**European Parliament – Joint Public Hearing of LIBE and JURI Committees on European Civil Law cooperation – Divorce and legal separation**
11 September 2007

Presentation by Dr Matteo Bonini Baraldi, University of Bologna

*The role of public policy clause in relation to proceedings concerning divorce and legal separation*

## *Background*

On 17 June 2006 the Commission published its Proposal for a Council regulation on applicable law in matrimonial matters.[1] With this proposal it seeks to amend Regulation 2201/2003[2] concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

As the preamble of the 1968 Brussels Convention on jurisdiction in civil and commercial matters affirms and as the ECJ has held many times, the meaning of Community involvement in private international law matters is primarily to 'provide legal protection of persons established within the Community'. According to the 2005 Green paper, 'in view of the high number of divorces within the European Union, applicable law and international jurisdiction in divorce matters affect a considerable number of citizens'.[3]

The rationale behind the Community proposal we are discussing today lies principally in the effort to facilitate citizens' lives and to protect them through better legal certainty and enhanced access to justice. This serves the aim of guaranteeing free movement of people foreseen by the treaty without unjustified restrictions (Recital nr. 1). These are very important 'constitutional' situations in relations to which the choices of the community lawmakers are, obviously, subject to the respect of principles and exceptions foreseen by the Treaty and by case law. Arguably, this is why the Commission considered that recourse to public policy should be exceptional.

## *Internal public policy*

At the outset, it should be recalled that both the existing regulation and the proposal apply only to cross-border situations (art. 65 of the Treaty), not in purely internal situations.

The concept of public policy referred to here encompasses the international public policy of each member state. In general terms it refers to such fundamental values of a given legal system, which cannot yield to any other interest, principle, or value coming from the outside. In its face it is neutral, and its concrete impact normally depends on the perspective adopted by the internal legal system as to what is good and what is evil. In the opinion of some, mutual trust and recognition cannot extend without limits and the public policy exception provides those limits.

Public policy is also foreseen by the art. 39(3) of the EC Treaty as a limitation to the exercise of freedom of movement, but we know that the ECJ has given it a very narrow meaning: its scope cannot be determined unilaterally by member states, and it comprises in addition to 'the perturbation of the social order which any infringement of the law

[1] COM(2006) 399 final.
[2] OJ 23.12.2003, L 338/1.
[3] COM(2005) 82 final, p. 3.

involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society'.[4]

By contrast, in European private international law public policy – which means protection of the essential principles of the forum – still plays a primary role when family matter are at stake. At present it concerns the recognition and enforcement of judgments already handed down.[5]

Art. 22(a) of Regulation 2201, as it now stands, seems to cover both substantive and procedural incompatibilities with the fundamental principles of the forum.

The proposal under examination would insert a second provision on public policy, concerning the application of the law of another member state.[6]

The resulting system would most likely imply that substantive law issues are dealth with under art. 20e, whereas procedural issues come under art. 22(a).

For instance, theoretically under art. 20e a member state will be able to refuse to apply the law of another member state which foresees divorce by consent, on grounds that in its legal system divorce can only be granted in cases determined by law. This, despite the fact that art. 25 of Regulation 2201 makes it clear that 'the recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts'. Such differentiation has not yet been replicated as far as applicable law is concerned. Thus, a member state will be able to block the application of a foreign law on consensual divorce, but not the enforcement of a judgment on consensual divorce granted in another member state.

In other fields there is perhaps less need for such a radical protection of domestic interests (art. 20 of the Draft regulation on maintenance obligations is telling).

More generally, the European integration has been pursued in many fields through mutual recognition: just think about professional qualifications or technical regulations for products just to name a few. The AFSJ is relatively new, but there are compelling reasons pointing to the opportunity of following the same approach in the field of family matters.

*Concepts of marriage and 'European public policy'*

But first, there are at least three main understandings of marriage that some member states might wish to preserve against other member states:

i) that marriage can always be (easily and inexpensively) dissolved;
ii) that marriage is for life and can never be dissolved;
iii) that marriage is between persons of different sex only.

