The connecting factor for the proprietary consequences of marriage*

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1 *Introduction*

In South African private international law the proprietary consequences of marriage are governed by the *lex domicilii matrimonii*,[1] that is the law of the matrimonial domicile at the time of marriage. Once the matrimonial domicile has been determined, it remains fixed, governing the proprietary consequences of that marriage once and for all in terms of the principle of immutability.[2] The *lex domicilii matrimonii* may be displaced by an antenuptial contract indicating a legal system other than the *lex domicilii matrimonii* to govern the proprietary consequences of a marriage or, in some cases, by a postnuptial contract which may alter the matrimonial property regime. By and large, however, South African law adheres to the principle of immutability, which means that proprietary consequences are, in the majority of cases which come before South African courts, governed by the *lex domicilii matrimonii*.

Currently the connecting factor, *domicilium matrimonii* or matrimonial domicile, is interpreted as the domicile of the husband at the time of the conclusion of the marriage.[3] However, recent developments in South African national law do not support this interpretation of matrimonial domicile any longer. In terms of the principle of gender equality embodied in section 9 of the Constitution of the Republic of South Africa 1996,[4] no justification exists for giving preference to the domicile of the husband. Furthermore, the wife's domicile of dependence

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[1] The Roman-Dutch authorities are not entirely clear on this issue, partly because the *locus celebrationis* and the *locus matrimonii domicilii* very often coincided: see Hahlo and Kahn *The South African Law of Husband and Wife* (1972) 627. After a thorough analysis of the old authorities, in *Frankel's Estate v The Master* 1950 1 SA 220 (A) (see especially Van den Heever JA's judgment at 240 ff) it was decided that the *lex domicilii matrimonii* governed the proprietary consequences of marriage. See also earlier cases such as *Blatchford v Blatchford's Executors* (1881) 1 EDC 365; *Clear v Clear* 1913 CPD 835; *Brown v Brown* 1921 AD 478; *Anderson v The Master* 1949 4 SA 660 (E); as well as subsequent affirmations of the rule in *Sperling v Sperling* 1975 3 SA 707 (A); *Milbourn v Milbourn* 1987 3 SA 62 (W); *Bell v Bell* 1991 4 SA 195 (W); *Esterhuizen v Esterhuizen* 1999 1 SA 492 (C). See also Edwards "Conflict of laws" in Joubert-Dlamini *et al* (eds) II LAWSA (1993) par 441; Forsyth *Private International Law* (1996) 259; Roodt "Migrerende egpare se huweliksgoedere-probleme: *common law* en gemengde stelsels" 1995 *THRHR* 194 440.

[2] *Brown v Brown* (n 1).

[3] South African Law Commission *Report on Domicile* Project 60 (1990) par 6.7.

[4] It reads as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No

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was statutorily abolished by the Domicile Act.[5] Therefore, the jurisprudential basis for interpreting *domicilium matrimonii* as the domicile of the husband at the time of marriage has fallen away. However, the South African law commission, in the same report in which the abolition of the wife's domicile of dependence was announced, elected to retain the *domicilium matrimonii* as the connecting factor for proprietary consequences and, more importantly, reaffirmed the interpretation of the matrimonial domicile as the husband's domicile at the time of marriage.[6] Academic authors have hinted at the reform of this choice-of-law rule with reference to the connecting factor,[7] but no substantial proposals have been advanced to deal with the current problem.

Admittedly, the solution to this problem is not a simple one; it does not only concern the interpretation of the connecting factor, but also the appropriateness of *domicilium matrimonii* as a connecting factor for proprietary consequences. Therefore, reform of this conflict rule must begin with a fundamental reappraisal of the connecting factor for proprietary consequences within the theoretical framework of South African choice of law. In an attempt to get the debate on reform going, this contribution investigates and seeks to delineate the function of the connecting factor in the conflict of laws with specific reference to the proprietary consequences of marriage.

