Public and Private International Law Bulletin, Volume: 35, Issue: 2, 51-68

THE IMPACT OF SUBSTANTIVE LAW ON THE MATERIAL SCOPE OF APPLICATION OF REGULATION BRUSSELS IIbis

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Abstract

Legal terms contained in each Regulation have to be interpreted in an autonomous way. To this purpose Article 2 of Regulation Brussels IIbis contains a list of definitions covering most but not all of the legal terms used. However, procedural law cannot be completely dissociated from substantive law. This paper addresses the impact of substantive family law on the determination of the Regulation's scope of application.

First of all, there is a relevance of the divide line between public and private law. As far as divorce issues are concerned, the new perception of marriage and the emergence of multicultural societies have to be carefully taken into account. The scope of application in relation to parental responsibility is to an important extent determined upon the basis of the new concept of family. Despite the interference of modern perceptions, it can be argued that determining the place of the child's habitual residence has led in the resurgence of traditionalist views.

Keywords: *Divorce, family, habitual residence, marriage, parental responsibility, Regulation Brussels IIbis.*

BRÜKSEL IIbis KONVANSİYONUNUN UYGULAMA ALANI ÜZERİNDE MADDİ HUKUK DÜZENLEMELERİNİN ETKİSİ

Öz

Her bir AB Tüzüğü'nde yer alan hukuki terimler, kendi içinde bağımsız olarak yorumlanmalıdır. Bu amaçla, Brüksel IIbis Tüzüğü'nün 2. maddesi, Tüzük metninde kullanılan terimlerin hepsini olmasa da çoğunluğunu kapsayacak şekilde bir tanımlar listesine yer vermiştir. Bununla birlikte, usul hukuku maddi hukuktan tamamıyla bağımsız düşünülemez. Bu makalede, Brüksel IIbis Tüzüğü'nün uygulama alanının tespitinde, aile hukukuna ilişkin maddi hukuk kurallarının etkisi incelenmiştir.

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Öncelikle, bu mesele kamu hukuku – özel hukuk ayrımı ile ilgilidir. Boşanmaya ilişkin meseleler değerlendirilirken, evlilik kurumuna ilişkin yeni bakış açıları ve çok kültürlü toplumların ortaya çıkışı dikkatle göz önünde bulundurulmalıdır. Tüzüğün velayet hakkına ilişkin hükümlerinin uygulama alanı çok büyük ölçüde yeni aile anlayışı baz alınarak belirlenmiştir. Modern görüşlerin müdahalelerine rağmen, çocuğun mutad meskeninin neresi olduğunun tespitinde gelenekçi görüşlerin yeniden ortaya çıktığını ileri sürmek mümkündür.

Anahtar Kelimeler: *Boşanma, aile, mutad mesken, evlilik, velayet hakkı, Brüksel IIbis Tüzüğü.*

Introduction

Regulation 2201/2003 (Regulation Brussels II*bis*[1] or II*bis*[2]) exclusively deals with procedural issues, i.e. the international jurisdiction and recognition or enforcement of judgments in matters of divorce and parental responsibility[3].

It is accepted as a general rule that legal terms contained in each Regulation have to be interpreted in an autonomous way, whereby their interpretation must be adjusted to the aims of the legislative tool at issue, notwithstanding the definition given to these terms by national laws as the *lex fori* or the *lex causae*. To this purpose Article 2 of Regulation Brussels II*bis* contains a list of definitions covering most but not all of the legal terms used.

At any rate, procedural law, cannot be completely dissociated from substantive law. This paper addresses the impact of substantive family law on the determination of the Regulation's scope of application.

As part of EU Law, the Regulation is integrated into a set of rules aiming at securing the freedom of circulation of persons, goods and services. Family law is closely connected to the circulation of persons. Therefore, it has to be taken into account that increasing their mobility is one of the main goals pursued by Regulation Brussels II*bis*. From this point of view, it has

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1 For instance in German and Greek bibliography.

