “homeland,” that is, a legal, persistent (and perhaps emotional) relationship with a state or nation. This relationship is important for a variety of reasons. For immigration purposes, a person “belonging” to a particular country may reside and work there or, when traveling abroad, the person may seek diplomatic protection with the consular authorities of her country.⁹ For jurisdictional purposes, a person may be sued before her home court.¹⁰ And, more importantly and germane to our discussion, with respect to *personal status*, the validity of important juridical acts (*e.g.*, marriage, adoption, testament, etc.) or the existence of crucial juridical facts (*e.g.*, kinship, parenthood, etc.) will be determined by the *personal law*, that is, the law of the state or country with which the person is more closely connected.¹¹

For centuries, conflicts scholars have debated what that personal law should be. Two were the prime candidates: the *law of nationality* (*lex patriae*) and the *law of domicile* (*lex domicilii*).¹²

⁹ See Vrellis, *Immigration Law*, 15 *et seq.* (2nd edition, 2003) [in Greek]; Papiopi-Pasia & Kourtis, *Immigration Law*, 4 *et seq.* (3rd edition, 2007) [in Greek].

¹⁰ See, *e.g.*, Article 4 of Regulation (E.U.) 1215/2012.

¹¹ See Hay/Borchers & Symeonides, *Conflict of Laws*, §§4.30 *et seq.* (5th edition, 2010).

¹² See Grammaticaki-Alexiou, *Domicile of the Natural Person in Private International Law*, *passim* (1980) [in Greek]; de Winter, ‘Domicile or nationality? The present

1. Nationality

The term “nationality” has many legal connotations as well as historical and political overtones. For the purposes of this discussion, the term “nationality” is used as defined, rather successfully, by *Maridakis*:¹³ Nationality is a public law bond between an individual and a country or state, pursuant to which that individual belongs to the people¹⁴ of that country or state.

As mentioned, nationality is important in several areas of public law. Here, we discuss nationality as a connecting factor designating the applicable law to the personal status of an individual (natural person).

The concept of *origin (origo)* can be traced back to Greco-Roman times, although the concepts adopted in the ancient laws and customs of Greece and Rome do not correspond to the modern terms of national (citizen) or foreigner (non-citizen). Be that as it may, the identity of a person as a “citizen” of a Greek city-state or of the Roman Empire meant that the private laws of that person’s homeland would apply to issues of personal status.¹⁵ The same concept of *origo* resurfaced later, during the 5th and 7th centuries A.D., when the scope of application of the medieval laws of the Frankish and Germanic tribes (*leges barbarorum*) depended on a person’s tribal origin.¹⁶

state of affairs, 128 *RCADI* 347 (1969-III); North, ‘Reform but not revolution – general course on private international law’, 220 *RCADI* 26, 141 (1990-I); Cavers, ‘Habitual residence: a useful concept?’, *Am. U. L. Rev.* 475 (1972); Vrellis, *Private International Law*, 80 [in Greek]

¹³ Maridakis, *Private International Law*, Vol. II, 248 *et seq.* (2nd edition, 1968) [in Greek].

¹⁴ “People” is defined as the total number of individuals having the nationality of a country, wherever these individuals may be located; “population” is defined as the total number of individuals (nationals or non-nationals) that are present within a country at a given time of a census. See Krispi-Nikoletopoulos, *Nationality Law*, 42 *et seq.* (1965) [in Greek].

¹⁵ See Maridakis, 249 note 21.

¹⁶ See, for example, the scope of application of the *lex salica* or the *lex ripuaria* as discussed by Reimitz, *History, Frankish Identity, and the Framing of Western Ethnicity*,

