

**CITIZENSHIP AS A CONNECTING FACTOR IN
PRIVATE INTERNATIONAL LAW FOR FAMILY
MATTERS**

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**A. THE CRITERION OF CITIZENSHIP IN THE ITALIAN
EXPERIENCE: THE TEACHINGS OF PASQUALE STANISLAO MANCINI**

Citizenship was traditionally conceived of as an inclusion or exclusion factor in the relationship between citizens and foreigners with regard to entitlement to rights. It plays a vital historical role in family matters and, more generally, in matters relating to the civil status of people. This arises out of the idea that a national court, in the field of jurisdiction, is best suited to rule on such notions for reasons of cultural or spiritual affinity.

Briefly mentioning the Italian situation by way of introduction, the criterion of citizenship was rigorously and forcefully advocated by Pasquale Stanislao Mancini from the middle of the nineteenth century. Mancini directly inspired the first uniform code of law with regard to both the range of jurisdiction and determination of applicable law by Italian courts, and the Italian legislature has always remained true to his teachings. Not even the study Committee on Law 218/1995¹ gave any serious consideration to reviewing this criterion.

The criterion of citizenship has therefore held firm as a fundamental factor even though certain far from irrelevant changes have been introduced in practice. In procedural terms, a defendant's Italian citizenship is not in itself a general entitlement to jurisdiction (compare Article 3, paragraph I of the 1995 law with Article 4 of the 1940 Code of Civil Procedure) yet still retains an extremely important role in special rules covering the many issues involved in personal status, as will be seen shortly. Subsidiary criteria have been introduced in terms of the applicable law: examples include relationships between spouses of different nationalities, which are now subject to the law of the state where

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¹ In Italy, issues of private international law are governed by Law 218 of 31 May 1995, reforming the Italian system of private international law [Riforma del sistema italiano di Diritto internazionale privato, 1995, Italian OJ 128, 3 June 1995], which replaced ss 16–31 of the general legal provisions of the Civil Code.

they mainly conduct their married life. Several doctrinal questions have been raised over whether a more comprehensive reworking is justified based on the current situation, experience built up on the basis of the Brussels and Rome Conventions² and European Union actions on private international law.³

B. THE CHANGEOVER TO NEW CRITERIA

With this in mind, a review of the adherence to Mancini's principles is prompted not only by the European Union experience – the salient point being, “any discrimination on grounds of nationality shall be prohibited” (Article 18 of the Treaty on the Functioning of the European Union (TFEU)⁴) – but also by the extensive development of national laws on citizenship, beginning with Italian law. For many states, citizenship is effectively losing its ability to express an individual's emphatic membership of the community of people who make up a state's social base. In the not-so-distant past, the vast majority of national lawmakers aimed to avoid situations of dual nationality. The Council of Europe Convention – 6 May 1963 – on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality was a clear expression of this approach, also in accordance with the second Protocol of Amendment, opened for signature in Strasbourg on 2 February 1993 and ratified by Italy.⁵ As in the law on Italian citizenship (Law No 555 of 13 June 1912), many foreign laws provided that, on marriage, a wife should take on her husband's nationality, losing her own original nationality and only the father was able to pass on his nationality to their children.

² Respectively, Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, 27 September 1968 (“Brussels Convention”) and Convention on the law applicable to contractual obligations, Rome, 19 June 1980 (“Rome Convention”).

³ More generally, on the debate that has begun in the literature over the need to reform Law 218/1995, “reform of the Italian system of private international law”, with particular regard to the connecting factor of citizenship, see the interesting contribution by F Mosconi, F Pocar *et al.*, “E' ora di riformare la legge di riforma del sistema italiano di diritto internazionale privato del 1995?” [Is it Time to Reform the 1995 Law on the Reform of the Italian Private International Law System?] [2011] *Rivista di Diritto internazionale privato e processuale* 625. From a different point of view, MR Mauro, “Il regime della cittadinanza nei casi di successione tra Stati: la recente prassi in Europa orientale” [The Regime of Citizenship in Cases of State Succession: the Recent Practice in Eastern Europe] [2000] *Rivista di Diritto internazionale privato e processuale* 49.

⁴ [2010] OJ C83/47.

⁵ Among the EU Member States, only three (Austria, Denmark and the Netherlands) are bound by the nationality part of this Convention. Originally, Belgium, France, Germany, Italy, Luxembourg and Sweden were also contracting parties, but these countries denounced either the whole convention or the nationality chapter of the Convention. The Second Protocol was previously binding for France, Italy and the Netherlands, but France and Italy denounced the Protocol together with the nationality part of the Convention in 2008 and 2009, respectively. The Second Protocol is now only relevant for the Netherlands.

Today the need to respect equality between men and women has led to a radical reversal of this trend. Many legal systems, including the Italian system, facilitate the passing-on of nationality to a foreign spouse by either husband or wife and allow both the father and the mother to pass on their nationality to their children. This is done regardless of any social or political integration.

Italy is no longer the country of mass emigration that it used to be in Mancini's time and remained for many years after. Now exactly the opposite is true and in recent decades it has become the destination of significant flows of migrants who flock in from states with very different cultures to that of Italy. This means that Italian courts are often faced with difficulties that can only be overcome by stretching public policy to its limits.⁶ Even in the knowledge that loyalty to Mancini, in other words the criterion of citizenship, can be more respectful to the original cultural identity of foreigners when faced with the problem of migration, the majority doctrine nevertheless inclined towards an idea of "betrayal", not merely to bring "forum" into line with "jus", and hence the application of Italian substantive law in Italian courts, but also because this would make it possible to follow the prevailing attitude in uniform private international law. As early as the Hague Convention of 12 June 1902 relating to the settlement of guardianship of minors, the criterion of habitual residence appeared as an antithesis to the criterion of citizenship, replacing the more traditional criterion of domicile, upon the suggestion of the Italian delegate Augusto Pierantoni,⁷ who was incidentally Mancini's son-in-law.

The aim of this article is to analyse the evolution of the criterion of citizenship in private international law for family matters, having special regard to the issue of dual nationality in European family law, and focusing the scope of research more on jurisdictional bases.

C. CRITERION OF CITIZENSHIP FROM A EUROPEAN UNION PERSPECTIVE

The traditional approach described above has therefore been considerably diluted during the international development of "national" and "international" private law during the last century: in particular, in the context of marriage,

⁶ See, in this sense, S. Marinai, "Matrimonial Matters and the Harmonization of Conflict of Laws: A Way to Reduce the Role of Public Policy as a Ground for Non-Recognition of Judgments" [2012] *Yearbook of Private International Law* 255. However, the trend towards "contractualisation" of family law triggers a redefinition of public policy (*ordre public*) in this area: public policy in family matters is not only reducing itself to a smaller core of essential values, but is also undergoing a transformation that may be described as a gradual shift from an *ordre public de direction*, aiming primarily at the preservation of certain family models, to an *ordre public de protection*, focusing on the position of the individual and on the safeguard of his or her rights.

⁷ See the preliminary documents for this Convention, in particular Preliminary Document No 8, para 89.

the predominant criterion of nationality gradually gave way to the emergence of criteria based on domicile that arose alongside the original criteria or in some cases replaced them.

It is also well known that the legal concept of *citizenship*, in public law, has undergone considerable changes over time, partly due to an increase in the phenomenon of migration and partly due to expansion of international human rights law, which is granted to all, regardless of country of origin, based on the significant centrality of the individual as a “person”.