Point one and two are radically incompatible but, as it appears, will be allowed to co-exist under the proposed system. The proposed solution aims at preserving the prerogatives of the forum, both when the court seized would have to apply a law that does not provide for divorce[7] and when it would have to apply a

[4] Case C-441/02 [2006] ECR I-3449.
[5] Art. 228(a) of Regulation 2201 stipulates that 'A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought'.
[6] Art. 20e of the Proposal: 'The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.'
[7] 'Where the law applicable...does not provide for divorce, the law of the forum shall apply' (see Council document 5274/07, 12 January 2007, p. 7). Later in year (Council document 8364/07, Justice and Home

law that does allow divorce. In fact, the Council held that 'the proposal does not establish the legal institution of divorce in a Member State which does not have such an institution nor does it oblige a Member State to introduce divorce in its national law. Moreover, nothing in the proposal obliges the courts of a Member State whose law does not provide for divorce to pronounce a divorce by the application of the conflict-of-laws rules of the proposal'.[8]

In our case, the public policy clause is designed to ensure respect for the laws and traditions of the member states. On closer look, nothing in principle prevents co-operation among them in the field of the family, as the recently established Alliance for Families testifies. Though public policy is mentioned there, too,[9] it appears that there are very intense co-operation efforts being put in place and very significant calls for Community action in order to support families in Europe.

Why is this? Because 'sustainable family policies have a part to play in improving social cohesion and in sound economic development', and because European exchanges in this field *can* go to the advantage of 'achieving the goals of the renewed Lisbon Strategy for Growth and Jobs and the European Union's social cohesion objectives'. Thus, member states do share the view that there is a close inter-relation between family matters and crucial Community action and objectives, and that domestic policies can be confronted and shared with others.

These developments highlight a promising approach as they demonstrate that it is possible and even desirable to align member states' and EC activities to the principle of loyal co-operation developed in other areas of Community integration.

By contrast, in the three fields mentioned above there seems to be little room for the mediation of opposing views. Ignoring the aim of closer integration in the area of family law could, sooner or later, clash against the fact that in the Community itself a 'public policy' has developed, a set of customs, values, principles so fundamental that could not be put aside. The Community also has its own 'traditions', such as – in economic matters – the prohibition of double regulation, home state control only on production and marketing of goods, subjecting the service provider only to the requirements of the member state where he or she is established, and others. As far as free movement of people is concerned it should be recalled, for instance, that any obstacle should be justified in primis on grounds of specific exceptions foreseen by the Treaty (public policy, security, and health). In addition, it is rather clear that a 'Community public policy' is fundamentally based on respect for certain core human rights, too.

The question today is whether it is lawful to ignore this bundle of essential principles of Community action when personal status is at stake. Let me just read out the second sentence of the Preamble of the Nice Charter:

'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its

---

Affairs meeting of 19-20 April 2007) the Council indicated that the issue is still open for discussion: 'Several proposals are on the table on this issue none of which is yet acceptable to all delegations...Future work will examine whether it would not be necessary to expressly indicate that lex fori shall apply where the foreign divorce law would discriminate against one of the spouses or where the foreign law does not provide for divorce' (p. 10).

[8] Document 8364/07, p. 10.

[9] See Recital nr. 6 of the Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the importance of family-friendly policies in Europe and the establishment of an Alliance for Families, OJ 17.7.2007, C 163/1.

activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.'

Seen from a Community perspective, the AFSJ is there to serve the individual citizen and to better protect his or her rights. Measures related to access to court and free movement of judgments can be seen both as an attempt to specify and substantiate these citizen's rights and as a factor that exerts foreseen or unforeseen, direct or indirect consequences on them.

The Union has a duty – inspired by those values – to protect individual rights and, thus, Union values should guide Community action at least alongside the values cherished by member states.

This bundle of EC economic and non-economic traditions can be distilled in principles that that could guide Community activism in other matters. To a large extent, disputes on family law concern member states'relations. Generally speaking, however, when transferred onto the Community arena, the domestic interests (safeguarded by the public policy clause) come into contact with the Community's own objectives and 'traditions', normally referred to under the label of the 'supremacy of EC law'. In this case, the provisions on freedom of movement of workers and the right of establishment (arts. 39 and 43 EC Treaty), the free movement of Union citizens (art. 18 EC), and the duty to respect and promote fundamental rights (art. 6 EU Treaty), among which equal treatment and access to justice.

While it is to be hoped that no particular national interest will be able to trump or undermine the enjoyment of Treaty rights by individuals and that member states will be able to negotiate a satisfying agreement, the risk is that the final arrangement will consist in a win-win situation for member states only, where no (value) choice is made by the EC.

Unfortunately, the only option currently pursued is that of letting each member state be free to filter and block any unwanted arrangement ***even in cross-border situations***.

Member states with opposite visions will both benefit: state A will be able to block foreign laws allowing divorce, and state B will be able to block foreign laws that do *not* allow divorce.

From the point of view of the EC this equates to a non-decision, or to a decision of the Community to let others decide. From the point of view of EU citizens, this is likely to result in a curtailment of their Community rights.

