FROM BRUSSELS TO ROME: THE NECESSITY OF RESOLVING DIVORCE LAW CONFLICTS ACROSS THE EUROPEAN UNION

TERESA HENDERSON*

As the lives of the citizens of the European Union (EU) become more and more intertwined, national borders have, in some ways, become less meaningful. National borders, however, provide jurisdictional boundaries that often are a determinative factor in the application of substantive divorce law. As international couples marry and live throughout the EU, a divorce of a couple coming from two different EU nations or a couple from one EU nation who are living in another confuses the application of this substantive law. Therefore, a resolution on the harmonization of jurisdiction and conflict of laws surrounding divorce is necessary to address the problems of legal uncertainty, unpredictability, and potential unfairness faced by international couples seeking a divorce in the European Union, in order to protect the EU's children and to maintain a unified and universal European Union.

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INTRODUCTION

Imagine a French-Swedish couple living in Stockholm. The French spouse gets a promotion and must relocate to Dublin. Three years later, the couple mutually decides to end their marriage. The couple is only familiar with Swedish divorce law, where the proceedings would be rather simple and swift because they do not have any children. They soon find out that Irish courts apply Irish law, which requires a four-year separation period, irrespective of the nationality of the spouses. Must the couple divorce in Ireland under the restrictive Irish laws? Does France or Sweden have jurisdiction over this divorce due to the spouses' nationalities, although neither currently resides in their home states? If one spouse returns to France and obtains a divorce without the consent of the other spouse, will other nations recognize this divorce?[1]

As this example shows, divorces involving international couples can be quite complex. Within the European Union (EU), marriage breakdowns with a foreign or international element are increasingly frequent occurrences.[2] This has created precarious and confusing situations for those seeking divorces outside of their native member state. Aside from the specific problems it causes in the lives of EU citizens, it also gives rise to three general legal problems: international jurisdiction, applicable law, and recognition and enforcement of judgments.[3] Recent

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[1] This example is adapted from Press Release, European Commission, New Community Rules on Applicable Law and Jurisdiction in Divorce Matters to Increase Legal Certainty and Flexibility and Ensure Access to Court in "International" Divorce Proceedings 5 (July 17, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/287&format=HTML&aged=0&language=EN&guiLanguage=en.

[2] Alegría Borrás, *From Brussels II to Brussels II bis and Further*, *in* BRUSSELS II BIS: ITS IMPACT AND APPLICATION IN THE MEMBER STATES 3, 6 (Katharina Boele-Woelki & Cristina González Beilfuss eds., 2007).

[3] *Id.*

efforts within the EU to create workable methods to solve these types of problems have been met with disagreement and debate.[4] Obtaining certainty in the area of matrimonial and family litigation is very important because of how it personally affects the lives of the EU's citizens, especially children.

The debate regarding the content and implementation of conflicts-of-laws rules[5] on jurisdiction and substantive law relating to divorce in the EU ultimately takes root in provisions contained in its foundational documents. The EU was established with the signing of the Maastricht Treaty in 1992.[6] It is based on the initial founding document of the European Economic Community, the Treaty of Rome, also known as the Treaty Establishing the European Community ("EC Treaty"), and contains the Treaty on European Union (TEU).[7] One of the main purposes of the TEU was to increase cooperation in justice and home affairs, by which the Union is expected to undertake joint action in order to offer European citizens a high level of protection in the areas of freedom, security, and justice.[8] The TEU also incorporates the jurisprudence of the Court of Justice, and the Union must respect the rights found in the 1950 European Convention and the common constitutional traditions of the member states.[9] "Opt-outs" were also negotiated at Maastricht and are part of the TEU.[10] The goal of the opt-outs is to avoid a general stalemate, and there are exemptions granted to a country that does not wish to join the other member states in a particular area of Community cooperation.[11] One well-known example of this is the United Kingdom's decision to opt-out of the EU's monetary

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4 *See id*. at 7–23.

5 The aim of "conflicts of laws rules," or rules on applicable law, is to determine which of the different laws will apply in a particular situation, here, where there are foreign nationals living in a foreign Member state. *See Commission Staff Working Document: Annex to the Proposal for a Council Regulation Amending Regulation (EC) No 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters: Impact Assessment*, at 4, COM (2006) 399 final (July 17, 2006) [hereinafter *Impact Assessment*], *available at* http://ec.europa.eu/civiljustice/divorce/docs/sec_2006_949_en.pdf.

6 *See generally* Treaty of the European Union, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter TEU].

7 *See* Treaty of Rome, Mar. 25, 1957. *See generally* TEU.

8 *See* TEU Title VI; *see also Treaty of Maastricht on European Union*, EUROPA.EU, http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm (last visited May 20, 2011).

9 PHILIP RAWORTH, INTRODUCTION TO THE LEGAL SYSTEM OF THE EUROPEAN UNION 13 (2001).

10 *Id*. at 14.

11 *Glossary—Opt Out*, EUROPA.EU, http://europa.eu/legislation_summaries/glossary/opting_out_en.htm (last visited May11, 2011).

union.[12] A few other member states reached opt-out agreements as well, allowing them to decide on a case-by-case basis whether or not to participate fully or only partially in certain planned measures.[13]

The TEU also establishes the principle of subsidiarity. Subsidiarity means that in areas that are not within its exclusive powers, the Community shall only take action where objectives can best be attained by action at the Community level, rather than at the national level.[14] Because of the wording of Articles 61 and 65 of the EC Treaty, which refers to civil judicial cooperation among member states for the purpose of the proper functioning of the internal market, there is an economic flavor to coordinating civil judicial action among member states.[15] However, this economic link between civil judicial cooperation and family law is not immediately clear.[16]

In addition to the TEU and the Maastricht treaty, another important EU document, the 1997 Treaty of Amsterdam, amended certain provisions of these two previous treaties.[17] These amendments underscore the objective of progressively establishing a common area of freedom, security, and justice by adopting measures in the field of judicial cooperation in civil matters.[18] Specifically, Article 65(a) of this treaty refers to the establishment of measures to "promot[e] the compatibility of the rules applicable in the Member states concerning the conflict of laws and of jurisdiction."[19]

Because of the focus on judicial cooperation and solving conflicts of laws and jurisdiction rules found in the Treaty of Amsterdam, the European Council requested that questions of which law is applicable to divorce proceedings be addressed within the first five years after the Treaty of Amsterdam enters into force.[20] Since then,

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[12] *Id.*; RAWORTH, *supra* note 9, at 33.

[13] *Glossary–Opt Out*, *supra* note 11.

[14] *Glossary–Subsidiarity*, EUROPA.EU, http://europa.eu/legislation_summaries/glossary/subsidiarity_en.htm (last visited May 11, 2011).