2 For instance in English and French bibliography. As this paper is redacted in English, the author prefers to denominate it as Brussels II*bis*.

3 See Katharina BOELE-WOELKI/Cristina GONZALEZ BEILFUSS (Eds.), *Brussels IIbis: Its Impact and Application in the Member States*, Intesentia, Antwerpen-Oxford, 2007, passim.

to be assumed that family relationships may turn out to be an impediment, in so far as they reduce the freedom of movement of the persons concerned.

This is the first element indicating the intertwining of procedural rules with the tenets of substantive law. In most laws we have been witnessing a trend towards loosening the binding effect of marriage. The development of substantive law in Catholic Southern European countries is a characteristic example.

Regulation Brussels II*bis* applies and supersedes national rules, if the connecting factor used by the applicable jurisdictional rule of the Regulation is located within the EU. Jurisdiction will always be determined by application of the relevant provisions of the Regulation. In particular regarding divorce cases, Article 3 prescribes a multiplicity of alternative grounds for jurisdiction; thus, facilitating the plaintiff to choose between more courts the most appropriate for a quick and advantageous outcome, i.e. the dissolution of the marriage. From this point of view, the provisions of Regulation Brussels II*bis* on divorce seem to be permeated by the purpose of facilitating the divorce (*favor divortii*).

Regulation Brussels II*bis* is applicable in cases with a foreign element. This means that it applies to cases related to more than one Member State, as well as to cases related to one Member State and a third state. This solution has been admitted by the European Court of Justice (ECJ) / Court of Justice of European Union (CJEU), in the case *Owusu*[4], with regard to the Brussels Convention of 27 September 1968 on international jurisdiction and recognition or enforcement of judgments in civil and commercial matters.

Consequently, Regulation Brussels II*bis* is applicable in divorce cases of Turkish citizens having their habitual residence in Germany, while it does not apply to divorce cases between Greeks living in Greece (or between a Greek citizen and the citizen of a third State living outside the EU).

Regarding parental responsibility, the child's habitual residence in the territory of a Member State at the time the court is seised is a prerequisite for the application of Regulation Brussels II*bis*. It is also the jurisdictional basis upon which international jurisdiction is determined (Article 8).

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[4] ECJ, 1.3.2005, OWUSU/JACKSON, C-281/02.

The impact of substantive law on determining the material scope of application of the Regulation will be examined with regard to:

a) the divide line between public and private law,
b) the new perception of marriage,
c) the new concept of family,
d) the determination of the child's habitual residence.

I. The Divide Line Between Public And Private Law

It cannot be put into doubt that the State is strongly interested in the way family relationships are being regulated. This entails the interference of public law provisions along with the private law provisions related to family law.

Article 1 para 1 of Regulation Brussels II*bis* states that the latter *"shall apply, whatever the nature of the court or tribunal, in civil matters relating to"* divorce and parental responsibility. This provision has to be read in conjunction with some of the definitions contained in Article 2.

According to Article 2 point 1, *"the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1"*. Article 2 point 2 specifies that *"the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation"*.

It derives that administrative authorities may deal with the divorce or parental responsibility issues. Consequently, the Regulation covers not only civil, but also administrative procedures. It breaks through the divide line between private and public law to the effect that its scope of application encompasses public law measures. This is reflected in judgments handed down by the ECJ/CJEU. The Court explicitly held[5] in 2007 that:

"the term 'civil matters' must be interpreted as capable of extending to

[5] ECJ, 27.11.2007, C, C-435/06.

measures which, from the point of view of the legal system of a Member State, fall under public law"[6].

No importance is to be attributed to the point of view of the law of a Member State, even if the latter is the State, where the tribunal dealing with the case is located. The autonomous interpretation of the term *'civil matters'* prevails. Following this the Court held that:

"...Article 1(1) of Regulation No 2201/2003 is to be interpreted to the effect that a single decision ordering that a child be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection"[7].