2 *The function of the connecting factor in the conflict of laws*

The true function of the conflicts connecting factor is firmly rooted in the traditional approach to choice of law. This "traditional" approach implies the selection of an appropriate conflict rule which will indicate the proper *lex causae* for a specific choice-of-law issue.[8] Thus the traditional approach entails the use of conflict rules to solve conflicts problems. These conflict rules are often referred to as "jurisdiction-selecting rules", since the issue is referred to

person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." In regard to the constitutional protection pertaining to gender equality, see, in general, Sinclair *The Law of Marriage* (1996) 66 ff.

[5] of 1992. S 1(1) reads as follows: "Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such person's sex or marital status."

[6] South African Law Commission (n 3) par 6.2-6.8, especially par 6.7: "The Commission ... decided not to recommend any statutory provision but to retain the common law rule in this regard. In the result the patrimonial consequences of marriage are still governed by the law of the place where the husband is domiciled at the time of marriage."

[7] See especially Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 *De Jure* 330, as well as Forsyth (n 1) 259 n 126; Neels "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *TSAR* 336 337; Visser "Enkele gedagtes oor fundamentele regte en die familiereg" 1995 *THRHR* 702 707; Van Schalkwyk "Artikel 7(3) van die Wet op Egskeiding 70 van 1979 – toepassing by lompsom as onderhoudsbevel" 1999 *TSAR* 378 379.

[8] See Anton *Private International Law* (1990) 5 ff; North and Fawcett *Cheshire and North's Private International Law* (1999) 35 ff; Falconbridge *Essays on the Conflict of Laws* (1954) 37 ff; Robertson *Characterization in the Conflict of Laws* (1940) 92 ff; Stone *The Conflict of Laws* (1995) 2 ff, as well as Lederman "Classification in private international law" 1951 *Can B Rev* 168; Spiro "Kinds of conflicts rules" 1979 *SALJ* 598.

the legal system of a specific jurisdiction (or country) without any investigation into the content or policies of the particular substantive-law rule of the jurisdiction (or country) referred to.[9] Thus the connecting factor constitutes the essential indicator of the relevant *lex causae* within such a conflict rule. This prominent function of the connecting factor is evident from the structure of a typical multilateral[10] conflict rule, such as the South African conflict rule for proprietary consequences which determines that the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*, the connecting factor being the *domicilium matrimonii*.[11]

2.1 Twentieth-century American approaches

The twentieth century produced some lively debate on conflict of laws and the traditional jurisdiction-selecting approach has come under fire, mainly from American quarters. American commentators on the conflict of laws have embarked on a total re-evaluation of the conflicts process and a number of them have totally rejected the traditional "jurisdiction-selecting" method in terms of which the law of a jurisdiction or certain state is indicated by a conflict rule through a connecting factor. They have turned their attention to so-called "rule-selection". Instead of blindly selecting a *lex causae* by means of a choice-of-law rule with no regard being had to the content and policies of the substantive law of the jurisdiction referred to,[12] rule selection focuses on the content of the substantive-law rules of the different states concerned, as well as the policy or policies underlying those rules.[13] In terms of one of the approaches, the governmental-interest-analysis approach, conflicts are resolved as follows: should more than one substantive-law rule claim application in a given situation, the conflict is resolved by the "weighing" of the interests of the different states concerned (also called "comparative impairment") in order to determine which state's interests would be more impaired if its policy was not given effect to.[14]

Predictably, these American approaches have not found favour with English and continental academics, the strongest points of criticism being that these approaches create uncertainty (for example, interpretation of policies underlying substantive-law rules by different courts may differ)[15] and that many of these approaches are only suited to the American situation, that is to conflicts between states, and not to private international law conflicts between the legal

[9] See par 2.1 below for a discussion of the so-called "American revolution" that places great emphasis on the content and policies of the substantive rules involved in a conflict-of-laws situation.

[10] or general or all-sided (in German "allseitige" or "zweiseitige"). See also Robertson (n 8) 98.

[11] *Brown v Brown* (n 1); *Frankel's Estate v The Master* (n 1); *Sperling v Sperling* (n 1).

[12] *Cf* the following remark by Cavers "A critique of the choice-of-law problem" 1933 *Harv LR* 173 180: "[T]he court ... is engaging in a blindfold test. The court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it."