[15] Johan Meeusen et al., *General Report*, *in* INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION 1, 1 (Johan Meeusen et al. eds., 2001).

[16] *Id.*

[17] *See generally* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340).

[18] *Commission Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters*, at 6, COM (2006) 399 final (July 17, 2006) [hereinafter Rome III Proposal].

[19] *Id.* at 2.

[20] *Id.*

several steps, each one building upon the other, have been taken to resolve the conflict-of-laws issues of divorces of international couples, but no Community rules currently address applicable law.[21] In 2006, the EU proposed the Rome III legislation.[22] Some member states rejected this attempt to harmonize, which spurred considerable debate.[23] Those opposed to the 2006 proposal continue to question whether or not any regulation on the matter is necessary.[24] This comment argues that, despite the reasons for some countries' rejection of a proposed regulation on applicable rules in divorce, resolution of the matter—not necessarily the exact terms of the legislation—is of ultimate importance. Only an international solution from an international body (the EU) will suffice.

Since its beginning, the EU worked toward creating a common market with the free movement of goods, services, and people, and a substantial amount of policy harmonization has occurred across the member states.[25] While this increased cooperation and harmonization of laws has brought many benefits to the member states, it has in some instances created gray areas of legal uncertainty.[26] This is especially true of the rules regarding jurisdiction and applicable law in divorces taking place in the EU for international couples.[27]

A resolution on the harmonization of jurisdiction and conflict of laws surrounding divorce is necessary to address the problems of legal uncertainty, unpredictability, and potential unfairness faced by international couples seeking a divorce in the EU, to protect the rights of children in the EU, and to maintain a unified and universal European Union. Part I of this comment will discuss the problems of legal uncertainty, unpredictability, and unfairness in family law procedures facing international couples within the EU. Part II covers the history of EU legislation on the matter. Part III discusses child welfare issues and the potential fracturing of the EU that may arise out of a failure to solve this current harmonization problem. Finally, Part IV explores the prospect of changing the theoretical basis of harmonization from a focus

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[21] *Id*.

[22] *See generally* Rome III Proposal, *supra* note 18.

[23] *See* Aude Fiorini, *Rome III—Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?*, 22 INT'L J.L. POL'Y & FAM. 178, 179 (2008).

[24] Katharina Boele-Woelki, *To Be, or Not to Be: Enhanced Cooperation in International Divorce Law Within the European Union*, 39 VICTORIA U. WELLINGTON L. REV. 779, 784 (2008).

[25] RAWORTH, *supra* note 9, at 29.

[26] *See* European Commission, *supra* note 1, at 2.

[27] *See id*.

on cultural and historical differences to a focus on the existence and extent of shared objectives and values. This Part also provides a suggestion of how the problems faced by EU legislators may be overcome by creating an innovative legislative solution to the problems presented by conflicting national divorce laws and the seeming inability to agree on the content of Rome III, and concludes with a possible scenario and outlook for the future of this debate.

I. LEGAL UNCERTAINTY, UNPREDICTABILITY, AND UNFAIRNESS IN EU FAMILY LAW

A. THE SCOPE OF THE PROBLEM

The resolution of the questions surrounding conflicts-of-laws rules and harmonization of divorce laws across the EU is necessary due to the growing number of international couples.[28] The enlargement of the EU increased the potential for conflicts-of-laws issues to arise by adding member states, thereby multiplying the number of international couples and international divorce cases.[29] Additionally, the growing mobility of European citizens has led to a growing number of cross-border marriages, international couples, and cross-border divorces.[30] International couples are defined as those with spouses living in different member states or who live in a member state in which one or both are not nationals.[31]

The European Commission compiled statistical data relating to the scope of the problem of international couples and divorces within the EU.[32] The available data on international divorces include divorces between a national of the member state concerned and: (a) a citizen of another EU member state; (b) a citizen of a non-EU state; (c) a citizen of double nationality; and (d) a non-national of unknown origin (including both EU citizens and non-EU citizens).[33] There is also statistical data on divorces between two non-nationals, of the same or different nationality, divorcing in the member state concerned.[34] The number of international divorces relative to the total number of divorces increased for all

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[28] *Id.* at 1.

[29] *Id.*

[30] *Id.*

[31] Rome III Proposal, *supra* note 18, at 2.

[32] Detailed statistical information, along with illustrative tables, is contained in the *Impact Assessment*, *supra* note 5.

[33] *Impact Assessment*, *supra* note 5, at 7.

[34] *Id.*

countries except Portugal and Estonia for the years 2000 to 2004.[35] In 2004, Germany recorded the highest number of international divorces of any of the Member states (36,933) compared with Slovenia, which reported the lowest number (256).[36] With the exception of Hungary and Portugal, the proportion of international divorces involving only foreigners increased in the years 2000 to 2003.[37] Estonia's rate of 78 percent foreigners-only divorce is the highest in the EU, and approximately half of all divorces in Luxembourg, the Netherlands, and Sweden involve only foreigners.[38] The proportions for divorces involving only foreigners in Belgium, Germany, Finland, and Portugal hover around 25 percent.[39]

According to Impact Assessment data, in 2003 there were, on average, almost eight international marriages per ten thousand persons.[40] Marriages of non-international character account for about thirty-nine marriages per ten thousand persons.[41] Accordingly, approximately every fifth marriage relates to an international couple.[42] Using this information, the Commission estimated the total number of international marriages in the EU at 350,299 per year.[43]

Out of the approximately eight international marriages per ten thousand persons, data regarding divorces show that there are almost four international divorces per ten thousand persons, while the number of national divorces were around twenty-two per ten thousand.[44] Using the same estimate for the number of international marriages (350,299), the total number of international divorce cases in the EU member states is estimated at 172,230 cases per year.[45] Based on the available data compiled by the EU in their Impact Assessment, there are 2.2 million marriages in the EU per year.[46] Approximately 350,000 of these marriages are international.[47] There are around 875,000 divorces in the

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35 *Id*. at 8.
36 *Id*.
37 *Id*.
38 *Id*.
39 *Id*.
40 *Id*. at 13.
41 *Id*.
42 *Id*.
43 *Id*.
44 *Id*.
45 *Id*.
46 *Id*.
47 *Id*.