To remain in the area of private law, this change basically came about as a result of two lines of reasoning: firstly, the criteria of domicile identifies a more genuine connection between the court and the dispute and avoids the creation of exorbitant jurisdictions, above all when the nationality is connected to only one of the parties. This happens, for example, when the national court declares itself competent to rule on a matrimonial dispute between two spouses of different nationalities who have spent their entire married life in a third state. In this situation, the closest connection with the particular situation is clearly in the state where the spouses have established the main centre of their married life, even though the spouses are legally entitled to seise a different court that has very weak links with their married life.⁸

Secondly, the criterion of nationality creates applicational difficulties if the spouses are of multiple nationalities or multiple common nationalities, since it is not possible to establish *a priori* a hierarchy between the two (or more) nationalities in question. In such cases, the solution sometimes lies in choosing the nationality that maintains the closest links with the dispute – seeking to overcome the “rigidity” of the criterion of nationality with elements of greater flexibility that may be more objectively applied. Another approach has been to make the introduction of territorial criteria subject to a “failure”⁹ to apply

⁸ Under the application of the EU norms, in any case, they are not entitled to seise a court solely on the basis of the nationality of only one of them. See Art 3(b) of Regulation No 2201/2003: “nationality of both spouses or, in the case of the United Kingdom and Ireland ... the “domicile” of both spouses”.

⁹ This “failure” takes place whenever there is no common nationality, or also when there are multiple nationalities. See the Proposal for a Regulation on Matrimonial Property: Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final, 16 March 2011. In the absence of choice of law, the Commission lists three successive connecting factors: “(a) the law of the State of the spouses’ first common habitual residence after their marriage or, failing that, (b) the law of the State of the spouses’ common nationality at the time of their marriage or, failing that, (c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated” (Art 17). It has then to be observed that the successive paragraph of the Article specifies that “Paragraph 1(b) shall not apply if the spouses have more than one common nationality.” First of all, when more than one common nationality exists, the Commission proposal is clearly not in favour of a renewal of the “effective nationality” principle, in line with the CJEU jurisprudence. The formulation of Art 17 does not surprise. What is more interesting, however, is that the Commission decided in the proposal to change the last connecting

the criterion of nationality, as provided for by Italian private international law, with reference to the rules on conflict with regard to personal and property relationships between spouses.¹⁰

D. CONNECTING FACTORS IN COMMUNITY PRIVATE INTERNATIONAL FAMILY LAW: REGULATION (EC) NO 2201/2003

The gradual move away from the concept of nationality as a primary criterion in civil status matters has ultimately been enshrined in EU law, where the nationality of spouses has retained an entirely marginal role as a basis of jurisdiction.

Only two of the seven criteria of jurisdiction laid down in Article 3 of Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa)¹¹ actually refer to nationality. In one case (Article 3(a), final indent), nationality coincides with habitual residence in determining jurisdiction.¹² In the other case, nationality performs the independent function of identifying legal entitlement, but this is possible only where it is common between the spouses.

In other words, the nationality of only one of the two spouses no longer makes it possible to identify any genuine connection with the territory of a Member State, unless it is reinforced by an additional territorial factor (habitual residence) or is specifically common to both spouses. The earlier Community system and now the EU system therefore consecrated the transition from a concept of nationality as an element that was absolute and sufficient for the

factor, which was the *lex fori*, introducing the “closest link”, a notion which was particularly used in the field of contractual obligations. The closest link has to be found by the judge “taking into account all the circumstances”, in particular the *place where the marriage was celebrated*. This connecting factor may – or most often may not – find the applicable law in the law of the state of common nationality. Even though the proposal refers to matrimonial property regimes, it seems that European institutions are trying to find a common approach for the purpose of dealing with family law matters. This is the reason why the evolution reflected in the aforementioned proposal is of great interest.

¹⁰ Law 218/1995, Arts 29 and 30. More generally, on the debate that has begun in the literature over the need to reform Law 218/1995, reform of the Italian system of private international law, with particular regard to the connecting factor of *citizenship*, see the interesting contribution of Mosconi and Pocar *et al*, *supra* n 3, 625.

¹¹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (“Brussels Iia”), repealing Regulation (EC) No 1347/2000 (“Brussels II”), [2003] OJ L338/1.

¹² This occurs when the plaintiff has his habitual residence in the state of the court and is also a national of that state.

identification of jurisdiction, to a concept of qualified nationality,¹³ in other words backed by an additional element capable of guaranteeing the authenticity of the identified connection.

Over and above these cases, nationality in its classical sense retains a residual area of application in cases not covered by the courts of any EU Member State where it is therefore necessary for a respondent to avail himself – as provided for in Article 7 of Regulation 2201/2003 – of national exorbitant bases of jurisdiction.

In all, these courts can be used not only by national citizens but also by a citizen from another Member State who is nevertheless resident in the territory of the state in question. Conversely, application of a national exorbitant jurisdiction is nevertheless ruled out when the defendant is an EU citizen or is habitually resident in a Member State.

As these examples show, citizenship has cast off its mantle as a criterion of direct competence but still has a direct impact on the sphere of jurisdiction, guaranteeing Member State nationals a privileged position. More specifically, “EU” citizenship¹⁴ – in other words nationality of a Member State – now acts as a privileged jurisdictional element, both in a positive sense – by ensuring national courts can be used by citizens of other Member States – and also in a negative sense – by limiting the scope of national exorbitant jurisdictions to non-EU citizens or those who do not have their habitual residence within the EU.

The reasoning of the EU lawmakers is effectively summarised in the report accompanying the 1998 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters,¹⁵ which specifies that:

“The nationality or ‘domicile’ must be common to both spouses. Some States wanted to allow that condition to apply to only one spouse. That possibility was rejected since it would be equivalent to pure forum actoris, often with no real connection whatsoever with the State in question, and would thus be contrary to the spirit of the Convention.”¹⁶

¹³ B Ancel and H Muir Watt, “La désunion européenne: le règlement dit *Bruxelles II*” [2001] *Revue Critique de Droit International Privé* 403, 414.

¹⁴ See H Gaudemet-Tallon, “Le règlement 1347/2000 du Conseil du 29 mai 2000: compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs” [2001] *Journal de droit international* 397.

¹⁵ Council Act, adopted on the basis of Art K.3 of the Treaty on European Union, containing the (non-ratified) Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, Brussels, 28 May 1998, [1998] OJ C221/1. The text of the Convention is followed by the Borrás Explanatory report, [1998] OJ C221/27. In the period between the Maastricht and Amsterdam Treaties, when this intergovernmental system was in place, the so-called “Brussels II” Convention did not enter into force.

¹⁶ Point 33 of the Borrás Explanatory report. See elsewhere, in the Brussels IIa Regulation, recital no 3 referring to this Report, prepared by Dr Alegria Borrás (Professor of Private International Law, University of Barcelona): “Council Regulation (EC) No 1347/2000 sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and mat-

According to the spirit of EU law, common nationality was intended to guarantee a genuine and real connection with the situation, avoiding the creation of exorbitant jurisdiction associated with the citizenship of only one of the spouses. Even common nationality does not actually always guarantee a sufficient connection since it could well be the case that spouses of the same nationality have stably and permanently relocated their married life to a different country and thus most of the elements of the case in point will relate to this state.

The choice of the EU lawmaker is therefore aimed at providing a “supplementary” EU jurisdiction if the main bases of jurisdiction based on the habitual residence of the spouses (or one of the spouses) are insufficient to locate the jurisdiction within EU territory. For example, in case of a couple of EU citizens of the same nationality who have lived throughout their entire married life in a non-EU state, their EU citizenship acts as a “last resort” criterion that is used to reclaim and incorporate certain situations that would otherwise not be destined to have any connection with EU territory.¹⁷ This approach opens up the possibility of one or both spouses petitioning their own national court for the dissolution of their marriage when they return to their own state after the marriage breakdown.

E. CASE LAW OF THE FRENCH COUR DE CASSATION

One such example is provided by a case ruled on by the Cour de Cassation, concerning a couple of French citizens who had married in Iceland, where they had also spent their entire married life.¹⁸ One of the two spouses had turned to the French courts to obtain a divorce on the basis of national exorbitant jurisdiction provided for in Article 14 of the Code Civil¹⁹ even though the particular situation fell within the sphere of application of EU conflict-of-laws rules.²⁰ The Cour de Cassation held that the French court had jurisdiction

ters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The content of this Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter. ... At the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report concerning that Convention prepared by Professor Alegria Borrás.”

