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Determining the law applicable to spouses with different nationalities

Filippo Tortorici

The 1942 Italian civil code provided in Article 18 of the general provisions on the law (preleggi) that the legal effects of a marriage between spouses with different nationalities would be linked to the law of the husband’s native country given the lack of a common *lex patriae*.

After the entry into force of Italy’s national constitution, Article 18 of the *preleggi* was called into question on various occasions for contravening the principle of equal treatment enshrined in Article 3 of the Constitution.

After initially ruling in numerous early judgments that this choice of law rule on the legal effects of marriage contained a constitutionally permissible, objective criterion based entirely on a regulative function, the Corte costituzionale (Constitutional Court) eventually found it to be unconstitutional in a 1987 decision.

The decision created a normative gap within Italian law which also had a ripple effect on other national legal systems. Trial judges devised different and in some cases novel solutions to fill this gap.

Law No. 218 of 31 May 1995 on the reform of Italian private international law created the necessary choice of law rules on the legal effects of marriage. Article 29 of this law states that personal relationships between spouses with different nationalities or with more than one common nationality are subject to the law of the state in which the marital life is primarily localised (*i rapporti personali tra coniugi aventi diverse cittadinanze, o più cittadinanze comuni, sono regolati dalla legge dello Stato nel quale la vita matrimoniale è prevalentemente localizzata*).

By allowing judges a range of discretion, this broad general rule necessitates a concrete, case-by-case determination of the law applicable to the effects of marriages between spouses with different nationalities. This is as much in the interest of the spouses themselves as it is in the interest of third parties – and last but not least takes account of the provision in Article 30 of Law No. 218/1995, which resorts to the choice of law rule on the legal effects of marriage for the determination of the law applicable to matrimonial property issues.

On a first and superficial reading, it could appear that recourse to the notion of “localisation” (*localizzazione*) of the couple’s marital life, taking into account the various private international law rules contained in other legal systems, could fuel contentions that the national legislature was seeking to establish the concept of “residence” (*residenza*) as connecting factor.

This would mean that the law of the state of marital residence would govern the personal relationships between spouses with different nationalities. The advantage of this solution is certainly that it would allow for a simple definition (for both the spouses and third parties) of the choice of law for the legal effects of marriage which is oriented around an objective criterion. It would also complement the other international rules in this area in which the same connecting factor was chosen. Moreover, the rule conforms to the basic principle of the Italian Law No. 218 reforming private international law, which allows wide latitude in terms of the autonomy of the parties.

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3. On the uncertainty experienced outside of Italy as a result of the unconstitutionality, see Tribunal grande instance Dunkerque (F) 29 November 1989 [1990] Rev. crit. droit int. priv. 326.


5. On the need for family law rules protecting spousal rights as well as the rights of third parties, see *Tortorici*, *Sul mutamento postnuziale del regime patrimoniale*, [1978] Il diritto di famiglia e delle persone 869.

6. On French private international law, see Cour de Cassation (F) 19 February 1963 – Chennouti, GA n. 31 also in: *Moneger*, *Droit international privé*, Paris (F), 2001, at 106 (with extensive references to other legal systems as well as international treaty law). In the absence of a common *lex patriae*, Tunisian law prescribes the marital residence as a connecting factor, as well as the place at which the marital contract was concluded, if the marital residence cannot be determined. (Article 48 of the Law on rules governing private international law of 9 November 1998, n. 94); see also *Mezghani*, *Commentaires du code de droit international privé*, Tunis (TN), 1999, at 116.
Certainly, applying other hermeneutic criteria reveals that, despite its simplicity, this solution is not tenable and thus cannot be followed.

The legislative history quickly shows that the choice of law rule on the legal effects of marriage does not intend the concept of prevalente localizzazione to be interpreted as connecting to the common residence of the married couple.

The private international law reform proposal of the Ministry of Justice stipulated that the personal relationships between spouses with different nationalities or with more than one common nationality would be subject to the law of the state in which both reside (diritto dello Stato nel quale entrambi risiedono) and/or only as a secondary and subordinate law, if the state of residence cannot be determined – the law of the state in which the marital life is primarily localised (prevalentemente localizzata).

The fact that the legislature knowingly deleted “residence” as a connecting factor when it passed the reform law shows that it may not be applied in the interpretation of the rule. Had the legislature desired such a connecting factor, there would not have been an amendment to the original draft of the statute. It could be argued that the legislature wanted to simplify the legal text by striking out any kind of reference to the common marital residence but keeping the link to the localizzazione of the marital life, insofar as this removed one of two connecting factors that were seen as equivalent. However, this runs counter to other rules of interpretation.

It should first be noted that in the draft statute, the reference to residence and to the localizzazione of the marital life were not used as equivalents, but rather as opposites. The linking of both concepts in such a way that the latter only becomes relevant when a common residence cannot be determined indicates that both connecting factors are to be applied subordinately and alternatively.

It is also worth mentioning that Law No. 218 did maintain residence as a connecting factor in other cases where it appeared opportune to do so. For determining the choice of law on adoption, for example, the legislature provided two competing sources of law as connecting factors: the law of the adoptive parents’ state of residence as well as the law of the state in which there marital life is primarily localised.

A proper interpretation therefore yields the conclusion that the Italian legislature intended to exclude as the decisive criteria the common spousal residence as connecting factor for the determination of both the legal effects of the marriage and resultant matrimonial property issues. The connecting factor of residence thereby drops out as the only and/or primary element for determining the applicable law or in any event for interpreting the legislative concept of the prevalente localizzazione of the marital life.

This necessitates a determination of criteria other than residence or criteria that are possibly antithetical to that factor which can be consulted when interpreting the concept of the localizzazione of marital life.

This leads to the understanding that by modifying the ministerial proposal, the legislature did not so much want to adopt a “quantitative” element – the impression generated with the spouses’ common residence and in the length of residence at a particular location. Priority should instead be accorded to the “qualitative” elements, such as the law of the state in which the marriage took place or in which the children of the marriage were born in accordance with a decision of the couple.

These circumstances, which certainly account for well qualified and meaningful time periods in the spouses’ marital life, are an outpouring of the free will of the parties and thus fit in with the constitutive orientation of the reform of Italian private international law; they can offer valuable elements for ascertaining the prevalente localizzazione of the couple’s marital life.

Similarly, the place where the spouses exercise their professions – for instance, the centre of their professional activities – should not be neglected.

The notion conveyed by the adverb “primarily” (prevalentemente) could lead to the presumption that the connecting factor put forward by the legislature is subject to change over time, with the consequence that the choice of law rule on the legal effects of marriage is alterable. To this extent, a decision based on the determination of a specific law could not grow in legal force, but rather must be understood as falling under the reservation of rebus sic stantibus (i.e. the unforeseeability doctrine).

However this may be, the lack of determinacy of the connecting factor chosen by the Italian legislature is unpersuasive. The ease of determining the law applicable to the personal relationships between the spouses and resultant matrimonial property issues using objective criteria that are as apparent to the spouses as to third parties is a principle of legal certainty requiring no additional justification.

The choice of a connecting factor for the intrafamily legal relationships that can change over time and that depends in large part on judicial discretion violates the principle of legal certainty. It most certainly does not facilitate the conduct of international relations in family law, an area of law with such significance for the private relationships of those involved.

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7 The draft reform is reprinted at [1989] Riv. dir. int. priv. proc. 932.

8 In agreement, see Mosconi, Diritto internazionale privato e processuale, Turin (I), 1999, at 90.