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Introduction to Polish PIL: Law Applicable to Natural Persons

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Three Notions

One should make a distinction between:

- the law applicable to natural persons
- the personal status of natural persons
- the personal law (*lex personalis*) of natural persons

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Law Applicable to Persons

- In Polish: *statut personalny* – French: *le statut personnel*; German: *das Personalstatut*; Spanish: *el estatuto personal*
- English term: *personal statute* seems incorrect (*statute* = law, act of Parliament, not the legal system referred to as applicable)
- In this case we have in mind **the law governing persons in general** (the beginning and the end of their existence, issues of legal capacity or capacity to act, the name, etc.)
- The scope of the law applicable differs under various systems of law of conflict (e.g. in Austria *das Personalstatut* means the law applicable to all the personal relationships, incl. marriage, family status, etc.) = more or less equivalent to the notion of the 'personal law' (*lex personalis*)
- In Poland – '*statut personalny*' is stretched only on the issues immediately connected with the persons (here: natural persons), see Chapter 2, Article 11 ff PILA 2011

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Personal status

- English legal concept - quite broad meaning
- According to P. H. Neuhaus (*Die Grundbegriffe des Internationalen Privatrechts;* 1976; Engl. transl. - see Exhibit No. 1): describes the position of a given person within the legal society, esp. as a family member, but also as a citizen or an alien, having or devoid of the full legal capacity, civil rights etc.
- Not too precise, yet it has something in common with the sphere of the PIL; conf. Art. 12(1) of the UN Convention Relating to the Status of Refugees (see Exhibit No. 2)

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Personal law (*prawo personalne*)

- Means every law indicated by the personal connecting factors, as applicable for any relationship within the scope of personal, family, or succession law (everything sctrictly tied to the personality of a man)
- Personal connecting factors for the natural persons are: 1) nationality (citizenship), 2) residence (*domicilium*), 3) habitual residence

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Case #1

- John C., a young Scot aged 17, has arrived in 2010 to Warsaw together with his parents, who are temporarily employed by the British Foreign Office in the UK Embassy in Poland. Immediately afterwards he got the driving licence and then decided to buy a car here. He did it on his own and did not pay the full price because of the lack of money; his parents denied their responsibility for this obligation. Thus the seller declared the contract avoided and now wants his car back arguing that due to his age, John C. could not enter into the contract without his parents' assent (Article 18 Polish Civ. Code). John C. opposed to this argument claiming that the age of consent according to Scots law shall be 16 (s.1 Age of Legal Capacity (Scotland) Act 1991).
- Is the buyer right? Which law governs the age of consent of a natural person under such circumstances, supposing that it is Polish law which is applicable to the sales contract (Article 4(1)(a) Rome I Reg.)?

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Observations

- The law applicable to a contract, here: Polish law (the law in force at the seller's place of habitual residence), governs its invalidity or ineffectiveness (Article 10 Rome I), together with the consequences of nullity (Article 12 (1)(e) Rome I).
- Yet the question of the legal capacity of a person seems to be the so-called **„sub-question"** (*Teilfrage* in German), i.e. a legal problem which itself has no independent meaning and in spite of that it shall be subject to the conflicts rule, and to the law, other that that one governing the subject matter of the case (here: the nullity of the contract)
- One might say that Article 18 of Polish Civ.C., which mentions a „limited legal capability" as a necessary prerequisite for the avoidance of a juridical act concluded without a legal representative's assent, makes an **implied reference** to the law governing the personal status of a person

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How to Decide on the Case #1

- From the standpoint of a Polish judge, the law governing the age of consent depends on the **nationality** of the interested person (Article 11 (1) Polish PILA)
- On the other hand, should the case have been decided upon by a British judge (esp. in Scotland), the applicable law would have been rather the **law of domicile**
- Our young Scot is a HM's (British) subject, then a British national – but there's no unique 'British' private law, English, Scots, etc. law existing alongside one another
- Three-step solution: (a) the judge shall find the law of the UK as applicable under Article 11; (b) because the UK is a multiple-law jurisdiction, British legal practice shall be examined in order to decide which of particular territorial laws will apply (Article 9 PILA => probably the doctrine of 'domicile' will apply as an internal connecting factor); (c) to learn whether there is a *renvoi* (Article 5 PILA: „back to Poland"?) or not, the judge shall examine where John C. has his domicile (still in Scotland, obviously – supposing he has his permanent home in the UK and intends to come back there)

