

German Federal Supreme Court: Ban on Divorce may infringe German Public Policy

The German Federal Supreme Court has held in its judgment of 11 October 2006 (XII ZR 79/04) that the non-availability of divorce under the applicable law may violate Art. 6 Basic Law which protects marriage and the family, and therefore German public policy (Art. 6 Introductory Act to the Civil Code (EGBGB)). With this decision the Federal Supreme Court set aside the judgment of the lower court (Court of Appeal Karlsruhe, judgment of 23 April 2004 – 5 UF 205/03)) which did not regard public policy as violated, thereby departed from its own former case law.

The Court sets forth *inter alia* that the public policy clause was not immutable, but had rather to be seen in the context of the contemporary legal order. Therefore it was subject to the transition of moral concepts. The Court refers for supporting the theory that value propositions had changed to the fact that hardly any State does not provide for the possibility of divorce nowadays (in the European Union the only State not allowing divorce is Malta). Further the Court stresses that the German Basic Law proceeds on the concept of a secular marriage subjected to civil law. Part of this marriage concept was also the possibility to reattain one's freedom to remarry – by divorce.

The full judgment is available on the Federal Supreme Court's website. The judgment of the Court of Appeal Karlsruhe can be found in IPRax 2006, 181 including an annotation by *Thomas Rauscher* at p. 140.