Such an arrangement could be justified for purely internal situations. Nevertheless, the ECJ has held in *K.B.* v. *National Health Service Pensions Agency*[10] that national rules on capacity to marry which undermine the enjoyment of a Treaty right are incompatible with EC law. That was an internal situation. The arrangement such as the one described would be *a fortiori* not justified when cross-border situations are involved because it undermines the pursuit of Community interests.

It is true that preferring the law of the last common habitual residence sends a clear message: European integration demands to those migrating that they fully agree that their lives will be governed primarily by the court and normally by the law of the place where they chose to live. The argument could be made that the opposite also holds true: choosing the court and the law of the member state where migrants reside equates to a lack of opennes of member states towards the laws (thus practices and values) of other member states.

## *Safeguarding the supremacy and coherence of EC law*

I will now briefly illustrate this perspective taking same-sex marriage as an example.

Same-sex marriage is a good illustration of the impact that different paths of European integration can have both on individual rights, on the role of the Union in the public sphere and, ultimately, on its legitimacy. Sexual orientation is a personal characteristic constitutionally protected at both the national and the European level: the ECtHR has held that both (homo)sexual conduct[11] and (homo)sexual identity[12] are

[10] ECJ, 7 January 2004, Case C-117/01, [2004] ECR I-541.
[11] ECtHR 22 October 1981, *Dudgeon* v. *UK*, appl. 7525/76, *Series A*, nr. 45.

intensely protected by art. 8 of the Convention (respect for private life). Any State or Union measure must take this into account, and of course gay and lesbian people are not isolated monads but they do form couples and families, they do move around, they do break up and separate.

The point I'd like to make is that while member states may feel that they retain exclusive competence over family law matters, the Union may feel that it is under a duty to abide to the fundamental values on which it claims to be built and to ensure the supremacy of EC law. Parliament in particular may feel that it has a duty to protect the fundamental rights of citizens, including gay and lesbian citizens.[13]

The balance between members states' interests and the EC vision and mission is now disproportionately tilted in favour of the former. In fact, the provision on public policy should be read in conjuction with a statement of the Council on existence and validity of marriages, following which 'the court of a Member State which has jurisdiction as regards divorce or legal separation may assess the existence of a marriage according to its own law.' [14]

If based on these grounds, the system seems seriously unbalanced and founded upon a very conspicuous 'mutual distrust'. This 'mutual distrust' will undermine supremacy of EC law, and will cause discrimination of individuals concerned. More precisely, a member state would simply have to claim that the same-sex marriage contracted in a given member state is non-existent or invalid in its territory; it will, thus, avoid the application of the regulation tout court without any need to go so far as to examine the public policy clause.

This solution might be justified in two cases: in purely internal situations, and in the context of an international Convention, which only establishes a minimum standard of inter-state co-operation and no further convergence.

For instance, the 1970 Hague Convention on recognition of divorces (art. 7) lets contracting states free to deny recognition of a divorce when the spouses are citizens of a country that does not foresee divorce.

Today we find ourselves in none of the two hypotheses.

You should not forget that these rules only apply when people migrate and not when they stay in their member state of origin. What the Council is saying, thus, is that a member state wishing to keep its own configuration of marriage for its own nationals, which is an understandable position for the time being, will be able to impose that same configuration on all EU citizens who took up residence there, and who will not be able to access justice there and to obtain a court decision for their divorce thanks to the facilitated regime foreseen by Community law.

Of course, since same-sex marriage is only an option among others, the three member states that currently allow it will not impose a condition of identity of gender in all marriages; by contrast, in all other member states a condition of difference in gender does implicitly apply.

---

[12] ECtHR 27 September 1999, *Smith and Grady* v. *UK*, appl. 33985/96 and 33986/96, *Reports of Judgements and Decisions* 1999-IX.

[13] In the Council there appears to be only one delegation opposing this state of things: 'One delegation underlined...that the respect of the national legal order should not jeopardise the coherent application of Community law' (document 8364/07, p. 7).

[14] Council document 8364/07, Justice and Home Affairs meeting of 19-20 April 2007, p. 11.

In the case of the EC Council's position generates unpredictabily and unfairness, and it runs contrary to the general principles adopted in other areas of EC law and to those upheld by the ECJ. We know that free movement of people can be limited only in exceptional cases which fall within the ambit of public policy, health and security seen above: the limitation deriving from the choice of the *lex fori* for determining one's personal status cannot easily be deemed to be covered. By way of comparison, as regards the attribution of *citizenship* (*Micheletti*[15]; *Chen*[16]) and *surnames* (*Garcia Avello*[17]), the ECJ has ruled that **member states must respect the choices made by other member states**. The grant of nationality and of surnames embody crucial State interests. These are matters which fall outside the powers of the Community. Simply put, there are no reasons why the Community lawmaker should depart from this principle as far as family status is concerned.

