

THE PUBLIC LAW ASPECTS OF MALTESE DIVORCE LAW

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1. The Argument in Brief

This paper provides a study of the new law on divorce from a public law perspective; it identifies a number of issues which are worth analysing from the point of view of Constitutional Law and Administrative Law. These comprise the obligatory referendum mechanism, the relevance of the Interpretation Act¹ to the making of regulations under the divorce law, the formulation of a Henry VIII clause empowering the Prime Minister to amend primary legislation through subsidiary law, the administrative law issue of continuing to task mediators with non-mediation functions, that is, to act as conciliators, the lack of a definition of key terms such as 'domicile' and 'ordinary residence' and, generally, the drafting style of the divorce law, dedicating particular attention to its very first provision. The author will argue that the divorce law could have been a better product from a legislative point of view if certain improvements suggested in this paper were incorporated therein.

2. The Civil Code (Amendment) Act, 2011

The Civil Code (Amendment) Act of 2011 (hereinafter referred to as the '**Divorce Law**') is the enactment which introduced divorce legislation in Malta with effect as of the 1 October 2011.² There is, however, also another provision in the Marriage Act³ which provides for the recognition of foreign divorces which will not be discussed in this paper due to space restriction.⁴

Briefly, the new Divorce Law deals with amendments to the institute of separation, the introduction of the institute of divorce within Maltese family law – which will now allow the dissolution of marriage as well as remarriage, the regulation of the effects of dissolution of marriage in so far as remarriage and cohabitation are concerned, the requirement of resorting to reconciliation and/or to mediation, the participation of the Children's Advocate in certain determinate circumstances, the requirement of domicile and ordinary

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¹ Interpretation Act, Chapter 249 of the Laws of Malta.

² Civil Code (Amendment) Act, Act No. XIV of 2011 [2011].

³ Marriage Act, Chapter 255 of the Laws of Malta.

⁴ *Ibid.*, art 33.

residence in order to ground the court's jurisdiction to hear and determine a demand for divorce, the establishment of a Committee to adapt current law to bring it in line with the new provisions introduced in the Civil Code by the Divorce Law, the making of orders in terms of a Henry VIII clause by the Prime Minister and their subjugation to a negative resolution procedure, the special procedure introduced for the method of amendment of Article 66B (a), (b) and (c) which requires the holding of a referendum before these provisions can be amended by Parliament, and the power of the Minister responsible for justice to make regulations. These are, in a nutshell, perhaps the most salient aspects of the Divorce Law as seen from a public law perspective. Naturally, there also exist private law implications which will not however be discussed in this paper. Not all of the above aspects of the Divorce Law are relevant from a public law perspective. On the other hand, the Divorce Law does contain pertinent Public Law aspects which can be grouped under the following headings:

- (a) the legislative drafting style of Article 1(1) of the Divorce Law;
- (b) the extension of the institute of reconciliation to divorce proceedings;
- (c) the treatment of confidentiality in out of court communication;
- (d) the reference to the yet unregulated institute of cohabitation;
- (e) the undefined significance of the expressions 'domicile' and 'ordinary residence';
- (f) the establishment, composition and functions of the Committee for the Adaptation of Laws;
- (g) Henry VIII clauses and the Interpretation Act;
- (h) the mandatory referendum requirement;
- (i) the regulations made by the Minister responsible for justice; and
- (j) the European Union dimension in so far as recognition and enforcement of judgments in matrimonial matters are concerned.

3. The Legislative Drafting Style of Article 1 (1) of the Divorce Law

The first difficulty one encounters when reading the Divorce Law lies in the very first provision. Article 1(1) states that Act No. XIV of 2011 is intended to amend the Civil Code⁵ and then contains a proviso to the effect that,

the provisions of Article 11⁶ and of Article 12⁷ of this Act shall not be included in the Code but shall continue to be in force as part of this Act provided however that they shall also be reproduced insofar as Article 11 is concerned in a footnote at the end of Sub-Title IV of Title I of Book First of the Civil Code entitled 'Of Divorce' and insofar as Article 12 is concerned in a footnote with a reference to Article 66B of the Code.

⁵ Civil Code, Chapter 16 of the Laws of Malta.

⁶ Dealing with adaptation of laws.

⁷ Dealing with the requirement of holding a referendum to amend art 66B.