Identical arguments were adopted two years later, in the judgment rendered on 2.4.2009 in the case A[8], this resulting in the Court deciding that:

"Article 1(1) of the Regulation must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection".

This was confirmed in 2012 with regard to a measure that had as a consequence that the child be deprived of its liberty[9]. It was held that:

"A judgment of a court of a Member State which orders the placement of the child in a secure institution providing therapeutic and educational care situated in another Member State and which entails that, for her own protection, the child is deprived of her liberty for a specified period, falls within the material scope of Council Regulation No 2201/2003 of 27 November 2003".

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[6] Point 51. See also point 52: *"That interpretation is, moreover, supported by Recital 10 in the preamble to Regulation No 2201/2003, according to which that regulation is not intended to apply 'to matters relating to social security, public measures of a general nature in matters of education or health ...' Those exceptions confirm that the Community legislature did not intend to exclude all measures falling under public law from the scope of the regulation".*

[7] ECJ, 27.11.2007, C, C-435/06, point 53.

[8] ECJ, 2.4.2009, A, C-523/07, point 29.

[9] CJEU, 26.4.2012, Health Service Executive/S.C., A.C, C-92/12.

It has to be inferred that the divide line between public and private law is not relevant as to determining the scope of application of Regulation Brussels II*bis*. It should however be stressed that the Regulation does not cover penal or criminal sanctions. Article 1 para 3 (g) explicitly exempts from the scope of application of Regulation the *"measures taken as a result of criminal offences committed by children"*.

II. The Scope Of Application In Relation To Matrimonial Matters: The New Perception Of Marriage

The Regulation applies irrespective of the form of the divorce proceedings (contested or consensual divorce) or of the ground the divorce claim is based upon (fault, separation etc.). The meaning of the term "marriage" should be ascertained in order to determine the scope of application of Regulation Brussels II*bis*. Article 2 does not contain a definition of this term. On the other hand, the meaning of marriage is subject to a profound reconsideration. Firstly, the significant social changes have called into question the traditional approach of marriage. Secondly, multicultural societies are faced up to the acceptance of a different approach of marriage.

A. The New Perception of Marriage

In the absence of a definition of marriage, the question arises as to whether this term is subject to an autonomous interpretation within the framework of Regulation Brussels II*bis*. This concerns in particular the case of same-sex marriages.

The prevailing view seems to be that same-sex marriages do not fall under the scope of application of the Regulation. This position is underpinned by the argument that the drafters of the Regulation were aware of the legislative development in favor of same-sex marriages, but did not explicitly mention that these marriages are covered by it[10].

[10] Walter PINTENS in Ulrich MAGNUS/Peter MANKOWSKI, *Brussels IIbis Regulation*, Sellier, Munich, 2012, Article 1, Rn. 21, Burckhardt HESS, *Europäisches Zivilprozessrecht*, Heidelberg 2010, p. 391 (who calls into question the correctness of this approach, p. 392).

This argument can be rebutted, because at the time Regulation Brussels II*bis* was being prepared, concluding a same-sex marriage was only permitted in some Northern European countries. In the last ten years, there was a significant development towards the acceptance of same-sex marriages. There is a tendency to accept the same-sex marriage even in Catholic countries (France, Spain, Portugal)[11].

Denying the applicability of Regulation Brussels II*bis* makes its jurisdictional rules inoperative. Their main goal is to facilitate the conduct of a litigation aiming at the dissolution of marriage in order to secure the free circulation of the persons concerned. To the extent that they are more favorable to the dissolution of marriage, their non-applicability leads to the oxymoronic situation that the dissolution of same-sex marriages does not benefit from the *favor divortii* that impregnates the Regulation[12].