[13] In regard to these modern American trends, see generally Anton (n 8) 31 ff; Cavers *The Choice-of-Law Process* (1965); North and Fawcett (n 8) 23 ff; Currie *Selected Essays on the Conflict of Laws* (1963); Juenger *Choice of Law and Multistate Justice* (1992) 88 ff; Lipstein *Principles of the Conflict of Laws, National and International* (1981) 36 ff.

[14] North and Fawcett (n 8) 27.

[15] See especially the comment by Stone (n 8) 5: "[T]heir use on a case-by-case basis, *instead of rules*, amounts to a formula for chaos; and that is what the American conflicts revolution has in fact achieved."

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systems of different countries.[16] Furthermore, it is questionable whether it is possible to totally reject the traditional approach. Whether a state has an interest in the application of its substantive-law rule will often depend on whether the underlying policy of the rule is, for example, to protect a defendant *domiciled* or *resident* in that state. In this sense, interest-analysis relies quite heavily on *connecting factors*, and in the area of family law resort will often be had to *personal* connecting factors, such as *domicile* and *residence*.[17]

The American Law Institute's *Restatement (Second)*[18] presents a more balanced picture. The basic criterion for choice of law in the *Restatement (Second)* is the application of the law of the state which has the most significant connection with the issue concerned, and in the absence of a statutory directive in this respect, the following factors must be considered:

i the needs of the interstate and international systems;
ii the relevant policies of the forum;
iii the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
iv the protection of justified expectations;
v the basic policies underlying the particular field of law;
vi certainty, predictability and uniformity of results;
vii ease in the determination and application of the law to be applied.[19]

The approach of the *Restatement (Second)* represents a compromise between those who support traditional conflict rules[20] and the more revolutionary commentators, who place great emphasis on policy evaluation.[21] The reporter of the *Restatement (Second)*, Reese, explains the approach as follows:

> "I believe that one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue. And I believe that in the development of these rules consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states and, of course, to the contacts of the parties and of the occurrence with these states."[22]

The question is whether these modern American methods and approaches, as well as the *Restatement (Second)*, hold any significance for the civilian-trained lawyer? Now, while the success or failure of these methods and approaches are largely dependent on the way in which the American courts apply them, as well as trends in the different states, these commentators have succeeded in stimulating thought on the conflicts process itself. The identification and evaluation of policies underlying particular fields of law are essential; it is true, indeed, that these considerations and policies are at the root of many of the traditional conflict rules.[23] A conflict rule may have developed out of, for example, the

[16] See in general Anton (n 8) 37 ff; North and Fawcett (n 8) 26 ff; Kegel "The crisis of conflict of laws" 1964.2 *Hague Recueil* 95 180 ff; Reese "Discussion of major areas of choice of law" 1964.1 *Hague Recueil* 315 at 329 ff.
[17] See Juenger (n 13) 100.
[18] published in 1971.
[19] s 6.
[20] notably factors iv, vi and vii.
[21] See especially factors ii, iii and v.
[22] "General course on private international law" 1976.2 *Hague Recueil* 1 180.
[23] See Stone (n 8) 5-6.

policy that minors should be protected by the law to which they belong, which led to a choice-of-law rule using the domicile of the minor as a connecting factor.[24] For the civilian-trained lawyer there can be no harm in reassessing the true *ratio* behind every existing conflict rule and, in the light of this, re-evaluating the existing rule.

Despite the fundamental differences between the modern (American) approaches and the traditional jurisdiction-selecting approach to the choice-of-law problem, the two opposing schools of thought share a common goal: to indicate, for each conflicts issue, the appropriate *lex causae* or substantive-law rule. Whereas the traditionalists focus on more generally formulated conflict rules which would accommodate certain categories of conflicts issues (for example, *proprietary consequences of marriage*), the modern American approaches focus on selecting for each fact-complex the appropriate substantive-law rule. However, these American approaches do have the potential to produce, as a result of the repeated evaluation of essentially identical conflicts situations by the courts, more generally formulated conflict rules. Be that as it may, an essential feature of both the traditional approach and the modern approaches, is that the connecting factor fulfils the crucial function of indicating which *lex causae* is the appropriate one. Therefore it is important to identify the most important principles underlying the choice of a connecting factor.