Firstly, this proviso states that the provisions of Articles 11 and 12 of the Divorce Law are not to be included in the Civil Code with the rest of the provisions on Divorce Law (Articles 66A to 66N) but then – *a contrario sensu* – it goes on to state that, notwithstanding this statement, Articles 11 and 12 of the Divorce Law should be included in the Civil Code, not as part of the text of the law but rather as ‘footnotes’. The natural question which arises at this juncture is why is it first stated in the Divorce Law that these provisions should not be included in the Civil Code and, at the same time, it is written that Articles 11 and 12 aforesaid have to form part of the Civil Code, even if as a footnote? Does this not constitute a contradiction in terms?

Secondly, what is the legal status of a footnote? Is it law? Marginal notes, headings and other wording not forming part of the substantive part of the law’s text have never been considered to be law and cannot be used for the purposes of interpreting the law. A cross-reference to Articles 11 and 12 of Act No. XIV of 2011 would have sufficed so as not to have two identical provisions in two diverse laws, one set being law and the other set being a footnote.

Thirdly, Article 11 of the Divorce Law dealing with the establishment of the Committee for the Adaptation of Laws could well have been included as a transitory provision in the Civil Code while Article 12 of the same enactment setting out the requirement for the holding of a referendum if Article 66B (a), (b) and/or (c) is to be amended – being such a fundamental norm – should not have been relegated to footnote status but should have been included in the *corpus* of the Civil Code. This point is, of course, apart from the other issue of whether the referendum requirement should have been entrenched in the Constitution, in the Civil Code or in the Divorce Law.

Fourthly, as the proviso stands, Act No. XIV of 2011 has all its provisions included in the text of the Civil Code except for Articles 11 and 12 which are instead inserted in the said Code as footnotes. This drafting leaves much to be desired as it provides two identical provisions on the statute book to the same tenor in two separate and distinct laws, these being Articles 11 and 12 in Act No. XIV of 2011, on the one hand, and the same two provisions reproduced as a footnote in the Civil Code, on the other hand. This is not the orthodox manner how a cross reference is made in one law with respect to another.

4. The Extension of the Institute of Reconciliation to Divorce Proceedings

The institute of reconciliation aimed at reconciling the parties during separation proceedings has existed for quite some time in Maltese family law. Prior to the 2003 regulations, such task used to be carried out by the Judge presiding the then Civil Court, Second Hall. More recently, following the creation of the Civil Court (Family Section) this task is devolved upon mediators in terms of the Civil Court (Family Section), the First Court of the Civil Court, and the Court of Magistrates (Superior Jurisdiction) (Family Section) Regulations (hereinafter the ‘**2003 Regulations**’).⁸ The difficulty with the 2003

⁸ The Civil Court (Family Section), the First Court of the Civil Court, and the Court of Magistrates (Superior Jurisdiction) (Family Section) Regulations, Chapter 12.20 of the Laws of Malta.

Regulations remains that a mediator was, and continues to be wrongly tasked with carrying out reconciliation between the parties, a task which does not fall within the remit of a mediator and is anathema with a mediator's role. Articles 66G, 66H(1) and 66I(1) seem to add a further complication because, rather than bringing the 2003 Regulations on mediation in line with the Divorce Law, it instead establishes a new type of mediator distinct and separate from existing mediators. This second category whom the law refers to as 'persons qualified to offer assistance in the process of reconciliation between spouses' need not necessarily be mediators but may be chosen from among counsellors, family therapists, psychologists and other social caring professionals. Although this is a welcomed and much awaited innovation, this is not what will happen in view of regulation 2 of Legal Notice 370 of 2011⁹ which has introduced a new regulation 3A in the 2003 Regulations reading as follows:

The provisions of regulation 3 shall apply for the purposes of Article 66J(1) of the Civil Code, such that the panels referred to in the said regulation 3 shall be deemed also to be the register of qualified persons referred to in the said Article 66J(1) of the Civil Code and shall serve the same function.

Indeed, in terms of regulation 4(4) of the 2003 Regulations, the mediator 'shall in the first place attempt to reconcile the parties'. Should the mediator fail to do so, s/he then passes on to the second stage, that is, to 'mediate between them in an effort to reach an agreement to enter a deed of personal separation by mutual consent'.¹⁰ And, this author would add, to file a joint application for divorce. It is a pity that this regulation 3A has been made in this way as it will not allow the mediator to dislodge him/herself from reconciliation proceedings. It would have been indeed wiser if the 2003 Regulations were amended to do away with the incongruous task of requesting mediators to carry out reconciliation functions which are not proper to the office of a mediator. The regulations should instead detach reconciliation functions from mediation in order to establish two distinct and separate categories of offices – that of conciliator, and that of mediator.