For instance, the divorce action of a person married with a person of the same sex in Sweden and seeking for a divorce in Greece upon the basis of his habitual residence being there will be dismissed on the grounds of lack of jurisdiction of Greek courts. The same-sex marriage concluded in Sweden will bind the spouse who tried to obtain the divorce; thus, reducing his/her freedom of movement. Without losing of sight, the likelihood that a foreign provision allowing same-sex marriage be considered as contrary to public policy, a dismissal based upon the non-applicability of Regulation Brussels II*bis* would be somewhat equivalent to a sort of favor *matrimonii(!)*

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[11] Hungary and Croatia are not prone to legalize same-sex marriages. In Croatia a constitutional referendum backed in December 2013 the proposal to amend the country's Constitution to the effect that same-sex marriages be banned.

[12] The *favor divortii* is invoked in order to call into question the Regulation's non-applicability for the enforcement of a judgment dismissing the request for divorce (Walter PINTENS in Ulrich MAGNUS/Peter MANKOWSKI, *Brussels IIbis Regulation*, Sellier, Munich, 2012, Article 1, Rn. 34). The position in favor of non-applicability is based upon the wording of Article 2 point 4 of the Regulation: *"the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision"*. Furthermore, the Regulation aims at facilitating the divorce. Therefore, recognition of a judgment dismissing the request for divorce on the conditions laid down by the Regulation that are presumed to favor the recognition should be considered as contrary to the main goal of Regulation Brussels II*bis*.

However, the Regulation aims at facilitating on the procedural level the free circulation of persons by lifting the burden of any family link. This can be argued in favor of extending its scope of application to same-sex marriages. To this purpose, the principle of *favor divortii* could be relied upon in order to accept that the scope of the Regulation encompasses same-sex marriages. Besides, it is accepted that the Regulation applies for the children of those living together, including those doing it as same-sex spouses, as far as parental responsibility is concerned. This could be an argument in favor of this position.

This position, in favor of applying the Regulation to divorce requests related to same-sex marriages, seems to be enhanced by the development of the ECJ/CJEU's case-law with regard to registered partnerships with same sex partners. As a matter of fact, the attitude of the ECJ towards a registered partnership with a person of the same sex has significantly changed. Initially the Court adhered to the negative position in 2001[13], by holding that domestic provisions for registered partnerships are diverging and that registered partnerships cannot be treated in the same way as marriage. That case concerned a staff member living in a registered partnership with a person of the same-sex who sought the same household allowance as that provided for married couples in the Staff Regulations of Officials of the European Communities.

The Court reversed its position some years later in a way that could anticipate its stance towards same-sex marriages, even in the context of Regulation Brussels II*bis*. In a judgment handed down in 2008 it decided that the non-granting of a pension to the surviving same-sex partner of a person, with whom the surviving had concluded a registered partnership, is contrary to European law[14]. The same solution was given to the issue by the Civil Service Tribunal[15].

[13] ECJ, 31.5.2001, D. and Swedish government/Council, C-122/99.
[14] ECJ, 1.4.2008, Tadao Maruko/Versorgungsanstalt der deutschen Bühnen, C-267/06.
[15] Judgment of 14.10.2010 in the case F-86/09.

B. Marriage In Multicultural Societies

Religious diversity is one of the components of multiculturalism. It is from this point of view that the application of Regulation Brussels II*bis* on religious proceedings of divorce has to be examined. Its application mainly concerns whether judgments delivered within the framework of religious proceedings may be recognized or enforced in accordance with the relevant provisions of the Regulation.

The main argument of the prevailing position, according to which religious proceedings do not fall under the Regulation's scope of application[16], is that it is somehow difficult to regulate issues related to the functioning of religious courts, because the latter are not fully integrated into the judicial organization of a State. Therefore, the Regulation is not applicable to a get-divorce pronounced by a rabbinic court.