The ECJ has held in *Micheletti*[18] that a member state was not entitled to dispute the nationality granted by a member state; in *Chen*[19] it also added that member states are not allowed to question the grant of nationality by other member states. Furthermore, in *Garcia Avello*[20] Belgian authorities were criticised for not allowing a Spanish-Belgian couple to follow Spanish rules on surname attribution for their children.

There could certainly be situations where a certain degree of flexibility towards national sentibilities could be opportune, but in this case there would be the need to balance various interests at play in light of principles of proportionality and necessity, not to radically exclude any possibility of debate.

This case law, and case law in the field of free movement of goods (*Cassis de Dijon*)[21] or freedom of establishment for companies (*Centros*)[22] point to a possible solution: to allow the Community to require member state B not to re-examine the existence of a family arrangement foreseen by member state A and penetrated together with the migrating citizen. The K.B. case on equal treatment of the transsexual partner offers further elements for reflection, even if it did not concern migrants.

Member state A might disagree on the meaning of marriage (or of divorce) adopted by member state B and legitimately refuse any Community influence on that matter when formulating its internal policies, but when citizens of A freely move to B and take up residence there, the Community could invite or require member state B to deal with any family arrangement that a citizen of A carried along.

In sum, there are two compelling reasons why the option chosen by the Council is disproportionate and unreasonable: first, because it does not follow the principle of mutual recognition developed and followed by the EC in most other matters; second, because it could result in a curtailment of individual rights.

<u>*Adopting the* lex loci actus *criterion*</u>

In order to reach the same results reached in these areas (just as sensitive) thanks to, for instance, the prohibition of double regulation principle, in private international law matters the EC should adopt the criterion of the *lex loci actus* (or *celebrationis*). This criterion is in line with Community objectives and solutions generally pursued.

In conclusion, certainly the times have gone when, as in the early 1970s, 'the possibility of human rights as a fundational principle of the Community was largely ignored' (Williams

[15] Case C-369/90 [1992] ECR I-4239.
[16] Case C-200/02 [2004] ECR I-9925.
[17] Case C-148/02 [2003] ECR I-11613.
[18] Case C-369/90 [1992] ECR I-4239.
[19] Case C-200/02 [2004] ECR I-9925.
[20] Case C-148/02 [2003] ECR I-11613.
[21] Case 120/78 [1979] ECR 649.
[22] Case C-212/97 [1999] ECR I-1459.

2005, 145). Now that human rights protection standards are clearly established within the Community, the Community itself could be well suited to assist national legal systems – from which those standards originated – to abandon their reluctance and to grow in coherence and in mutual trust at the Community level. Convincing member states that 'double regulation' the field of personal status and conditions to marry cannot be a sustainable option in the long run will certainly be a crucial challenge for the years to come.

*Some guidelines as to how to address the situation*

- 1) In general, discrimination on grounds of sexual orientation must be avoided as much as possible

According to general principles of EC law, to art. 6 TEU and to art. 21 of the Nice Charter it is important that the benefits sought by the new rules (i.e. better legal protection) go to the advantage of all citizens without discrimination. Regulation 2201 applies to the dissolution of marriages only. First, it is unclear whether the Regulation and the draft regulation could apply to same-sex marriages. Second, registered partnerships or the like are not mentioned and there is no indication that 'international' or bi-national registered partners whishing to terminate their relationship can benefit from the facilitated regime foreseen by the Regulation. The draft regulation on applicable law does nothing to change this.

- 2) Application of existing or proposed rules should include legal separation or dissolution of same-sex marriages

An Italian court will be able to claim that a Belgian same-sex marriage amounts to a legal nullity and, thus, no divorce can and should be granted. In fact, in the Council there is agreement as to letting the member state which has jurisdiction as regards divorce or separation 'assess the existence of a marriage according to its own law'.
By the way, applicable law to validity of marriages is an item not open for discussion at the moment. Letting the member state which has jurisdiction as regards divorce or separation assess the existence of a marriage according to its own law amounts to establishing embrionic rules on the jurisdiction and the law applicable to marriages and conditions to marry: this is certainly beyond the scope of the draft regulation. If there needs to be a discussion as to the law applicable to marriages, and not only to divorces, it should at least be done in an overt way and in an appropriate setting. The attempt of the Council is completely inappropriate.