The concept of nationality as we know it today appeared when the modern States were created. From the 1800s, nationality played an important role not only for the cultivation of a “national conscience” and “state identity”, but also for reasons of migration policy. As people were on the move across continents and oceans in search for a better life, some countries, such as the United States and the United Kingdom, became countries of influx of population whereas other countries, such as Germany and Greece, were countries of outflow of population. Choosing nationality as a connecting factor became an important policy decision for the latter countries of outflow, as it maintained that person’s bond with the motherland. Thus, a Greek immigrant to the United States would take Greek law with her.¹⁷ In the “eyes of Greece,”¹⁸ Greek law would still apply as the personal law of Greeks residing abroad. The application of the national Greek law was considered to be part of that immigrant’s heritage. That heritage would also be passed on to that person’s posterity. Hence, the system of *jus sanguinis* prevailed as to the acquisition of Greek nationality. A person born to Greek parents anywhere in the world would automatically acquire Greek nationality.¹⁹

As a connecting factor, nationality dominated the scene in the private international law of Continental Europe. Virtually all choice-of-law rules concerning marriage,²⁰ incidents of marriage,²¹ divorce,²² chil-

233 *et seq.* (2015).

¹⁷ See Maridakis, 264.

¹⁸ That is, according to Greek private international law.

¹⁹ The principle of the “law of blood” does not mean (and never was intended to mean) “purity” of a nation. That is so, because it is possible for a naturalized citizen as well to pass citizenship on to her posterity by birth. See Maridakis, 251 note 30; Vallindas, *Nationality Law*, 50 (1943) [in Greek]; Papasiopi-Pasia, *The Principle of Jus Sanguinis: Ethnicity or Nationalism? Developments and Modern Trends in Greek Nationality Law*, Efimerida Dioikitikou Dikaiou, 293 (2012) [in Greek].

²⁰ Substantive and formal validity of the marriage are determined by the national law of the parties to the marriage (see Article 13 of the Greek Civil Code).

²¹ The incidents of marriage are governed primarily by the law of the common nationality of the spouses (see Articles 14 and 15 of the Greek Civil Code).

dren,²³ and succession²⁴ pointed to the national law (*lex patriae*), while the law of domicile retained a subsidiary role as applicable only in cases of stateless persons or in the rare cases of absence of the spouses' common domicile.²⁵

In the 1990s, however, a change in the global demographics started to become more apparent. Countries of outflow of population, such as Greece and Italy, suddenly became countries of massive influx of immigrants from the east. Soon, the countries of the Mediterranean became main ports of entry for migrants crossing from Asia into Europe. Immigration and asylum laws in Greece have been amended several times within the last twenty years to cope with the new social reality.²⁶ A significant change in nationality law was also made, incorporating the *doublejus soli* principle.²⁷ But, the choice-of-law rules enacted in the Greek Civil Code of 1946, which were based on the nationality principle, remained unchanged. Based on these rules, a Greek judge was therefore instructed to apply the law of the nationality of a migrant, as the governing law to issues of personal status. To determine the validity of a marriage or a will, or the existence of a divorce, or the requi-

²² Divorce is governed by the law applicable to the incidents of marriage as of the time of initiation of divorce proceedings (see Article 16 of the Greek Civil Code). But, see the new choice-of-law provisions in Regulation (E.U.) 1259/2010.

²³ The relationship between parent and child is governed primarily by the law applicable to the incidents of marriage as of the time of birth (see Article 18 of the Greek Civil Code).

²⁴ Succession to the entire estate (principle of unity) is governed by the national law of the decedent at the time of death (see Article 28 of the Greek Civil Code). But, see the new choice-of-law provisions in Regulation (E.U.) 650/2012.

²⁵ See, e.g., Articles 29 and 14 of the Greek Civil Code. However, it is noted that "domicile" actually refers to "habitual residence" and not the English concept of domicile as discussed below. See *Maridakis*, 258 et seq.

²⁶ See Papasiopi-Pasia/Kourtis, 25 et seq.

²⁷ See Papasiopi-Pasia, *The Principle of Jus Sanguinis: Ethnicity or Nationalism? Developments and Modern Trends in Greek Nationality Law*, Efimerida Dioikitikou Dikaiou, 293, 300 (2012); *idem*, 'The right to nationality under the constitution of Greece', 69 *Armenopoulos* 813 (2009) [in Greek].

sites of paternity concerning a migrant in Greece, the Greek judge had to take notice of and apply that migrant's national law. Soon Greek judges had to become versed in Albanian law, Afghan law, Syrian law, Turkish law, or the Sharia law, as the case may be.

