

Розділ 4

ПРАВО В СУЧАСНИХ УМОВАХ: СТАНОВЛЕННЯ, ОСОБЛИВОСТІ ТА ТЕНДЕНЦІЇ РОЗВИТКУ

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NATIONALITY AND HABITUAL RESIDENCE AS CONNECTING FACTORS IN PRIVATE INTERNATIONAL LAW

Having regard to the increased development of private relationships involving foreign elements in Ukraine over the past 20 years, the issue of identifying applicable substantive law to a foreign natural person – *lex personalis*, as it is named in Latin, has become a topical subject. In the context of private international law (hereinafter – PIL) *lex personalis* refers to a set of legal norms of a state or states with which an individual is legally connected, and which regulate legal capacity of that person, his capacity to act, his rights and obligations in family, inheritance matters etc. [1, p. 282; 2, p. 123]. The relevance of the issue is enhanced when it comes to his legal status in foreign jurisdictions

It should be noted that among legal tools of PIL there exist so called *connecting factors* – criteria that connect specific relations to the law of a particular state/states [3, p. 45–49]. In this article we will focus on *nationality* and *habitual residence* as connecting factors for determining *lex personalis*. The purpose of the study is to identify the general trend regarding the tactics as to the choice and application of *lex personalis*.

At the outset we need to give an explanation of these connecting factors. *Nationality* in this context may be defined as a principle according to which *lex personalis* shall be the law of the state of which a person is a citizen [4, p. 74–80]. On the one hand, nationality is relatively easy to determine, on the other hand, some difficulties may arise if one person has more than one nationality or a person is considered stateless.

As to the concept of *habitual residence* this is relatively new connecting factor compared to traditional ones such as nationality, domicile, place of residence, place of temporary residence, and has not yet been strictly defined. According to various sources: habitual residence means that a person lives somewhere regularly [5]; habitual residence should be based on a «close and stable connection» with a state; factors to be taken into account include the duration, regularity, conditions and

reasons for staying in a country [6, art. 23]; duration, regularity, conditions and reasons for the child's stay in a given place and the family's move there, the child's nationality, the place where they attend school, what languages they speak, as well as their family and social relationships [7, art. 51].

Traditionally, the application of the two criteria for determining *lex personalis* had emerged based on the legal traditions of two different legal systems: countries of the civil law traditions (*nationality*) and common law countries (*place of residence, habitual residence, domicile*). However, over the past decades, with the development of international relations in the field of private law, the growth of migration processes, the development of international human rights law, there has been observed a world trend to a mixed, more flexible approach to determining *lex personalis* involving the use of several criteria, and sometimes the dominance of a *place of residence, habitual residence* or a *place of stay* over the law of *nationality*.

Eventually, such an approach was enshrined in numerous international legal documents (Convention Relating to the Status of Refugees, Convention on the Status of Stateless Persons etc.), EU Regulations (Rome I, II, III Regulations etc.) and national legislations on private international law. For example, in conformity with parts 2, 3, 4 of article 16 of the Law of Ukraine on Private International Law if a natural person is a citizen of two or more states, his/her personal law shall be the law of that state with which the person has closer relation, in particular, has a permanent place of residence (has habitual residence) or carries out basic activity; the personal law of a stateless person shall be the law of the state where the person has the place of residence, or in case of its absence – the place of stay; the personal law of a refugee shall be the law of the state where she/he stays [8, art. 16].

Summing up, in the modern world, despite the traditional importance of *nationality* in determining *lex personalis*, the more effective and flexible law of *habitual residence (place of residence, domicile etc.)* is equally applied, depending on actual circumstances, or a combination of both, which allows observing the principle of the closest connection.

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