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Why is the Nationality Important

- The tradition of the nationality (otherwise speaking: *citizenship*) as a connecting factor dates back to the beginning of the 19th century, see Art. 3 al. 3 of the French *Code civil* 1804:
  - *Les lois concernant l'état et la capacité des personnes régissent les français, même résidant en pays étranger.* [The laws which concern the status and capacity of the persons shall govern French people, even if they reside in a foreign country.]
- That was an imperfect rule of law, silent on anyone having no French nationality
- It was only the famous Italian scolar and statesman Pasquale Stanislao Mancini (1817-1888), who developped the doctrine of nationality in the conflict of laws in his famous Turin lecture (1862): *„Della nazionalità come fondamento del diritto delle genti"* [On the nationality as the foundation of the law of nations]"
- For Mancini, the nationality expressed the idea of the natural social environment of every natural person =>we live according to the law of our nation and then we should have always the same set of rights and obligations, no matter whether residing in our home country or abroad, esp. in the field of the personal, family, and inheritance relationships (the 'private law of necessity' = *diritto privato necessario*)

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Weak Points in the Concept

- What to do with dual/multiple nationals (*bi-, polipatridae*)?
- How to treat people whose connection with their mother countries have been breached (esp. refugees)? What about stateless persons?
- Is the connecting point of the nationality in line with the EU law (prohibition of discrimination under Article 18 TFEU…)? Is it still reasonable to believe that the nationality mirrors a natural person's legal culture and environment (heterogenous societies, often and easy changing of domicile)?

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Conflicts of Nationality (dual/multiple nationality)

- The law of conflicts does not try to resolve the matters of multiple nationals
- Every sovereign State is in the position to regulate who is its national
- The conflicts at the international level are dealt with some customary rules of the international law and by the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws
- The subject matter of our discipline is only to regulate which of 'competing' nationalities shall be taken into consideration as the basis of one's personal status

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Case #2

- Mario S. is a son of an Italian-Polish couple. He was born in Milan in 1980, he does not speak Polish at all and moreover, he has never seen Poland so far.
- How does the Polish court decide on his nationality? Does his origin from the Polish mother play any role in this inquiry?

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Remarks and Reflections

- Mario S. has acquired (probably) Polish nationality *lege sanguinis* (through the fact of being born from a Polish citizen) and then he is not Italian even if the latter nationality is 'effective' (= he is closely connected with Italy), see the **exclusive nationality principle**, Article 2 (1) PILA
- On the other hand, to demand applying only Polish law to his private-law affairs (when and where applicable under the conflicts provisions) seems exorbitant and thus contrary to the European law (see ECJ case C-148/02 *Garcia Avello vs Belgian State*)
- The nationality is proved and evidenced in the way foreseen by the law of the State whose citizenship is at stake (*lex causae* principle), in practice the **passports** are treated as *prima facie* evidence
- *Polipatridae* having no Polish citizenship – the closest relationship test applied (Article 2 (2) PILA)

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Some More Remarks on EU Law and the Nationality

- Generally speaking, the EU law neither forbids the nationality as a connecting factor in the law of conflict nor imposes any legal policy in this respect
- To apply one's national law, may not *a limine* be perceived to mean that a person is discriminated
- Nevertheless there is some evidence that the role of the nationality is decreasing step by step:
  - the cross-border mobility of individuals, esp. in the European Union
  - the growing importance of the EU citizenship (see for instance the ECJ case C-353/06 *Grunkin and Paul*)

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Stateless Persons and Refugees

- Their personal status cannot be determined according to the nationality (either because it is impossible or it is not reasonable)
- Two subsidiary connecting factors under Article 3 (1): the law of the country of the place of domicile or, in the absence of the latter, the law of the place of one's habitual residence
- Domicile and habitual residence - quite a difficult distinction; both depend on where a given person has his or her **real centre of life**
- **The intention to stay** (*animus manendi*) also plays a role here (e.g. a person imprisoned in a foreign State generally should not be deemed to have established his or her domicile/habitual residence in that latter country)
- Habitual residence seems rather to be directed towards the objective criteria but indeed, the difference is the slight one

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Deviation from the Application of the *lex patriae* – „Lizardi's Case"

