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Displaced People in International Marriage Law: Choice of Law and the 1951 Convention Relating to the Status of Refugees

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Abstract : The 1951 Convention relating to the status of refugees contains a conflict of law rule for the determination of the applicable law to marriage. The wording of this provision leaves much to be desired as it uses the domicile and the residence of the spouses as single main and subsidiary connecting factors. In cases where couples live in different countries, the law applicable to the case is unclear. The same problem arises when refugees are married to individuals outside of the convention's scope of application. Different interpretations of this legal provision have arisen to solve this problem. Courts in a number of European countries apply the so-called modification doctrine: states should apply their domestic private international rules in all cases involving refugees. Courts shall, however, replace the national connecting factor by the domicile or residence in situations where nationality is used to determine the applicable law. The internal conflict of law rule will then be slightly modified in order to be applied according to the convention. However, this approach excludes these people from using their national law if they so desire. As nationality is, in all cases, replaced by domicile or residence as connecting factor, refugees are automatically deprived of the possibility to choose this law in jurisdictions that include the party autonomy in international marriage law. This contribution aims to shed light on the international legal framework applicable to marriages celebrated by refugees and the unnecessary restrictions to the exercise of the party autonomy these individuals are subjected to. The interest is motivated by the increasing number of displaced people, the significant number of states party to the Refugee Convention – approximately 150 – and the fact that more and more countries allow choice of law agreements in marriage law. Based on a study of German, Spanish and Swiss case law, the current practices in Europe, as well as some incoherencies derived from the current interpretation of the convention, will be discussed. The main objective is showing that there is neither an economic nor a legal basis to deny refugees the right to choose the law of their country of origin in those jurisdictions providing for this possibility to other foreigners. Quite the contrary, after analyzing other provisions contained in the conventions, this restriction would mean a contravention of other obligations included in the text.

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