The need to move away from the strict application of the law of nationality was quickly identified by several commentators in Continental Europe.²⁸

2. Domicile

The concept of *domus* was known in Roman law and still retains its importance in the civil law.²⁹ Here, however, we discuss *domicile* as a connecting factor in the choice-of-law process. For the purposes of our discussion, we will adopt *Story's* popular definition of domicile:³⁰ "That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

The elements of *residence (corpus)* and *intention of remaining and/or returning (animus manendi et revertendi)* are also present in the Roman law concept of *domus*. What differentiates common law domicile, however, is the distinction between *domicile of origin* and *domicile of choice*.³¹

Domicile of origin is the domicile obtained by a person at birth; it will usually derive from the domicile of a parent or it will attach to the place of birth. In effect, domicile of origin will often coincide with na-

²⁸ See, e.g., Rabel, *The Conflict of Laws*, Vol. I, 177 (2nd edition, 1958); Bucher, 'Staatsangehörigkeits- und Wohnsitzprinzip. Eine rechtsvergleichende Übersicht', 28 *Schweizerisches Jahrbuch für internationales Recht – Annuaire Suisse de droit international*, 76, 131 (1972).

²⁹ See, e.g., Windscheid/Kipp (ed.), *Lehrbuch des Pandektenrechts* §§ 36, 55 (8th edition, 1900); Balis, *General Principles of Civil Law*, § 14 (8th edition, 1961) [in Greek].

³⁰ Story, *Conflict of Laws*, § 41 (8th edition, 1883); see also *Restatement (Second) Conflict of Laws*, §§ 11, 12 (1971).

³¹ See Dicey, Morris & Collins, *Conflict of Laws*, 117-121 (13th edition, 2002).

tionality. A person may abandon her domicile of origin in favor of a new *domicile of choice*. To effect such a change, an intent to take a new abode and to abandon the old must be manifested. It is possible, however, that the domicile of origin may revive in cases where the domicile of choice is abandoned and no new domicile of choice is designated.³²

As a connecting factor, domicile is particularly useful in the United States and the United Kingdom, where the need arises for assimilation of the inflowing population. Application of the local law of the domicile, instead of a multiplicity of national laws, is a practical necessity.³³ In a federal nation, such as the United States, domicile is in particular attached to the State (that is, the territorial unit) with which a person retains a persistent relationship. Nationality (citizenship) still retains its importance in public law, although the principle of *jus soli* is usually applied for the acquisition of national citizenship at birth.³⁴

Although domicile seems to serve the practical needs of a multicultural society, nevertheless the peculiarities of common law domicile become apparent in the international conflict of laws, especially when a civil law court is called to apply the common law concept of domicile.³⁵

For example, suppose a Greek court, by application of Greek choice-of-law rules, is called to apply the national law of a United States citizen to determine the law applicable to this person's succession.³⁶ In essence the Greek judge is instructed to apply "United States law" to the succession. Naturally, "United States law" must refer to the law of a

³² See Graveson, *Conflict of Laws*, 185 et seq. (7th edition, 1974); Reese, 'Does domicile bear a single meaning?', 55 *Colum. L. Rev.* 589 (1955).

³³ See Nygh, 'The reception of domicil into English private international law, 1 *Tasmanian U. L. Rev.* 555 (1961)

³⁴ See *Hay/Borchers/Symeonides*, §§ 4.1-4.3.

³⁵ *Id.*, §§ 4.11-4.12.

³⁶ According to Article 28 of the Greek Civil Code, succession is governed by the national law of the decedent at the time of death. We refer to this provision for the needs of this example (Note, however, that this rule has been replaced pursuant to Regulation (E.U.) 650/2012).

State of the United States. In this example, the solution could be provided by the definition of “state citizenship” in the United States Constitution³⁷ for citizens of the United States are citizens “of the state wherein they reside” and, in this context, residence means domicile. Consequently, a choice-of-law reference by a Greek court to “United States law” as the national law of a person will include a reference to the law of the state wherein this person is currently domiciled. This reference provides an easy transition from national law to common law domicile.