5. The Treatment of Confidentiality in Out of Court Communication

Article 66K of the Divorce Law regulates inadmissible evidence in divorce proceedings. It states essentially that parties conducting out of court negotiations should not bring into the divorce proceedings evidence used during such negotiations. In this context, the out of court proceedings refer to reconciliation and mediation before the case is forwarded to the presiding judge in the Civil Court (Family Court). A similar provision is indeed found in regulation 4(7) of the 2003 Regulations which states that: 'no evidence may be adduced before any court of anything divulged to the mediator in the conciliation or mediation procedures, of any proposal made by him or any other person during the procedures or of the reaction of either spouse to such proposals'. The principle is that the judge presiding

⁹ The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Section) (Amendment) Regulations, 2011.

¹⁰ (n 7), reg 4 (5).

over that court should not be privy to any negotiations taking place before the case reaches his/her court. These without prejudice proceedings are indispensable in out of court negotiations as they enable parties to put proposals to each other which might not necessarily be strictly in line with their request to the court seised of their case in order to arrive at an amicable settlement of the dispute. So this is a laudable provision. However, it should have been extended not only to divorce proceedings but to any proceedings taking place before a court, whatever the nature of such proceedings. What is without prejudice should remain so and should not be adduced before a court of law.

6. The Reference to the Yet Unregulated Institute of Cohabitation

Although the bill regulating cohabitation has not yet been published in *The Malta Government Gazette*, notwithstanding the Government's declared intention that such bill should become law by the end of this year, there is a provision in the Divorce Law which refers to cohabitation. Article 66M of the Civil Code regulates the forfeiture of maintenance by one spouse when such spouse remarries or what the law refers to as enters 'into a personal relationship which brings about an obligation of maintenance by a third party in favour of that party'. Such forfeiture of maintenance takes place from the date of the commencement of the said personal relationship. While in the case of remarriage, the date of remarriage is easily ascertainable, how will the date of commencement of cohabitation be determined in the absence of a register of cohabitants? The matter will end up having to be decided by the court on the basis of evidence produced before it intended to establish the actual date of commencement of cohabitation. This might end up being quite a time consuming exercise to prove only one point in the divorce proceedings. To simplify matters, the law on cohabitation should stipulate that for cohabitation to subsist such institute should be subject to registration.

7. The Undefined Significance of the Expressions 'Domicile' and 'Ordinary Residence'

Article 66N of the Civil Code grounds the court's jurisdiction to hear and determine divorce proceedings on the basis of a spouse's domicile or ordinary residence. Although these two terms are very common in Maltese Law, they remain undefined. In the absence of such definition, it is the courts' task to define these terms. However, it would have been more useful if a consequential amendment were to be made to the Interpretation Act to define these two terms in the light of their prevalent use in Maltese Law rather than leaving the matter to be decided by the courts. The Legislature should avoid throwing upon the judiciary unnecessary burdens when, by means of a definition, it can make life easy for everybody. Moreover, laws are not made for judges but for the ordinary person. Hence, laws have to be intelligible for such persons as well.

8. The Establishment, Composition, and Functions of the Committee for the Adaptation of Laws

Article 11 of the Divorce Law establishes the 'Committee for the Adaptation of Laws due to the introduction of Divorce'. The Committee is composed of three persons: a Chairperson

being a representative of the Minister responsible for justice and two members being representatives of the Ministry responsible for social policy and finance. Their terms of reference are to advise the Prime Minister on any amendments necessitated by the introduction of Divorce Law to any existing law. It has to submit its report by 29 February 2012.