The same position prevails as to the divorce judgments rendered by the Moufti in Northern Greece pursuant to the *sharia*, as prescribed by Article 5 of the Law Nr. 1920/1991, in compliance with international conventions between Greece and Turkey. These judgments are confirmed by a judgment of State courts, i.e. of the competent District Court, the role of which is confined to a control of constitutionality[17]. The Court of Appeal of Frankfurt[18] denied the application of the Regulation on the grounds that the judgment issued by the Greek District Court is not a judgment falling into the scope of application of the Regulation, because it does not control the contents of the Moufti's judgment. However, I think that the confirming decision should be recognized in other Member States.

An additional argument in favor of applying the Regulation to the recognition of judgments confirming divorce judgments pronounced by the Moufti can be based upon the different approach adopted with regard to some religious proceedings of annulment of marriages. This is the solution contained in Article 63 of the Regulation as to the annulment of judgments handed down by ecclesiastical courts upon the basis of the International Trea-

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[16] Burckhardt HESS*, Europäisches Zivilprozessrecht*, Heidelberg 2010, p. 392.

[17] See also Kurt SIEHR, *Divorce of Muslim marriages in secular courts*, Mélanges Gaudemet-Tallon, Paris 2008, p. 809 et seq.

[18] OLG Frankfurt, 16.1.2006, FamRBInt 2006.77 = IPRax 2008.352.

ties (*Concordat*) between the Holy See (Vatican) and Portugal, Italy, Spain and Malta. According to Article 63 para 2 and 3 these judgments shall be recognized in the Member States on the conditions laid down by the relevant provisions of the Regulation which are favorable to the recognition (Article 21 et seq.). Para 2 refers to the recognition of judgments on the validity of the marriage rendered in accordance with the Concordat between Portugal and the Holy See Para 3, concerns the recognition of judgments delivered in Italy within the "*delibazione*" proceedings (by which the ecclesiastical court's judgment is confirmed by State courts), as well as Spanish and Maltese judgments that confirmed judgments rendered by ecclesiastical courts.

In these cases recognition in accordance with the relevant rules of the Regulation is not hindered by the facts that these judgments are issued by ecclesiastical courts or by State courts referring to religious proceedings more or less in the same way the Greek District Court does with regard to a divorce pronounced by the Moufti. Besides, as Vatican is not a Contracting State to the European Convention on Human Rights, the European Court of Human Rights came to the conclusion in the widely discussed case *Pellegrini* that Italy has violated Article 6 para 1 of the Convention, on the grounds that its courts enforced a Vatican ecclesiastical judgment annulling the marriage on grounds of consanguinity, although the rights of defense of the wife were breached by the ecclesiastical court[19].

As to whether the Regulation also applies to polygamous marriages, it should be taken into consideration that this type of marriage is likely to be held as contrary to the fundamental principles of every Member State. Thus, it has to be assumed that the request for divorce shall be dismissed on the substance, on the grounds that polygamous marriages will be deemed to constitute a violation of public policy. However, this should not be a sufficient ground for denying the applicability of the Regulation. The request for divorce concerns a marriage that is characterized by the feature that the husband is simultaneously bound by other marriages. Besides, the plaintiff could deny the validity of some of his other marriages.

[19] ECHR, 20.7.2001, Pellegrini, application no. 30882/96.

III. The Scope of Application In Relation To Parental Responsibility: The New Concept of Family

Article 1 para 1 states that the Regulation *"shall apply……. in civil matters relating to:*

……. (b) the attribution, exercise, delegation, restriction or termination of parental responsibility". Article 1 para 2 specifies that these matters may, in particular, deal with:

"(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions".

A broad definition of parental responsibility is admitted. According to Article 2 point 7 this term:

"shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access". The reference to rights of custody and rights of access makes clear that this definition encompasses the bulk of the litigation in matters of parental responsibility. The measures of protection encompass the assets of the child.

Article 1 para 2 mentions as such measures on an indicative basis:

"(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

... (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property" [20].