- If validity of marriages is discussed, then the *lex loci actus* factor should be adopted.

This is also the option preferred by the Council with respect to the agreement concerning choice of court and of applicable law by the parties (options two and three).[23]

As to the merits, the Council maintains that 'the definition of marriage and the conditions of the validity of a marriage are matters of substantive law and are therefore left to national law'. This contention can be acceptable in this case, but the question is: to which national law? It does not follow automatically, as the Council seems to imply, that it should be the law of the member state which has jurisdiction as regards divorce. It could well be the *lex loci actus*, that is to say the law of the place where the marriage was contracted. Unfortunately, this factor is never mentioned, neither with regards to jurisdiction nor with respect to applicable law. If this criterion is disregarded, a chain of problems could emerge.

> *Aris and Nikos, two men of Cypriot nationality, live and work for the EP in Brussels. After five years they get married there. Not long after the wedding, they take up residence in Italy for their new job at the Commission's representation in Rome. After many years the couple decides to split.*
> *They may wish to divorce in front of an Italian court, which would theoretically have jurisdiction according to art. 3(a), first indent, if it was a different-sex marriage.*

A plain reading of the text and of *travaux préparatoires* would suggest that same-sex marriages have not been deliberately excluded by Reg. 2201 and are, thus, comprised within the scope of the regulation. Italy would then have jurisdiction. This has never been tested in courts. The Council, as it appears, is seeking to block such interpretation. In the example, the Italian court will be able to claim that a Dutch same-sex marriage amounts to a legal nullity and, thus, no divorce can and should be granted.

[23] See Council document 5274/07, 12 January 2007, p. 3 and 6: 'Such agreement shall be concluded in accordance with the formal requirements of a marriage contract *under the law of the place where the agreement was made*' (emphasis added).

- Council position generates unpredictability and unfairness

The Italian court, which could have jurisdiction because Italy is the place of habitual residence of the couple, will not apply Reg. 2201 to a same-sex marriage because it considers it non-existent. Italy could, thus, decline jurisdiction even if both 'spouses' are jointly residing there. It could then apply its domestic rules of private international law and determine jurisdicion that way. Next, it would have to determine the applicable substantive family law. In the meantime the couple might start divorce proceedings in Cyprus, according to art. 3(b) of Reg. 2201. The Cypriot court could take the same view as the Italian court and refuse to apply the Regulation: this might result in a refusal to grant divorce. If, let's suppose, the couple manages to obtain divorce in the Netherlands and wishes to have that decision enforced in Italy, Italian courts could still deny recognition of the Dutch divorce on public policy grounds pursuant to art. 22(a) of the Regulation. *Sic stantibus rebus*, unpredictability and unfairness seem to prosper.
Same-sex married couples become hostage of a system that does not grant them the same facilitations granted to opposite-sex spouses and that places on them considerable hardship. Until all member states open up marriage to same-sex couples, the most adequate connecting factor is that of *lex loci actus*.

- Registered partnerships should be included

The problems tackled by Regulation 2201 and by the draft regulation remain wholly unaddressed as far as registered partnerships are concerned. The only rational explanation for this choice is that, as seen above, registered partners are normally treated similarly to unmarried (and unregistered) couples, which would have no divorce or anulment claim to pursue. However, it must be remembered that Regulation 2201 applies to children of both married and unmarried couples. Registered partners who jointly adopted a child according to the relevant law and wishing to obtain a court decision over custody, could therefore benefit from the regime foreseen by the Regulation. Because of the national diversity and sensitivity in matters pertaining to children and parenthood, it is still possible that a court decision adjudicating a custody dispute between registered partners will not be recognised and enforced in other member states on grounds of public policy pursuant to art. 23(a).

*Recommendations*

In order to bring the instruments more in line with the needs of LGBT couples, they would have to be amended as follows:
(a) clarify that Regulation 2201 applies to same-sex marriages, contracted according to the law of the *lex loci actus*, and that the validity of marriages and the conditions to marry are determined by the law of the place where marriage was celebrated;
(b) clarify explicitly that no public policy concern emerges solely on the grounds that the spouses are of the same sex, neither as far as applicable law is concerned, nor as regards recognition and enforcement of judgments;
(c) ensure the application of Regulation 2201 to registered partnerships and eventually of other forms of legal cohabitation, and expressly exclude that any public policy claim can be made solely on the grounds that the decision concerns one of such schemes;
(d) make it clear that no public policy claim may be made by any one member state as regards court decisions concerning parental responsibility over children of same-sex couples.