Section 6 of the American *Restatement (Second)* identifies certain factors which may influence the choice of an appropriate *lex causae*. Since the function of the connecting factor is to indicate the *lex causae*, these factors impact on the selection of the connecting factor. For purposes of the present discussion the following factors for identifying an appropriate connecting factor are particularly relevant: the protection of justified expectations, as well as certainty, predictability and uniformity of result.[25]

The protection of justified expectations is paramount in choice-of-law issues relating to the proprietary consequences of marriage, since parties may expect certain proprietary consequences to ensue when a marriage is dissolved.[26] In fact, the financial survival of spouses may depend on the legal system which governs the proprietary consequences of their marriage. Therefore the choice of the connecting factor should reflect an awareness of which legal system parties would justifiably or reasonably expect to apply.

As far as certainty, predictability and uniformity of results are concerned, the attainment of these values will help to discourage forum shopping.[27] Uni-

[24] *Cf* the *fraus-legis* rule in regard to the essential validity of a marriage in the South African conflict of laws in terms of which, for example, a minor may not marry in a country other than the one of his/her domicile with the intention of evading a disqualification regarding age (or relating to any other essential requirement) which exists in the *lex domicilii*. Such a marriage may be declared invalid by the forum of the *lex domicilii*, in other words, the *forum legis domicilii*. Therefore, the regular conflict rule regarding the essential validity of a marriage which refers such issues to the *lex loci celebrationis*, will be displaced by the *lex domicilii* provided that the forum is also the *forum domicilii*: see Edwards (n 1) par 427.

[25] s 6(2)(d)(f). See also Nygh *Conflict of Laws in Australia* (1995) 33-35; Reimann *Conflict of Laws in Western Europe* (1995) 12-17.

[26] *Cf* Kegel (n 16) 184: "Law is not just an armor fixed onto life. It is the guiding principle for human actions. It is that element by which man directs himself or, in cases of breach and infraction, the court compels him to."

[27] Ideally, the fact that a case is heard in a specific forum should not have an effect on the outcome of the case. In other words, any decision on the same facts should be the same, regardless of *where* the case is heard: see Nygh (n 26) 34.

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formity of result, which will ensure certainty and predictability is, realistically speaking, an unattainable goal, since absolute uniformity could only be achieved if the substantive law of all countries was unified,[28] and that would render choice-of-law rules redundant. Nevertheless, this ideal should be borne in mind when connecting factors are selected, since uniformity of connecting factors may go a long way towards achieving uniform results.[29]

2.2 Conflicts justice

All the factors discussed above which may influence the selection of a particular connecting factor may, directly or indirectly, be traced back to the very *ratio* of our subject, namely to ensure, or to aspire to do so, justice to individuals.[30] Therefore the purpose of the connecting factor is to indicate which legal system is the appropriate one to be applied within the framework of what would constitute justice in the particular situation. According to Kegel, *conflicts justice* is concerned with "the correct and proper ordering of relationships among private parties"[31] or "a *just* ordering of private life"[32] in a conflict-of-laws sense: the ideal should be to achieve the best and fairest solution for *all* people, regardless of which state they are affiliated to. If this result can only be achieved by the application of a foreign *lex causae*, the forum should not hesitate to apply such foreign law. State interests should never be confused with "the search for justice inherent in private law".[33] A forum may, of course, refuse to apply foreign law should such application lead to a result which is contrary to the public policy of the forum.[34]

Furthermore, a clear distinction should be drawn between *conflicts justice* and *substantive justice*. Unlike conflicts justice, substantive justice is found in domestic substantive-law rules themselves and is, therefore, concerned with justice for the legal subjects of that particular legal system within its particular legal framework. This is where, according to Kegel, those modern American approaches which focus on the content of substantive-law rules, fail to meet the standard of conflicts justice:

> "Even assuming that domestic substantive law is in every way the most just solution ... its application might perpetrate an injustice. What is considered as the best law according to its content, that is *substantively*, might be far from the best *spatially*, that is to say, where it relates to a set of circumstances arising abroad.... It could therefore be unjust to judge an individual