¹⁷ F Salerno, “I criteri di giurisdizione comunitari in materia matrimoniale” [2006] *Rivista di diritto internazionale privato e processuale* 70.

¹⁸ Cour de Cassation, 22.02.2005, in [2005] *Revue Critique de Droit International Privé* 515 with note by E Pataut.

¹⁹ Art 14 of the Code Civil provides for jurisdictional precedence for French nationals: “L'étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.”

²⁰ The Cour d'Appel had ignored the fact that this particular case should be regulated by EU rules of conflict, which indicated the competence of the French court by virtue of the national-

based on Article 3(b) of Regulation No 2201/2003, even if all elements of the marriage were located in a different country.²¹

Conversely, even when nationality is common, it cannot be used as a factor to exclude the competence of the court in the spouses' place of habitual residence because otherwise it would infringe the exclusive nature of the courts referred to in Article 3 of the Brussels IIa Regulation.²² For example, if two Algerian spouses who had spent their entire married life in France had petitioned for divorce before a French court, this court would undoubtedly have to declare itself competent because it is the court of the spouses' habitual residence. In this case the connection – conferred by the common nationality – with a country cannot have any significance for jurisdiction in the EU.²³ It might have significance for the third country, in this case Algeria, when that country's courts are seised.

ity of the spouses: as a consequence, it concluded that the French court did not hold jurisdiction because the husband who had filed a petition for divorce in France had tacitly waived his jurisdiction privilege guaranteed by Art 14 of the Code Civil because he had not opposed the divorce petition brought by his wife in Iceland.

²¹ E Pataut wrote: "L'arrêt est une illustration concrète de cette conception très extensive du champ d'application du règlement, puisque, en l'espèce, ce sont bien les règles communautaires qui vont imposer la compétence des juridictions françaises, alors même que le litige ne présente que peu de lien avec l'ordre juridique communautaire, puisque les rattachements ne convergent que vers un Etat non membre et un seul Etat membre". See also, in this sense, Case C-68/07 *Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403. The case was referred to the Court by the Swedish Supreme Court (Högsta Domstolen), which asked for a preliminary ruling on the following question: "The respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State. May the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of the Brussels II Regulation], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?" The Court confirmed that Arts 6 and 7 of Council Regulation (EC) No 2201/2003 "are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation".

²² Art 3.1 gives a large choice and reads as follows: "In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State: (a) in whose territory: the spouses are habitually resident, or – the spouses were last habitually resident, in so far as one of them still resides there, or – the respondent is habitually resident, or in the event of a joint application, either of the spouses is habitually resident, or the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or – the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there; (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses." In any case, once chosen, each of these bases of jurisdiction is exclusive.

²³ This was the mistake made by the Cour d'Appel d'Aix-en-Provence in its judgment of 14 May 2004, overturned by the Cour de Cassation judgment of 12 December 2006, in *Bulletin*, 2006, I, Issue 539, p 480.

F. COMMON NATIONALITY OF SPOUSES AND REGULATION (EC) NO 4/2009

In line with the latest developments discussed above, one of the most recent EU regulations²⁴ therefore identifies the common nationality of spouses as a subsidiary criterion and no longer as the main jurisdictional entitlement. Accordingly, Regulation No 4/2009 on maintenance obligations²⁵ provides for its application only if there is evidence that

“no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 and no court of a State party to the Lugano Convention which is not a Member State has jurisdiction pursuant to the provisions of that Convention.” (Article 6)²⁶

²⁴ The succession regulation is the most recent one: see Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. The EU Succession Regulation entered into force on 16 August 2012 but in principle will only apply to deaths on or after 17 August 2015. In this paper, we do not dwell on the Succession Regulation because it does not involve family law matters. In any event, the Succession Regulation is interesting to consider in this discussion, insofar as only one single criterion remains for determining the jurisdiction and the applicable law to cross-border succession: the last habitual residence at the time of death of the deceased (Art 4 and Art 21 para 1). Thus, for deaths as of 17 August 2015, criteria such as nationality or the location of the deceased's immovable property will no longer be the primary connecting factors for succession. However, nationality is the only basis for party autonomy in the Succession Regulation. The determined applicable law will govern the succession as a whole, embracing the worldwide assets of the estate, irrespective of their nature and whether they are located in another EU Member State or in a third state. Difficulties in determining the last habitual residence will evidently arise, for example, in case of frontier workers, persons having an itinerant life (for business or private reasons) including persons with seasonal stays in holiday homes abroad (“Majorca retiree”), temporary study stays in foreign countries, stays in a nursing home, etc. It will be for the CJEU to refine the concept of habitual residence and develop case law. See, among others, A Bonomi, “The EU Regulation in Matters of Successions” [2013] *Rivista di Diritto internazionale privato e processuale* 293.

²⁵ Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.

²⁶ A supplementary condition has therefore been introduced for the application of this entitlement, which is absolutely unprecedented in the history of EU regulations on judicial co-operation in civil matters. This condition aims to protect not only EU nationals from the application of a jurisdiction that is clearly considered to be not particularly genuine but also nationals from non-EU Member States who are party to the Lugano Convention, in other words Iceland, Norway and Switzerland, by means of a material referral (in other words a referral to the connecting factors referred to in the above convention). As a consequence, the court of the Member State of common nationality of the parties must establish that none of the jurisdictions referred to in Arts 3, 4 and 5 is applicable before it can ensure its competence to rule on a claim relating to a maintenance obligation and, in this event, must also establish on the basis of the Lugano Convention that none of the courts in one of the non-EU states that is party to this convention is competent. The seised court can only declare itself competent as the court of the state of the spouses' common nationality if the outcome of this twofold test is negative.

Regulation No 4/2009 has been applicable since 18 June 2011. It allows some parties the freedom to choose certain jurisdictions,²⁷ the place where one of the parties is a national or has his or her habitual residence, or – in the case of a petition associated with the matrimonial dispute – the jurisdictional authorities of the place in which the spouses (or former spouses) had their last habitual residence provided that residence lasted for at least one year.

Secondly, over and above the jurisdictional options described above, the Regulation also allows for the possibility of an EU court declaring itself competent if a procedure cannot reasonably be attempted or carried out or has proved impossible in a state not governed by the Regulation with which the dispute has a close connection. This *forum necessitatis* mechanism essentially allows recourse to a court that would not normally be competent to rule on the dispute if the same petition cannot effectively be filed or processed in the state of the competent court. This can only happen when there is no other basis of jurisdiction that could be applied by an EU court under the Regulation.²⁸

These two new developments undoubtedly concern a highly specific operating sector, in other words the subject of maintenance obligations, but nevertheless represent – with reference to their own different situations – two factors that are not absolutely novel within the field of private international law as it applies to families.²⁹

On the one hand, Community law has introduced the factor of the will of the parties in the determination of the court competent to rule on the matri-

²⁷ The recent “Rome III” Regulation (1259/2010) is certainly in line with this approach. See Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (“Rome III Regulation”) [2010] OJ L343/10. This Regulation establishes enhanced co-operation within the scope of the law applicable to divorce and separation and is based on the acknowledgement that the spouses can only choose a law that has a strong connection with their marriage in respect of the law applicable to their divorce. According to the Regulation, this connection mainly consists of the common habitual residence of the spouses or the last common habitual residence of the spouses if one of them still resides there, followed by the citizenship of one of the spouses and ultimately the *lex fori*. If no agreement is reached, the applicable law is determined on the basis of a set of objective connecting factors intended to ensure that the process of weakening or dissolving the bond is governed by a legal system with which the spouses have a close connection. In general, the Regulation gives precedence to the criterion of the habitual residence of the spouses at the time when the petition was filed with the judicial authority. The precedence accorded to the residence of the spouses over their nationalities is motivated by the advantages that this connecting factor offers over the criterion of their nationality. On this topic, see among the first comments in the literature, I Ottaviano, “La prima cooperazione rafforzata dell’Unione Europea: una disciplina comune in materia di legge applicabile a separazioni e divorzi transnazionali” [2011] *Diritto dell’Unione Europea* 113. See also P Franzina, “The Law Applicable to Divorce and Legal Separation Under Regulation (EU) No 1259/2010 of 20 December 2010” [2011] *Cuadernos de Derecho Transnacional* 85, 116.