EU per year, excluding Denmark.[48] It is estimated that around 16 percent (170,000) of these divorces are of international character.[49]

B. PROBLEMS RESULTING FROM DIVORCES OF INTERNATIONAL CHARACTER

Several problems have arisen due to the increasing number of international divorces within the EU. In response to a public consultation in 2005 on the question of applicable law and jurisdiction in divorce matters, the European Commission received sixty-five replies from member states opining on the appropriateness of such legislation.[50] The public consultation revealed three main problems, both practical and legal, that couples in the EU currently confront and which play a large role in the final determination of their divorce.[51] The majority of members considered Community action necessary to improve legal certainty and flexibility, as well as to ensure access to court.[52]

1. LEGAL UNCERTAINTY

Significant differences exist among the member states' divorce laws[53] regarding both substance (such as the grounds for divorce or laws regarding property division or child custody) and procedure.[54] There is a divergence among the member states with regard to conflict-of-laws rules.[55] When faced with conflicts-of-laws issues, the court that exercises jurisdiction determines which law to apply to a case that involves foreign parties or has certain foreign elements.[56] Some states regularly apply the *lex fori* (the law of the forum),[57] some apply the national law of the spouses (the law of the member state of which the spouses are citizens), and some apply the law of the spouses' habitual residence or the law

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[48] *Id.*

[49] *Id.*

[50] *See* European Commission, *supra* note 1, at 1.

[51] *Id.* at 2.

[52] *Id.* at 1.

[53] All Member states, with the exception of Malta, allow divorce. *See Impact Assessment*, *supra* note 5, at 5). Malta does, however, recognize divorce judgments given by competent foreign courts. *Id.* at 5 n.7.

[54] *Id.* at 5.

[55] Boele-Woelki, *supra* note 24, at 784.

[56] *Choice of Law*, ENCYCLOPAEDIA BRITTANICA, *available at* http://www.britannica.com/EBchecked/topic/333023/conflict-of-laws/276358/Choice-of-law#ref992191 (last visited July 30, 2011).

[57] BLACK'S LAW DICTIONARY 993 (9th ed. 2009).

with the "closest connection."[58] Without a solid sense of harmonized conflict-of-law rules in place, spouses will not know which law applies to their divorce, thereby causing practical problems and making the process more difficult for European citizens.

2. UNPREDICTABILITY

This legal uncertainty leads to an unpredictability of applicable law, as well as uncertainty as to the possible or likely results.[59] The public consultation revealed that spouses and practitioners often find it difficult to predict which law will apply due to the differences of the national conflict-of-law rules.[60] This unpredictability may lead to results that do not correspond to the legitimate expectations of the citizens.[61] Because of the increased mobility of EU citizens, it is common for citizens of a member state to reside in a state of which they are not nationals for an extended period of time.[62]

Some spouses may prefer to divorce under the laws of the state in which they currently reside or to divorce under the laws of the state of which they are nationals.[63] By creating a regulation that introduces the possibility (within specific limits) for spouses to choose the applicable law and the competent court for their divorce, spouses will more readily be able to predict the results of their divorce because they will have chosen the applicable law.[64] The fear of uncertainty and the practical difficulties encountered in international divorces will decrease for spouses who are granted some flexibility in choosing a competent court for their divorce.[65]

3. UNFAIRNESS

At the heart of the fairness concerns behind legislation intended to resolve divorce-related conflict-of-laws problems is that unfairness in

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[58] Boele-Woelki, *supra* note 24, at 781. "Closest connection" is determined by considering the spouses' last common habitual residence, if one of them still resides there, the nationality of one of the spouses, or the law of the State of their previous habitual residence. These connecting factors vary but are usually based on nationality or residence. The majority of Member states use this "close connection" analysis. *Impact Assessment*, *supra* note 5, at 5.

[59] Rome III Proposal, *supra* note 18, at 3; *Impact Assessment*, *supra* note 5, at 6.

[60] *Impact Assessment*, *supra* note 5, at 5.

[61] *Id*. at 6.

[62] *Id*. at 4.

[63] *Id*. at 6.

[64] European Commission, *supra* note 1, at 3.

[65] Rome III Proposal, *supra* note 18, at 3–4.

divorce proceedings of international couples across the EU contradicts the concept of a European area of "freedom, security, and justice."[66] Much of the potential for unfairness comes from opportunities for one spouse to engage in a "rush to court" or "forum shopping." Under current rules and regulations,[67] a competent court in a member state seized first will have jurisdiction over the divorce proceeding.[68] Thus, the court of another member state must defer to the first court and any subsequent application (from the other spouse) must be dismissed so as to avoid duplication of litigation or irreconcilable judgments.[69] As a result, there is an increased need to prevent a rush to court by one spouse trying to obtain a more favorable result due to the likelihood that there will be more than one court with jurisdiction over the couple.[70]

One spouse with knowledge of the laws of multiple jurisdictions may rush to a court with laws more favorable to his or her situation or to a forum where laws fail to take into account the other spouse's interests.[71] Some jurisdictions allow for shorter waiting periods or do not require a specific length of separation before a divorce is granted.[72] The financial implications ancillary to divorce, such as property division or maintenance, also may play a role in a spouse's choice to rush to a specific court or jurisdiction.[73] Often a spouse who cannot afford a lawyer to determine where it would be most personally beneficial to obtain a divorce is most at risk of being taken advantage of by the other spouse's hurry.[74] The public consultation revealed that practitioners throughout the EU believe that, in their experience, rush to court and forum shopping were serious and frequent problems.[75]

The current regulations may, in part, encourage this type of behavior on the part of EU citizens, and it is this type of unfairness

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[66] Johan Meeusen, *System Shopping in European Private International Law in Family Matters*, *in* INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION, *supra* note 15, at 239, 270. The notion of a European area of "freedom, security and justice" is founded in the Treaty of Amsterdam of the European Union. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 1, Oct. 2, 1997, 1997 O.J. (C 340) 1.

[67] *See* Council Regulation 2201/2003, art. 3, 2003 O.J. (L 388) 5 (EC).

[68] *Impact Assessment*, *supra* note 5, at 6.

[69] *Id*.

[70] Rome III Proposal, *supra* note 18, at 4.

[71] *Id*.

[72] *Impact Assessment*, *supra* note 5, at 5.

[73] *Id*.

[74] *Id*. at 6.

[75] *Id*.

resulting from the rush to court or forum shopping that the new proposals for EU regulations attempt to remedy.[76] Rushing to court or forum shopping would be less advantageous if all member states applied the same choice-of-law rules.[77]

Another concern regarding fairness pertains to ensuring access to court for EU citizens of different nationalities living in third states—states that are not members of the EU.[78] Current EU regulations[79] give courts of member states "residual" jurisdiction over the couple, allowing courts to avail themselves of the national rules of jurisdiction.[80] Across the EU, these national rules of jurisdiction vary widely and are often based on differing criteria, such as nationality, residence, or domicile.[81] Two member states (Belgium and the Netherlands) have no national rules on residual jurisdiction.[82] Because of these varying criteria for jurisdiction and the fact that two member states do not have any such rules, depending on the third state and the nationality of the EU citizens, the situation may arise where no court within the EU or within the third state has jurisdiction over a divorce proceeding for a particular couple.[83] If this set of circumstances were present, the couple would be deprived of their right of access to court.[84]

Improving access to courts in the member states for EU citizens living in a third state may also solve the problem of recognition of judgments faced by those who obtain divorce decisions in a third state.[85] While all member states mutually recognize divorce decrees from other member states,[86] this applies *only* to member states and not to third states.[87] Thus, the spouses may have difficulty getting the decision from a third state recognized in their respective home state.[88] Further action by the EU will ensure that all EU citizens and any foreign nationals

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[76] Meeusen, *supra* note 66, at 266–67.