[28] *Cf* Kegel (n 16) 185.
[29] See, eg, s 3*bis* of our South African Wills Act 7 of 1953 which is based on the Draft Convention on the Formal Validity of Wills which emanated from the ninth session of the Hague conference on private international law (1960). This convention was aimed at the unification of the conflict rules of the ratifying countries, in other words, the use of uniform connecting factors.
[30] See Anton (n 8) 4 ff; North and Fawcett (n 8) 5 ff; Graveson *Conflict of Laws* (1974) 8 ff; Fawcett "The interrelationships of jurisdiction and choice of law in private international law" 1991 *Current Legal Problems* 39 50.
[31] Kegel (n 16) 182.
[32] Kegel (n 16) 183.
[33] Kegel (n 16) 184.
[34] North and Fawcett (n 8) 123; Kahn-Freund *General Problems of Private International Law* (1976) 280.

according to a legal system other than his own, even where the foreign system claims to be 'substantively' more just."[35]

Kegel emphasises that no substantive-law rule may be applied as if it was "isolated and self-contained".[36] Every rule of substantive law is, in a conflict-of-laws situation, subject to the justice of the conflict of laws, in other words, *conflicts justice*. Conflicts justice should not be influenced by notions of *substantive justice*, in other words, decisions regarding justice in substantive-law rules.[37] The structure of the conflict of laws (and here Kegel refers to the traditional doctrine) is such that a conflict rule may refer to a certain group of substantive-law rules from different countries, for example the conflict rule pertaining to the proprietary consequences of marriage, the group or category being *proprietary consequences of marriage*. The purpose of an individual substantive-law rule will only become relevant when it has to be decided whether a specific issue, for example the question of redistribution of assets upon divorce,[38] relates to the category of proprietary consequences or whether it relates to the category of divorce.[39] Therefore, conflicts justice should not be derived from substantive justice. Conflicts justice has a spatial reach[40] and in this sense it is "altruistic" rather than "egoistic".[41]

Seen in this perspective, the *ratio* of our subject, to do justice to individuals, and the function of the connecting factor are inextricably linked: the selection of the correct connecting factor will, ideally, ensure conflicts justice.

2.3 Softening of connecting factors

The motivation to seek just results and secure conflicts justice has lead traditionalists to rethink the connecting factors used in certain conflict rules, for example those pertaining to contracts, in order to instil a degree of flexibility into the choice-of-law process. This has resulted in what has been termed the "softening of connecting factors",[42] a process aimed at the transformation of connecting factors within certain conflict rules. The softening of connecting factors should, however, not be confused with twentieth century reaction to the

[35] (n 16) 184. See also Reimann (n 26) 109 who, with specific reference to European conflicts practice, expresses the same sentiments regarding the distinction between substantive and conflicts justice: "The principal objective of the European choice of law process is to determine the law that is geographically most appropriate, not the law that provides the best substantive solution in the individual case."

[36] Kegel (n 16) 185.

[37] In conflicts cases conflicts justice will, as a rule, take precedence over substantive justice. However, in exceptional cases, substantive justice may prevail. This will happen where the application of a foreign substantive-law rule would violate the public policy of the forum. In such an instance the foreign law will not be applied on the basis of the well-known public policy exclusion: see Kegel (n 16) 189; Reimann (n 26) 111.

[38] See the discussion of s 7(3) of the South African Divorce Act 70 of 1979 by Heaton and Schoeman "Foreign marriages and section 7(3) of the Divorce Act 70 of 1979" 2000 *THRHR* 141.

[39] Kegel (n 16) 198-199.

[40] See Reimann (n 26) 110 for an explanation of "spatial reach" with reference to Western European choice of law: "Its goal is to select the law of the governmental unit, the country or state, with which the case is primarily connected.... Thus it is, in principle, neutral *vis-à-vis* substantive values and blind towards results. More modest than American approaches, it only tries to achieve what has been called 'conflicts justice'."

[41] *Cf* Kegel (n 16) 183.

[42] Kahn-Freund (n 35) 260.