²⁸ The second para of Art 7 of Regulation No 4/2009 states that the *forum necessitatis* mechanism can be applied if the dispute has a sufficient connection with the seised court.

²⁹ Brussels II and, in an extended way, Brussels IIa already allowed for the possibility of a choice of jurisdiction with regard to parental responsibility.

monial dispute;³⁰ on the other hand, it has provided for a mechanism hitherto unknown in EU law in order to bring certain rare disputes that have a strong connection with non-EU countries but cannot reasonably be brought there within the sphere of EU jurisdiction: the same approach is used in the recent Succession Regulation.

G. DUAL NATIONALITY IN EUROPEAN UNION COURT OF JUSTICE CASE LAW

Regulation 2201/2003 does not specify what happens if the spouses hold several nationalities or even if they hold more than one nationality in common.³¹ The Borrás report simply states that “the judicial bodies of each State will apply their national rules within the framework of general Community rules on the matter”.³²

The rule of conflict between the different nationalities should therefore be sought in the national rules of conflict. In the case of the Italian legal system, this should lead to the application of Article 19, second paragraph, of Law 218/1995 which, in the event of conflict between nationalities, states that the one with a closer connection with the case should take precedence except in the case of conflict with Italian citizenship, in which case the latter takes precedence.³³

In both cases, the application of Article 19, second paragraph, is, however, at odds with the aim of EU law: Italian citizenship taking precedence over another EU citizenship could be at odds with the general prohibition imposed by EU law on discriminating on the basis of nationality and could ultimately be detrimental to the aim of uniform application of EU law. This would happen, for example, if two spouses were both Italian nationals and also had the nationality of another EU country.

In this situation, the two “European” nationalities should clearly be seen as exactly equal and the national court must assess them as two independent

³⁰ Before the Maintenance Regulation, maintenance fell under the Brussels I Regulation, and this regulation, as the Brussels Convention before it, already permitted forum choices. On the fact that EU legislation separates three different aspects of divorce, ie divorce as such, maintenance and matrimonial property, and, as a consequence, ignores the ties between these three issues, see M Harding, “The Harmonisation of Private International Law in Europe: Taking the Character Out of Family Law?” (2011) 7 *Journal of Private International Law* 203.

³¹ See T Kruger and J Verhellen, “Dual Nationality = Double Trouble?” (2011) 7 *Journal of Private International Law* 601.

³² As seen *supra* n 16, at the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report on the 1998 Convention prepared by Professor Alegría Borrás, [1998] OJ C221/27. The reference here is to para 33, p 39.

³³ On this topic, see also the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930).

jurisdictional entitlements with equal dignity. Cases of dual nationality have been increasing in the last few years due to several factors, including the free movement of persons and the enlargement of the European Union.³⁴ This state of affairs requires a response capable of superseding, or limiting, the adverse effects of the differences existing in the legislation of Member States as far as family law is concerned. The Court of Justice of the European Union (CJEU) has ruled several times on this point, departing from the international principle of “effective” nationality. In order to exercise the freedom guaranteed by the Treaty, the Court states that the legislation of a Member State may not limit the effects of citizenship of another Member State by imposing an additional condition for recognition of that citizenship (as occurred in the *Micheletti* and *Garcia Avello* judgments). In *Micheletti*³⁵ a person with dual Argentinean and Italian nationality asked for a permanent residence card in Spain as a Community national. The Spanish authorities refused according to Spanish law which, in cases of dual nationality, gives priority to the nationality of the last residence, in that case the Argentinean one. The Tribunal Superior de Justicia of Cantabria referred a question to the CJEU for a preliminary ruling on the interpretation of some provisions of the then EC Treaty and of relevant secondary EU legislation.³⁶ The CJEU held that even though “[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality”, the legislation of a Member State cannot “restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty”.³⁷ The CJEU developed an “autonomous” standard different from the international notion of “effective nationality” later

³⁴ European Commission, *Green Paper on applicable law and jurisdiction in divorce matters*, COM(2005) 82 final, 14 March 2005, para 1. Recently, European Commission, “Clearer Rules for International Couples”, press release, MEMO/10/100, 24 March 2010: “There are around 122 million marriages in the EU, of which around 16 million (13%) are considered ‘inter-national’ (couples of different nationalities, couples living apart in different countries or living together in a country other than their home country). There were more than 1 million divorces in the 27 EU Member States in 2007, of which 140,000 (13%) had an ‘international’ element”.

³⁵ Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

³⁶ Reference was made in particular to Arts 3(c), 7, 52, 53 and 56 of the EC Treaty, and to Council Directive No 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services ([1973] OJ L172/14).

³⁷ *Micheletti*, *supra* n 34, para 10. See S De Vido, “The Relevance of Double Nationality to Conflict-of-Laws Issues Relating to Divorce and Legal Separation in Europe” [2012] *Cuadernos de Derecho Transnacional* 222; HU Jessurun D’Oliveira, “Case C-369/90, *MV Micheletti and others v Delegación del Gobierno en Cantabria*, Judgment of 7th July 1992” [1993] *Common Market Law Review* 623; D Ruzie, “Nationalité, effectivité et droit communautaire” [1993] *Revue générale de droit international public* 107.

developed by the International Court of Justice in its *Nottebohm* judgment.³⁸ It is worth pointing out, though, that under international law “effective nationality” comes into play for the purpose of identifying the state entitled to exercise diplomatic protection. On the contrary, in *Micheletti* what was at stake was the exercise of one of the four liberties enshrined in the Treaty of the European Community. The CJEU has consistently supported this view in its subsequent case law.³⁹

The same principle has been clarified with reference to private international law matters in a case regarding two spouses who had both Hungarian and French citizenship and had filed two separate petitions for divorce, one with a Hungarian court and another with a French court.⁴⁰ In a case such as this, where there is a “perfect” conflict between two legal titles, the EU Court clarified that “the court seized cannot overlook the fact that the individuals concerned hold the nationality of another Member State”, as the spouses would otherwise be precluded “from relying on Article 3(1)(b) of that regulation before a court of the Member State addressed in order to establish the jurisdiction of the courts of another Member State, even though those persons hold the nationality of the latter State”.⁴¹ In other words, the two common nationalities of the spouses are equivalent for the purpose of jurisdiction. The CJEU further clarified in this connection that “there is nothing in the wording of Article 3(1)(b) to suggest that only the ‘effective’ nationality can be taken into account in applying that provision”.⁴²

³⁸ International Court of Justice, judgment of 6 April 1995, *Nottebohm, Liechtenstein v Guatemala*, p 22: “International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”

³⁹ Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, para 28: “That conclusion [the fact that a person, having the nationality of a Member State, although resident in another one, has a link with Community law, para 27] cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter. It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty”. On this case, see, among others, P Lagarde, “Note to Garcia Avello” [2004] *Revue Critique de Droit International Privé* 184.

⁴⁰ Case C-168/08 *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)* [2009] ECR I-6871.

⁴¹ *Hadadi*, *ibid*, para 41.

⁴² *Hadadi*, *ibid*, para 51. The reasoning of the Court was in line with the Opinion of Advocate General Kokott, delivered on 12 March 2009. Even though the Advocate General recognised “the principle of the priority of the more effective nationality”, which “has long been recognised in international law, where it affects the right of States to afford diplomatic protection”

A different situation could apply in the case of conflict between an EU nationality and a non-EU nationality: in this case, the need to avoid situations of discrimination under EU law would no longer apply and the automatic precedence of national citizenship within the EU (as in the case of Article 19, second paragraph, final indent of Law 218/1995) could well be justified by the aim of ensuring the application of EU law as opposed to national exorbitant jurisdictions.⁴³

In the same way, Article 19, second paragraph, first indent would not be applicable. As already stated, this establishes the precedence of the nationality that has a closer connection with the situation: the practical application of this subsidiary criteria would lead to a substantial distortion of the hierarchy between the legal titles referred to in Article 3 of Regulation No 2201/2003. More specifically, this would mean relinquishing the criterion of nationality to effectively give hierarchical precedence to the criterion of habitual residence. In other words, in the economy of the judicial system outlined by the EU legislature, nationality has an absolute value that cannot be adapted in the light of the actual situation. The solution of literally interpreting Article 3(1)(b) of Regulation No 2201/2003 is undoubtedly the most appropriate, including in terms of predictability of the jurisdiction.