However, this transition does not work well when there is no rule of reference³⁸ or when the United States person in our example is domiciled outside the United States and, therefore, maintains a United States citizenship but has abandoned her state citizenship. A possible solution in this case would be to refer, by a limited *renvoi*, the issue to the current law of the domicile outside the United States.³⁹ Another solution, particularly followed in the United Kingdom, would be to refer to the law of the domicile of origin, even though it was abandoned by that person when she moved to another State or abroad.⁴⁰

These peculiarities of domicile have been critiqued by common law commentators who argue in favor of a less rigid system for the designation of the personal law.

³⁷ According to the first sentence of the first section of the 14th Amendment to the U.S. Constitution: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the state wherein they reside.*” (emphasis added).

³⁸ For example, the United Kingdom has no rule for allocation of domicile between England and Wales, Scotland, and Northern Ireland. Nevertheless, a choice-of-law reference to “British law” or “United Kingdom law” will most likely refer to domicile, even though there is no rule to allocate such domicile to one of the territorial units of the United Kingdom. See Cheshire, North & Fawcett, *Private International Law*, 159 *et seq.* (14th edition, 2008).

³⁹ See Hay, Borchers & Symeonides, § 4.12.

⁴⁰ See, e.g., *Re O’Keefe* [1940] 1 ALL ER 216, and critique in Cheshire, North & Fawcett, 159 *et seq.*

3. *Habitual residence*

Being mindful of the noted shortcomings of the competing principles of nationality and domicile, contemporary conflicts scholars have proposed a third option: *habitual residence*.

This connecting factor is gaining popularity in the international conflict of laws,⁴¹ and it is preferred in the modern European choice-of-law rules.⁴² In the international setting, this connecting factor became especially popular with the Hague Convention of 1980 of the Civil Aspects of International Child Abduction.⁴³ According to Article 3(a) of this Convention, “The removal or the retention of a child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law⁴⁴ of the State in which *the child was habitually resident* immediately before the removal or retention” (emphasis added).⁴⁵

Likewise, the recent E.U. Successions Regulation⁴⁶ employs this connecting factor both as a basis for jurisdiction for succession disputes, as well as a connecting factor for the designation of the law applicable to

⁴¹See de Winter, 348 *et seq.*

⁴² See Baetge, *Die gewöhnliche Aufenthalt im internationalen Privatrecht*, *passim* (1994).

⁴³ See Grammaticaki-Alexiou, *International Child Abduction According to the 1980 Hague Convention*, 93 *et seq.* (1996) [in Greek]; Beaumont & McElevy, *The Hague Convention on International Child Abduction*, 88 *et seq.* (1999). The Hague Conference on Private International Law makes frequent use of this connecting factor in its conventions. This connecting factor was first used in the Hague Convention of 1896 on Civil Procedure.

⁴⁴ The term “law” refers to the whole law of the country of the child’s habitual residence, by application of the doctrine of *renvoi*. See Grammaticaki-Alexiou, *International Child Abduction According to the 1980 Hague Convention*, 101; Grammaticaki-Alexiou, Papasiopi-Pasia & Vassilakakis, *Private International Law*, 261; Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, 445 *et seq.* (1980).

⁴⁵ See Grammaticaki-Alexiou, *International Child Abduction According to the 1980 Hague Convention*, 91 *et seq.*

⁴⁶ Regulation (E.U.) 650/2012.

the succession.⁴⁷

The determinative use of this connecting factor in the above examples and in several other international and European instruments renders its *definition* profoundly crucial. However, a precise definition of habitual residence is noticeably missing from the international conventions and European regulations. It is said that definition of this term has been resisted so that courts will enjoy more latitude to determine habitual residence in a more flexible way than would be the case for nationality or domicile.⁴⁸ Be that as it may, a lack of a definition may oftentimes create *legal uncertainty*.