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traditional approach.[43] It goes back to the endeavours of Von Savigny to establish the proper *seat* of each legal relationship: "to ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject."[44]

This is indeed the test to which every conflict rule should conform: to indicate, by means of a connecting factor, where the seat of every legal relationship is.

It was in the area of contract conflict of laws that the softening of connecting factors started to emerge. As early as the sixteenth century, it was realised that the *lex loci contractus-lex loci solutionis* rule did not always produce just results.[45] The development and extension of trade often rendered the *locus contractus* fortuitous, or each party had a different *locus solutionis* in the case of bilateral contracts. The idea had also taken root that parties to an agreement should be allowed to choose the legal system to govern their contract, commonly known as the principle of *party autonomy*.[46] Therefore a contract should, ideally, be governed by the *lex causae* chosen by the parties.[47] In the absence of an express choice, or in the event of the court being unable to infer a choice from the contract, the contract will be governed by the legal system with which it has the closest and most real connection.[48] This, of course, gives more power to the judge to decide every case on its merits and, in actual fact, to formulate a rule for every case.

The question is whether a softening of concepts does not render the whole system of choice-of-law rules with fixed connecting factors redundant. Should we not abandon the traditional approach altogether in favour of the American case-by-case approaches? No, says Kahn-Freund:

> "'[C]losest and most real connection' is a form of words which merely substitutes for a connecting concept the motivation for defining it. The *raison d'être* of any choice of law is to find the legal system with which a given issue is considered to be most closely connected. All 'hard' connecting factors are crystallisations of a policy to find the system of law with which a type of issue has its closest link."[49]

Thus it may be said that the function of the connecting factor in the conflict of laws, and more specifically within the structure of the traditional conflict rules, is to indicate, for each category of issues (for example, *proprietary consequences of a marriage*) the appropriate *lex causae*. However, this rather clinical formulation of the function of the connecting factor does not reveal the true complex-

[43] *Cf* Kahn-Freund (n 35) 262: "[T]he 'softening' of concepts began long before the first American 'realist' ever saw the light of day...."

[44] Von Savigny *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits in Respect of Place and Time* (1880) 70 (translated by Guthrie).

[45] See Edwards "Some reflections on the reception of the 'proper law' doctrine into South African law" in Van der Westhuizen *et al* (eds) *Huldigingsbundel Paul van Warmelo* (1984) 38 ff; Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 13.

[46] North *Private International Law Problems in Common Law Jurisdictions* (1993) 104 ff.

[47] Unless there is a reason not to give effect to the parties' choice, eg that application of the chosen *lex causae* is against the public policy of the forum. See the classic English case of *Vita Food Products Inc v Unus Shipping Co Ltd* 1939 AC 277 290 where it was said that the choice of law by the parties should be *bona fide* and legal and not against the public policy of the forum.

[48] This is also the criterion accepted by the Rome Convention on the Law Applicable to Contractual Obligations (1980).

[49] (n 35) 263.

ities thereof. The connecting factor does not exist in a vacuum – its purpose is to secure conflicts justice for individuals. Even though this is perhaps an unattainable goal, it is an ideal worth striving for. In most instances[50] conflicts justice will be achieved by determining the true seat of a legal relationship which will, in turn, point to the appropriate *lex causae*. The reason for this is probably that the true seat of a legal relationship is determined objectively in an "international" frame of mind, in other words, without any undue advantage being sought for the subjects of a particular legal system; rather, it is an attempt to establish the seat of the legal relationship which will ensure conflicts justice for *all* people.[51] In the process of determining the true seat of a legal relationship, many and varied considerations may play a role, such as the policies underlying a particular field of law; certainty, predictability and uniformity of result; as well as the protection of justified expectations.

3 *Towards reform of the conflict rule for proprietary consequences*

Turning to the conflict rule for the proprietary consequences of marriage, this is one area of private international law where conflicts justice must be seen to be done. The need for urgent reform in this area was recently voiced by Josman AJ in *Esterhuizen v Esterhuizen*:[52]

> "The fact that the law in this respect is both complex and not entirely satisfactory is not, however, something that the Courts can set right by means of interpretation. The Legislature must decide whether it wishes the *lex domicilii matrimonii* principle to remain intact, even if it does produce anomalous results in some circumstances...."[53]

On the basis of the analysis of the function of the conflicts connecting factor given above, a tentative suggestion for the reform of the conflict rule for proprietary consequences may be ventured.