[77] *Id*. at 270.

[78] European Commission, *supra* note 1, at 1; *Impact Assessment*, *supra* note 5, at 7.

[79] *See* Council Regulation 2201/2003, *supra* note 67, art. 7.

[80] *Impact Assessment*, *supra* note 5, at 7. This means that the rules applied would be the national rules of the individual Member state.

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *See* Council Regulation 2201/2003, *supra* note 67, art. 21.

[87] *Impact Assessment*, *supra* note 5, at 7.

[88] *Id*.

involved in a complicated jurisdictional question relating to their divorce enjoy access to court.

II. BEGINNING ATTEMPTS AT RESOLVING THE CONFLICT-OF-LAWS ISSUES IN CROSS-BORDER DIVORCE

A. THE BRUSSELS II CONVENTION AND THE BRUSSELS II REGULATION

For the past ten years, the EU has begun unifying the rules on cross-border divorce law.[89] This process involved several different pieces of legislation along a somewhat complicated and convoluted procedural timeline.[90] In May 1998, the EU adopted the Brussels II Convention, containing rules on jurisdiction and the enforcement of judgments in matrimonial matters.[91] One year later, the Treaty of Amsterdam came into force, changing some of the matters contained in Brussels II.[92] The Treaty of Amsterdam made it easier for European legislative measures to be taken in cross-border situations.[93]

With this strengthened power to legislate in cross-border situations, the Commission proposed changing the 1998 convention into a regulation on jurisdiction, as well as a recognition and enforcement of judgments in matrimonial matters; the proposed changes eventually came into force in March 2001.[94] This regulation sets out the circumstances in which, as well as standardizes when, a state enjoys jurisdiction regarding divorce and related financial matters.[95] For example, in the case of a couple connected to two European countries, the courts of both countries may have jurisdiction over that divorce based on differing grounds for jurisdiction.[96] While the regulation provides for "residual" jurisdiction if neither spouse fits under those jurisdictional categories, it does not provide the basis for deciding, in the face of jurisdictional conflict, if one court or another is better suited to hear the divorce case.[97] It establishes that the court of the country in which the divorce proceedings are first issued will take precedence; any other country contracted to Brussels II

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[89] Boele-Woelki, *supra* note 24, at 781.
[90] *See* Borrás, *supra* note 2, at 4–6.
[91] Boele-Woelki, *supra* note 24, at 781.
[92] *Id.*
[93] *Id.*
[94] Borrás, *supra* note 2, at 4–5.
[95] *See* Council Regulation 1347/2000, art. 2, 2000 O.J. (L 160) 21 (EC).
[96] *Id.*
[97] *Id.* art. 8.

must decline jurisdiction in favor of the other country whose court proceedings were first issued.[98]

This regulation only addresses concerns of uncertainty, unpredictability, and unfairness in a minor way. Although Brussels II determines which member states may have jurisdiction, it does not address which law should apply once jurisdiction has been found.[99] Additionally, this regulation establishes that a court is considered seized upon filing for divorce.[100] This provision may increase the risk of rush to court and forum shopping problems because once a divorce begins in one member state, all others must decline jurisdiction in favor of the first state.[101]

B. BRUSSELS II *BIS* AND ROME III

In 2004, the European Council adopted the Hague programme's[102] plan of action for the years 2005 through 2010.[103] This plan includes addressing matters such as succession and wills, conflict of laws and jurisdiction on divorce matters (Rome III), and a proposal on maintenance obligations.[104] In 2005, Brussels II was renamed Brussels II *bis*, and the scope of the articles relating to parental responsibilities were widened, while the rules on jurisdiction regarding divorce essentially remained the same.[105] It was also announced that the Brussels II *bis* would be amended by Rome III, as planned by the Hague programme.[106]

In July 2006, the Commission proposed a draft regulation, amending Brussels II *bis*, to determine the applicable law in divorce proceedings and to amend existing jurisdictional rules—a proposal commonly known as Rome III.[107] The change in the legislation's name signifies the departure the Rome legislation makes from the content of the Brussels legislation.[108] "Brussels" only addresses procedural issues

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[98] *Id*. art. 11.

[99] *See* Council Regulation 1347/2000, *supra* note 95.

[100] *Id*. at art. 11.

[101] *Id*.

[102] The Hague Programme was a five-year program for closer cooperation in justice and home affairs at the EU level from 2005 to 2010. It aimed to make Europe an area of freedom, security and justice. *See Hague Programme JHA 2005-10*, EURACTIV.COM (Dec. 13, 2005) http://www.euractiv.com/en/security/hague-programme-jha-programme-2005-10/article-130657.

[103] Borrás, *supra* note 2, at 5–6.

[104] *Id*. at 6.

[105] Boele-Woelki, *supra* note 24, at 781–82.

[106] *Id*.

[107] *Id*.

[108] *Id*. at 783.

such as jurisdiction, recognition, and enforcement, while "Rome" has been used for instruments that contain conflict-of-laws rules.[109] The objectives of the Rome III proposal involved directly combating the problems associated with international couples, striving to strengthen legal certainty and predictability, increasing flexibility by introducing limited party autonomy, preventing rush to court by one spouse, and ensuring access to court.[110] This instrument is not intended to harmonize national divorce laws, as it is limited to questions of applicable law and jurisdiction in divorce matters.[111]

While the EU, in Brussels II *bis*, has already harmonized rules of jurisdiction in matrimonial cases that are intended to prevent duplication and possible inconsistency of proceedings, the main changes from Brussels II *bis* and Rome III are two-fold.[112] First, spouses would be able to jointly select the competent court to preside over their divorce.[113] Second, conflict of laws rules determining the law to be applied in cross-border divorce cases would become part of Community law.[114]

C. OPPOSITION TO ROME III

In the eyes of some international legal scholars, Rome III essentially "failed."[115] While, for the most part, the provision allowing choice of forum for couples was generally accepted, the conflict-of-laws rules caused great debate.[116] The conflict-of-laws rules would allow for the application of foreign law,[117] generally the divorce law of another member state. Thus, Rome III has been rejected on the grounds that

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[109] *Id*.

[110] Rome III Proposal, *supra* note 18, at 3–4.