If the criterion of nationality is interpreted without any reference to rules of national conflict of laws, but purely and simply applying the jurisdiction of any state of which both spouses are nationals, there is no doubt that the spouses will reasonably be able to predict the court to which they should submit their petition for dissolution of the marriage.⁴⁴

(para 52 of the Opinion), she affirmed that “if, in the case of persons of dual nationality, account were taken only of the more effective nationality in the context of Article 3(1)(b), this would lead to a restriction of choice. As habitual residence would be of fundamental importance in determining the more effective nationality, the forum of jurisdiction under Article 3(1) (a) and (b) would often be the same. In the case of persons of dual nationality, this would lead in practice to an order of precedence of the grounds of jurisdiction in subparagraphs (a) and (b), which is precisely what is not wanted. Conversely, a couple with only one common nationality could still seise the courts in their home State even if they had long ceased to be habitually resident there and now had only limited real contact with that State” (para 59).

⁴³ The Court of Justice expressed this principle in the *Micheletti* judgment, *supra* n 34, which concerned a different legal sector) by virtue of which a person who holds both the nationality of a Member State and the nationality of a third-party state must be treated as having citizenship of an EU Member State in other Member States. Gaudemet Tallon, *supra* n 14, 393.

⁴⁴ F Mosconi, “Giurisdizione e riconoscimento delle decisioni in materia matrimoniale secondo il regolamento del 29 maggio 2000” in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale scientifica, 2004) 2231, in particular 2240. TM de Boer, “Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation” [2002] *Netherlands International Law Review* 315: “Jurisdictional criteria should be unambiguous. If the courts are allowed to take account of the actual circumstances in weighting the significance of a person’s nationality, it will be difficult for a petitioner to foresee whether or not the court seised will assume jurisdiction.”

This solution also offers the advantage of observing the principles laid down in Article 3(1)(b) and, in general, the purpose of Regulation No 2201/2003 which, as already stated, is to facilitate dissolution of the marriage and allow the spouses to achieve this result in the simplest possible manner. Otherwise there would be a risk of making the application of EU rules subject to supplementary national criteria that would in practice bring about a different effect, which could potentially be at odds with the principles of EU law.

The CJEU gave significant confirmation of this in the judgment mentioned above, when one of the spouses effectively invoked the greater “clarity” of one of the two nationalities to justify the precedence of the seised court.⁴⁵ The Court stressed the lack of influence of factual elements in assessing this jurisdictional entitlement, even in cases where the nationality reveals no true connection with the seised court.⁴⁶ Consequently, even when the nationality only reflects a legal and not a factual connection, it is still able to identify a jurisdictional entitlement that is legitimate under the terms of Regulation No 2201/2003.

Numerous national laws consider cases of people with more than one nationality⁴⁷ and give precedence to the national citizenship. For example, in Italy, Article 19 of Law 218/1995, even though it establishes as a general principle that the applicable law is that of the state with which the individual has the closest ties in the case of a person with more than one nationality, declares that if the nationalities include Italian, “this should prevail”. This matter was assessed in the sphere of application of the Hague Convention of 1961 on the powers of authorities and the law applicable in respect of the protection of infants. Even this instrument does not cover the question of dual nationality and the explanatory report refers readers to general principles applicable to

⁴⁵ In the case in point, the spouses had actually married in Hungary, their native country, and after one year they had moved to France, the country where they had lived for more than 20 years and where they had become *naturalised*, thus becoming French nationals. According to the documents before the Court, in the judgment which is being contested in the main proceedings, the Paris Court of Appeal held that the jurisdiction of the Pest Court, to the extent that this was founded on Mr Hadadi’s Hungarian nationality, a ground of jurisdiction not recognised by the French rules on international jurisdiction, was “in reality very flimsy”, whereas the jurisdiction of the courts where the marital home is situated, ie France, was by comparison “particularly clear”. See, *Hadadi*, *supra* n 39, para 34.

⁴⁶ The Court judgment aims to safeguard the aim of the EU Regulation and the same approach to jurisdictional entitlements established by the law. The Court upheld the plaintiff’s choice of the various courts referred to in Art 3, which represent jurisdictional entitlements previously assessed as objective and specifically genuine by EU law (in particular, paras 41–43). The Court emphasised that recourse to the criteria of “effective precedence” would essentially lead to a downgrading of the criterion of nationality in favour of that of habitual residence, which is at odds with the alternative and exclusive nature of the courts referred to in Art 3 (para 54 in particular).

⁴⁷ In this sense, V Egea, “Compétence européenne: divorce d’époux ayant une double nationalité” [2009] *Recueil Dalloz* 2106.

cases of dual nationality. It is unclear whether these criteria⁴⁸ should be those of international law or the principles in force within the private international law norms in each state party to the Convention (which are different from one another). In this way, some countries observe the rule whereby the citizen belongs to the seised state and he is considered to be a national of that state even if he holds a second nationality, with consequent application of *lex fori*, while other states opt for the solution of observing the most effective regulations, in other words referring to the law of the country with which the child has the greatest ties.⁴⁹ If we go, as is proper, beyond the dictates of Article 19 of Law 218/1995, this solution was also accepted by the United Sections of the Italian Court of Cassation (Cassation No 1 of 9 January 2001)⁵⁰, which state:

“In the case of a child with dual Italian and German nationality, it is not possible to apply Article 4 of the Convention, which establishes the precedence of measures adopted by the Court in the State of which the child is a national over those adopted in the place of habitual residence; neither is it possible to apply Article 19 of Law 218/1995 which provides for the precedence of Italian nationality in the event of more than one nationality because, since the interested parties are European Union citizens, this would give rise to discrimination based on nationality, which is forbidden under Article 12 of the EC Treaty; the jurisdiction of the State with which the child has the closest connection must therefore prevail. In the case in point, this is the State, ie Germany, where the child has his habitual residence.”

In this case too, however, as in the case of application of foreign law, the cross-cutting nature of the subject and the existence of doubts over whether an instrument adopted under enhanced co-operation agreements can rule on such a debatable matter meant that it was considered preferable not to introduce a specific legal provision. The matter is dealt with in recital 22 of the Regulation No 1259/2010 which refers, in the case of the rules governing multiple nationality, to national legislation, in “full observance of the general principles of the European Union”.⁵¹ This reference is very apt given that the principles enshrined in numerous rules of private international law, including Italian law, always apply the rule of prioritising the national law of the seised state (Italian law, in Italy), except when two EU nationalities are held, in which case

⁴⁸ Again, the reference is to the Hague Convention (1930) on Certain Questions relating to the Conflict of Nationality Laws.

⁴⁹ On this point, F Mosconi, *La tutela dei minori in diritto internazionale privato* (A Giuffrè, 1965) and M Franchi, “Riforma del diritto internazionale privato” [1996] *Le Nuove Leggi Civili Commentate* 1235.

⁵⁰ MG Civinini, “Note” [2001] *Famiglia e Diritto* 282.