This is not a novel procedure in Maltese Law, even if it is of an exceptional nature: when a law is enacted it normally contains also consequential amendments to other existing laws to bring those laws in line with the new law. However this is not the approach taken in the divorce bill. Indeed, Article 11 of the divorce bill finds its source in Article 28 of the Public Transport Authority Act¹¹ – whose marginal note reads ‘Adaptation of Laws’. The difficulty here lies in the fact that the Divorce Law is already binding and in effect, yet its provisions may conflict with existing laws. Which law should therefore prevail? Presumably the legal maxim of *lex posterior derogat priori* should apply in such case; however, this might not always be a straight forward procedure, and, by applying this legal principle, it does not necessarily mean that justice is dispensed to the parties involved. On the other hand, the Prime Minister may make orders with retroactive effect to 1 October 2011. But what will be the case where the Judge in the Civil Court (Family Court) has decided the case on the basis of existing law? Or should the Judge wait for the Prime Minister to make an order as aforesaid before s/he decides the case so as not to prejudice any party? These are all legal difficulties in the application of the law in the light of the fact that consequential amendments to other laws have not been made by Parliament in the Divorce Law itself as is normally the procedure. Again, this is a case of bad drafting which brings about uncertainty in the law as nobody knows which are those laws that are potentially in conflict with the Divorce Law and their implications for the parties. It could well be that the parties will not benefit from the order to be made by the Prime Minister if they seek divorce before that order is made, especially more so if the Prime Minister does not back date the order retrospectively to 1 October 2011. On the other hand, the law should strive towards clarity, certainty and recourse to simple and plain language to be understood by one and all.

9. Henry VIII Clauses and the Interpretation Act

Article 11 of the Divorce Law contains what, in Administrative Law, is known as a Henry VIII clause, that is, an empowering provision in a primary law which allows a Minister or other person or body to make subsidiary legislation amending primary laws. These types of clauses typically attract widespread criticism as Parliament’s law making function is considered to be ‘usurped’ by the Government of the day. Such clause is not innovative to Malta and has been used in various enactments. Perhaps the most far reaching Henry VIII clauses are those contained in Articles 4 and 21 of the Administrative Justice Act.¹² So, to a certain extent, there is nothing new in having recourse to such a clause. In Article 11(5) of the Divorce Law the Henry VIII clause comes in the following form:

¹¹ Public Transport Authority Act, Chapter 332 of the Laws of Malta, art 28.

¹² Administrative Justice Act, Chapter 490 of the Laws of Malta.

Without prejudice to the powers of the Parliament of Malta, the Prime Minister may, by means of an order made until the 30th June 2012 make any amendments to any law or regulation [...] as may appear to him to be necessary or expedient and those amendments may be given retroactive effect as from the 1st October 2011, saving any acquired rights.

This Henry VIII clause is worded very carefully in order to ensure that the Prime Minister's power are well defined and limited so that he does not go beyond the task of making amendments to any law 'which, directly or indirectly, refers to personal separation between the spouses for the purpose of adapting the same to the introduction to divorce'. Limitations imposed on the Prime Minister's exercise of the Henry VIII clause come in the following manner:

- (a) the provision sets out the exact breadth of the exercise of the Henry VIII clause in so far as the law making power is concerned;
- (b) all orders made by him are subject to the powers of Parliament;
- (c) they cannot affect vested rights;
- (d) they cannot be retroactive than the date of entry into force of the Divorce Law (1st October 2011);
- (e) such power lapses on 30th June 2012; and
- (f) the power to make orders is subject to the negative resolution procedure, that is, such orders have to be 'laid on the Table of the House and shall have effect upon the lapse of the period of twenty-eight days after it is so laid, unless the House of Representatives within that period resolves that the order be annulled or amended, whereupon that order shall have no effect or shall have effect as amended, as the case may be'.¹³

The Interpretation Act, on the other hand, allows such a negative resolution procedure but in the case of the latter enactment the subsidiary law still has effect within the period of twenty-eight days from laying on the Table of the House (unless it is annulled during that period by the House itself) while in the case of Article 11(6) of the Divorce Law, the order does not commence to have effect unless and until the twenty-eight day period from the laying on the Table of the House has expired.

10. The Mandatory Referendum Requirement

From a public law perspective, perhaps the most interesting provision in the Divorce Law is Article 12. In so far as referenda are concerned, Maltese Law recognises three types: the abrogative, the consultative and the obligatory. To date it does not recognise a 'propositive' referendum. There are three laws which refer to an obligatory referendum. These are: the Constitution of Malta; the Local Councils Act¹⁴ and the Divorce Law. The

¹³ (n 2), art 11 (6).

¹⁴ Local Councils Act, Chapter 363 of the Laws of Malta.

method as to how a referendum is to be conducted is contained in the Referenda Act.¹⁵ What is interesting with regard to Article 12 of the Divorce Law regulating the obligatory referendum is that it does not apply to all the provisions regulating divorce but only to three – those contained in Article 66B (a), (b) and (c) of the Civil Code. These refer to: the requirement of the spouses to have lived for at least four years apart from the date of legal separation or for a period of four years out of the immediately preceding five years; there is no reasonable prospect of their reconciliation; and the spouses and all of their children, if any, are in receipt of maintenance.