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[20] However Article 1 para 3 outweighs the broad approach of para 1 and 2. It states that:
" This Regulation shall not apply to:
(a) the establishment or contesting of a parent-child relationship;
(b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
(c) the name and forenames of the child;
(d) emancipation;
(e) maintenance obligations;
(f) trusts or succession;

It has to be stressed that one of the reasons for amending the initial Regulation 1347/2000 (Brussels II) has been the extension of the scope of application regarding the children covered. The short-lived Regulation Brussels II covered only the common marital children of both spouses. Upon the insistence of the UK delegation there has been a significant change, resulting in the new Regulation Brussels II*bis* covering all children, even if the parents live together and they are not married[21]. Furthermore Regulation Brussels II*bis* encompasses parental responsibility over children living under the same roof, notwithstanding the features of the legal link between the adults. This means that its scope of application includes parental responsibility over children living with same-sex spouses or persons bound by a registered partnership[22]. In a nutshell, the scope of application of the Regulation is shaped in accordance with a new concept of family, whereby the importance of biological links between the persons concerned is lesser in comparison to what was accepted in the recent past.

This also entails that persons other than parents can be holders of parental responsibility, as it is explicitly stated in Article 2 point 8 of the Regulation. This includes not only legal entities as social care institutions, but also natural persons lacking any biological link with the children (or some of them), for instance the stepfather or stepmother who lives in the same house. To give an example: A, mother of B and C (whose fathers are D and E respectively) lives with her children and F, who may ask the parental responsibility, notwithstanding the fact that he is not their father.

This creates *locus standi* issues in a constellation of procedural complexity. In the above mentioned example, it may be that A is the plaintiff in a custody case, while D is the respondent as far as B is concerned, while A sues E as to the custody of C. Things can get more complicated if F asks the custody of both B and C. In such a case, the tribunal provided for by Article 8 of the Regulation, i.e. the court of the place of the child's habitual residence, is competent (see under IV). It is not unlikely that there are

(g) measures taken as a result of criminal offences committed by children".

[21] The purpose of this amendment was unifying the jurisdictional rules applicable to all children concerned (Bertrand ANCEL/Horatia MUIR-WATT, *La désunion européenne: le Règlement dit "Bruxelles II"*, RCDIP 2001.426).

[22] Reiner HAUSMANN, *Internationales und Europäisches Ehescheidungsrecht*, C.H. Beck, Munich, 2013, p. 172 Rn. 28.

separate proceedings, for instance if D asks as a plaintiff the custody over B and E asks the custody of C.

This plainly explains Article 19 para 2 of the Regulation on *lis pendens*. This provision applies, *"where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States"*[23]. It is not required that the parties are the same.

Dissociating procedural from substantive law is not easy. The applicable law shall be designated by the forum's conflict of laws rule on custody. Given that in some laws the partner is entitled to ask the parental responsibility, while in other laws this is not allowed, the contents of the applicable substantive law may have an impact either on the procedural question whether the stepfather/stepmother may ask the custody (*locus standi*) or on the substantive law question as to whether his/her action is legally founded. In such a case the outcome shall depend on the approach accepted by the relevant domestic provisions of the court seised. The role of the Regulation is confined to the determination of the international jurisdiction[24].

There is also an impact of substantive law as to whether unborn children should be excluded from the scope of application of the Regulation[25]. To this respect there is a divergence between domestic rules. The issue is closely

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[23] If the conditions are met, the court second seised shall of its own motion stay its proceedings until the court first seised establishes its jurisdiction.