⁵¹ Recital 22 of the Regulation No 1259/2010: “Where this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union.”

the now consistent CJEU case law considers that giving precedence to the law of the court constitutes (forbidden) discrimination on the basis of nationality,⁵² based above all on principles laid down in the *Garcia Avello* judgment. It should nevertheless be considered that Article 19 of Law 218/1995, which states that Italian nationality should take precedence, could not in any case be applied because this rule is not considered applicable to conjugal relationships, whether they are being formed or dissolved.⁵³

It is assumed that the spouses both have dual nationality and also dual nationality of the same states. In Regulation No 2201/2003 on jurisdictional competence alone, the alternately applied jurisdictional entitlements are habitual residence, common nationality and domicile. In the Proposal for a Regulation of 17 July 2006,⁵⁴ intended to modify this Regulation, the prorogation of jurisdiction is limited to courts in states with which the spouses have substantial ties: the parties can continue to seise a court in the state of which both are nationals (as in Regulation No 2201/2003). The solution to cases of dual nationality could only be that proposed by the CJEU in the *Hadadi* case. We are nevertheless bound to ask whether the Court would reach the same conclusion if the applicable law were observed: in other words, if the court hearing the case did not have to treat the laws of both the states of which the parties are nationals as though they were on the same level. Regulation No 2201/2003 does not contain provisions on the applicable law. The Proposal for a Regulation of 17 July 2006 states with regard to the choice of applicable law that this should be dictated by compliance with the principle of “proximity”. In the absence of choice, the Commission identified successive criteria that recall:

“the law of the State where the spouses are habitually resident at the time the court is seised; or, failing that, where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was

⁵² See J Basedow, “Le rattachement à la nationalité et les conflits de nationalité en droit de l’Union Européenne” [2010] *Revue critique de droit international privé* 427; E Calò, *Il diritto internazionale privato e dell’Unione Europea nella prassi notarile, consolare e forense* (A Giuffrè, 2010), 77.

⁵³ Calò, *ibid.*, 205.

⁵⁴ COM(2006) 399. On 17 July 2006 the Commission adopted, on the basis of Art 61(c) and Art 67(1) of the Treaty establishing the European Community (now Art 81(3) of the Treaty on the Functioning of the European Union), a proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (“Rome III”). The aim was that the Council should adopt the proposal by unanimity, after consulting the European Parliament. The European Parliament gave its opinion on the proposal on 21 October 2008. The Commission’s proposal was discussed in the Committee on Civil Law Matters (Rome III), beginning in October 2006. However, unanimity could not be reached on all the proposed solutions regarding applicable law rules in the Regulation or on the proposed derogations. On 5 and 6 June 2008 the Council accordingly took note of the lack of the unanimity needed to go ahead with the Rome III Regulation, and of the existence of insurmountable difficulties that made unanimity impossible both then and in the near future. It observed that the objectives of Rome III could not be attained within a reasonable timescale by applying the relevant Treaty provisions.

seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that, of which both spouses are nationals at the time the court is seised; or, failing that, where the court is seised.” (Proposal for a Regulation of 17 July 2006, Article 4)

In the case of dual citizenship, the spouses could therefore choose to apply to the court of one of the two states of which they are nationals and to establish the law of another state of which they are nationals as the applicable law. In this case, following the reasoning of the Court, we cannot fail to conclude that the court applied to could not deny the application of the law of another Member State merely because the spouses had lived for many years in the state where the court is located. The autonomy of the parties takes precedence, provided the guidelines laid down in the Regulation are complied with. Greater autonomy of the parties and the introduction of criteria such as habitual residence will certainly reduce problems associated with cases of dual citizenship.

H. EUROPEAN UNION CITIZENSHIP: THE ZAMBRANO CASE

On the subject of EU citizenship, the judgment by the CJEU in the *Zambrano*⁵⁵ case is a genuine turning point in the Court’s case law.

The Luxembourg court traditionally treats matters of this kind as intimately associated with principles of free circulation of people between Member States (and in particular with exercising the right to free movement in Member State territories by EU citizens). Briefly, the approach adopted was that of progressive integration on a transnational scale leading to a convergence between the statuses of other EU Member State nationals and citizens in host countries. What emerges from a reading of the *Zambrano* judgment is a complete overturning of this approach, albeit partly anticipated by cases such as *Zhu and Chen* (Case C-200/02)⁵⁶ and *Rottmann* (Case C-135/08).⁵⁷ The CJEU in fact abandoned its traditional transnational approach and opted for a decidedly “European” approach. Gerardo Ruiz Zambrano is a man of Colombian nationality who decided to leave his country to go and live in Belgium together with his wife. The spouses’ claims for the granting of the right to asylum in

⁵⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office National de l’Emploi* [2011] ECR I-1177.

⁵⁶ [2004] ECR I-9925.

⁵⁷ *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449. The Court repeats that Member States “have the power to lay down the conditions for the acquisition and loss of nationality” (at para 39), but they must “have due regard to European Union law” (at para 45). For the first time, the Court explains what the latter affirmation means: “in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law” (para 48).

Belgium were rejected by the competent authorities even though the order to leave the country was followed by a clause of non-repatriation to Colombia given a situation of persistent civil war in the Latin American country. Despite these rejections, the two spouses nevertheless took steps to regularise their position as residents of the municipality of Schaerbeek and Mr Zambrano gained permanent employment with an indefinite contract. During their stay in Belgium, the couple had two children. Because the children were born within Belgian territory and neither of the parents took any steps for them to be acknowledged as Colombian nationals, both children under Belgian law must be considered Belgian and EU nationals. Mr Zambrano submitted an application for a residence permit, but this was rejected. In March 2006, he submitted an appeal against this decision. As a consequence of this, pending the appeal, Mr Zambrano was granted a special residence permit. The appeal was rejected and this decision was appealed against before the Brussels Tribunal du travail. The prejudicial questions raised by the national court and analysed jointly by the CJEU aim to clarify the limits of applicability of the TFEU on EU citizenship. In particular, the Luxembourg Court was called upon to establish whether these TFEU rules entitle a citizen of a third party state with care of the children who are young and citizens of a Member State (and therefore of the Union) to the right to reside in the state of which the children are citizens and exemption from the need for a work permit. The thrust of the decision in question is to disassociate the right to EU citizenship from the right to free movement between Member States. In essence, with the *Zambrano* case, the CJEU started to treat EU citizenship as a right in itself. The Court clarifies that Directive 2004/38 (on the right to move and reside freely within the territory of the Member States) is not applicable in the case in question, concerning EU citizens who visit or reside in Member States other than that of their citizenship and of their family members. Conversely, the CJEU rewrote the boundaries of Article 20 of the TFEU and the range of rights associated with the status of EU citizens. To be a citizen of the European Union, it is necessary to be a citizen of one of the Member States, and these Member States are responsible for establishing the requirements for obtaining citizenship. As Belgian citizens, Mr Zambrano's children are undoubtedly EU citizens. Since EU citizenship is the fundamental status of Member State citizens,⁵⁸ Article 20 of the TFEU must be read in the sense that it prevents any restriction to the full and effective enjoyment of the rights associated with this status. According to the Court, therefore, denying the right of residence to a parent who is a citizen of a third-party country and has charge of two children who are citizens of an EU Member State represented excessive compression of the children's

⁵⁸ See Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31: "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality."

rights by virtue of their EU citizenship and was an obstacle to their full and effective enjoyment. Moreover, an individual who is a citizen of a third-party state must not be denied a work permit either because otherwise he would risk not having the necessary resources to meet the primary requirements and needs of his household.

The CJEU therefore handed down a judgment that was extremely significant. The potential impact of a precedent of this kind on EU citizenship regulations was clear. Above all, it implied a move away from a transnational or multinational idea of EU citizenship toward a unitarian and “European” viewpoint. While in the past EU citizenship was seen as a tool for promoting the enjoyment of rights associated with the status of being citizens of a Member State, now it has risen to the status of being a key factor for protecting a fundamental core of rights. These include, and it could not be otherwise, the right of children not to be separated from their parents or, in any case not to be forced to leave EU territory to follow their parents *sans papiers*. Rights associated with EU citizenship are therefore disassociated from the specific exercise of free circulation, ultimately acting as a main pillar for the protection of fundamental rights granted by the Nice Charter and the European Convention on Human Rights. It is difficult to imagine the repercussions of this judgment on EU immigration policies. One detail nevertheless clearly emerges that cannot be underestimated: the judgment represents a paradigm shift by the CJEU, whereby EU citizenship changes from being a means to an end, with a great significance relating, *inter alia*, to private international law issues.