[111] European Commission, *supra* note 1, at 3. The explanatory memorandum accompanying the Proposal clearly states that divorce laws for each individual Member state differ for historical and cultural reasons. *Id*.

[112] EUROPEAN UNION COMMITTEE, ROME III—CHOICE OF LAW IN DIVORCE, 2005-6, H.L. 272, at 6 (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/272.pdf.

[113] Boele-Woelki, *supra* note 24, at 783.

[114] *Id*. at 783–84.

[115] *Id*.

[116] *Id*. at 784.

[117] The proposal states that when the spouses had not made a choice of the applicable law, the applicable law is the law of the state (a) where the spouses have their common habitual residence, or failing that, (b) where the spouses had their last common habitual residence in so far as one of them still resides there, or failing that, (c) of which both spouses are nationals, or failing that, (d) where the application is lodged. *Id*. at 784.

application of foreign law would be impossible.[118] The main objectors were Ireland and the United Kingdom.[119]

Ireland's objection stemmed from its refusal to apply law that directly conflicts with its constitution.[120] The requirements to obtain a divorce in Ireland are quite strict compared to those of other member states, allowing for a divorce only after at least four years of separation.[121] The Irish justice ministry explained Ireland's opposition to Rome III, saying that "if Ireland were to adopt and implement this measure, this would allow EU nationals resid[ing] in Ireland to obtain a divorce in our courts on substantially different and less onerous grounds than that provided for in our constitution."[122] This unwillingness to be a part of any supranational measure that conflicts with national law has led Ireland to opt out of the Rome III legislation.[123]

In the United Kingdom, the subcommittee of the House of Lords was assigned to research the impacts of the application of Rome III within the UK.[124] The committee concluded that jurisdiction and choice-of-law conflicts were matters properly resolved by an international body, such as the EU, rather than by individual EU member states.[125] The subcommittee, however, had problems with and concerns about some aspects of the proposal.[126] The United Kingdom desired to apply *lex fori* in its own courts, and therefore disagreed with allowing couples to choose their applicable law.[127] Furthermore, the subcommittee was not thoroughly convinced by the Commission's statistical data in its Impact Assessment,[128] which was provided as the justification for EU action, and they questioned whether there was in fact a practical need for legislation on the issue.[129] The subcommittee also believed that this proposal's jurisdictional elements would, in practice, actually encourage the rush to

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[118] *Id*.

[119] *Id*. at 785.

[120] Teresa Kuchler, *Member States Attack Divorce Law Scheme*, EUOBSERVER (Nov. 16, 2006, 9:30 AM), http://euobserver.com/9/22882.

[121] Katie McQuaid, *Divorce in the European Union: Should Ireland Recognize Foreign Divorces?*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 373, 378–79 (2006).

[122] Kuchler, *supra* note 120.

[123] Boele-Woelki, *supra* note 24, at 785.

[124] *See generally* EUROPEAN UNION COMMITTEE, *supra* note 112.

[125] *Id*. at 4.

[126] *Id*.

[127] *Id*. at 6.

[128] *See Impact Assessment*, *supra* note 5, at 8–13.

[129] EUROPEAN UNION COMMITTEE, *supra* note 112, at 8.

court rather than prevent it.[130] Finally, the subcommittee questioned the existence of a power to act because the connection between conflicts of laws and matrimonial matters was unclear.[131] In summation, the Subcommittee was concerned most with the practical applications of the Rome III legislation and worried that the difficulties in application would outweigh its supposed worth.

III. EU SYSTEM-WIDE PROBLEMS ARISING FROM LACK OF A SOLUTION

In addition to the problems of legal uncertainty, unpredictability, and unfairness resulting from a failure to form legislation, stalling the process of harmonization on conflicts-of-laws rules may result in related problems. These include an increased risk of jeopardizing the rights and protections of children and a fracturing of the EU through "enhanced cooperation"—possibly making jurisdictional questions surrounding international divorces even more complex and difficult to discern.

A. CONCERNS FOR THE RIGHTS AND PROTECTION OF CHILDREN

Any discussion of divorce necessitates an understanding of the issues pertaining to the care and well being of children that may be involved. Brussels II, along with its new rules on recognition of judgments, also contained uniform rules of jurisdiction regarding parental responsibility for marital children.[132] However, these rules covered a limited scope of proceedings related to parental responsibility, addressed only those that arise at the proceeding to end the marriage, and covered only the biological or adopted children of both spouses.[133] Harshly criticizing this approach, many claimed that the lack of importance placed on children's rights shows that European family law is "firmly entrenched in the traditional notion that divorce is primarily

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[130] *Id.* at 9.

[131] *Id.* at 9–11. Article 61(c) of the TEU enables the Council to adopt "measures in the field of judicial cooperation in civil matters as provided for in Article 65." Article 65 provides: "Measures in the field of judicial cooperation in civil matters having cross-border implications . . . and insofar as is *necessary for the proper functioning of the internal market*, shall include . . . promoting the compatibility of the rules applicable in the Member states concerning the conflict of laws and of jurisdiction." *Id.* at 10 (emphasis added).

[132] CLARE MCGLYNN, FAMILES AND THE EUROPEAN UNION: LAW, POLITICS AND PLURALISM 161 (2006).

[133] *Id.* at 161, 166.

concerned with regulating the lives of adults and of only incidental importance to the child."[134]

Brussels II *bis*, enacted soon after Brussels II, addressed some of the points that had been omitted in the first legislation.[135] Brussels II *bis* covers all proceedings regarding parental responsibility; its adoption marks an important step forward for Community action in European family law and the rights and protection of children.[136] Brussels II *bis* is an improvement on its predecessor in its approach to children by encompassing *all* proceedings regarding parental responsibility and including *all* children, not just marital children.[137]

However, critics see this new version of the regulation as weaker than earlier drafts in relation to its declarations regarding the rights of the child.[138] The draft included specific language drawn from the EU Charter and followed the UN Convention on the Rights of the Child.[139] Critics believe that this version would have been a "much more genuine endeavor to engage with children's rights issues" than previous Community measures.[140] In the event of a non-solution, failure to harmonize these laws as they relate to the protection of children, without further modification, may also leave children vulnerable in the wake of divorce.

B. CREATION OF A "TWO-SPEED" EU DUE TO "ENHANCED COOPERATION" OF A FEW MEMBER STATES

It seems clear that, given the Rome III proposal's current provisions, the EU legislative activities in cross-border matters on divorce will not yield a unanimous resolution in the near future.[141] Because the intended cooperation cannot be established among all

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[134] *Id*. at 166 (quoting Helen Stalford, *Brussels II and Beyond*, *in* PERSPECTIVES FOR THE UNIFICATION AND HARMONIZATION OF FAMILY LAW IN EUROPE, 471, 475 (Katharina Boele-Woelki, ed., 2003).