A bill to amend any one or more of these three provisions requires a majority of electors voting and approving that bill before it can be enacted by Parliament. The Bill has to be submitted to the electorate at any stage after it is approved in first reading or even after it has been approved in third reading. Parliament has thus kept open all options as when to hold a referendum.

Although Article 66(3) of the Constitution of Malta – which refers to the holding of a referendum in order to amend certain provisions of the Constitution – is entrenched, Article 12 of Act XIV of 2011 is not so entrenched in the Constitution but can be amended by a simple majority of the Members of Parliament present and voting even if, when the said enactment was voted upon during third reading, it garnered more than a two-thirds majority of the said members. So should Article 66B (a), (b) or (c) need to be amended later on, will we have some form of repeat of the 1974 amendments to the Constitution when Parliament first passed through Act No. LVII of 1974 to abrogate Article 6 of the Constitution to render itself supreme and then to re-enact Article 6 immediately afterwards through Act No. LVIII of 1974 during the same sitting? In the case of the Divorce Law, in the absence of an entrenched provision, Parliament can very easily do away with the referendum requirement by just deleting Article 12 of Act XIV of 2011 and the corresponding footnote to Article 66B of the Civil Code before passing on to amend Article 66(a), (b) or (c).

11. The Regulations Made by the Minister Responsible for Justice

Article 66J of the Civil Code empowers the Minister to make ‘regulations establishing a register of persons qualified to assist the parties involved in the process of reconciliation’ and ‘to establish the procedure related to the mediation between the parties’. Such regulations have been made by Legal Notice 370 of 2011 and Legal Notice 386 of 2011. That said, however, there is a problem with these regulations as they have been made in terms of Articles 66A (3), 66I (1) and 66J of the Civil Code. Both Legal Notices amend the 2003 Regulations. Nonetheless, the Minister responsible for justice does not have the *vires* to make regulations under Articles 66A (3), 66I (1) and 66J of the Civil Code to amend regulations made under the Code of Organization and Civil Procedure¹⁶ even if it is one and the same Minister – the Minister responsible for justice – who is entrusted to make

¹⁵ Referenda Act, Chapter 237 of the Laws of Malta.

¹⁶ Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure.

regulations under both enactments. However, Article 10 of the Interpretation Act sanctions such a mistake on the part of the Minister and validates regulations made under a wrong provision of the law:

Where by virtue of any Act, whether passed before or after the commencement of this Act, power is conferred to make subsidiary laws, any subsidiary law that may lawfully be made thereunder shall be valid and shall have effect whether or not it purports to be made in exercise of those powers and even if it purports to be made in exercise of other powers.

Were these regulations to be made by the Prime Minister in terms of the Henry VIII clause then the Interpretation Act would not need to be called in to regularise an otherwise invalid regulation.

Finally, on this point, one asks what is the relevance of Article 66I (1) which at no stage refers to the powers of the Minister to make regulations.

12. The European Union Dimension: Recognition and Enforcement of Judgments in Matrimonial Matters

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition of judgments in matrimonial matters and the matters of parental responsibility, the Brussels II bis regulation, repealing Regulation (EC) No 1347/2000 did not apply to Malta in so far as regulation 5 refers to the conversion of legal separation into divorce. It reads as follows:

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

With effect from 1 October 2011, this provision applies fully to Malta as well as Malta now recognises divorce. See in this respect Articles 66D and 66F of the Civil Code.

13. Conclusion

The divorce bill is not sufficient by itself to regulate divorce proceedings. It is supplemented by regulations made by the Minister responsible for justice in terms of Article 66J of the Civil Code with regard to the register of conciliators and the procedure to be used in mediation. These regulations are contained in Legal Notice 370 of 2011. Furthermore, the Committee for the Adaptation of Laws has to draw up its recommendations and submit them to the Prime Minister and the latter will then have to make the required order. There are, therefore, still further procedures to be taken for the Divorce Law to be given full force. One however hopes that this Committee will avail itself of the opportunity to distinguish the office of mediator from that of conciliator and ensure that conciliation duties under the 2003 Regulations are carried out by conciliators appointed for that purpose from competent persons rather than by mediators. One also

hopes that when the Divorce Law comes up for review in Parliament, the House of Representatives will take note of the recommendations for change made in this paper and will give effect thereto with a view to continuing to better existing law regulating divorce in the Maltese archipelago.