I. STATELESS PERSONS AND REFUGEES

An additional note must be added on the situation of stateless persons and refugees: these categories of individuals cannot use citizenship either as an independent jurisdictional entitlement or as a contributing entitlement since it is not possible to identify a stable legal tie (stateless persons) or sufficiently reasonable tie (refugees) in their situations.

Internationally, the country of citizenship of these individuals is identified as the State where they are domiciled or resident. For example, this was the solution adopted by the Geneva Convention of 1954 on the status of stateless persons. Article 12.1 of the above Convention states that:

“The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.”

It is not a viable approach to borrow the solution adopted to determine the applicable law, and transpose it for the purposes of determining jurisdiction

because this would introduce a jurisdictional entitlement based on a more tenuous connection (domicile) than provided for in the Regulation (habitual residence):⁵⁹ this situation could be justified only if it is not possible to identify a more significant territorial link in this particular case (habitual residence, in other words).

J. CITIZENSHIP IN THE UNITED KINGDOM AND IRELAND: DOMICILE

Probably one of the most demanding yet fascinating challenges of the Brussels IIa Regulation is the need to wed the concept of citizenship – typical of civil law countries – with the different connecting factor adopted by common law countries, in other words domicile.

The concept of domicile is foreign to the modern legal tradition of civil law and the demarcation line between this and concepts of habitual residence on the one hand and citizenship on the other is not always easy to determine.

The concept of a domicile of choice requires a connection with a given territory that is intended to be indefinite and not merely habitual. In other words, a domicile of choice represents the permanent – and not simply habitual – residence of a subject, ie the place that an individual has established as the centre of their interests for a time period that is intended to be indefinite.⁶⁰

The premise for the existence of domicile does not merely consist of a territorial link with a state but also a demonstration that an individual belongs to the social community of that state.

Domicile is nevertheless characterised by greater flexibility than the criterion of nationality. While in civil law systems, citizenship is linked with rigid legal premises and any event that changes those premises is subject to a specific appraisal procedure, under the laws in the UK and Irish law domicile – in this case being compared to citizenship as a connecting factor – is subject to a

⁵⁹ The concept of habitual residence is one suited to modern conditions where people move around the world with greater ease than in the past and is ideally suited for purposes such as divorce jurisdiction or child abduction where the aim is not to establish a “real home” but rather to identify a jurisdiction with which a person has a legitimate connection (although he may be more closely connected with some other country).

⁶⁰ Supreme Court of Ireland, 5 March 2002, case of *PK v TK* [2002] IESC 15; [2002] 2 IR 186. In the conclusion Fennelly J, giving the judgment of the Court, said that in order for a person’s domicile to change it must be shown that the person “had formed the settled purpose of residing indefinitely” in the new country. For a fuller examination of the concept of domicile in England and Wales and the characteristic manner in which it operates, see CMV Clarkson and J Hill, *The Conflict of Laws* (Oxford University Press, 4th edn, 2011), 305-27. More references to the leading authorities in Scotland and in England and Wales can be found in P Beaumont and P McEleavy, *Private International Law, Anton* (W Green/SULI, 3rd edn, 2011), paras 7.13–7.59 and L Collins (gen ed), *Dicey, Morris and Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012).

certain amount of flux because it can change – automatically – according to events affecting an individual.

At the outset, an individual's domicile is the same as that of his father⁶¹ (termed in this case domicile of origin) but this subsequently changes if the individual acquires particularly significant and permanent ties with another territory (domicile of choice).⁶² When a domicile of choice is abandoned and not replaced by any other domicile of choice, the domicile of origin applies.⁶³

In the face of this substantial difference in approach between civil law and common law systems, Regulation No 2201/2003 adopted a solution by virtue of which both notions – nationality and domicile – coexist within a single system based on a relationship of reciprocal respect and tolerance. In this way, Article 3 of the Brussels IIa Regulation specifies that in the case of the United Kingdom and Ireland, the concept of citizenship is replaced by that of domicile: naturally this “replacement” does not refer exclusively to the case of Article 3, but to all provisions of the Regulation that refer to the concept of citizenship.

This decision nevertheless leaves room for some interpretational doubts over the relationship established between the concept of nationality and that of domicile.

⁶¹ Or that of the mother, if the child is born out of wedlock. This is different for Scotland: see the Family Law (Scotland) Act 2006, s 22. “Domicile of persons under 16. (1) Subsection (2) applies where – (a) the parents of a child are domiciled in the same country as each other; and (b) the child has a home with a parent or a home (or homes) with both of them. (2) The child shall be domiciled in the same country as the child's parents. (3) Where subsection (2) does not apply, the child shall be domiciled in the country with which the child has for the time being the closest connection. (4) In this section, “child” means a person under 16 years of age.” The interrelation between the common law rules on domicile of origin and s 22 of the Family Law (Scotland) Act 2006 is not entirely clear, see Beaumont and McElevay, *ibid*, paras 7.25–7.31.

⁶² In *PK v TK*, *supra* n 59, it was not contested that the appellant had a domicile of choice in Ireland before leaving there in 1977. The issue was whether she had lost her domicile of choice and reacquired her domicile of origin in New York by the time of her divorce decree in New York on 7 January 1980.

⁶³ The mechanism by which the domicile of choice is lost and the domicile of origin is restored is aptly illustrated by the case of *PK v TK*, *supra* n 59. The case dealt with a couple made up of an Irish citizen and a US citizen who had married in New York but had then spent most of their married life in Ireland, where they had also raised their children. When the marriage broke down, the wife returned to New York with the children and asked a US court for a divorce, but without calling for any order to be made with regard to the husband's obligations to contribute to their children's upbringing. Subsequently, the wife again filed a petition, this time in an Irish court, asking for the order issued by the US court not to be taken into account because it was not based on the true domicile of the plaintiff and thus to issue a new order that would oblige the husband to contribute to the expenses for their children's upbringing. The Irish court nevertheless emphasised that the wife's decision to return to her country of origin and re-establish that country as the permanent centre of her interests unequivocally demonstrated that the judgment handed down by the US court was valid from a jurisdictional viewpoint, because the wife had demonstrated that she wished to return to her domicile of origin. See also K McQuaid, “Divorce in the European Union: Should Ireland Recognize Foreign Divorces?” [2006] *Transnational Law and Contemporary Problems* 373.

The Regulation does not in fact explain whether the courts of the United Kingdom and Ireland will apply the criteria of domicile in any case or will do so only if the case exclusively concerns citizens of these two states – or rather spouses with a domicile in of those two states. A literal interpretation that is faithful to the prudent choice of the Regulation leads to the conclusion that the criterion of domicile is generally applied by the courts in these countries and thus also in cases where nationals of other Member States are involved.⁶⁴ To support this interpretation, the Borrás report specifies that states cannot apply both criteria cumulatively but are bound to choose one or other to be applied indifferently in all cases.⁶⁵ For this reason, the 1998 Convention called on Member States to submit a statement in which each Member State had to indicate which criteria would be applied in their own respective courts. This provision has not, however, been reflected in the EU Regulation and this decision has certainly not encouraged the clear and unequivocal application of the EU instrument.⁶⁶

K. CONFLICT BETWEEN DOMICILE AND CITIZENSHIP

Furthermore, EU law does not specify what is the conflicts rule if the spouses have common domiciles in one country and common citizenship in another state. The situation is somewhat unusual but should nevertheless not be ruled out: an example would be two spouses, both born in France to one English parent and one French: on the basis of Article 19-3 of the Code Civil, they hold French citizenship by virtue of a combination of the principles of *jus soli* and *jus sanguinis*.⁶⁷

⁶⁴ TM de Boer, “Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation” [2002] *Netherlands International Law Review* 314, n 19.

⁶⁵ Report accompanying the 1998 Convention, *supra* n 15, 27, point 33.