The Council of Europe has provided the following non-binding definition (or description) of habitual residence:

... 7. The residence of a person is determined solely by factual criteria; it does not depend upon the legal entitlement to reside. 8. A person has a residence in a country governed by a particular system of law or in a place within such a country if he dwells there for a certain period of time. That stay need not necessarily be continuous. 9. In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence. 10. The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or an habitual residence, but a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence. 11. A person's residence or habitual residence does not depend upon that of another per-

⁴⁷ See Kindler, 'Vom Staatsangehörigkeits- zum Domizilprinzip: das künftige internationale Erbrecht der Europäischen Union', *IPRax* 44 (2009).

⁴⁸ See Cavers, 485.

son.⁴⁹

Therefore, it is left to the courts to determine what habitual residence is, and, as a matter of fact (*factum*)⁵⁰, where is it located.⁵¹ This determination is made with reference to objective factors (e.g., duration of stay in one place) as well as subjective factors (e.g., intent to settle in a particular place, relations and connections with one place, etc.).⁵² On the basis of these factors, habitual residence may be formed through the passage of time and it also may be lost instantaneously when the individual abandons a place and moves elsewhere.⁵³ However, during a person's absence, the old habitual residence will persist until a new

⁴⁹ Council of Europe Resolution 72(1) on the Standardization of the Legal Concepts of "Domicile" and "Residence" (1972). An express (though incomplete) definition is attempted in Article 19 of Regulation (E.C.) 593/2008 "on the law applicable to contractual obligations" (Rome I Regulation) ("1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business. 2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence. 3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract"). An analogous definition is also contained in Article 23 of Regulation (E.C.) 864/2007 "on the law applicable to non-contractual obligations" (Rome II Regulation).

⁵⁰ Conversely, the connecting factors of nationality and domicile are legal connecting factors (*ius*) determined in accordance with the law of State of nationality and the forum, respectively. See Maridakis, 254 et seq.; Hay, Borchers & Symeonides, §§ 4.8-4.10; Pérez-Vera, 445.

⁵¹ See North, 'Reform but not revolution – general course on private international law, 220 *RCADI* 26, 141 et seq. (1990-I).

⁵² Concerning the jurisprudence on the Hague Convention on Child Abductions, see Beaumont & McEleavy, 112 et seq.

⁵³ See Davis, Rosenblatt & Galbraith, *International Child Abduction*, 15 et seq. (1993).

habitual residence is established.⁵⁴

It should be obvious that habitual residence, as a connecting factor, is situated somewhere between nationality and domicile, though it is more closely related to domicile rather than nationality. However, it should also be clear that habitual residence and domicile are not one and the same. Habitual residence was designed as a less persistent and more flexible connecting factor. Although domicile and habitual residence could, and often do, coincide, technically it is still possible that habitual residence and domicile (particularly domicile of origin) may differ.

Nevertheless, confusion between these two concepts is evident in several statutes, especially in the United States, where it seems that the two terms are often used interchangeably.⁵⁵ For example, Article 38 of the Louisiana Civil Code provides the following definition of domicile: "The domicile of a natural person is the place of his habitual residence." Article 39 continues: "A natural person may reside in several places but may not have more than one domicile. In the absence of habitual residence, any place of residence may be considered one's domicile at the option of persons whose interests are affected."⁵⁶ It should be noted that "habitual residence" in the sense of these provisions must not be confused with the term "habitual residence" in Article 3 of the Hague Convention on Child Abductions as discussed above.

Confusion also exists as to the legal treatment of this connecting factor. Although the prevailing opinion is that this connecting factor

⁵⁴ But, especially in the case of habitual residence of minor children, it would be difficult to imagine an autonomous residence that would be unrelated to its parents' residence. In other words, the habitual residence of a child or an interdict will most like coincide with that of the parent or legal representative. See Grammatikaki-Alexiou, *International Child Abduction According to the 1980 Hague Convention*, 98; but also see Beaumont & McEleavy, 91 et seq.

⁵⁵ See Hay, Borchers & Symeonides, §4.14.