[135] *Id*. at 167.

[136] *Id*. at 168.

[137] *Id*. at 169.

[138] *Id*.

[139] *Id*. at 169–70. "The draft had included specific provisions declaring the child's right to 'maintain on a regular basis a personal relationship and direct contact with both parents, unless this is contrary to his or her interests' and the statement that: '[a] child shall have the right to be heard on matters relating to parental responsibility over him or her in accordance with his or her age and maturity.'" *Id*.

[140] *Id*. at 170 (quoting Stalford, *supra* note 134, at 478).

[141] Boele-Woelki, *supra* note 24, at 785.

member states within a reasonable period, the question becomes whether or not "enhanced cooperation" can be used to solve the problem.[142]

Using enhanced cooperation will be a first test-case of this only remaining option for the otherwise failed Rome III.[143] On July 28, 2008, nine member states[144] requested to begin the enhanced cooperation procedure.[145] On July 12, 2010, the Council authorized enhanced cooperation as to cross-border divorces.[146] By this time, fourteen states had decided to join in this process and the Council began implementing the new rules for those in the enhanced cooperation bloc on December 20, 2010.[147] Because enhanced cooperation is untested, it is unclear what might happen as these fourteen member states move forward on the Rome III legislation.[148] These states involved in enhanced cooperation characterized the action as one that would allow some member states to "go forward faster than others" in the harmonization efforts.[149]

With enhanced cooperation of fourteen states, moving forward to adopt the Rome III proposal—upon which there has been no widespread consensus or unanimity reached—will result in a loss of the "unanimity" concept which has always been achieved in cross-border matters. Rather, it will result in a "two-speed"—or as more time passes, possibly even a "three-speed"—EU concerning a specific area of law.[150] For example, another subset of member states, perhaps those who prefer the *lex fori*

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[142] *Id*. at 784. The notion of "enhanced cooperation" was introduced in the 1997 Treaty of Amsterdam and amended by the Treaty of Nice in 2001. Article 43 of the Treaty of Nice groups together the fundamental principles of enhanced cooperation and created the formal possibility of a certain (smaller number) of Member states establishing closer cooperation between themselves on matters covered by the Treaties using institutions and procedures of the EU. Member states not wishing to participate in that matter may abstain. This method is to be used only as a last resort when full cooperation cannot be achieved with reasonable effort. *See also* Treaty of Nice: A Comprehensive Guide, Enhanced Cooperation,http://europa.eu/legislation_summaries/institutional_affairs/treaties/nice_treaty/nice_treaty_cooperations_en.htm (last visited May 9, 2011).

[143] Boele-Woelki, *supra* note 24, at 786.

[144] Austria, France, Greece, Hungary, Italy, Luxemburg, Romania, Slovenia and Spain. *Id*. at 787.

[145] *Id*.

[146] Council Decision 2010/405, Authorizing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 189/12) 1, 2.

[147] These states are Belgium, Bulgaria, Germany, Portugal, Spain, France, Italy, Latvia, Romania, Luxembourg, Hungary, Malta, Austria, Slovenia. Press Release, Council of the European Union, Council Implements New Rules Regarding Law on Divorce and Legal Separation (Dec. 20, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/118639.pdf.

[148] Boele-Woelki, *supra* note 24, at 787–88.

[149] *Id*. at 789.

[150] *Id*. at 788, 791.

approach, could combine for enhanced cooperation on jurisdictional questions of divorce and move in a different direction on this same topic.[151] This could result in two Rome III instruments containing nearly opposite rules for applicable laws in divorce.[152] The area of divorce law involving international couples is not well-suited for the enhanced cooperation process. The consequence of using the enhanced cooperation procedure within the EU for divorce law is that the resulting varied "speeds" would ultimately contravene the goal of streamlining EU divorce law. This would cause increased confusion for spouses attempting to determine the applicable law for their international divorce depending upon which member states had opted-in or opted-out of the relevant regulations.

IV. OUTLOOK FOR THE FUTURE

A. NEW THEORETICAL APPROACH

Much of the persistent disagreement over the need for and the feasibility of the harmonization of family law is centered upon the notion that family law is unsuitable for harmonization efforts because of strong cultural and historical constraints, resulting in a lack of shared values and objectives.[153] In general, the process of harmonizing laws across the EU on family law matters has been accompanied by a confrontation between adherents of conservative family values and proponents of progressive family values.[154] Any possible reform must reconcile the conflicting objectives of the two groups.[155]

The adherents of the conservative family values and the adherents of progressive family values do not split neatly at a nation's border. Not only do member states disagree about the underlying values of divorce—adding another layer of complexity to this issue—but factions within member states also disagree; some oppose and others are in favor of more progressive family law reforms.[156] Countries with

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[151] *Id*. at 791.

[152] *Id*.

[153] Masha Antokolskaia, *Objectives and Values of Substantive Family Law*, *in* INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION, *supra* note 15, at 49, 50. This theory suggests that family laws of different European nations have their foundations in the unique national culture and history. This historical and cultural diversity is therefore unbridgeable and cannot be harmonized deliberately. *Id*.

[154] *Id*. at 51.

[155] *Id*.

[156] *Id*. at 51–54.

"conservative" family laws have population groups with the most "modern" views on family life while countries with "modern" family laws have population groups with the most "conservative" views on family life.[157] While this split within a specific member state may cause discord in that state, it also presents the possibility of reaching across borders to find shared family values among people of different member states. Approaching the underlying values in this way, rather than approaching them on a country-to-country basis, may be an important step in helping EU legislators find common ground.

Pan-European family law values are thus arguably sufficient for the harmonization of family laws at least as they relate to enforcement of judgments. As values are fluid and changeable, Europe has the ability to move into the direction of harmonization of family values leading to a harmonization of family laws. Two options exist for identifying the underlying values of all member states' domestic family laws, and for finding a thread that binds them all together—either comparing the values underlying existing family laws or looking to the sets of values developed in UN conventions, EU instruments, and European case law of the European Court of Human Rights (ECHR).[158]

This search to find common values across the domestic family laws of member states, however, is not without difficulty. First, adherence to specific values has a certain amount of fluidity.[159] In the realm of family law, some values become universally accepted and may remain a universally accepted value for a long time.[160] However, a point of agreement may in the future turn into a point of disagreement as societal norms change. For example, thirty years ago, a point of agreement was that marriage was the union of a man and a woman—this previous "fact" is now under question and, instead of an agreement, it has become a point of contention.[161] Looking to UN conventions, EU instruments, or the ECHR may not bear fruit on finding common values either. Quite often, "the Community, when attempting to draw a list of

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[157] *Id*. at 62.
[158] *Id*.
[159] *Id*.
[160] *Id*. at 62–63 (using the union between a man and a woman as an example of a universally accepted idea that changes over time).
[161] *Id*.