[24] There is no definition of the term 'child' in the Regulation. It is suggested that the solution contained in Article 2 of the Hague Convention of 19 October 1996 on the protection of the child fixing the age limit at 18 years, has to be followed in order to avoid any contradiction between the Regulation and the Convention (Ulrich SPELLENBERG, in Julius STAUDINGER, *EheGVO*, Article 1, Rn. 29, compare Reiner HAUSMANN, *Internationales und Europäisches Ehescheidungsrecht*, C.H. Beck, Munich, 2013, p. 179 Rn. 58). Other authors share the view that the law designated by the conflict of laws rule of the *lex fori* on parental responsibility has to be applied (Denis SOLOMON, *"Brüssel IIa" – Die neuen europäischen Regeln zum internationalen Verfahrensrecht in Fragen der elterlichen Verantwortung*, FamRZ 2004.1410, Stefan ARNOLD in Christoph ALTHAMMER, *Brüssel IIa*, Rom III, C.H. Beck, Munich, 2014, p. 25). I tend to consider that the age of majority should be determined in accordance with the national law applicable to the child (see also Walter PINTENS in Ulrich MAGNUS/ Peter MANKOWSKI, *Brussels IIbis Regulation*, Sellier, Munich, 2012, Article 1, Rn. 65).

[25] Article 2 of the Hague Convention of 19 October 1996 on the protection of the child excludes them from the Convention's scope of application.

connected to the question of abortion. May the father rely upon Article 8 of the Regulation in order to seize a court with the purpose of preventing the abortion within the framework set by the Regulation in relation to parental responsibility? In the event of a positive reply, this could end up in establishing the opposite impact, if the court seized upon the basis of Article 8 delivered a judgment on parental responsibility to the effect that abortion be ruled out. In other words, the acceptance of jurisdiction could have an impact on the solution to the substantive law issue: accepting that the request for an order prohibiting the abortion falls under the scope of application of the Regulation could entail that the court seised holds that out of parental responsibility arises the father's right to oppose the abortion.

IV. Determining The Place of The Child's Habitual Residence: The Resurgence of Traditionalist Views

Article 2 point 9 specifies that *"the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence"*.

Although the term of habitual residence (of the spouses for divorce requests and of the child for parental responsibility) is crucial for the applicability, as well as the implementation of the rules contained in Regulation Brussels II*bis*, there is no definition thereof. This has led to interpretation issues in particular regarding the international jurisdiction for divorce requests.

As already mentioned, the child's habitual residence in the territory of a Member State at the time the court is seised is a prerequisite for the application of Regulation Brussels II*bis* in matters of parental responsibility. At the same time, it constitutes according to Article 8 of the Regulation the jurisdictional connecting factor upon the basis of which international jurisdiction is determined. In the event of no court having jurisdiction under Article 8 to 13, jurisdiction is determined in each Member State by the domestic laws of that State (Article 14).

The criterion referred to in ECJ/CJEU's judgments on the determination of the child's habitual residence within the framework of Article 8 et seq.

of the Regulation is the integration of the child into a social and family environment. This is rightly chosen as the pivotal criterion for confirming that the child has its habitual residence in the territory of the State of the forum. In some of the cases dealt with by the ECJ/CJEU, the family at issue had features that did not cope with the traditional concept of family.

This was true in particular for the family in the case A[26], in which the children C, D and E settled in 2001 in Sweden accompanied by their mother, A, and their stepfather, F. They were taken into care because of their step-father's violence, but that measure was subsequently discontinued. In the summer of 2005, the family left Sweden to spend the holidays in Finland. They stayed on Finnish territory, living in caravans on various campsites, notwithstanding the beginning of fall. The competent Finnish authority ordered that they be taken into immediate care in Finland and placed in a foster-family on the grounds that they had been abandoned by A and F who applied for the decisions relating to the taking into care to be quashed.

Confirming that the place of the child's residence corresponds to the place where there is some integration of the child into a social and family environment, the Court held that the circumstances to be taken into account in order to determine this place are in particular:

"...the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State"[27].

The reference to the child's nationality deserves to be underscored. Nationality is in general considered within the context of EU Law as retrograde. Therefore, nationality is to be taken into consideration only in exceptional situations. This explains why there are just a few references to nationality in Regulation Brussels IIb*is*[28], despite the latter regulating

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[26] ECJ, 2.4.2009, C-523/07, A (mentioned already *supra* under note 8).