⁵⁶ Yiannopoulos (ed.), *Louisiana Civil Code*, Vol. I (2016). These provisions were revised in 2008. The revision comments under these provisions state that these Articles are based on the old Articles of the Louisiana Civil Code of 1870 and the jurisprudence of the Louisiana courts.

should be treated as a matter of fact (*factum*) and not law (*jus*), the opinion has been expressed that determination of habitual residence must be made by reference to the law of the forum and is subject to unrestricted appellate review.⁵⁷

Finally, the redactors of the recent E.U. Successions Regulation admitted that in some instances the designation of the habitual residence can be a complex endeavor.⁵⁸

In Place of a Conclusion: The Proper Personal Law in a Multicultural Society

It is often said that nationality, as a connecting factor, represents a “closed society” unwilling to assimilate or incorporate migrants and

⁵⁷ See Beaumont & McEleavy, 93. On the meaning and function of the connecting factor in a bilateral choice-of-law rules, see Vrellis, *Private International Law*, 79 *et seq.*

⁵⁸ According to recital 24 of the preamble to Regulation (E.U.) 650/2012: “In certain cases, determining the deceased’s habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travel ed from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.” See, in more detail, Odersky in Bergquist U. *et al.* (eds.), *EU Succession Regulation – Commentary*, Article 4 nos. 9 *et seq.* (2015); Dutta in *MünchKomm* Bd. 10, Article 4 *EuErbVO*, nos. 2 *et seq.* (6th edition. 2015); Hertel in *Rauscher (Hrsg.)*, *EuZPR/EuIPR Kommentar*, Vol. V, Article 4, nos. 22 *et seq.* (2016); Bonomi A. & Wautelet P., *Le Droit Européen des Successions*, Article 4 nos. 14 *et seq.* (2016); Caravaca, Davì & Mansel (eds.), *The E.U. Succession Regulation – A Commentary*, Article 4 nos. 4 *et seq.* (2016).

foreigners, whereas habitual residence, as a modern version of domicile, is more suited for the needs of an “open society” willing to accept multiple cultures.⁵⁹

This opinion may be overstating reality. A closer look could reveal that recognition of, and respect for, national differences among members of a society could be a sign of openness, whereas a tendency to assimilate different ethnic groups in one system of personal law could be perceived as a sign of exclusion of the right to be different. Take, for example, a Muslim immigrant in a European country. This individual may wish to obey Sharia law; she may feel connected to her motherland and may intend to be governed by her national laws. Application of the *lex patriae* will satisfy this request, whereas application of the *lex domicilii* will exclude such a possibility. Another solution would be to give this person a right to choose (and therefore determine) her own personal law.⁶⁰

In essence, the ultimate choice of the proper personal law rests on what type of society we envisage. If an “open society” is truly a goal, perhaps a choice of personal law would be warranted.⁶¹

Whatever the societal concerns may be, one truth is undeniable:

⁵⁹ See Basedow, 715, 736 *et seq.*

⁶⁰ For example, according to recital 38 of the preamble to the E.U. Succession Regulation (Regulation (E.U.) 650/2012): “This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.”

⁶¹ Public policy would also play a subtle counterpart to ensure a fair balance and a just result, in accordance with how the Romans envisioned the object of the law: “*Iuris procepta sunt haec: honeste vivere, neminem laedere, suum cuique tribuere*” (“The precepts of the law are these: To live honorably, not to injure another, to give each his due.”) (Corpus Juris Civilis, Institutes 1:1). See Vrellis, ‘Nationality and domicile in the era of globalization’ in *Krispis Foundation, The World Council of Hellenes Abroad (SAE) According to the Constitution and the Laws of Greece – History and Prospects*, 35 *et seq.* (2008).

Law may be written perfectly in the books, but the success of the law is measured in action, as applied in human society, as Professor Courakis very aptly reminds us.⁶²

⁶² Courakis, 'Towards a Greek immigration policy with humanity and an effective outcome', in Fouskas & Tsevrenis (eds.), *Contemporary Immigration in Greece: A Sourcebook*, 45 *et seq.* (2014); *idem*, 'Anti-corruption efforts in Greece: between law in books and law in action in "The art of crime"' (www.theartofcrime.gr), July 2015.