human rights, would necessarily take a minimalist approach and be able to agree only on the lowest common denominator of such rights."[162]

While it appears that some differences in pan-European values regarding family law may not be reconcilable, the significance of the common values that European countries do share should not be underestimated.[163] Perhaps this is most clearly seen when compared to non-European countries' family laws.[164] For example, one of the common values of European family law is the principle of equality of the sexes.[165] Although the specific laws surrounding divorce can vary greatly, some values are universally shared.[166] For example, it is beyond dispute in the member states that both husband and wife enjoy equal rights to seek divorce.[167] Additionally, there is consensus on the recognition and enforcement of judgments of other member states on family law matters, and on May 28, 1998, all member states signed the Convention on Jurisdiction and the Recognition of Judgments in Matrimonial Matters.[168] A minimum of common values had been identified that all member states were satisfied that mutual recognition of divorce judgments throughout the EU was appropriate.[169]

B. INNOVATIVE LEGISLATIVE SOLUTIONS

Addressing the surrounding issues of maintenance and property division through new regulations will aid in accomplishing the Rome III proposal's stated goals of legal certainty, predictability, and fairness. A new Council regulation on jurisdiction, applicable law, and recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations entered into force in January 2009.[170] This,

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[162] *Id*. at 64 (quoting THE EUROPEAN UNION AND HUMAN RIGHTS 16 (Nanette Neuwahl & Allan Rosas, eds., 1995)).

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] *Id*.

[168] Note, *The Brussels II Convention: A Tool Necessary to Enforce Individual Rights Relating to Matrimonial Matters within the European Union*, 23 SUFFOLK TRANSNAT'L L. REV. 157, 179–80 (1999).

[169] *Id*. at 179–82.

[170] Council Regulation 4/2009, 2009 O.J. (L 7/1) (EC). The legal concept of "maintenance obligations" as it relates to the Council Regulation has been shaped by the case law on the 1968 Brussels Convention." The European Court of Justice has drawn a wide notion of what is considered a maintenance obligation, "encompassing . . . periodical payments between former spouses as well as lump sums or transfers in property. These are usually "designed to enable one spouse to provide for himself/herself and determined on the basis of respective needs and

along with a proposed regulation on marital property division, may be helpful, as they both set forth rules making the major financial consequences of divorce more certain and predictable, thereby decreasing the incentives to rush to court by making it less financially beneficial to one party and by making the rules on applicable law clearer.

The new regulation on maintenance harmonizes the rules determining applicable law for maintenance decisions.[171] This regulation also works toward the same goals of legal certainty and simplification of the lives of EU citizens involved in international divorce cases.[172] Harmonized rules regarding maintenance provide a greater measure of foreseeability for the divorcing spouses on the law determining whether, and how much, maintenance will be granted and how the decision will be enforced.[173] This regulation is an important complement to the Rome III proposed regulation because the law regarding maintenance can often become a reason for one spouse to rush to court or engage in forum shopping.[174] Under the new rules provided by the regulation, the court with jurisdiction over the divorce proceeding will now render its decision based on the substantive law to which the couple has the "closest connection."[175] This measure will assist in avoiding the most unfair situations of forum shopping by at least basing the maintenance decision on a law to which the couple has a close connection.[176] Additionally, the decision will be less open to challenge, as it will have been made in accordance with a law designated by rules that have been harmonized across the EU, thus providing greater legal certainty and predictability.[177]

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resources." Laura Tomasi, Carola Ricci & Stefania Bariatti, *Characterisation in Family Matters for Purposes of European Private International Law*, *in* INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION 341, 353 (2007).

[171] *See generally* Council Regulation 4/2009, *supra* note 170.

[172] Rome III Proposal, *supra* note 18, at 3; *Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations*, at 4–5, COM (2005) 649 final (Dec. 15, 2005).

[173] *See generally* Press Release, European Commission, Maintenance Obligations (Dec. 15, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/287&format=HTML&aged=0&language=EN&guiLanguage=en.

[174] *Commission Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, at 5, COM (2006) 400 final, (July 17, 2006) [hereinafter Green Paper 2006].

[175] *Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations*, *supra* note 172, at 5.

[176] *Id.*

[177] European Commission, *supra* note 173, at 2.

The Commission has also begun exploring ways to resolve conflicts-of-laws issues concerning marital property regimes.[178] With a July 2006 Green Paper, the Commission launched a consultation exercise on the difficulties of property division facing married couples upon divorce at the European level, particularly regarding couples of the same nationality who leave property in another member state and couples not of the same nationality who, upon separation, leave property in a third member state.[179] The Green Paper addresses the questions that arise in determining the law applicable to the division of these couples' property and the ways in which to facilitate the recognition and enforcement of court decisions.[180]

At present, only a few fragmented rules exist at the Community level regarding marital property regimes, and these do not solve the conflicts-of-laws problems confronted by international couples in the course of a divorce.[181] A regulation on this topic would have the similar goals of greater legal certainty and simplification of legal processes for EU citizens.[182] The Commission would like to introduce rules enabling application of either the law of a member state or the law of a third country, taking into account factors such as the couple's choice of forum and both movable and immovable property.[183] These rules would contain provisions that determine applicable law based on certain connecting factors (such as residence) or, under certain circumstances, the spouses may choose the applicable law.[184] The Commission hopes that uniform rules on the applicable law and jurisdiction will enhance mutual trust between member states so that intermediate measures for the recognition and enforcement of judgments can be dispensed, guaranteeing legal certainty regarding property division for divorcing couples.[185]

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[178] Green Paper 2006, *supra* note 174, at 4. "Marital property regime" is defined by this Green Paper as the "matrimonial property rights of the spouses. Matrimonial property regimes are the sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors." *Id*. at 2.

[179] Press Release, European Commission, Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition 1 (July 17, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/288&format=HTML&aged=1&language=EN&guiLanguage=en.

[180] Green Paper 2006, *supra* note 174, at 2.

[181] European Commission, *supra* note 179, at 2.

[182] *Id*.

[183] Green Paper 2006, *supra* note 174, at 5.

[184] *Id*. at 5–6.

[185] European Commission, *supra* note 179, at 2.

Two new legislative instruments on maintenance and property division have the potential to play a large role in achieving goals similar to those of Rome III. The Commission acknowledges that "the rules of financial provision ancillary to divorce (maintenance and division of property) may play an important role in determining a party's choice of forum."[186] The harmonized rules set forth in the regulation on maintenance and the Green Paper on property division would remedy, at least in part, problems such as rush to court or forum shopping by taking away incentives to engage in this behavior.