⁶⁶ It is doubtful whether the reasoning underlying this decision can be attributed to an incompatibility between the possibility of Member States accompanying the Regulation with interpretative statements and the nature of the EU Regulation, which is obligatory in all aspects and directly applicable within Member State legal systems. The practice of accompanying EU regulations with statements by Member States concerning certain applicational details of EU law arises frequently in EU law on civil judicial co-operation. For example, this method – clearly borrowed from international law – allows Member States to publicise important information on the national legal system or on the national procedural rules to be followed for the correct application of EU law and therefore makes it easily accessible to other Member States and all citizens. This practice does not, however, subvert the nature of EU regulations as legal acts directly applicable in all aspects because it takes the form – as already stated – of complementary information that does not absolve the Member States of their obligations under EU law and has no impact on the direct and immediate applicability of the regulations within EU territory.

⁶⁷ Art 19-3 of the Code Civil: “Est français l’enfant “légitime ou naturel” né en France lorsque l’un de ses parents au moins y est lui-même né.”

They nevertheless also have their domiciles (of origin) in the United Kingdom since they are both born of an English parent with an English domicile, meaning that both fathers were domiciled in England at the time that their children were born in France. It therefore follows that both spouses hold French citizenship and also have joint domicile in England, if their domiciles of origin never changed.

At this point, we are faced with the same question that applies to the conflict between multiple common nationalities: both jurisdictions – French and English – are competent and will apply their respective jurisdictional criterion – common nationality in one case and joint domicile in the other. The jurisdiction will depend on which court is initially seised, because the claimant can choose any court having jurisdiction under Article 3 and the proper commencement of a marriage dissolution procedure before one of the competent courts automatically excludes the competence of the other.

It is therefore clear that while the solution adopted by Regulation No 2201/2003 safeguards the different approaches adopted by both legal systems, it also creates a kind of forced coexistence that certainly does not make it any easier to apply the EU conflict rules clearly and uniformly.

As stated previously, the concept of domicile lies on an intermediate line between that of habitual residence and that of citizenship, because it includes aspects of both. At this point, however, it would not be easy for the UK and Irish courts to identify the demarcation line between these two concepts with accuracy. We need only imagine an example where a UK couple spent their entire married life in France (which they therefore made their domicile of choice), returned to the United Kingdom after the marriage breakdown and after ten months asked a UK court to dissolve the marriage. Article 3(1)(a), final indent – which establishes jurisdiction in the place of habitual residence for at least six months provided the spouse is also a national of that state or domiciled there – would effectively mean the court in the UK would have to establish two things. On the one hand, it would be necessary to establish whether the spouse had resided habitually for a period of at least six months in the territory of the United Kingdom and on the other hand whether he or she had also reacquired domicile in a part of the UK during the overall time spent in the territory.

Clearly, in this situation the work conducted to prove both elements would largely overlap: in other words, the court in the UK would be called upon to carry out an examination based on concentric circles, where the smaller circle represents the establishment of habitual residence and the larger circle represents the establishment of reacquisition of domicile of origin.

The resulting situation certainly does not make it easy to predict the competent court and creates many problems with regard to evidence, because it is

unclear when evidence of fulfilment of one or the other requirement has been obtained.⁶⁸

At this point, it could be legitimate to change this approach and in particular consider the possibility of harmonising the concept of domicile with that of habitual residence.

This would entail the UK and Irish judges carrying out a single investigation with the aim of establishing whether the spouse (or spouses) had effectively acquired strong ties that were intended to be unlimited with the territory to the extent that it amounted to a genuine link with the seised court.

For this operation, any minimum time period requested (eg 6 months) would act – as in the case of habitual residence – as a factor that is necessary but not sufficient to establish the above link because the court would also have to consider other qualitative factors (type of stay in the territory: purchase of a house, rental of a property, stay in a hotel) and purely subjective factors (an individual's intention to remain permanently in a given territory).

L. CONCLUSION

A final question still remains: what is the future of nationality as a jurisdictional base or connecting factor⁶⁹ (and thus of the Mancinian theory of nationality)?

To conclude, the criterion of citizenship is losing its former strength and

⁶⁸ A clear demonstration of the difficulty in establishing a neat boundary between the concept of domicile and that of habitual residence is given by a case brought before the High Court of Ireland (*DT v FL*, judgment of 23 November 2001, [2001] IEHC 223), relating to a period when the EU conflict rules were not yet in force. The case concerned an Irish couple who had moved to Holland due to work: a few years after the move, the marriage broke down and the wife filed with a Dutch court, which declared a divorce and ordered the husband to pay a contribution to the children's maintenance. The Dutch court declared itself to be competent based on the residence of the husband – the defendant (a criterion established by Dutch national rules on conflict). The husband nevertheless failed to comply with the order handed down by the Dutch court and the wife – who in the meantime had returned to Ireland – called upon an Irish court to recognise the order issued by the Dutch court. The Irish court nevertheless did not consider that the husband had established his new domicile in Holland at the time the divorce was requested in Holland because he had never abandoned his domicile of origin in Ireland. The Dutch divorce decree was not recognised in Ireland. Naturally, if this case had fallen under the temporal jurisdiction of the EU rules, the order handed down by the Dutch court would have been recognised in Ireland based on the principle of the jurisdiction of residence of the defendant. It was subsequently clarified by McKechnie J in the Irish High Court that the maintenance aspects of the Dutch divorce decree were not entitled to recognition in Ireland under the Brussels Convention because the couple were not recognised as divorced in Ireland: see [2006] IEHC 98, paras 72–80.

⁶⁹ E Jayme (ed), "Della nazionalità come fondamento del diritto delle genti, Pasquale Stanislao Mancini" (Giappichelli, 2000); S De Vido, "The Relevance of Double Nationality to Conflict-of-Laws Issues Relating to Divorce and Legal Separation in Europe" in *Cuadernos de Derecho Transnacional* (Universidad Carlos III de Madrid, 2012) 222–32.

becoming an alternative or even a subsidiary criterion, giving way to other criteria that are more relevant to the current situation.

Despite this, citizenship is not disappearing altogether: it now occupies a subordinate position to the connecting factor of habitual residence to meet the unique needs of a diverse European society.

The EU concept of habitual residence is different from that of residence defined by paragraph II of Article 43 of the Italian Civil Code – which locates it “in the place where the person has their regular abode” – and is essentially closer to the notion of domicile, which paragraph I of the same Article 43 states is the main place where a person “takes care of his affairs and interests”.

It would therefore be useful to update Italian rules on private international law to replace the connecting factor of citizenship with that of habitual residence, in line with EU policies. This would align Italian private international law with uniform systems of private international law that are already in force or in the process of adoption, depending on areas of interest. The lawmaker could also offer an aid to interpretation.

In the end, even in a matter so sensitive as family law, nationality has acquired a subordinated position compared to “habitual residence”. This is a different approach compared to the one followed by most Member States, eg Italy. Considering the evolution of EU law, a new solution might be envisaged in the forthcoming private international law instruments: reference to nationality should be confined to situations where the parties may choose the law governing their relationship, and be one of the options granted to the parties. The objective determination of the applicable law would therefore be left to factors other than common nationality, such as habitual residence, or the place where the marriage is celebrated.⁷⁰ Some of these “codified” connecting factors may well correspond to the standards according to which the “effective” or “more significant” nationality would normally be identified: this would possibly overcome the difficulties inherent in situations where the spouses have more than one common nationality, without the possible ambiguities of the largely discretionary notion of “effective” nationality.

The unification of private international law in family matters in the European Union remains a difficult task, due to the marked differences between the substantive and conflict-of-laws legislation (and traditions) of Member States. Enhanced co-operation, as the recent Rome III regulation shows, may be a practically useful response to this situation, even though the *lex fori* still plays a role as a last connecting factor (and not, as it could have been, as a residual connecting factor). This does not mean, however, that nationality has completely lost its role in private international law: properly employed it may still contribute to meeting the new challenges posed by a diversified and increasingly complex European society.

⁷⁰ Although the place where the marriage is celebrated may have no connections with the spouses.