It is submitted that the *lex causae* indicated by the connecting factor (in the absence of an antenuptial contract indicating a chosen *lex causae*) should be that legal system which has the most significant connection with the marriage and the parties concerned. Not only will this criterion satisfy the justified expectations of the parties, but it will also accord with conflicts justice, since it will achieve the best and fairest solution for all people, regardless of which state they are affiliated to. However, a criterion such as "most significant connection" lacks certainty and predictability, which will, in turn, impact negatively on uniformity of results. Therefore it should be translated into a concrete connecting factor for purposes of determining the applicable legal system for proprietary consequences.

Within the current context of South African private international law, it is suggested that matrimonial domicile be retained as the connecting factor, since the *lex domicilii matrimonii* will, in most cases, be the legal system which has the most significant connection with the marriage and the parties. However, matrimonial domicile in this context should be interpreted as the joint or

[50] There will always be "hard cases", ie cases in which the general rule produces an unjust result, but this is an acceptable price to pay in areas of the law where certainty and predictability are paramount.
[51] Kegel (n 16) 183.
[52] (n 1).
[53] (n 1) 504E-F.

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common domicile of the parties at the time of marriage. Also, the concept "domicile" should be interpreted in the spirit of the Domicile Act[54] so that a person will be domiciled in the community or country to which he or she truly belongs. Since parties often have the same domicile at the time of marriage, this connecting factor will, more often than not, apply without any problems. Where the parties have different domiciles at the time of marriage, it is suggested that the applicable law should be that of the country with which the parties and the marriage have the most significant connection. It must be borne in mind that this route will only be followed in cases where the parties do not have the same domicile at the time of marriage and therefore initial uncertainty will be limited to those instances where there is no mutual domicile. It is also possible that connecting factors, such as habitual residence, may develop to lend more certainty to the notion of "most significant connection".[55]

4 *Conclusion*

The above suggestion may not be perfect; but the point of departure is believed to be sound and it is hoped that this will provide some impetus for the debate on a proper connecting factor for proprietary consequences. More importantly, the true function of the connecting factor in the theoretical framework of private international law, as well as the policies which underlie this area of conflicts law, such as the protection of the justified expectations of the parties concerned, as well as certainty, predictability and uniformity of results, should be acknowledged, for it is only on this basis that the ideals of conflicts justice can be fulfilled.

SAMEVATTING

DIE KOPPELFAKTOR VIR DIE VERMOËNSREGTELIKE GEVOLGE VAN 'N HUWELIK

Die gemeenregtelike reël dat die vermoënsregtelike gevolge van 'n huwelik beheers word deur die reg van die domisilie van die man ten tyde van huweliksluiting, is in stryd met artikel 9 van die grondwet. Die outeur stel voor dat, in die afwesigheid van 'n regskeuse in 'n huweliksvoorwaardekontrak, die vermoënsregtelike gevolge van 'n huwelik beheers moet word deur die reg van die gemeenskaplike domisilie van die partye. Indien die partye geen gemeenskaplike domisilie ten tyde van huweliksluiting het nie, moet die vermoënsregtelike gevolge van die huwelik beheers word deur die reg van die land waarmee die partye en die huwelik die nouste verband het. In die loop van haar betoog bespreek die outeur die funksie van die koppelfaktor in die internasionale privaatreg in die algemeen. Sy verwys na die posisie in die kontinentale stelsels en na ontwikkelings in die VSA. Die onderskeid tussen konflikgeregtigheid en substantiewe geregtigheid kom ter sprake, asook die proses van die versagting van koppelfaktore.

[54] of 1992.

[55] See, eg, Palmer "The Austrian codification of conflicts law" 1980 *American Journal of Comparative Law* 197 216-217 226: in the Austrian Code (§19 which refers to §18) a "common personal status law", the law of the common habitual residence, as well as the *lex fori*, are indicated as possible *leges causae*, while provision is also made for the application of the law of a third state, should the spouses have a stronger connection with that state.