C. REASONS TO HOPE FOR A RESOLUTION ON THE HORIZON?

Recent changes regarding the acceptance of certain EU legislation might represent an evolving attitude toward allowing the EU to legislate in more areas of European life. For example, although the United Kingdom originally rejected the proposal on maintenance and planned to opt-out, in January 2009 it informed the Council that it would like to accept the regulation.[187] By accepting and opting-in to these provisions, the UK acknowledges the potential benefits to its citizens of regulating maintenance orders throughout the EU and perhaps shows a greater willingness to cooperate more with the member states in regard to international family law matters.

Another reason to hope for increased integration regarding family is the passage of the Lisbon Treaty. The treaty amended the current EU and EC treaties, putting an increased focus on rights, values, and freedom in Europe by introducing the Charter of Fundamental Rights into European law in an effort to ensure better protection of European citizens.[188] With the charter, the Lisbon Treaty introduces new rights (generally in the areas of civil, political, economic, and social rights) to the already existing rights under former EU treaties, including provisions on children's rights and family rights.[189] The Lisbon Treaty guarantees these freedoms and principles by giving its provisions a binding legal force.[190] In June 2008, Ireland voted against ratification of this treaty,

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[186] EUROPEAN UNION COMMITTEE, *supra* note 112, at 9.

[187] *Commission Opinion on the Request from the United Kingdom to Accept Regulation (EC) No. 4/2009 of the Council of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations*, at 2, COM (2009) 181 final (Apr. 21, 2009).

[188] *Treaty of Lisbon—The Treaty at a Glance*, EUROPA.EU, http://europa.eu/lisbon_treaty/glance/index_en.htm (last visited May 9, 2011).

[189] *Id.*; MCGLYNN, *supra* note 132 at 183.

[190] *Treaty of Lisbon—The Treaty at a Glance*, *supra* note 188.

prompting fears that the policies and agendas set forth were dead.[191] However, sixteen months later, the people of Ireland considered the treaty once again, voting decisively in its favor.[192] As this treaty recommits the EU to making the lives of EU citizens better by ensuring that social, economic, and political rights are maintained, the arena of family law now has a better chance of being a large focus of new measures taken under the Lisbon Treaty. In an interview on January 3, 2010, Viviane Reding, outgoing European Commissioner for Information, Society and Media, and Commissioner designated for Justice, Fundamental Rights and Citizenship, specifically mentioned addressing the problems associated with the dissolution of marriages between nationals from different member states when asked what could be expected from the ratification of the Lisbon Treaty.[193] She also commented that "A lot has changed since December 1[, 2009] with the new Lisbon Treaty. . . . [B]efore that Europe was a common market, an internal market where finance and economy stood in the first place. Now, in the beginning of the Treaty it is not the market, it is the citizen . . ." underscoring the new focus on the rights of European citizens in the future of the EU.[194]

Movement toward harmonization and resolving conflicts-of-laws issues in European family law seems to have great momentum. Until recently, family law was considered "too political" and too close to the culture of individual states to be appropriate for harmonization efforts.[195] The first version of *Towards a European Civil Code* in 1994 did not include a chapter on family law.[196] Just four years later, though, the second edition devoted an entire chapter to family law, eliciting the harmonization debate.[197]

In 2001, a group of academics established the Commission in European Family Law (CEFL), whose aim is to promote and coordinate

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[191] *Ireland Says 'No' to the Treaty of Lisbon— and 'No' Say All of Us*, TELEGRAPH, June 14, 2008, *available at* http://www.telegraph.co.uk/comment/telegraph-view/3559425/Ireland-says-No-to-Treaty-of-Lisbon—-and-No-say-all-of-us.html.

[192] Henry McDonald, *Ireland Votes Yes to Lisbon Treaty*, GUARDIAN, Oct. 3, 2009, *available at* http://www.guardian.co.uk/world/2009/oct/03/ireland-votes-yes-lisbon-treaty.

[193] *What Happens if a German-Greek Couple Living in Belgium Divorce?*, NEW EUROPE, Jan. 3, 2010, *available at* http://www.neurope.eu/articles/98216.php.

[194] *Id*.

[195] MCGLYNN, *supra* note 132, at 181.

[196] *Id*.

[197] *Id*. at 181–82.

research in the field of family law.[198] The establishment of CEFL marks an important turning point in the debate over family law harmonization because CEFL "gives greater academic credibility to the debates on family law harmonization and provides exposure for the ideas generated."[199] Along with these changes has come the rapid development of Brussels II, Brussels II *bis*, and Rome III, as discussed above. From all of these actions, it appears that the discussion on whether family law is an appropriate realm for EU legislation to enter into is essentially over, despite some dissenting opinions or objections.[200] The momentum toward goals of harmonization seem stronger than ever and the debate now centers on *how*, not *whether*, or even *why*.[201] As fourteen EU members move forward with the enhanced cooperation procedure, perhaps little by little, the remaining countries that are not currently a part of this enhanced cooperation will join in the process which will provide a straight-forward and workable system across the entire European Union.

CONCLUSION

The EU is becoming more interconnected than ever before. One of the main goals of the EU, as set out by the EC Treaty, was to create a common market for the free movement of goods, services, and people.[202] The TEU contains broad statements on these types of values and objectives, which have been amplified by subsequent treaties (the Treaty of Amsterdam and the new Treaty of Lisbon) and which further define EU citizenship.[203] At the same time, however, there exists a tension in all of these founding documents between these broad-stated objectives and the affirmations of the member states' separateness and individuality of traditions.[204]

The Rome III proposal is caught among these tensions. While some member states wholeheartedly embrace the provisions of the proposal, others are highly critical, questioning whether such regulation is necessary, and criticizing the proposal as unworkable. However, between political or theoretical arguments in favor or against the

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[198] *Id*. at 182.
[199] *Id*. at 183.
[200] *Id*. at 199.
[201] *Id*.
[202] RAWORTH, *supra* note 9, at 29.
[203] STEPHEN SIEBERSON, DIVIDING LINES BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES: THE IMPACT OF THE TREATY OF LISBON 13, 73 (2008).
[204] *Id*. at 73.

increased cooperation among member states in family law matters, there still exist the genuine problems of legal uncertainty, unpredictability, and unfairness faced by the almost 250,000 EU citizens in international couples pursuing divorces each year—a by-product of the increased interconnectedness and free flow of people across borders.

Because core aspects of family relationships are at issue, and these problems affect those involved so personally, a resolution adopted by all member states on the harmonization of jurisdiction and conflict of laws surrounding divorce is necessary to address these problems and to maintain a unified and universal European Union. There is some emerging evidence, as former dissenting member states on integration of family law matters begin to change their minds, that the national family laws of the member states may begin to merge, providing hope for the future harmonization of these values and, therefore, harmonization of family laws across the EU, furthering the EU's commitment to improving the lives of EU citizens.