[27] ECJ, 2.4.2009, A, C-523/07, point 16.

[28] Article 3 para 1 (b) provides for the international jurisdiction of the courts of the spouses joint nationality. Article 12 para 3 (a) and Article 15 para 3 (c) included the child's nationality as one of the particular connections to be assessed in case of prorogation of jurisdiction and transfer of the case to another court than the one initially seized, respectively.

family law relationships in which the role of nationality cannot easily be undermined. From this angle the above referenced judgment reflects a traditionalist view.

The same can be accepted with regard to a judgment delivered on 22nd December 2010 in the case *Mercredi/Chaffe*[29] that concerned the removal of a child born out of wedlock. After living many years together with the English father, the French mother left the United Kingdom one week after the birth and moved to the island of La Reunion. The Court proceeded to an interpretation of the term 'habitual residence' of the child for the purposes of Article 8 and 10 of Regulation Brussels II*bis*, whereby it confirmed that this residence is to be localized in the place *"which reflects some degree of integration by the child in a social and family environment"*. The specificity of the case at issue consisted in the short time spent in the United Kingdom combined with the age of the child. For this reason the Court held that the factors to be taken in consideration in order to determine the place of residence are:

"...first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case"[30].

It is not paradoxical that the Court focuses on the mother's geographic and family origins. I think that the Court was right in deciding so. However it could be argued that such an approach is discriminating against the father, because his connections are not considered. From this angle the judgment in the case *Mercredi/Chaffe* is permeated by the traditional view that special attention should be given to the mother, if the child is very young.

[29] CJEU, 22.12.2010, Mercredi/Chaffe, C-497/10 PPU.
[30] CJEU, 22.12.2010, Mercredi/Chaffe, C-497/10 PPU, point 56.

A third judgment[31] deserves to be referred to from the point of view herein envisaged, although the main issue was related to Article 20 of Regulation II*bis* on provisional measures. The dispute at issue concerned the interim custody of a child. The father was Italian and the mother Slovenian. An Italian decision granted the interim custody to the father and ordered that the 10 years old daughter be temporarily placed in a children's home with nuns. The mother returned immediately with the child to her native Slovenia and initiated proceedings before the regional court for provisional custody. Upon referral of the matter by the Court of Appeal of Maribor to the ECJ, the latter denied the international jurisdiction of the Slovene courts under Article 20 of Regulation Brussels II*bis*, because the order of the Slovene court affected the father who was not living in Slovenia. Furthermore, the Court held that the order issued by the Slovene court would undermine the child's fundamental right under Article 24 para 3 of the Charter of Fundamental Rights of the European Union to maintain a personal relationship with both parents. Such a restriction can only be restricted if it is justified by another interest of the child that should be prioritized.

This judgment puts both parents on an equal footing, following another direction that the judgment delivered in the case *Mercredi/Chaffe*. On the other hand, it ends up confirming the temporary placement of a 10 years-old girl into a children's home with nuns. Such a result is a Solomonic solution indirectly impregnated by traditionalist views, as it leads to the child being temporarily placed in an environment where religious concepts play an important role.

[31] ECJ, 23.12.2009, Deticek/Sgueglia, C-497/10 PPU.

Conclusion

The conclusion can be drawn that there is some impact of substantive law perceptions as to interpretation issues related to the determination of the material scope of jurisdictional provisions contained in Regulation Brussels II*bis*. This can be used as an example in order to argue that procedural and substantive law cannot be fully dissociated.

Family law is one of the legal fields where the clash between modern and traditionalist views is acute. It derives that this clash persists even in the context of the interpretation of EU jurisdictional rules in family matters, this resulting to a choice that may be strongly influenced by the practitioner's views on the question at issue.

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