- See Article 13 Rome I, Article 12 PILA
- The colloquial name of the institution comes from the famous case settled by the French Cassation Court in 1861:
  - A Mexican national called **Lizardi**, aged 22 or 23, bought and sold precious objects in France and got indebted up to a staggering sum of nearly 700,000 golden francs
  - After his creditors had begun to seek relief, he tried to extricate himself from troubles claiming that all his contracts were null and void due to the lack of his legal capacity (the age of consent according to the Mexican law of that time was 25 years)
  - The demand dismissed by the French courts because otherwise it would undermine the reasonable reliance of French citizens as to the legal capacity of that person
  - The basis for such findings was that the contracting persons had acted in good faith – they neither knew nor could have known of Lizardi's foreign origin
- Two factors taken into consideration:
  - **Knowledge of the other interested party:** both factual circumstances and (rather occassionally) the availability of the information concerning the content of foreign law
  - **Due diligence:** someone acting carelessly, who negligently ignores the content of a foreign law, may never count on the court's leniency
- Instutition quite rarely met in the legal practice, no reported case law in Poland

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Incapacitation

- Incapacitation (Article 13) means basically the transformation or the loss of legal capacity of a natural person due to his or her illness, age, or any other such circumstance
- The application of Polish *lex fori* depends on the jurisdiction and instigation of proceedings before the Polish court, so paragraph 1 should be applied quite exceptionally
- The scope of this provision does not cover the means of protection normally established for an incapacitated person, for instance the guardianship and/or custody, which is governed by the law specified by Article 60 – yet it is the same law which is applied
- In 2008 Poland signed – but it has not ratified it yet – the 2000 Hague Convention on the International Protection of Adults, which would replace the rule of Article 13
- It is probable that Poland will not have to do it – the EU as the whole considers adoption of this Convention

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Determination of death

- Determination of death (Article 14) is used in the sense of an official (court or administrative) method of establishing the fact or the time of the death
- Paragraph (2) is another exception from the rule that the law of nationality governs the end of the person's legal existence and capacity to act
- The ordinary presumptions of death (known to the law of some *common law* countries) are always subject to the national law of a person presumed to be dead, even if they are used in the course of the court proceedings (e.g. concerning the succession matters)
- The application of the court's own law (*lex fori*) depends of procedural issues: the Polish court must be seized with the case concerning the determination of the death of a foreigner, which is possible only if it has jurisdiction (see Article 1106 CCP: the place of domicile or habitual residence shall be sufficient)

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Rights of Personality (Article 16 PILA)

- Many countries have developped institutions protecting a person from the outside world
- Difficult to delimit and define, but the rights of personality should be stretched certainly (for example) onto the following spheres:
  - Knowledge of one's intimate and private life (e.g. thoughts, feelings, personal relationships, sexual life)
  - Honour and personal reputation
  - Personal image
- Article 16(1) PILA treats the existence and the content of such rights as a part of one's personal law, the applicable law is the law of one's nationality (lex patriae, cf. Article 24(1) Italian PILA: *L'esistenza ed il contenuto dei diritti della personalità sono regolati dalla legge nazionale del soggetto* = The existence and the content of the rights of personality shall be subject to the national law of the interested person)
- It is treated separately from issues of the protection of such rights (e.g. the claim for material or immaterial damages, for giving up the state of violation, etc.), the latter being the part of the law applicable to delicts/torts designated by Article 16(2) and (3) PILA

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Problematic Characterization of Personality Rights

- The decision of the Polish lawgiver is subject to criticism:
  - The international protection of rights of personality is clearly the matter of non-contractual obligations
  - The declaration of existence and content of such rights hardly ever constitutes the independent subject matter of the civil case
  - The personality is internationally protected due to the universal recognition of human rights
- Interesting case law:
  - **SC judg. 28.9.2011, I CSK 743/10, OSNC [SCRep.-Civ.] 2012/3/40:** three Libyans sued the administrator of the website for removing the defamatory press article suggesting they are 'suspect' and 'unwellcome', the Supreme Court found for the applicants but applied only the Polish law and the European Convention of Human Rights (Article 8)
  - **SC dec. 8.8.2003, V CK 6/02, OSNC 2004/7-8/111:** in spite of the declaration that the name as such is subject to the national law of the person bearing it, the international protection of the name was subjected to the international human rights conventions
- Conclusion: as the scope of protection granted to rights of personality is concerned, there is a clear inclination to the immediate application of international standards

Exhibit No. 1
P. H. Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts*, Tübingen 1976, p. 201 (Anknüpfung des Personalstatuts - Point of connection for the law applicable to persons)[1]:

The notion of **Personalstatut** *(law applicable to persons) means according to the current German language manner […] the legal system which is proper either for all the personal legal relationships of the natural person concerned (and the moral person as well) or for the remaining personal entity. This word should be clearly differentiated from the English term:* **"personal status",** *which stands for one's individual or civil status, i.e. one's position within the legal society, be it the legal status as a married or single person, as the marital, extramarital or legitimate child, be it the position of a citizen or of a foreigner, as a capable or incapable to act in law, as the bankrupt debtor, as the culpable of high treason devoid of his civil rights, as the guardian, and the position of the moral person, too. Eventually, the shimmering French expression:* **"statut personnel"** *means sometimes the* Personalstatut *in German sense (it is called* **"loi personnelle"***, too), sometimes the personal situation just as the English word: "status" ("état et capacité"), and sometimes the whole of the issues governed by the* Personalstatut *(so the subject-matter of the connection,* Anknüpfungsgegenstand*).*

Exhibit No. 2
Excerpts from the 1951 UN Convention Relating to the Status of Refugees

Article 12
Personal Status
1. The personal status of a refugee 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.
2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Exhibit No. 3

Case C-148/02

Carlos Garcia Avello
v
État belge

Judgment of the Court (Full Court), 2 October 2003

Summary of the Judgment

1..

Citizenship of the European Union – Treaty provisions – Scope ratione personae – National of one Member State lawfully residing on the territory of another Member State – Whether included – Effect – Benefit of rights attaching to the status of citizen of the Union – Persons concerned also nationals of the State of residence – Not relevant – Discrimination on grounds of nationality in regard to the rules governing the surname – Not permissible

(Arts 12 EC, 17 EC and 18 EC)
2..

Community law – Principles – Equal treatment – Discrimination on grounds of nationality – Minor children resident in a Member State and having dual nationality of that State and of another Member State – Application for a change of surname to enable those minor children to bear the surname to which they are entitled in the second Member State – Refusal of the administrative authority to grant that application – Not permissible

(Arts 12 EC and 17 EC)
1.

[1] English translation by M. Pilich.

Nationals of one Member State who are lawfully resident in the territory of another Member State may rely on the right set out in Article 12 EC not to suffer discrimination on grounds of nationality in regard to the rules governing their surname. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those nationals who find themselves in the same situation to enjoy, within the scope *ratione materiae* of the EC Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. The situations falling within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC. Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law, in particular with the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States. Citizenship of the Union, established by Article 17 EC, is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. Such a link with Community law does, however, exist in regard to persons in a situation such as that of a national of one Member State who is lawfully resident in the territory of another Member State. That conclusion cannot be invalidated by the fact that the persons concerned 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.

see paras 22-29

2.

Articles 12 EC and 17 EC must be construed as precluding the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State. First, with regard to the principle of the immutability of surnames as a means designed to prevent risks of confusion as to identity or parentage of persons, although that principle undoubtedly helps to facilitate recognition of the identity of persons and their parentage, it is still not indispensable to the point that it could not adapt itself to a practice of allowing children who are nationals of one Member State and who also hold the nationality of another Member State to take a surname which is composed of elements other than those provided for by the law of the first Member State and which has, moreover, been entered in an official register of the second Member State. Furthermore, by reason in particular of the scale of migration within the Union, different national systems for the attribution of surnames coexist in the same Member State, with the result that parentage cannot necessarily be assessed within the social life of a Member State solely on the basis of the criterion of the system applicable to nationals of that latter State. In addition, far from creating confusion as to the parentage of the children, a system allowing elements of the surnames of the two parents to be handed down may, on the contrary, contribute to reinforcing recognition of that connection with the two parents. Second, with regard to the objective of integration pursued by the practice in issue, the practice in issue is, in view of the coexistence in the Member States of different systems for the attribution of surnames applicable to those there resident, neither necessary nor even appropriate for promoting the integration of the nationals of other Member States within their State of residence.

see paras 42-43, 45, operative part